Global Arbitration Review

The Guide to Evidence in International Arbitration

Editors
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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Evidence in International Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service, but we also provide more in-depth content: books such as this one; reviews; conferences with a bit of flair; and time-saving workflow tools. Do visit www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we often become aware of gaps in the literature. Recently, evidence emerged as one, not because there are no other books about it, just none that bridge the law and practice in a modern way. Indeed, few topics command as much attention as evidence and its related topics during our GAR Live sessions.

The Guide to Evidence in International Arbitration aims to fill this gap. It offers a holistic view of the issues surrounding evidence in international arbitration, from the strategic, cultural and ethical questions it can throw up to the specifics of certain situations. Along the way it offers various proposals for improvements to the status quo.

We trust you will find it useful. If you do, you may be interested in the other books in the GAR Guides series. They cover energy, construction, M&A, IP disputes, and challenge and enforcement of awards in the same practical way. We also have guides to advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration* (*UCIA*)). These will soon be joined by a volume on investment treaty arbitration.

We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you all.

And great personal thanks to our three editors – Amy, Martin and Joseph – for the energy with which they have pursued the vision, and to my Law Business Research colleagues in production on such a polished work.

David Samuels
GAR publisher
August 2021

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Approaches to Managing Evidence as Criteria for Selecting Arbitrators

Michael McIlwrath[1]

How to prove one's case should always be one of the most essential questions considered by a party preparing to pursue a claim in any forum. Before a claim is filed, an assessment of a case's strength and possible shortcomings will necessarily be based on the documents and witnesses that are available to the claiming or defending party.

But what about evidence that may be produced or become available once proceedings are under way, and that may reinforce the case or, as often happens, contradict it? This can only be subject to speculation about what may be available within the framework of how the taking of evidence will be managed, and how the evidence will be weighed.

Take, for example, how a claim or defence might develop depending on how the following questions are answered:

- Will far-ranging document discovery be available to the parties, or will they be limited to narrow requests, a bare minimum, or no discovery at all?
- How much time will a hearing take: months, weeks, days? Or perhaps there is no need for a hearing at all.
- Will the decision maker take a hands-on approach to managing expert evidence, or will this be left entirely in the hands of the parties and their counsel?
- Will the decision maker give meaningful weight to witness testimony that is not supported by contemporaneous documents?

Although there will always be a degree of uncertainty about how a party will prove its claims or defences before a proceeding is under way, national rules of evidence and procedure in domestic litigation – court and arbitration – usually provide guidance as to what to expect.

1 Michael McIlwrath is the founder and chief executive officer of MDisputes.

These rules address what evidence can be produced, when it should be produced, whether a party will be able to seek evidence from the opposing side, and national legal practices will also guide how the adjudicator will weigh the different types of evidence presented.

Not so in international arbitration, in which arbitration rules leave the management of evidence, and the weight it is given, to the arbitral tribunal.[2] The International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules of Evidence), widely considered a best practice in international arbitration, were conceived from existing procedures from 'different legal systems'.[3] They enshrine a principle of flexibility and expressly encourage parties and tribunals 'to adapt them to the particular circumstances of each arbitration'.[4]

Different legal traditions, naturally, vary widely in how they approach evidence. These differences, which the IBA Rules not only respect but seek to accommodate, can determine how – and even whether - a party will be able to prove its claim or a defence. They can also have a meaningful effect on the time and costs of an arbitration.

For a case that will be decided on the basis of contested facts, this potentially far-ranging flexibility can inject an unsettling degree of uncertainty until the arbitrator is appointed. The only way to reduce the uncertainty about how an arbitral tribunal's management of evidence will affect a party's ability to prove its case is to include the likely approach to evidence as one of the criteria for selecting the members of the tribunal.

A reliable way of predicting how a prospective candidate is likely to approach evidence in an international arbitration is to have appeared personally before that person on multiple occasions in the past and to have experienced at first hand how they have dealt with the issues presented.

But since this opportunity rarely presents itself in reality, at least without injecting problems of its own, this chapter presents other means of predicting an arbitrator's inclinations: (1) 'domestication' of international arbitrations so that the handling of evidence is consistent with a preferred national approach; (2) methods of self-disclosure by the prospective arbitrators of their preferences for managing issues of evidence and procedure; and (3) the emerging fee-based services of arbitrator information, including data analytics drawn from published arbitral awards and other available information about the arbitrator. The chapter concludes by predicting how arbitration institutions may soon begin to advance the availability of information that will aid parties in predicting how they will be able to prove their case.

Strategic 'domestication' of arbitration procedure

Parties from different countries involved in an arbitration are not bound to apply the flexibility offered by the IBA Rules of evidence. In fact, many do not and simply default to the procedures of their domestic court litigation, even unwittingly. This is frequently the result of parties selecting counsel and arbitrators from the same country without appreciating the effect this convergence may have on the arbitral procedure.

2 ICC Rules of Arbitration, Art. 25: LCIA Arbitration Rules, Arts. 20–22; SIAC Arbitration Rules, Rule 19.

3 IBA Rules on the Taking of Evidence in International Arbitration (2020), Foreword.

4 id., Preamble.

If both parties appoint counsel from the same country, it becomes easy to agree on arbitrators who are also from the same country. When all counsel and arbitrators are from the same country, the procedural consensus (for lack of a better term) will revolve around the domestic practices associated with national arbitration or court litigation. Once the counsel and tribunal are appointed from the same country, parties may not be able to escape the domestication of their dispute even if they are from distant countries and have agreed to resolve their dispute under international arbitration rules.

Take, for example, a case in which the disputants are from Europe and Asia, and their contract provides for disputes to be resolved by arbitration in Paris, under an international institution's rules, and the substantive law is English. If the parties both appoint English counsel, and on their counsels' advice they appoint two distinguished Queen's Counsel as co-arbitrators, then it is nearly certain that they will have a third English arbitrator as chair. By their choices, they have virtually assured they will have an arbitration that features many of the most notable characteristics of English common law practice, such as document disclosure, and expectations for the handling of witness evidence that can make for robust, extended hearings.

In cross-examining witnesses,[5] the parties' counsel may feel compelled to ensure the tribunal has excluded the applicability of the principles of cross-examination laid out in the English case of *Browne v. Dunn*.[6] This case 'basically entails that a cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction'.[7] The application of the rule of *Browne v. Dunn* in an international arbitration may lead counsel to challenge each witness on every point raised in their witness statements, for fear of the award being subject to challenge.[8]

5 Although the prevailing opinion is that '[t]he rule [in Browne v. Dunn] itself does not apply in arbitration' (see Waincymer, *Procedure and Evidence in International Arbitration*, 2012, page 917, fn 99), in *P v. D and others* [2019] EWHC 1277, Sir Michael Burton found that the rule in *Browne v. Dunn* applied to arbitral as well as court proceedings. The tribunal seems to have implied the applicability of the rule to international arbitration as at no point was it discussed in the course of proceedings. The rule was interpreted as an element of procedural fairness. See also http://arbitrationblog.kluwerarbitration.com/2019/09/09/why-are-we-still-not-done-with-the-rule-in-browne-v-dunn/? In addition, the rules of some of the major arbitration institutions make it clear that strict rules of evidence do not apply by default. For example, the current version of Article 22.1(vi) of the LCIA Rules specifies that a tribunal has the power to decide whether or not to apply any strict rules of evidence, but only after giving the parties a reasonable opportunity to state their views on the issue. Rule 19.2 of the SIAC Rules goes one step further – the tribunal is not required to apply the rules of evidence of any applicable law in making such a determination.

6 *Browne v. Dunn* (1893) 6 R. 67.

7 https://en.wikipedia.org/wiki/Browne_v_Dunn (last accessed 5 June 2021).

8 There is a possibility of an arbitration with a London seat being set aside for failing to comply with the *Browne v. Dunn* rule, even if the English Arbitration Act provides that English-seated tribunals are not bound by domestic English procedures and practices. See 'English High Court Sets Aside International Arbitral Award for Failure to Comply with English Rule in *Browne v. Dunn*', https://www.mofo.com/resources/insights/190826-browne-v-dunn.html (last accessed 15 June 2021).

Although 'domesticating' an international arbitration will often be an unintended consequence of counsel and arbitrator selection by both sides in an international dispute, it can also be intentional, for strategic reasons, where one or both parties may feel they are more likely to prevail if the proceedings are conducted along the lines of domestic traditions.

Selecting counsel of the same nationality may also influence the appointment of arbitrators even in the absence of party agreement. An arbitration institution or other appointing authority may have rules or internal practices that require consideration of the nationality of counsel. And even if they do not, an institution may simply find the common background of the appointed counsel to be confirmation that the parties will feel most comfortable with arbitrators who share that same background.

Therefore, in considering the question of how to prove one's case, a party should form at least a rudimentary view of whether it is advantageous to have a domestic-style procedure.

The party must then also assess whether the dispute presents a preferred jurisdiction or legal tradition for the purposes of domestication. Respondents have the luxury of knowing the identity of the counsel appointed by the claimant, and can choose to appoint from the same jurisdiction, if they feel it would be advantageous. For its part, the claimant will often – but not always – be able to anticipate the identity of the counsel who the respondent will appoint. Furthermore, in international arbitration, it is often the case that neither party will be comfortable deciding the dispute according to the practices of the other's jurisdiction or the procedures at the place of arbitration.

Selecting arbitrators based on their likely approaches to evidence

If a party concludes – as many will – that an international procedure is preferred over an available domestic one, then the question becomes, which among the varying legal traditions represented in the arbitration are more advantageous? Or, to put it bluntly, which arbitrators are more likely to deliver an approach to evidence that best suits the party's interests, strategy and desire for procedural efficiency?

With respect to identifying candidates for appointment, there is ample authority that international arbitrators should evince the qualities of 'personal competence, intelligence, diligence, availability, nationality, and integrity of an individual, as well as the individual's arbitration experience, linguistic abilities, knowledge of a particular industry or type of contract, willingness to devote time and attention to the matter, and legal qualifications'.[9] Parties will often consider whether candidates have an appropriate level of familiarity or special expertise in the law or the subject matter of the dispute.

However, a high level of integrity and qualification to decide the issues in dispute should be regarded as the main criterion for being considered. Once admitted, the most important differentiator between candidates should be in relation to how they will conduct the case. A party will not only desire a neutral and competent tribunal but also one with characteristics – especially on the taking of evidence – that are fundamentally aligned with its own expectations for being able to prove its case.

9 Gary Born, *International Commercial Arbitration: Commentary and Materials* (3rd ed., Kluwer, 2021), at 1810, 1811.

Commentators occasionally refer to the advantages of a harmonised approach to different types of procedures, as if international arbitrators were able to escape entirely the procedural preferences developed in the course of their careers. Notably, the domestic legal tradition (or traditions) most closely associated with an arbitrator may indicate a degree of comfort – even if not a preference – for how evidence should be taken and presented and the weight that should be given to it.

It is possible to paint the largest of these distinctions with a broad and imperfect brush (i.e., the differences in the handling of evidence between the common law and civil law systems). In very general terms, some of the most often mentioned differences include the following:

- Disclosure: In common law, a party will usually have the opportunity to seek relevant documents from the opposing party, and parties may have an obligation to provide what they did not want to be shared with the other side. In civil law, litigants are expected to meet their burdens by relying on documents already in their possession.
- Evidentiary weight: Judges and arbitrators in civil law systems place greater decisional weight on contemporaneous documents than witness testimony than their counterparts in common law jurisdictions. This difference means that hearings conducted more in accordance with common law expectations will often take substantially more time to fully exhaust witness and expert testimony. And when the procedural expectations are those of civil law traditions, judges and domestic arbitrators will frequently conclude a case without any hearing at all, relying instead on the documentary evidence presented by the parties (a rare occurrence in common law practice).

There are many other differences in the approaches that arbitrators can take towards matters of procedure, but the two examples above should be sufficient to demonstrate that the way these approaches are implemented can lead to very different situations in which a party will be required or able to prove its case in an international arbitration.

Limitations of traditional methods for inferring evidence approaches

As broad, imperfect brushes go, the distinction between civil and common law is not a bright line. Some international arbitrators may candidly profess preferences for one of these broad categories. Many others may be - or may claim to be – true internationalists without strong preferences and a case-specific approach to the taking of evidence (i.e., that they adapt to fit the needs of the case).

So, having established that there are differences in approaches to evidence, and that these differences can be determinative in – or even whether - a party can prove its case, where does this leave us in selecting arbitrators?

Parties will nearly always refer to an arbitrator's curriculum vitae or website, or a public listing of the arbitrator's background, publications and experience. This largely biographical information typically does not provide any express indication of the arbitrator's preferences in the handling of evidence.

A frequent substitute for actual knowledge about an arbitrator's approach to procedure and evidence is to draw conclusions from where an arbitrator was schooled or trained. The inference is that an arbitrator will be most comfortable with the practices of his or her 'native' legal culture.

Unfortunately, this assumption is increasingly an outdated stereotype as international arbitration expands and arbitrators become comfortable with the procedural tools of different legal systems, and of applying the IBA Rules of Evidence in flexible, innovative ways. Although some difference between civil law and common law approaches still holds among practitioners who are relatively new to international arbitration, it is increasingly blurred by an emerging field of practitioners who could be considered 'none of the above'.

In all events, if a party is satisfied in knowing whether an arbitrator is comfortable with civil or common law approaches to evidence, *Arbitral Women* provides an open-access (non-fee-based) database of arbitrator names, searchable by experience with common law, civil law, European law, Islamic law and international law.[10] On the other hand, Global Arbitration Review (GAR) introduced a fee-based Arbitrator Research Tool, which allows parties to search for arbitrators based on factors such as the number of arbitration appointments in recent years, nationality and experience with common law and civil law-style procedures.[11]

Limitations of word-of-mouth information about arbitrators

Until recent years, word-of-mouth information from experienced colleagues was the only method for identifying arbitrator soft skills relevant to the taking of evidence. However, this has a number of well-known shortcomings, not the least of which is the necessity of access to colleagues who have appeared before (or have sat with) arbitrators being considered. Further, this limits the selection process to arbitrators with developed track records. There can be little available first-hand information about an arbitrator's views on the taking of evidence if she or he has sat in only one or two cases.

Further, word-of-mouth information can be outdated and not reflect how an arbitrator's preferences have evolved over time. Furthermore, the opinions of the person providing the information may be coloured by their level of satisfaction with the outcome, or they may simply be relaying how an arbitrator handled evidentiary issues in a very different type of dispute than the one at hand.

Fortunately, other means used by arbitrators to approach the taking of evidence have begun to emerge, accompanying the growth in popularity of arbitration to resolve international commercial and investment disputes. Below are some of the most well-known means of gathering this information, which range from methods of self-disclosure to publicly available and fee-based databases and data analytics.

Ask before appointing: arbitrator interviews

A very simple solution for determining whether an arbitrator has particular preferences about the taking of evidence is simply to ask them before making an appointment. In 2007, a committee constituted by the Chartered Institute of Arbitrators published a Guideline for Interviews for Prospective Arbitrators, which it updated in 2016 as Practice Guideline 16: The Interviewing of Prospective Arbitrators.[12]

10 https://www.arbitralwomen.org/find-practitioners/.

11 https://globalarbitrationreview.com/tools/arbitrator-research-tool.

12 https://ciarb.org/media/4185/guideline-1-interviews-for-prospective-arbitrators-2015.pdf (last accessed 21 July 2021).

The Guideline purports to set out what it calls 'current best practice in international commercial arbitration in relation to interviews for prospective arbitrators'.[13] It provides a framework for questions to be asked of candidates without unduly risking a subsequent challenge based on how the interview was conducted or what was discussed. Prospective sole or presiding arbitrators should only be interviewed by all parties jointly, whereas co-arbitrators may be interviewed by the appointing party separately, subject to limitations on the scope of the interview.[14]

While noting the wisdom of preparing an agenda that clearly defines the matters to be discussed, the Guideline provides that, among the matters to be discussed, it is appropriate to enquire about 'past experience in international arbitration and attitudes to the general conduct of arbitral proceedings'.[15] The Guideline explains:

> *Prospective arbitrators may discuss their approach to procedural issues but they should not discuss specific questions as to the procedural aspects likely to arise in the arbitration they are being interviewed for. It is permissible to discuss questions phrased in general terms relating to the candidate's ability to manage and progress arbitral proceedings, including questions seeking the arbitrator's view on generic procedural issues.*[16]

The Guideline expands on what is meant by 'generic procedural issues', cautioning against prospective arbitrators providing answers to specific issues or questions, including hypothetical ones, likely to arise in the arbitration for which they are being interviewed.[17] This is consistent with the IBA Guidelines on Party Representation in International Arbitration, which similarly state that party representatives should not 'seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute'.[18]

Within these identified boundaries, what sort of questions may a party properly ask a prospective arbitrator? For each of the questions posed at the beginning of this chapter, generic questions may be posed that could yield useful information on the likely approach the arbitrator would adopt if given the opportunity:

- Document discovery: A party may appropriately request a prospective arbitrator's general views on the IBA Rules of Evidence, and experience in international arbitrations in which the Rules were applied or used as a reference, or cases in which they were not applied (and, if so, why). Does the arbitrator think the IBA Rules of Evidence are useful in the management of document disclosure and, if so, in what ways?

13 Chartered Institute of Arbitrators, Practice Guideline 16: The Interviewing of Prospective Arbitrators, Introduction.

14 id., Art. 4.

15 id., Art. 2(1).

16 id., Art. 2(d).

17 id., Art. 3.

18 IBA Guidelines on Party Representation in International Arbitration, at Guideline 8(d).

- Hearing duration: A party may simply enquire as to the prospective arbitrator's experiences to date, whether as arbitrator and counsel, and how long the hearings typically lasted: months, weeks, or days? Evidently, the answers will have no bearing on the arbitration for which the candidate is being interviewed, but the answers will indicate whether the arbitrator is accustomed to short or lengthy hearings.
- Expert evidence: It would seem entirely appropriate, and not case-specific, to simply ask if the candidate believes arbitral tribunals should manage experts firmly or if they believe this should be left in the hands of the parties and their counsel. Some arbitrators, particularly in technical or fact-driven disputes such as construction arbitration, may have highly developed preferences and even techniques for managing experts that they may wish to share with the parties sooner rather than later. Or they may not have clearly developed opinions about how to manage expert evidence, which is equally useful to know.
- Witness testimony and documents (weight given to different types of evidence). Asking about how a candidate might weigh certain types of evidence is likely to be too close to issues that will come up in a case. However, asking about an arbitrator's experience to date, if any, in arbitrations concluded on the basis of documents only, without the need for a hearing, should be seen as a within-bounds question that yields useful information.

Arbitrator self-disclosures and related databases

Some arbitrators have pre-empted the need for parties to ask them about their preferences for the taking of evidence and managing cases generally, by simply disclosing them, whether via their own websites or published profiles.

In 2016, the author of this chapter (with co-authors Ema Vidak-Gojkovic and Lucy Greenwood) published an article that set out to establish a structure for arbitrators to disclose their approaches to case management. Entitled 'Puppies or Kittens: How to Better Match Arbitrators to Party Expectations',[19] it set out categories of information that, the authors felt, arbitrators typically seemed comfortable disclosing about themselves when speaking at arbitration conferences.

For the purposes of examination and comparison, examples of arbitrators who have published their responses to the 'Puppies' questions can be found at the websites of Greg Wood,[20] John Lowe,[21] Lucy Greenwood[22] and Duarte Henriques.[23] Simply by perusing how these arbitrators have answered the questions – or have not answered them – should give parties an indication of how they are likely to approach the issues if they arise in the arbitration.

The questions in the 'Puppies' article about case management, only some of which deal with the taking of evidence, were never intended as a definitive list.

19 First published in the Vienna International Arbitration Centre Yearbook 2016, Part IV-A, at 11.

20 https://woodipdr.com/wp-content/uploads/2020/05/Procedures-and-Philosophy-Arbitrator-Greg-Wood.pdf.

21 https://www.linkedin.com/pulse/how-i-work-arbitrator-response-article-puppies-kittens-john-lowe/.

22 https://www.greenwoodarbitration.com/case-management-preferences.

23 See https://arbitrationlaw.com/profile/duarte-g-henriques.

The future: data analytics and the role of arbitration institutions

As the practice of international arbitration continues to expand, so does the demand for information about the soft skills of arbitrators.

Ultimately, information about how an arbitral tribunal is likely to approach evidence in a case is a question of fundamental strategy for parties. The fee-based Arbitrator Intelligence already exists as a comprehensive source of information about how arbitrators have conducted cases in the past.[24] Drawing on data contained in both published and unpublished arbitral awards, plus user-provided information, Arbitrator Intelligence provides analyses of how arbitrators tend to handle discovery requests across cases, and how parties view their handling of requests for documents in individual cases.

It may not be long before arbitration institutions recognise the advantageous role they can play in making similar information available to parties. They may do this either by, for example, working with Arbitrator Intelligence or any similar data providers, or by collecting information on their own about how arbitrators have conducted their cases and then packaging it in a way that arbitrators will find to be acceptable and parties will view as useful. Some institutions have begun to provide information of this sort, uploaded on their websites voluntarily by arbitrators.[25] This is certainly a useful practice and we shall see whether it will constitute a discriminating factor in the parties' selection of arbitrators. However, to speed up the process, arbitration institutions could introduce policies that require arbitrators to provide this information, or disclose that they have chosen not do so.

Why might an institution begin to provide this type of information to parties? Because it would render the arbitrations conducted under the institution's rules more predictable. Parties may favour institutions that make it easier for them to answer the questions posed at the beginning of this chapter about how their cases will be conducted, and the approaches the arbitrators are likely to adopt. And if only one institution is successful in making this information available, others may soon follow.

24 https://arbitratorintelligence.com/order-reports/.

25 For example, the Vienna International Arbitration Centre [VIAC] has done so. See https://www.viac.eu/en/arbitration/list-of-practitioners.

Appendix 1

The Contributing Authors

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MDisputes

Michael McIlwrath is the founder and CEO of MDisputes. He spent 22 years as in-house litigation counsel, most recently as vice president of litigation for Baker Hughes Company and before that as global chief litigation counsel for GE Oil and Gas. Michael is chair of the ICC's governing body for dispute resolution services and an adjunct professor at Bocconi School of Law in Milan, as well as a member of the Officers Committee of the Mediation Committee of the International Bar Association. He was the chair of the Global Pound Conference in 2016–2017 and a board member of the International Mediation Institute (IMI) from 2008 to 2020, as well as IMI's president in 2009–2010. In 2017, *Arbitral Women* recognized Michael as a Champion of Change for promoting diversity in international arbitration. He lives in Florence, Italy.

Michael is the co-author of two textbooks – *Negotiating International Commercial Contracts: Practical Exercises* (Eleven Publishing, 2020) and *International Mediation and Arbitration: A Practical Guide* (Kluwer, 2010) – and numerous articles about international mediation and arbitration.

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