APPLICABLE RULES OF EVIDENCE IN ARBITRATION

Damithu Surasena

Currently a Legal Apprentice attached to the Colombo Law Alliance

&

Dr. Asanga Gunawansa

PhD (NUS); LLM (Warwick); Attorney-at-Law

Lead Counsel, Colombo Law Alliance

A. Introduction

The use of "Arbitration" for settlement of disputes is traceable to the ancient Middle Eastern settlements. Archaeological evidence in the form of clay tablets found from places such as Iraq and Egypt show that dispute over water rights have been resolved by arbitration.[1] There is also evidence that it was common amongst the ancient Romans to "to put an end to litigation" by means of arbitration.[2]

The first evidence of an outlined plan for the arbitration of international disputes dates back to the early fourteenth century, when Pierre Dubois, a royal advocate of Normandy, wrote a pamphlet in which was developed an elaborate plan for the recovery of the Holy Land.[3] As the success of a Crusade depended on a general peace in Europe, Dubois advocated arbitration to

[1] Pfeiffer & Speiser, One Hundred New Selected Nuzi Texts, in M. Burrows & E. Speiser (eds.), XVI The Annual of The American Schools of Oriental Research 79, 95 (1936), cited in Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) – P 25

[2] PANDFX bk. 4, t. 8.

[3] Pierre Dubois, *De Recuperatione Terre Sancte Ed 1891* (Hachette Livre-Bnf 2012).

settle outstanding quarrels.[4] Therefore, the popular belief that Arbitration is a modern form of dispute resolution is inaccurate.

The recognition of arbitration agreements as a fundamental requirement to enable a dispute to be resolved by arbitration, marked an important milestone in the evolution of arbitration as an effective and alternative dispute resolution mechanism. However, the use of arbitration was still very much limited since national courts refused to enforce arbitration agreements and did not recognize the same as binding.[5] Subsequent judgments such as the celebrated judgment of Lord Campbell in **Scott v. Avery**[6] revisited this issue and upheld arbitration agreements to be binding and enforceable by courts and that courts should not intervene in an instance where the parties have effected an arbitration agreement.

As far as Sri Lanka is concerned, certain historical records state that Lord Buddha during his second visit, in the fifth year of Buddhahood (5 B.E. or 523 B.C.), arbitrated a dispute over a Jewelled Throne between two Naga Kings, namely, Culodara and Mahodara and handed over the custody of the Jewelled Throne to Naga King Maniakkika of Kelaniya.[7] According to legend, the Nāgānanda International Institute for Buddhist Studies cradled in the heart of Kelaniya is the venue of this first arbitration known to man either in legend or history.

Today, arbitration is an alternative dispute resolution mechanism which is almost indispensable due to its wide spread use owing to factors such as the global acceptance of the New York Convention,[8] the UNCITRAL Model Law and the harmonization of national laws on arbitration with the provisions contained in the said Convention and the Model Law. In Sri Lanka, the British legal reformers introduced arbitration as a less formal dispute resolution mechanism in 1866 by enacting the Arbitration Ordinance No.15 of 1866 and thereafter the Civil Procedure Code of

---

[4] Henry S. Fraser, A Sketch of the History of International Arbitration (1926) 11 Cornell L. Rev. 179. Available at: <http://scholarship.law.cornell.edu/clr/vol11/iss2/3>
[5] *See Kill v Hollister* [1746] 95 ER 532, 532 (English KB)
[6] [1856] 5 HL Cas 811 (House of Lords)
[7] *The Mahavamsa: The Great Chronicle of Sri Lanka*.
[8] Formally known as the: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

1889. With the introduction of the UNCITRAL Model Law, Sri Lanka enacted the current arbitration law in force, i.e. the Arbitration Act No. 11 of 1995, based on the said Model Law,

B. The Need for Rules and Procedures for Arbitration to be Effective

With arbitration becoming a popular mechanism for settlement of disputes, the complexity of procedures to be followed for an arbitration to be effective, continued to escalate. Practical issues surfaced by reason of the inherent lack of a uniform legal framework applicable to settle disputes by arbitration. Unlike in the case of formal dispute resolution by instituting actions before Courts, where legislation dealing with procedures and evidence (for example, the Civil Procedure Code and the Evidence Ordinance), in Arbitration, there were no such detailed procedures and rules.

In terms of international arbitration, to some extent, uniformity was achieved through instruments such as the New York Convention and the UNCITRAL Model Law.[9] However, these instruments restricted its spectrum to cover only the fundamental elements of arbitral procedure with provisions to the effect of excluding court intervention in determining the dispute,[10] appointment/challenge of arbitrators,[11] time frames to issue notices[12] and other general powers of the tribunal.[13] Particularly, the question of what a suitable procedure would be in taking evidence in an arbitration, remained unsettled.

Unlike in any national courts system where strict procedural laws on evidence dictate the conduct of evidence taking, in arbitration such strict rules are not followed. For example, the provisions in the Sri Lankan Evidence ordinance which provide that documents must be proved by primary evidence unless in listed exceptional circumstances;[14] rules as to giving notice to

---

[9] *See* UNCITRAL Model Law (as amended in 2006), Art. 2A(1): *"In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application…."*.
[10] ibid, Art. 5; Sri Lankan Arbitration Act, s. 5; English Arbitration Act, s. 9.
[11] UNCITRAL Model Law, Art. 12; Sri Lankan Arbitration Act, s. 10.
[12] Sri Lankan Arbitration Act, s. 10, 27; UNCITRAL Model Law Arts. 13, 33.
[13] UNCITRAL Model Law, Art. 19(2), 33(2); Sri Lankan Arbitration Act, s. 17, 27(3).
[14] Evidence Ordinance of Sri Lanka, s. 64.

produce;[15] rules requiring that copies of documents be certified etc. are dispensed with. In fact, almost all arbitration laws include provisions to the effect of excluding the national evidentiary laws from application to arbitrations under such laws.[16] Thus, what typically takes care of the evidentiary process would be "party autonomy" and the tribunal's discretion and therefore, arbitrations enjoy much procedural flexibility.[17] In fact, arbitrators are given wide powers and almost all national laws/institutional rules empower arbitral tribunals to determine admissibility, relevance, materiality and weight of any evidence.[18]

According to Gary Born, one of the principal reasons that this procedural autonomy is granted is to enable the parties and arbitrators to fashion procedures "tailored" to particular disputes. As a result of this, technically complex disputes can include specialized procedures for testing and presenting expert evidence and other ways which the parties are free to agree on in gaining an optimum outcome of the exercise of arbitration.[19] However, despite the autonomy arbitration enjoys outside the regular judicial systems, there are instances where such intervention by courts are needed. Particularly, the assistance of courts is required in evidentiary matters. Since arbitrators may only "require" a witness to attend an examination and if such witness refuses, they are not empowered to compel witnesses to attend hearings, an application can be made to court seeking the court's indulgence to compel such witness to attend the hearing.[20]

Apart from such instances where court intervention is sought, arbitration functions independently of the national courts and arbitrators exercise wide powers in terms of setting procedures for the arbitration. It is universally accepted that the arbitrators are empowered to

---

[15] Ibid, s. 66.
[16] Sri Lanka Arbitration Act, s. 22(3); Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, P 34.
[17] *See*, *Slanely v International Athletic Federation*, 244 F.4d 580, 591 (7th Cir. 2001); *McDonald v. City of W Branch* (466 U.S. 284), 292; *Forsythe International, SA* v. *Gibbs Oil Co*, 915 F.2d 1017, 1022 (5th Cir. 1990).
[18] UNCITRAL Model Law, Arts. 19, 24(1); Sri Lanka Arbitration Act, S. 17, 19(2), 22(3); English Arbitration Act, S. 33 - 34; UNCITRAL Arbitration Rules, Art. 27(4); HKIAC Rules, Art. 22.2 - 22.7; SIAC Rules, Art. 19.2, 19.4.
[19] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014), P 85.
[20] *See* UNCITRAL Model Law, Art. 9, 17(J), 27; Sri Lanka Arbitration Act, S. 20(1), 21(1) – (3); *Also see* Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014)*, P1275: "Court actions in this regard does not affect exclusivity of arbitration"*

decide on the admissibility and relevancy of evidence. It is also universally accepted that arbitrators are not bound by usual rules on taking evidence.[21] Therefore, the taking of evidence in arbitration, would largely depend on the legal background and training of the arbitrators. The dependence of the evidentiary procedure on the arbitrators' legal background and training may defeat the objective of achieving uniformity in international arbitral procedure. For an example, an arbitrator from a civil law background may follow an inquisitorial approach in taking evidence and may use tools such as "discovery" to obtain evidence. Whereas an arbitrator of common law background would follow an adversarial approach in taking evidence and may not use "discovery" procedures but rather keep to "disclosure" procedures.

In exercising discretion however, a tribunal must be cautious because if in case a party does not agree with the evidentiary approach taken by the arbitrator and the arbitrator nevertheless proceeds and makes an award against such party, chances are that this party would apply to court to set aside the award on the ground that the arbitral procedure followed was not in accordance with the agreement of the parties.[22] On the other hand, if the arbitrators do not follow any approach at all and do not make use of general rules and evidentiary principles, the final award may still be set aside in the enforcement stage on the ground that it contradicts public policy[23] where irrelevant and/or inadmissible evidence may have been considered due to not using any rules and principles in taking evidence. Therefore, it is of fundamental importance that a proper and uniform procedure in taking evidence is developed to avoid subsequent complications and to complement the tribunal's duty to determine the dispute in an impartial, fair, efficient and expeditious manner.[24]

[21] *See* Model Law (n 20), Art. 19; Arbitration Act (20), S. 22(3).
[22] *See* Sri Lanka Arbitration Act, s. 32(1)(a)(iv); UNCITRAL Model Law, Art. 34(2)(a)(iv).
[23] *See* Arbitration Act (n 22), Art. 34(1)(b)(ii); Model Law (n 22), Art. 36(1)(b)(ii)
[24] *See* UNCITRAL Model Law, Art. 18; Sri Lanka Arbitration Act, s. 15(1)

C. Challenges to Establishing Common Evidentiary Rules for Arbitration

A publication by the Global Arbitration review highlights one of the key constraints in developing universally acceptable rules of evidence for arbitration as follows: *"…. nowhere can the divide between common law and civil law be better illustrated than in the conduct of proceedings by arbitrators (adversarial versus inquisitorial approach), the weighing of different kinds of evidence (witness testimony versus documentary evidence) and the volume of rules regulating the evidentiary procedure."*[25] Further, parties from common law background may be inclined to seek for evidence to be filed through liberal discovery in support of a claim even after it has been filed. However, a party from a civil law background would follow the approach of obtaining an order from the tribunal to produce documents in the possession of the other party or even a third party, if the said parties have referred to such documents in their pleadings.

As stated above, although, typically, arbitration processes are not governed by strict rules concerning the taking of evidence, Michael Moser and Chiann Bao suggest that tribunals should give due regard to such rules, for the following reasons:

a) "The rules themselves have evolved based on years of judicial and legislative experience and expertise. They are, by and large, rational and designed to achieve fairness;

b) The rules are comprehensive and should cover most situations. They will therefore be a source of persuasive guidance to the tribunal;

c) If the tribunal were to make decisions on evidential issues based on its own whims and without any rational basis, the parties may have legitimate grounds to feel aggrieved, and possibly recourse."[26]

---

[25] Andrea Gritsch, Stefan Riegler and Alexander Zollner, The taking of Evidence in The Guide to M&A Arbitration – First Edition.
[26] Michael Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press 2017), P 9.154.

At present, although national rules on taking of evidence in arbitration is not common, uniformity is achieved to a great extent due to the introduction of the "Rules on the Taking of Evidence in International Arbitration" developed by the International Bar Association (IBA Rules), gradually evolving through its initial introduction in 1983 up to the latest version of the rules that were issued in 2010, and the more recent introduction of the "Prague Rules on the Efficient Conduct of Proceedings in International Arbitration'', which was released in December 2018.

D. The IBA Rules

The IBA Rules were the pioneers in introducing uniform rules dealing with evidentiary procedure in international commercial arbitration. The status quo prior to the introduction of these rules where evidentiary procedure is concerned, was to find limited recourse to the broad provisions in various national arbitration laws and institutional rules.[27] As stated earlier, these provisions only addressed the fundamentals of an evidentiary procedure and left most other advanced aspects of evidence taking for the tribunal and the parties to decide. Therefore, it can be said that national arbitration laws and institutional rules formed the basis of the evidentiary procedure in international commercial arbitrations prior to the introduction of dedicated rules of evidence.

These rules were drafted by a sub-committee under the supervision of the Arbitration Committee of the International Bar Association.[28] The latest version of the IBA Rules was introduced in 2010. These rules gained much popularity among parties, arbitrators and counsel involved in international commercial arbitration. This has been evidenced in a survey carried out by White & Case LLP in 2012, which shows that the IBA Rules were used in 60% of the international

[27] *See* UNCITRAL Arbitration Rules Sections 24, 25, 26(1), 27, 28(3), 29.
[28] IBA Rules on the Taking of Evidence in International Arbitration (2010), pg 1.

arbitrations that year, with 85% of the respondents believing them to be useful. It was further shown that 53% of the respondents used them as guidelines and 7% from the rest, as binding rules.[29]

The primary goal behind the introduction of these rules was to "provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between parties from different legal traditions".[30] Thus, it can be seen that the IBA Rules intended to introduce a hybrid system of evidentiary rules encompassing both common law and civil law qualities. The provisions dealing with expert evidence are one such instance that is indicative of the hybrid approach used by the IBA Rules.[31] The common law approach in terms of experts is to allow parties to appoint their own expert witnesses to give evidence on technical matters whilst the civil law approach is for the tribunal to appoint experts and conduct their own line of inquiry. The IBA Rules have made provision for both these situations and it is also possible under these rules to have both types of experts appointed simultaneously. However, despite the intention to bridge the gap between the different legal systems and their practices, the IBA Rules still face criticism by some practitioners as to their inclination towards a common law approach and thereby creating a common law dominance in the sphere of international commercial arbitration. This criticism warranted the introduction of the Prague Rules which uses an inquisitorial approach to taking of evidence.

[29] White & Case LLP, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process at p 11.
[30] IBA (n 28), paragraph 1 of the preamble.
[31] IBA (n 28), Art. 5-6.

E. The Prague Rules

The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration, which was introduced very recently, is claimed to be an ideal evidentiary procedure that can be used where parties prioritize a cost efficient and fast-track arbitral process. These rules follow a civil law approach and unlike in the IBA Rules, the tribunal is equipped with substantial powers and discretion in the conducting of proceedings in terms of evidentiary matters. The Tribunal's power to limit the duration of a hearing,[32] the *"Iura Novit Curia"* principle which allows proactive arbitrators to apply legal provisions that were not set out by the parties[33] and power to grant assistance in amicable settlement,[34] are some of the interesting provisions which are not seen in the IBA Rules but are included in the Prague Rules.

F. Key Differences between the IBA Rules and Prague Rules

It may sometimes be said that the discussion between IBA Rules and the Prague Rules is more or less a discussion between common law and civil law evidentiary procedures. What is important is however, that these rules address important issues that are not generally provided for in the applicable laws and institutional rules.

The key aspects where provisions can be contrasted from each other in these rules are: the provisions dealing with the tribunal's role in case management; document production; number of witnesses; examinations of witnesses and expert witnesses as demonstrated in the following table.

[32] Prague Rules, Art. 8.2.
[33] ibid, Art. 07.
[34] Ibid, Art. 09.

Key Aspect	Article	Prague Rules	Article	IBA Rules
Case management	2, 3.1 – 3.3	Provide for a proactive tribunal, including the tribunal's power to hold case management conferences, make orders for site inspections and/or any other necessary action for the purpose of fact-finding, imposing cut-off dates for production of evidence.[35]	3.10	The rules do not expressly require the tribunal to be proactive in comparison to the corresponding provisions in the Prague Rules.[36] The tribunal merely requests the parties to produce evidence that they consider appropriate[37] and the tribunal under these rules do not have the power to impose cut-off dates for production of evidence.
Document Production	4.3, 4.5	support the notion that document production must be limited in order to save costs and time. Under these rules a party may request the tribunal to order another party to produce a	3.3 - 3.10,	The wording of the IBA Rules does not suggest strict considerations for the tribunal to refuse to request a party to produce documents.[40]

[35] Prague Rules, Arts. 2, 3.1 – 3.3.
[36] However, Art. 02, IBA Rules provides that the tribunal shall invite parties to consult each other to agree on an efficient, economical and fair process for the taking of evidence.
[37] IBA Rules, Art. 3.10.
[40] IBA Rules, Art. 3.3-3.10.

		specific document which shall be relevant, material, not to be found in the public domain and is in the possession of another party or within its power[38] and it may be granted only if the tribunal is satisfied.[39]		
Tribunal's power to decide on number of witnesses	2.4(b), 5.2	Under the Prague Rules the tribunal may decide on factors such as, the number of witnesses to be called and which witnesses may be called.[41]		A tribunal following the IBA Rules would not have such powers as the Parties are at liberty to decide on the necessary witnesses.
Examination of witnesses	5.3, 8.1	In alignment with its objectives of achieving cost and time efficiency, the Prague Rules, although having retained the common law-typical cross-examination mechanism, have made provisions to the effect of empowering	8.2	Such encouragement to dispense with hearings is not found in the IBA Rules. They however, empower the tribunal to take control over the evidentiary hearing and to limit and/or

[38] Prague Rules, Art. 4.5.
[39] ibid, Art. 4.3.
[41] Prague Rules, Art. 2.4(b), Art. 5.2.

		the tribunal to decide that a certain witness should not be called for examination during the hearing.[42] The tribunal is even encouraged in appropriate cases to seek to resolve the dispute on a documents-only basis instead of having hearings.[43]		exclude any question to a witness.[44]
Expert witnesses	6.1, 6.5	A tribunal following the Prague Rules would in the first instance appoint the expert. This is the default step as laid out in the rules.[45] However, this appointment would not preclude a party from submitting reports by its own appointed expert.	5, 6	The IBA Rules provide for a hybrid mechanism where both party-appointed and tribunal-appointed experts may be called to give evidence.[46]

[42] ibid, Art. 5.3.
[43] ibid, Art. 8.1.
[44] IBA Rules, Art. 8.2.
[45] Prague Rules, Art. 6.1.
[46] IBA Rules, Art. 5 & 6.

Although differences exist between the IBA and Prague rules, it must be noted that such differences only arise in terms of the scope of the tribunal's powers in taking evidence. The general mechanisms of document production, which must be done through the tribunal's intervention; empowering the tribunal to decide on the relevance, admissibility and materiality of evidence; the requirement for parties to make known the witnesses each other intend on calling and making provisions for the calling of both party-appointed and tribunal appointed expert witnesses and the fixing of the expert's terms of reference, are the similarities that form common ground between the two sets of rules.

G. Assessing of Evidence using IBA Rules and Prague Rules

G.1 Burden of Proof

The various provisions dealing with the burden of proof in arbitrations, merely requires each party to prove the facts upon which it relies.[47] It must be noted however, that tribunals and parties must exercise caution in dealing with issues on burden of proof since it may raise an issue of characterization, as the same is treated as an issue of substantive law in civil law jurisdictions whereas in common law jurisdictions it is treated as a procedural issue. Owing to this reason, a rule on burden of proof was not included in the Model Law as well.[48]

Regardless of the absence of provisions dealing with this aspect, it is widely accepted that an arbitral tribunal should apply the normal standard of proof used in civil cases, i.e. on a "balance of probability"[49] while not restricting the proceedings to strict rules of evidence. On the contrary, however, some cases may require a higher standard of proof. This is typical when allegations of

[47] HKIAC Rules, Art. 22.2; UNCITRAL Arbitration Rules, Art. 27.
[48] UN Doc A/40/17, P 328 and UN Doc A/CN9/SR331, paras 20, 29 (statements of the Swiss, German and Finnish delegates)
[49] Blackaby, Hunter, Partasides and Redfern, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International 2015), P 378; Michael Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press 2017), P.152.

fraud and illegality are made in arbitrations. In such cases, tribunals would require more evidence than that is usually needed to ensure such allegations are adequately proven.[50]

G.2 Adverse Inferences and Procedural Good faith

Adverse inferences may be drawn by the tribunal in instances such as where a document was requested to be produced, but the party within whose possession or powers to produce such document, does not produce it; where a witness whose attendance has been requested but such witness refuses to attend and where a witness who has submitted a witness statement refuses to attend a hearing for oral examination.[51] However, it must be noted that in instances where a witness refuses attend examination, it will be difficult to justify the drawing of such adverse inference as against an instance where a party does not produce documents that are within its control, because a party may have genuinely attempted to procure the witness's attendance and/or the witness may have a satisfactory justification for not attending, such as illness etc.

The concept of adverse inferences is found in both the IBA and Prague Rules. The IBA Rules provide for instances where if a party without satisfactory explanation, refuses to produce a document being requested under a "Request to Produce" to which it has not objected in due time; and where a party refuses to make available any other relevant evidence including testimony, without satisfactory explanation. Accordingly, in these instances the tribunal may infer that such refusal is made because of its adversity to the interests of that party.[52] Article 10 of the Prague Rules empower the tribunal to draw adverse inferences "with regard to a party's case or issue" where such party does not comply with the tribunal's orders or instructions in the absence of justifiable grounds.

---

[50] *See Wells Ultimate Service LLC v Bariven, SA,* Court of Appeal of the Hague (Judgment dated 28.10.2019): On the contrary, caution must be exercised as to avoid placing a standard too strict. In this case, an ICC award was annulled for the reason that the tribunal placed a standard as to "clear and convincing evidence" to prove that the contract in question was concluded through means of corruption, which was deemed by courts as a standard too strict.

[51] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014), P 2351

[52] IBA Rules, Art. 9.5 – 9.6.

In addition to this power of the tribunal to draw adverse inferences, a requirement for parties to conduct itself in good faith during the evidence taking process, is also set out in the IBA Rules. Accordingly, if the tribunal determines so, it is empowered to assign costs of the arbitration including costs of taking evidence against such party.[53]

G.3 Admissibility of illegally obtained evidence

In deciding issues relating to admissibility of evidence, Redfern and Hunter have generally stated that *"In practice, tribunals composed of three experienced international arbitrators from different legal systems approach the question of the reception of evidence in a pragmatic way. Whether they are from common law or civil law countries, they tend to focus on establishing the facts necessary for the determination of the issues between the parties and are reluctant to be limited by technical rules of evidence that might prevent them from achieving this goal."*[54]

Redfern and Hunter's above statement may however not apply to instances where the issue is on the admissibility of illegally obtained evidence. That being mentioned, this issue is now considered a moot point where it is debated whether actually, in international arbitration, such evidence should be deemed inadmissible. What is clear is that the admission of such evidence is put in the juxtaposition between the party's right to be heard and the requirement to render an award aligned with public policy, i.e. not tainting the arbitral procedure by admitting illegally obtained evidence.

In negotiating this rather tricky bend, George von Segesser has stated, *"…. assessment of admissibility of illegally obtained evidence …. is generally undertaken by balancing the interest in finding the truth against the legal interests which were harmed when the evidence was obtained."*[55]

---

[53] IBA Rules, Art. 9.7.
[54] Blackaby, Hunter, Partasides and Redfern, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International 2015), P 377.
[55] George Von Segesser, Kluwer Arbitration Blog, Admitting illegally obtained evidence in CAS proceedings – Swiss Federal Supreme Court shows Match-Fixing the Red Card, 17th October 2014 - http://arbitrationblog.kluwerarbitration.com/2014/10/17/admitting-illegally-obtained-evidence-in-cas-proceedings-swiss-federal-supreme-court-shows-match-fixing-the-red-card/>

This approach was also used by the Swiss Federal Supreme Court where the issue as to whether the reliance on an illegally obtained video recording in a CAS award (Court of Arbitration for Sports) violates public policy was raised.[56]

The IBA Rules (Articles 9.1 - 9.3) empower the tribunal to decide on whether to exclude certain evidence or not. These Articles provide for instances where evidence have been produced under legal impediments/privilege, affecting commercial or technical confidentiality etc. and the tribunal is empowered to exclude such evidence in those instances. There is similar provision in the HKIAC Rules as well.[57] Article 19.4 of the IBA Rules provides that the tribunal may make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

The Prague Rules, however, do not contain such provision to this effect. In terms of such exclusion, the only provisions dealing with exclusion is where a tribunal may preclude a witness from attending a hearing.[58] However, if such party insists on calling such witness, the tribunal as a general rule must call the witness.[59] Even the process of document production, in setting requirements to enable parties to request for documents, provides only that such document be relevant and material to the outcome of the case, not in the public domain and if in the possession of another party.[60]

H. Conclusion

Many argue that when conducting arbitration, strict adherence to the rules of evidence is not necessary, as that would have an adverse impact on the effective and speedy resolution of the disputes referred to arbitration. The key justification behind this argument is that rules of evidence can be misused to obstruct and/or obfuscate the facts and thus, delay the proceedings.

---

[56] Decisions 4A_362/2013 and 4A_448/2013
[57] HKIAC Rules, Article 22.3.
[58] Prague Rules, Art. 5.3.
[59] ibid, Art. 5.7.
[60] ibid, Art. 4.5.

In this article we have argued and endeavoured to demonstrate that rules and procedures concerning evidence is actually not bad for arbitration, if properly used. The advantages of having rules such as the IBA Rules and the Prague Rules have also been discussed.

We are of the view that if Arbitrators could endeavour to manage the application of rules of evidence consistent with the purposes of arbitration in a manner that would not defeat the expectations of the parties, and also manage to ensure that the process is not misused by the lawyers and/or parties to frustrate the effective and speedy conclusion of arbitral hearings, then the application of rules of arbitration would result in more fool proof awards being delivered. In other words, the arbitrators should apply the rules of evidence to find the evidence that will reach the merits and truth of the claims, and defenses to those claims, in a manner that would encourage the parties to present solid evidence in support of their respective cases and avoid unnecessary delay.