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The Guide to Evidence in International Arbitration

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Special Issues Arising when Taking Evidence from State Parties

Stefan Riegler, Dalibor Valinčić and Oleg Temnikov[1]

Introduction

The involvement in arbitration of states, public authorities (such as government agencies, municipalities or other local authorities), or publicly owned enterprises may imply specific procedural issues. Indeed, the involvement of such public entities in arbitration led to the development of certain procedural mechanisms to secure their participation in a fair and balanced way. From bifurcation of proceedings to direct enforcement under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), the approach has often been to create specific rules to address the standing of public entities. The interrelationship between the objectives of arbitration and the specifics of public entities, such as their immunities, the public interest objectives and considerations, have resulted in particularities widely discussed by scholars.

As concerns evidence, however, for a long time there were no particularly elaborated or detailed specific rules.[2] The reason for this, at least in part, is the flexibility inherent in arbitration, which allows arbitral tribunals to use their discretion to account for the participation of public entities by adapting practices to the needs of a given arbitration procedure. Nevertheless, with an increase in arbitrations involving public entities, whether under investment protection instruments or under commercial contracts, some specific rules have emerged, which are also relevant to evidentiary issues.

When approaching the question of 'special issues arising when taking evidence from state parties', there are a couple of points about the possible nature of state parties that need to be taken into consideration. The most clear-cut example is when a state itself is taking part in proceedings, which is typically the case in investment treaty arbitrations. However,

1 Stefan Riegler and Dalibor Valinčić are partners and Oleg Temnikov is a counsel at Wolf Theiss.

2 Frédéric G Sourgens, Kabir Duggal, et al., *Evidence in International Investment Arbitration* (Oxford University Press, 2018), Preface, pp. vii–x.

in international arbitration there are numerous examples of the respondent being a specific public authority (such as a government agency), a local authority (such as a municipality, federal unit of state or other local authority) or a fully or partially publicly owned enterprise. Although the rules of evidence may differ somewhat, such as in the case of sovereign immunity, which is often available only for the state itself, the general considerations relating to evidence bear some similarities and may be applied analogously.

The special issues around the taking of evidence in arbitration involving state parties are usually regarded from the perspective of obtaining evidence from a state party at the request of a private party. Indeed, arbitrations involving state parties are regularly asymmetric in their nature, as they involve private parties on the one side and state parties on the other. Therefore, even when the issues of taking evidence are considered in the context of a private party's possibilities to obtain evidence from the state party, the asymmetry of the relationship may also create salient issues the other way round, that is when state parties produce evidence to which a private party would normally not have access.

Which rules apply?

There are no generally applicable specific rules or instruments on taking evidence from state parties. National arbitration laws, arbitration rules and international legal instruments do not address the issue in a comprehensive manner. Thus, specific rules are usually determined by arbitral tribunals taking into consideration the applicable procedural rules, the applicable *lex arbitri*, any specific provisions in the agreement between the parties and sometimes the applicable substantive law.

Arbitration rules, in general, contain very broad provisions regarding arbitral tribunals' powers to organise the collection of evidence in the proceedings.[3] Even the ICSID Rules, which are designed for disputes involving state parties, do not provide for more precision in that respect.

Arbitral tribunals dealing with cases involving state parties have also applied public international law and the practices of other international adjudicatory bodies,[4] as these have been tested not only in the context of state parties, but by their nature were often based on states' consent. Even though the emergence of these practices on evidentiary matters were labelled as the creation of a new *lex evidentia*,[5] the process appears to have been slowed down by the increased use of purely arbitration tools, such as the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules). Nevertheless, parties involved in the taking of evidence from state parties, especially in investment treaty arbitration, may still rely on practices arising from public international law and practice.

3 A typical example is Article 25 of the 2021 ICC Rules: 'The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.'

4 'Approaches to Evidence and Fact Finding' (Chapter 10) in Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), pp. 743–824.

5 Charles N Brower, 'The Anatomy of Fact-Finding before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence' in *Fact-Finding before International Tribunals: Eleventh Sokol Colloquium*, ed. Richard B. Lillich (New York: Transnational Publishers, 1992), 150.

A particularly salient question is the potential application of rules under domestic laws. Domestic law may be applicable as *lex arbitri*, but domestic arbitration and civil procedure laws often do not contain rules with respect to taking evidence that would be specific to state parties. Domestic laws may also be applicable as laws governing particular privileges by a state party or a public entity.[6] In such cases, the arbitral tribunal may have to determine the applicable law and the extent to which that law is relevant in the international arbitration proceedings. It is submitted that the application of domestic rules, however, should not lead to a disadvantage for, or to the detriment of the rights of, the private party in the arbitration.[7] This approach safeguards the risk of states adopting extensive privilege legislation to protect themselves from evidence-taking in international arbitration and constitutes a real advantage of international arbitration over domestic litigations involving states.

Therefore, it is not surprising that the most relevant set of rules is a non-mandatory soft-law instrument – the IBA Rules. Originally designed to be used in international commercial arbitrations, the IBA Rules were so commonly used in investment treaty arbitrations that the word 'commercial' in their title was deleted.[8] Nowadays it is undisputed that the IBA Rules may be applied in both investment treaty arbitration[9] and commercial arbitrations involving state parties or public entities. Nevertheless, the application of the IBA Rules is not automatic; it is subject to the relevant agreement between the parties, a tribunal's decision rendered under its wide discretion to organise the proceedings as it deems fit or under the applicable arbitration rules. The question of their applicability may be a major point to be included in the terms of reference or procedural orders at the very beginning of the proceedings and it is recommended that the matter be raised in the early stages of the proceedings.

A practical point to note is that the IBA Rules have not been specifically designed for investment treaty arbitrations or commercial arbitrations involving state parties or public authorities. They do not contain specific provisions in this respect.[10] Nevertheless, the general framework set out by the Rules, as well as some specific provisions,[11] generally provide substantial guidance on the matter. In view of their prominent role, this chapter follows the logic behind the IBA Rules but also addresses other pertinent developments beyond the application of the IBA Rules, where applicable.

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6 '11. Exclusionary Rules of Evidence' in Frédéric G Sourgens, Kabir Duggal, et al., *Evidence in International Investment Arbitration* (Oxford University Press, 2018), p. 240.

7 *Philip Morris Asia Ltd v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 12 (14 November 2014) [4.6].

8 'Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration', IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration, January 2021, p. 3.

9 '2. Commentary on the IBA Rules on Evidence, Preamble' in Roman Mikhailovich Khodykin, Carol Mulcahy, et al., *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press, 2019), pp. 10–42.

10 'Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration', IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration, January 2021, p. 5.

11 e.g., IBA Rules, Article 9.

IBA Rules, Article 9

As a general matter, because of the asymmetry in the positions between private and state parties in arbitration, the issues with taking evidence from state parties are often narrowed down to the question of what tools a private party may have to obtain evidence it may otherwise not be able to access. In that respect, the main source of rules that are relevant for taking evidence from state parties in arbitration proceedings is contained in Article 9 of the IBA Rules, which is also the provision most often relied on by state parties to resist evidence disclosure requests by the opposing parties. An evaluation of the specific elements and grounds of exclusion may be performed by the arbitral tribunal, at the request of a party or on its own motion, to limit or exclude certain evidence.[12]

Legal impediment or privilege exception in practice

Article 9.2(b) of the IBA Rules provides protection from disclosure of evidence that may be covered by privileges under the applicable domestic law, such as the attorney–client privilege or professional privilege.

This provision may be relied on by state parties in different contexts. For example, states may rely on confidentiality of ongoing investigations,[13] tax secrecy, banking secrecy, medical secrecy or other similar domestic rules. In such cases, the practice of arbitral tribunals has been to consider the relevant evidence request against the relevance and materiality in light of the claims advanced in the arbitration.[14] The IBA Rules contain a list of five elements to be considered by the arbitral tribunal when making a decision on such exceptions, namely:

- any need to protect the confidentiality of a document created or a statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
- any need to protect the confidentiality of a document created or a statement or oral communication made in connection with and for the purpose of settlement negotiations;
- the expectations of the parties and their advisers at the time the legal impediment or privilege is said to have arisen;
- any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the document, statement, oral communication or advice contained therein, or otherwise; and
- the need to maintain fairness and equality as between the parties, particularly if they are subject to different legal or ethical rules.

12 'Admissibility and Assessment of Evidence' (Article 9) in Tobias Zuberbuehler, Dieter Hofmann, et al., *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (Schulthess Juristische Medien AG, 2012), p. 171.

13 See, e.g., *BSG Resources Ltd, BSG Resources (Guinea) Ltd, and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 7 (5 September 2016) Annex A, Request No. 34; *Churchill Mining plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and ARB/12/40, Award (6 December 2016).

14 '11. Exclusionary Rules of Evidence', in Frédéric G Sourgens, Kabir Duggal, et al., *Evidence in International Investment Arbitration* (Oxford University Press, 2018), p. 248.

Grounds of commercial or technical confidentiality in practice

Article 9.2.(e) of the IBA Rules contains the generally accepted principle that parties should not be allowed to obtain unauthorised access to protected secrets of the other party. Confidential information may include a variety of types of data, such as commercial or technical communications or secrets, banking information, specific product information, among other things. In the context of taking evidence from state parties, these grounds are often relied on. Nevertheless, in this context the practice of arbitral tribunals does not seem to substantially differ from commercial cases not involving state parties. The reason for this may be the existence of other more specific grounds for exclusion of evidence, such as the political or institutional sensitivity.

Special political or institutional sensitivity in practice

States and their various authorities may often be involved in matters of substantial importance for their internal or foreign policies, such as the development of internal policies about national security, or a dispute with another state. As a part of the state's engagement in such matters, various pieces of information may be generated that are sensitive for the state both internally and externally.

In both commercial and investment treaty arbitration against state parties, private parties often seek to obtain evidence from state parties that may contain such politically or institutionally sensitive information. Although as a matter of principle sensitive information concerning the activities of governments or other state authorities may be protected from disclosure, under certain circumstances, the question is on what specific basis this protection should be granted.

As discussed above, most rules governing arbitration proceedings vest arbitral tribunals with wide discretion in resolving evidentiary issues. However, specific mention of questions of disclosure protection exists only as exceptions, rather than as rules. Examples of these exceptions are the 2016 Arbitration Rules of the Singapore International Arbitration Centre, which explicitly vest tribunals with the power to determine 'any claim of legal or other privilege',[15] the JAMS International Arbitration Rules and Procedures, and the International Dispute Resolution Procedures of the International Centre for Dispute Resolution, which both provide that the tribunal will 'take into account' any applicable principle of privilege.[16]

In the investment treaty arbitration arena, there are some treaties explicitly governing the issue of disclosure protection. However, such examples also exist as an exception, rather than a rule. An example is the 2012 US Model Bilateral Investment Treaty, which limits access to information determined to be contrary to the state's 'essential security interests'[17]

15 Arbitration Rules of the Singapore International Arbitration Centre (6th Edition, 1 August 2016), Article 27(o).

16 JAMS International Arbitration Rules and Procedures, 1 June 2021, Article 24.4; International Dispute Resolution Procedures of the International Centre for Dispute Resolution, 1 March 2021, Article 25.

17 2012 U.S. Model Bilateral Investment Treaty, Article 18(1).

or the disclosure of which would 'impede law enforcement or otherwise be contrary to the public interest'.[18] Other examples are the North American Free Trade Agreement (NAFTA)[19] and the Free Trade Agreement between China and Australia.[20]

Perhaps because of the scarcity of rules governing evidentiary issues in arbitration in general, Article 9.2(f) of the IBA Rules was highly important in the development of jurisprudence in this context. Under this Article, an arbitral tribunal may exclude evidence from the evidentiary record or production on the grounds of 'special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling'.[21] However, even under the application of this Article, it still remains unresolved which rules on disclosure protection should be applied by the arbitral tribunal. Should they be the national rules of the state seeking to rely on disclosure protection, the rules of the seat of arbitration, the rules applicable in the place where the evidence has been generated or is physically situated, or some other rules?

When a state seeks to withhold disclosure of information that is politically sensitive, arbitral tribunals might first consider the national laws of that state. Most states have internal rules or regulations providing protection from disclosure of documents because they are politically sensitive. However, these protections may vary in their scope. In some jurisdictions, predominantly common law jurisdictions, the disclosure protections for politically sensitive information are considered to be a type of privilege and may automatically cover documents or other evidence based on the content of the politically sensitive information. In others, predominantly civil law jurisdictions, disclosure protection may not automatically apply if the content of evidence is politically sensitive. Rather, in these jurisdictions, for the disclosure protection to be effective, it may require a formal classification procedure under local laws and a labelling of the information or a document as secret, assigning it the appropriate secrecy level under the applicable regulation.

Primarily in the context of investment treaty arbitration, arbitral tribunals have considered these domestic law regimes, such as the concepts of cabinet privilege,[22] deliberative process privilege[23] or public interest immunity.[24] Nonetheless, there seems to be no general recognition that these concepts have risen to the level of universally accepted grounds for withholding disclosure. Even if it is established that these domestic law regimes may apply to the evidence sought by the other side, they are not understood to be determinative and arbitral tribunals tend to investigate whether the grounds for withholding disclosure were compelling in the context of arbitration. The argument has been that neither party should

18 id., Article 19.

19 See Articles 2102 and 2105.

20 See Articles 16.3, 9.17.4 and 9.10(g).

21 IBA Rules on the Taking of Evidence in International Arbitration, 17 December 2020, Article 9.2(f).

22 *SD Myers, Inc. v. Government of Canada*, UNCITRAL, Procedural Order No. 10, 16 November 1999.

23 *Glamis Gold Ltd v. United States of America*, UNCITRAL, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, 17 November 2005.

24 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, 24 May 2006.

be put at a disadvantage with respect to claims for withholding disclosure and that a state should not be allowed to rely on its own domestic laws to advance its position in international arbitration.

An assessment of the compelling nature of grounds for withholding disclosure involves weighing the state's interest in non-disclosure against the other party's competing interest to be given access to a document that is relevant and material. The result of this assessment should be to establish whether the state's asserted sensitivities outweigh the extent to which disclosure of sensitive information would advance the other party's case. Criteria aimed at assisting arbitral tribunals in performing this weighing exercise include (1) availability of alternative means of protecting the confidentiality of the disclosed information within and beyond the arbitration proceedings, (2) whether any parts of the overall body of sensitive information have already been in the public domain, (3) availability of other information with related content, and (4) the length of time that has passed since the information was generated.[25]

Illegally obtained evidence and leaks of information

A particularly salient question in international arbitrations involving states or public entities is the production of evidence that has allegedly been obtained illegally. With the development of information technology services and new technologies, situations in which such evidence is at stake have become more and more common.

Many domestic law systems do not contain specific prohibitions for the provision of allegedly illegally obtained evidence in the context of civil or commercial disputes. The rationale for this could be the interest of justice. If the facts are correct and relevant to the dispute, the way of obtaining them may be considered not per se a sufficient ground to deny production. Another possible explanation may be that state courts often have wide powers to order the provision of evidence, including that obtained by illegal means, thus remediating the illegality. The status is also similar under public international law,[26] in which the International Court of Justice has explicitly allowed the provision in some cases of evidence that has allegedly been obtained illegally.[27]

As concerns international arbitration, there is no clear-cut rule for, or uniform approach to, the admission of allegedly illegally obtained documents, or documents that have been leaked.[28] The question of admissibility of such evidence is a discretionary matter for the

25 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v. Government of Canada*, PCA Case No. 2009-04, Procedural Order No. 13, 11 July 2012.

26 W Michael Reisman and Eric E Freedman, 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication', *American Journal of International Law 76* (1982), 737; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (The Hague: Kluwer Law International, 1996), 208.

27 For example, see the *Corfu Channel* case – *United Kingdom of Great Britain v. People's Republic of Albania (Merits)*, ICJ Reports (1949) 4, 34–36.

28 '12. Commentary on the IBA Rules on Evidence, Article 9 [Admissibility and Assessment of Evidence]' in Roman Mikhailovich Khodykin, Carol Mulcahy, et al., *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press, 2019), p. 414.

arbitral tribunal and depends on the specific circumstances of the case.[29] Practical factors that have been taken into consideration include whether the party relying on the allegedly illegally obtained evidence was involved in its illegal procurement, the materiality of the evidence, whether the evidence was in the public domain, or the degree of the illegality.[30]

Article 9.3 of the IBA Rules provides that the arbitral tribunal may, at the request of a party or on its own motion, exclude evidence obtained illegally, but does not bring much clarity to the issue.

In the context of disputes involving states or public entities, a particularly current issue is the admissibility of evidence from information leaks.[31] Interestingly, both private parties[32] and states[33] have extensively relied on these types of documents in recent cases. Arbitral tribunals seem to have adopted a case-by-case approach, taking into consideration the factors outlined above.

Practical implications in taking evidence from state parties

Although the admission of evidence is generally approached in a more flexible manner in arbitration proceedings compared to state court proceedings, the issue is often heavily disputed by parties. In the context of arbitration proceedings involving state parties or public entities, the fact-finding stages of the proceedings often involve evidence (allegedly) protected by different privileges or that has been obtained illegally. The lack of uniform and clear rules has the advantage of providing arbitral tribunals with the required flexibility to handle this, but at the same time adversely affects predictability for the parties.

To address the above concerns, the evidentiary process followed by arbitral tribunals becomes more and more sophisticated and formalised. Tribunals have started requesting parties to provide 'privilege logs' – lists of requested documents with explanations of the claimed privilege, grounds and additional notes for each document. The use of privilege logs may have the benefit of streamlining the discussion and allowing the counterparty to comment efficiently on the submission, without compromising the information at stake. In some cases arbitral tribunals have even decided to appoint an independent third party or specific experts to review documents for which there are allegations of privilege and to issue a decision on the possibility of their disclosure.

29 Final award (under NAFTA Chapter 11 and the UNCITRAL Arbitration Rules) of 3 August 2005, *Methanex Corporation v. United States of America*, Part II, Chp 1, 26, para. 54.

30 '12. Commentary on the IBA Rules on Evidence, Article 9 [Admissibility and Assessment of Evidence]' in Roman Mikhailovich Khodykin, Carol Mulcahy, et al., *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press, 2019), p. 416.

31 See Jessica Ireton, 'The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of Wikileaks Cables as Evidence' (2015) 31 *ICSID Rev* 231.

32 e.g., *OPIC Karimum Corp v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands (5 May 2011), *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013).

33 *ConocoPhillips Petrozuata BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration (10 March 2014); ibid., Dissenting Opinion of Professor Abi Saab (10 March 2014); see also Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion (10 April 2015).

Appendix 1

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Dalibor Valinčić heads the dispute resolution team in Zagreb. He focuses on investment and commercial arbitration and also has extensive experience in energy law. Dalibor combines an international perspective, which comes from advising clients in several different countries, with a very good local rapport. He has successfully represented investors in multimillion-dollar arbitrations under both ICSID and UNICTRAL Rules. His commercial arbitration experience includes representing and advising clients in arbitrations under the VIAC and ICC Rules and the local Zagreb Rules. His sector experience covers industries such as oil and gas, global hospitality and multinational food manufacturers. Dalibor graduated from the University of Zagreb Law School and holds an LLM (distinction) in international and comparative dispute resolution from Queen Mary and Westfield College, University of London. He is a visiting lecturer at the University of Osijek Law School, and a regular speaker and panellist at conferences and seminars. Dalibor is a member of the ICC Croatia Arbitration Committee.

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Oleg Temnikov is a counsel in the Sofia office and a member of the disputes team. Oleg focuses on advising companies in commercial disputes and arbitration and investment arbitration. He is also regularly involved in domestic and international arbitrations, cross-border disputes, administrative disputes and white-collar crime matters and has an outstanding track record of litigations in Bulgaria. Oleg has experience in acting as an expert on Bulgarian law in foreign commercial, criminal and arbitration proceedings in other jurisdictions. He is author and co-author of a number of articles in the field of international arbitration, international investment law and private international law in Bulgarian and foreign legal journals, such as the *ICSID Review*, *Journal of International Dispute Settlement*, *Kluwer Arbitration*. Oleg is also member of the managing board of the Bulgarian European Law Association and in this capacity has been invited to provide amicus curiae briefs to the Bulgarian Constitutional Court, the Bulgarian Supreme Court of Cassation and the Bulgarian Supreme Administrative Court on various matters.

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