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ARTICLE 19—EVIDENCE

ARTICLE 19

1. Each party shall have the burden of proving the facts relied on to support its claim or defense.

2. The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.

3. At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.

I. Introduction

19.01 The decisions of tribunals to admit or refuse to admit evidence are crucial to both the arbitral process and the determination of a claim. Therefore, presenting evidence in support of a party's claim before a tribunal is at the very heart of the arbitral process. Indeed, the function of an arbitral tribunal is to assess the evidence presented by the parties, and make an informed and impartial determination as to the merits of the claims and counterclaims presented. Accordingly, Article 19(1) outlines that each party bears the burden of proving the relevant facts on which it relies to support any claim or counterclaim or to establish any defence.

19.02 Article 19(2) and (3) provides that the tribunal controls the evidentiary process, and may require the parties to produce documents that will assist the tribunal in

its determinations. The tribunal has substantial discretion to control the scope and extent of disclosure of documents, and given the 2008 ICDR Guidelines for Arbitrators Concerning Exchanges of Information, tribunals are well equipped to ensure that the parties obtain a fair and just opportunity to present their evidence, yet in a prompt and efficient manner that does not undo the perceived temporal advantage of choosing arbitration over litigation.

II. Textual commentary

A. Burden of proof (Article 19(1))

Article 19(1)

Each party shall have the burden of proving the facts relied on to support its claim or defense.

19.03 Article 19(1) requires each party to carry the burden of proving the facts on which it relies in support of its claim or defence. While '[a]s a general rule, a party to an international arbitration has the burden of proving the facts necessary to establish its claim or defence',[1] there is little guidance in international arbitral practice for determining what standard of proof actually applies (for example, the 'balance of the probabilities', 'clear and convincing evidence', or even 'beyond reasonable doubt'). Indeed, '[i]nternational arbitration conventions, national arbitration laws, *compromis*, arbitration rules and even the decisions of arbitral tribunals are almost uniformly silent on the subject of the standard of proof'.[2]

19.04 Perhaps because it has become a general rule of international arbitral practice that each party bears the burden of proof for proving its own claim, Article 19(1) is not reflected in other institutional arbitration rules in that it expressly states a general rule that already widely known and accepted in arbitral practice. The genesis of Article 19(1) is, presumably, the near-identical language found in the 1976 UNICTRAL Rules, stating that '[e]ach party shall have the burden of proving the facts relied on to support his claim or defence'.[3]

19.05 This language embodies 'the general principle [that] was expressed by the Tribunal in *Reza Said Malek*: "it is the Claimant who carries the initial burden of proving the facts upon which he relies. There is a point, however, at which the Claimant may

[1] R Pietrowski, 'Evidence in International Arbitration', 22 Arb Intl 373, 379 (2006).

[2] Ibid. *See also* M Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, The Hague, 1996) *passim.*

[3] 1976 UNCITRAL Rules, Art 24(1); now replicated in 2010 UNCITRAL Rules, Art 27(1).

be considered to have made a sufficient showing to shift the burden of proof to the Respondent"'.[4] Thus, each party, beginning with the claimant, must discharge its burden of proof by presenting evidence to the tribunal in support of its claims.

19.06 Despite Article 19(1)'s unique nature as an express institutional rule specifically devoted to the burden of proof, it is nevertheless a procedural rule, and thus is incorporated by reference into the parties' arbitration agreement. Article 19(1), however, does not detail the relevant standard of proof that applies to a specific claim or defence.[5] Indeed, the substantive laws of many civil law jurisdictions contain specific and sometimes elaborate rules about the standard of proof to be applied to a particular claim or defence. The issue is further complicated because, under some laws, the burden of proof and how it is reversed in certain circumstances[6] are not purely procedural issues, but a matter of substantive law, so that substantive and procedural issues can overlap in international arbitrations.[7] Tribunals are therefore well advised, despite the clear language of Article 19(1), to examine carefully the impact of the applicable substantive law on both the standard and the burden of proof for the claims and defences in question.

19.07 Under some international (and national) frameworks, such as the Iran-US Claims Tribunal, allegations such as fraud, bribery, corruption, and the like require a higher threshold of proof. For example, the Iran-US Claims Tribunal has held that 'if reasonable doubts remain, such an allegation [of bribery] cannot be deemed to be established'.[8] In another Iran-US Claims Tribunal decision, the tribunal held that allegations of forgery 'must be proven with a higher degree of probability . . . the proper standard of proof [being] "clear and convincing evidence"'.[9] Therefore, the relationship between Article 19(1) and the underlying procedural rules of the seat and the substantive law is open to interpretation and varies from case to case.

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[4] DD Caron, LM Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 568–69, quoting *Reza Said Malek and The Islamic Republic of Iran*, Award No 534–193–3 (11 August 1992), reprinted in 28 Iran-US CTR 246 (1992).

[5] Often, arbitrators simply 'evaluate' or 'weigh' the evidence in terms of its credibility, noting why they did, or did not believe, a particular witness etc. *See* ICDR Case 1990 WL 10559702 (ICDR).

[6] As noted ibid, however:

> Burden of proof rules are frequently intertwined with substantive legal rules, and it would often distort such rules to separate them. At the same time, some burden of proof rules are the result of procedural matters (such as the availability or unavailability of discovery); it is important in these instances to take this into account in allocating the burden of proof.

[7] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,858 ('Allocating the burden of proof arguably presents choice-of-law questions. In particular, tribunals must decide whether to apply the law of the arbitral seat (on the theory that the burden of proof is "procedural"), the law governing the underlying substantive issues, or some international standard').

[8] *Oil Field of Texas, Inc v Islamic Republic of Iran*, Award No 258-43-1 (8 October 1986), 12 Iran-US CTR 308, para 25 (1986). For further discussion on allegations of illicit activity in international arbitrations, *see* J Rosel and H Prager, 'Illicit Commissions and International Arbitration: The Question of Proof', 15 Arb Intl 329 (1999).

[9] *Dadras International et al and The Islamic Republic of Iran et al*, Award No 567-213/215-3 (7 November 1995), reprinted in 31 Iran-US CTR 127, 162 (1995).

Nevertheless, parties conducting arbitrations pursuant to the ICDR Rules should bear in mind the distinction between the burden of proof, on the one hand, and substantive and procedural standards of proof, on the other.

B. Exchange of information and document production (Article 19(2) and (3))

Article 19(2)

The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.

Article 19(3)

At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.

19.08 As discussed in the context of Article 16, the tribunal may, in its discretion, direct the order of proof. Article 19(2) and (3) reinforces in express terms that the tribunal may request that the parties offer specific evidence and/or to order the production of documents by way of disclosure. The tribunal is entitled to order the production of evidence either upon a party's request or of its own volition if it is deemed appropriate in the circumstances of the case.[10] The tribunal will, in all instances, be guided by the relevance of the evidence for the issues at bar.

19.09 In that regard, the ICDR has recently introduced Guidelines for Arbitrators Concerning Exchanges of Information,[11] aimed at ensuring that document production processes adopted in arbitration do not detract from the arbitrator's duty to ensure that arbitration remains 'a simpler, less expensive, and more expeditious process' than litigation in state courts.[12] Recognizing that each party must have a fair opportunity to present its case, the Guidelines direct the tribunal to 'manage the exchange of information among the parties in advance of the hearings with a

[10] According to the ICDR Guidelines for Arbitrators Concerning Exchanges of Information ('ICDR Guidelines'), '[t]he parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard': ICDR Guidelines, s 1.b., available online at <http://www.adr.org/si.asp?id=5288>

[11] The Introduction to the ICDR Guidelines states that '[u]nless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases'. *See generally* J Beechey, 'The ICDR Guidelines for Information Exchanges in International Arbitration: An Important Addition to the Arbitral Toolkit', Disp Res J 84 (2008).

[12] The Introduction to the ICDR Guidelines specifically states that '[t]he purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process'.

view to maintaining efficiency and economy'.[13] Under the Guidelines, each party is required to produce all documents on which it intends to rely prior to the hearing. The tribunal is authorized to order the production of documents in the possession[14] of the other party if these documents are described with specificity, and shown to be relevant and material to the outcome of the case.

19.10 On the somewhat controversial subject[15] of the production of 'electronic documents',[16] the Guidelines do not treat such electronic documents any differently from traditional sources,[17] and thus apply the same concepts of specificity, relevance, and materiality. The Guidelines merely state in addition that '[r]equests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible'.[18] The documents can be produced in paper form, or in any other form that is most convenient and cost-effective in the circumstances. The Guidelines avoid terminology such as 'disclosure' or 'discovery', and instead emphasize that US court procedures are, in principle, not appropriate for obtaining information in international arbitration.[19]

19.11 The Guidelines also recognize that defences of confidentiality and privilege may be raised against a request for document production. Recognizing the reality in international arbitration that parties and their counsel may be subject to different ethical or professional rules with respect to the documents concerned, the Guidelines direct the tribunal 'to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection'.[20] This approach of a 'most favourable regime' appears quite sensible in international cases involving different legal traditions.

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[13] Ibid, s 1.a.

[14] This seems to be a narrower standard than the possession, custody, and control of Art 3.3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration. *See* M Gusy and M Illmer, 'The ICDR Guidelines for Arbitrators Concerning Exchanges of Information: A German/American Introduction in Light of International Practice', Intl ALR 6, 199 (2008).

[15] *See* J Howell (ed) *Electronic Disclosure in International Arbitration* (Juris Publishing, Huntington, NY, 2008); L Shore, 'Three Evidentiary Problems in International Arbitration', *Zeitschrift für Schiedsrecht* 76 (2004).

[16] Some authors stress that the reference to electronic 'documents' limits the tribunal's authority to order the production of other electronic data, such as metadata or recovered deleted data. *See* Gusy and Illmer, op cit. In practice, the Guidelines should not be read to impose an inflexible standard, referring generally to the exchange of information. A party may therefore be able to request the production of electronic data more generally if it can identify that data with specificity, show that its production would be relevant and material to the outcome of the case, and show that the production is justifiable in light of the overarching goals of expediency and cost-efficiency.

[17] Electronic documents can be produced in paper form, or in any other form that allows for the most convenient and cost-effective production in the circumstances.

[18] ICDR Guidelines, s 4.

[19] Ibid, Introduction, s 6.b.

[20] Ibid, s 7.

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