

Evidence in International Arbitration: Standards, Strategy, and Evolving Norms

Arif Hyder Ali
Rose Marie Wong

Founding Principal | Independent Arbitrator
AHALI Dispute Resolution LLC



Objectives of the Presentation

- **Understand the role and importance of evidence in international arbitration**
- **Explore sources and frameworks governing evidenceLevel playing field**
- **Discuss different types of evidence and their treatment**
- **Highlight strategic and procedural considerations**
- **Examine recent trends and controversies**

What is Evidence and Why it Matters

- **Determines facts in dispute**
- **Impacts credibility and persuasion**
- **Influences allocation of burden and risk**
- **Mitigate bias risk**
 - **Confirmation Bias**: Tendency to favor evidence that supports preexisting beliefs or case theories. May cause arbitrators to unconsciously dismiss or undervalue contradictory evidence.
 - **Hindsight Bias**: After an outcome is known, past events may seem more predictable or inevitable. This affects judgment about decisions made before the outcome.
 - **Anchoring Bias**: First numbers or ideas presented (e.g., damages figures, early narratives) heavily influence later evaluation, even if arbitrary.

Gathering Evidence

- **Client files – the culture of discovery**
- **Employees and ex-employees**
- **Service providers and electronic data**
- **Technical / scientific evidence**
- **Visual evidence**
- **Ensuring integrity**
- **Statements by custodians**

Legal Frameworks

- **Institutional Rules: ICC, LCIA, SIAC, ICSID, UNCITRAL**
- **Soft Law: IBA Rules (2020), Prague Rules**
- **National Law: *Lex arbitri* influences**
- **Procedural rules applicable in domestic proceedings**

IBA Rules vs. Prague Rules

- **2020 IBA Rules on the Taking of Evidence in International Arbitration**
- **2018 Prague Rules on the Taking of Evidence in International Arbitration**

	IBA Rules	Prague Rules
Tradition	Common Law leaning	Civil Law leaning
Document production	Broad	Limited
Role of tribunal	Passive	Active
Witness examination	Cross-examination	Tribunal-led

Documentary Evidence

- **Disclosure obligations**
- **Redfern Schedule**
- **Admissibility and relevance**

Example - Redfern Schedule

Document Request	Relevance and Materiality	Objections	Tribunal's Decision
Claimant requests all internal emails from Respondent dated Jan-Mar 2021 related to Project X	Relevant to Claimant's argument on delay caused by Respondent	Overbroad, burdensome, confidentiality concerns	Partially granted: limited to specific departments and keyword search

Witness Statements

- **Format and structure**
- **Direct vs. cross-examination**
- **Tribunal examination**
- **Objections**
- **Witness preparation: permitted vs. improper**

Expert Evidence

- **Party-appointed vs. tribunal-appointed experts**
- **Duties of loyalty and candour**
- **Joint statements**
- **Hot-tubbing**

Digital and Electronic Evidence

- **E-discovery tools**
- **Metadata and cybersecurity**
- **Authenticity issues**

Burden and Standard of Proof

- **The general principle on the burden of proof in international arbitration is: Each party bears the burden of proving the facts upon which it relies.**
- **This principle is widely accepted across different legal traditions and arbitration frameworks. It is reflected in:**
 - **IBA Rules on the Taking of Evidence (Art. 3.1): “*Each Party shall have the burden of proving the facts relied on to support its case...*”**
 - **UNCITRAL Arbitration Rules (Art. 27.1): “Each party shall have the burden of proving the facts relied on to support its claim or defence.”**
- **Standards: balance of probabilities, clear and convincing, etc.**
- **Shift of burden with presumptions**
- **Corruption cases**

Admissibility vs. Weight

- **Admissibility** refers to whether a piece of evidence is allowed to be part of the record.
- **Weight** refers to how much persuasive value the tribunal assigns to that evidence.
 - **Broad admissibility:** Arbitral tribunals typically take a *liberal approach*, admitting most evidence unless it is clearly irrelevant, duplicative, or obtained unlawfully.
 - **IBA Rules (Art. 9.1–9.2):** Tribunals may exclude evidence for *irrelevance, immateriality, duplicativeness, or legal privilege*.
 - **Weight is separate:** Once admitted, the tribunal assesses whether the evidence is *credible, probative, and persuasive*.
 - **No rigid exclusions:** Rules like hearsay are not automatically excluded—tribunals may admit hearsay but give it lesser weight.

Adverse Inferences

- **Negative conclusion drawn by the tribunal based on a party's failure to present evidence or provide information, especially when it is expected that they could have done so.**
- **When Can Tribunals Draw Adverse Inferences?**
- **Legal basis: IBA Rules, inherent powers, case law**
- **Conditions for Drawing Inference**
- **Types of Inferences**

Common Strategic Issues

- **Overloading the record**
- **Withholding key documents**
- **Late production**
- **Tactical use of witness evidence**

Trends and Challenges

- **Remote hearings and virtual cross-examination**
- **AI-assisted document review**
- **Third-party funding and disclosure**
- **Cultural differences in evidentiary expectations**
- **Corruption cases**

Practical Tips for Counsel

- **Tailor strategy to tribunal composition**
- **Focus on quality, not quantity**
- **Use soft law frameworks to build procedural consensus**
- **Stay credible and cooperative**

Contact

Arif Hyder Ali

arif.ali@ahalidisputes.com

**(+1) 202 538 9133
(Washington, D.C.)**

**(+44) (0) 204 577 2522
(London)**

