Chapter 6: Evidentiary Procedure

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In every international arbitration, each party must present evidence in support of its case. This principle is expressed in the Latin maxim, *semper necessitas probandi incumbit ei qui agit.* [(1)] Yet most international arbitration rules provide only basic guidance with respect to the gathering and presentation of evidence, leaving the details of evidentiary procedure to the broad discretion of the arbitral tribunal (subject to any limitations in the parties' arbitration agreement or mandatory law at the place of arbitration). [(2)] To some extent, this approach to gathering and testing evidence—tribunal-directed and inquisitorial in nature—reflects the long-standing civil-law tradition of continental Europe. [(3)] At the same time, the tribunal may in its discretion permit aspects of the advocate-directed and adversarial approach developed in common-law jurisdictions such as the United Kingdom and the United States, e.g., party-directed "discovery" of documents and cross-examination of witnesses. [(4)] Indeed, such procedures have become relatively commonplace in international arbitration. [(5)] To

achieve the appropriate balance between these two approaches, many tribunals turn to the IBA Rules of Evidence, either pursuant to the agreement of the parties or on their own initiative. [(6)] The IBA Rules of Evidence are a restatement of broadly accepted evidence procedures, meant to guide tribunals in the exercise of their discretion by filling lacunae in the applicable arbitration rules. [(7)] In this chapter, we set out the arbitration rules, along with the relevant IBA Rules of Evidence, concerning evidentiary procedures in the following areas: (i) documentary evidence; (ii) written witness testimony; (iii) witness testimony in evidentiary hearings; (iv) inspection/site visits; and (v) the admissibility of evidence.

§6.01 DOCUMENTARY EVIDENCE

In international arbitration, documentary evidence initially consists of each party's submission of documents upon which it intends to rely in making its case. The tribunal then has the authority to order the parties to produce additional documents and other evidence, subject to certain criteria. Under some regimes, and often in practice, the tribunal will exercise this power further to requests by each party for the other party to produce specific documents or categories of documents.

[A] Documents upon Which the Parties Rely

All of the arbitration rules under consideration contemplate that the parties will begin to discharge their burden of proof by submitting documents upon which they rely in support of their case. Most rules mandate the submission of such documents, using the word "shall." [(8)] Though, ICSID includes a qualifier: "ordinarily shall." [(9)] The UNCITRAL Rules encourage the practice, using the word "should." [(10)] The ICC Rules merely suggest

the practice through the use of the word "may" and consider the practice to be an optional case management technique. [(11)]

Typically, documents on which a party intends to rely must be submitted to the tribunal, the administering institution and the other party at a relatively early stage of the arbitration—and well before the evidentiary hearing. [(12)] Normally, parties must submit their supporting documentary evidence with the parties' statement of claim and statement of defense. [(13)] Although this requirement can make these initial

exchanges fairly costly, it has the benefit of forcing parties to “show their hands” early in the proceedings. Disclosure of the evidence at a relatively early stage of the proceedings avoids “ambush tactics” and instead allows the parties to assess the relative strengths and weaknesses of their positions, which, among other benefits, may promote settlement. In case the parties agree upon a documents-only arbitration, the documents disclosed by the parties with their written submissions might well be the main, or even the only, evidence in support of their claims and defenses. (14)

Table 6.1 Documents on Which the Parties Rely

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AAA-ICDR	
Article 21. Exchange of Information	*3. The parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.*
CIETAC	
Article 12. Application for Arbitration	*A party applying for arbitration under these Rules shall:* *[…]* *2. Attach to the Request for Arbitration the relevant documentary and other evidence on which the Claimant’s claim is based.*
Article 15. Statement of Defense	*2. The Statement of Defense … shall, inter alia, include the following contents and attachments:* *[…]* *(c) the relevant documentary and other evidence on which the defense is based.*
Article 16. Counterclaim	*2. When filing the counterclaim, the Respondent shall specify the counterclaim in its Statement of Counterclaim and state the facts and grounds on which the counterclaim is based with the relevant documentary and other evidence attached thereto.*
Article 35. Conduct of Hearing	*3. Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.*
Article 41. Evidence	*1. Each party shall bear the burden of proving the facts on which it relies to support its claim, defense or counterclaim and provide the basis for its opinions, arguments and counter-arguments.*
HKIAC	
Article 13. General Provisions	*13.3. Subject to Article 11.5, all written communications between any party and the arbitral tribunal shall be communicated to all other parties and HKIAC.*
Article 16. Statement of Claim	*16.3. The Claimant shall annex to its Statement of Claim all documents on which it relies.*
Article 17. Statement of Defence	*17.4. The Respondent shall annex to its Statement of Defence all supporting materials on which it relies.*
Article 22. Evidence and Hearings	*22.1. Each party shall have the burden of proving the facts relied on to support its claim or defence.*
ICC	
Article 3. Written Notifications or Communications; Time Limits	*1) All pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat.*
Article 4. Request for Arbitration	*3. […] The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.*
Article 5. Answer to the Request; Counterclaims	*1. […] The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute.* *5. […] The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute.*
Article 25. Establishing the Facts of the Case	*2. [The tribunal will] study[] the written submissions of the parties and all documents relied upon […].*
Appendix IV. Case Management Techniques	*[E]xamples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost.[…]*

	d) Production of documentary evidence:
	(i) requiring the parties to produce with their submissions the documents on which they rely [...].
ICSID	
Arbitration Rules, Rule 23. Copies of Instruments	*Except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation, supporting documentation, if any, or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies: (a) before the number of members of the Tribunal has been determined: five; (b) after the number of members of the Tribunal has been determined: two more than the number of its members.*
Arbitration Rules, Rule 24. Supporting Documentation	*Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.*
Arbitration Rules, Rule 30. Transmission of the Request	*As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated [and] of the supporting documentation [...].*
Arbitration Rules, Rule 31. The Written Procedure	*(3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.*
LCIA	
Article 13. Communications Between Parties and Arbitral Tribunal	*13.3. Where any party delivers to the Arbitral Tribunal any communication (including statements and documents under Article 15), whether by electronic means or otherwise, it shall deliver a copy to each arbitrator, all other parties and the Registrar; and it shall confirm to the Arbitral Tribunal in writing that it has done or is doing so.*
Article 15. Written Statements	*15.2., 15.4. [...] The Claimant shall deliver to the Arbitral Tribunal and all other parties [with each written submission] all essential documents.* *15.3., 15.5. [...] The Respondent shall deliver to the Arbitral Tribunal and all other parties [with each written submission] all essential documents.*
SCC	
Article 29. Written Submissions	*1. [...] [T]he Claimant shall submit a Statement of Claim which shall include, unless previously submitted: [...] (iii) any evidence the Claimant relies on.* *2. [...] [T]he Respondent shall submit a Statement of Defence which shall include, unless previously submitted: [...] (v) any evidence the Respondent relies on.*
Article 31. Evidence	*2. The Arbitral Tribunal may order a party to identify the documentary evidence it intends to rely on and specify the circumstances intended to be proven by such evidence.*
SIAC	
Rule 19. Conduct of the Proceedings	*19.6. All statements, documents or other information supplied to the Tribunal and/or the Registrar by a party shall simultaneously be communicated to the other party.* *20.1. Unless the Tribunal determines otherwise, the submission of written statements shall proceed as set out in this Rule.*
Rule 20. Submissions by the Parties	*[...]* *20.7 All submissions referred to in this Rule shall be accompanied by copies of all supporting documents which have not previously been submitted by any party.*
UNCITRAL	
Article 17. General Provisions	*4. All communication to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.*
Article 20. Statement of Claim	*4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.*
Article 21. Statement of Defence	*2. [...] The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.*
Article 27. Evidence	*1. Each party shall have the burden of proving the facts relied on to support its claim or defence.*
IBA Rules of Evidence	
Article 3. Documents	*1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.*

[B] The Tribunal's Power to Obtain Documentary Evidence

Should the evidence provided by a party leave questions unanswered or prompt new questions, the tribunal holds the power to require further production of documentary evidence, or in some cases to obtain documentary evidence on its own. Most regimes restrict the scope of documents and other evidence that may be sought from the parties by the tribunal to that which is "relevant to the case and material to its outcome." (15) The LCIA Rules omit the materiality requirement, which may permit a wider scope of

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evidence. (16) The ICDR Rules define the scope differently as that which the tribunal deems "necessary or appropriate." (17)

Additionally, the CIETAC, LCIA, and SIAC Rules make express provision for the tribunal itself to undertake investigations and collect evidence. (18) The ICC Rules seem to go even farther, granting the tribunal sweeping authority to establish the facts of the case "by all appropriate means." (19)

Subject to the relevance and materiality requirement, the IBA Rules contemplate that the tribunal may order a party to use best efforts to obtain documents from a third party (person or organization), unless doing so would be unduly burdensome. (20) By contrast, the LCIA and SIAC Rules expressly limit the scope of documents that the tribunal may order a party to produce to those which are in that party's possession or control. (21)

Table 6.2 The Tribunal's Authority to Obtain Documentary Evidence

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AAA-ICDR	
Article 20. Conduct of Proceedings	*4. At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate.*
CIETAC	
Article 43. Investigation and Evidence Collection by the Arbitral Tribunal	*1. The arbitral tribunal may undertake investigations and collect evidence as it considers necessary.* *2. When investigating and collecting evidence, the arbitral tribunal may notify the parties to be present. In the event that one or both parties fail to be present after being notified, the investigation and collection of evidence shall proceed without being affected.* *3. Evidence collected by the arbitral tribunal through its investigation shall be forwarded to the parties for their comments.*
HKIAC	
Article 22. Evidence and Hearings	*22.3. At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence.*
ICC	
Article 25. Establishing the Facts of the Case	*1. The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.* *[…]* *5. At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.*
ICSID	
ICSID Convention, Article 43. Powers and Functions of the Tribunal	*Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,* *(a) call upon the parties to produce documents or other evidence, […].*
Arbitration Rules, Rule 34. Evidence: General Principles	*(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:*

	(a) call upon the parties to produce documents [...]
LCIA	
Article 22. Additional Powers	*22.1. The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:* *[...]* *(iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute;* *(iv) to order any party to make any documents [...] under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal;* *(v) to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant;*
SCC	
Article 31. Evidence	*(2) The Arbitral Tribunal may order a party to identify the documentary evidence it intends to rely on and specify the circumstances intended to be proved by such evidence.* *(3) At the request of a party, or exceptionally on its own motion, the Arbitral Tribunal may order a party to produce any documents [...] that may be relevant to the case and material to its outcome.*
SIAC	
Rule 27. Additional Powers of the Tribunal	*Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:* *[...]* *(c) conduct such enquiries as may appear to the Tribunal to be necessary or expedient;* *[...]* *(f) order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome;*
UNCITRAL	
Article 27. Evidence	*3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.*
IBA Rules of Evidence	
Article 3. Documents	*10. At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.*

[C] Party Requests for Document Production

Only the ICDR, ICSID and SCC Rules expressly allow the parties to submit to the tribunal a request for the other party to produce documents—but even then the tribunal retains the discretion to accept or reject such a request. [(22)] The ICC Rules only suggest, in their optional case management techniques, that the tribunal may allow the

parties to submit requests for documents to one another, while limiting the scope of such requests and using a document production schedule to control time and costs. (23) The CIETAC, HKIAC, LCIA, SIAC and UNCITRAL make no express provision for document requests by a party.

The IBA Rules of Evidence contemplate that the tribunal will typically order a party to produce documents in response to the counter-party's request whenever specified criteria are satisfied. (24) Only the ICDR Rules adopt much of the language from the IBA Rules of Evidence. (25) However, since all of the rules give the parties the ability to agree on rules of procedure, and for the tribunal to establish such rules in the absence of such an agreement, the IBA Rules of Evidence concerning document production are often applied under all of the regimes under consideration. As a practical matter, in many international arbitration cases, the tribunal will authorize the parties to serve requests for production of documents on the other party or parties by a certain date in the procedural calendar. The tribunal will then resolve objections to the requests and/or assertions of non-compliance with the requests.

The ICC Rules, in Appendix IV "Case Management Techniques" suggest using a "schedule of document production to facilitate the resolution of issues in relation to the production of documents." In practice, parties in most international arbitrations employ the so-called Redfern Schedule to manage the process of document production. Named for Alan Redfern (the English barrister and arbitrator who originally proposed the procedure), the Redfern Schedule consists of a table with the parties' description of requested documents in the first column. In the second column, the requesting party gives a brief explanation of the relevance and materiality of the document to the issues in dispute. In the third column, the counter-party may indicate any objection to the request. In the fourth and fifth columns the parties may elaborate their respective positions, and in the sixth column the tribunal indicates its decision whether to grant or reject the request. The Redfern Schedule provides an organized and efficient means of implementing the IBA Rules concerning document production, which are included in the table below. The Redfern Schedule is regularly used in international arbitration, regardless of the particular rules under which the case is proceeding.

Table 6.3 Requests for Documents

AAA-ICDR	
	2. The 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 the extent that the parties wish to depart from this Article, they may do so only by written agreement and in consultation with the tribunal. *[…]*
Article 21. Exchange of Information	*4. The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.* *[…]*
CIETAC	
	Not specifically addressed.
HKIAC	
	Not specifically addressed.
ICC	
Appendix IV. Case Management Techniques	*[E]xamples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. […]* *d) Production of documentary evidence:* *[…]*

(ii) avoiding requests for document production when appropriate in order to control time and cost;

(iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;

(iv) establishing reasonable time limits for the production of documents;

(v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.

ICSID

Arbitration Rules, Rule 33. Marshalling of Evidence

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

LCIA

Not specifically addressed.

SCC

Article 31. Evidence

3. At the request of a party, [...] the Arbitral Tribunal may order a party to produce any documents or other evidence that may be relevant to the case and material to its outcome.

SIAC

Not specifically addressed.

UNCITRAL

Not specifically addressed.

IBA Rules of Evidence

3.2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.

3.3 A Request to Produce shall contain:

(a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

Article 3. Documents

(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

3.4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

3.5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the 8 Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

[...]

3.7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection.

§6.02 WRITTEN WITNESS TESTIMONY

In many international arbitrations, the testimony of witnesses provides an important source of facts and information to enable the tribunal to resolve the parties' dispute. The parties may each appoint their own fact- and expert witnesses, and the tribunal may appoint its own expert witness. These witnesses will present their account of the facts in the form of written statements or reports to be filed with their parties' written submissions. Thereafter, as discussed in section §6.03, they may be called to a hearing to answer questions about their written testimony.

[A] Party-Appointed Witnesses

Although contemporaneous documents are generally considered to be the most reliable source of evidence in international arbitration, parties often submit written (and oral) testimony of witnesses to support their cases. (26) The IBA Rules of Evidence, as well as the ICDR, LCIA, SCC, SIAC and UNCITRAL Rules, make express provision for written witness testimony. (27) Even while not explicitly mentioned by the ICC Rules, written witness testimony is commonly used in ICC arbitration; (28) the same can be said of CIETAC, HKIAC and ICSID arbitration. Although some regimes expressly provide for oral testimony only, in our experience it is relatively rare for witnesses to testify at hearings when they have not previously submitted written statements. Indeed, it is often the case that the written witness testimony serves as the main direct testimony of the witness, while oral testimony is largely reserved for cross-examination and redirect examination.

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Witnesses presented by a party include both fact witnesses and expert witnesses. (29) The written statement of a fact witness usually consists of, *inter alia*, a detailed description of relevant events and the source of the witness's information. (30) An expert report contains, among other things, the expert's opinions and conclusions on technical matters (e.g., industry practices, applicable foreign or international law, or quantification of damages), as well as a description of the methods, evidence and information used in arriving at those conclusions. (31)

The parties to an international arbitration are free to choose their fact witnesses, and, where the parties are natural persons (rather than legal entities), they may appear as fact witnesses themselves. This is clear in the IBA Rules of Evidence and the LCIA and UNCITRAL Rules; the LCIA Rules provide that "any individual intending to testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party." (32)

Counsel are generally permitted to assist a witness in the preparation of his or her written statement. (33) The LCIA Rules state this principle expressly, since barristers are generally not so permitted in litigation under the laws of England and Wales. (34) In international arbitration, however, the rules tend to recognize that counsel will be in a position to assess the relevance of a fact witness's knowledge to the issues in the case, and to help organize and present that knowledge in a manner that will be most useful to the tribunal.

That said, counsel must not become overly involved in the preparation of a witness statement. The IBA Guidelines on Party Representation in International Arbitration state that "a party representative should seek to ensure that a witness statement reflects the witness's own account of relevant facts, events and circumstances." (35) Similar principles apply to expert witnesses, as their expert opinion cannot be misguided by counsel's desire to support a specific legal position. The IBA Guidelines on Party Representation recommend that "[a] Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and Opinion." (36) Similarly, under the IBA Rules of Evidence, an expert should provide a statement of his or her independence from the parties, their legal advisors and the tribunal, as well as an affirmation of his or her genuine belief in the opinions expressed in the Expert

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Report. (37) Counsel should limit their involvement in the preparation of fact and expert witness statements in accordance with these principles.

The IBA Rules of Evidence further provide that a party's witnesses may submit additional written testimony in response to the written statement or report of the counter-party's witnesses on common issues. (38) Typically, witnesses submit their written testimony and any added testimony (or new testimony) along with each round of their party's written submissions. In preparing each written submission, the parties' counsel will cite to the corresponding written testimony as they would to any other external source or authority. Thus, the ability of counsel to communicate with the witness in the preparation of the written testimony helps to focus the witness on the key facts or legal issues underlying counsel's presentation of the case.

Lastly, the ICSID Rules are alone among the arbitral regimes under consideration in specifically stating that the tribunal may "admit evidence by a witness or expert in a written deposition." (39) In a deposition, a witness is examined under oath (or similar affirmation) by the parties in a proceeding that is separate from the main evidentiary hearing—typically without the judge or arbitrator in attendance. Depositions may be taken in order to preserve the testimony of a witness (e.g., if the witness is ill or for other reasons will be unable to attend the evidentiary hearing). Depositions may also be taken for discovery purposes (and indeed, depositions are commonplace in U.S. discovery). Notwithstanding the specific reference to deposition in the ICSID Rules, depositions as defined above are quite rare in ICSID arbitration. (40) Depositions are not provided for by the other rules under consideration. They are expressly discouraged by ICDR Rules, which make clear that "[d]epositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules." (41) Nevertheless, depositions are sometimes taken under these other arbitral regimes, though it would be unusual for a tribunal to allow them without the consent of the parties.

Table 6.4 Written Witness Testimony

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ICDR	
Article 21. Exchange of Information	*10. Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.*
Article 23. Hearing	*4. Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them. [...]*
CIETAC	
	Not specifically addressed.
HKIAC	
	Not specifically addressed.
ICC	
	Not specifically addressed.
ICSID	
	Notwithstanding Rule 35 the Tribunal may:
Arbitration Rules, Rule 36. Witnesses and Experts: Special Rules	*(a) admit evidence given by a witness or expert in a written deposition; [...]*
LCIA	

	20.2 Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document.
	20.3 The Arbitral Tribunal may decide the time, manner and form in which these written materials shall be exchanged between the parties and presented to the Arbitral Tribunal; and it may allow, refuse or limit the written and oral testimony of witnesses (whether witnesses of fact or expert witnesses).[...]
Article 20. Witness(es)	*20.5 Subject to the mandatory provisions of any applicable law, rules of law and any order of the Arbitral Tribunal otherwise, it shall not be improper for any party or its legal representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal [...]*
	20.6 Subject to any order by the Arbitral Tribunal otherwise, any individual intending to testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party.
SCC	
Article 33. Witnesses	*(2) The testimony of witnesses or party-appointed experts may be submitted in the form of signed statements.*
SIAC	
Rule 25. Witnesses	*25.4 The Tribunal may direct the testimony of witnesses to be presented in written form, either as signed statements or sworn affidavits or any other form of recording. [...]*
	Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:
Rule 27. Additional Powers of the Tribunal	*[...]*
	h. direct any party or person to give evidence by affidavit or in any other form;
UNCITRAL	
Article 27. Evidence	*2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.*
IBA Rules of Evidence	
	2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
	3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.
	4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.
Article 4. Witnesses of Fact	*5. Each Witness Statement shall contain:*
	(a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
	(b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;

(c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;

(d) an affirmation of the truth of the Witness Statement; and

(e) the signature of the witness and its date and place.

6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

1. [...] (ii) the Party-Appointed Expert shall submit an Expert Report.

2. The Expert Report shall contain:

(a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

Article 5. Party-Appointed Experts

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(h) the signature of the Party-Appointed Expert and its date and place; and

(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

[...]

IBA Guidelines on Party Representation in International Arbitration

Rule 20	*A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.*
Rule 21	*A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances.*
Rule 22	*A Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and opinion.*

[B] Tribunal-Appointed Experts

Consistent with the tribunal-directed approach to evidence in international arbitration (and most national arbitration laws, [(42)]) all of the rules under consideration except ICSID expressly empower the tribunal to appoint its own expert witness to give evidence on technical matters. [(43)] In practice, ICSID tribunals, too, may appoint an expert. [(44)] The contents of the written report of a tribunal-appointed expert are the same as the report of a party-appointed expert. [(45)]

As is true for any expert appointed by the parties, an expert appointed by the tribunal must be impartial to the issues in dispute and independent from the parties and the tribunal. [(46)] The IBA Rules of Evidence, as well as the LCIA Rules and UNCITRAL

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Rules, require the tribunal-appointed expert to submit a written declaration of impartiality and independence. [(47)] Both the IBA Rules of Evidence and UNCITRAL Rules further require (in nearly identical terms) the tribunal-appointed expert to submit a statement of his or her qualifications, and permit the parties to raise any objections to the expert's qualifications or independence or impartiality. [(48)] In practice, arbitral tribunals will usually require such a statement even where the relevant arbitration rules are silent on these issues. [(49)]

Under the IBA Rules of Evidence, and all arbitration rules under consideration except the ICC Rules and the SCC Rules, the parties are specifically obligated to comply with the request of the tribunal-appointed expert to furnish documents or other evidence that he or she may require to prepare his or her report and which are relevant to the report. [(50)] The IBA Rules of Evidence circumscribe the scope of evidence that the expert may require from the parties to that which is both relevant to an issue in dispute and material to the outcome of the case. [(51)] This standard is consistent with the IBA Rules of Evidence's scope of permissible document production (discussed above).

The tribunal must take care to ensure that the parties have a sufficient opportunity to comment on the tribunal-appointed expert's opinion. Failure of the tribunal to do so could result in an award being subject to challenge under Article V of the New York Convention. [(52)] The ICDR, HKIAC, SCC, SIAC and UNCITRAL Rules require the tribunal to allow the parties to comment on the expert's report in writing. [(53)] All of the arbitration rules provide that the parties must have an opportunity to question the expert at an oral hearing (discussed further below).

In addition to the relevant arbitration rules excerpted below, other useful sources regarding tribunal-appointed experts include the Chartered Institute of Arbitrators' Practice Guideline No. 10 on the Use of Tribunal-Appointed Experts.

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Table 6.5 Tribunal-Appointed Experts and Reports

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AAA-ICDR

Article 25. Tribunal-Appointed Expert

1. The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the tribunal and communicated to the parties.

2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require.

3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion of the report. A party may examine any document on which the expert has relied in such a report.

[...]

CIETAC

Article 44. Expert's Report and Appraiser's Report

1. The arbitral tribunal may consult experts or appoint appraisers for clarification on specific issues of the case. Such an expert or appraiser may be a Chinese or foreign institution or natural person.

2. The arbitral tribunal has the power to request the parties, and the parties are also obliged, to deliver or produce to the expert or appraiser any relevant materials, documents, property, or physical objects for examination, inspection or appraisal by the expert or appraiser.

[...]

HKIAC

Article 25. Tribunal-Appointed Experts

25.1. To assist it in the assessment of evidence, the arbitral tribunal, after consulting with the parties, may appoint one or more experts. Such expert shall report to the arbitral tribunal, in writing, on specific issues to be determined by the arbitral tribunal. After consulting with the parties, the arbitral tribunal shall establish terms of reference for the expert, and shall communicate a copy of the expert's terms of reference to the parties and HKIAC.

25.2. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

25.3. Upon receipt of the expert's report, the arbitral tribunal shall send a copy of the report to the parties who shall be given the opportunity to express their opinions on the report. The parties shall be entitled to examine any document on which the expert has relied in his or her report.

25.4. At the request of either party, the expert, after delivering the report, shall attend a hearing at which the parties shall have the opportunity to be present and to examine the expert. At this hearing either party may present experts in order to testify on the points at issue. The provisions of Articles 22.2 to 22.7 shall be applicable to such proceedings.

25.5. The provisions of Article 11 shall apply by analogy to any expert appointed by the arbitral tribunal.

ICC

Article 25. Establishing the Facts of the Case

4. The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. [...]

ICSID

Not specifically addressed.

LCIA

Article 21. Expert(s) to Arbitral Tribunal

21.1. The Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal.

21.2. Any such expert shall be and remain impartial and independent of the parties; and he or she shall sign a written declaration to such effect, delivered to the Arbitral Tribunal and copied to all parties.

21.3. The Arbitral Tribunal may require any party at any time to give to such expert any relevant information or to provide access to any relevant documents, goods, samples, property, site or thing for inspection under that party's control on such terms as the Arbitral Tribunal thinks appropriate in the circumstances.

[...]

21.5. The fees and expenses of any expert appointed by the Arbitral Tribunal under this Article 21 may be paid out of the deposits payable by the parties under Article 24 and shall form part of the Arbitration Costs under Article 28.

SCC

Article 34. Experts Appointed by the Arbitral Tribunal

(1) After consulting the parties, the Arbitral Tribunal may appoint one or more experts to report to it on specific issues set out by the Arbitral Tribunal in writing.

(2) Upon receipt of a report from an expert it has appointed, the Arbitral Tribunal shall send a copy of the report to the parties and shall give the parties an opportunity to submit written comments on the report.

[...]

SIAC

Rule 26: Tribunal-Appointed Experts	*26.1. Unless otherwise agreed by the parties, the Tribunal may:* *(a) following consultation with the parties, appoint an expert to report on specific issues; and* *(b) require a party to give any expert appointed under Rule 26.1(a) any relevant information, or to produce or provide access to any relevant documents, goods or property for inspection.* *26.2. Any expert appointed under Rule 26.1(a) shall submit a report in writing to the Tribunal. Upon receipt of such written report, the Tribunal shall deliver a copy of the report to the parties and invite the parties to submit written comments on the report.*
UNCITRAL	
Article 29. Experts Appointed by the Arbitral Tribunal	*1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.* *2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.* *3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. [...]* *4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. [...]*
IBA Rules of Evidence	
Article 6. Tribunal Appointed Experts	*1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.* *2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.* *3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection [...]* *[...]* *8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.*

§6.03 WITNESS TESTIMONY AT THE EVIDENTIARY HEARING

Following the submission of any written witness statements and expert reports, the witness may be called to answer questions at a hearing. Depending on the applicable arbitration rules, the tribunal and/or a party may call the witness of the other party to appear for questioning. The tribunal and/or the parties may then pose questions to the witness concerning the witness's written statement or report. Oral witness testimony typically proceeds through successive phases of direct examination,

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cross-examination, and redirect examination (as in common-law trial practice), subject to the control of the tribunal and any agreement of the parties.

[A] The Power to Call Witnesses

A witness upon whose testimony a party seeks to rely may be required to attend an evidentiary hearing for questioning. The language of the different regimes under consideration varies as to who may call witnesses. In deference to the inquisitorial approach, the ICC, ICSID, and UNCITRAL Rules provide that only the tribunal may decide to call witnesses. (54) The ICDR and SIAC Rules additionally provide that a party may request the tribunal to call certain witnesses to the hearing, but that the tribunal may (or may not) extend the request or permit those witnesses to testify. (55) By contrast, and reflecting the adversarial approach, the IBA Rules of Evidence and LCIA Rules grant the parties, in addition to the tribunal, the power to call a witness to appear at the hearing. (56) The SCC Rules provide that any witness on whose testimony a party seeks to rely is automatically obligated to attend a hearing, unless otherwise agreed by the parties. (57) Neither the CIETAC nor the HKIAC Rules expressly provide for the power to call a witness to give oral testimony, though it seems that the parties may make such provision by agreement, and, in the absence of such agreement, the tribunal may do so. (58) A tribunal's authority to call or compel a witness to testify will be conditioned by the rules stated in the law of the place of the arbitration.

As a practical matter, in most international arbitration cases, the tribunal will allow for a party to request the examination of any witness for whom the opposing party has submitted a written witness statement or expert report, and will require the opposing party to arrange for such witness or expert appear for examination or else face certain consequences (as discussed below). Of course, the tribunal can generally request to examine any witness or expert who has submitted written testimony (regardless of whether a party requests their examination), and indeed, can request to examine witnesses under the parties' control even if such witnesses have not submitted written testimony.

If a witness is called and fails to appear, the ICDR, LCIA and SIAC Rules indicate that the tribunal may disregard that witness's written statement. (59) The LCIA Rules further provide that the tribunal may, alternatively, disregard a portion of the witness's statement or reduce the probative value of the statement. (60) The SIAC Rules provide

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further still that the tribunal may "exclude such written testimony altogether." (61) The ICSID Rules are somewhat more ambiguous on the point, providing that the tribunal "shall take formal note" if a party fails to present a witness. (62) Even where the rules do not specifically so provide, it is generally within the tribunal's inherent authority to disregard or give less weight to the statement of a witness who has failed to appear for examination when called to do so. In our experience, the tribunal may also draw adverse inferences against the party who submitted the statement of a witness who then declined a request or order to appear for examination on his or her statement.

Lastly, the tribunal may be able to seek the testimony of even a non-party-appointed witness. Under the IBA Rules of Evidence, the tribunal may order a party to use its best efforts to provide the appearance of any person (subject to the limitations of admissibility in Article 9.2, discussed further below). (63) Also under the IBA Rules, a party may ask the tribunal to take whatever steps are legally available to obtain the testimony of someone who has relevant and material information about the case. (64) The tribunal may even be able to exercise this power *sua sponte*, as expressly indicated by the SIAC Rules; under the tribunal's authority to conduct inquiries as under the CIETAC and LCIA Rules; or pursuant to the tribunal's broad authority to obtain evidence "by all appropriate means" under ICC Rules. (65)

In this regard, many jurisdictions provide for the tribunal and/or the parties to the arbitration to seek the assistance of domestic courts (at the seat of arbitration) and foreign courts in ordering persons within the jurisdiction of such courts to appear before the tribunal and provide evidence. (66) For example, the U.S. Federal Arbitration Act provides:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such

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person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States. (67)

Such mechanisms may prove immensely helpful for bringing a third party with important knowledge about the case out of the shadows.

Table 6.6 Power of the Tribunal and/or the Parties to Call Witnesses to Appear at a Hearing for Questioning

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AAA-ICDR	
Article 23. Hearing	*4. […] In accordance with a schedule set by the tribunal, each party shall notify the tribunal and the other parties of the names of any witnesses who have presented a witness statement whom it requests to examine. The tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the tribunal, the tribunal may disregard any written statement by that witness.*
CIETAC	
Article 43. Investigation and Evidence Collection by the Arbitral Tribunal	*1. The arbitral tribunal may undertake investigations and collect evidence as it considers necessary.*
Article 35. Conduct of Hearing	*1. The arbitral tribunal shall examine the case in any way it deems appropriate unless otherwise agreed by the parties.*
HKIAC	
Article 22. Evidence and Hearings	*22.5. The arbitral tribunal may determine the manner in which a witness or expert is examined.*
ICC	
Article 25. Establishing the Facts of the Case	*1. The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.* *[…]* *3. The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.*
ICSID	
Arbitration Rules, Rule 34. Evidence: General Principles	*2. The Tribunal, may, if it deems necessary at any stage of the proceeding:* *(a) call upon the parties to produce […] witnesses and experts […]. […]* *3. The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.*
LCIA	
Article 20. Witness(es)	*4. The Arbitral Tribunal and any party may request that a witness, on whose written testimony another party relies, should attend for oral questioning at a hearing before the Arbitral Tribunal. If the Arbitral Tribunal orders that other party to secure the attendance of that witness and the witness refuses or fails to attend the hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony or exclude all or any part thereof altogether as it considers appropriate in the circumstances.*
Article 22. Additional Powers	*22.1. The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:* *[…]*

(iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute;

SCC

Article 33. Witnesses

3. Any witness or expert, on whose testimony a party seeks to rely, shall attend a hearing for examination, unless otherwise agreed by the parties.

SIAC

25.1. Before any hearing, the Tribunal may require the parties to give notice of the identity of witnesses, including expert witnesses, whom the parties intend to produce, the subject matter of their testimony and its relevance to the issues.

25.2. The Tribunal may allow, refuse or limit the appearance of witnesses to give oral evidence at any hearing.

Rule 25. Witnesses

[...]

25.4. The Tribunal may direct the testimony of witnesses to be presented in written form, either as signed statements or sworn affidavits or any other form of recording. Subject to Rule 25.2, any party may request that such a witness should attend for oral examination. If the witness fails to attend for oral examination, the Tribunal may place such weight on the written testimony as it thinks fit, disregard such written testimony, or exclude such written testimony altogether.

Rule 26. Tribunal-Appointed Experts

26.3. Unless otherwise agreed by the parties, if the Tribunal considers it necessary or at the request of any party, an expert appointed under Rule 26.1(a) shall, after delivery of his written report, participate in a hearing. At the hearing, the parties shall have the opportunity to examine such expert.

Rule 27. Additional Powers of the Tribunal

Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:

[...]

(c) conduct such enquiries as may appear to the Tribunal to be necessary or expedient;

[...]

(h) direct any party or person to give evidence by affidavit or in any other form;

UNCITRAL

Article 28. Hearings

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

IBA Rules of Evidence

Article 8. Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. [...]

Article 4. Witnesses of Fact

9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

[B] The Power to Question Witnesses

Once a witness is present for examination at the hearing (or via videoconference [68]), the ability of the parties and/or the tribunal to question the witness helps to raise, and possibly resolve, any questions about the witness's written testimony and any doubts about his or her credibility. All of the rules under consideration except CIETAC make express provision for the parties to question a tribunal-appointed expert at the hearing. [69]

However, there is significant variation among the rules as to whether the tribunal or the parties, or both, may question fact witnesses and party-appointed experts. The IBA Rules of Evidence, and the ICSID, LCIA and SIAC Rules, expressly grant both the tribunal and the parties the power to question fact witnesses and party-appointed experts at a hearing. [70] Taking a slightly different tack, the ICDR, HKIAC and UNCITRAL Rules give the tribunal discretion to decide on the manner in which witnesses are examined (including whether by the tribunal or by the parties, or both). [71] The CIETAC

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Rules permit the parties to agree on whether to use an "inquisitorial or adversarial approach" at the hearing, and, in the absence of any agreement, it is for the tribunal to decide. [72] The ICC Rules could be read to indicate that it is only for the tribunal to question fact witnesses and party-appointed experts, since it may do so even in the absence of the parties, and because the tribunal "shall be in full charge of the hearings." [73] Nonetheless, examination of witnesses by the parties is common in ICC arbitration, per the parties' agreement or the tribunal's discretion, which may include application of the IBA Rules of Evidence. (It should be noted that the ICC Commission Report indicates that the tribunal should consider limiting the time available for cross-examination. [74]) The SCC contemplates that witnesses will be examined but does not indicate who will conduct the examination. [75] Some of the rules additionally provide that witnesses must take an oath. [76]

Many of the regimes indicate that any questioning of witnesses by the parties is subject to the control of the tribunal. [77] However, the rules do not give any guidance as to how the tribunal should order the presentation and questioning of witnesses. On this critical issue of evidentiary procedure, the IBA Rules of Evidence provide important guidance. First, the IBA Rules of Evidence provide for the parties to engage, first, in a sequence of direct examination, cross-examination, and redirect examination of fact witnesses. [78] The questions raised in each successive stage should be limited to the subject matter covered in the previous stage. [79] Next, the same procedure is applied to expert witnesses. [80] In each instance the claimant's witnesses are presented before the respondent's witnesses. [81] The tribunal may organize the presentation of witnesses in relation to the various stages of the arbitration and/or in relation to particular issues in dispute, and in confrontation with each other. [82] Lastly, the IBA Rules of Evidence indicate that leading questions should be used on cross-examination only (consistent with US practice). [83]

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Table 6.7 Power of the Tribunal and/or the Parties to Question Fact Witnesses, Party-Appointed Experts, and Tribunal-Appointed Experts

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AAA-ICDR	
	3. The tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination.
	[…]
Article 23. Hearing	
	5. The tribunal may direct that witnesses be examined through means that do not require their physical presence.
Article 25. Tribunal-Appointed Expert	*4. At the request of any party, the tribunal shall give the parties an opportunity to question the [tribunal-appointed] expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.*
CIETAC	
Article 35. Conduct of Hearing	*3. Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.*
Article 44. Expert's Report and Appraiser's Report	*3. Copies of the [tribunal-appointed] expert's report and the appraiser's report shall be forwarded to the parties for their comments. At the request of either party and with the approval of the arbitral tribunal, the expert or appraiser shall participate in an oral hearing and give explanations on the report when the arbitral tribunal considers it necessary.*
HKIAC	
Article 22. Evidence and Hearings	*22.5. The arbitral tribunal may determine the manner in which a witness or expert is examined.*

Article 25. Tribunal-Appointed Witness	*25.4. At the request of either party the expert, after delivery of the report, shall attend a hearing at which the parties shall have the opportunity to be present and to examine the expert. At this hearing either party may present experts in order to testify on the points at issue. The provisions of Articles 22.2 to 22.7 shall be applicable to such proceedings.*
ICC	
	3. The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.
Article 25. Establishing the Facts of the Case	*4. At the request of a party, the parties shall be given the opportunity to question at a hearing any [tribunal-appointed] expert.*
Article 26. Hearings	*3. The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. [...]* *The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. [...]*
Appendix IV. Case Management Techniques	*(f) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.*
ICC Commission Report, ¶ 80. Limiting Cross-Examination	*¶ 80. If there is to be cross-examination of witnesses, the arbitral tribunal, after hearing the parties, should consider limiting the time available to each party for such cross-examination.*
ICSID	
	1. Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.
	2. Each witness shall make the following declaration before giving his evidence:
Arbitration Rules, Rule 35. Examination of Witnesses and Experts	*"I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth."*
	3. Each expert shall make the following declaration before making his statement:
	"I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."
LCIA	
Article 19. Oral Hearing(s)	*2. [...] [A] hearing may take place by video or telephone conference or in person (or a combination of all three).* *7. Subject to the mandatory provisions of any applicable law, the Arbitral Tribunal shall be entitled (but not required) to administer any appropriate oath to any witness at any hearing, prior to the oral testimony of that witness.*
Article 20. Witness(es)	*8. Any witness who gives oral testimony at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of such testimony.*
Article 21. Expert(s) to Arbitral Tribunal	*4. If any party so requests or the Arbitral Tribunal considers it necessary, the Arbitral Tribunal may order the [Tribunal-appointed] expert, after delivery of the expert's written report, to participate in a hearing at which the parties shall have a reasonable opportunity to question the expert on the report and to present witnesses in order to testify on relevant issues arising from the report.*
SCC	
Article 33. Witnesses	*3. Any witness or expert, on whose testimony a party seeks to rely, shall attend a hearing for examination, unless otherwise agreed by the parties.*
Article 34. Experts Appointed by the Arbitral Tribunal	*3. Upon the request of a party, the parties shall be given an opportunity to examine any expert appointed by the Arbitral Tribunal at a hearing.*
SIAC	
Rule 25. Witnesses	*25.3. Any witness who gives oral evidence may be questioned by each of the parties, their representatives and the Tribunal in such manner as the Tribunal may determine.*
Rule 26. Tribunal-Appointed Experts	*26.3. Unless otherwise agreed by the parties, if the Tribunal considers it necessary or at the request of any party, an expert appointed under Rule 26.1(a) shall, after delivery of his written report, participate in a hearing. At the hearing, the parties shall have the opportunity to examine such expert.*

UNCITRAL	
	2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.
	[...]
Article 28. Hearings	*4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).*
Article 29. Experts Appointed by the Arbitral Tribunal	*5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.*
IBA Rules of Evidence	
	1. [...] Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.
	3(b) "[F]ollowing direct testimony, any other Party may question such witness [...]."
	[...]
Article 8. Evidentiary Hearing	*3(d) [T]he Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts.*
	[...]
	3(g) [T]he Arbitral Tribunal may ask questions to a witness at any time.

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§6.04 INSPECTION/SITE VISITS

It is often useful for the tribunal to visit the site of a property that is the subject of the dispute between the parties. This may aid the arbitrators' understanding of any technical processes involved and put into context the parties' presentations of the facts. The IBA Rules of Evidence and the ICDR, HKIAC, ICSID, LCIA and SIAC Rules make specific provisions for site visits, and usually provide for the parties to take part. (84) The HKIAC's provision on inspection and site visits is contained within its provision permitting the tribunal to hold meetings at any location outside the seat of arbitration. (85) The analogous provisions of the ICC, SCC and UNCITRAL Rules concerning meetings might be read to encompass inspections and site visits, as well. (86) The CIETAC Rules allow the arbitral tribunal to conduct its own investigations without the participation of the parties after giving notice, with the evidence collected then being provided to the parties after the visit. (87) The ICDR Rules also allow the tribunal to collect evidence without the participation of the parties, but omit the notice requirement. (88)

Table 6.8 Inspection/Site Visits

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AAA-ICDR	
Article 17. Place of Arbitration	*2. The tribunal may meet at any place it deems appropriate for any purpose, including to [...] inspect property [...].*
CIETAC	
Article 43. Investigation and Evidence Collection by the Arbitral Tribunal	*1. The arbitral tribunal may undertake investigations and collect evidence as it considers necessary.*
	2. When investigating and collecting evidence, the arbitral tribunal may notify the parties to be present. In the event that one or both parties fail to be present after being notified, the investigation and collection of evidence shall proceed without being affected.

	3. Evidence collected by the arbitral tribunal through its investigation shall be forwarded to the parties for their comments.
HKIAC	
Article 14. Seat and Venue of Arbitration	*14.2. Unless the parties have agreed otherwise, the arbitral tribunal may meet at any location outside of the seat of arbitration which it considers appropriate for consultation among its members, hearing witnesses, experts or the parties, or the inspection of goods, other property or documents. The arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the seat.*
ICC	
Article 18. Place of the Arbitration	*2. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.*
ICSID	
ICSID Convention, Article 43. Powers and Functions of the Tribunal	*Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,* *[...]* *(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.*
Arbitration Rules, Rule 37. Visits and Inquiries; Submissions of Non-disputing Parties	*(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.*
LCIA	
Article 22. Additional Powers	*22.1. The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:* *[...]* *(iv) to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal[.]*
SCC	
Article 25. Seat of Arbitration	*2. The Arbitral Tribunal may, after consulting the parties, conduct hearings at any place it considers appropriate. The Arbitral Tribunal may meet and deliberate at any place it considers appropriate. The arbitration shall be deemed to have taken place at the seat of arbitration regardless of any hearing, meeting, or deliberation held elsewhere.*
SIAC	
Rule 27. Additional Powers of the Tribunal	*Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:* *[...]* *d. order the parties to make any property or item in their possession or control available for inspection;*
Rule 21. Seat of Arbitration	*21.2. The Tribunal may hold hearings and meetings by any means it considers expedient or appropriate and at any location it considers convenient or appropriate.*
UNCITRAL	
Article 18. Place of Arbitration	*2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.*
IBA Rules of Evidence	
Article 7. Inspection	*Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing*

and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

§6.05 ADMISSIBILITY OF EVIDENCE

In international arbitration, the tribunal has broad discretion to determine the admissibility and the weight of evidence. As a threshold matter, the tribunal may determine that certain evidence is not sufficiently relevant to the case or material to its outcome. Next, even evidence which is relevant and material may be excluded on the grounds that the evidence is privileged or unduly burdensome for a party to produce. Finally, even when evidence is admitted, the tribunal may determine in its discretion the probative value, or weight, to ascribe to such evidence, considering the reliability of the source of the information or other factors. As in other areas of evidentiary procedure, the arbitral regimes do not provide specific criteria or standards for the tribunal to make these determinations, though the IBA Rules of Evidence may provide useful guidance. In case the tribunal orders a party to produce admissible evidence, the arbitral regimes under consideration indicate a range of consequences should that party fail to comply with the order.

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[A] Scope of Admissible Evidence

Most of the arbitral regimes and the IBA Rules of Evidence authorize the tribunal to exercise its discretion in determining the admissibility of evidence that is presented or sought by a party, particularly with respect to the "relevance and materiality" of that evidence. (89) Under the IBA Rules, these two criteria are a dual *requirement*: for evidence to be admitted, it must be both sufficiently relevant to the case and material to its outcome. (90) This double-requirement results, at least in theory, in a narrower scope of evidence to be admitted in most international arbitrations compared to the singular "relevance" requirement found in common-law litigation and the LCIA Rules. (91) In most international arbitrations, irrelevant evidence most certainly will be excluded, (92) but even relevant evidence may be excluded if it is not also material to the outcome of the case. This approach seeks to strike a balance between, on the one hand, little or no evidence to be produced by an opposing party in the civil-law tradition and, on the other hand, lots of evidence to be produced by an opposing party in the common-law tradition.

Even if the tribunal determines that certain evidence is both relevant and material, it may nevertheless find that the evidence is inadmissible. (93) However, most of the rules do not prescribe any criteria or standards for the tribunal to make such a determination. Indeed, the LCIA Rules, as well as the SIAC Rules, make clear that the tribunal has the power "to decide whether or not to apply any strict rules of evidence (or other rules) as to the admissibility ... of any material tendered by a party on any issue of fact or expert opinion." (94)

Despite the lack of guidance under the various international arbitration rules, tribunals generally consider the issue of admissibility of evidence with great care. Excluding too much of the evidence tendered by a party might undermine the enforceability of the award under Article V(1)(b) of the New York Convention on the ground that the tribunal did not afford a party a reasonable opportunity to present its case. But then excluding too little evidence can result in inefficiencies as the tribunal attempts to deal with thousands of pages of potentially irrelevant documents and witness testimony.

Here, again, the IBA Rules of Evidence provide a helpful supplement to the arbitration rules by indicating criteria for a tribunal to admit or exclude documentary

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evidence as well as to sustain an objection to witness testimony within the requirements of the New York Convention. (95) The tribunal may determine that relevant and material evidence in the possession, custody or control of a party is nevertheless inadmissible on the specific grounds that it is: unreasonably burdensome to provide; lost or destroyed; duplicative of other evidence already submitted; protected by a legal privilege; particularly commercially or technically confidential; especially politically or institutionally sensitive (e.g., a classified government secret); or that production of the evidence would simply not be in keeping with principles of procedural economy, proportionality, fairness, or equality of the parties. (96)

Elaborating on the ground of privilege, the IBA Rules of Evidence guide the tribunal to take into account two typical grounds for asserting privilege to exclude evidence. (97) The first is communication between counsel and client for the purpose of obtaining legal advice, the so-called "attorney-client privilege." This privilege requires that the client and counsel had an expectation that such communication would be protected and that they did not waive the privilege by disclosing the communications to a third party. The second is communication made for the purpose of settlement negotiations. Such communications are privileged in order to encourage parties to make disclosures to one another in case they can reach an amicable settlement, without fearing that those disclosures will be used against them in a subsequent litigation or arbitration should the negotiations ultimately fail.

It is important to note that these grounds are well-known to common-law lawyers, though not necessarily to civil-law lawyers. Perhaps for this reason the ICDR and SIAC Rules are the only arbitration rules that expressly recognize the power of the tribunal to decide a claim of

privilege, including the attorney-client privilege. (98) Therefore the IBA Rules suggest, and the ICDR Rules mandate, that the tribunal should apply any privilege standard equally to all parties. (99)

The IBA Rules of Evidence also recognize that certain confidential information, while admissible as evidence, should be accorded special protection. (100) Certain commercial information, such as trade secrets or contracts with third parties, or especially politically sensitive information, such as government classified documents, that does not present a "compelling" case for exclusion from evidence may nevertheless be admitted subject to a confidentiality agreement among the parties for use only in the proceedings. (101) A further measure of protection would be for the tribunal to order certain information in the requested documents to be redacted. Yet a further measure would be for the tribunal to order the documents or testimony to be produced for "attorneys' eyes only." The ICDR, ICC, and ICSID Rules specifically recognize the

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tribunal's ability to adopt appropriate procedures to admit and protect especially confidential information as evidence in the arbitration. (102)

Finally, even when the evidence has cleared the foregoing hurdles, most arbitral regimes permit the tribunal to exercise its discretion in assigning the appropriate probative value, or weight, to such evidence. (103) Once again, the regimes make no express indication as to any criteria or standards for the tribunal to make this assessment; the LCIA Rules again state that the tribunal has the power "to decide whether or not to apply any strict rules of evidence (or other rules) as to the … weight of any material tendered by a party on any issue of fact or expert opinion." (104) Even the IBA Rules do not provide guidance on this front. Instead the preference would seem to be for the arbitrators to rely on their own knowledge of rules concerning probative value from their home jurisdiction and/or at the seat of arbitration and their common-sense appreciation for the reliability of the evidence.

Table 6.9 Admissibility and Weight of Evidence

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AAA-ICDR	
	3. The tribunal may […] exclude cumulative or irrelevant testimony or other evidence […].
Article 20. Conduct of Proceedings	*6. The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.*
Article 21. Exchange of Information	*5. The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.*
Article 22. Privilege	*The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.*
CIETAC	
	Not specifically addressed.
HKIAC	
Article 22. Evidence and Hearings	*22.2. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence.*
ICC	
Article 22. Conduct of the Arbitration	*3. Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.*
ICSID	
Arbitration Rules, Rule 32. The Oral Procedure	*(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.*
Arbitration Rules, Rule 34. Evidence: General Principles	*(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*
LCIA	
Article 22. Additional Powers	*22.1. The Arbitral Tribunal shall have the power, […]*

	(vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion [...]
SCC	
Article 31. Evidence	*1. The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine.*
SIAC	
Article 19. Conduct of the Proceedings	*19.2. The Tribunal shall determine the relevance, materiality and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination.* *19.4. The Tribunal may, in its discretion, [...] exclude cumulative or irrelevant testimony or other evidence [...].*
Article 27. Additional Powers of the Tribunal	*Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:* *[...]* *o. determine any claim of legal or other privilege.*
UNCITRAL	
Article 27. Evidence	*4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.*
IBA Rules of Evidence	
	1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence. *2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: (a) lack of sufficient relevance to the case or materiality to its outcome; (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable; (c) unreasonable burden to produce the requested evidence; (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred; (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling; (f) 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; or (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.*
Article 9	*3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) 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 (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.* *[...]*

[B] Failure to Produce Evidence

Where the tribunal determines that evidence is admissible and orders its production, a party's failure to comply with such an order on time and without a valid excuse may result in the tribunal assigning no weight to that party's argument, or even assuming that the missing evidence would support the counter-party's argument. The IBA Rules of Evidence, as well as the ICDR Rules, expressly authorize the tribunal to draw

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so-called "adverse inferences" from a party's failure to produce evidence. (105) The IBA and ICDR Rules also provide that the tribunal may allocate a greater share of the costs of the arbitration to a party who fails to act in good faith to produce admissible evidence. (106)

Assuming the truth and full evidentiary weight of an unproven fact in response to a party's failure to produce evidence to the contrary may not always be appropriate. A study of several awards concluded that in order for the tribunal to draw an adverse inference several requirements must be met: "(1) the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought; (2) the requested evidence must be accessible to the inference opponent; (3) the party seeking the adverse inference must produce prima facie evidence and all available evidence corroborating evidence; and (4) the inference sought must be reasonable, consistent with the facts in the record and logically related to the likely nature of the evidence withheld." (107)

Since these criteria may not always be satisfied, the other rules employ less explicit terms concerning the consequences of a party's failure to produce evidence, suggesting that the tribunal may either draw adverse inferences or simply consider that that party has failed to carry its burden of proof or to rebut the counter-party's evidence. Taking this approach, the ICDR, HKIAC, and UNCITRAL Rules authorize the tribunal ultimately to "make the award on the evidence before it." (108) CIETAC Rules indicate that if a party fails to produce evidence it "shall bear the consequences thereof." (109) ICSID instructs only that the tribunal "shall take formal note" of the failure. (110) The SCC Rules authorize the tribunal to "draw such inferences as it considers appropriate." (111) The SIAC Rules generally permit the tribunal to respond to a party's failure to comply with an order by proceeding with the arbitration and imposing appropriate sanctions. (112) The ICC Rules and the LCIA Rules are silent on the consequences of a party's failure to produce admissible evidence.

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Table 6.10 Consequences of Failure to Produce Evidence

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AAA-ICDR	
Article 20. Conduct of the Proceedings	*7. The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.*
Article 21. Exchange of Information	*9. In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences [...].*
Article 26. Default	*3. If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.*
CIETAC	
Article 41. Evidence	*3. If a party bearing the burden of proof fails to produce evidence within the specified time period, or if the produced evidence is not sufficient to support its claim or counterclaim, it shall bear the consequences thereof.*
HKIAC	
Article 26. Default	*26.3 If one of the parties, duly notified under these Rules, fails to present its case in accordance with these Rules including as directed by the arbitral tribunal, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration and make an award on the basis of the evidence before it.*
ICC	
	Not specifically addressed.
ICSID	
Arbitration Rules, Rule 34. Evidence: General Principles	*3. The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.*
LCIA	
	Not specifically addressed.
SCC	
Article 35. Default	*3. If a party, without good cause, fails to comply with any provision of, or requirement under, these Rules or any procedural order given by the Arbitral Tribunal, the Arbitral Tribunal may draw such inferences as it considers appropriate.*
SIAC	
Rule 27. Additional Powers of the Tribunal	*Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:* *[...]*

l. proceed with the arbitration notwithstanding the failure or refusal of any party to comply with these Rules or with the Tribunal's orders or directions or any partial Award or to attend any meeting or hearing, and to impose such sanctions as the Tribunal deems appropriate in relation to such failure or refusal;

UNCITRAL

Article 30. Default

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

IBA Rules of Evidence

Article 9. Admissibility and Assessment of Evidence

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that party.

6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such document would be adverse to the interests of that party.

FURTHER READING

Peter Ashford, *The IBA Rules of Evidence on the Taking of Evidence in International Arbitration*: *A Guide* (Cambridge University Press 2013).

Nigel Blackaby & Alexander Wilbraham, *Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration*, 31(1) ICSID Rev.—Foreign Invest. L.J., 655-669 (October 1, 2016).

Jeffrey Commission & Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press 2018).

Yves & and Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (2d ed., Kluwer Law International 2005).

Peter V. Eijsvoogel, *Evidence in International Arbitration Proceedings* (Kluwer Law International 2001).

Jason Fry et al., *The Secretariat's Guide to ICC Arbitration* (ICC 2012).

Teresa Giovannini & Alexis Mourre, *Written Evidence and Discovery in International Arbitration* (Teresa Giovannini & Alexis Mourre eds., Kluwer Law International 2009).

Ragnar Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration* (Kluwer Law International 2015).

Ragnar Harbst, Chapter Seven: *Witness Statements*, in *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration* (Kluwer Law International 2015).

Michael Hwang & Andrew Chin, *The Role of Witness Statements in International Commercial Arbitration*, in *International Arbitration 2006*: *Back to Basics?*, ICCA Congress Series (Albert Jan van den Berg ed., Kluwer Law International 2007).

Laurent Levy & V.V. Veeder, *Arbitration and Oral Evidence* (Kluwer Law International 2006).

Reto Marghitola, *Document Production in International Arbitration* (Kluwer Law International 2015).

Nathan D. O'Malley, *Rules of Evidence in International Arbitration*: *An Annotated Guide* (Informa Law 2012).

Jeffrey Pinsler, *Is Discovery Available Prior to the Commencement of Arbitration Proceedings*, 2005 Sing. J. Legal Stud. 64 (2005).

Jeremy K. Sharpe, *Drawing Adverse Inferences from the Non-production of Evidence*, 22 Arb. Int'l (Kluwer Law International 2006).

Frederic G. Sourgens et al., *Evidence in International Investment Arbitration* (Oxford University Press 2018).

Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012).

References

1) "The necessity of proof always lies with the person who lays charges." *See* CIETAC Rules, Art. 41; HKIAC Rules, Art. 22(1); UNCITRAL Rules, Art. 27(1).

2) Substantive issues of evidence such as standards of proof, presumptions, inferences, probative value, privilege, hearsay exceptions, etc. are also left to the discretion of the tribunal, subject to the law of the seat of arbitration. Many of these substantive issues are not specifically addressed in the rules under consideration and are outside the scope of this book. More information on the substantive and procedural issues related to evidentiary matters in international arbitration is available in the recommended readings at the end of this chapter.

3) In an inquisitorial system, the court is actively involved in investigating the facts of the case. *See* Julian D. M. Lew, et al., *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 533.

4) *Id.* Note that the CIETAC Rules expressly provide that, "[u]nless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case." CIETAC Rules, Art. 35(3).

5) In our experience, international arbitration increasingly resembles common-law litigation in some respects. Evidentiary hearings in international arbitration often look very much like common-law trials, with extensive examination of the witnesses by counsel and few (if any) questions from the tribunal. Document discovery, while still under the control of the tribunal, is usually party-driven. We have also observed a trend toward broader document discovery than in the past (if still not on the scale of a typical U.S. litigation). Even depositions—while still uncommon—are no longer entirely unheard of in international arbitration. Consequently, the production of evidence has the potential to increase dramatically the costs of an arbitration if not appropriately regulated.

6) Other helpful guidelines can be found in the draft Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), the CIETAC Guidelines on Evidence, and the International Institute for Conflict Prevention and Resolution Protocol on Disclosure of Documents and Presentation of Witness Testimony in Commercial Arbitration, and the ICDR Guidelines for Arbitrators Concerning Exchanges of Information, among others.

7) *See* IBA Rules of Evidence, *Foreword* (2010) ("The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when parties come from different legal cultures. [...] [P]arties [may] adopt the IBA Rules of Evidence of Evidence in their arbitration clause [...]. In addition, parties and Arbitral Tribunals may adopt the IBA Rules of Evidence of Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter. They may also vary them or use them as guidelines in developing their own procedures.").

8) ICDR Rules, Art. 21(3); CIETAC Rules, Arts. 12, 15 and 16; ICSID Rules, Rule 24; LCIA Rules; SCC Rules, Arts. 29(1) and 29(2); SIAC Rules, Rule 20(7).

9) ICSID Rules, Rule 24.

10) UNCITRAL Rules, Arts. 20(4), 21(2).

11) ICC Rules, Arts. 4(3) and 5(5); Appx. IV(d)(i).

12) ICDR Rules, Art. 21(3); HKIAC Rules, Art. 13.3; ICC Rules, Art. 3(1); LCIA Rules, Art. 13.3; SIAC Rules, Rule 19.6; UNCITRAL Rules, Art. 17(4).

13) *See* section §7.01 (Additional Written Submissions). The CIETAC Rules uniquely require parties to submit the evidence supporting their claims and defenses at the outset of the arbitration with their request for arbitration, answer and any counterclaims. CIETAC Rules, Arts. 12, 15, 16. *See* Ch. 3 (Commencement of the Arbitration).

14) In our experience, documents-only proceedings are rare in international arbitration. A tribunal's denial of an oral hearing, if requested by any of the parties, could well be grounds for non-recognition of the resulting award. *See* Gary Born, *International Commercial Arbitration*, 3515-3516 (2d. ed., 2014)

15) HKIAC Rules, Art. 22.3; SCC Rules, Art. 31(3); SIAC Rules, Rule 27(f); IBA Rules of Evidence, Art. 3(10).

16) LCIA Rules, Art. 22.1(v).

17) ICDR Rules, Art. 20(4).

18) CIETAC Rules, Art. 43(1); LCIA Rules, Art. 22.1(iii); SIAC Rules, Rule 27(c).

19) ICC Rules, Art. 25(1) and (5).

20) IBA Rules, Art. 3(10).

21) LCIA Rules, Art. 22.1(v); SIAC Rules, Rule 27(f).

22) ICDR Rules, Art. 21(4); ICSID Rules, Rule 33; SCC Rules, Art. 31(3).

23) ICC Rules, Appx. IV(d).

24) IBA Rules of Evidence, Art. 3(7) ("The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession custody or control as to which the Arbitral Tribunal determines that (*i*) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (*ii*) none of the reasons for objection set forth in Art. 9(2) applies; and (*iii*) the requirements of Art. 3(3) have been satisfied.").

25) ICDR Rules, Art. 21.

26) Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, ¶ 3.01 (Informa Law 2012).

27) ICDR Rules, Art. 23(4); LCIA Rules, Art. 20; SCC Rules, Art. 33(2); SIAC Rules, Rules 25.4 and 27(h); UNCITRAL Rules, Art. 27(2).

28) *See* Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration*, 276-277 (2d ed., Kluwer Law International 2005).

29) *See*, e.g., LCIA Rules, Art. 20.3 (defining "witnesses" as including both "witnesses of fact" and "expert witnesses"); SCC Rules, Art. 33 (defining "witnesses" as including "experts"), UNCITRAL Rules, Art. 27(2) (defining "witnesses" as "including expert witnesses").

30) *See* IBA Rules of Evidence, Art. 4(5)(b).

31) *See id.*, Art. 5(2)(e).

32) IBA Rules of Evidence, Art. 4(2); LCIA Rules, Art. 20.6; UNCITRAL Rules, Art. 27(2).

33) *See*, IBA Rules of Evidence, Art. 4(3) ("It shall not be improper for a [Party's] ... legal advisors ... to interview its witnesses or potential witnesses and to discuss their prospective testimony with them."); *see also* IBA Guidelines on Party Representation in International Arbitration, Rule 20 ("a Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.")

34) LCIA Rules, Art. 20.5.

35) IBA Guidelines on Party Representation in International Arbitration, Rule 21.

36) *Id.*, at Rule 22.

37) IBA Rules of Evidence, Art. 5(2).

38) *Id.*, Art. 4(6).

39) ICSID Rules, Rule 36.

40) Lucy Reed et al., *Guide to ICSID Arbitration* 142 (Kluwer Law International 2004).

41) ICDR Rules, Art. 21(10).

42) *See,* e.g., UNCITRAL Model Law, Art. 26; English Arbitration Act 1996, § 37.

43) ICDR Rules, Art. 25(1); CIETAC Rules, Art. 44(1); HKIAC Rules, Art. 25.1; ICC Rules, Art. 25(4); LCIA Rules, Art. 21.1; SCC Rules, Art. 34(1); SIAC Rules, Rule 26.1(a); UNCITRAL Rules, Art. 29(1). Here too, however, it is within the inherent power of an ICSID tribunal to appoint its own expert. The proposed ICSID amendments maintain this power of tribunal. *See Proposals for Amendment of the ICSID Rules—Synopsis*, para. 42, ICSID, World Bank Group, 2018 (thereafter "*ICSID Synopsis*"). https://icsid.worldbank.org/en/amendments/Documents/Homepage/Synopsis_English.pdf.

44) *See* generally N. Blackaby & A. Wilbraham, *Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration*, 31(1) ICSID Rev.—Foreign Invest. L.J., 655-669 (Oct. 1, 2016).

45) *Compare* IBA Rules of Evidence, Art. 5(2) *with* IBA Rules of Evidence, Art. 6(4).

46) Jason Fry, et al., *The Secretariat's Guide to ICC Arbitration*, 275 (ICC 2012).

47) IBA Rules of Evidence, Art. 6(2); LCIA Rules, Art. 21.2; UNCITRAL Rules, Art. 29(2).

48) *Compare* IBA Rules of Evidence, Art. 6(2) *with* UNCITRAL Rules, Art. 29(2).

49) Fry, *supra* n. 46, at 275.

50) IBA Rules of Evidence, Art. 6(3); ICDR Rules, Art. 25(2); CIETAC Rules, Art. 44(2); HKIAC Rules, Art. 25.2; LCIA Rules, Art. 21.3; SIAC Rules, Rule 26.1(b); UNCITRAL Rules, Art. 29(3).

51) IBA Rules of Evidence, Art. 6(3).

52) *See*, e.g., *Paklito Investment Limited v. Klockner East Asia Limited, Supreme Court of Hong Kong, High Court, MP* 2219, ¶ 34 (Jan. 15, 1993).

53) ICDR Rules, Art. 25(3); HKIAC Rules, Art. 25.3; SCC Rules, Art. 34(2); SIAC Rules, Rule 26.2; UNCITRAL Rules, Art. 29(4).

54) ICC Rules, Art. 25(3); ICSID Rules, Rule 34; UNCITRAL Rules, Art. 28(2).

55) ICDR Rules, Art. 23(4); SIAC Rules, Rules 25.2 and 25.4.

56) IBA Rules of Evidence, Art. 8(1); LCIA Rules, Art. 20.4.

57) SCC Rules, Art. 33(3).

58) CIETAC Rules, Art. 35(1); HKIAC Rules, Art. 22.5 (omitting language from the 2013 Rules that expressly provided for the parties and the tribunal to call witnesses, and instead indicating only that "[t]he arbitral tribunal may determine the manner in which a witness or expert is examined").

59) ICDR Rules, Art. 23(4); LCIA Rules, Art. 20.4; SIAC Rules, Rule 25.4.

60) LCIA Rules, Art. 20.4.

61) SIAC Rules, Rule 25.4.

62) ICSID Rules, Rule 34(3).

63) IBA Rules of Evidence, Art. 4(10).

64) *Id.*, Art. 4(9).

65) CIETAC Rules, Art. 43(1); ICC Rules, Art. 25(1); SIAC Rules, Rule 27(h).

66) *See* UNCITRAL Model Law in International Commercial Arbitration (2006), Art. 27; 28 U.S. Code § 1782—Assistance to foreign and international tribunals and to litigants before such tribunals; English Arbitration Act, 1996 §§ 38, 42-43; Swiss Law on Private International Law, Art. 184(2). *See also* Julian D. M. Lew, et al., *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 579-583; G. Born, *International Commercial Arbitration*, 2343 (2d ed., Kluwer Law International 2014). The standards and procedures for obtaining evidence from non-parties may vary considerably from one jurisdiction to another; many jurisdictions do not provide for such assistance.

67) U.S. Federal Arbitration Act, 9 U.S. Code § 7—Witnesses before arbitrators; fees; compelling attendance.

68) *See* IBA Rules of Evidence, Art. 8(1); ICDR Rules, Art. 23(5); ICC Rules, Appx. IV(f); LCIA Rules, Art. 19.2; UNCITRAL Rules, Art. 28(4) (permitting witness oral testimony and questioning via videoconference).

69) IBA Rules of Evidence, Art. 8(3)(d); ICDR Rules, Art. 25(4); HKIAC Rules, Art. 25.4; ICC Rules, Art. 25(4); LCIA Rules, Art. 21.4; SCC Rules, Art. 34(3); SIAC Rules, Rule 26.3; UNCITRAL Rules, Art. 29(5). CIETAC Rules do not make any express provisions for the parties to question the tribunal-appointed expert (or appraiser) at the hearing. *See* CIETAC Rules, Art. 44(3).

70) IBA Rules, Art. 8(3)(b) and (g); ICSID Rule 35(1); LCIA Rules, Art. 20.8; SIAC Rules, Rule 25.3.

71) ICDR Rules, Art. 23(3); HKIAC Rules, Art. 22.5; UNCITRAL Rules, Art. 28(2).

72) CIETAC Rules, Art. 35(3).

73) ICC Rules, Arts. 25(3) and 26(3).

74) ICC Commission Report: *Controlling Time and Costs in Arbitration* (2018), ¶ 80.

75) SCC Rules, Art. 33(3).

76) IBA Rules of Evidence, Art. 8(4); ICSID Rules 35(2) and 35(3); LCIA Rules, Art. 20.7.

77) ICDR Rules, Art. 23(3); CIETAC Rules, Art. 35(3); HKIAC Rules, Art. 22.5; ICC Rules, Art. 26(3); ICSID Rules, Rule 35(1); LCIA Rules, Art. 20.8; SIAC Rules, Rule 25.3; UNCITRAL Rules, Art. 28(2).

78) IBA Rules of Evidence, Art. 8(3)(a)-(b).

79) *Id.*, at Art. 8(3)(b).

80) *Id.*, at Art. 8(3)(c).

81) *Id.*, at Art. 8(3)(a) and (c).

82) *Id.*, at Art. 8(3)(e)-(f).

83) *Id.*, at Art. 8(2).

84) IBA Rules of Evidence, Art. 7; ICDR Rules, Art. 17(2); CIETAC Rules, Art. 43; ICSID Convention, Art. 43(b); ICSID Rules, Rule 37(1); LCIA Rules, Art. 22.1(iv); SIAC Rules, Rule 27(d).

85) HKIAC Rules, Art. 14.2.

86) ICC Rules, Art. 18(2); SCC Rules, Art. 25(2); UNCITRAL Rules, Art. 18(2).

87) CIETAC Rules, Art. 43.

88) The 2009 version of ICDR rules required the Tribunal to provide parties with sufficient written notice to enable them to attend any proceedings in which the tribunal would inspect property or documents. ICDR Rules 2009, Art. 13(2). The 2014 version omits the requirement.

89) ICDR Rules, Art. 20(6); HKIAC Rules, Art. 22.2; SCC Rules, Art. 31(1); SIAC Rules, Rule 19.2; UNCITRAL Rules, Art. 27(4). The LCIA Rules indicate relevance but not materiality. LCIA Rules, Art. 22.1(vi). The ICSID Rules authorize the tribunal to determine the admissibility of evidence, but do not mention relevance or materiality. ICSID Rules, Rule 34(1). The CIETAC and ICC Rules are silent on this issue.

90) IBA Rules of Evidence, Arts. 3(3)(b) and 9(2).

91) LCIA Rules, Art. 22.1.

92) *See* ICDR Rules, Art. 20(3); SIAC Rules, Rule 19.4.

93) ICDR Rules, Art. 20(6); HKIAC Rules, Art. 22.2; ICSID Rules, Rule 34(1); LCIA Rules, Art. 22.1(vi); SCC Rules, Art. 31(1); SIAC Rules, Rule 19.2; UNCITRAL Rules, Art. 27(4); IBA Rules of Evidence, Art. 9(1).

94) LCIA Rules, Art. 22.1(vi); SIAC Rules, Rule 19.2.

95) IBA Rules of Evidence, Arts. 3(3), 8(2) and Art. 9(2).

96) *Id.*, Art. 9(2).

97) *Id.*, Art. 9(3).

98) ICDR Rules, Art. 22; SIAC Rules, Rule 27(o). The ICSID Rules only acknowledge the ability of the tribunal to establish procedures for the protection of privileged or proprietary information at a hearing when non-parties are present. ICSID Rules, Rule 32(2).

99) IBA Rules of Evidence, Art. 9(3)(e); ICDR Rules, Art. 22.

100) IBA Rules of Evidence, Art. 9(4).

101) IBA Rules of Evidence, Art. 9(2)(e) and (f).

102) ICDR Rules, Art. 21(5); ICC Rules, Art. 22(3); ICSID Rules, Rule 33(2).

103) ICDR Rules, Art. 20(6); HKIAC Rules, Art. 22.2; ICSID Rules, Rule 34(1); LCIA Rules, Art. 22.1(vi); SCC Rules, Art. 31(1); UNCITRAL Rules, Art. 27(4); IBA Rules of Evidence, Art. 9(1). The CIETAC, ICC and SIAC Rules do not make express provision for the tribunal to assess the weight of the evidence.

104) LCIA Rules, Art. 22.1(vi).

105) IBA Rules of Evidence, Art. 9(5) (concerning documentary evidence) and Art. 9(6) (concerning witness testimony and other evidence); ICDR Rules, Art. 21(9).

106) IBA Rules of Evidence, Art. 9(7); ICDR Rules, Art. 21(9).

107) Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, ¶¶ 7.42-7.43 (Informa Law 2012), *citing* Jeremy K. Sharpe, "*Drawing Adverse Inferences from the Non-production of Evidence*," *Arbitration International*, 549-571, at 551 (Kluwer 2006).

108) ICDR Rules, Art. 26(3); HKIAC Rules, Art. 26.3; UNCITRAL Rules, Art. 30(3).

109) CIETAC Rules, Art. 41(3).

110) ICSID Rules, Rule 34(3). Notably, ICSID is considering a proposed amendment that would require a notice to be sent to the defaulting party after 150 days of inactivity, and a further 30 days for that party to act, failing which the proceeding will be deemed discontinued. *See ICSID Synopsis,* para. 53.

111) SCC Rules, Art. 35(3).

112) SIAC Rules, Rule 27.1.