Milbank

Litigation & Arbitration Group

Dispute Resolution Briefing

Fact Evidence Reforms in 2021: Building Flexibility and Maintaining Integrity

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In the last five months, there have been multiple developments relating to the use and presentation of fact evidence both in English litigation and international arbitration. This briefing compares and contrasts the reforms introduced by the English courts and the arbitral community in 2021 in three particular areas: remote evidentiary hearings in a post-Covid environment, illegally obtained evidence, and the accuracy of witness evidence.

Remote evidentiary hearings

In February 2021, the International Bar Association ("**IBA**") formally released its updated Rules on the Taking of Evidence in International Arbitration (the "**2020 IBA Rules**").[1] The rules include new provisions on remote hearings, which reflect "*the tools implemented and the practices adopted*" in arbitrations during the Covid-19 pandemic.[2]

The prior version of the IBA rules (the 2010 rules) did permit evidentiary hearings to be conducted in person or by teleconference, videoconference, or another method. However, a new Article 8.2 in the 2020 IBA Rules sets out a procedure for the Tribunal to order a remote evidentiary hearing on its own motion or at

[1] The IBA rules are non-mandatory rules, which parties and Tribunals may adopt in whole or in part in their arbitrations, and which are intended to supplement the legal, institutional, or other rules that govern the arbitration.

[2] Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration (January 2021) (the "**Commentary**"), page 25.

the request of a party. The Commentary to the 2020 IBA Rules states that Article 8.2 "*encourages arbitral tribunals to be pro-active and consider time, cost and environmental concerns when assessing whether the evidentiary hearing should be conducted remotely.*"[3] Where an evidentiary hearing is to be held remotely, a protocol will be established through consultation with the parties, "*to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions*."[4]

Correspondingly the 2020 IBA Rules remove the default position under Article 8.1 of the 2010 rules that each witness should appear in person. To address the concern that a witness giving evidence remotely may be "*improperly assisted by other persons or make improper reference to documents*",[5] Article 8.2 provides that the remote hearing protocol may set out procedures governing how documents are placed before a witness and measures that will be taken to ensure that witnesses are not "*improperly influenced or distracted.*"[6] Examples of potential measures (including questioning the witnesses about their surroundings and installing mirrors behind the witness) are provided in the Commentary to the new rules.

The English courts have also recognised the need to adapt their procedures in 2020 to accommodate remote hearings during the pandemic. However, in contrast to the 2020 IBA Rules (and the approach taken in other recent updates to institutional arbitration rules),[7] remote court hearings seem to be viewed more as a temporary measure necessitated by the current crisis, and recently there has been a shift back to in-person evidence. In view of the easing of lockdown restrictions in the UK, the Lord Chief Justice stated that it will be "*desirable to increase attendance in person where it is safe and in the interests of justice*"[8] and the Commercial Court "*expects that most trials should look to be in court*"[9] from the middle of May 2021. In-person oral evidence given under cross-examination is seen as the "*gold standard*" by the English courts.[10]

By way of an example of the English courts' continuing preference for in-person evidentiary hearings, in January 2021, the High Court refused to adjourn a five-week trial in Bilta[11] (a case relating to alleged dishonest assistance), despite the government's lockdown restrictions which were in effect at that time. The judge noted that during the pandemic, there had been a dramatic shift to remote hearings and that "*[a]s a general rule of thumb…interlocutory hearings and other hearings not involving witnesses can, and therefore should, in light of the present prevailing circumstances, be heard remotely.*"[12] However, whilst holding that a remote process would not be unfair, the Court noted that, where there is a need to cross-examine witnesses, such examination is best done in person and that "*particularly in this case, where honesty is at issue – giving evidence remotely ranks as second best.*"[13] The Court ordered a hybrid hearing with strict limits on the number of people present and a detailed trial timetable to avoid any "*waiting around of witnesses*".[14]

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[3] Commentary, page 25.
[4] Article 8.2, 2020 IBA Rules.
[5] Commentary, page 25.
[6] Article 8.2, 2020 IBA Rules.
[7] See, for example, the LCIA Arbitration Rules 2020 and the ICC 2021 Arbitration Rules.
[8] Message from the Lord Chief Justice: Courts Recovery (17 March 2021), https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-courts-recovery/.
[9] April 2021 Meeting Minutes of the Commercial Court User Group Meeting, page 2.
[10] Bilta (UK) Limited & Ors v SVS Securities Plc & Ors [2021] EWHC 36 (Ch) at [14(4)], quoting R (Dutta) v General Medical Council [2020] EWHC 1974 (Admin) 414 at [39]; see also the April 2021 Meeting Minutes of the Commercial Court User Group Meeting, page 2.
[11] Bilta (UK) Limited & Ors v SVS Securities Plc & Ors [2021] EWHC 36 (Ch) ("**Bilta**").
[12] Ibid at [14(3)]; see also the Protocol Regarding Remote Hearings published on 26 March 2020 at paragraph 12 ("*It will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.*")
[13] Bilta at [19(5)].
[14] Ibid at [19(3)].

The difference in approach between the English courts and arbitration might reflect a key principle of international arbitration: party autonomy on matters of procedure. Considered in that light, the 2020 IBA Rules recognise that some parties, particularly in an international dispute, may prefer that hearings, including those involving the provision of witness evidence, are conducted remotely even after coronavirus restrictions are lifted, and the rules provide the flexibility to facilitate this (even if, in the English courts' view, this might risk, in some cases, potentially prejudicing the integrity of the oral evidence).

Illegally obtained evidence

Under the 2020 IBA Rules, a Tribunal has a broad discretion to determine the admissibility, relevance, materiality and weight of evidence, subject to the limitations set out in Article 9.2 and now Article 9.3.[15] The new Article 9.3 expressly provides that the Tribunal "*may*", on its own motion or at the request of a party, exclude evidence obtained illegally. In contrast to the grounds for the exclusion of evidence under Article 9.2,[16] the exclusion of illegally obtained evidence is not mandatory. This reflects the diversity of approach of national laws on whether illegally obtained evidence should be excluded. The Commentary sets out various factors that Tribunals have considered when deciding whether to exclude illegally obtained evidence, including "*whether the party offering the evidence was involved in the illegality, considerations of proportionality and whether the evidence is material and outcome-determinative, whether the evidence has entered the public domain through public "leaks," and the clarity and severity of the illegality.*"[17]

In English litigation, the position on the admissibility of illegally obtained evidence was confirmed very recently by the Court of Appeal in March 2021 in Ras Al Khaimah Investment Authority ("**RAKIA**") v Azima,[18] which involved claims of fraudulent misrepresentation and conspiracy, based largely on evidence that had been obtained through the alleged hacking of the defendant's emails. Among other grounds, Mr Azima appealed against the High Court's findings that he had not proven that RAKIA was responsible for the hacking, and he argued that the evidence should therefore be excluded and RAKIA's claims should be struck out. The Court of Appeal considered first whether, if RAKIA had been responsible for the hacking, the evidence obtained by those means should be excluded. The Court held that, "*the general rule of English law is that evidence is admissible if it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.*"[19] There are a few exceptions to this rule, including for evidence procured by torture. As the Supreme Court confirmed last year in Shagang Shipping Company Ltd (in liquidation) v HNA Group Company Ltd,[20] it is settled law that evidence of a statement procured by torture "*is not admissible and must be excluded from consideration altogether when deciding the facts in issue*".[21] This exclusion is justified on grounds of relevance, public policy and morality.[22]

However, despite illegally obtained evidence being generally admissible, the English courts still have a discretionary power under CPR Part 32.1 to exclude it. In exercising this discretion, the Court balances "*two potentially conflicting public policies in play: the achieving of justice in a particular case on the one hand; and promoting the observance of the law on the other*."[23] In RAKIA, the Court of Appeal agreed with the High Court in that even if Mr Azima had proven that RAKIA had hacked his emails, the evidence would not necessarily have been excluded, noting that an order for standard disclosure would likely have required Mr

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[15] See Article 9.1, 2020 IBA Rules.

[16] These grounds relate to: relevancy or materiality to the case's outcome; legal impediment or privilege; unreasonable burden of producing requested evidence; loss or destruction of documents; confidentiality; special political or institutional sensitivity; or procedural economy, proportionality, fairness or equality.

[17] Commentary, pages 30-31.

[18] [2021] EWCA Civ 349.

[19] RAKIA v Azima [2021] EWCA Civ 349 ("**RAKIA**") at [41].

[20] [2020] UKSC 34.

[21] Shagang Shipping Company Ltd (in liquidation) v HNA Group Company Ltd [2020] UKSC 34, at [106].

[22] Ibid at [107].

[23] RAKIA at [44].

Azima to disclose the materials in any event and the materials "*revealed serious fraud on the part of Mr Azima which would have been a very serious bar to the grant of equitable relief in his favour*".[24]

The position in English litigation with respect to the admissibility of illegally obtained evidence, as confirmed by the Court in RAKIA, is therefore similar to the 2020 IBA Rules in that both an English court and the Tribunal have discretionary powers to exclude such evidence. The express inclusion of this discretion in the 2020 IBA Rules adds clarity, whilst still preserving flexibility for the Tribunal. This is particularly important in the international context given the potentially different approaches taken by national laws on whether illegally obtained evidence should be excluded.

Accuracy of witness evidence

In January 2021, the ICC Commission on Arbitration and ADR presented its report on the Accuracy of Fact Witness Memory in International Arbitration (the "**ICC Report**").[25] This report analysed scientific research on human memory and considered whether changes should be made to current arbitration practices to maximise the accuracy and probative value of fact witness evidence. The ICC Report highlighted that the memory of an honest witness can easily be distorted, and that greater awareness of the causes of such distortion is key to improving witness reliability. The ICC Report sets out different steps that everyone involved in the arbitration (including in-house counsel, outside counsel and the Tribunal) could take to reduce the risk of memory distortion. These include:

In-house counsel:

- Avoid establishing a "*party line*" to potential witnesses, which could distort their memory of events.[26]
- Minimise memory contamination by discouraging witnesses from discussing the matter amongst themselves where it is unnecessary to do so.
- Involve external counsel early on, and then "*identify and preserve witness evidence while it is still fresh and authentic.*"[27]

Outside counsel:

- Interview witnesses individually (where practicable) and at the earliest opportunity, and keep detailed, accurate records of all interviews.
- Use documents carefully during interviews and when preparing witness statements to avoid distorting or contaminating a witness's memory.
- Establish "*good practice rules*" at the start of the arbitration about who should draft witness statements and how.[28]

Tribunal:

- Consider discussing the taking of evidence with parties at the outset to avoid memory contamination, or whether it would be appropriate to require witness statements to include descriptions of how they have been prepared.

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[24] Ibid at [47].
[25] https://iccwbo.org/media-wall/news-speeches/new-icc-report-takes-bold-move-to-tackle-unreliability-of-witness-testimony-in-arbitration/. The ICC Report was published in November 2020.
[26] ICC Report, paragraph 5.5(e).
[27] Ibid at paragraph 5.5(g).
[28] Ibid at paragraph 5.22.

The Commission's recommendations are not mandatory, and the ICC Report emphasises that the appropriateness of each suggested step should be considered on a case-by-case basis, as in some circumstances the steps may be impractical, inefficient, or may even negatively impact accuracy. For example, while interviewing witnesses individually may help avoid memory contamination, sometimes a group meeting can be productive as witnesses may help each other to recall details.

The English courts have also recently considered the malleability of witnesses' memories. The Statement of Best Practice appended to the new Practice Direction 57AC (which came into force just over a month ago) states that human memory "*is a fluid and malleable state of perception… and therefore…is vulnerable to being altered by a range of influences*".[29] Like the ICC Report, Practice Direction 57AC provides that legal representatives should avoid asking leading questions and instead use open questions when interviewing witnesses, and should minimise revisions to draft witness statements to avoid corrupting the witness's recollection.

However, the new Practice Direction also sets out strict requirements relating to how a trial witness statement should be prepared and what must be included in it. For example, the witness statement must state whether the witness's memory has been refreshed by considering documents, and if so how and when.[30] Additionally, if a trial witness statement is "*not based upon evidence obtained by means of an interview or interviews*" the process used instead should be described at the start of the statement.[31] This contrasts with the approach recommended in the ICC Report, which suggests that a Tribunal "*might…consider requiring that each witness statement include information about the way in which it was prepared*"[32] or that parties might choose to include this information "*with a view to enhancing the reliability of the evidence of those witnesses in the eyes of the tribunal*",[33] rather than recommending that these steps are taken routinely. Indeed, it was the firm view of the ICC's Task Force that preparation of witness evidence should only be the subject of inquiry by the Tribunal in exceptional circumstances where "*preparation is an important issue going to the essence of the particular testimony.*"[34]

A key distinction to be drawn between the ICC Report's recommendations and Practice Direction 57AC is that the latter prescribes mandatory procedures that apply to all trial witness statements signed on or after 6 April 2021 in the Business and Property Courts of England and Wales. The optional nature of the ICC recommendations provides flexibility for practitioners and Tribunals to implement procedures appropriate for the individual circumstances of a particular arbitration.

Conclusion

The fact evidence reforms proposed and implemented in 2021 by the English courts and the international arbitration community obviously seek to achieve the same thing: a balance between flexibility and preserving the integrity of the evidence. However, the reforms differ in their emphasis. There is a clear divergence between the flexible approach to fact witness statements proposed by the ICC Report for international arbitration, and the mandatory rules in place under Practice Direction 57AC for Court based litigation. Perhaps more significantly though, the English courts seem adamant on a return to face-to-face hearings as Covid-19 restrictions ease in order to preserve the 'gold standard' of cross-examination in person – whereas the international arbitration community (spurred on by recent amends to the IBA rules and the major institutional rules) appears to consider that remote hearings might well be here to stay.

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[29] Appendix to Practice Direction 57AC, Statement of Best Practice in relation to Trial Witness Statements ("**Statement of Best Practice**"), paragraphs 1.3(2) and (3).
[30] Practice Direction 57AC, paragraph 4.1 and Statement of Best Practice, paragraph 3.7.
[31] Statement of Best Practice, paragraph 3.12.
[32] ICC Report, paragraph 5.36.
[33] Ibid.
[34] Ibid, at paragraph 6.9.

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