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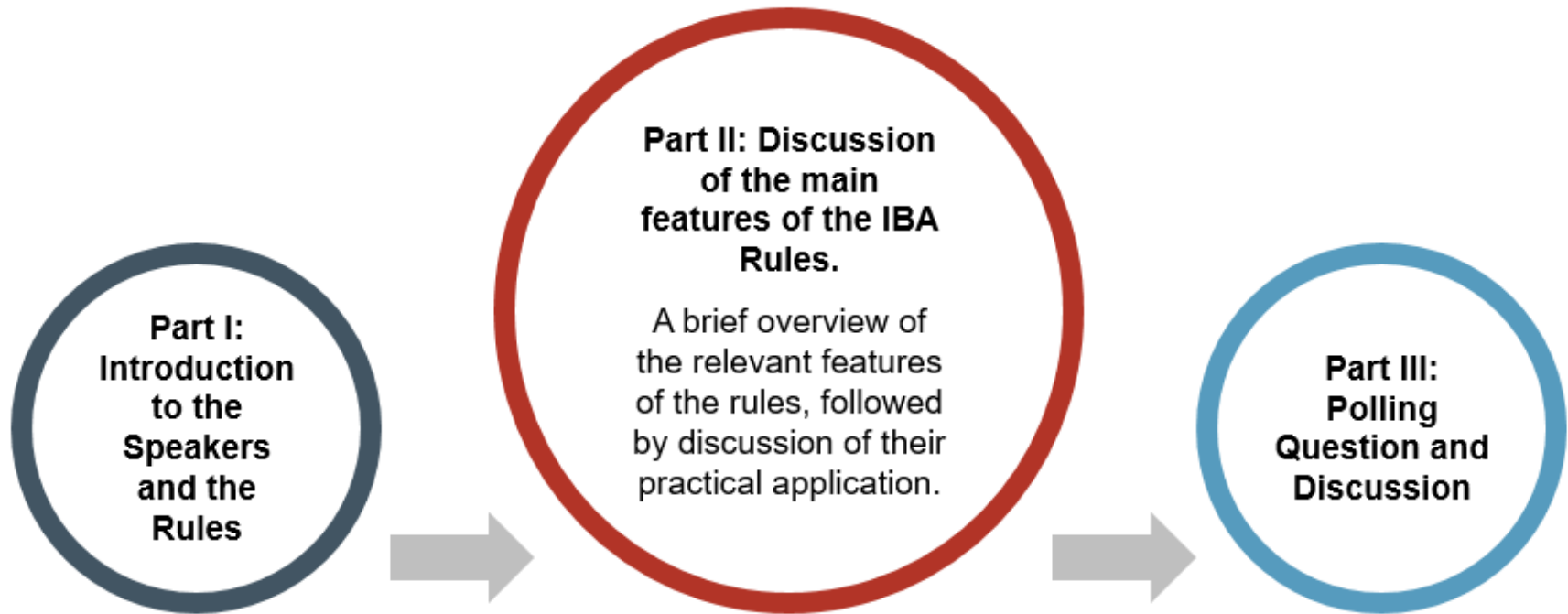
IBA APAG Webinar Series – Part 3
*Arbitration in Practice: A close look at the IBA Rules on
the Taking of Evidence in International Arbitration*

Friday, 7 August 2020

#IBAWebinars

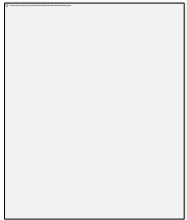


Today's Webinar



Introduction of speakers

Moderator



Sheila Ahuja
Partner,
Allen & Overy
(Singapore)



Sanjeev Kapoor
Partner,
Khaitan & Co
(India)



Ke Hu
Partner,
Jingtian &
Gongcheng
(China)



Desmond Ang
Partner,
Sidley Austin LLP
(Hong Kong)



SeungMin Lee
Partner,
Peter & Kim
(Korea)



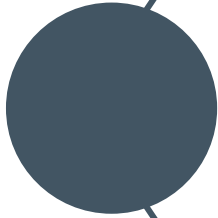
Gitanjali Bajaj
Partner,
DLA Piper
(Australia)

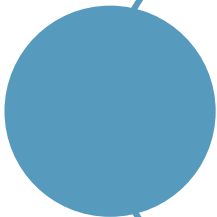


Tony Nguyen
Founder,
EPLegal
(Vietnam)

I. Introduction

The Purpose and Origins of the Rules

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- Both institutional and *ad hoc* rules provide the framework for arbitration, including provisions relating to appointments of arbitrators, initial statements of case, and costs. They are purposely silent, however, on how evidence should be gathered and presented.
 - This intentional gap can cause problems where parties come from different legal backgrounds, or parties are inexperienced in international arbitration.

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- The IBA Rules on the Taking of Evidence in International Commercial Arbitration are the mechanism to fill in the gap.
 - The Rules were drafted by a Working Party appointed by the Committee on Arbitration and ADR of the International Bar Association, and introduced in 1999.
 - In May 2010, following a two-year review process, the IBA Council approved the revised version of the Rules that are in force today.

Introduction to the Rules (Preamble, Articles 1 & 2)

A framework to promote efficiency, economy and conservation of resources, without limiting the flexibility inherent in international arbitration

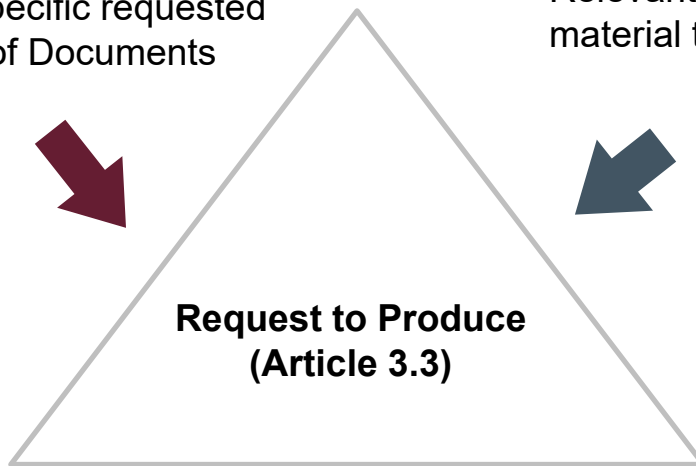


II. Main features of the IBA Rules

Document Production (Article 3)

Description of each requested Document or a narrow, specific requested category of Documents

Relevant to the case and material to its outcome



Not in the possession, custody, control of the requesting Party and assumed to be in the possession, custody, control of another Party

A Party may accept (Article 3.4) or seek to oppose or limit a Request to Produce by objecting, in writing, within the time ordered by the Arbitral Tribunal (Article 3.5).

Acceptable objections include:

- Reasons set out in Article 9.2 of the Rules.
- Failure to satisfy any requirement in Article 3.3 of the Rules.

The Arbitral Tribunal shall, in consultation with the Parties and in a timely fashion, consider the Request to Produce and the objection (Articles 3.6 and 3.7).

Document Production (Article 3)

Article 3.8

Review by expert

- In “*exceptional circumstances*”, the Arbitral Tribunal may appoint an independent and impartial expert to review the document and report on the objection.

Article 3.9

Documents from non-Party

- Upon a Party’s request, the Arbitral Tribunal may take appropriate steps legally available to obtain requested Documents from a non-Party or authorise/order a Party to take such steps.

Article 3.10

Arbitral Tribunal’s requests

- At any time before the conclusion of the arbitration, the Arbitral Tribunal may request any Party to produce Documents and the Party may object to the request for reasons set out in Article 9.2.

Article 3.12

Confidentiality

- Any Document submitted or produced in the arbitration and not otherwise in the public domain shall be kept confidential and used only in connection with the arbitration, except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.

Discussion



How do the safeguards in Article 3.3 of the IBA Rules help prevent "*fishing expeditions*" and strike a balance between the differing approaches to document production in civil and common law jurisdictions?

Article 3.3

A Request to Produce shall contain:

- (a) (i) a description of each requested Document sufficient to identify it, or
- (b) (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;
- (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.

Discussion



In what circumstances is it appropriate for the Arbitral Tribunal to appoint an independent and impartial expert to rule on an objection to production, and how does this procedure work in practice?

Article 3.8

In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

Witness and Expert Evidence (Articles 4-6)

Common features re witness statement (WS) and expert report (ER)

- Identification of witnesses/experts and subject matter within the time ordered by the Arbitral Tribunal (**Articles 4.1 & 5.1**)
- Content of the WS and ER (**Articles 4.5 & 5.2**)
- Submission of revised or additional WS/ER responding only to matters raised by another Party's evidence (**Articles 4.6 & 5.3**)
- Arbitral Tribunal's power to disregard any WS/ER by a witness/expert whose appearance has been requested, but fails without a valid reason to appear for testimony (**Articles 4.7 & 5.5**)
- Parties shall not be deemed to have agreed to the correctness of the content of a WS/ER on the basis that the appearance of the witness/expert has not been requested (**Articles 4.8 & 5.6**)

Article 4 – Witnesses of Fact

Article 4.2 (Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative)

Article 4.3 (Not improper to interview witnesses or potential witnesses and discuss their prospective testimony)

Article 4.9 (Upon a Party's request, the Arbitral Tribunal may take appropriate steps legally available to obtain the testimony of a person who will not appear voluntarily at the Party's request, or authorise / order a Party to take such steps)

Article 4.10 (At any time before the conclusion of the arbitration, the Arbitral Tribunal may request any Party provide for, or to use its best efforts to provide for, testimony of any person and the Party may object to the request for reasons set out in Article 9.2)

Article 5 – Party-Appointed Experts (PAE)

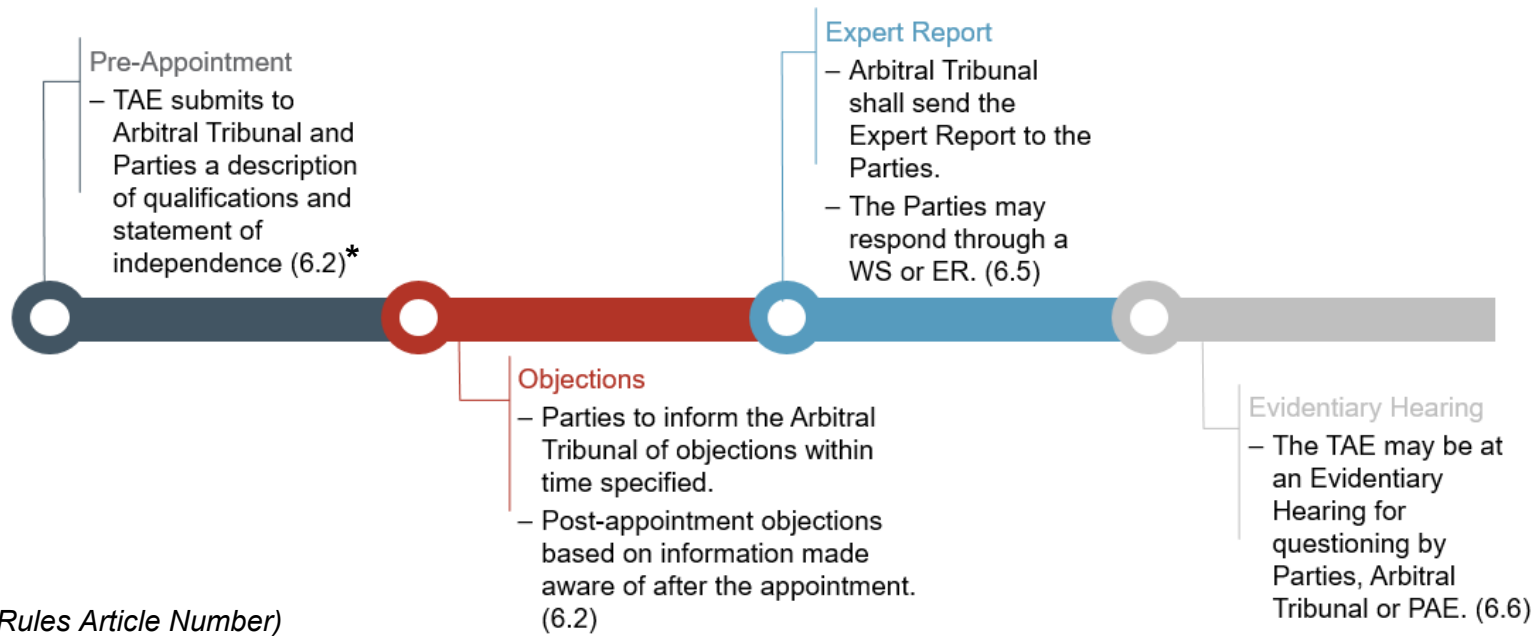
Article 5.2(b)-(c) (The ER of a PAE should include a description of the instructions pursuant to which he/she is providing his/her opinion, and a statement of his/her independence from the Parties, their legal advisors and the Arbitral Tribunal)

Article 5.4 (Expert conferral – the Arbitral Tribunal may order PAEs giving evidence on the same or related issues to meet and confer, and record in writing areas of agreement and disagreement after the meeting)

Witness and Expert Evidence (Articles 4-6)

Article 6 – Tribunal-Appointed Experts (TAE)

- General Principle: Substantial involvement of the Parties in the process, even though the expert is being appointed by the Arbitral Tribunal itself.
- The Arbitral Tribunal shall assess any expert report from a TAE with due regard to all circumstances of the case (Article 6.7).
- The fees and expenses of a TAE, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration (Article 6.8)



*(IBA Rules Article Number)

Discussion



What tools for effectively controlling the scope of witness and expert evidence are available to the Arbitral Tribunal under the IBA Rules, and how are they applied in practice?

Discussion



When is the use of tribunal-appointed experts appropriate and how does Rule 6 of the IBA Rules address the specific procedural considerations which arise therefrom?

Inspection and Evidentiary Hearing (Articles 7 & 8)

Article 7 – Inspection

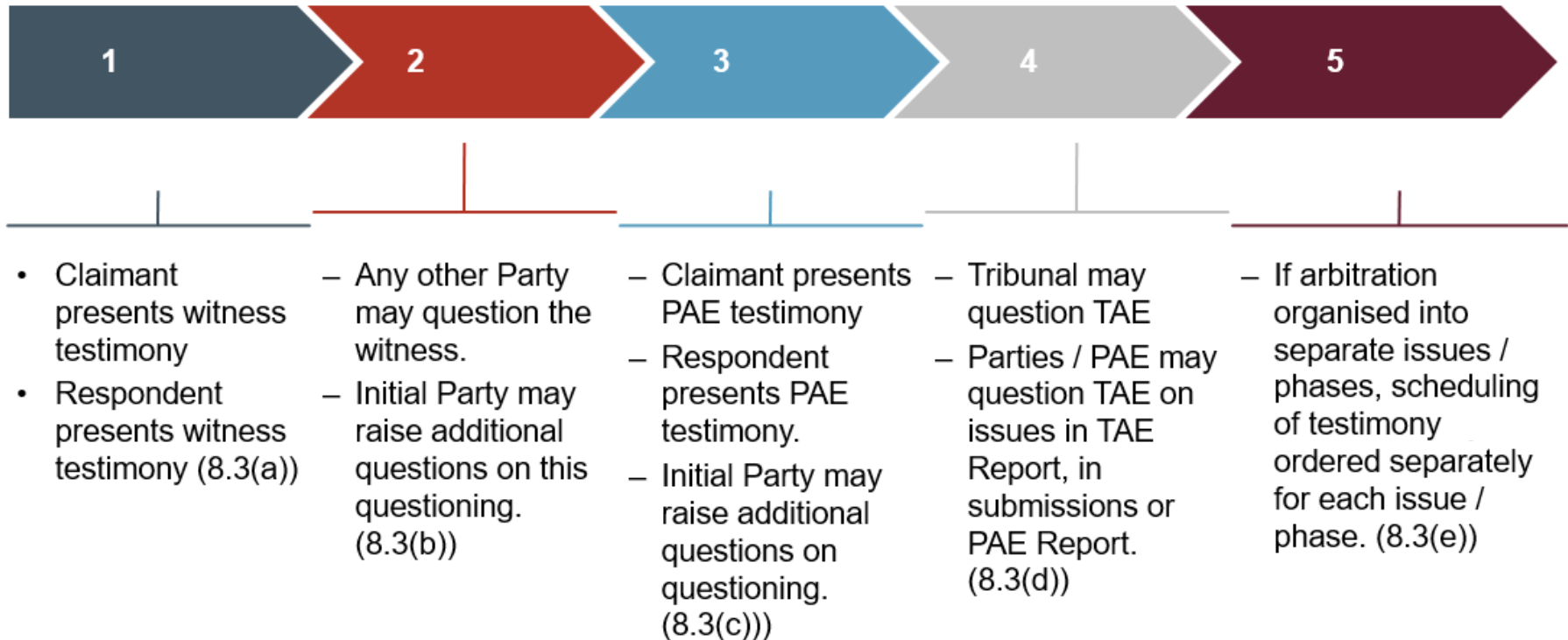
- The Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate.

Article 8 – Evidentiary Hearing

- The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing (**Article 8.2**).
- The Arbitral Tribunal may vary the order of proceedings and ask questions to a witness at any time (**Article 8.3(f) and (g)**).
- The Arbitral Tribunal may request any person to give oral/written evidence on any issue that the Arbitral Tribunal considers relevant to the case and material to its outcome, subject to the provisions of Article 9.2 (**Article 8.5**).

Inspection and Evidentiary Hearing (Articles 7 & 8)

Order of Oral Testimony (8.3)



*The Tribunal may vary this order of proceeding upon request or on its own motion. It may also ask questions to witnesses at any time (8.3(f),(g))

Discussion



In what circumstances is it appropriate for the Arbitral Tribunal to vary the template order for oral testimony in Article 8.3 of the IBA Rules (for example, to allow for witness conferencing)?

Discussion



In what circumstances is it appropriate for the Arbitral Tribunal to use its power under Article 8.5 to request *"any person to give oral or written evidence on any issues that the Arbitral Tribunal considers to be relevant to the case and material to its outcome"*?

Article 8.5

Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

Admissibility and Assessment of Evidence (Article 9)

Article 9.1 – The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

Article 9.2 – Grounds for exclusion

The Arbitral Tribunal shall 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**;
- (c) unreasonable burden to produce;
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
- (e) grounds of commercial or technical confidentiality;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution); or
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties.

Article 9.3 – Legal Impediment / Privilege

In considering issues of legal impediment or privilege under Article 9.2(b), 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.

Admissibility and Assessment of Evidence (Article 9)

Adverse Inference from a failure to produce a Document requested without satisfactory explanation (**Article 9.5**)



Adverse Inference from a failure to make available evidence (including testimony) without satisfactory explanation (**Article 9.6**)

Duty of Good Faith
Failure to act in good faith in taking of evidence may be considered in costs assignment (**Article 9.7**)

Discussion



In what circumstances would the grounds in Articles 9.2(a), (b), and (c) serve to exclude evidence?

Article 9.2

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;

(c) unreasonable burden to produce;

....

Discussion



How do the factors in Article 9.3 help address "*issues of legal impediment or privilege*" in arbitrations where parties are subject to different legal or ethical rules?

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:

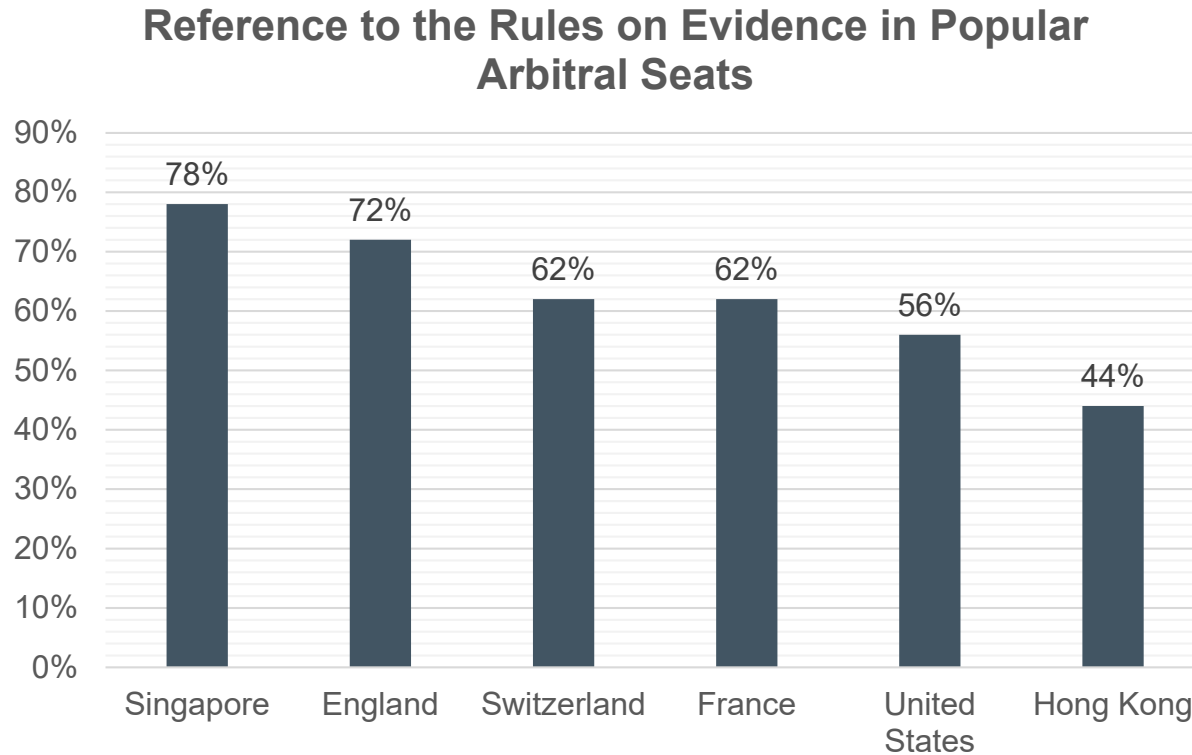
- (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;*
- (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection 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.*

III. Live Polling and Q&A

Polling Question

Q: Should the IBA Rules be adopted in all international arbitration cases?

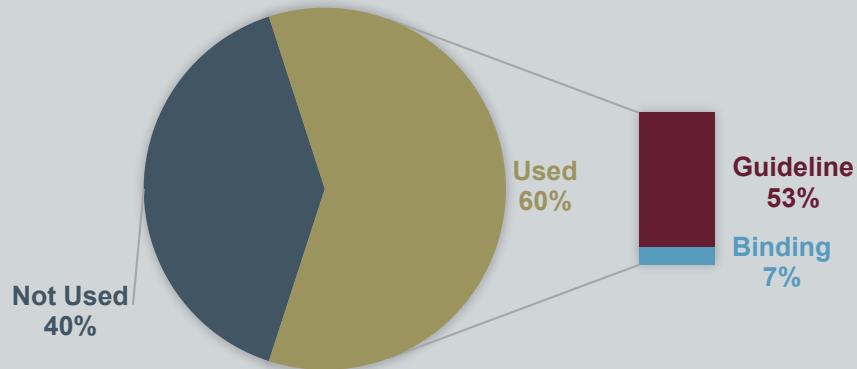
Discussion



Source: Report on the Reception of the IBA Arbitration Soft Law Products (*IBA Arbitration Guidelines and Rules Subcommittee*, September 2016)

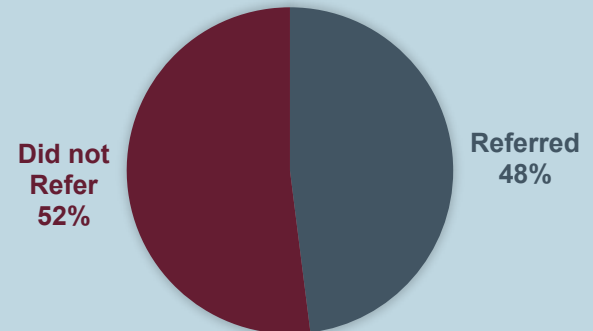
Discussion

USE OF IBA RULES IN ARBITRATIONS

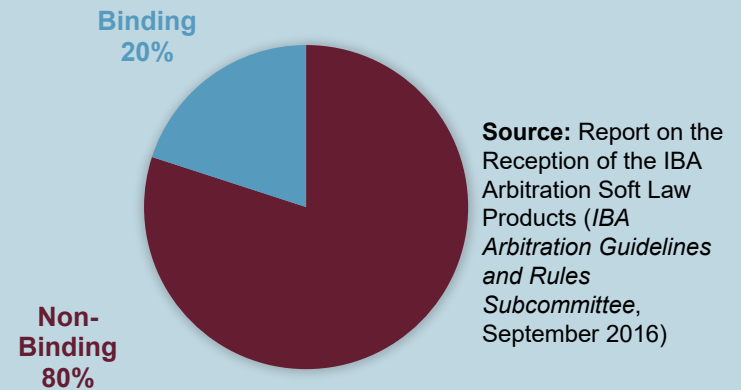


Source: 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process (Queen Mary University of London, White & Case)

REFERENCE TO IBA RULES IN ARBITRATIONS



PROPORTION OF REFERRING ARBITRATIONS TREATING THE RULES AS BINDING



Source: Report on the Reception of the IBA Arbitration Soft Law Products (IBA Arbitration Guidelines and Rules Subcommittee, September 2016)

Discussion

Are there areas for improvements in the IBA Rules?

1. Limiting scope of disclosure of documents (Article 3)
2. Differentiate Rules for different sizes of disputes
3. More tribunal's control on the taking of evidence

Q&A



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