Preamble

1 These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.

2 Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.

3 The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

IBA COMMITTEE COMMENTARY

It was considered important to identify certain general principles which governed the IBA Rules of Evidence, so that parties and arbitral tribunals could best understand how to apply them. The Preamble is also important in illustrating both what the IBA Rules of Evidence hope to accomplish and what they do not intend to do.

i. *The Preamble notes that the IBA Rules of Evidence are 'designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration'. The IBA Rules of Evidence are not intended to provide a complete mechanism for the conduct of an international arbitration (whether commercial or investment). Parties must still select a set of institutional or ad hoc rules, such as those of the ICC, AAA, LCIA, UNCITRAL or ICSID, or design their own rules, to establish the overall procedural framework for their arbitration. The IBA Rules of Evidence fill in gaps intentionally left in those procedural framework rules with respect to the taking of evidence.*

ii. *As the very first sentence of the Preamble notes, the IBA Rules of Evidence are intended to provide an 'efficient, economical and fair process' for the taking of evidence in international arbitration. This principle informs all of the IBA Rules of Evidence. The Working Party considered that as international arbitration grows more complex and the size of cases increases, it is important for parties and arbitral tribunals to find methods to resolve their disputes in the most effective and least costly manner. The Review Subcommittee revised this sentence to include expressly the principle of fairness. This change goes hand in hand with the revision to paragraph 3 of the Preamble, which now includes a requirement that each Party shall act 'in good faith' in the taking of evidence pursuant to the IBA Rules. At the discretion of the arbitral tribunal, violation of the good faith requirement can result in the consequences set forth in Articles 9.5, 9.6 and 9.7.*

iii. *It was recognised that there is not a single best way to conduct all international arbitrations, and that the flexibility inherent in international arbitration procedures is an advantage. Therefore, it was considered important to note specifically, in paragraph 2 of the Preamble, that the IBA Rules of Evidence are not intended to limit this flexibility.*

Indeed, as noted in that paragraph, the IBA Rules of Evidence should be used by parties and arbitral tribunals in the manner that best suits them.

iv. *The Preamble notes the overriding principle of the IBA Rules of Evidence that the taking of evidence shall be conducted on the principle that each party shall be 'entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the*

evidence on which the other Parties rely'. This principle infuses all of the provisions of the IBA Rules of Evidence. Accordingly, the provisions for the exchange of documentary evidence, witness statements, and expert reports, among others, provide each party and the arbitral tribunal with significant information about each side's evidence.

PARTICULAR WORDS AND PHRASES

an efficient, economical and fair process	These aims are sensible and pragmatic and they deserve universal acceptance.
different legal traditions	As the foreword to the IBA Rules states: 'The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.' The Rules seek to balance different traditions and in particular those of the common law and civil law.
may adopt … in whole or in part … to govern arbitration proceedings … may vary them … use … as guidelines … not intended to limit the flexibility … inherent in, and an advantage of, international arbitration … free to adapt …	This makes clear the flexibility of the Rules. They are only occasionally expressly adopted in an arbitration agreement and are more often included by agreement of the parties after a dispute has arisen. The IBA rules can be adopted to govern the reference or be merely guidance (persuasive or otherwise) and can be adopted in whole, part and with or without variations.

good faith	This is a new concept in the IBA Rules and perhaps the one that will generate the most controversy. It is discussed in more detail below.
entitled to know, reasonably in advance … the evidence on which the other Parties rely	This a key feature of fairness. Ambush is inimical to fairness. What is reasonably in advance will depend on the circumstances.

DISCUSSION

[P-1] At the outset it must be emphasised that the Rules seek to balance different legal traditions. As a consequence they will always be vulnerable to attack as being incomplete, vague or favouring common law or civil law traditions. This is inevitable and should not be seen as a weakness in the Rules.

[P-2] According to the Commentary to the Rules, the preamble was intended to identify 'certain general principles' which governed the Rules in order to help parties and arbitral tribunals understand how to apply them. Preambles 1 and 2 speak of 'intentions' – the purpose of the IBA Rules. This recitation of purposes can become relevant as an interpretive tool whenever questions regarding the meaning or application of the IBA Rules arise:

In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration. (Article 1.4 of the IBA Rules)

[P-3] Preamble 1 provides for an 'efficient, economical and fair process'. These words will underpin any area of ambiguity in the Rules or doubt in the mind of an arbitral tribunal. If, for example, a tribunal was in two minds whether to order disclosure under Article 3, the answer to the question whether to do so would be efficient, economical and fair will no doubt assist the tribunal. Significantly, the Rules are specifically intended to supplement institutional rules.

Most institutional rules do not get into anything like the detail that the IBA Rules do but equally the Rules do not address many of the other issues (for example, memorials and awards) that institutional rules do address.

[P-4] Preamble 2 recognises that the IBA Rules may be incorporated by express agreement (either in the arbitration agreement or subsequently) or adopted as guidance. The Rules are not intended to be a rigid framework, rather they are to provide support for the inherent flexibility of the arbitral process.

[P-5] Similarly, preamble 3 provides two *principles* for the conduct of the taking of evidence, including that 'each Party shall act in good faith'. Pursuant to Article 1.5, whenever the Rules are silent, the general principles of the Rules are to be consulted to fill any gap:

Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

[P-6] Thus, Article 1 appears to invite invocation of principle of good faith whenever the Rules do not specifically prescribe another standard for party behaviour. If so, parties and tribunals are now in possession of a powerful tool with which to insist that proceedings be conducted in a civil, honest, compliant and forthright manner. The good faith principle and the Article 3 strictures of 'documents relevant to the case' and 'material to its outcome' are the backbone of the Rules.

[P-7] By way of example, Article 3.13 imposes certain confidentiality obligations with respect to documents submitted or produced in an arbitration, but leaves an exception in cases in which:

[D]isclosure 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.

Even without the word 'bona fide', the duty of good faith in preamble 3 could be implied to circumscribe this exception to exclude bad-faith acts that have the primary purpose of disclosure rather than the protection or pursuit of a legal right, challenge of an award based on reasonable grounds or similar.

[P-8] Paragraph 3 of the preamble states that the taking of evidence shall be conducted on the principles that each party shall act in good faith. Although many commentators consider good faith to be an implicit duty in arbitration, the Rules did not contain an express requirement of good faith until the 2010 revisions. The inclusion of an express duty of good faith in the Rules is especially noteworthy as neither the UNCITRAL Model Law nor most of the sets of well-known institutional arbitral rules include an express obligation to arbitrate in good faith. Two notable exceptions are Article 15.6 of the Swiss Rules, providing that '*[a]ll participants in the proceedings shall act in accordance with the requirements of good faith*', and, to a lesser degree, Rule 34(3) ICSID Arbitration Rules, providing that '*[t]he parties shall cooperate with the Tribunal in the production of the evidence*'. The duty to arbitrate in good faith is generally considered to be derived from the contractual obligation to arbitrate.

[P-9] Whether or not these changes are viewed as introducing a new duty or merely codifying existing duties or best practices, they will increase the emphasis that is put on good faith in the coming years. The consensus among practitioners is that the IBA have merely reflected and codified good practice. It does not appear that there was any particular evil that the amendment was aimed at.

[P-10] Whilst there is, therefore, no express reference to a duty of good faith, any doubt that such a duty arises is removed by the new provision at Article 9.7. This provides that if the arbitral tribunal determines that a party has failed to conduct itself in good faith in the taking of evidence, the arbitral tribunal may, in addition to any other measures available under the Rules, take such failure into account in the allocation of the costs of the arbitration. Despite the slight variation in wording, ('act' in preamble 3 and 'conduct itself' in Article 9.7), both fairly plainly refer to the same thing. Article 9.7 appears to elevate the duty of good faith from an aspiration to a concrete obligation, the failure to comply with which, can be visited by sanctions. Although Article 9.7 does not necessarily attribute powers to the arbitral tribunal that it did not have already, it may be expected to increase the frequency with which parties request costs on this basis. Interestingly, Article 9.7 is not restricted to the costs of the taking of evidence itself (the purview of the Rules), but potentially

encompasses the entire costs of the arbitration. As always, however, the Rules are limited in their effect by the so-called 'General Rules' or any mandatory applicable law (Article 1.1).

[P-11] The type of conduct that will amount to a breach of this duty to act in good faith is not clear. That will be a matter for arbitral tribunals to consider on a case by case basis. It is inevitable that different standards will be applied by different tribunals and perhaps by tribunal members from different cultural backgrounds. Although most legal systems impose and enforce obligations to act in good faith, good faith is also a notoriously difficult concept to define. Indeed, the case law and commentary on good faith is often voluminous, even in civil-law countries. Good faith is difficult to define in the abstract and is highly fact-dependent in its application.

[P-12] At least initially, this new provision will not therefore provide parties with any certainty as to what conduct will be considered to be inappropriate. Indeed, this uncertainty might well be considered a negative feature of the new Rules, particularly in light of the express link between the duty to act in good faith and the later allocation of costs.

[P-13] Using the tribunal's discretion on the allocation of costs to encourage good behaviour during the course of the arbitration is a mechanism that other arbitral bodies have also introduced. For example, in its *Guidelines for Arbitrators Concerning Exchanges of Information*,[4] the ICDR guideline 8(b) provides that in the event any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.

[P-14] Similarly, in the Techniques *for Controlling Time and Costs in Arbitration*[5] the ICC Commission states at para. 85 that, '*the allocation of costs can provide a useful tool to encourage efficient behaviour and discourage unreasonable behaviour*'. That report goes on to give examples of unreasonable behaviour, including, in the context

[4] Available at http://www.adr.org/si.asp?id=5288.
[5] Available at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

of the taking of evidence, excessive document requests and excessive cross-examination.

[P-15] Article 9.7 envisages that, following a determination that a party has failed to conduct itself in good faith in the taking of evidence, the tribunal may take this into account not only in the allocation of costs arising out of the taking of evidence, but also in the allocation of the costs of the arbitration generally. This might appear to be an example of the Rules extending their reach beyond matters relating to the taking of evidence. However, in practice, it is appropriate that in order to achieve a fair result and penalise bad conduct in a proportionate way, arbitral tribunals should have discretion over the costs of the entire arbitration (such discretion is likely to exist in any event under the general rules which govern the arbitration).

[P-16] A tool that the new Rules do not make use of expressly is the making of interim costs orders. Requiring the parties to pay as they go has been shown in commercial litigation to have a dramatic effect in discouraging unmeritorious interim applications. Such interim orders are particularly well suited to discouraging excessive document production requests. The use of such orders in arbitration is, however, complicated by the fact that they are likely to require the making of interim awards.

[P-17] It appears that under most circumstances the duty to act or conduct oneself in good faith in the taking of evidence should not be interpreted to impose positive duties beyond those expressly imposed by the Rules. By way of example, the duty of good faith would not be interpreted to require voluntary submission of documents that would be adverse to the party's case assuming that there was otherwise no duty to do so pursuant to Article 3.1 (i.e. because the submitting party did not choose to rely on such documents) or pursuant to Article 3.3 (because the documents had not been properly requested). Similarly, the duty of good faith would appear not to give rise to an affirmative duty to preserve evidence or prevent destruction of *potentially* relevant (as opposed to known relevant) and material evidence once a dispute appears likely since the Rules do not impose such an express duty. Of course, should the parties or the arbitral tribunal agree on data preservation measures

in the context of an Article 2 consultation, the duty of good faith would then appear to require good faith compliance with such measures.

[P-18] Any attempt to define the duty, certainly includes the negative duty to abstain from any bad faith failure to comply with express obligations under the Rules. Under this approach, the bad faith violation of each positive obligation could amount to a corresponding lack of good faith. The duty of good faith is also susceptible to a more expansive interpretation that would prohibit any bad faith acts that undermine the system and purpose of the IBA Rules to provide an, 'efficient, economical and fair process for the taking of evidence' (preamble 1).

[P-19] Examples for bad-faith violations related to Article 3 could, depending on the circumstances of the particular case, include the following violations of express obligations under the IBA Rules:

- Article 3.1: Failing to produce all documents on which a party relies with the intention of ambushing or surprising parties or witnesses with documents in violation of the second principle enshrined in preamble 3.[6]
- Article 3.3: Submitting requests to produce that are intentionally burdensome, excessive, irrelevant or immaterial. Although such requests may be objected to on formal or substantive grounds pursuant to Articles 3.3 and 9.2, the duty of good faith could also be relevant, for example, if the decision-making process triggered by bad faith requests itself amounted to a bad faith attempt to burden the other parties or delay the proceedings.
- Article 3.4: Producing documents in a manner intended to burden the receiving party unduly, e.g. by 'burying' responsive documents under reams of unimportant or unresponsive documents.
- Article 3.5: Raising objections to requests to produce without a reasonable and good-faith basis or with the intention of delaying or disrupting the taking of evidence.

[6] Although note that the Rules themselves contemplate additional documents with witness statements (Article 4.5(b)).

- Article 3.12(a): Any kind of tampering with documents submitted or produced, including by manipulating electronic versions of documents (cutting or pasting), abridging, redacting or excerpting from documents, with the intent of misleading the arbitral tribunal or the other parties.
- Article 3.12(b): Submitting data in a form other than the agreed or default form with the intent to hide information, prevent electronic searching or otherwise burden the other party.
- Article 3.12(d): Submitting translations that are substantively misleading or disguising the fact that a document has been translated at all (i.e. by failing to mark it as a translation or failing to submit the original) with the intent of hiding information or misleading the arbitral tribunal or the other parties.
- Article 3.13: Disclosing otherwise confidential materials with the intent of pressuring or harming another participant in the arbitration, including by causing negative publicity; invoking an exception to confidentiality contained in Article 3.13 without a reasonable or good-faith basis.

[P-20] On the basis that Preamble 3 also prohibits bad faith acts that undermine the exchange of documents as foreseen by Article 3 (implicit violations of good faith), such indirect means could include intentionally destroying documents that are responsive to a valid Article 3.3 request for documents. On this level, the duty of good faith could also be interpreted to imply a duty to conduct a reasonably diligent search for documents as to which the party makes no timely objection or whose production has been ordered by the arbitral tribunal. Although more closely connected with Article 9.2(g), the duty of good faith under Preamble 3 should likely also be viewed as preventing the submission of evidence knowingly obtained by improper means.

[P-21] A lack of good faith could arise in the violation of the express obligations under Article 4.1 by failing to identify all witnesses on whose testimony a party intends to rely with the intent to ambush or surprise the other parties.

[P-22] On the basis that Preamble 3 also prohibits bad faith acts that undermine the provision of witness testimony as foreseen by