Production of Physical Evidence in International Arbitration – A No Go?

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I. Introduction

With the proliferation of the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "IBA Rules") throughout the international arbitration sphere, as well as the more recent publishing of the Rules on the Efficient Conduct of Proceedings in International Arbitration (the "Prague Rules") in 2018, the importance of evidence production procedures continues to be a topical and interesting subject for practitioners and academics alike. Particularly the question of the efficient nature of such procedures in both international investment and commercial arbitration has received extensive academic attention in recent years.

The international arbitration scene has seen numerous comprehensive and detailed contributions discussing the merits of the IBA Rules as a guide for such evidentiary procedures, as well as proposing solutions to ensure such procedures are conducted to ensure factors such as time and cost are reduced. Similarly, the Prague Rules have been discussed as a potential, civil law focused, alternative to the IBA Rules by providing arbitral tribunals with greater powers to get more directly involved in the evidentiary process. What has received considerably less attention, however, is the precise scope of evidentiary procedures in international arbitration. The phrase "document production" is frequently used as a synonym for the evidentiary phase of arbitral proceedings despite the term "evidence" having a far broader scope of application that the synonymous use of "document" would suggest.

In researching this article, the authors were confronted with an abundance of scholarly work on the evidentiary proceeding in general but were surprised to find that very limited work has been done to adequately explore the appropriate limits of such evidence production. For this reason, the authors intend to explore the scope of document production and whether or not more express reference is needed to a party's entitlement to request not only the production of documentary evidence but also other, physical evidence.

In conducting this exploration, the authors will briefly examine the importance of the production of evidence in arbitral proceedings more generally and then turn to the rules adopted by various arbitration institutions and rules concerning the procedure. Naturally, the IBA Rules and Prague Rules will be

examined as some of the more important and recent contributions toward this issue. Finally, and on the basis of the aforementioned, the authors will assess whether current arbitral practice does or does not entitle parties to seek the production of physical evidence in the context of the evidentiary procedures.

II. Evidence Production in Arbitral Proceedings

The production of evidence forms a key component of any arbitral proceeding as factual determinations will, in virtually all cases, form the foundation of any arbitral award.[1]) Despite this important role within an arbitral procedure, not all institutional arbitral rules expressly provide for the means and manner in which such evidentiary procedures are to be conducted.[2]) Generally, where no express provision regarding the evidentiary procedure is stipulated, institutional rules (and national laws) will include a general empowerment of the arbitral tribunal to conduct the procedure of the arbitration with a significant degree of discretion.[3]) It is this discretion that forms the basis for the arbitral tribunal's authority to order a party to produce documents within the context of an arbitral procedure.[4])

An example of such empowerment is contained in the ICC Rules (2017), where, in Article 25(1), the arbitral tribunal is required to "*establish the facts of the case by all appropriate means*".[5]) Article 25(5) also provides "[a]*t any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence*". The ICC Rules include an express reference to the arbitral tribunal's power to order the production of evidence on its own volition. It does not, however, provide express language upon which a party to an arbitration could rely to request the production of evidence by another party. While the parties should not be deemed to have an automatic duty to request to obtain document production in international arbitration,[6]) it is virtually

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[1]) J. Waincymer, Procedure and Evidence in International Arbitration 743 (2012); G. Born, International Commercial Arbitration 2210 (2nd ed., 2014); N. Blackaby, C. Partasides, et al., Redfern and Hunter on International Arbitration para. 6.75 (6th ed., 2015).

[2]) A notable exception to this is the International Centre for Dispute Resolution Arbitration Rules 2014, which in Article 21 sets out concrete procedures for the exchange of information in the course of arbitral proceedings. In this regard, *see also* R. Marghitola, Document Production in International Arbitration International Arbitration Law Library, Vol. 33, 185, 29–30 (2015).

[3]) Born, *supra* note 1, at 2341–2343.

[4]) Waincymer, *supra* note 1, at 836.

[5]) Further provisions on the manner in which the arbitral tribunal is to conduct the arbitration are also contained in Article 22, where the considerations of time and cost are expressly identified.

[6]) ICC Commission Report – Managing E-Document Production, Techniques for Managing Electronic Document Production When it is Permitted or Required in

undisputed that the provision empowering the arbitral tribunal to order the production of evidence extends to such procedures whereby the parties submit a request for such production, upon which the arbitral tribunal's order is subsequently based.[7])

The Vienna Rules (2018) provide a slightly more expansive example of an arbitral institution providing the parties with a right to request of the arbitral tribunal the production of evidence by the other side. In Article 28(2), the Vienna Rules expressly recognize the arbitral tribunal's authority to consider "*requests for the taking of evidence*". While this provision is clearly directed at the arbitral tribunal, as opposed to the parties themselves, the language of the provision clearly carves out the procedural opportunity for parties to submit such requests for evidence. In addition to this provision, like the ICC Rules, the Vienna Rules also empower the arbitral tribunal to order the production of evidence on its own initiative.[8])

In these ways, all arbitral rules, be they national, international or institutional, provide their own method by which the evidentiary procedures may be conducted. The universal recognition of their importance is based in large part on the parties' right to be heard and the right to duly present their case.[9]) These rights are core to any legal proceeding and form key aspects of arbitral procedures to which any arbitral tribunal must abide. The right to present one's case is of particular importance in the context of evidentiary procedures, as a restriction in access to evidence could seriously frustrate a party's ability to adequately establish the facts of the dispute. Naturally, no party is entitled to unlimited latitude in this regard,[10]) parties must have access to some foundation for their claims before seeking the production of evidence from another party, but these rights form important considerations for arbitral tribunals when needing to decide on whether to order the production of evidence.

Both of these rights are tempered and reinforced by further obligations generally considered to be imposed on the arbitral tribunal. The fundamental legal standard of equal treatment is, in principle, universally applicable to all aspects of arbitral proceedings and contained in such principles of the "equality of arms" and "equality of treatment".[11]) Additionally, the arbitral tribunal is

International Arbitration (2012) Report of the ICC Commission on Arbitration and ADR Task Force on the Production of Electronic Documents in International Arbitration, 2.

[7]) Born, *supra* note 1, at 2341–2342.

[8]) Vienna Rules 2018, Article 29(1); *see also* F. Haugeneder & P. Netal, Vienna Handbook Article 29, 208, para. 3 (2019).

[9]) P. Peters, *Waiter, I did not order this! – The Arbitrator and the Evidentiary Excess*, Kluwer Arbitration Blog, November 24, 2010.

[10]) Waincymer, *supra* note 1, at 751.

[11]) Born, *supra* note 1, at 2173.

expected to conduct a "*fair process*".[12]) Both of these factors require the arbitral tribunal to weigh the interests of the parties against each other in order to reach a just result and allow the proceedings to proceed (preferably in an economical manner). The parties are to be given the opportunities necessary to act upon their rights, to be heard and present their case, which may often include affording them access to evidence in the possession of the other party.

Despite the pivotal role played by the evidentiary procedures in ensuring the fairness of arbitral proceedings, it is imperative to ensure the production of evidence is not abused. For this reason, most arbitral rules do not prescribe a general and unrestricted right for the parties to have evidence disclosed to them.[13]) Any request for the production of evidence by a party must also attest to the relevance and materiality of that evidence to their respective case.[14]) This standard limits the extent of any request for evidence and is generally seen as striking a balance between the interest of the requesting party to have access to evidence necessary to present its case and those of the party in possession of the evidence to not be unduly burdened with the need to make excessive amounts of evidence available to the opposing party and, in the end, to the tribunal. The requirement to demonstrate the relevance and materiality of any requested evidence contributes to the fairness of arbitral proceedings by ensuring that neither party is unduly burden by the procedural aspects of the proceedings. Furthermore, it bridges the gap between the expectations of parties coming from a civil law background on the one hand and from the common law system on the other hand.

There have also been suggestions, arising out of a desire to ensure the evidentiary proceeding is conducted efficiently, that requests for evidence production should only be accepted where that evidence would be required by the requesting party to discharge its burden of proof.[15]) This would further limit a party's ability to request evidence and could potentially be considered to place an undue burden on the requesting party for having to establish precisely how the evidence would contribute to meeting its burden of proof without ever having seen the requested evidence. This debate cannot be properly discussed in this article, but the authors felt it pertinent to raise the issue in the context of evidentiary procedures more generally as it establishes some of the more restrictive views on the production of evidence.

Ensuring access to evidence for the parties to an arbitration is pivotal to safeguarding the rights of the parties and the overall fairness and justness of the arbitral proceedings, in particular where the parties' access to evidence is

[12]) IBA Rules on the Taking of Evidence in International Arbitration 2010, Preamble, para. 1.

[13]) Born, *supra* note 1, at 192.

[14]) IBA Rules on the Taking of Evidence in International Arbitration 2010, Article 3(3)(b); Waincymer, *supra* note 1, at 842.

[15]) J. Sicard-Mirabal & Y. Derains, Introduction to Investor-State Arbitration 202 (2018).

disproportionate.[16]) Practical examples of situations in which the parties might find themselves with disproportionate access to the relevant evidence include post-M&A disputes, large construction contracts, insurance cases and in investment arbitrations.[17]) This problem of disproportionate access to evidence is compounded where physical evidence is concerned. The need for access to physical evidence is often associated with a particular item, such as specific damaged goods, supplied chemicals or even contaminated soil samples, in particular in warranty or damage claim cases where, evidently, the opposing party may be keen to obstruct the taking of evidence. These items are not readily available or accessible as they are usually in possession of one of the parties to the dispute but not the other.

Take for example the situation where two parties enter into a commercial relationship for the supply of mechanical components. The seller warrants the performance of the components and the purchaser subsequently raises a warranty claim, alleging the component to have contained a defect. While, ordinarily, the purchaser bears the burden of proof to establish that the defect exists or that a consequential damage was in fact caused by a defect, certain presumptions (such as might arise in relation to latent defects) can act to shift the burden of proof to the seller. The seller would then, rightly, request access to the defective component in order to ascertain the veracity of the warranty claim raised by the purchaser. The seller needs to have access to the specific mechanical component in question, as an examination of the properties of the component is, likely, the only way to assess whether the damage complained of was in fact caused by such latent defect. Ordinarily, if both parties act in good faith, the seller will be afforded the opportunity to inspect the damaged component. This does not necessarily need to be case, however, as tension between the parties or the threat of high damage claims might very reasonably cause a degree of hostility to arise and result in the breakdown of their cooperation and, to say the least, reluctance to provide access to evidence that might actually prove the other side's claims.

In this context, it may be imperative for the seller to use the evidentiary procedures only available in arbitral proceedings to obtain access to physical evidence in order to be able to present their case. The question arises, however, whether the evidentiary procedures envisaged by arbitral institutions are generally considered to provide for the possibility of a party requesting the production of physical evidence, and not only written documents.

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[16]) Born, *supra* note 1, at 192.

[17]) K.H. Böckstiegel, *Taking Evidence in International Commercial Arbitration – Legal Framework and Trends in Practice*, *in* The Taking of Evidence in International Commercial Arbitration 5 (Böckstiegel, Berger & Bredow eds., 2010).

III. International Rules and Guidelines on the Production of Physical Evidence

The starting point for this assessment must be an examination of the language of various institutional rules that, in addition to the applicable national laws, provide for the competences of the arbitral tribunal. Since arbitration is based, in large part, on the parties' autonomy, the parties are also able to prescribe specific procedural rules to which the arbitral tribunal must abide, but it is likely that the parties will rely on existing national and international legal frameworks to dictate the manner in which the evidentiary proceeding is to be conducted. Therefore, the authors have actually, in their practice, never encountered specific agreements of the parties that force one side to freely grant access to the other party.

An example of rules that provide for a restrictive scope to the type of evidence that parties may request to have produced in the course of arbitral proceedings can be found in the International Centre for Dispute Resolution's ("ICDR") Arbitration Rules (2014), by the American Arbitration Association.[18]) In Article 21, these rules refer only to "*information exchange*" and "*documents*", whereby the term 'documents' appears to be used as the specific type of information that can be requested. Specifically, the arbitral tribunal is only empowered, pursuant to the language of Article 21(4), to require a party to make available *documents* in their possession. The ICDR appears to have adopted a very limited view as to the type of evidence that is to be exchanged between the parties in arbitral proceedings. It should be noted, however, that those same rules, pursuant to Article 21(2), expressly provide for the ability of the parties to mutually agree, in consultation with the arbitral tribunal, on the appropriate level of information exchange. There is therefore scope to agree on an expansion of the type of evidence that can be exchanged between the parties. Such ex post agreements are unlikely to occur, however, as parties may be hesitant to offer their opposing party access to evidence that may weaken their own case. In addition, since clear provision is made to allow for an expansion, it is likely that the language of the ICDR Arbitration Rules should be interpreted narrowly as it is easier to argue that any broadening should rightfully fall under the need to mutually agree on an expansion under Article 21(2). Therefore, the language of the ICDR Arbitration Rules, devoid of any contrary agreement, would appear to preclude the ability to request the production of physical evidence in its entirety.

Turning to less rigid arbitration rules, as previously mentioned, the ICC Rules do not provide for any specific mention of the manner in which the evidentiary proceeding is to be conducted. In Article 25(5) the arbitral tribunal is empowered to summon a party to provide additional 'evidence', but no

[18]) A similar, restrictive scope is contained in the LCIA Arbitration Rules, Article 22(1)(v).

further clarification is provided as to whether this is limited to documentary evidence or includes the potential to order the production of physical evidence. It seems, however, that such requests must, in any case, stem from the arbitral tribunal itself and not from the opposing party. It could therefore be rightfully discussed whether the tribunal itself, by applying Article 25(5), is entitled to interfere with general burden of proof rules by ordering one party to make accessible evidence that this party has not voluntarily relied upon in the proceedings.

The Vienna Rules similarly refer only to the production of 'evidence' in general. The reference to 'evidence' in the Vienna Rules actually constitutes a broadening of the scope of the type of evidence that may be ordered. The 2006 version of the Vienna Rules was limited to the terms "*documents and visual evidence*",[19]) which was changed to the broader term 'evidence' with the entry into force of the Vienna Rules 2013.[20]) Despite this broadening of the term, the Vienna Handbook, the commentary on the Vienna Rules, continues to refer solely to documentary evidence in its discussion of the arbitral tribunal's power to order the production of evidence.[21]) Still, it must be pointed out that the broadening of the wording cannot be considered to be meaningless and therefore certainly entitles the arbitral tribunal to issue broader production orders, at least on specific request.

Like the Vienna Rules, the ICSID Convention also refers to the broader term 'evidence' but does so alongside the narrower 'documents' when it states: "[…] *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*".[22]) Unfortunately, this suggestion toward a more expansive scope is not retained in the ICSID Arbitration Rules (2006), which, in a very similar provision to that contained in the ICSID Convention, refers solely to 'documents'.[23]) This reduction in the apparent scope between the ICSID Convention and Arbitration Rules could lend credence to the notion that the reference to "other evidence" in the Convention might preclude an interpretation that includes the production of physical evidence.

The more recent work being done on the amendment of the ICSID Arbitration Rules has included an overhaul of the provisions on evidence. In the first Working Paper, the ICSID Secretariat suggests a new Rule 40, which would incorporate the broader "*documents and other evidence*" into the new Arbitration Rules[24]) but simultaneously explains that this language was included to "*ensure that the requests cover different types of evidence including*

[19]) Vienna Rules 2006, Article 20(5).

[20]) *Haugeneder & Netal*, *supra* note 8, at Article 29, 207, para. 2.

[21]) *See id*. at Article 29, section 1.2.

[22]) ICSID Convention, Article 43(a).

[23]) ICSID Arbitration Rules, Rule 34(2)(a).

[24]) Proposals for Amendment of the ICSID Rules – Working Paper, Volume 3, ICSID Secretariat, August 2, 2018, 197–198.

documentary evidence, expert reports and witness testimony".[25]) No specific intention to include physical evidence in the definition of evidence in the ICSID Convention or the Arbitration Rules can therefore be established on the basis of a mere reading of these sources (although it is also not specifically precluded).

Both the UNCITRAL Arbitration Rules (2013) and the Stockholm Chamber of Commerce Arbitration Rules (2017) include provisions with similar language to that contained in the ICSID Convention.[26]) Also like the language adopted by ICSID, neither of the aforementioned rules provide a clear indication as to the scope of the term 'other evidence'. It could be interpreted as including the possibility of seeking the production of physical evidence, but an interpretation, such as that of the ICSID Secretariat, whereby it would refer to witness statements and expert reports, is also not out of the question.

In its 2016 Notes on Organizing Arbitral Proceedings ("Notes"), however, UNCITRAL has provided some guidance on the potential of physical evidence in arbitral proceedings.[27]) Despite recommending the Notes, UNCITRAL does not consider them to be a specific restatement of best practice,[28]) nor do they constitute any binding source of arbitral rules. Their relevance in international commercial arbitration is therefore somewhat limited, but their unambiguous reference to the use of physical evidence in arbitral proceedings is both refreshing and confirmation that the potential of physical evidence has not be discounted by the arbitral community. In terms of concrete provisions on the matter, the Notes – indeed – envisage that certain arbitral proceedings may require the submission of physical evidence and that, where it is submitted, the arbitral tribunal should make specific arrangement for the manner in which it is presented as well as for the safekeeping of the items of evidence.[29]) The method by way of which such evidence is to be taken is left to the discretion of the arbitral tribunal.

Despite the Notes, the vast majority of arbitral institutions do not expressly provide for the opportunity for parties to request of the arbitral tribunal the production of physical evidence by another party. This is, actually, absolutely surprising. Physical evidence, in particular of allegedly defective or

[25]) *Id.* at 199, para. 428.

[26]) UNCITRAL Arbitration Rules 2013, Article 27(3); SCC Arbitration Rules 2017, Article 31(3).

[27]) UNCITRAL Notes on Organizing Arbitral Proceedings 2016, effective July 7, 2016, Article 16(a), para. 109.

[28]) UNCITRAL Notes on Organizing Arbitral Proceedings 2016, effective July 7, 2016, Preamble; *see also* B. Ehle & C. Furner, *Eyeopeners – The Enlightening Effect of Site Visits in Construction Disputes*, *in* Dispute Resolution International Vol. 12 No. 2 175–194, 183 (2018).

[29]) UNCITRAL Notes on Organizing Arbitral Proceedings 2016, effective July 7, 2016, Article 16, paras. 108–109.

damaged items that form the basis for monetary claims is often key for winning or losing a case. Still, it is generally unaddressed in the provisions of the various arbitral rules and tends not to be of any major concern for arbitral institutions in the course of the review and amendment to their respective institutional rules.

A first conclusion may therefore be that arbitral tribunals should not be narrow-minded or formalistic and allow requests for the production of physical evidence along the lines of the rules for document production.

As mentioned at the outset of this chapter, the parties are of course entitled to mutually agree to specifically include the exchange of physical evidence as a procedural rule in their arbitral dispute. It is, however, doubtful whether the parties, at the outset of the proceedings, would have the foresight to expressly include such a provision in their agreement or in the procedural terms of the arbitration. Far more likely is the situation in which the parties rely on the general practice of international arbitration, on the assumption that such practices will adequately provide for all the procedural necessities and opportunities they require. For this reason, it is imperative to examine the IBA Rules, which are widely accepted as establishing best practice in international arbitration,[30]) as well as the Prague Rules, which offer a different, civil law-oriented approach to the evidentiary procedures in arbitral proceedings. Since these rules evidence the international communities' approach to evidentiary procedures in international arbitration (in particular the IBA Rules), the manner in which they deal with the question of physical evidence is likely to be relied on by parties seeking such production.

The IBA Rules were prepared with the intention of providing arbitrators, practitioners and parties to arbitral proceedings with a guide to ensuring "*an efficient, economical and fair process*" and are designed to supplement existing arbitral rules.[31]) Since their original issuance in 1999,[32]) they have, even in the traditional civil law countries, become widely adopted and are as a rule used by those involved in arbitral proceedings.[33]) Despite having no binding effect on the parties without explicitly being opted into, the IBA Rules are often considered to have attained the status of 'soft law' in international arbitration.[34])

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[30]) Blackaby, Partasides, et al., *supra* note 1, at para. 6.95.

[31]) IBA Rules 2010, 2, Foreword.

[32]) While technically preceded by the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration 1983, these rules were not as widely accepted as the 1999 version of the IBA Rules, which is also more akin to the IBA Rules as they were issued in 2010.

[33]) E. Mereminskaya, *Results of the Survey on the Use of Soft Law Instruments in International Arbitration*, June 6, 2014, Kluwer Arbitration Blog.

[34]) P. Hodges, *Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?*, *in* International Arbitration and the Rule of Law: Contribution and Conformity ICCA Congress Series, Volume 19, 599–633, 623 (Menaker ed., 2017); G.R. Amaral, *Prague Rules v IBA Rules*

The IBA Rules' preamble clarifies that the rules are designed to act as guidelines to assist the parties to an arbitration and that the provisions of the IBA Rules may be adapted by those parties upon their mutual agreement in order to best suit their needs. In terms of the scope of the IBA Rules, the preamble refers to the broader terms of 'evidence' and does not appear limit its application to documentary evidence alone.

The list of definitions, however, does not include a definition of the word 'evidence' and instead only sets out the drafter's definition of the term 'documents'. 'Documents' is defined as: *"a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means*". This definition, whilst broad in relation to a more traditional definition of the word, does not extend so far as to include physical evidence such as mechanical components or other goods. The IBA Rules do not, therefore, make it clear that references to 'documents' are to be interpreted as including an implied reference to physical evidence.

While this restriction may seem self-evident as the term 'documents' would not ordinarily include physical evidence (beyond the paper or electronic storage device that comprises the 'document'), it is important to establish this limitation in the assessment of the IBA Rules. Despite concerning the taking of 'evidence', the IBA rules appear to limit this to the taking of documentary evidence,[35]) witness statements[36]) and expert reports,[37]) akin to the definition applied by the ICSID Secretariat.

Relevant for the purposes of the present article, Article 3 of the IBA Rules sets out the procedure for the production of documentary evidence, including both the method by which one party can request the production of documentary evidence from another as well as prescribing the arbitral tribunal's ability to order the production of documents of its own volition. In both of these contexts, the IBA Rules only provide for this opportunity in the context of the production of 'documents', as per the defined term.

The only reference to physical evidence comes in the context of the ability by the Arbitral Tribunal to order an inspection. The question of inspections will be dealt with in the next chapter, but for now it is important to highlight that the IBA Rules do not ignore the existence of physical evidence in its entirety. In the context of an inspection generally and the appointment of a tribunal appointed expert specifically, the IBA Rules allow the arbitral tribunal to "*provide access to any Documents, goods, samples, property, machinery,*

and the Taking of Evidence in International Arbitration: Tilting at Windmills – Part I, July 5, 2018, Kluwer Arbitration Blog.

[35]) IBA Rules, Article 3.

[36]) IBA Rules, Article 4.

[37]) IBA Rules, Articles 5 and 6.

systems, processes or site for inspection".[38]) In so doing, the IBA Rules seem to draw a clear distinction between the treatment of physical evidence and documentary evidence. Whether or not this division is justified remains to be seen.

Having examined the manner in which the IBA Rules deal with the question of a party's ability to request the production of physical evidence, it would be interesting to examine how the Prague Rules have approached the issue. The Prague Rules, officially published on December 14, 2018, were devised in order to provide arbitrators with a legal basis for their authority to adopt a more civil law oriented approach to the evidentiary process. Arbitrators were to be empowered to take a more active role in managing the proceedings, which is intended to cut down on the time and cost of arbitral proceedings.[39]) Like the IBA Rules, the Prague Rules require the parties (or the arbitral tribunal) to opt-in to them and can be modified in order to best suit the arbitral proceeding in which they are to be applied.[40])

Concerning the production of physical evidence, it must be noted that, again, no express reference to such evidence is contained in the Prague Rules in the context of either a request made by the parties or an order by an arbitral tribunal. While the Prague Rules encourage a proactive approach by arbitral tribunals in the process of fact finding,[41]) they actually reduce the scope for party participation in the same process.[42]) The Prague Rules are generally drafted from the perspective of the arbitral tribunal and their provisions tend to afford tribunals with authority as regards the fact finding procedure. In light of this, it is unsurprising that the Prague Rules do not provide for any general rule, entitling parties to seek the production of evidence generally and only include such opportunities with regard to the more specific production of documentary evidence.[43]) It therefore offers hardly any scope for the interpretation that parties are entitled to seek the production of physical evidence.

As for the powers of the arbitral tribunal, these are prescribed more broadly. Pursuant to Article 3.1, arbitral tribunals are *"entitled and encouraged to take a proactive role in establishing the facts of the case which it considers relevant for the resolution of the dispute"*.[44]) Significant discretion is there-

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[38]) IBA Rules, Articles 6(3), 6(5) and 7.

[39]) The Prague Rules, 2, Note from the Working Group; M. Kocur, *Why Lawyers from Civil Law Jurisdictions Do Not Need the Prague Rules*, August 19, 2018, Kluwer Arbitration Blog; Amaral, supra *note 34*.

[40]) The Prague Rules, Articles 1.1 and 1.2.

[41]) The Prague Rules, Article 3.1.

[42]) L. Hoder, *Prague Rules vs. IBA Rules: Taking Evidence in International Arbitration, in* Austrian Yearbook of International Arbitration 2019 157, 158 (Klausegger et al. eds., 2019).

[43]) The Prague Rules, Articles 4.3 and 4.4.

[44]) The Prague Rules, Article 3.1.

fore afforded to arbitral tribunals to employ those measures necessary to establish the facts of the case. The measures that may be employed are listed in Article 3.2. but are clearly intended to be non-exhaustive as the drafters preface them with the phrase "*in particular*". Requesting the production of documentary evidence, witness statements and expert reports are expressly listed but the Prague Rules further provide for the taking of "*any other actions which it deems appropriate*".[45]) The implication of this addition to the general powers to conduct the fact finding process afforded to arbitral tribunals surely entails the possibility that the production of physical evidence could reasonably be ordered by tribunals under the Prague Rules.

Despite this ability to interpret Article 3.2 of the Prague Rules as to include a clear right of the parties to demand the production of physical evidence, it should be reiterated that the drafters of the rules did not appear to specifically contemplate this possibility. This lack of consideration for the role of physical evidence is, in addition to the clear omission of any reference thereto, evident from the narrow provision as regard the evidence that might be considered by a tribunal-appointed expert. In Article 6.2.d, arbitral tribunals are empowered to "*request parties to provide the expert appointed by the arbitral tribunal with all the information and documents he or she may require*". The language settled on by the drafters of this provision does not foresee a scope of evidence as broad as that which is contained in Article 3.2. It is certainly more difficult to interpret the phrase 'information and documents' as leaving much room for the production of physical evidence, which would be precisely the type of evidence that demands expert scrutiny. Its apparent preclusion in the context of an expert examination by a tribunal appointed expert is therefore peculiar and evidences a lack of regard for the importance of physical evidence in the settlement of disputes.

The role of physical evidence is not addressed in the Prague Rules. They offer a hypothetical opportunity for arbitral tribunals to order the production of physical evidence, but even so, only do so implicitly. They further completely preclude the option for the parties to seek the production of such evidence from each other, although this is a reflection of the stated aim of the rules rather than an express restriction on the basis of the nature of physical evidence itself. The lack of regard for the place of physical evidence in arbitral proceedings appears to continue the international trend to not reflect on the importance of such evidence to specific kinds of disputes.

As mentioned, physical evidence tends to only be addressed in the context of inspection procedures, as identified in both the IBA Rules and the Prague Rules. These procedures and their place within the evidentiary process are peculiar as they require or offer the possibility for the proceedings to step beyond the bounds of the conference room and interact with an industrial, commercial or other site relevant to the dispute at hand. Such procedures are

[45]) The Prague Rules, Article 3.2.d.

not a direct parallel to the production of documents, but their relevance in the context of the production of physical evidence should be addressed.

IV. Inspection Procedures: An Adequate Substitute for the Exchange of Physical Evidence?

The authority to order inspections is not uniformly dealt with by arbitral institutions. Some rules will expressly provide for the opportunity (LCIA Rules[46]) and ICSID Rules[47])), others contain references to the possibility but do not provide any guidance on how to conduct them (Vienna Rules[48])), while others still remain entirely silent on the matter (ICC Rules). Despite this lack of a consistent approach and subject to their express exclusion by agreement between the parties,[49]) the authority to order inspections as part of the evidentiary process is generally considered to be implied in the broad range of authority and discretion afforded to tribunals in the taking and gathering of evidence.[50])

Even in cases where institutional rules do expressly provide for the opportunity to hold a site inspection, they tend to only identify the possibility without shedding any light on the manner in which this might be conducted. Rather, the decision as to the form of the inspection, including its participants, is generally left to the discretion of the arbitral tribunal. This approach is also applied by the drafters of the Prague Rules, as the only reference to inspections contained therein is limited to simply allowing an arbitral tribunal to order them.[51])

The ICSID Arbitration Rules and IBA Rules contain some of the more detailed provisions on the matter, but even they are limited in the manner in which they describe the procedure. The IBA Rules provide the following with regard to inspections:

> "*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,*

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[46]) LCIA Rules, Article 22(iv); where the arbitral tribunal is empowered "*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*".

[47]) ICSID Arbitration Rules, Rule 37; where inspections are described as 'visits' to any place connected to the dispute for the purpose of an inquiry.

[48]) Vienna Rules, Article 43(1); where the possibility of a site visit is referred to solely in the context of their implications as to the costs of the arbitration.

[49]) J. Lew, L. Mistelis, et al., Comparative International Commercial Arbitration 579 (2003).

[50]) Waincymer, *supra* note 1, at 815; Born, *supra* note 1, at 2353.

[51]) Prague Rules, Article 3.2(c); see also L. Hoder, *supra* note 42, at 175.

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."[52])

According to Article 7 of the IBA Rules, any goods or samples may be subject to an inspection. This constitutes a clear reference to physical evidence within the context of such inspections, but no further clarification is provided as to the manner in which that physical evidence can be assessed within the inspection procedure. The general purpose of an inspection is to allow the arbitral tribunal to better conceptualize or comprehend the issues in dispute by visiting a location or good of importance to the arbitration and obtaining firsthand experience of the realities of the site or physical good.[53]) For a more thorough assessment, arbitral tribunals may also rely on party- or tribunal-appointed experts to conduct such an inspection in the arbitral tribunal's stead. This option is particularly useful where the inspection includes onsite-testing or requires technical determinations not within the expertise of the arbitrators.

Article 7 is a brief provision and sparing in the details and nature of the contemplated inspections. Despite limited guidance, legal scholars generally agree that a number of practices should be employed to ensure an inspection runs smoothly and does not, inadvertently, negatively impact the fairness of the proceedings and the ultimate enforceability of the award. Generally, and as a matter of the efficient conduct of proceedings, inspections should be organized with the participation of both parties and questions such as the nature of the schedule, the number of participants (and the participation of the parties) must be determined.[54]) Furthermore, the inspection may require or entice the arbitral tribunal to ask questions, whether such questions should be on or off the record, who the addressees of the questions are and whether the parties are entitled to comment on the answers provided must also be established ahead of time.[55])

An inspection can give rise to considerable costs, especially where it is decided that the representatives of both parties should be present, as travel

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[52]) IBA Rules, Article 7; the provision on inspections in the ICSID Arbitration Rules is very similar to that in the IBA Rules, with the notable exception that the IBA Rules specifically permit parties to request an arbitral tribunal order an inspection, while the ICSID Arbitration Rules exclusively refer to the arbitral tribunal's authority to order them (although it is likely implied that the parties may request such an order). The IBA Rules also provide a non-exhaustive list of things that might be subject to an inspection, which the ICSID Arbitration Rules do not.

[53]) Waincymer, *supra* note 1, at 815. B. Ehle & C. Furner, *supra* note 28, at 177.

[54]) Born, *supra* note 1, at 2353–2354.

[55]) Blackaby, Partasides, et al., *supra* note 1, at para. 6.151.

expenses and potentially the cost of accommodation can become significant. Furthermore, it would generally be unwise to restrict the participation of the parties or their counsel in such inspections as it could give rise to grounds to challenge the award.[56]) Consequently, the inspection procedures is one not commonly employed in international commercial arbitrations, as the cost of an inspection is liable to outweigh the value contributed by the inspection to the arbitration's evidentiary procedures.[57])

It is in this context that the relationship between physical evidence and the inspection procedure must be assessed. By referring to the procedure as an "inspection", the IBA Rules have adopted a rather ambiguous term that is not adequately expounded upon. An inspection could refer to a merely visual assessment of a good, site or sample, but another reading might imply a more involved process including an investigation and comprehensive (technical, chemical or elemental) analysis. The ability to involve experts in the inspection procedure does not allow the determination as to the intended scope of an inspection to be swayed in any particular way, as expert participation could be beneficial in the event of either interpretation (although an expert would likely be a necessary participant where a thorough assessment and investigation is involved). The IBA Rules, as a consequence of their ambiguity and broad scope, likely intended for the inspection procedure to be molded by the discretion of the arbitral tribunal with the needs of the arbitration in mind.

It is questionable whether the process of an inspection (whereby the parties, their counsel, the experts and the arbitral tribunal may be involved) really should constitute the one and only means by way of which physical evidence can be requested or assessed by an opposing party in arbitral proceedings. It would appear that, especially in cases where the good rather than the site is of particular relevance, the procedures set out for site inspections are not only excessive, but in many ways do not lend themselves to direct application to the exchange of a good. Even if one were to accept that the reference to the inspection of "*goods*" or "*samples*" should entitle one party or expert to remove them from the property of the other party, which is not evident from a simple reading of the text, it would be peculiar as to why the inspection procedures should apply in this regard and why physical evidence should not, rightly, be included in the standard "document" production procedure.

Where the testing of a good can be readily performed by an expert in a short amount of time and with access to mobile equipment to perform such tests, an inspection may offer a structured and formalized procedure within which that testing can occur without needing to remove the property from the possession of the party with ownership of the good. Where such circumstances arise, an inspection, with the participation of both parties, is a balanced and

[56]) Blackaby, Partasides, et al., *supra* note 1, at para. 6.150.

[57]) D. Girsberger & N. Voser, International Arbitration: Comparative and Swiss Perspectives 249 (3 ed., 2016).

fair method for the introduction of additional, scientific evidence onto the record (although the expense of the procedure continues to represent a barrier to its use).

The actual removal or transfer of possession of a good or sample is a completely different issue, however. The inspection procedure prescribes no means by way of which an arbitral tribunal might determine whether the taking and removing of a sample or good for more thorough testing by an expert or party would be justified. Inspection procedures tend not to contemplate the possibility of such a transfer of possession at all. Such decisions, within the context of an inspection, would need to ensure both parties are granted an opportunity to be heard on the matter, as is the case for document production requests. This would necessitate the involvement of the arbitral tribunal and the parties' counsel, which only adds to the cost of the inspection. Furthermore, the parties would need to prepare their arguments on the merits of such an exchange on the basis of which the arbitral tribunal would then be required to decide on the matter. The arbitral tribunal will either be required to make such a decision under pressure and during the inspection or take time to review the parties' arguments, in which case it becomes questionable whether the procedure would not have been better suited by simply applying the document production procedures to the request for physical evidence.

V. How Should Physical Evidence Be Requested?

The production of physical evidence may be an inherently more onerous and costly burden on the party being asked to produce it. Usually, any physical evidence will be more substantial in mass than documentary evidence (although it may not always be the case when the total volume of documentary evidence is considered), and the transportation of such material may require additional consideration to ensure it is safely delivered to the other party or an (tribunal-appointed) expert.

None of these considerations, however, require the arbitral tribunal itself to engage in the inspection procedure. Pictures and general descriptions of a good should suffice to allow the arbitral tribunal to make an informed decision on the requirements and challenges posed by the exchange of such evidence. There is no pressing need for the arbitral tribunal to actually see the item requested and therefore no need to engage in the complex and costly inspection procedure.

An arbitral tribunal's decision as to the propriety of a request for physical evidence would be best assessed in the same manner as it assesses the production of documentary evidence. The considerations identified in Article 3 of the IBA Rules on the production of documents find convenient application to requests for the production of physical evidence. The requesting

party should still be expected to identify and narrowly describe the evidence they are seeking[58]) and indicate reasons for the party's belief that the evidence is in the possession of the party to which the request is addressed.[59]) The relevance of the evidence to the case and its materiality to the case's outcome remain key considerations that must be demonstrated by the requesting party.[60]) The answers to these questions are not significantly impacted by the differing nature of the requested evidence. By specifically incorporating physical evidence in the documentary evidence procedure, all the well-established safeguards and guidelines are maintained and contribute to a fair and equitable process for both parties involved.

As mentioned, requests for physical evidence do give rise to considerations that are generally not applicable to document production. Requests for physical evidence require the transfer of possession of property that often cannot simply be copied or easily reproduced. Questions as to liability in the event of damage or loss become more significant in relation to the production of physical evidence and require careful attention on the part of the arbitral tribunal. Furthermore, the added burden to produce such evidence may also be relevant depending on the size of the requested good.

Due to the lack of specific provisions on the production of physical evidence, arbitral tribunals will need to rely on the wide discretion afforded to them under virtually all institutional arbitration rules, to establish specific procedures to allow physical evidence to be transferred between parties. The IBA Rules provide additional guidance to assist arbitral tribunals in making such determinations, despite failing to specifically account for the production of physical evidence. In Article 9, in addition to prescribing the arbitral tribunal's almost complete control over evidence submitted in arbitral proceedings,[61]) the IBA Rules also establish a number of reasons on the basis of which evidence may be excluded. Of particular relevance in the context of the production of physical evidence, arbitral tribunals' are specifically considered to be entitled to exclude evidence where the requested evidence would constitute an unreasonable burden for the addressed party if asked to produce such evidence.[62]) Furthermore, arbitral tribunals are also called upon to consider factors such as procedural economy, proportionality, fairness and equality of the parties.[63]) Although framed in the context of the exclusion of evidence, these considerations can also be applied as part of a general test as to the admissibility of evidence and the reasonableness of a request for production.

[58]) IBA Rules, Article 3.3(a)(i) and (ii).
[59]) IBA Rules, Article 3.3(c).
[60]) IBA Rules, Article 3.3(b).
[61]) IBA Rules, Articles 9.1.
[62]) IBA Rules, Article 9.2(c).
[63]) IBA Rules, Article 9.2(g).

In so doing, the arbitral tribunal would be required to assess whether the relevance and materiality of the physical evidence (or more specifically the expert report produced on the basis of a comprehensive assessment thereof) to the case at hand and its outcome is such as to outweigh the economic burden on the part of the addressed party. Such transfers should only occur having fully accounted for the interest of the party producing the evidence to have the good returned to it in a condition similar to that in which it was produced.[64]) This consideration may not always apply, in particular where the good is already damaged and beyond repair or where it concerns mundane evidence (such as contaminated soil samples) but, in any event, the interests of the party to which the property belongs must be duly considered. Any failure to abide by the safeguards put in place by the arbitral tribunal as to the integrity of produced physical evidence could be considered either as part of the final award or specifically as part of the decision as to costs, depending on the value of the physical evidence produced. In the event of an inclusion in the final award, the parties would be wise to expressly agree on the condition of the produced physical evidence becoming part of the substance of the arbitral proceedings.

Having taken into account these additional considerations, the standard rules and procedures for the production of documentary evidence will allow the arbitral tribunal to conduct the arbitration without running afoul of the obligation to provide for a fair and just evidentiary process.[65]) Failing to fully consider the interests of the party in possession of the requested physical evidence as well as failing to permit the exchange of physical evidence at all, especially where it is a key factor in the factual scenario that underlies the dispute between the parties, could seriously detract from the fairness of the proceedings.

VI. Potential Consequences of Restricting Access to Physical Evidence

Where physical evidence plays a key role in determining the outcome of a case and where such evidence is in the possession of one of the parties only, access to such evidence for the other party could seriously impact the fairness of the arbitration and the equality of the parties. By not permitting a party to gain access to physical evidence for the purpose of its own testing or other use in the proceedings (or the testing by a tribunal- or party-appointed expert), especially where that evidence is crucial in discharging its own burden of

[64]) UNCITRAL Notes on Organizing Arbitral Proceedings 2016, effective July 7, 2016, Article 16, paras. 108–109.

[65]) IBA Rules, Preamble (1).

proof, parties may rightfully consider their right to be heard and the right to state their case to have been infringed.

The equal treatment of the parties and the right to duly present their respective cases are mandatory procedural guarantees that form key parts of due process[66]) and must be adhered to even if it is not explicitly expressed by the parties in their arbitration agreement.[67])According to Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the recognition and enforcement of an award may be refused where the party against whom the award is invoked was "*unable to present his case*".[68]) Similarly, and generally representative of many national laws,[69]) the UNCITRAL Model Law establishes the same ground for the setting aside of an arbitral award.[70])

The right to be heard provides parties to an arbitration with various procedural guarantees such as the right to submit relevant evidence, to be able to express their opinions on all relevant statements of fact and law and to request appropriate measures for the taking of evidence.[71]) A party's ability to present its case can be seriously jeopardized where pertinent physical evidence is withheld despite such evidence being necessary for the party to discharge its burden of proof. As mentioned above, such a situation could arise where a party must rebut the presumption of a defect in a delivered product due to its almost immediate failure and where the product remains in the possession of the opposing party. It would then be necessary for the arbitral tribunal to ensure the production of that physical evidence as failing to do so could result in the inability to do justice, which would result in the award being put at risk.[72]) Additionally, as was suggested by Waincymer, "*it is hard to allege a failure of due process if more relevant information is provided rather than less*",[73]) such practices could therefore be employed as a matter of precaution.

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[66]) C. Lau, *Do Rules and Guidelines Level the Playing Field and Properly Regulate Conduct? – An Arbitrator's Perspective, in* International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19, 559, 560 (Menaker ed., 2017).

[67]) Born, *supra* note 1, at 3224.

[68]) New York Convention, Article V.1(b).

[69]) Born, *supra* note 1, at 3222; Austrian Code of Civil Procedure ("Zivilprozessordnung"), § 611(2)(2); German Code of Civil Procedure ("Zivilprozessordnung"), § 1059(2)(b); Swiss Private International Law Act ("Internationale Privatrechtgesetz"), Article 190(2)(d); and a different kind of formulation can be found in the English Arbitration Act 1996, Section 68(2)(a).

[70]) UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006), Article 34(2)(a)(ii).

[71]) Girsberger & Voser, *supra* note 57, at 412.

[72]) Y. Derains, *Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint*, *in* Document Production in International Arbitration, ICC Bulletin Special Supplement, 83, 87 (2006).

[73]) Waincymer, *supra* note 1, at 837.

It must be acknowledged, however, that the prevailing practice as regards the annulment of arbitral awards on the basis of evidentiary complaints by national courts is restrictive. Such applications for annulment have rarely succeeded[74]) as the discretion afforded to arbitral tribunals in evidentiary matters tends to also be reflected in decisions on such annulment applications.[75]) Furthermore, whether national courts will be receptive to annulment applications on the basis of evidentiary complaints will also greatly depend on the applicable national law and the associated jurisprudence.[76])

Despite the existence of limited practical examples of awards being annulled as a consequence of the failure to order the production of physical evidence, it's potential to significantly impact arbitral proceedings and pose potential challenges should not be dismissed. The factual scenario in which the request for the production of evidence arises and its relevance and materiality to the outcome of the case will be key factors that will influence the likely change of success of an annulment application on the basis of a refusal to grant access to such evidence. When assessing the merits of requests for the production of physical evidence, arbitral tribunals should be well-informed of the potential importance of such evidence for the outcome of the case. The mere fact that physical evidence has received limited attention should not blind arbitrators to its potential importance and its relevance in ensuring due process.

VII. Conclusion

The rules established by arbitral institutions and national laws tend to remain silent on many aspects of the evidentiary procedure, instead opting to empower arbitral tribunals with broad discretions as to the manner in which such procedures are to be conducted. Surprisingly, the international community has largely remained silent on the role of physical evidence in international arbitration and often limits the production of evidence by reference to the term 'document procedure' without affording full consideration to the potentially pivotal role that can be played by physical evidence in specific types of disputes. This lack of dedicated consideration is particularly evident by the failure to include any reference to physical evidence in the IBA Rules, which are often relied on as a guide to the manner in which the evidentiary procedures are to be conducted in arbitral proceedings.

The failure to fully incorporate the production of physical evidence in arbitral proceedings is entirely unwarranted, however. Where physical evidence is both relevant to the case and material to its outcome, there is no reason to

[74]) Born, *supra* note 1, at 3239.
[75]) Born, *supra* note 1, at 3244.
[76]) Marghitola, *supra* note 2, at 204.

refuse its production or a request for its production simply as a consequence of such evidence failing to be in documentary form. The production of physical evidence can easily be incorporated into the procedures that have been established for decisions on the production of documents without requiring material changes. Arbitral tribunals should be cognizant, however, of the need to prescribe specific rules to safeguard the evidence that is produced and to take into account the added cost that may be incurred in producing physical as opposed to documentary evidence when assessing its relevance and materiality.

Refusing to permit the production of physical evidence can seriously impugn the fairness of the arbitration as a whole, especially where the requested physical evidence is a core aspect of the dispute, and infringe the equality of arms principle. Ultimately, failure to adequately consider a request for the production of physical evidence that is integral to the dispute could have consequences for the enforceability of the award. It would therefore be in the best interest of international arbitration as a whole for arbitral tribunals to duly consider any request for physical evidence as a valid part of the evidentiary procedure and not to recoil from such requests merely as a consequence of the limited attention physical evidence has received in academic discourse.