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Taking Evidence in Latin America: Some Observations on Local Practices and Use of the IBA Rules

By André Abbud, Rafael Alves and Victor M. Ruiz*

The common law and civil law systems adopt contrasting approaches to the taking of evidence. The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration were developed to offer a neutral approach that would help to avoid the risk of cultural clashes between practitioners from different traditions. On the basis of a study of 35 ICC cases related to Latin America in which reference is made to the IBA Rules, this article considers the extent to which the IBA Rules can be considered to fulfil this role in Latin America. The authors consider the characteristics of these cases, which provisions of the IBA Rules are most commonly used and how they are referred to. To put their discussion in context, the article begins with a brief presentation of rules and practices relating to document production, the examination of witnesses and expert evidence in a selection of Latin American countries.

Les pays de common law *et de tradition romano-germanique divergent sur la manière d'aborder l'administration de la preuve. Les règles de l'International Bar Association (IBA) sur l'administration de la preuve dans l'arbitrage international ont été élaborées en vue de proposer une approche neutre de la question, afin d'éviter les risques de choc culturel entre praticiens d'écoles différentes. Sur la base d'une étude de 35 affaires CCI liées à l'Amérique latine dans lesquelles il est fait référence aux règles de l'IBA, cet article s'attache à déterminer la mesure dans laquelle on peut considérer que ces règles jouent leur rôle dans cette partie du monde. Les auteurs s'interrogent sur les caractéristiques de ces affaires, les règles de l'IBA les plus utilisées dans celles-ci, ainsi que la manière dont il y est fait référence. Afin de replacer cette analyse dans son contexte, l'article présente d'abord brièvement les règles et les pratiques en vigueur dans un certain nombre de pays de la région en matière de production de documents, d'audition de témoins et de preuves par expertise.*

*La aproximación que se tiene respecto de los medios de prueba en arbitraje internacional contrasta de manera importante entre los sistemas de derecho civil y derecho anglosajón. La Reglas sobre Prueba en Arbitraje Internacional fueron desarrolladas por la International Bar Association (IBA) para ofrecer una aproximación que ayude a neutralizar las diferencias culturales entre los practicantes de arbitraje de distintas tradiciones jurídicas. Sobre la base del análisis de 35 arbitrajes CCI relacionados con América Latina en los cuales se ha hecho referencia a las Reglas de la IBA, este artículo analiza la manera en que dichas Reglas han satisfecho ese rol neutralizador en América Latina. Los autores consideran las características de estos casos, los artículos de las Reglas de la IBA comúnmente aplicados y la manera en que estos han sido utilizados. Para poner la discusión en contexto, el artículo comienza con una breve referencia a las reglas y prácticas procesales relacionadas con la exhibición de documentos, el interrogatorio de testigos y la prueba pericial en varios países latinoamericanos.

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The article remains the work of the authors, who are solely responsible for the information, analyses and opinions it contains.

I. Introduction

1. Latin America's involvement in international arbitration has risen remarkably in recent years. In 2011, 247 parties involved in new cases filed with the ICC came from Latin America and the Caribbean,[1] which represents around 10% of all parties in new cases, as compared to 4.4% twenty years previously, in 1992.[2] One result of this growth is that contacts between practitioners from other regions of the world and parties, counsel and arbitrators from Latin America are more frequent than before. In areas of practice marked by local traditions, such encounters may lead to cultural clashes. One such area is the production of evidence, where differences may exist in relation to the production of documents, the examination of witnesses and expert evidence.[3]

2. The IBA Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules')[4] were developed precisely to address and help prevent clashes of this kind. They purport to reflect techniques and practices used in many parts of the world, and, as such, offer a common ground for the production of evidence in arbitrations involving parties from different legal cultures.

3. The purpose of this article is to offer some comments on the use of the IBA Rules in cases related to Latin America based on empirical research using a sample of ICC cases involving Latin American parties, arbitrators, law, languages and/or places of arbitration. The data collected give some indication of whether and to what extent Latin Americans have embraced the IBA Rules.

II. Approaches to the production of evidence

A. Document production

4. It is common knowledge that practices regarding the production of documents vary widely between the common law and the civil law systems. In the former, it is considered to be a fundamental right that the parties acquire the same degree of knowledge about the facts in dispute. Therefore, a party usually has a broad obligation to produce to the other party each and every document that may be in some way relevant to the case, regardless of whether the documents are harmful to the producing party's position.[5] In the civil law system predominant in continental Europe and widely followed in Latin America, each party is generally expected to build its case using its own documents.

5. In reality, however, the distinction between the continental and common law systems would appear to be less clear-cut. For example, despite being part of the continental tradition, national laws in Latin America generally allow parties to ask the court to order any party to the proceedings—or even third parties—to present documents in their possession, as happens in the common law system, but only in limited circumstances and under certain conditions.[6] In Argentina for example, when a document is not in its possession, the interested party must identify the relevant document and indicate its contents, location, the person in possession of it or the public office or registry where the document is filed:[7]

> Cuando la prueba documental no estuviere a su disposición, la parte interesada deberá individualizarla, indicando su contenido, el lugar, archivo, oficina pública o persona en cuyo poder se encuentra.

In Chile, documents in possession of another party may be requested only if they are directly related to the issues in dispute and provided they are not confidential or secret:[8]

> Podrá decretarse, a solicitud de parte, la exhibición de instrumentos que existan en poder de la otra parte o de un tercero, con tal que tengan relación directa con la cuestión debatida y que no revistan el carácter de secretos o confidenciales.

In Colombia, the requesting party must indicate the facts that it aims to prove with the requested documents:[9]

> Quien pida la exhibición expresará los hechos que pretende demostrar y deberá afirmar que el documento se encuentra en poder de la persona llamada a exhibirlo, su clase y la relación que tenga con aquellos hechos.

Once the order has been issued, the party at which it is directed will be required to present the requested document, even if the document is detrimental to its case. If the party refuses to produce the document, the judge may draw adverse inferences from its failure to do so[10] and even consider that the facts alleged by the party requesting production are true and undisputed:

> Si la parte a quien se ordenó la exhibición se opone en el término de ejecutoria del auto que la decreta, el juez al decidir la instancia o el incidente en que aquélla se solicitó, apreciará los motivos de la oposición; si no la encontrare justificada y se hubiere

1 '2011 Statistical Report' (2012) 23:1 ICC ICArb. Bull 5 at 8.

2 'Ten Years of ICC Arbitration (1983–1992): A Statistical Survey' (1993) 4:1 ICC ICArb. Bull. 3 at 4.

3 For further information and commentary on the production of evidence in international arbitration, see the following ICC publications: T. Giovannini & A. Mourre, eds., *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossier VI, ICC Institute of World Business Law (2009); L. Lévy & V.V. Veeder, eds., *Arbitration and Oral Evidence*, Dossier II, ICC Institute of World Business Law (2004); *Document Production in International Arbitration*, Special Supplement, ICC ICArb. Bull. (2006). Available online in the ICC Dispute Resolution Library: www.iccdrl.com

4 Available on the IBA website at www.ibanet.org.

5 US Federal Rules of Civil Procedure (Rules 26–37); English Civil Procedure Rules (Rules 31.1–31.23).

6 See e.g. Brazilian Code of Civil Procedure, Arts. 355–363 and 396; Argentinian Code of Civil and Commercial Procedure, Arts. 333–334 and 388–389; Mexican Code of Commerce, Arts. 44, 1061, § III and 1243; Mexican Code of Civil Procedure, Arts. 79, 90, 137 and 323; Colombian Code of Civil Procedure, Arts. 283 and 284; Chilean Code of Civil Procedure, Art. 349; Venezuelan Code of Civil Procedure, Art. 436. Cf., in Europe, French Code of Civil Procedure, Arts. 132 and 138–142; German Code of Civil Procedure, Art. 142; Italian Code of Civil Procedure, Art. 210.

7 Argentinian Code of Civil and Commercial Procedure, Art. 333.

8 Chilean Code of Civil Procedure, Art. 349.

9 Colombian Code of Civil Procedure, Art. 284.

> acreditado que el documento estaba en poder del opositor, tendrá por ciertos los hechos que quien pidió la exhibición se proponía probar . . . [11]
>
> Si el instrumento no fuere exhibido en el plazo indicado, y no apareciere de autos prueba alguna de no hallarse en poder del adversario, se tendrá como exacto el texto del documento, tal como aparece de la copia presentada por el solicitante y en defecto de ésta, se tendrán como ciertos los datos afirmados por el solicitante acerca del contenido del documento.[12]
>
> Ao decidir o pedido, o juiz admitirá como verdadeiros os fatos que, por meio do documento ou da coisa, a parte pretendia provar: I - se o requerido não efetuar a exibição, nem fizer qualquer declaração no prazo do art. 357; II - se a recusa for havida por ilegítima.[13]

This said, Latin America cannot be said to have fully espoused the common law tradition, as can be seen from its reticence to use such provisions other than sparingly, and from the fact that Latin American procedural law generally does not allow parties to request the production of broad categories of documents.[14]

6. Hence, unlike parties in the United States, parties in Latin America have, for instance, no standard obligation to produce each and every document that may be relevant to the dispute, especially if a document is beneficial to the other party's case. And even if a court orders a party to present documents, its order would generally refer only to individual or specific documents, as indicated above, not entire categories of documents. Mexican law, for example, contains a specific provision preventing courts and parties from conducting fishing expeditions (*pesquisas*), which limits requests to specific documents relevant to the case, and even then the requesting party must declare under penalty of perjury that it is not in possession of the requested document:

> No se puede hacer pesquisa de oficio por tribunal ni autoridad alguna . . . [15]
>
> Si las partes no tuvieran a su disposición o por cualquier otra causa no pudiesen presentar los documentos en que funden sus acciones o excepciones, lo declararán al juez, bajo protesta de decir verdad . . . [16]

7. The IBA Rules attempt to present a midway solution. Article 3 allows a party to request the production of individual documents or a 'narrow and specific' category of documents from the opposing party, provided that the requested documents are 'relevant to the case and material to its outcome'. Furthermore, document production remains entirely under the arbitral tribunal's control: it is the arbitrators who decide on the request to produce and related objections, who take or allow any party to take any steps that are legally available to obtain documents from third parties, and who control the admissibility of documentary evidence in general (Arts. 3.4, 3.7, 3.9, 3.10, 9.1 and 9.2).

B. Examination of witnesses

8. Oral evidence is another area where practices differ between the common law and the continental systems. In the United States, for instance, no distinction is made between witnesses and the representatives of a party,[17] whereas in Latin America, as in countries elsewhere belonging to the civil law tradition, representatives of parties usually cannot act as witnesses.[18] Hence, company officers and board members are regarded as party agents, who lack the impartiality required of witnesses in judicial proceedings (*nullus idoneus testes in re sua intellegitur*). While their testimony may be heard, a lower probative value will be attached to their statements.[19] In Brazil, for instance, only in exceptional circumstances may a judge hear testimony from a party's legal representative, and such testimony will be given the weight it deserves:[20]

> Sendo estritamente necessário, o juiz ouvirá testemunhas impedidas ou suspeitas; mas os seus depoimentos serão prestados independentemente de compromisso (art. 415) e o juiz lhes atribuirá o valor que possam merecer.

In Mexico, when according weight to testimony a judge will always take into account the independence of the witness:[21]

> Para valorar las declaraciones de los testigos, el juez tendrá en consideración las circunstancias siguientes: . . . III. Que por su probidad, por la independencia de su posición y por sus antecedentes personales, tenga completa imparcialidad.

9. In international arbitration practice, attitudes towards the testimony of parties' representatives are less contrasted. However, the contrast between the common law and civil law traditions remains strong when it comes to the questioning of witnesses. Like other civil law professionals, Latin American practitioners would expect the arbitrators to take a more active role in obtaining evidence from witnesses. A recent survey illustrates this fact.[22] The survey revealed that in 83% of cases witnesses are questioned primarily by counsel, as opposed to 17% of cases in which the questioning is done by the tribunal, and that the questioning of witnesses primarily by the tribunal is more frequent in arbitrations involving civil lawyers than in those involving common lawyers. The survey also revealed that there was a

10 See the rules cited above. See also H.A. Grigera Naón, 'Document Production in International Commercial Arbitration: A Latin American Perspective' in *Document Production in International Arbitration*, ICC ICArb. Bull., 2006 Special Supplement, 15 at 18.

11 Colombian Code of Civil Procedure, Art. 285.

12 Venezuelan Code of Civil Procedure, Art. 436.

13 Brazilian Code of Civil Procedure, Art. 359.

14 See H.A. Grigera Naón, *supra* note 10 at 18.

15 Mexican Code of Commerce, Art. 42.

16 Mexican Code of Commerce, Art. 1061, § III.

17 See Rule 601 of the US Federal Rules of Evidence.

18 Article 358 of the Chilean Code of Civil Procedure prohibits witness testimony from employees or agents of the company submitting the evidence.

19 See Brazilian Code of Civil Procedure, Art. 405, §2º, III, and § 4º; Argentinian Code of Civil and Commercial Procedure, Art. 427; Mexican Code of Commerce, Art. 1303; Mexican Code of Civil Procedure, Art. 215, § 4º.

20 Brazilian Code of Civil Procedure, Art. 405, § 4.

21 Mexican Code of Commerce, Art. 1303.

22 See 2012 *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, p. 25, available at http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf.

greater wish for witnesses to be questioned primarily by counsel among common lawyers than among civil lawyers.

10. The main area of divergence between the common law and civil law traditions with respect to oral evidence is probably cross-examination. Cross-examination is considered to be a central feature of the adversarial system adopted in common law countries. During the hearing, counsel address questions directly at the other party's witnesses, with a view to obtaining the admission of facts favourable to their client and undermining the witnesses' credibility and the value of the witnesses' testimony. The techniques used to achieve these ends can be quite sophisticated and aggressive.[23] While counsel in Latin America[24] may likewise put questions to the other party's witnesses, the techniques they use in doing so are not very different from those employed to question their own witnesses, and their approach is usually less sophisticated and aggressive.

11. The IBA Rules allow any person to 'present evidence as a witness, including a party or a party's officer, employee or other representative' (Art. 4.2). As to the questioning of witnesses, once again the IBA Rules attempt to offer a compromise between different legal traditions. Counsel are free to take an active role in questioning the witnesses called by the other party, generally on the basis of their previously filed witness statements,[25] but the arbitral tribunal has broad powers to control this activity so as to prevent abuses (Arts. 8.2, 8.3(b), 9.1 and 9.2).

C. Experts

12. In common law countries, experts are treated as part of the adversarial scheme. Each party may bring its own expert to provide oral evidence on technical matters considered relevant to proving its case, and the party's counsel may cross-examine the other party's expert witness with a view to demonstrating to the tribunal that the expert is not independent or qualified for the matter at hand. In both the United States and England, the law allows a court to appoint its own expert, but this is rarely done in practice.[26]

13. In countries belonging to the civil law system, party-appointed experts are generally suspected of being unable to act with the necessary independence and impartiality. The courts generally appoint experts, either upon the request of a party or on their own motion. This is the approach adopted in Latin American countries, although with variations between different countries. In Argentina and Brazil, for instance, the court-appointed expert will present his or her opinion in a written report, and the parties will usually have the right to appoint ancillary experts, who will follow, provide support for or object to the court-appointed expert's report and the judge may take the party-appointed expert's comments into consideration when deciding the case. In Colombia, the judge will generally appoint two independent experts upon the request of either party, and only if their reports are contradictory will the judge then appoint a third expert to act as referee:[27]

> En los procesos de mayor cuantía la peritación se hará por dos peritos; en caso de desacuerdo se designará un tercero . . .

Although the parties are free to submit reports from experts they have appointed, the findings and opinions recorded in such reports will be considered as mere arguments presented by the party submitting the report. In Mexico, the court will appoint its expert only if the opinions of the parties' experts diverge. In that case, the court-appointed expert will act as a sort of referee and render an 'independent' opinion for the court to consider:[28]

> Cuando los dictámenes rendidos resulten sustancialmente contradictorios de tal modo que el juez considere que no es posible encontrar conclusiones que le aporten elementos de convicción, podrá designar un perito tercero en discordia.

The parties can usually put written questions to the expert, to be answered in the expert's report, or orally at the hearing. However, as with witnesses, the questioning of experts is not as extensive as in common law countries.[29]

14. The IBA Rules contain provisions on both party-appointed and tribunal-appointed experts (Arts. 5 and 6). They invite the arbitrators, in consultation with the parties, to decide which way of producing expert evidence is more suitable in the case at hand. It is also possible to combine both methods. In any event, whether appointed by the parties or the tribunal, the expert must provide his or her opinion in a written report (Arts. 5.1 and 6.4), and must be available for questioning at the hearing, if requested by a party or the arbitral tribunal (Arts. 6.6 and 8.1).

23 See J. Madden, 'How to present witness evidence in an arbitration – American style' (1993) ASA Bulletin 438 at 442–43; B. Cremades & D. Cairns, 'Cross-examination in international arbitration: is it worthwhile?' in L.W. Newman & B.H. Sheppard Jr., eds., Take the Witness: Cross-Examination in International Arbitration (Juris, 2010) 223 at 226–32.

24 See e.g. Venezuelan Code of Civil Procedure, Art. 485.

25 Art. 367 of the Chilean Code of Civil Procedure expressly prohibits the use of witnesses' statements in litigation.

26 See US Federal Rules of Evidence, Rules 702 and 706; English Civil Procedure Rules, Rules 35.4 and 35.7.1. See also the Notes of Advisory Committee on Rules at http://federalevidence.com/node/1335#Rule706.

27 Colombian Code of Civil Procedure, Art. 234.

28 Mexican Code of Commerce, Art. 1255.

29 See Brazilian Code of Civil Procedure, Arts. 145 and 421–439; Argentinian Code of Civil and Commercial Procedure, Art. 458; Mexican Code of Commerce, Arts. 1255 and 1258; Mexican Code of Civil Procedure, Art. 152.

III. Use of the IBA Rules in a sample of ICC Latin American cases

15. Given the divergent practices in relation to the production of evidence with which Latin American parties and practitioners are confronted in international proceedings, the question arises as to whether they consider the IBA Rules offer an acceptable solution in such situations.

16. To answer that question, while working at the Secretariat of the International Court of Arbitration, authors Rafael Alves and Victor Ruiz studied a sample of 35 ICC cases in 2010 and 2011 involving at least one Latin American party in which reference was made to the IBA Rules. Although limited in number, the selection of cases provides a sample that was considered sufficiently large and representative to draw some initial conclusions, which are presented below.

A. Characteristics of the cases

17. The 35 cases constituting our sample involved parties of 29 different nationalities (Argentina, Aruba, Bermuda, Brazil, British Virgin Islands, Chile, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, El Salvador, France, Germany, Italy, Mexico, Netherlands, Netherlands Antilles, Norway, Panama, Peru, Santa Lucia, Spain, Suriname, Switzerland, Trinidad and Tobago, UK, USA, Venezuela). The range of nationalities involved shows that use of the IBA Rules is not dependent on the parties' nationalities or on any particular combination of nationalities. This conclusion is confirmed by the wide range of nationalities among arbitrators, too (Argentina, Brazil, Canada, Chile, Colombian, Egypt, France, Germany, Mexico, Netherlands, Peru, Portugal, South Africa, Spain, Switzerland, UK, Uruguay, USA).

18. All 35 cases were of a transnational nature. In all but three of the cases the parties came from different countries, and in the three cases in which the parties were from the same county the arbitrators were of different nationalities. It is in cases combining different nationalities, where the risk of a clash of cultures is strongest, that the IBA Rules can be particularly valuable.

19. The language in which the proceedings were conducted was English in 20 cases and Spanish in 13 cases. One case was conducted in both English and Spanish and another case in Portuguese. The predominance of English is not surprising given the transnational nature of the cases, but the choice of language would not appear to have any particular impact on use of the IBA Rules. It would appear that the native languages of the parties and the arbitrators might have a greater influence. This is suggested by a case that was conducted in Portuguese—a language in which a translation of the IBA Rules has not been published. In this case, the use of the IBA Rules was proposed by the German respondent.

20. Nor would use of the IBA Rules seem to be related to or dependent on the place of arbitration or the applicable law. The 35 cases in our sample were seated in 15 cities in Latin America, North America and Europe, and the range of laws applied was equally broad, covering 13 different nations (Argentina, Brazil, Chile, Colombia, Dominican Republic, El Salvador, England, Mexico, Spain, Trinidad and Tobago, Uruguay, USA (New York), Venezuela) and both the common law and civil law traditions.

21. An interesting observation made in relation to arbitrators is that experience seems to count more than nationality when it comes to applying the IBA Rules: most of the arbitrators acting in the proceedings in which the IBA Rules were applied were experienced arbitrators. Most of them had acted in more than ten ICC cases and many in more than fifteen. In only six of the 35 cases studied had all the arbitrators previously acted in less than ten ICC cases.

B. How were the IBA Rules referred to?

22. The table overleaf addresses this question by showing whether the use of the IBA Rules was suggested by the parties or the arbitral tribunal and whether their use was mentioned in the Terms of Reference or decided by the arbitrators in procedural orders. One is not exclusive of the other: as the table shows, there were cases in which the IBA Rules were mentioned in the Terms of Reference and then in procedural orders issued pursuant to the agreement recorded in the Terms of Reference. In case 1, for instance, the respondent suggested the use of the IBA Rules, the claimant accepted the respondent's suggestion, and their agreement was confirmed in the Terms of Reference. The arbitral tribunal then ordered the production of documents requested by the respondent on the basis of Article 3 of the 1999 IBA Rules.

Case	Use of IBA Rules suggested by whom?	IBA Rules mentioned in Terms of Reference?	IBA Rules applied in procedural orders?
1	Respondent (claimant agreed)	Yes	Yes
2	Arbitral tribunal	No	Yes
3	Arbitral tribunal	No	Yes
4	Arbitral tribunal	No	Yes
5	Arbitral tribunal	No	Yes
6	Arbitral tribunal	No	Yes
7	Parties	Yes	No
8	Arbitral tribunal	No	Yes
9	Arbitral tribunal	No	Yes
10	Arbitral tribunal (parties agreed)	Yes	Yes
11	Arbitral tribunal (parties agreed)	Yes	No
12	Arbitral tribunal (parties agreed)	Yes	No
13	Arbitral tribunal	No	Yes
14	Arbitral tribunal	No	No
15	Arbitral tribunal	No	Yes
16	Arbitral tribunal (parties agreed)	Yes	Yes
17	Parties	Yes	Yes
18	Arbitral tribunal	No	No
19	Parties	Yes	No
20	Parties	Yes	No
21	Arbitral tribunal (parties agreed)	Yes	Yes
22	Arbitral tribunal	No	Yes
23	Arbitral tribunal	No	Yes
24	Arbitral tribunal	No	Yes
25	Arbitral tribunal	No	Yes
26	Arbitral tribunal (parties agreed)	Yes	Yes
27	Arbitral tribunal	No	Yes
28	Arbitral tribunal (parties agreed)	Yes	Yes
29	Arbitral tribunal	No	Yes
30	Arbitral tribunal	No	Yes
31	Arbitral tribunal	No	Yes
32	Arbitral tribunal (parties agreed)	Yes	Yes
33	Arbitral tribunal	No	Yes
34	Arbitral tribunal	No	Yes
35	Arbitral tribunal (parties agreed)	Yes	Yes

23. As can be seen from the table opposite, in 21 cases the IBA Rules were referred to in procedural orders without the parties' express agreement to their use. Hence, arbitrators have not been hesitant in applying or referring to the IBA Rules even in the absence of the parties' express agreement.

24. Our research showed that in two cases the IBA Rules were not referred to until the final award (as opposed to being referred to in course of the proceedings to organize the production of evidence, which is the more common scenario). In these two cases the reference in the final award was to support the drawing of adverse inferences, in one case from a witness's failure to appear at the hearing and in the other case from the claimant's failure to produce documents.[30]

C. Which provisions of the IBA Rules were referred to?

25. The tables on the following pages list the provisions of the IBA Rules that were applied or referred to in the cases in our sample and the number of cases in which reference was made to each of the provisions listed. Sometimes, the reference was to an Article as a whole and sometimes to a subparagraph of an Article. Of the 35 cases studied, 24 referred to the 1999 version and 11 to the 2010 version of the IBA Rules.

26. The number and variety of provisions listed in the table above show that several parts of the IBA Rules have been used, with a particular preference for those relating to their scope of application, document production, witnesses of fact and party-appointed experts (respectively Arts. 2, 3, 4, and 5). Interestingly, we see no reference to the provisions regarding tribunal-appointed experts, inspections, and the organization of the evidentiary hearing (Arts. 6, 7, and 8).

27. While in most cases the reference to the IBA Rules was for the purpose of directly applying the provision or provisions specified, in a small number of cases the IBA Rules were referred to simply as a source of guidance for the arbitral tribunal.

IV. Conclusion

28. Our study shows that the IBA Rules have been applied widely in international arbitrations involving Latin American parties, regardless of the nationalities of the parties and the arbitrators, the seat of the arbitration, the language of the arbitration and the law applicable to the merits. Furthermore, their use has extended to several of their provisions. Practitioners in Latin America would appear to be conversant with the IBA Rules and here, as elsewhere, the Rules are well on their way to becoming the common ground for the production of evidence in international arbitration, especially—but not only—where there is a risk of a cultural clash.

30 On the drawing of adverse inferences, see S. Greenberg & F. Lautenschlager, 'Adverse Inferences in International Arbitral Practice' (2011) 22:2 ICC ICArb. Bull. 43 and the extracts from ICC awards published in the same issue.

1999 IBA Rules

Provision	Number of cases
Article 2: Scope of application	
2.1 IBA Rules govern taking of evidence, subject to mandatory provisions of applicable law.	12
2.2 In case of conflict between IBA Rules and General Rules, aim should be to accomplish the purposes of both the General Rules and the IBA Rules.	13
2.3 In the event of dispute over meaning of IBA Rules, they shall be interpreted according to their purpose and as appropriate for the particular arbitration.	2
2.4 If IBA Rules silent on any matter concerning the taking of evidence and the parties have not agreed otherwise, the taking of evidence to be conducted as appropriate and in accordance with the general principles of the IBA Rules.	1
Article 3: Documents	2
3.1 Obligation to submit documents upon which the parties rely, when ordered, except those already submitted by another party.	18
3.2 Submission of a document production request.	19
3.3 Contents of document production request.	20
3.4 Production of all requested documents that a party has in its possession, custody or control to which no objection has been made.	19
3.5 Objections to document production requests.	19
3.6 Arbitral tribunal's examination of document production request and objections, issue of an order to produce.	19
Article 4: Witnesses of fact	8
4.1 Identification of witnesses and subject matter of their testimony.	12
4.2 Any person may present evidence as a witness, including a party or a party's officer, employee or other representative.	12
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