

**PERMANENT COURT OF
ARBITRATION (PCA) –
INTERNATIONAL ARBITRATION
TRAINING COURSE**



ADR VIETNAM CHAMBERS LLC
— INDEPENDENT ARBITRATORS & MEDIATORS —

**EVIDENCE IN
INTERNATIONAL
ARBITRATION**

Hanoi, 29/06/2023

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Independent International Arbitrator

VIAC, KCAB, HIAC, SHAC and HKIAC

Former ICC Court Member 2017-2021



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2. Burden of proof
3. Soft law
4. Types of witness
5. Witness preparation
6. Production of evidence
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3. LEGAL GROUNDS

- ❖ Art. 26 -27 UNCITRAL MODEL LAW 2006
- ❖ Art. 27 UNCITRAL Arbitration Rules 2021
- ❖ Art. 27 PCA Arbitration Rules
- ❖ Art. 45, 46, 47 Law on Commercial Arbitration 2010
- ❖ Solf law (IBA Rules on the Taking of Evidence in International Arbitration, Ciarb Guideline on International Arbitration)

4. UNCITRAL MODEL LAW 2006



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❖ **Art. 26 UNCITRAL MODEL LAW 2006, *Expert appointed by arbitral tribunal***

“(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.”

❖ **Art. 27 UNCITRAL MODEL LAW 2006, *Court assistance in taking evidence***

“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.”

5. UNCITRAL Arbitration Rules 2021



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❖ Art. 27 UNCITRAL Arbitration Rules 2021, *Evidence*

“1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2, Witnesses, including expert, witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them

3, At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine. The arbitral tribunal may also, after consultation with the parties, perform a site visit

4, The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered”



6. PCA Arbitration Rules

Art. 27 PCA Arbitration Rules, *Evidence*

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7. Law on Commercial Arbitration 2010

- ❖ Art. 45 The arbitral tribunal's jurisdiction to verify matters
- ❖ Art. 46 The arbitral tribunal's jurisdiction to collect evidence
- ❖ Art. 47 The arbitral tribunal's jurisdiction to summon witnesses



9. SOFT LAW – IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

IBA Rules on the Taking of Evidence in International Arbitration

- ❖ Article 4 Witnesses of fact
- ❖ Article 5 Party-Appointed Experts
- ❖ Article 6 Tribunal-Appointed Experts
- ❖ Article 8 Evidentiary Hearing
- ❖ Article 9 Admissibility and Assessment of evidence

-Deal with evidentiary issue and provide guidelines on what evidence is admissible in international arbitral proceedings.

-For these rules to be apply, the parties must agree to adopt them although many tribunals will be “inspired” by these rules in making evidential rulings



10. SOFT LAW - Ciarb Guideline on International Arbitration

❖ Ciarb Guidelines on International Arbitration

CIArb Guidelines 7 Party Appointed and Tribunal Appointed Expert Witnesses, 2016:

<https://ciarb.org/media/4200/guideline-7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf>.

CIArb Guidelines 13 for witness conferencing in international arbitration: <https://ciarb.org/media/4555/guideline-13-witness-conferencing-april-2019pdf.pdf>.



11. BURDEN OF PROOF

Art. 27(1) PCA Arbitration
Rules 2012:

“1. Each party shall have the burden of proving the facts relied on to support its claim or defence.”

Art. 27(1) of UNCITRAL
Arbitration Rules 2021:

“1. Each party shall have the burden of proving the facts relied on to support its claim or defence.”

12. TYPES OF WITNESS in INTERNATIONAL PRACTICE



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1, Fact Witness

- Individuals (including parties' representative, parties' employees, director)
- Do not have conflict of interest with any members of tribunal
- Art. 27 PCA Rules

2, Tribunal-appointed expert

- Art. 29 PCA Arbitration Rule 2012, Art. 29 UNCITRAL Arbitration Rules, Art 26 UNCITRAL Model Law
- The tribunal may appoint an independence expert to report to it, in writing, on specific issues determined by the arbitral tribunal (for instance, the valuation of assets)
- Support the tribunal in providing diverging views of the case
- Before appointment, the arbitral tribunal must consult the parties and thereafter communicate to them a copy of the expert's terms of reference

3, Party-appointed expert

- Art. 27 PCA Rules

13. WITNESS PREPARATION



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- ❖ Art. 4.3 IBA Rules: *“It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them”*
- ❖ Depend on applicable arbitration rules and ethical rules, lawyers and parties consider the appropriate approach
- ❖ Parties and Counsels shall not request witnesses to provide wrongful testimony



14. PRODUCTION OF EVIDENCE

- ❖ Production of Evidence is a practice in international arbitration.
- ❖ Art. 3.1 IBA Rules on the Taking of Evidence in International Arbitration

“Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by other Party”

- ❖ Redfern Schedule is a tool usually used by the tribunal and parties to manage this issue (**PCA P08 on evidence production**)



15. CROSS EXAMINATION

- ❖ Purpose: for the tribunal and counsel to examine the validity of witness testimony
 - ❖ Schedule of hearing with witness cross examination: Opening statement – witness examination – closing statement
 - ❖ **witness examination with fact witnesses:**
 - **Direct examination**
 - Asked by party who invites the witness;
 - Do not include leading questions;
 - The examination should be brief to confirm the identity of the witness and that the content of the statement is correct;
 - **Cross examination**
 - Asked by opposing party
 - Party can oppose to unappropriated questions
 - Allowed to have leading questions
- The tribunal can have questions during or after the parties' cross examination. The tribunal should avoid asking similar questions and unappropriated questions and decide when a party opposes to other parties questions
- ❖ **Witness examination with tribunal- appointed expert**
tribunal- appointed experts will be examined by the tribunal

16. ADMISSIBILITY AND WEIGHT OF EVIDENCE



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Art. 27(4) UNCITRAL Arbitration Rules and

Art. 27(4) PCA Arbitration Rules:

“The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered”

17. ADMISSIBILITY AND WEIGHT OF EVIDENCE - INTERNATIONAL PRACTICE



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- ❖ In making rulings on the evidence, the arbitral tribunal is not bound by the strict legal rules of evidence.
- ❖ The arbitral tribunal evaluates evidences based on four criteria: (1) *admissibility*, (2) *relevance*, (3) *materiality* and (4) *weight of the evidence*
- ❖ The arbitral tribunal should carefully evaluate the assumptions, reservations, reasoning underlying the experts' opinion and consider it together with the rest of the evidence submitted by the parties.
- ❖ If a party fails to appear at a hearing, despite notice, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration. (UNCITRAL Rules, Art 30(2); PCA Rules, Art 30(2))
- ❖ If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it. (UNCITRAL Rules, Art 30(3); PCA Rules, Art 30(3))

18. ADMISSIBILITY AND WEIGHT OF EVIDENCE - VIETNAM PRACTICE



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- ❖ There is no regulation regarding the standards of admissibility of evidences
- ❖ Art. 68.2.d of Law on Commercial Arbitration, An arbitral award shall be set aside in any of the following cases:
“ ... d) The evidence provided by the parties on which the arbitration council bases to issue the award is counterfeit:.....”



19. LIMITATION ON ADMISSIBLE EVIDENCE

- ❖ The arbitral tribunal might exclude evidence that is not sufficiently relevant to the case or material to its outcome (Art. 9.2(a) IBA Guideline)
- ❖ Protection for documents and other evidence that may be covered by certain privileges, under the appropriate applicable law, such as the attorney-client privilege, professional secrecy or the without prejudice privilege (Art. 9.2(b) and Art. 9.3 IBA Guideline)
- ❖ The arbitral tribunal is permitted to exclude from production or from evidence any documents or evidence which would be unreasonable burden to produce (Art. 9.2(c) IBA Guideline)
- ❖ Documents have been lost or destroyed therefore it can be reasonably be produced (Art. 9.2(d) IBA Guideline)
- ❖ Special political or institutional sensitivity or commercial or technical confidentiality (Art. 9.2(e) (f) IBA Guideline)



20. PRESENTATION OF NEW EVIDENCE

- ❖ International practice v. Vietnam practice in submission of evidence
- ❖ In International practice, if parties come upon new evidence, they would then need to apply to the tribunal, putting the other party on notice, for permission to admit such evidence.
- ❖ In deciding whether to admit new evidence, the tribunal will have to weigh the advantages of allowing it in against the potential detriment to the other party and its ability to respond to the new material
- ❖ Cut-off date, after which parties shall not submit any documents or evidence. Normally, cut-off date is mentioned in Procedural Order no. 1 (PO1)



21. DISCUSSION

- ❖ Application of soft law in Vietnam?
- ❖ Objection to tribunal-appointed expert?
- ❖ Fact witness/ expert witness does not participate in the hearing?
- ❖ Conflict between parties' fact witnesses/ expert witnesses?

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THANK YOU FOR LISTENING



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