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International Arbitral Rules and Admissibility of Anonymous Evidence

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This article briefly discusses the rules and guidelines followed by international arbitral tribunals, with particular focus on the controversial issue of anonymous witnesses. It examines the procedural standards governing the admissibility of evidence in international arbitration and highlights how tribunals balance fairness with confidentiality. The article analyses key legal frameworks, including the IBA Rules on the Taking of Evidence in International Arbitration (revised 2021), the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules, and the practices of the Court of Arbitration for Sport (CAS) under the Swiss Private International Law Act. It also considers relevant precedents of the European Court of Human Rights (ECHR) to understand how principles of due process and the right to a fair hearing are applied. Through this analysis, the article seeks to provide insight into the evolving approach of international tribunals toward anonymous testimony and evidentiary standards.

Keywords: *arbitration, anonymous witnesses, admissibility of evidence, right to a fair trial.*

INTRODUCTION

Arbitration is a form of alternative dispute resolution and is a binding procedure. Private individuals, instead of engaging in lengthy courtroom litigation, seek a neutral third party to help resolve their dispute. It is not as costly as litigation and is less time-consuming as well.

The mechanism of International Arbitration is carried out by individual adjudicators who are called 'arbitrators', and it extends beyond the borders of a country. This process of arbitration is carried out by tribunals that are specialised and specific to the issue that is the cause of the arbitration. The arbitrators may not necessarily be lawyers and can be specialists or experts as well. One such international tribunal is the Court of Arbitration for Sports, or CAS, in short.

There are multiple tribunals at the international level, each with its own set of rules and similar guidelines with respect to the admissibility of evidence. They provide mechanisms for the presentation of documents, witness procedures, and the conduct of hearings for evidence.

RULES GOVERNING INTERNATIONAL TRIBUNALS

The IBA Rules on the Taking of Evidence in International Arbitration were drafted by the Arbitration Committee of the International Bar Association, and the current edition was revised in 2021. As stated in the preamble of the rules, parties and tribunals may adopt the IBA Rules of Evidence, *in whole or in part,* to govern arbitration proceedings. They can also be used as guidelines to develop other procedures or adapt them to the particular circumstances of each arbitration. Similarly, most arbitral rules are not rigid and allow for tailored rule application as suitable in each proceeding. Article 9 of these rules states the guidelines for Admissibility and Assessment of Evidence. It gives full autonomy to the arbitral tribunal to apply its discretion and determine the materiality of the evidence. At the request of a party or as its own initiative, may exclude illegally obtained evidence. Article 9.2 states other reasons permitting exclusion of evidence as well. Under Article 4(5) are the requirements for a valid witness statement, which includes full name and address of the witness along with other personal details.[1] However, Article 9(4) of these rules gives the tribunal the power to make necessary arrangements to protect the confidentiality of documents, statement or oral communications for legal advice or

[1] International Bar Association Rules on the Taking of Evidence in International Arbitration 2020, art 4(5)

settlement negotiations.[2] This provision allows for the admission of anonymous statements as evidence, keeping in mind the interests of both parties.

The ICSID (International Centre for Settlement of Investment Disputes) Arbitration rules apply to any arbitration proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of other states. Rule 36 of these rules under Chapter 5 gives the Tribunal the power to determine the admissibility and probative value of the cited evidence.[3] In Ipek Investment Limited v Republic of Turkey, the ICSID Tribunal held that 'An application for witness anonymity is and must remain an exceptional procedural step, to be granted only in cases where a tribunal is satisfied that it is essential in the interests of justice and for the protection of the witness herself and that the due process rights of both parties can be adequately protected.' This judgment proceeded to lay down 3 requirements to accept a request for confidentiality. The stated requirements were (i) Relevance of testimony, (ii) Compelling reason of risk or danger, and (iii) The rights of the parties must be balanced.

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules apply in cases where the parties have agreed to have their dispute referred under these rules. These rules may be subject to modifications as agreed by the parties. According to clause 3 of Article 1 of these rules, 'These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.'[4] The tribunal is allowed to conduct the arbitration in the manner that it considers appropriate, while ensuring that both parties are treated equally and are allowed to present their case under Article 17 (1).[5] Subsequently, under clause 3 of article 28, the witnesses can be heard in the manner set by the tribunal, which allows for anonymity of statements, given that there is enough proof of danger to the witness and the interests of either parties is not disregarded.[6] In the proceedings between South American Silver Limited v In the Plurinational State of Bolivia, both parties had requested anonymity of witnesses on separate occasions. Bolivia had requested a protective order against one of their witnesses as they were going to confirm unlawful actions committed by the other party and did not wish to reveal their

[2] International Bar Association Rules on the Taking of Evidence in International Arbitration 2020, art 9(4)
[3] International Centre for Settlement of Investment Disputes Arbitration Rules 2022, r 36
[4] United Nations Commission on International Trade Law Arbitration Rules 2021, art 1(3)
[5] United Nations Commission on International Trade Law Arbitration Rules 2021, art 17(1)
[6] United Nations Commission on International Trade Law Arbitration Rules 2021, art 28(3)

identity. The Tribunal settled this request, allowing only the claimant's counsel, witnesses and independent experts to know the witness's identity and the contents of their statement. Similarly, the claimant requested a protective order for two witnesses, reasoning that they were indigenous Bolivians and were afraid of suffering either physical harm or loss of their property as a result of giving their statements. However, they only wanted the tribunal to know their identity and question the witnesses, which was rejected as it tipped the balance in favour of the claimants.

EVIDENCE IN THE COURT OF ARBITRATION FOR SPORTS

The Court of Arbitration for Sports gets its powers from the Code of Sports-related Arbitration, which lays down procedures and guidelines that are applicable as and when two parties agree to refer a sports-related dispute to the CAS.[7] The code is silent on the evidence collection and admission aspect, but the arbitrations under the CAS are governed by Chapter 12 of the Swiss Private Law Act (PILA). The exception to this application is if both parties are domiciled in Switzerland. Article 182 of the Swiss Private Law Act says that 'the parties may determine the arbitral procedure, directly or by reference to arbitration rules; they may also submit it to a procedural law of their choice.'[8] Article 184 broaches the procedure on evidence and states that 'The arbitral tribunal shall conduct the taking of evidence itself.'[9] Reading these two together, it implies that the evidentiary issues may be decided according to the CAS Code of Sports-Related Arbitration and, if the Code is silent on the relevant evidentiary issue, shall be left to the discretion of the panel appointed for the dispute.

Seeing how the Code does not broach upon the topic of resolution of evidentiary issues, the IBA rules on The Taking of Evidence in International Arbitration can be used as a form of guidance. Anonymous communications may or may not be admissible as evidence before the CAS. There are two cases in reference to this issue with opposite results. These were FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v UEFA and UCI v Alberto Contador Velasco & RFEC. In the UEFA case, the identity of multiple witnesses was not disclosed, and the decision was announced against the appellants. After an appeal, there were more witnesses whose identity was revealed to UEFA but not to the appellants in order to protect their anonymity and for safety purposes.

[7] Code of Sports Related Arbitration 2025, r 27
[8] Swiss Private International Law Act 1987, art 182(1)
[9] Swiss Private International Law Act 1987, art 184(1)

There was a history of the appellants engaging in witness intimidation, which gave the tribunal a reason to allow for anonymous witnesses. Allowing such witnesses came with regulations for the same, such as that the witness statements support the other evidence provided to the court, and there is a situation where the safety of the person is at stake.

The question of anonymous witnesses came up again in the case of UCI v Contador, where the athlete in question objected to it, saying that it would be unfair. The panel held that 'Admitting anonymous witnesses potentially infringes upon both the right to be heard and the right to a fair trial of a party, since the personal data and record of a witness are important elements of information to have in hand when testing his/her credibility. Furthermore, it is a right of each party to assist in the taking of evidence and to be able to ask the witness questions. It was concluded that the right to use anonymous witnesses was available only in circumstances with a concrete or likely probability of danger to the person. Subsequently, the panel laid down conditions for admission of anonymous witnesses, which were:

- The witness must provide a convincing motivation for his or her right to remain anonymous.
- The court must have the possibility to see the witness.
- There must be a concrete risk of retaliation against the witness by the party against whom he or she is testifying.
- The witness must be questioned by the court itself, and such court must investigate his or her identity and the reliability of his or her evidence; and
- The opposing party must be able to cross-examine the witness through an audiovisual protection system.

ANONYMOUS EVIDENCE IN THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights is an international court which rules on violations of the rights set out in the European Convention on Human Rights. The court is based in Strasbourg, France. The Convention on Protection of Human Rights has been very decisive in whether allowing witnesses to stay anonymous is just and fair to both parties. Multiple arbitral tribunals refer to these rules to decide upon such cases as guidelines. Article 6, Right to a Fair Trial, in particular, has been interpreted to ensure that no one is given an unfair advantage in producing

evidence or is unable to examine witnesses.[10] The ECHR first visited the subject of an anonymous witness in the case of Kostovski v The Netherlands.[11] In the aforementioned case, there had been an anonymous phone call along with a separate witness who had been allowed anonymity by the police officers as they believed their reasons for maintaining confidentiality were valid. In a judgment on 17th January, 1938, the Supreme Court had held that hearsay evidence could be admitted even if the witness did not name their informant, though such information called for caution while assessing its probative value. The same ruling was made in a judgment of 4 May 1981, concerning a case where the witness had been heard anonymously by both the police and the examining magistrate; on that occasion the Supreme Court also held that 'the mere fact that the official reports of the hearings did not name the witness was not an obstacle to their utilisation in evidence, subject to an identical proviso as to caution.'

CONCLUSION

We see in all these arbitration rules that the admissibility of evidence is left up to the tribunal's discretion. On the topic of anonymous witnesses, though, the right to a fair hearing is brought into question. This right includes the choice of being able to argue against evidence and put forward their own reasoning and defence. Since an anonymous statement cannot be questioned thoroughly by the other party, it infringes upon their right to a fair trial and gives them a disadvantage or handicap in proving their side of the case. So the main issue faced in cases requiring confidentiality of the witness is of the tribunal having to balance the rights of both parties and ensuring that no one gets an unfair advantage over the other. This subject has also helped lay down the criteria to determine the admissibility of such evidence, such as in cases where the person is at risk or in danger if their identity is revealed.

[10] European Convention on Human Rights 2021, art 6
[11] *Kostovski v The Netherlands* [1989] 12 EHRR 434 (ECtHR)