Global Arbitration Review

The Guide to Evidence in International Arbitration

Editors
Amy C Kläsener, Martin Magál and Joseph E Neuhaus

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Amy C Kläsener

Martin Magál

Joseph E Neuhaus

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This article was first published in September 2021
For further information please contact insight@globalarbitrationreview.com

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-577-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ALLEN & OVERY

ALVAREZ & MARSAL

BÄR & KARRER AG

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For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service, but we also provide more in-depth content: books such as this one; reviews; conferences with a bit of flair; and time-saving workflow tools. Do visit www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we often become aware of gaps in the literature. Recently, evidence emerged as one, not because there are no other books about it, just none that bridge the law and practice in a modern way. Indeed, few topics command as much attention as evidence and its related topics during our GAR Live sessions.

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We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you all.

And great personal thanks to our three editors – Amy, Martin and Joseph – for the energy with which they have pursued the vision, and to my Law Business Research colleagues in production on such a polished work.

David Samuels
GAR publisher
August 2021

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Approaches to Evidence across Legal Cultures

Jalal El Ahdab, Pablo Berenguer, Michael Chik, Jonathan Choo, Jiri Jaeger, Nicholas Peacock, Lucas Pitts and Gavin Zuo[1]

Introduction

Even in a country where one would think the meaning of 'love' would be self-evident, a French poet, Pierre Reverdy, once said, 'there is no love; there are only proofs of love'. The word 'evidence', which is derived from the Latin *evidentia*, meaning 'that which is obvious', can either be a verb or a noun (i.e., 'to render evident' or 'that which makes evident'). The persuasive power of facts is underscored by the words of John Adams, who once described them as 'stubborn things' that cannot be altered 'whatever may be our wishes, our inclinations, or the dictates of our passion'.

There is no uniform or universal definition of evidence. Many countries do not provide a precise or single definition in their legislation;[2] for those countries that do, the definitions provided are distinct but similar. For example, under the Criminal Procedure Law of the People's Republic of China, evidence is simply said to be 'all material that can be used to prove the facts of the case',[3] whereas in Spain, pursuant to Article 281.1 of the Spanish Civil Procedure Act, the purpose of evidence is to establish the facts that are related to the legal position that each party intends to maintain in legal proceedings.[4] In a slightly different

1 Jalal El Ahdab, Pablo Berenguer, Michael Chik, Jonathan Choo, Jiri Jaeger, Nicholas Peacock and Lucas Pitts are partners at Bird & Bird. Gavin Zuo is a partner at Lawjay Partners in association with Bird & Bird. The authors wish to thank Claire Bentley (associate, Paris) for her contribution to the drafting of this chapter. The partners also thank Mollie Lewis (trainee, Paris) and other colleagues from across the firm's global network for their assistance: Cristina Manas (associate, Madrid), Zoe Chung (associate, Hong Kong), Olivia Cheng (trainee, Hong Kong), Teo Tze She (associate, Singapore), Michael Brooks-Zavodsky (counsel, Düsseldorf), Rebecca Slater and Megan Curzon (associates, London), Rana Sebaly (associate, Dubai) and Jade Chen (associate, Beijing).

2 UAE legislation, French legislation, Hong Kong legislation, etc.

3 See PRC Criminal Procedure Law, Article 50.1.

4 Constitutional Court judgments 168/2002 of 30 September 2002 and 71/2003 of 9 April 2003.

manner, under the Evidence Act of Singapore, evidence is defined as oral evidence (all statements that the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry) and documentary evidence (all documents produced for the inspection of the court).[5] Therefore, though some countries may not specifically define evidence, they do list the different types.

Generally, the different types of evidence detailed within national legislation[6] – with exceptions such as New York[7] – can be divided into two main groups: oral evidence and documentary evidence. Additional types of evidence are recognised within certain jurisdictions, such as hearsay evidence, physical evidence and presumptions.[8]

The main objective of evidence – of any type – is the pursuit of the truth. In Germany, this objective is set out clearly in Section 286, paragraph 1 of the German Code of Civil Procedure, which provides that 'the court shall, taking into account the entire content of the proceedings and the result of any taking of evidence, freely decide whether a factual allegation is to be considered true or not true'. The law in the United Arab Emirates (UAE) refers to evidence that is 'useful to reveal the truth'.[9] This provision also aligns with the French position, which considers that evidence is a mechanism to bring truth to light, albeit a relative truth.[10] Singapore law also recognises the objective of the pursuit of truth, subject to the caveat that there is no guarantee of absolute truth.[11] In consideration of the constant evolution of the common law of evidence, former Chief Judge of the New York Court of Appeals Stanley Fuld offered that '[a]bsent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts'.[12]

This chapter first addresses the general rules and requirements of evidence across various legal cultures, including France, Germany, Spain, England and Wales, the UAE, the People's Republic of China, Hong Kong, Singapore and the United States (notably New York), then provides an analysis of evidence in international arbitration.

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5 Evidence Act (Cap 97, 1997 Rev Ed), s 3.

6 For example, the UAE has a specialised law, Federal Law No. 7 on the Regulation of the Experts Profession Before Judicial Authorities, which applies in tandem with the UAE Evidence Law. Another example is the Civil Procedure Rules [CPR] in England and Wales, particularly Parts 31 to 35, as well as the 1968, 1972 and 1995 Civil Evidence Acts.

7 New York does not have a statutory code of evidence. However, New York's Unified Court System has published a 'Guide to New York Evidence', http://www.nycourts.gov/JUDGES/evidence/.

8 Depending on the jurisdiction, presumptions may either be considered as a type of evidence (such as in the UAE) or a rule of evidence.

9 UAE Evidence Law, Articles 44.1 and 44.5 in relation to questions on witness examination.

10 Jean-Louis Baudouin, 'La vérité dans le droits des personnes : aspects nouveaux, rapport général' in *Travaux de l'association*, Henri Capitant (1989) p. 21 et seq.; Gérard Cornu, 'La vérité et le droit' in *L'art du droit en quête de la sagesse* (1998) p. 211 et seq.; see also: R Trittmann, 'Basics and Differences of the Continental and Common Law System and State Court Proceedings' in Karl-Heinz Böckstiegel, Klaus Peter Berger, Jens Bredow, eds., *The Taking of Evidence in International Commercial Arbitration*, Sect. III, p. 20.

11 Jeffrey Pinsler, *Evidence and the litigation process* (Seventh edition, LexisNexis Singapore, 2020) at [1.003], [1.005].

12 *Fleury v. Edwards*, 14 NY2d 334, 341 [1964, Fuld, J., concurring].

General rules and requirements of evidence across legal cultures

Probative value of different types of evidence

The question of whether oral evidence or documentary evidence is of a higher probative value depends on the jurisdiction. Nevertheless, it should be noted that most often the probative value of any given element of evidence is subject to the discretion of the judge (or judges) or jury hearing the case.[13] For example, in China, the court is expected to examine the evidence comprehensively and objectively, and examine the relevance, legality, authenticity and probative force of the evidence using logical reasoning and rules of daily life, in accordance with the law.[14] Documentary evidence, in some jurisdictions, has the advantage of holding a certain value under the law, meaning it does not require the judge's conviction, known as 'assessed evidence'. This is the case in Spain. Article 319 of the Spanish Civil Procedure Act states that public documents, court rulings and certifications of registry are the only means of proof considered to be 'assessed evidence'. In other words, these documents constitute full proof of the facts they document.[15] In France, documentary evidence is also considered the most common, persuasive and practical type of evidence.[16] In cases in the UAE, when the amount in dispute exceeds 5,000 dirhams or is indeterminate, witness testimony may not be relied on to establish the existence or negation of a fact.[17] A similar principle is found in France, such that if the sum or value exceeds an amount fixed by decree, the juridical act must be signed and in writing in order to be proved.[18] The probative value of witness testimony may also depend on the nature of the proceedings. In contrast with criminal proceedings in France, it is uncommon for witnesses to appear in civil proceedings and, if they do, the evidence is unlikely to be afforded much weight.

Burden and standard of proof

The legal burden refers to the obligation on a party to establish a fact in issue. On a basic level, the notion that each party must prove its own allegations is universal. To provide an example from France, the party who claims a debt must prove that it is the creditor. Thus, this party must prove that the debt exists, together with its nature and content.[19] If the

13 See, e.g., German Code of Civil Procedure, s 286.

14 See Interpretation of the Supreme People's Court on the application of the Civil Procedure Law of the People's Republic of China, Articles 104 and 139; Civil Procedure Law, Article 634.

15 Supreme Court judgments of 30 September 1995, 30 October 1998, 20 January 2001 and 31 December 2003.

16 Jalal El Ahdab, Amal Bouchenaki, 'Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?' in Albert van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, 2010 Rio Vol. 15 (Kluwer Law International, 2011), p. 70.

17 UAE Federal Law No. (10) of 1992 On Evidence in Civil and Commercial Transactions, Article 35.

18 French Civil Code, Article 1359.

19 See French Civil Code, Article 1353, para. 1 ('[t]he party who claims the execution of an obligation shall prove it').

existence of the obligation is established, then the other party is tasked with proving either that payment was made or that the obligation to pay was extinguished.[20] Similar rules exist in the UAE,[21] Spain[22] and Germany.[23]

In England and Wales, Singapore and Hong Kong, the law distinguishes between the legal and evidential burdens of proof. In the United States, the evidential burden is called the 'burden of production'.[24] In a civil action, the party who desires that the court give judgment as to a legal right or liability (the plaintiff) bears this burden throughout the proceedings.[25] The evidential burden, however, may shift: once the plaintiff has adduced some evidence to prove the facts asserted, the evidential burden shifts to the counterparty (the defendant) to adduce evidence in rebuttal.[26] If the defendant fails adequately to do so, the court may conclude that the legal burden is discharged and, consequently, make a finding of fact against the defendant.[27]

The standard of proof refers to the degree of evidence and level of certainty necessary to establish a fact in dispute. In the aforementioned common law jurisdictions, the standard of proof to be applied in criminal and civil proceedings is different. In civil proceedings, the plaintiff must prove the issue on the 'balance of probabilities'.[28] In criminal cases, the prosecution must prove guilt 'beyond a reasonable doubt'.[29] Doctrinal sources in civil law jurisdictions, by contrast, do not differentiate between the standards of proof to be applied in civil and criminal proceedings; however, in practice, judges tend to apply a standard that is similar to 'preponderance of the evidence'.[30]

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20 See French Civil Code, Article 1353, para. 2; Civ. 1ère, 14 February 2018, No. 16-23.205 (the 1st Chamber of the French Court of Cassation rejected the claim of a family who failed to prove that the airline was obligated to pay damages for the late arrival of their flight. See also Com. 27 October 1981, Bull. Civ. No. 372 (company A ordered goods from company B and refused to pay as it did not receive plans before the production of said goods. Company B commenced an action to claim payment. The court decided that company A, even though it did not introduce the action, had to prove its allegations, namely the non-receipt of the plans).

21 See, e.g., UAE Evidence Law, Article 1(1); Federal Law No. 18 of 1993 concerning Civil Transactions Law, Article 113; and UAE Civil Code (UAE Law No. 5 of 1985), Article 117.

22 See Spanish Civil Procedure Act, Article 217; Supreme Court Judgment No. 899/2003 of 23 March 2009 and Malaga's Court of Appeal Judgment No. 945/2008 of 17 March 2009 (the defendant must, if applicable, prove the facts that, according to the applicable substantive legal rules, prevent, extinguish or weaken the legal effectiveness of the cause of action of the claim).

23 Though not codified, the rules are considered part of statutory law.

24 This burden refers to the obligation to present evidence to raise an issue at trial.

25 *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] SGCA 47, at [60].

26 id.

27 id.

28 In Singapore, see *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] SGCA 47, at [61]. In the UK, see *Miller v. Minister of Pensions* [1947] 2 All ER 372.

29 In Singapore, see *Public Prosecutor v. GCK and another matter* [2020] SGCA 2, at [133]. In the UK, see, for example, *Woolmington v. DPP* [1935] UKHL 1.

30 Mark Schweizer, 'The civil standard of proof – what is it, actually?', *The International Journal of Evidence & Proof*, 2016, Vol. 20(3), pp. 217–34, 2016 (the English law equivalent is known as the 'balance of probabilities').

Exceptions to standard rules on the burden of proof

As discussed above, the burden of proof may shift from the party who originally bears this obligation to the other party. In France, this can result from a statutory presumption[31] or an exception based in case law, which may allow the relevant party to produce other converging factual elements and circumstances (*faisceau d'indices*) to establish a certain fact.[32] In Germany, the burden of proof may be reversed in specific cases identified by case law (e.g., producer's liability)[33] or if a party in possession of the evidence destroys or withholds it.[34] German courts also apply a modified burden of proof to overcome the challenge of proving the non-existence of facts, as opposed to proving a fact positively.[35] Similarly, statutory and common law presumptions exist under Singapore law, for example, relating to the authenticity of signatures and handwriting in the case of a document that is more than 30 years old,[36] or the accuracy of an electronic record provided that certain conditions are met.[37]

In Spain, for example, the Spanish Civil Procedure Act provides for exceptions in the presence of admitted, notorious or presumed facts.[38] In China, there are specific rules depending on the subject matter of the case; for example, in patent infringement[39] and in tort litigation involving environmental pollution,[40] ultrahazardous materials[41] or domestic animals.[42] Similarly, UAE law provides for exceptions in relation to the forgery of customary and official documents[43] and liquidated damages.[44] In civil cases, different rules may also be

31 See French Civil Code, Article 1354. A statutory presumption may be irrefutable, mixed (such that it may be refuted by certain types of evidence provided by law) or simple (such that it may be refuted by any type of evidence).

32 For example, the French Court of Cassation considers that, when faced with a donation made in the form of a deed for valuable consideration, the French tax authorities may rely on presumptions.

33 Federal Supreme Court [BGH or Bundesgerichtshof] decision dated 2 February 1999, ref. VI ZR 392-97; Federal Supreme Court decision dated 24 November 1976, ref. VIII ZR 137/75.

34 German Code of Civil Procedure, s 444. See also German Code of Civil Law, s. 280, para. 1, second sentence.

35 BGH NJW 1993, 746, 747; BGH NJW 2010, 1813, para. 20 (once the party with the burden of proof asserts the negative facts, the onus is on the opposing party, within reasonable bounds, to advance substantiated counterclaims that rely on refuting circumstances. The party with the primary burden of proof must then prove the incorrectness of those counterclaims).

36 See Evidence Act (Cap 97, 1997 Rev Ed), s 92 (the court may presume that the signature and every other part of the document that purports to be in the handwriting of any particular person is in that person's handwriting).

37 See id., s 116A (1) (i.e., produced or communicated by a device or process that is accurate when ordinarily and properly used, unless there is sufficient evidence to raise doubt as to this fact).

38 Admitted facts are those that are established in the process as certain through the agreement of both parties as to their production and content. Notorious facts are those that are generally considered as certain by the majority of the population. Presumed facts are those that are logically deduced from other certain facts.

39 See PRC Patent Law, Article 66.1; Judgment (2020) Zui Gao Fa Min Shen No. 1007.

40 See PRC Civil Code, Article 1230; Judgment (2019) Zui Gao Fa Min Shen No. 6459.

41 See PRC Civil Code, Article 1239.

42 See id., Article 1245; Judgment (2020) Jing Min Shen No. 1695.

43 See Evidence Law, Article 23(1).

44 See UAE Civil Code, Article 390; Federal Supreme Court, Case No. 187/2016; Federal Supreme Court, Case No. 264/2011. In respect of liquidated damages, the creditors shall not prove the occurrence of any damage. The burden of proof shifts to the debtor to prove that the liquidated damages are not equivalent to the damage suffered.

applied depending on the seriousness of the allegation, the consequences of the allegation or the subject matter of the case. For example, courts in England and Wales apply different rules on the burden of proof in committal proceedings,[45] commercial fraud claims[46] and applications for anti-suit injunctions.[47]

Obtaining evidence outside a party's possession and scope of discovery

Each jurisdiction has its own procedure and practice when a party seeks to obtain evidence outside its possession or control. Expectations also differ as to the scope of the document production itself. Whereas in some jurisdictions parties are accustomed to limited or no discovery, in others the requesting party is able to cast a wide net.

A party may seek to obtain evidence outside its possession or control using various methods. In Singapore, for example, there are three types of discovery: pre-action,[48] general[49] and specific.[50] The court will only order pre-action discovery to identify possible parties to the proceedings[51] or when the requesting party needs to ascertain whether it has a viable claim at all.[52] Regardless of the type, the scope of documents to be produced during discovery is rather limited[53] and is subject to the overarching requirement that the evidence must be necessary for disposing fairly of the matter or for saving costs.[54] In England and Wales, parties to civil proceedings are most commonly subject to 'standard disclosure', which has a relatively broad scope and requires the disclosure of documents on which they rely, that adversely affect their own case or another party's case, and that support another party's case. Under Practice Direction 51U of the Civil Procedure Rules, which began on 1 January 2019, the business and property courts are currently testing a new disclosure regime under which disclosure is split into 'initial disclosure' and 'extended disclosure'. Whereas initial disclosure is understood to cover the key documents, extended disclosure requires the parties to agree on a list of issues and choose which of the five models of

45 See *Phillips and another v. Symes and another* [2003] EWCA Civ 1769, *Sarayiah v. Williams and another* [2018] EWHC 342 (QB) and former PD 81.9 (all allegations of contempt, both civil and criminal, must be proved to the criminal standard of beyond a reasonable doubt).

46 See *Re B* (Children [2008] UKHL 35) (there is only one standard of proof, the balance of probabilities, even though a commercial fraud claim may amount to criminal conduct).

47 See, e.g., *Midgulf International Ltd v. Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm) or *Transfield Shipping Inc v. Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3642 (Comm) (the standard of proof required is a 'high degree of probability' that there is a binding arbitration agreement). See also Richard T Farrell, *Prince, Richardson on Evidence,* § 3-103 [11th ed 1995], § 3-104. In New York, the higher standard of 'clear and convincing evidence' may be applied in cases involving fraud and wills and inheritances.

48 See Rules of Court, O. 24, r. 6(1).

49 See id., O. 24, r. 1.

50 See id., O. 24, r. 5.

51 id., O. 24, r. 6(5).

52 *Toyota Tsusho (Malaysia) Sdn Bhd v. United Overseas Bank Ltd & another* [2016] SGHC 74, at [12].

53 Rules of Court, O. 24, r. 1(2), 5(3), 6(5). See *Wright Norman and another v. Oversea-Chinese Banking Corp Ltd and another appeal* [1992] SGCA 49, at [16] (courts in Singapore are generally wary of fishing expeditions, which are meant to 'raid the cupboards [of the counterparty] to see whether [there is] anything useful for the [requesting party's] case').

54 Rules of Court, O. 24, r. 7.

disclosure[55] is to be applied to each one. The most restrictive is Model A, which requires disclosure only of known adverse documents. At the other end of the spectrum is Model E, which permits wide search-based disclosure, and may be used in exceptional cases.

Discovery and document production are also affected by the form of evidence that is sought. In e-discovery, the nature of the evidence, such that it exists in electronic format, does not mean that it is not 'discoverable' or cannot be disclosed or produced.[56] However, difficulties may arise, as listed in the Sedona Principles,[57] in relation to the volume and duplicity of the evidence, metadata, changeable content, among other things. In the United States, Federal Rules[58] ensure that e-discovery issues are addressed early in the proceedings. Another specific feature of US evidence-gathering is the deposition, which is an oral interrogation of a witness, prior to a hearing, who will testify for the opposing party. As explored in the subsection titled 'Role of the parties and the tribunal in taking evidence', below, depositions are of limited importance in international arbitration.

By contrast, civil law jurisdictions generally do not impose disclosure obligations on the parties. Some variations exist, however, such as in Spain, where there is a duty to exhibit specific documents.[59] A similar rule exists in Germany, though it is applied cautiously, such that production of certain documents may be required in consideration of their purpose and content.[60] Generally, a party may also request, through the courts, the production of documents from the other party[61] or third parties.[62] In addition, in French civil proceedings, if evidence is at risk of being destroyed, a party may file an application before a judge known as a '*référé 145*' to thwart any destruction.[63]

Admissibility and assessment of evidence

To varying extents, nearly all the jurisdictions surveyed consider 'relevance' as one of the key criteria to the determination of whether evidence is admissible.[64] For example, in Singapore, evidence will be admitted only if it is a fact in issue (direct evidence) or if it is relevant to the fact sought to be proved (indirect evidence).[65] In civil proceedings in the

55 The five models are Model A: Disclosure confined to known adverse documents; Model B: Limited Disclosure; Model C: Request-led search-based disclosure; Model D: Narrow search-based disclosure, with or without Narrative Documents; and Model E: Wide search-based disclosure.

56 See *Grant v. Southwestern and County Properties Ltd* [1975] ch185 at 197.

57 'The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production' (first published January 2004, second edition, June 2007), http://www.thesedonaconference.org/content/miscFiles/TSc_PrIncP_2nd_ed_607.pdf.

58 Federal Rules, Rules 16, 26(a), 26(f) and Form 35.

59 Spanish Civil Procedure Act, Article 328 (each party may seek that the other parties exhibit any documents that are not in his possession and that refer to the matter at issue in the proceedings or the value of the evidence). A non-certified copy of the document shall be attached to the application and, should it not exist or be unavailable, the document's contents shall be indicated as accurately as possible.

60 See German Civil Code, ss 810, 422 and 429.

61 In the UAE, see Evidence Law, Article 18. In Germany, see German Code of Civil Procedure, s 142, para. 1, first sentence.

62 See French Code of Civil Procedure, Article 1469.

63 See id., Article 145.

64 For more on the specific issue, see the subsection titled 'Probative value of different types of evidence', above.

65 Evidence Act (Cap 97, 1997 Rev Ed), s 5, 138(1).

United Kingdom and Hong Kong, relevance is required for the admissibility of evidence, and relevant evidence will be admissible in civil proceedings unless it falls within an exclusionary rule of law or is excluded by the court in the exercise of discretion. To be relevant, evidence need not necessarily prove or disprove a fact in issue, but must assist in doing so.

In Spain, evidence must be useful, relevant and legal to be admissible in proceedings.[66] Under German law, which requires that the evidence offered be exhausted,[67] there are a limited number of narrow grounds on which to reject a request for evidence.[68] By contrast, the admissibility of evidence in the UAE is not affected by its potential relevance or materiality (or the lack thereof). The default position is that evidence is admissible unless its authenticity is challenged by the opponent or is called into question by the court.[69] Nevertheless, the underlying facts for which evidence is presented must be 'related to the case, productive and acceptable'.[70]

Whereas evidence that is material is necessarily relevant, evidence that is relevant may not necessarily be material. The criterion of 'materiality' can therefore be understood as setting a higher bar (i.e., that the evidence in question goes to facts or issues that can affect the outcome of the case). Neither Singapore nor France requires that evidence be material to be admissible. By contrast, Rule 401 of the US Federal Rules of Evidence appears to require that evidence be both relevant and material, such that the evidence must have a 'tendency to make a fact more or less probable than it would be without the evidence; and [be] of consequence in determining the action'.

Regarding oral testimony more specifically, judges and arbitrators must also be cognisant of the largely inevitable fallibility of human memory, as explored in a recent report by the International Chamber of Commerce that incorporates insight from psychologists with expertise in human memory.[71] Although acknowledging the potential shortcomings of human memory, the report stressed the value and importance of witness testimony and proposed steps to maximise its reliability. For example, in preparing for a hearing and

66 Spanish Civil Procedure Act, Article 283, explicitly states that evidence that is irrelevant (i.e., no relation to the subject of the proceedings) or useless (i.e., cannot contribute to clarifying controversial facts) is inadmissible.

67 BVerfGE 50, 36 = NJW 1979, 413; BGHZ 53, 259 = NJW 1970, 946 (based on the constitutionally guaranteed right to present evidence and, in addition, the requirement to safeguard justice as well as the principle of equality of arms).

68 In particular, if the subject of the evidence is irrelevant, if the subject of the evidence does not require proof because it is undisputed, because the taking of evidence is inadmissible, if the fact has already been proven, if the evidence is late, or if the evidence is unavailable (i.e., if there are actual obstacles). The rejection of a request for evidence based on the unsuitability of the evidence is controversial. Some legal scholars consider that such evidence should be rejected only if it seems completely impossible in the individual case that the taking of evidence could reveal anything relevant (cf. MüKoZPO/Prütting, 6th ed. 2020 Marginal No. 98, ZPO § 284 Marginal No. 98).

69 UAE Evidence Law, Articles 22 to 34.

70 id., Articles 1 to 2.

71 ICC Commission Report, 'The Accuracy of Fact Witness Memory in International Arbitration', November 2020, https://iccwbo.org/content/uploads/sites/3/2020/11/icc-arbitration-adr-commission-report-on-accuracy-fact-witness-memory-international-arbitration-english-version.pdf. This report was discussed in a February 2021 article written by Sophie Eyre and Yvanna Miller of the UK office of Bird & Bird, https://www.twobirds.com/en/news/articles/2021/global/how-reliable-is-witness-testimony-in-international-arbitration.

during the hearing itself, witnesses should be reminded to distinguish between post-event information, such as what they have read or learned from others, and the facts or events that they remember.[72] The tribunal is thus better able to assess the reliability of the testimony that is presented.

Exclusion of evidence

Beyond the relevance of the evidence in question, jurisdictions apply different rules that might lead to the exclusion of evidence. Besides these rules, judges have broad discretion to decide on evidentiary matters and exclude legally admissible evidence.[73] By way of example, common law jurisdictions generally consider that hearsay evidence is inadmissible, but the rules changed drastically in the United Kingdom with the Civil Evidence Act of 1995. Beyond implementing several safeguards to protect the other party against any unfair prejudice that may arise, the Act permits the admission of hearsay evidence provided it meets the general rules on admissibility.

By way of contrast with the United Kingdom and New York, Singapore adopts an inclusionary, rather than exclusionary, approach by prescribing circumstances in which evidence should be admissible, rather than inadmissible.[74] For example, hearsay evidence will be admissible if it is an entry or memorandum in books kept in the ordinary course of one's occupation,[75] or where parties to the proceedings mutually agree that the statement may be given.[76]

Evidence falling under legal profession privilege may also be excluded. This includes both litigation privilege (or, in the United States, the doctrine of work-product)[77] and legal advice privilege[78] (known as attorney–client privilege in the United States).[79] These types of privilege do not exist in the UAE, for example, and in France[80] and Spain,[81] they are encompassed within the obligation of lawyers to respect professional secrecy.

72 See ICC Commission Report, para. 1.24, 5.37.

73 In the UK, see CPR 32.1.

74 *Lee Chez Kee v. Public Prosecutor* [2008] SGCA 20, at [69].

75 Evidence Act (Cap 97, 1997 Rev Ed), s. 32(1)(b)(i).

76 id., s. 32(1)(k).

77 Litigation privilege covers documents created and communications arising between a lawyer and client (or either of them and a third party) in the context of litigation that is pending, reasonably contemplated or existing.

78 Evidence will fall under legal advice privilege if it is a confidential communication between a client and their lawyer that has come into existence for the dominant purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context.

79 See New York Civil Practice Law and Rules (CPLR), § 4503(A)(1); *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991).

80 See the National Internal Regulations, Article 2; General Principles of the Code of Conduct for European Lawyers, Article 2.3.

81 See Code of Conduct of the Spanish Legal Profession, Article 5; General Statute for the Legal Profession, Articles 32, 34 and 42; and New General Statute for the Legal Profession, Articles 21 and 22 (adopted on 2 March 2021 and entering into force on 1 July 2021).

Evidence obtained illegally or improperly, such as through a cyberattack, is also handled differently depending on the seat. Many jurisdictions, including Spain[82] and China,[83] consider such evidence to be inadmissible. A court may determine that such evidence is to be excluded if its prejudicial effect outweighs its probative value, as in Singapore[84] and Hong Kong,[85] or if there is an unlawful encroachment on the constitutionally protected rights of the individual (i.e., human dignity and personality rights), as in Germany.[86]

In Hong Kong, courts focus on ensuring a fair trial.[87] As part of what could be considered a more permissive approach, courts in England and Wales have admitted evidence obtained by unlawful hacking as well as covert recordings.[88] However, a court may exercise its discretion to exclude such evidence, usually on the grounds of the public interest in discouraging the conduct involved and in consideration of human rights, such as the right to privacy and the right to a fair trial.[89]

One area that raises novel evidentiary questions is the internet of things and, more specifically, the collection and use of its data. These issues were the subject of recent debate in Singapore, for example, in the context of the use by the government of a series of digital contact tracing systems to curb the spread of covid-19. In early 2021, it was disclosed that such data could also be used for police investigations, which prompted an urgent Bill[90] to amend existing legislation. The Bill clarified that the use of contact tracing data would be limited to criminal investigations in respect of serious offences[91] and also implemented additional safeguards, such as the deletion of all personal contact tracing data following the end of the covid-19 crisis.[92]

82 See, e.g., Spanish Civil Procedure Act, Articles 283 and 287.1.

83 See PRC Criminal Procedure Law, Article 56 (in criminal matters). See Article 106 of Interpretation of the Supreme People's Court on the application of the Civil Procedure Law of PRC, Article 57 of Supreme People's Court 'Several provisions on evidence in administration procedure' (in civil and administrative matters). For example, in Judgment (2020) Zui Gao Fa Min Shen No.2428, Jing San Jiao Company argued that the sound recording evidence was illegal and should not be accepted. Supreme People's Court does not mention this evidence in the court's comments.

84 See *Muhammad bin Kadar and another v. Public Prosecutor* [2011] SGCA 32, at [53]. See also *ANB v. ANC* [2015] SGCA 43, at [30]: The Singapore Court of Appeal was confronted with the precise issue of whether certain documents and files that were surreptitiously copied from one's notebook could be subject to an interim injunction to prevent further disclosure, on the basis that it was illegally obtained. Although the issue of admissibility did not arise squarely for decision, the Court of Appeal affirmed that the general exclusionary discretion applies equally to both civil and criminal proceedings.

85 See *Lam Tat Ming* (2000) 3 HKCFAR 168.

86 German Federal Constitutional Court (BVerfGE NJW 2011), 2417 (2419).

87 *HKSAR v. Chan Kau Tai* [2006] 1 HKLRD 400.

88 See, e.g., *Ras Al Khaimah Investment Authority v. Azima* [2021] EWCA Civ 349 and *Mustard v. Flower and others* [2019] EWHC 2623 (QB).

89 See CPR 32.1.

90 Covid-19 (Temporary Measures) (Amendment) Bill, para. 7.

91 For example, terrorism, kidnapping, murder, sexual assault. See Covid-19 (Temporary Measures) Act 2020 (No. 14 of 2020), s 82(2), Seventh Schedule.

92 Covid-19 (Temporary Measures) Act 2020 (No. 14 of 2020), s 82(8).

Role of state judges in taking evidence

The role of state judges in the taking of evidence varies from one jurisdiction to the next. Although parties in civil proceedings in most, if not all, jurisdictions, assume a leading role and guide this process, the role of the judge may vary. In Spain, the taking of evidence in civil proceedings is subject to the 'dispositive principle', whereby the courts are to decide based on the evidence introduced by the parties. In New York, a certain degree of judicial intervention is permitted in the presentation of evidence;[93] however, 'the line is crossed when the judge takes on either the function or appearance of an advocate at trial'.[94] In China, judges have the right to conduct *ex officio* investigation and collect evidence, therefore acting as inquisitor in the process of taking evidence.[95] In Germany, where there is a principle of party publicity, the parties have the right to be informed of the court's taking of evidence and to inspect the court's files.[96]

In an adversarial system, as is found in the United Kingdom[97] and Singapore, judges assume a primarily supervisory role. This is also true of civil proceedings in France, in which parties are actively involved in the evidentiary process.[98] As a result, all parties to the proceedings must, under the judge's supervision, search for the elements of proof that are relevant to the case and assist the judiciary in this process.[99] In this respect, although there is no right to or duty of discovery, 'civil factfinding comes closer to the Anglo-American style, in which the court supervises rather than participates in proof-taking activity'.[100] The adoption in France of the new Code of Civil Procedure has meant, however, that French judges have taken on a more significant role in ensuring the proper conduct of the proceedings; for example, they may order any measure of enquiry that might be relevant for the outcome of the case. This evolution has been viewed as a move towards a more inquisitorial system for civil matters,[101] much like the current approach in criminal matters. It would seem, however, that the jurisdictions surveyed do not necessarily fit neatly into the category of 'adversarial' as opposed to 'inquisitorial'; many encompass aspects of both.

Evidence in international arbitration: a melting pot of legal cultures

Moving from a national jurisdiction to the sphere of international arbitration requires the parties to embrace a certain degree of flexibility and willingness to compromise. Though parties may enter a dispute with their respective expectations as to the approach that will be taken on evidentiary issues, it is unlikely that either party will have the option of importing all or even some of the rules and principles of evidence to which they may be accustomed.

93 *People v. Jamison*, 47 NY2d 882, 993 [1979].

94 *People v. Arnold*, 98 NY2d 63, 67 [2002].

95 See Interpretation of the Supreme People's Court on the application of the Civil Procedure Law of the People's Republic of China, Article 95.

96 German Code of Civil Procedure, s357, para. 1.

97 The introduction of the CPR has provided judges with a slightly more interventionist approach for judges in terms of case management matters.

98 French Code of Civil Procedure, Articles 1 and 2.

99 See French Civil Code, Article 10(1).

100 Mirjan R. Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments', 45 *Am. J. Comp. L.* (1997) at p. 843.

101 François Terré, *Introduction générale au droit* (6th edn., Précis Dalloz 2003), fn. 60, no. 482, p. 471.

Generally, arbitrators are not bound by national regimes governing evidence, such as in Singapore, where Section 2(1) of the Evidence Act expressly states as such.[102] Nonetheless, in accordance with the principle of party autonomy, parties in international arbitration are free to agree on the applicable rules of evidence, such that many of the aspects explored in the section above covering general rules and requirements of evidence invariably arise in the arbitral realm. Furthermore, the key principles underlying a fair trial, such as the equality of arms and the right to be heard, are not only closely tied to evidentiary issues but are also found in arbitration.[103]

Effects of soft law (IBA Rules and Prague Rules)

Most *lex arbitri* and arbitral rules do not provide extensive information about taking evidence for arbitral proceedings. Nevertheless, regardless of the applicable law in the arbitral proceedings or the applicable arbitration rules, certain principles and rules relating to evidence are often applied. These principles and rules can be found in the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules) and the Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules).

The IBA Rules[104] are intended to provide 'an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between [p]arties from different legal traditions'.[105] The aim of the IBA Rules was therefore to 'bridge the gap between common law and civil law traditions of taking evidence'.[106] The parties to an arbitration may either adopt the IBA Rules, whether in whole or in part, or decide that the IBA Rules will serve as guidelines for them to develop their own tailor-made procedure.

Similarly, the aim of the Prague Rules, launched in December 2018, is to provide guidance for the efficient conduct of international arbitration proceedings and, therefore, they also cover issues of evidence. The Prague Rules, like the IBA Rules, are intended to supplement institutional rules; they can be applied in a binding manner or as guidelines.[107] One of the goals of the drafting of the Prague Rules was to address the perception that

102 Evidence Act (Cap 97, 1997 Rev Ed), s. 2(1). See also, e.g., UK Arbitration Act 1996, s 34(1).

103 For an example of how such principles are reflected in institutional rules, see, e.g., 2021 ICC Arbitration Rules, Article 22.4 ('[i]n all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case'); 2007 DIAC Arbitration Rules, Article 17.2 ('[i]n all cases, the Tribunal shall act fairly and impartially and ensure that each party is given a full opportunity to present its case').

104 On 17 December 2020, the International Bar Association adopted the revised IBA Rules on the Taking of Evidence in International Arbitration. The 2020 IBA Rules supersede those of 1999 and 2010. The main difference between the revised version of the IBA Rules and the 2010 IBA Rules are the addition of a provision on remote hearings (Article 8.2), as well as references to cybersecurity and data protection.

105 'Preamble', in Tobias Zuberbuehler, Dieter Hofmann, et al., IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration (Schulthess Juristische Medien AG 2012) p. 1.

106 Note from the Working Group, Draft Prague Rules of 1 September 2018, https://praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf

107 Preamble to the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration of the Prague Rules.

the IBA Rules lean towards the common law tradition.[108] The Prague Rules were therefore drafted to tackle both the voluminous nature of document production under adversarial systems and the inefficiencies involved in oral testimony, including the examination of witnesses. By contrast, the Prague Rules propose a less adversarial approach regarding document production, fact witnesses and party-appointed experts.[109]

As in civil proceedings before national courts, each party to an arbitration has the burden of proof with respect to the facts necessary to establish its claims or defences and, therefore, is required to produce the evidence on which it relies.[110] To prove the law, the burden of proof is also on the parties. The principle of *jura novit curia* (the court knows the law) that originates from national court proceedings, however, also applies, which serves to expand the role of the tribunal in the evidentiary process. This principle is reflected in the Prague Rules, pursuant to which the tribunal may apply legal provisions not pleaded by the parties if deemed necessary.[111] The power is also recognised in the case law and national legislations of other jurisdictions. For example, the Paris Court of Appeal found, in a 1997 decision, that 'the arbitrators, who had to decide "in conformity of French substantive laws" had the obligation to inquire, to apply the adequate rule of law, the true legal nature of the agreement of which the conditions of execution they had to study'.[112] Depending in part on the arbitral seat, the tribunal may even have the power to compel a witness within the control of a party to appear by issuing an order that may then be supported by a national court. This is the case in England and Wales, which is reflected in the Arbitration Act: 'It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.'[113] These matters include 'whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law'.[114] Additionally, state judges may be called on to compel the production of evidence before an arbitral tribunal by way of mechanisms such as Section 28 US Code 1782 in the United States or, in France, through a judge (*juge de la preuve*) to obtain, for example, a document from a third party.[115]

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108 Russian Arbitration Association Press Release, 'The IV RAA Annual Conference and Member Meeting', 1 May 2017, https://arbitration.ru/en/press-centr/news/the-iv-raa-annual-conference-and-member-meeting-/ (indeed, at the time that a potential alternative to the IBA Rules was discussed in 2017, the development of the Prague Rules was raised during a session devoted to the question of the 'creeping Americanization of international arbitration' and whether it was 'the right time to develop inquisitorial rules of evidence').

109 Draft Prague Rules of 1 September 2018, https://praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf.

110 Robert F Pietrowski, 'Evidence in International Arbitration', in William W Park (ed), *Arbitration International* (Oxford University Press, 2006, Volume 22, Issue 3) p. 374.

111 Prague Rules, Article 7.

112 Paris Court of Appeal, 25 November 1997, *Société VRV v. Pharmachim*, in *Rev Arb*, 684 ff, 687 (1998) ('les arbitres qui devaient statuer "conformément aux règles de droit substantiel français" avaient l'obligation de rechercher, pour lui appliquer la règle de droit adéquate, la véritable nature juridique de la convention dont ils avaient à apprécier les conditions d'exécution'). In the same manner, see Raeschke-Kessler, Recht und Praxis des Schiedsverfahrens, Köln, 156 (1999) (Germany).

113 Arbitration Act 1996, s 34.

114 id.

115 See French Code of Civil Procedure, Article 1469.

Role of the parties and the tribunal in taking evidence

One of the most significant advantages of arbitration is party autonomy and flexibility. Parties are offered the flexibility to devise the procedures best suited to their case and can select the rules of evidence they wish to apply. For example, given their importance in the United States, US parties may decide to add to their arbitration clauses that depositions shall be allowed in the arbitral proceedings as part of evidence-gathering.[116]

As discussed above, the IBA Rules and the Prague Rules are the two available sources of rules of evidence for arbitral proceedings and parties can choose to apply all or part of them. Indeed, the tribunal also has broad discretion to decide on evidentiary matters. This principle is reflected, for example, in the UK Arbitration Act, which empowers the tribunal to decide 'whether to apply strict rules of evidence (or any other rules as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion'.[117]

The main differences between the two sets of rules concern the degree to which the arbitral tribunal may have an active role in taking evidence. For example, these rules have divergent approaches as to the reliance on fact and expert witnesses, electronic documents (e-discovery) and the scope of document production.

Under the IBA Rules, the parties have a virtually unlimited right to introduce fact witnesses,[118] with the presumption that each of these witnesses will be cross-examined.[119] By comparison, the tribunal has a more significant role under the Prague Rules, as it decides which witnesses to call for examination,[120] with cross-examination permitted only if the tribunal so decides.[121] However, the IBA Rules do provide in Article 8.2 that 'the Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing'. Under the IBA Rules, expert witnesses may be appointed by the parties or by the tribunal.[122] By contrast, the Prague Rules emphasise the authority of the tribunal to appoint the expert.[123]

Regardless of the rules selected by the parties, or if no such rules are adopted, the tribunal is necessarily tasked with evaluating the evidential weight of evidence. The broad scope of this discretion can be found in Article 9.1 of the IBA Rules, which states that the arbitral tribunal 'shall determine the admissibility, relevance, materiality and weight of evidence'. Taking electronic documents as a specific example, neither the Prague Rules nor the IBA Rules suggest that the probative value of electronic documents, including electronic

116 See Paul Friedland, *Arbitration Clauses for International Contracts* (2nd edn, Juris, New York, 2007), p. 81; ICDR Guideline 6(b) (the ICDR's Guidelines for Arbitrators Concerning Exchanges of Information, released in 2008, warn against this method in the context of arbitration: 'Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration'). Though depositions remain a possibility in international arbitration, they are not necessarily useful and are rarely used.

117 UK Arbitration Act 1996, s 34(1).

118 IBA Rules 2020, Article 4.

119 id., Article 8.

120 Prague Rules 2018, Article 5.

121 id., Article 5.9.

122 IBA Rules 2020, Articles 5 and 6.

123 Prague Rules 2018, Article 6.

exchanges and e-signatures, is to be assessed any differently from hard copies.[124] Though the parties may agree or the tribunal may decide otherwise, the parties are encouraged to submit documents 'in the form [that is] most convenient or economical'.[125] Although generally against e-discovery,[126] the Prague Rules, unlike the IBA Rules, do not address the form of submission or production of documents. Despite this apparent proscription in the Prague Rules, e-discovery is sometimes used in arbitral proceedings, with different guidelines having been published[127] and certain arbitration rules addressing the issue directly.[128]

With regard to document production, the IBA Rules more readily embrace this process, even where broad.[129] As explained above, parties from certain common law jurisdictions, particularly the United States, are more likely to expect broad document production than parties from civil law jurisdictions. Parties may also have different expectations as to the documents that are protected from disclosure, notably based on privilege. The Prague Rules, on the other hand, aim to limit document production while emphasising the importance of the relevance and materiality of the documents in the interest of efficiency.[130] Therefore, depending on whether the parties agree to adopt the Prague Rules or the IBA Rules, and the nature of that consent, the arbitral tribunal may be involved more or less actively in taking evidence.

Conclusion

This chapter has sought to bridge the divide between the general rules and requirements of evidence across legal cultures and the approach to evidence in international arbitration. Although the jurisdictions covered each have their own approaches to these various evidentiary issues, there are indeed multiple points of convergence. As such, when parties, counsel and arbitrators from different jurisdictions come together in a single dispute, each may have differing views as to the 'best' approach. However, practice has shown that these differences are not insurmountable, particularly with the development of the Prague Rules and the IBA Rules, which aim to coalesce these various national approaches.

124 However, IBA Rules, Article 12(a), requires that copies of documents conform to the originals and, furthermore, permits the tribunal to request that any original be presented for inspection.

125 IBA Rules, Article 12(b).

126 Prague Rules, Article 4.1.

127 For example, see Protocol for E-Disclosure in Arbitration, which was issued by the Chartered Institute of Arbitrators on 2 October 2008, http://www.arbitrators.org/institute/cIarb_e-protocol_b.pdf. See also ICC Arbitration Commission Report on Managing E-Document Production.

128 For example, the American Arbitration Association's Commercial Arbitration Rules, Article R-22(b), paras. iii) and iv) and the Arbitration Rules of the International Centre for Dispute Resolution, Article 21, para. 4 expressly refer to e-discovery.

129 IBA Rules 2020, Article 3. For example, Article 3(a)(ii) requires that a request to produce contain 'a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist'. However, a party is not necessarily required to state, for example, the presumed time frames or the authors or recipients.

130 Prague Rules 2018, Article 4.

Appendix 1

The Contributing Authors

Jalal El Ahdab
Bird & Bird

Jalal El Ahdab (Jil Ahdab) is a partner at Bird & Bird, in the dispute resolution group in Paris. He is the head of the arbitration department in France and member of the dispute resolution practice in the UAE, where he offers clients his long-standing and cross-border expertise in managing international disputes and arbitrations, especially in international business law, notably in Europe, Africa and the MENA region, focusing on international disputes and foreign investments.

Jalal acts as counsel, arbitrator and expert in various sectors, such as telecommunications, ports, airports, construction, life sciences, sports and more.

Jalal is a former member of the International Court of Arbitration of the ICC (2015–2021). He is also vice chair of the European branch of the Chartered Institute of Arbitrators and co-chair of the IBA Arab Regional Forum.

Jalal is qualified to practise in Beirut, Paris and New York, and is equally fluent in Arabic, English and French. A book on arbitration law in France, written jointly with Professor Daniel Mainguy, is due to be published by LexisNexis in August 2021.

Michael Chik
Bird & Bird

Michael Chik is a dispute resolution lawyer based in Hong Kong. He has a strong track record in a wide range of high-value commercial disputes, with a specialisation on matters in relation to complex commercial transactions, trusts, shareholders' disputes, financial institutions, and estate and probate disputes. Michael is experienced in both international arbitration and litigation before courts in Hong Kong. Michael's arbitration cases often involve parties located in different jurisdictions and application of foreign laws and various institutional rules. In terms of litigation, Michael's expertise extends beyond pure commercial and monetary disputes and includes administrative law and judicial review proceedings against the Hong Kong SAR government and statutory bodies.

Jiri Jaeger
Bird & Bird

Jiri Jaeger is a partner in the Düsseldorf office, where he is head of the German dispute resolution team, and a member of the international dispute resolution practice group, representing clients in complex litigation and arbitration matters.

In recent years, his work has included litigations and arbitrations in sectors such as energy and utilities, planning, construction and infrastructure, as well as post-M&A disputes, internal investigations and advising on corporate crisis scenarios. His deep-level sector expertise enables him to understand the technical and commercial specificities of any given project, providing advice that goes beyond just the legal and contractual.

Speaking fluent German, English, Czech and French has helped him expand his client base to include international companies from Switzerland, France, the United Kingdom and the United States. He is also a partner on the firm's German China desk, regularly providing advice on China-related mandates.

Nicholas Peacock
Bird & Bird

Nicholas Peacock is a solicitor-advocate and head of the international arbitration practice at Bird & Bird in London. He has appeared before arbitral tribunals in Europe and Asia, as well as in the London High Court, and has acted for and against state governments. He has also sat as arbitrator in London and Singapore under various institutional rules and ad hoc. He is a supervisory council member of the Mumbai Centre for International Arbitration, and a Users' Council member for the London Court of International Arbitration and the Singapore International Arbitration Centre.

Pablo Berenguer
Bird & Bird

Pablo Berenguer is head of the commercial and commercial dispute resolution practice in the Madrid office of Bird & Bird. With extensive experience in the field of dispute resolution, including many civil jurisdiction cases before the Spanish courts (including the Supreme Court), Pablo also regularly participates in domestic and international arbitration proceedings, acting as both counsel and arbitrator. His litigation and arbitration expertise covers sectors and areas such as IT and business consultancy projects, insurance, healthcare, financial services, international commerce, corporate and M&A-related disputes, among others.

Pablo also regularly acts in complex commercial contracts and negotiations, with a particular focus in the technology and communications sector. His experience in this area includes legal design, negotiation and implementation of complex transformation projects, software development and integration contracts and IT outsourcing.

Pablo writes regularly for specialist publications and has lectured in several education and business institutions, such as CEU San Pablo University and CEU Business School in Madrid.

He joined Bird & Bird in 2006, having previously worked in one of the most prestigious law firms in the Ibero-American market. He was admitted to the Madrid Bar Association in 2003.

Jonathan Choo
Bird & Bird

Jonathan Choo is a partner in Bird & Bird's international dispute resolution practice and is based in Singapore. He is an experienced arbitration practitioner and has advised and represented multinational corporations, technology giants, banks, international contractors, media and broadcasting agencies and rights holders in arbitrations spanning a wide range of subject matters, including technology, media and broadcasting, aviation, intellectual property, construction, international trade and general commercial disputes.

Jonathan is a director and honorary secretary of the Singapore branch of the Chartered Institute of Arbitrators. Apart from acting as counsel, he also accepts appointments as arbitrator and has been appointed by prominent arbitral institutions such as the ICC and the SIAC (including as sole arbitrator and president of a tribunal) on various disputes. Jonathan is dual-qualified in Singapore and England and Wales and is a past recipient of the Law Society of Singapore Advocacy Prize.

Jiri Jaeger
Bird & Bird

Jiri Jaeger is a partner in the Düsseldorf office, where he is head of the German dispute resolution team, and a member of the international dispute resolution practice group, representing clients in complex litigation and arbitration matters.

In recent years, his work has included litigations and arbitrations in sectors such as energy and utilities, planning, construction and infrastructure, as well as post-M&A disputes, internal investigations and advising on corporate crisis scenarios. His deep-level sector expertise enables him to understand the technical and commercial specificities of any given project, providing advice that goes beyond just the legal and contractual.

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Nicholas Peacock
Bird & Bird

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Lucas Pitts
Bird & Bird

Lucas Pitts is a dispute resolution partner based in the Dubai office, where he specialises in complex financial, fraud and tech cases from a broad range of sectors and jurisdictions.

He has advised on matters throughout the Middle East for more than 10 years and has extensive experience of advising on disputes in a wide range of sectors, including telecommunications, banking, insolvency, aviation, fraud and breach of fiduciary duty, as well as general commercial disputes.

His practice is inherently international and he has worked on cases from a wide variety of jurisdictions.

He has advised on cases proceeding under the Civil Procedure Rules of the English Court, DIFC, ICC, LCIA, GCC Commercial Centre and DIAC arbitrations, arbitrations proceeding under the 1996 Arbitration Act and the Oman Arbitration Act.

He has handled cases before tribunals in the High Court, Court of Appeal and Supreme Court of England and Wales, the Bahrain Centre for Dispute Resolution, the SAMA Committee, Board of Grievances and Committee for the Resolution of Securities Disputes in Saudi Arabia and the Commercial Court in Mauritius.

He is a qualified solicitor in England and Wales, and is also admitted to practise in the United Arab Emirates.

Gavin Zuo
Lawjay Partners in association with Bird & Bird

Gavin Zuo is a partner at Lawjay Partners in association with Bird & Bird in Beijing. Gavin has more than 10 years' experience in intellectual property (IP) litigation and more than 20 years' experience in IP prosecution in China. He qualified as a patent attorney of China in 2005 and as an attorney at law in China in 2007.

Gavin has successfully handled more than 500 IP litigation cases focusing on patent infringements and invalidations in the fields of electronics, communications, software, mechanics and design, and trademark infringement and administrative litigation, anti-unfair competition litigation and copyright infringement litigation. Two of Gavin's cases were listed by the Supreme People's Court of China (SPC) in the Top 10 Innovative IP cases; four other cases were selected for inclusion in the SPC's 50 exemplary IP cases and were mentioned in the SPC's annual reports.

Gavin graduated from the Hebei Institute of Technology with a bachelor's degree in computer science in 1993. He also obtained a master's degree of civil and commercial law at the Chinese Academy of Social Sciences in 2011.

Gavin has published several articles in the *China Intellectual Property* and *China Invention and Patents.* He is a co-author of the book *Patent Cases Analysis*.

Bird & Bird
Lawjay Partners in association with Bird & Bird
8/F, China World Office 1
1 Jianguomenwai Dajie
Chaoyang District
Beijing 100004
China
Tel: +86 10 5933 5688
gavin.zuo@twobirdslawjay.com

Bird & Bird
Lawjay Partners in association with Bird & Bird
8/F, China World Office 1
1 Jianguomenwai Dajie
Chaoyang District
Beijing 100004
China
Tel: +86 10 5933 5688
gavin.zuo@twobirdslawjay.com

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ISBN 978-1-83862-577-1