Chapter 7

Document Production in Arbitration: A Civil Law Viewpoint

Pierre Tercier and Tetiana Bersheda***

INTRODUCTION

There is a consensus among legal scholars that arbitrators have the power to order production of documents which are in the possession or control of a party. In general, the purpose of the document production procedure is to enable a party to establish the facts on which the party relies or to contest the facts underpinning the other party's case. Document production as a means of proving the facts of a dispute is available in most national legal systems. However, the legal rules vary from one jurisdiction to another depending on the social and legal traditions of each country. The dichotomy of the document production or discovery in common law and civil law countries is limited to *the extent to which discovery should be allowed and how the procedure should be managed*. This article addresses the topic of document production or discovery in international arbitration from the "civil law" standpoint.

Arbitration has become a common method of settlement of international commercial disputes, increasingly supplanting court litigation. Arbitration follows *its own procedural rules* which may be different from the national rules of civil procedure and are partly defined on a case-by-case basis in order to accommodate the parties' specific needs. Arbitral proceedings are in general governed by the mandatory rules of the law on international arbitration applicable at the place of the arbitration, the rules of an arbitral institution if the arbitration is conducted under the auspices of such institution, and the procedural rules issued by the arbitral tribunal, usually after consultation with the parties. In spite of the existence of a set of procedural rules applicable to international arbitration, the arbitral proceedings are still influenced by the procedural culture of the home jurisdiction of the parties and their counsel.[1]

---

* Emeritus Professor at the University of Fribourg (Switzerland), Honorary Chairman of the ICC Court of Arbitration (Paris).
** Dr. iur., LL.M. (Cambridge), Founding Partner, Bersheda Avocats (Geneva).

[1] The discrepancies in the legal systems in the field of document production and rules

In order to reconcile the diverging expectations of parties with different legal backgrounds, it is necessary to provide acceptable solutions bridging the gap between common law and civil law cultures in international arbitral proceedings. The foundations of the document production or discovery process will be examined first (**I**) and then we will outline the rules and principles acceptable for international arbitration practitioners from the civil law viewpoint (**II**).

---

applicable in international arbitration have generated a wealth of scholarly commentary, see specifically the contributions published in the ICC International Court of Arbitration Bulletin 2006 Special Supplement, Document Production in International Arbitration; Teresa Giovannini/Alexis Mourre (eds.), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossier VI of the ICC Institute of World Business Law, 2009; see also Gabrielle Kaufmann-Kohler/Philippe Bärtsch, Discovery in International Arbitration: How Much Is Too Much?, SchiedsVZ, 2004, p. 13 ff; Klaus Sachs, Use of Documents and Document Discovery: "Fishing Expeditions" versus Transparency and Burden of Proof, SchiedsVZ, 2003, p. 193 ff; Hilmar Raeschke-Kessler, The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence, Arbitration International, Vol. 18, No. 4, 2002, p. 411 ff, also printed in Robert Briner et al. (eds.), Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum in honor of Karl-Heinz Böckstiegel, 2001, p. 641 ff; Brian D. King/Lise Bosman, Rethinking Discovery in International Arbitration: Beyond the Common Law/Civil Law Divide, ICC Bulletin, Vol. 12, No. 1, 2001, p. 24 ff; Sigvard Jarvin, Die Praxis der Beweiserhebung in internationalen Schiedsverfahren – Ein einführender Beitrag zum Thema Disclosure of Documents, in Karl-Heinz Böckstiegel (ed.), Beweiserhebung in internationalen Schiedsvervahren, 2001, p. 87 ff; Karl-Heinz Böckstiegel, Optionen und Kriterien der Beweiserhebung in internationalen Schiedsverfahren, in Karl-Heinz Böckstiegel (ed.), Beweiserhebung in internationalen Schiedsvervahren, 2001, p. 1 ff; Bernardo M. Cremades, Powers of the Arbitrators to Decide on the Admissibility of Evidence and to Organize the Production of Evidence, ICC Bulletin, Vol. 10, No. 1, 1999, p. 49 ff; Fabio Bortolotti/Calvin A. Hamilton, Discovery and Civil Law Systems, International Arbitration Report, Vol. 21, No. 10, 2006, p. 23 ff; Paolo Michele Patocchi/Ian Meakin, Procedure and the Taking of Evidence in International Commercial Arbitration, in International Business Law Journal, No. 7, 1996, p. 884 ff; Martin Hunter, Modern Trends in the Presentation of Evidence in International Commercial Arbitration, in The American Review: Essays in honor of Hans Smit, Vol. 3, 1992, p. 204 ff; Andrew Rogers, Improving Procedures for Discovery and Documentary Evidence, in Albert Jan van den Berg (ed.), ICCA Congress Series No. 7, Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, 1996, p. 131 ff; Paul D. Friedland, A Standard Procedure for Presenting Evidence in International Arbitration, Mealey's International Arbitration Review, 1996, p. 133 ff; Christopher Staughton, Common Law and Civil Law Procedures: Which is More Inquisitorial? A Common Lawyer's Response, Arbitration International, 1989, Vol. 5, No. 4, p. 352 ff. See more generally Gary B. Born, International Commercial Arbitration, 3rd ed., 2009, p. 1875 ff; Nigel Blackaby/ Constantine Partasides, Redfern and Hunter on International Arbitration, 5th ed., 2009, no. 6-82 ff; W. Laurence Craig/William W. Park/Jan Paulsson, International Chamber of Commerce Arbitration, 3rd ed., 2000, p. 449 ff; Yves Derains/Eric A. Schwartz, A Guide to the ICC Rules of Arbitration, 2nd ed., 2005, p. 281 ff; Emmanuel Gaillard/John Savage, Fouchard, Gaillard, Goldmann on International Commercial Arbitration, 1999, no. 1272 ff; Robert Merkin, Arbitration Law, 2004, p. 578 ff.

I. THE FOUNDATIONS: THE RIGHT TO PRODUCTION OF DOCUMENTS

The parties' right to production of documents—as a component of the right to evidence—enables the parties to prove facts which are not personally known to the judge or the arbitrator (**A**). Put differently, document production, as part of the process of the search for truth in litigation or arbitration, enables the parties to ascertain the facts.[2] Procedure in international arbitration is still partly exposed to the influence of diverse legal traditions while harmonized procedural rules acquire more and more importance (**B**). A particular case of e-disclosure deserves attention in this context as an example of harmonization (**C**).

A. The Parties' Right to Evidence

An arbitral tribunal seated in Switzerland in an international arbitration case defines itself the subject matter of taking of evidence by reference to Article 184 Swiss Private International Law Act, which provides that the arbitral tribunal shall itself conduct the taking of evidence. The same provision continues by stating that if the assistance of state authorities is necessary for taking of evidence, the arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the state court at the seat of the arbitral tribunal; the court shall apply its own law. Thus, arbitral tribunals have control over the evidentiary proceedings and have broad discretion within the framework constituted by the applicable procedural rules.[3]

From the civil law perspective, the right to evidence raises the following *four questions*: (i) what to prove? (ii) who bears the burden of proof? (iii) what are the means of proof available to the parties? and (iv) how to decide on what evidence is relevant? It is generally recognized in civil law countries that the first two questions are part of a substantive law analysis, while the last two are part of a procedural law analysis.

---

[2] The ascertainment of law in international arbitration is outside the scope of the present article. On this topic, see Gabrielle Kaufmann-Kohler, "The Governing Law: Fact or Law?"—A Transnational Rule on Establishing its Contents, in ASA Special Series No. 26, Best Practices in International Arbitration, 2006, p. 79 ff.

[3] Georg von Segesser/Dorothée Schramm, Swiss Private International Law Act (Chapter 12), Article 184, in Loukas A. Mistelis (ed.), Concise International Arbitration, 2010, p. 938.

The *subject matter of evidence* defines which facts have to be proved and is essentially derived from the parties' submissions, in particular from their substantiated factual allegations.[4] The *burden of proof* determines who has to prove a fact and, consequently, who bears the risk of the failure to provide evidence. In most cases, each party shall bear the burden of proof of the facts on which it is basing its case. As the subject matter of evidence and the burden of proof are considered part of substantive law, they are subject to the law applicable to international arbitration in Switzerland pursuant to Article 187 Swiss Private International Law Act if the parties have not agreed otherwise.[5] By contrast, the *procedure of taking evidence*, including such issues as the admissibility of evidence and the production of documents, falls under Article 182 Swiss Private International Law Act.[6]

The party's right to evidence contains the right to documents relevant to establish the facts for which that party bears the burden of proof in relation to its claim or to its defense to a counterclaim. Accordingly, the document production procedure *can not be used for fishing expeditions.* No legitimate interest exists if the request for documents serves simply to gather information or to create a factual basis for the claim. The purpose of document production is to enable a party to prove its case but not to build its case. In Switzerland, the Federal Court has held that as a matter of federal law the claimant must *plead in detail the facts* on which its claim is based so as to make it possible to take evidence. Similarly, the respondent's answer must address all the allegations made by the claimant, pointing out whether they are admitted or denied because only allegations which are denied (or not admitted) must be proved. The duty to plead factual circumstances in detail applies also to a counterclaim.[7] Thus, a party

---

[4] *Ibid.,* with reference to ATF, 17 August 1994, reason 3c.

[5] Bernhard Berger/Franz Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, para. 1203 with further references. Article 187 Swiss Private International Law Act reads as follows: "The arbitral tribunal shall decide the dispute according to the law chosen by the parties or, in the absence of such choice, according to the law having the closest connection with the dispute. The parties may authorize the arbitral tribunal to decide according to principles of equity".

[6] Article 182 Swiss Private International Law Act reads as follows: " The parties may set forth the arbitration procedure either directly or by reference to existing rules of arbitration; they may also subject the procedure to a procedural law of their choice. Where the parties have failed to set forth the procedure, it shall, to the extent necessary, be determined by the arbitral tribunal either directly or by reference to a law or to existing rules of arbitration. Whatever the procedure chosen, the arbitral tribunal must in all cases guarantee the equal treatment of the parties and their right to be heard in an adversarial procedure".

[7] Philip Habegger, Document Production—An Overview of Swiss Court and Arbitration Practice, in ICC International Court of Arbitration Bulletin 2006 Special

bearing the burden of proof must first introduce the relevant facts because in order for a fact to be proved, that very fact must first be alleged in the proceedings.[8]

Section 8 Swiss Civil Code allocates the burden of proof as follows: In the absence of a special provision to the contrary, the burden of proving an alleged fact rests on the party who bases its claim on that fact. Applying the general principle of good faith, Swiss judges have admitted that in certain cases only one party may be in a position to provide evidence or even allege certain facts. In such cases, that party has a general duty to cooperate and in particular to help clarify these facts.[9]

This duty of cooperation does not raise any problem if the documents to be disclosed are favorable to the party who has the documents in its possession. As to the *unfavorable documents*, the issue is more problematic and the discrepancies between common law and civil law approaches step in. Procedural rules in the civil law countries are much less stringent as to the production of unfavorable documents. As a matter of principle, each party is defending its own case on the Continent. The duty to cooperate constitutes an exception to the general principle and it is confined to the concept of good faith. By contrast, the common law lawyers make a revealing analogy with "all cards on the table" in relation to the production of unfavorable documents: "Everyone shows their cards; no one gets to have more cards in their hand, or hide cards and only show or play the cards they like. The other player also gets to use the cards in your hand".[10] This illustrates that the document production in the Continental legal systems is more "adversarial" and less "inquisitorial".[11] In international arbitration, arbitrators have the power to order production of any document sought, irrespective of its content,

---

Supplement, Document Production in International Arbitration, p. 21 ff at 22 with reference to case law in notes 8 and 9.

[8] Paul-Henri Steinauer, Le Titre préliminaire du Code civil, Traité de droit privé suisse vol. 2, Le titre préliminaire du code civil et droit des personnes t. 1, 2009, no. 640.

[9] Max Kummer, Berner Kommentar, 1962, ad Section 8 Civil Code, no. 186.

[10] Tyler B. Robinson, The Use of Document Production in International Arbitration: How Indispensable Is It? And How Much Is Too Much?, An American Common-Law Perspective, Presentation at the ASA Annual Conference "The Search for 'Truth' in Arbitration", Zurich, 6 February 2009.

[11] Michael E. Schneider, Forget E-discovery!, in Presentation at the ASA Annual Conference "The Search for 'Truth' in Arbitration", Zurich, 6 February 2009, p. 4, with reference to Claude Reymond, Common Law and Civil Law Procedure: Which is the More Inquisitorial? A Civil Lawyer's Response, Arbitration International, Vol. 5, No. 4, 1989, p. 357 ff.

provided the request meets the usually applicable criteria.[12] It is widely recognized that document production in international arbitration requires that all relevant documents—favorable or harmful for one party's argument—be submitted at an early stage of the arbitration proceedings.[13]

When arbitrators define the scope of document production, they must ensure that the *party's right to present evidence* is respected. In certain cases, a party may suffer particular difficulties in bringing evidence of its allegations. For instance, where a party pleads fraud or misappropriation, the evidence will almost inevitably be in possession or under control of its opponent.[14] Hence, the arbitrators should not be overly reluctant in using the latitude of their decision-making power and ordering document production where documents sought are supportive of allegations of fraud and are likely to be within the requested party's possession, custody or control.

To sum up, a party has a right to bring evidence, including documents, in relation to facts which it has alleged and for which it bears the burden of proof. The procedural duty to produce documents serves the purpose of proving properly detailed allegations of fact. When ruling on a document production request, the following questions enter into consideration: (i) has the requesting party pleaded the factual circumstance in sufficient detail? (ii) has the opposing party contradicted the factual allegation in sufficient detail? and (iii) whether the factual allegations are material and relevant.

B. The Divergence of Legal Traditions vs. Harmonization in International Arbitration

There is no universal right to evidence and the concepts prevailing in different legal cultures diverge substantially.[15] The law of

---

[12] See Section II.B below.

[13] See also Hans van Houtte, The Document Production Master and the Experts' Facilitator: Two Possible Aides for an Efficient Arbitration, in Miguel A. Fernandez-Ballesteros/David Arias (eds.), Liber Amicorum Bernardo Cremades, 2010, p. 1147.

[14] On document production and position of third parties in international arbitration, see Thomas A. Webster, Obtaining Evidence from Third Parties in International Arbitration, Arbitration International, Vol. 17, No. 2, 2001, p. 143 ff. See also Merkin, *op. cit.* note 1, no. 15.12.

[15] On the dichotomy of civil procedure rules in civil law and common law countries and the "denationalization" of these rules in international arbitration, see Axel H. Baum, International Arbitration: The Path toward Uniform Procedures, in Liber Amicorum in honour of Robert Briner, 2005, p. 51 ff; Siegfried H. Elsing/John M. Townsend, Bridging the Common Law-Civil Law Divide in Arbitration, Arbitration International, Vol. 18, No. 1, 2002, p. 59 ff; Axel H. Baum, Reconciling Anglo-Saxon and Civil Law Procedure: The Path to a Procedural Lex Arbitrationis, in Robert Briner et al. (eds.), Law of

evidence is a cultural institution and *any right to submit evidence is deeply rooted in legal cultures*.[16] For instance, the importance of the search for truth in the United States is demonstrated by the jury trial system and pre-trial discovery.[17] The English judges have hailed discovery as "an essential feature of the English adversary system" which "compensates for the tribunal's lack of inquisitorial powers" and as "a most valuable aid in […] discovering the truth so that justice can be done between the parties", while American courts added that their version of discovery constitutes a means of eliminating "the element of chance from litigation" and assuring "a determination of each controversy on the merits".[18] By contrast, on the Continent, the civil procedure is confined to establishing a "relative" truth, *i.e.* the reality that the parties purport to establish, as opposed to the "absolute" truth independent of the parties' arguments. This discrepancy has its impact on the applicable procedural rules. From the civil law standpoint, evidence is in the hands of the parties' counsel who have discretion to decide on the extent of disclosure by making or omitting to make corresponding allegations of fact.[19] Thus, the civil law approach to evidence is characterized by *a less ambitious search for truth* than the common law approach.

The right to evidence is governed by complex and subtle national rules, sometimes tied to the substantive law and sometimes to the procedural law.[20] This ambivalence creates obvious problems where the laws of different jurisdictions apply to the substance of the dispute

---

International Business and Dispute Settlement in the 21st Century, Liber Amicorum in honor of Karl-Heinz Böckstiegel, 2001, p. 21 ff.

[16] On the rules pertaining to discovery in international arbitration in the domestic law in the United States, China, France, Switzerland and England, see Peter R. Griffin, Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings, Journal of International Arbitration, Vol. 17, No. 2, 2000, p. 19 ff at 23. For excerpts from leading institutional arbitration rules and provisions from selected national arbitration statutes addressing the taking and presentation of evidence in international arbitration, see Born, *op. cit.* note 1, p. 1879 ff.

[17] On the US-style discovery, see Lucy Reed/Ginger Hancock, US-Style Discovery: Good or Evil?, in Teresa Giovannini/Alexis Mourre (eds.), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossier VI of the ICC Institute of World Business Law, 2009, p. 339.

[18] David St. J. Sutton, Discovery and Production of Evidence in Arbitral Proceedings—the U.S. and England Distinguished, in Taking of Evidence in International Arbitral Proceedings/L'administration de la preuve dans les procédures arbitrales internationales, Publication No. 440/8 of the ICC Institute for International Business Law and Practice, 1990, p. 61 with reference to in particular Mustill & Boyd, The Law and Practice of Commercial Arbitration in England, p. 285, *Riddick v. Thames Board Mills Ltd*, (1977) 3 ALL ER 677 per Lord Denning, p. 687 and *Hickman v. Taylor*, 329 US 495.

[19] Blackaby/Partasides *op.cit*. note 1, no. 6-84.

[20] See Section I.A above.

and to the procedure. However, in international arbitration, the importance of the conflict-of-law rules is reduced as compared to international litigation because of *the harmonization of international rules and practices*. In order to ensure the predictability and uniformity of rules of evidence in international arbitration, several tools of harmonization have been put in place by such institutions as the International Bar Association (IBA), the ICC International Court of Arbitration, the International Centre for Dispute Resolution (ICDR) and the International Institute for Conflict Prevention & Resolution (CPR).[21] All these tools of harmonization of the rules on documentary evidence in international arbitration aim at setting out general principles for dealing with the parties' right to evidence.[22] They explain why document production in arbitration is considered today as *one of the most remarkable examples of a merger between different national civil procedure approaches*.[23]

The absence of rules on documentary evidence and more specifically document production in institutional rules and national arbitration rules was noted in the *UNCITRAL Notes on Organizing Arbitral Proceedings*, finalized by the UNCITRAL in 1996. In relation to documentary evidence, the UNCITRAL noted that procedures and practices differed widely as to the conditions under which the arbitral tribunal may require a party to produce documents. This emphasized the need to harmonize the practices to be adopted by international arbitrators with respect to document production and led to several international initiatives aimed at such harmonization. The IBA

---

[21] On the early attempts at and recent steps towards codification, in particular with reference to the UNCITRAL, IBA, ICDR and ICC techniques, see James H. Carter/Joseph E. Neuhaus/John L. Hardiman, Discovery in Arbitration: Recent Developments, The Arbitration Review of the Americas 2009, Section 3.

[22] In order to help filling the gap by providing information on document production practices, and to suggest ways of overcoming the unwieldiness of document production in international commercial arbitration, the ICC Court of Arbitration issued in 2006 a *Special Supplement on Document Production in International Arbitration*.[22] The American Arbitration Association (AAA) and its international arm (the ICDR) published in 2008 the *ICDR Guidelines for Arbitrators concerning Exchanges of Information*, its purpose being to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process. The exchange of information governed by the Guidelines includes the exchange of documents. In December 2008, the CPR Arbitration Committee issued the *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, which addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different nations, a lack of predictability in the conduct of the arbitration proceedings.

[23] Gabrielle Kaufmann-Kohler, Globalization of Arbitral Procedure, Vanderbilt Journal of Transnational Law, Vol. 36, No. 4, 2003, p. 1313 ff at 1325.

adopted the *IBA Rules on the Taking of Evidence in International Arbitration* ("IBA Rules") in 1999 (revised in 2010).[24] The IBA Rules offer a resource that seeks a balance between common law and civil law practices.[25] The text may be used in both *ad hoc* and institutional arbitrations.[26] The IBA Rules, by their nature, are not binding as such. They are guidelines, which may or may not be formally adopted by an arbitral tribunal and the parties or which may simply be cited as a reference.[27]

Notwithstanding the prevailing trend of harmonization of the rules on document production in international arbitration, *the extent to which this trend prevails* in each arbitration procedure depends on the legal background and experience of the arbitrators, parties and their counsel.[28] There is a risk that the harmonized rules on document

---

[24] In 2008, the IBA's Arbitration Committee established the IBA Rules of Evidence Review Subcommittee to which it assigned the task of updating the existing Rules. The Subcommittee conducted surveys and published a draft of the revised Rules for public comment. The revised IBA Rules on the Taking of Evidence in International Arbitration were adopted by the IBA Council on 29 May 2010. The resulting text of the 2010 revised IBA Rules of Evidence reflects the Arbitration Committee's wish to change and update the 1999 version of the IBA Rules only as necessary to reflect new developments and best practices in international arbitration since 1999. See also Georg von Segesser, The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010, in ASA Bulletin, Vol. 28, No. 4, 2010, p. 735. See also Detlev Kühner, The Revised IBA Rules on the Taking of Evidence in International Arbitration, Journal of International Arbitration, Vol. 27, No. 6, 2010, p. 667.

[25] Gabrielle Kaufmann-Kohler, Soft Law in International Arbitration: Codification and Normativity, Journal of International Dispute Settlement, 2010, p. 7: "the IBA Rules sought to fill the gaps in existing national legislation and to harmonize divergent national traditions and practices […] The provisions on document production are a good illustration of such merger. The Rules adopt a middle ground between, on the one hand, US pre-trial discovery and English document disclosure and, on the other hand, court procedures in civil law jurisdictions where, while not entirely unknown, document production is very restricted".

[26] It should be noted that "the word 'commercial' was deleted from the title of the Rules to acknowledge the fact that the IBA Rules of Evidence may be and are used both in commercial and investment arbitrations", 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, available at <www.ibanet.org>.

[27] Baum, *op. cit.* note 15, p. 56. The author adds that the IBA Rules are now more and more widely accepted and used as a reference by practitioners from very diverse backgrounds, albeit often as guidelines rather than as strict requirements. As such, the IBA Rules have done much to narrow the differences in procedure and to harmonize the expectations of parties. See also Blackaby/Partasides *op.cit*. note 1, no. 6-107: The authors refer to the 1999 edition of the Rules as an "almost universally recognized […] international standard for an effective, pragmatic, and relatively economical document production regime".

[28] Bernard Hanotiau, Document Production in International Arbitration: A Tentative Definition of "Best Practices", in ICC International Court of Arbitration Bulletin 2006 Special Supplement, Document Production in International Arbitration, p. 113 ff at 114

production would be applied without any stringent safeguards by the U.S. lawyers who are used to a broad discovery, encompassing any relevant document which may lead to admissible evidence, even if such document does not constitute in and of itself evidence, including internal documents and documents which are contrary to the requested party's interests.[29] By contrast, the civil law lawyers may tend to apply the rules on document production in international arbitration more restrictively.

To sum up, it appears that harmonization of rules on document production in international arbitration constitutes an uncontested reality. While the right to evidence is a cultural institution embedded in the legal tradition of each jurisdiction, it at the same time constitutes a central issue on which the whole arbitration depends. This reality led to an important effort of harmonization of rules applicable to evidence in international arbitration.

C. An Example of Harmonization: E-discovery

Due to the technological progress, the documents sought in international arbitration can also be in electronic form. Today, electronically stored documents, in particular emails, have rapidly

---

with reference to in particular Yves Derains, Towards Greater Efficiency in Document Production before Arbitral Tribunals—A Continental Viewpoint, in ICC International Court of Arbitration Bulletin 2006 Special Supplement, Document Production in International Arbitration, p. 83 ff: "'For the Continental lawyer, it is essential that the legal problem in dispute be clearly defined so that the judge can solve it. Facts are relevant and have to be proved beyond any doubt only insofar as they help to define the legal problem. The common lawyer generally takes the opposite approach, the chief concern being that all parties have equal and full knowledge of the facts'. In practice this means that in the common law world, and especially in the United States, '[r]equests for documents typically are far-reaching in scope and require parties and non-parties to expend considerable time and expense in responding to such requests', whereas in Continental Europe, Latin American and Arab States it is generally for the parties to submit with their briefs the documents on which they rely; and although national courts may have a residual power to order the production of documents, they rarely seem to use it". See also Born, *op.cit.* note 1, p. 1893 ff: "a tribunal composed entirely of civil lawyers, particularly civil lawyers with limited international experience, will not infrequently be reluctant to order disclosure and sceptical about the benefits of such a procedure […] [A] tribunal of three English or U.S.-trained arbitrators will, in all likelihood, assume that the parties should be permitted to exchange disclosure requests and that some substantial measure of document disclosure is essential to a fair and reliable proceeding. Despite these generalizations, the importance of the differences between civil and common law backgrounds to the disclosure process is often exaggerated. While influenced by their legal training, experienced arbitrators in cases with parties of diverse nationalities will usually seek to arrive at procedural decisions that are 'international', rather than replicating parochial procedural rules in local courts".

[29] Section 26(b)(1) Federal Rules of Civil Procedure.

become an important source of evidence in commercial business disputes. Considering the difference between electronic documents (including emails, webpages, word processed files and computer databases) and paper documents, the questions of whether *special rules should govern the electronic discovery* (e-discovery) and whether these rules *need to be harmonized* in international arbitration arise.[30]

In England, Rule 31.4 of the Civil Procedure Rules contains a broad definition of a document.[31] The definition includes electronic documents, such as e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers documents that are stored on servers and back-up systems and electronic documents that have been

---

[30] See Richard Hill, The New Reality of Electronic Document Production in International Arbitration: A Catalyst for Convergence?, Arbitration International, Vol. 25, No. 1, 2009, p. 87. The author argues that following the broadening acceptance of the standards of production reflected in the IBA Rules, electronic production may be a catalyst that leads to a further convergence of the practice of document production in international arbitration proceedings. See also Nicholas Tse/Natasha Peter, Confronting the Matrix: Do the IBA Rules Require Amendment to Deal with the Challenges Posed by Electronically Stored Information?, Arbitration, Vol. 74, No. 1, 2008, p. 28 ff at 33; Jonathan L. Frank/Julie Bédard, Electronic Discovery in International Arbitration: Where Neither the IBA Rules Nor U.S. Litigation Principles Are Enough, Dispute Resolution Journal, Vol. 62, No. 4, 2008, p. 66; Robert H. Smit/Tyler B. Robinson, E-Disclosure in International Arbitration, Arbitration International, Vol. 24, No. 1, 2008, p. 105 ff at 129. The latter article also contains a proposal of "Guidelines for Disclosure of Electronically Stored Information in International Arbitration". These Guidelines set forth recommended practices and principles for disclosure of electronically stored information in international arbitration, selected and adapted from the IBA Rules on the Taking of Evidence in International Arbitration, the Federal Rules of Civil Procedure and the Sedona Conference Principles for Addressing Electronic Document Production. They are intended as a resource for parties and arbitrators in addressing the often difficult and unique issues presented by the preservation, retrieval and production of electronic information in international arbitration. See also Carole Malinvaud, Will Electronic Evidence and E-discovery Change the Face of Arbitration?, in Teresa Giovannini/Alexis Mourre (eds.), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossier VI of the ICC Institute of World Business Law, 2009, p. 373 ff. The author argues that electronic evidence will not change arbitration beyond all recognition since it only puts a range of new tools at the disposal of parties and arbitrators. Used properly, they will simply be other means of doing what arbitration has always striven to do, namely to resolve disputes in a fair, efficient and cost-effective way. See also Schneider, *op. cit*. note 11, p. 13 ff. The author argues that in international arbitration, the electronic nature of documentary evidence does not require any special rules for document production. The large scale replacement of paper documents by electronically stored information is likely to have little effect on the rules and practices of document production.

[31] See further Practice Direction 31B: Disclosure of Electronic Documents, available at <www.justice.gov.uk>.

"deleted". It also extends to additional information stored and associated with electronic documents known as metadata.

Recognizing the limitation of discovery rules conceived in an age of paper discovery, the U.S. federal courts introduced the new e-discovery Federal Rules, applicable to all pending and future cases filed in the federal court system as of 1st December 2006.[32] As to the state court systems within the United States, those courts are also at various stages of studying and adopting new e-discovery rules, including important commercial jurisdictions like New York, California and Illinois. The Sedona Conference think-tank has promulgated the *Sedona Principles Addressing Electronic Document Production*, which set forth e-discovery principles and commentary that have proved very influential in the United States.[33]

In international arbitration, most of the international arbitration rules—such as Articles 24(3) Swiss Rules, 20(5) ICC Arbitration Rules, 22(1)(e) LCIA Rules, 27(3) UNCITRAL Arbitration Rules, 19(2) and (3) AAA (ICDR) Arbitration Rules—empower arbitral tribunals to order the production of "documents" or other "evidence", but are silent as to the electronic information in particular.[34] In August 2008, the *ICC Task Force on Production of Electronic Documents in Arbitration* was created. The Task Force was mandated to study and identify the essential features and effects of the disclosure of electronic documents in international arbitration and to establish a report, possibly in the form of notes or recommendations for the production of electronic documents in international arbitration.[35]

The *ICDR Guidelines for Arbitrators concerning Exchanges of Information* provide that when documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper

---

[32] The U.S. Federal Rules of Civil Procedure are available at <www.uscourt.gov/rules>.

[33] Smit/Robinson, *op.cit.* note 30, p. 110 ff. The Sedona Principles were first published in 2004 and the second edition was issued in 2007, available at <www.thesedonaconference.org>. In January 2008, a separate set of the Sedona Principles was issued for Canada.

[34] It should be noted that despite the absence of any reference to electronic disclosure in the revised version of the UNCITRAL Rules, which came into force in August 2010, it is considered that the drafters, by focusing on addressing the arbitration community's concerns regarding delays and increasing costs of arbitration proceedings, indirectly addressed the challenges of electronic disclosure, see Daria Kozlowska, The Revised UNCITRAL Arbitration Rules Seen through the Prism of Electronic Disclosure, Journal of International Arbitration, Vol. 28, No. 1, 2011, p. 64.

[35] See also Loretta Malintoppi, The ICC Task Force on the Production of Electronic Document in Arbitration – An Overview, in Teresa Giovannini/Alexis Mourre (eds.), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossier VI of the ICC Institute of World Business Law, 2009, p. 415 ff.

copies) most convenient and economical for it, unless the arbitral tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured so as to make searching for them as economical as possible.

In October 2008, the Chartered Institute of Arbitrators published the *Protocol for E-Disclosure in Arbitration*. This Protocol is intended: (i) to achieve early consideration of disclosure of documents in electronic form (e-disclosure) in those cases in which early consideration is necessary and appropriate for the avoidance of unnecessary costs and delay; (ii) to draw the parties and the tribunal's attention to e-disclosure issues, including the scope and conduct of e-disclosure (if any); and (iii) to address e-disclosure issues by allowing parties to adopt this Protocol as part of their agreement to arbitrate a potential or existing dispute.

The *IBA Rules*, in their revised version published in May 2010, provide specific guidance for the production of electronic documents. The revised IBA Rules are neutral regarding whether electronic documents should be produced in any given arbitration; they simply provide a framework for doing so where the parties agree or the arbitral tribunal orders production of such documents.[36] As documents in electronic form have become increasingly important in international commerce and hence in dispute resolution, and since their production may be burdensome for the requested party, a new Article 3.3(a)(ii) was introduced in the 2010 version of the IBA Rules, which provides the means for parties to identify more precisely a narrow and specific requested category of documents maintained in electronic form. Either at a party's own behest or upon order of the arbitral tribunal, electronic documents may additionally be identified by file name, specified search terms, individuals (for example, specific custodians or authors) or other means of searching for such documents in an efficient and economic manner. Article 3.12(b) IBA Rules provides that "[d]ocuments that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise". This format will generally not be the native format with full metadata, as submission in this format can be unduly

[36] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, available at <www.ibanet.org>, p. 9.

expensive and inconvenient. Where electronic disclosure is likely to play a role in an arbitration, the question of the form of production should be addressed as early as the procedural rules governing arbitration start being discussed.[37]

The recent developments described above confirm that the electronic documents create a quantitative problem, but in principle they should be subject to the *same rules governing document production as paper documents*. As the new technological means may not remain unnoticed in the procedure of document production, various international institutions have made *an important effort of harmonization* of rules governing e-discovery in international arbitration. The existence of the electronically stored information has an impact in particular on the burden of search imposed on the requested party and on the precision in the definition of the requested document or category of documents by the requesting party.[38]

II. THE NEED FOR A REASONABLE SOLUTION

After having presented the theoretical foundations of the document production procedure, it is important to remember that the arbitrators are under duty to act with due diligence and to ensure efficient case management. The need for a reasonable approach to document production is part of the efficient management of arbitration proceedings (**A**). This need has led to the establishment in the arbitral practice of rules and principles applicable to document production in international arbitration (**B**).

A. The Efficiency of Case Management

When making a decision on a request for document production, arbitrators may not omit taking into account the need to keep arbitration proceedings *within reasonable dimensions*. In particular, the arbitrators must have regard to the complexity, the length and the

---

[37] *Ibid.*, p. 12.

[38] On this subject, see Nicholas Fletcher, The Use of Technology in the Production of Documents, in ICC International Court of Arbitration Bulletin 2006 Special Supplement, Document Production in International Arbitration, p. 101 ff. On the specific risks resulting from the ease with which electronic documents can be generated and modified, as well as on the potential contributions of the electronically stored information on data collection, data search and retrieval and data presentation and management, see Schneider, *op. cit.* note 11, p. 15 ff with further reference to Erik G.W. Schäfer, IT in Arbitration: the Work of the ICC Task Force in Using Technology to Resolve Business Disputes, in the ICC International Court of Arbitration Bulletin 2004 Special Supplement, Using Technology to Resolve Business Disputes, p. 59 ff.

costs of the proceedings in general, including specifically the impact of their decision on document production on these parameters.[39] A failure to consider the decision on document production in its more general context of efficient case management constitutes a direct threat to the wide use of arbitration as a means of settlement of commercial disputes. Arbitration should also remain open to companies of medium and small size. It is the arbitrators' duty to avoid increasing the complexity, length and costs of the proceedings.[40] This explains why experienced presiding arbitrators tend to curtail dilatory maneuvers in the use of procedural means – such as document production requests – which may be exercised by a party in bad faith to complicate the proceedings and render them excessively onerous for the opponent. The search for a reasonable solution serves a fundamental rule for the arbitrators in organizing the proceedings and in particular in deciding what evidence to accept and how to conduct the evidentiary proceedings. It also constitutes a means of construction of the procedural rules agreed upon by the arbitrators and the parties or issued by the arbitrators at the beginning of the arbitration proceedings.[41]

---

[39] The following non-exhaustive list of factors has been identified for arbitrators to consider when dealing with applications for document production orders: the expectations of the parties and their lawyers; the amount in dispute; the nature of the issues in dispute; the volume and type of documents sought and some other factors such as the extent to which the documents are relevant to the dispute, whether or not there are other means of obtaining the requested information without resorting to an order for document production and whether the order for document production has been sought in a vexatious manner. See Michael Hwang/Andrew Chin, Discovery in Court and Document Production in International Commercial Arbitration – Singapore, in ICC International Court of Arbitration Bulletin 2006 Special Supplement, Document Production in International Arbitration, p. 33 ff at 37 with reference to C. T. Tan/J. Choong, Disclosure of Documents in Singapore International Arbitrations: Time for a Reassessment, Asian International Arbitration Journal, Vol. 1, 2005, p. 49 ff. See also King/Bosman, *op. cit.* note 1, p. 30 ff.

[40] See also Van Vechten Veeder, Document Production in England: Legislative Developments and Current Arbitral Practice, in ICC International Court of Arbitration Bulletin 2006 Special Supplement, Document Production in International Arbitration, p. 57 ff at 60. The author notes that the best procedure for document production will differ from case to case depending upon the dispute, the parties and their legal representatives. The IBA Rules provide an important resource, subject to the overriding discretion of the tribunal and as modified for each particular case. The procedure for document production should fit into the overall procedural timetable with strict deadlines.

[41] On the importance of an early clarification of the "rules of the game", see Karl-Heinz Böckstiegel, Case Management by Arbitrators: Experiences and Suggestions, in Liber Amicorum in honour of Robert Briner, 2005, p. 115 ff at 117; *Idem*, Major Criteria for International Arbitrators in Shaping an Efficient Procedure, in the ICC International Court of Arbitration Bulletin 1999 Special Supplement, Arbitration in the Next Decade, p. 49 ff at 52.

For instance, one of the parties may request the other party to produce *documents which are not in the requested party's possession*. In such a case, the tribunal must deliberate and reach a conclusion as to whether the production of such documents falls within the reasonable possibilities of the requested party. On the one hand, the production must be possible and must not be excessively burdensome; on the other hand, the failure to produce documents may not always be justified by a formal excuse such as for instance that the documents are in the possession of a different company within the same group. The search for a reasonable solution requires putting on the balance the interests at stake and considering all the surrounding circumstances.

The revision of the IBA Rules in 2010 has added emphasis on the requirement of efficiency in document production. For instance, Article 3.12(c) IBA Rules provides that a Party is not obligated to produce multiple copies of documents which are essentially identical unless the arbitral tribunal decides otherwise. The requirements of *reasonableness and efficiency* in conducting arbitration proceedings apply not only to arbitrators but also to the parties' counsel. This implies that when formulating their requests for document production, counsel need to take into account the tight deadlines within which the members of the arbitral tribunal have to study the requests for production of documents and objections if any, confer between themselves and then issue a decision. In addition to the timing of requests, it is also necessary to consider the stage of the proceedings at which the document production requests are filed and the ability of the arbitrators to assess the relevance of the documents sought. The precise reference to the pleadings significantly facilitates the decision-making process. By contrast, an overly broad request motivated by a will to "flood" the arbitral tribunal and the requested party with requests for as many documents as possible in the hope of obtaining at least some of them is counterproductive and infringes on the parties' procedural duties.

B. The Practical Consequences: Some Rules and Principles

The document production process in international arbitration has become over the past years a harmonized procedure following its own rules and principles. We will first outline the procedure itself, which includes the exchange of the parties' submissions on document production and the decision by the arbitral tribunal using specific criteria which will also be presented (**1**). We shall then address two specific issues, namely that of the timing of document production within the general framework of arbitration proceedings (**2**), and the

potential sanctions at the disposal of an arbitral tribunal whose order of document production has not been complied with (**3**).

1) The procedure of document production and applicable criteria

At the outset of the arbitration proceedings, in most cases immediately after the first procedural hearing with the parties, the arbitral tribunal issues procedural rules governing the arbitration. The procedure of document production is usually described in these rules either issued as a separate document entitled "Procedural Rules" or contained in the Procedural Order No. 1 issued by the arbitrators. This procedure is without prejudice to the power of arbitrators to order a party to produce documents at any time.

Considering the volume of document requests and the limited time at the disposal of parties' counsel and arbitrators during the document production procedure, the document requests are very often exchanged following a schematic presentation. It has become a widespread practice in international arbitration to use the so-called *Redfern Schedule* for this purpose. The following is a model of this schedule:

No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Tribunal's Comments
		Ref. to Submissions	Comments		

The parties exchange their submissions on document requests by means of completing the respective columns of the Redfern Schedule. The arbitral tribunal issues its decision on document production in the form of a procedural order and attaches the completed Redfern Schedule to the procedural order thereby integrating this document into its decision.

The formal procedure of document production is initiated by *a request for document production* that the requesting party addresses to its opponent, in principle with a copy to the arbitral tribunal, within the time limit set out by the arbitral tribunal in the procedural timetable.

The document production request must contain all the elements enabling the requested party to identify and locate the documents sought and the arbitral tribunal to rule upon the request in case the requested party objects. More precisely, a request for production shall identify each document or category of documents sought with precision. The request must also establish the legal relevance of the documents sought and why the requesting party assumes the requested documents to be in the possession, power or control of its opponent.

Upon receipt of a document production request, *the requested party has to react*. Within the time limit granted to it by the arbitral tribunal, the requested party may either complete the production of the requested documents by producing the documents to the requesting party (but not to the arbitral tribunal) within the fixed time limit, or provide the requesting party and the arbitral tribunal with its objections and/or reasons for its failure to produce responsive documents. Documents so communicated are not considered to be on record unless and until the requesting party subsequently produces them.

The procedural rules or special instructions of the arbitral tribunal, issued upon a request of the parties, define whether there will be *a second round* of exchange of submissions between the parties on document production requests. The parties and the arbitrators may agree that the requesting party be authorized to reply to the requested party's objections, possibly in the form of the Redfern Schedule to which an additional column is added to this effect. Similarly, the requested party may then wish to submit its rejoinder in the form of comments on reply to objections.

In case of a refusal of the requested party to produce the documents sought, the arbitral tribunal makes *a decision* in the form of a procedural order. The tribunal rules in its discretion upon the communication of the documents or categories of documents having regard to the legitimate interests of the requested party and of all the surrounding circumstances. Any disagreements between the parties as to the scope, conditions, timing and/or method of the production of documents are also decided by the arbitral tribunal by means of a procedural order. In order to respect the right to be heard, all the parties must have a reasonable opportunity to express their views. As to the substance of the decision of the arbitral tribunal, the harmonized practice of international arbitration has established *the conditions of admissibility* of the request for document production. First of all, it is reminded that the procedure of document production is intended to be

specific and limited, as opposed to the fully fledged discovery. Although it is undisputed that international arbitrators have the power to order the parties to produce documents, it is in fact most unusual to proceed to a broad discovery to the extent admissible in common law jurisdictions.

In the arbitration proceedings conducted under the auspices of the ICC International Court of Arbitration, *Article 20(5) ICC Rules* affords considerable discretion to the arbitrators when ruling upon the production of documents ("unlike in common law court proceedings, a Party has no right to the discovery of documents in an ICC arbitration proceeding. But such discovery is not excluded either […]. It is thus left to the Arbitral Tribunal to decide on a case-by-case basis how much, if any, discovery should be allowed […]").[42]

Based on the harmonized and widely recognized arbitral practice, the following standards guide international arbitrators when ruling on a document production request:

— As to the drafting of a request, the request for production must *identify* each document or specific category of documents sought with precision. Sweeping requests asking for "all documents relating to" or "all minutes of the board" over a long period of time will not usually satisfy the criterion of specificity.[43] Otherwise, the requested party may not be able to trace a document and the arbitral tribunal may possibly be unable to rule on its production. The tribunal and the requested party must be able to identify the documents sought, directly or indirectly. The description of documents sought will usually need to be composed of three elements: (i) the presumed author and/or recipient of the document; (ii) the date or presumed time frame within which the document was established; and (iii) the presumed content of the document.[44]

— The *relevance* of the document or category of documents sought must be explained in relation to the facts for which the requesting party bears the burden of proof.[45] The request for

---

[42] Derains/Schwartz, *op. cit.* note 1, ad Art. 20(5), p. 281.

[43] Hanotiau, *op. cit.* note 28, p. 117.

[44] Raeschke-Kessler, *op. cit.* note 1, p. 647.

[45] Derains, *op. cit.* note 28, p. 87. The author argues that to be efficient, document production must serve the purpose of bringing to the arbitral tribunal's knowledge not simply any document relevant and material to the outcome of the dispute, but documentary evidence without which a party would not be able to discharge the burden of proof lying upon it. When a document production request is disputed, the arbitrators

production must establish the relevance of each document or of each specific category of documents sought in such a way that the other party and the arbitral tribunal are able to refer to factual allegations in the submissions filed by the parties to date. Obviously, this shall not prevent a party from referring to future factual allegations, provided such factual allegations are made or at least summarized in the request for production of documents. In other words, the requesting party must make it clear with reasonable particularity what facts/ allegations each document (or category of documents) is intended to establish.

— The arbitral tribunal will only order the production of documents or category of documents if the requesting party shows that it is more likely than not that *the documents exist and are within the possession, power custody or control of the other party*.[46] It is primarily the responsibility of each party to submit the evidence upon which it wishes to rely. If contested, the requesting party must establish that the documents sought are not and cannot be within its own possession, power custody or control and that it has made specific efforts to obtain the documents through other sources.[47]

If the requested party puts forward an objection of principle—such as based on privilege or on business confidentiality—the requesting party will have to refute any such objection. This may lead the arbitral tribunal, upon proper application from the requested party, to balance the request for production against *the legitimate interests of the requested party*, including any applicable privilege, unreasonable burden and the need to safeguard confidentiality, taking into account all the surrounding circumstances. Article 9.2 IBA Rules lists among such circumstances the following: (i) lack of sufficient relevance or

---

have the responsibility of determining whether the requesting party actually needs the documents to discharge its burden of proof. If not, the request should be denied.

[46] Hanotiau, *op. cit.* note 28, p. 117. The author adds that if the party from which the document is requested objects that it does not have it or that it was unable to locate it, the request will normally be denied. The requesting party should be reminded that it has the possibility of arguing in its upcoming submission(s) that this is not true and asking the arbitral tribunal to draw appropriate conclusions from the other party's refusal to produce the documents sought.

[47] David D. Caron/Lee M. Caplan/Matti Pellonpää, The UNCITRAL Arbitration Rules, A Commentary, 2006, pp. 576, 593 (with reference to *MCA Incorporated and The Islamic Republic of Iran*, Case No. 768, Chamber Two, Order of 6 October 1983) and 597 (with reference to *Vera-Jo Miller on her own behalf, on behalf of Laura Aryeh, on behalf of JM Aryeh and the Islamic Republic of Iran*, Case Nos. 842, 843 and 844, Chamber One, Order of 6 March 1992).

materiality; (ii) legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable; (iii) unreasonable burden to produce the requested evidence; (iv) loss or destruction of the document that has been reasonably shown to have occurred; (v) grounds of commercial or technical confidentiality that the arbitral tribunal determines to be compelling; (vi) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the arbitral tribunal determines to be compelling; or (vii) considerations of fairness or equality of the parties that the arbitral tribunal determines to be compelling. The 2010 revision of the IBA Rules has introduced Article 9.3, which specifies that in considering the issues of legal impediment or privilege under Article 9.2, and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the arbitral tribunal may take into account any need to protect the confidentiality of a document created in connection with and for the purpose of providing or obtaining legal advice, any need to protect the confidentiality of a document created in connection with and for the purpose of settlement negotiations, the expectations of the parties and their legal advisors at the time the legal impediment or privilege is said to have arisen, any possible waiver of any applicable legal impediment or privilege and the need to maintain fairness and equality as between the parties, particularly if they are subject to different legal or ethical rules.

The *confidentiality* concern has been further addressed in the new 2010 version of the IBA Rules, which Article 3.13 provides that any document submitted or produced by a party or non-party in the arbitration and not otherwise in the public domain shall be kept confidential by the arbitral tribunal and the other parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in *bona fide* legal proceedings before a state court or other judicial authority. The arbitral tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

2) The timing of document production requests

Pursuant to Article 27(3) UNCITRAL Rules, the order to produce documents may be made at "any time during the arbitral proceedings". Similarly, Article 3(10) IBA Rules provides that the arbitral tribunal may request a party to produce to the arbitral tribunal

and to the other parties any documents that it believes to be relevant and material to the outcome of the case "at any time before the arbitration is concluded". This general principle does not in theory preclude the parties from submitting their requests at the very first stage of the proceedings, *i.e.* before the first exchange of briefs on the merits. In practice, however, the requests are usually scheduled after the exchange of statement of claim and statement of defense.[48]

As a matter of principle, a request for document production should be submitted no earlier than and no later than *after the first exchange of the parties' submissions on the merits*.[49] This principle corresponds to the "best practice" in international arbitration. It is explained by the fact that in order for a party to ascertain whether certain documents are necessary to successfully argue its case or meet the burden of proof lying upon it, it is first necessary to present its own case and know the position of the other party. Conversely, for the arbitral tribunal to rule on a document production request, the arbitrators must be in a position to assess, at least *prima facie*, the relevance of the documents sought and to form a preliminary view on the case. This approach may need to be varied from time to time. Under certain circumstances, for instance where the parties agree to proceed with only one round of exchange of submissions on the merits, thereby excluding the reply and rejoinder, a request for document production will be necessarily submitted before the exchange of these submissions. In investment arbitration, where the investor has been expelled from the country and does not have any documents to defend itself, it would be appropriate to allow document production requests to be filed early in the proceedings.[50]

Experienced arbitrators usually fix the timing of document production procedure during the initial procedural hearing with the parties, after hearing the views of the parties' counsel and taking into account any specific requests and circumstances of the case. Parties should, of course, be free to request documents from each other at any time, but in case of a refusal by the opponent or absence of an agreement on the methodology of document production between the parties, the procedural calendar for the arbitration should clearly indicate when the parties will have an opportunity to file a request for document production with the arbitral tribunal.[51] This procedure does

---

[48] Hanotiau, *op. cit.* note 28, p. 115; Born, *op.cit.* note 1, p. 1900.

[49] Raeschke-Kessler, *op. cit.* note 1, p. 650: "As a rule the arbitral tribunal will not be able to make a decision on the Request to Produce by a party, until the parties have exchanged fully developed factual and legal submissions in a first round".

[50] Hanotiau, *op. cit.* note 28, p. 115.

[51] *Ibid.*

not preclude the parties from seeking leave from the arbitral tribunal to make additional requests at a later stage should such need arise.[52]

The 2010 revision of the IBA Rules has introduced Article 3.14, which provides that if the arbitration is organized into separate issues or phases (such as jurisdiction, preliminary determination, liability or damages), the arbitral tribunal may, after consultation with the parties, schedule the submission of documents and requests to produce documents separately for each issue or phase.

In deciding on the requests for document production, the arbitrators rule on the *prima facie* relevance of the requested documents, having regard to the factual allegations made by the parties in the submissions filed to date.[53] At the stage of the proceedings where a decision on the document production requests is made, the arbitral tribunal may not be in a position to make any final ruling on the relevance of the requested documents to the determination of the parties' claims and defenses in the arbitration. The Iran-US Claims Tribunal stated clearly that a decision on document production in international arbitration proceedings is without prejudice to the arbitrators, if and when they eventually consider the merits of the case, weighing the evidentiary significance if any, that flows from the request for production of documents and the requested party's position taken in its respective submissions.[54]

3) The sanctions for non-compliance with the document production order

In case a party does not comply with an order for disclosure, English and American courts may issue powerful judicial sanctions. By contrast, arbitral tribunals do not have such sanctions at their disposal.

---

[52] Born, *op.cit*. note 1, p. 1900: "It not infrequently occurs that a party will seek to make supplemental disclosure requests, usually based on documents that come to light during the course of the proceedings, new claims or defenses, testimony, or the like. In general, tribunals will permit such requests to be made, while also being wary of efforts to reargue previously-decided issues. Although a previously-denied request may appropriately be revisited, if the parties' legal positions change or unforeseen testimony is given, tribunals will often be skeptical (perhaps unduly skeptical) of such efforts".

[53] Virginia Hamilton, Document Production in ICC International Court of Arbitration Bulletin 2006 Special Supplement, Document Production in International Arbitration, p. 63 ff at 69. The author notes that inevitably, a tribunal's assessment of the relevance of a document is made on the basis of the knowledge it has of the case and the parties' claims at the time the document production order is made. This means that it will rule on what one arbitral tribunal referred to as the "*prima facie relevance*" of the requested documents. See also Born, *op.cit*. note 1, p. 1909.

[54] *Brown & Roots, Inc. and The Islamic Republic of Iran*, Case No. 50, Chamber One, Order of 4 January 1993, quoted in Caron/Caplan/Pellonpää, *op. cit.* note 48, p. 597.

In theory, several remedies could enter into consideration, for instance enforcement by the assisting judge or the power to order the defaulting party to pay a penalty ("*astreinte*").[55] However, such remedies give rise to both *practical and legal difficulties*.[56]

Thus, in order to avoid the risk of the parties being unfairly deprived of the ability to prosecute or defend against claims, international and institutional arbitral rules and some national arbitration laws authorize arbitrators, implicitly or explicitly, to draw *adverse inferences* from the parties' non-production of discoverable evidence.[57] The very threat of adverse inferences can impel recalcitrant parties to produce unfavorable evidence, thereby allowing their adversaries to make out their claims or defenses. In this way, adverse inferences contribute to ensuring the efficacy and fairness of international arbitration.[58]

When a requested party fails to comply with an order to produce documents, the tribunal may excuse the requesting party when its evidence for a certain allegation would otherwise appear insufficient, and even infer that the withheld documents would have supported the requesting party's allegation.[59] The adverse inferences can thus be used

---

[55] Gaillard/Savage, *op. cit.* note 1, no. 1274. The authors note that there is a controversy as to whether arbitrators can attach penalties to their procedural orders since it has been argued that they lack *imperium* and the absence of statutory basis prevents them from doing so. But they argue that where the arbitration agreement is drafted in terms sufficiently broad so as not to exclude that option (such as "all disputes arising our of the present contract"), there is no reason why international commercial arbitrators should not attach penalties to their injunctions, provided that the measures are incorporated, in the interests of enforcement, in an interim award.

[56] Born, *op.cit.* note 1, p. 1918: "[M]any national laws (including the UNCITRAL Model Law, U.S. FAA, English Arbitration Act, 1996, Swiss Law on Private International Law and Japanese Arbitration Law) authorize the arbitral tribunal and/or the parties to seek judicial assistance in obtaining disclosure of evidentiary materials that have not been voluntarily produced to the arbitral tribunal. In general, however, the delays, expense and uncertainties that arise from applications to national courts ordinarily make this an unattractive or impractical option".

[57] Vera van Houtte, Adverse Inferences, in Teresa Giovannini/Alexis Mourre (eds.), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossier VI of the ICC Institute of World Business Law, 2009. See also Jeremy K. Sharpe, Drawing Adverse Inferences from the Non-production of Evidence, Arbitration International, Vol. 22, No. 4, 2006, p. 549 ff with reference to Article 9(4) and (5) IBA Rules (1999 edition) and Article 6 of the Hong Kong International Arbitration Centre Small Claims Procedure of 4 July 2003, as well as Howard M. Holtzmann/Joseph E. Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, 1989, p. 701: "[T]he tribunal has the power to infer from a party's failure to produce evidence that the evidence would have been to that party's disadvantage".

[58] Sharpe, *op. cit.* note 58, p. 550.

[59] See Article 9(5) IBA Rules. See also Concurring and Dissenting Opinion of Judge Charles N. Brower in *Frederica Lincoln Riahi and the Government of the Islamic Republic of*

by arbitral tribunals to help an opponent of a recalcitrant party to discharge its *burden of proof*. If a party bearing the burden of proof faces an unjustified refusal to comply with an order of document production, it may be freed of its burden of proof. For the sake of predictability and in order to provide the right incentives to the parties, such consequence of non-compliance with the order of document production must be clearly stated in the procedural rules governing arbitration proceedings.

The recent revision of the IBA Rules was innovative as the Rules now offer a supplementary or alternative tool to sanction non-complying parties. Article 9.7 IBA Rules provides that "[i]f the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its *assignment of the costs of the arbitration*, including costs arising out of or in connection with the taking of evidence" (emphasis added).

To sum up, the arbitrators' power to sanction a party's non-compliance with a document production order is more limited as compared to the power of a State judge in similar circumstances. The arbitrators' most efficient power in this respect consists of presumptions in matters of evidence and the reversal of the burden of proof in case of non-compliance with the arbitral tribunal's order of document production and of the possibility to take into account the parties' conduct when allocating the costs of arbitration. Other potential measures sanctioning a party's non-compliance with an order to produce documents remain theoretical and do not play any practical role in international arbitration.

Iran, Award No. 600-485-1 of 27 February 2003, paras. 21 and 30. One commentator suggests that "[i]n an extreme case, the party which fails to carry out an order of the tribunal may find itself 'punished' by having an adverse award made against it (but it would seem that this would only be defensible if justified by evidence and arguments advanced against it by the winning party)", see Alan Redfern, Interim Measures, in Lawrence W. Newman/Richard D. Hill (eds.), The Leading Arbitrators' Guide to International Arbitration, 2004, p. 217 ff at 240. For a slightly different view, see Jan Paulsson, Overview of Methods of Presenting Evidence in Different Legal Systems, in Albert Jan van den Berg (ed.), ICCA Congress Series No. 7, Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, 1996, p. 112 ff at 118. The author argues that adverse inferences are not the fearsome weapon some lawyers seem to imagine, given the fact that most arbitrators would be disturbed at the thought of deeming the burden of proof discharged by an inference, but he notes that the threat is not an idle one. On the preconditions for an "adverse inference", see Sharpe, *op. cit.* note 58, p. 551 ff.

CONCLUSION

The peculiar feature of international arbitration is to offer a procedure acceptable to all the parties, irrespective of their origin and cultural background. It is crucial to avoid the imposition of a document production procedure which would be embedded in the specificities of one or another legal culture. A reference to national rules of evidence would greatly complicate the practice of international arbitration. The procedure in international arbitration, including the document production, must follow its own rules proper to the international context of arbitration and must be adapted to the needs of the parties with different legal traditions.

In light of the wide use of arbitration and its evolution into a commonly used method of settlement of international disputes, more and more lawyers, from different jurisdictions, will specialize both as counsel and arbitrators in international arbitration. This will free them from the influence of their domestic rules of civil procedure and render actors of international arbitration friendlier to the specific needs of the international context of arbitration. There is a good deal of hope that the future will bridge the few remaining differences in legal backgrounds of arbitration practitioners.