

arbitration

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IBA Rules of Evidence

Commentary on the IBA Rules
on the Taking of Evidence in
International Arbitration

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Table of contents

Introduction	V
List of Authors	XV
List of Abbreviations	XVII
Bibliography	XXI
Preamble	1
I. 2010 and 2020 Revisions	1
II. Efficient, Economic and Fair Taking of Evidence (par. 1)	2
III. Supplementation of Institutional, Ad Hoc or Other Rules (par. 1)	4
IV. Adaptation of the Rules in Arbitral Proceedings (par. 2)	5
V. Good Faith Principle (par. 3)	5
VI. Knowledge of Evidence Sufficiently in Advance of the Hearing (par. 3)	7
Definitions	11
Article 1 Scope of Application	13
Article 2 Consultation on Evidentiary Issues	17
I. 2010 and 2020 Revisions	17
II. Early Consultation with the Parties (par. 1)	18
III. Evidentiary Issues to Address (par. 2)	20
IV. Identification of Relevant and Material Issues (par. 3(a))	24
V. Preliminary Determination/Bifurcation (par. 3(b))	25
Article 3 Documents	29
I. The 2020 Revision	32
II. Objective and Structure of Art. 3	33
III. What Is a "Document" Under the Rules?	34
IV. Documentary Evidence in International Arbitration in General	35
A. Importance of Documentary Evidence	35
B. Terminology and Its Limits	36
C. Controversy as to Document Production Due to Differing Concepts	36
D. Harmonised Rules and Document Production in Arbitral Practice	38

E.	The Arbitral Tribunal's Power to Order Document Production in General	40
F.	Production of Electronic Documents in Particular	43
G.	Statutory and Contractual Rights to Production	46
H.	General Remarks on the Provisions of Art. 3	47
V.	Submission of Documents That Are Available to Each Party (par. 1) ...	48
VI.	Production of Documents	51
A.	Principles Governing Document Production (par. 2-9)	51
B.	Production of Documents in the Control of the Opposing Party (par. 2-7)	53
1.	Introduction	53
2.	Request to Produce to the Arbitral Tribunal and to the Other Parties (par. 2)	53
3.	Requirements as to the Content of a Request to Produce (par. 3)	58
a)	Overview	58
b)	Identified Document or Narrow and Specific Category	60
c)	Narrow and Specific Category in Case of Documents Maintained in Electronic Form	61
d)	Only Documents That Exist	64
e)	Relevance and Materiality	66
f)	Possession, Custody or Control	72
4.	No Objection by the Other Party: Obligation to Produce (par. 4)	75
5.	Objection and Response to Production Request (par. 5)	76
a)	2020 Revision	76
b)	Objection to Production Request	77
c)	Response to Objections	78
6.	Invitation to Consult (par. 6)	79
7.	Decision and Order by the Arbitral Tribunal (par. 7)	80
C.	Review of the Document by a Neutral Expert (par. 8)	85
D.	Request to Produce Against a Third Party (par. 9)	88
E.	Request to Produce by Arbitral Tribunal (par. 10)	92
VII.	Additional Documents – Second Round of Document Submission (par. 11)	94
VIII.	Form of Submission or Production, Copies, Electronic Documents, Multiple Copies and Translations (par. 12)	95
A.	General Remarks	95
B.	Conformity of Copies and Presentation for Inspection (par. 12(a))	95
C.	Documents Maintained in Electronic Form (par. 12(b))	96

D.	No Multiple Copies (par. 12(c))	98
E.	Translations (par. 12(d) and (e))	99
IX.	Confidentiality (par. 13)	101
X.	Separate Issues or Phases (par. 14)	103
Article 4	Witnesses of Fact	103
I.	2010 and 2020 Revisions	105
II.	General Remarks	105
III.	Identification of Witnesses (par. 1)	106
IV.	Who Can Be a Witness (par. 2)	106
V.	Interviewing Witnesses (par. 3)	108
VI.	Witness Statements	111
A.	General Remarks (par. 4)	111
B.	Submission (par. 4)	114
C.	Content (par. 5)	115
1.	Identity of the Witness (par. 5(a))	115
2.	Statement of Facts (par. 5(b))	116
3.	Language (par. 5(c))	119
4.	Affirmation of Truth and Signature (par. 5(d) and (e))	120
D.	Rebuttal Witness Statements (par. 6)	120
VII.	Right to Examine Witnesses Who Have Submitted a Witness Statement	122
A.	No General Duty to Appear Before the Arbitral Tribunal	122
B.	Waiver of Appearance (par. 8)	124
C.	Failure to Appear (par. 7)	125
1.	General Rule	125
2.	Waiver of Appearance by the Parties	125
3.	Waiver of Appearance by the Arbitral Tribunal	125
4.	Witnesses Who Are Unavailable for Examination Because of Objective Reasons	126
5.	Unexcused Non-Appearance	127
VIII.	Evidence of Recalcitrant Witnesses (par. 9)	128
IX.	Witness Appearance Ordered by the Arbitral Tribunal (par. 10)	130
Article 5	Party-Appointed Experts	133
I.	2010 and 2020 Revisions	135
II.	Reliance on a Party-Appointed Expert (par. 1)	135
III.	Identification of Party-Appointed Expert (par. 1)	136

Table of contents

IV.	Expert Report	136
A.	General Remarks	136
B.	Submission (par. 1)	137
C.	Content (par. 2)	137
1.	Identity of the Expert (par. 2(a))	137
2.	Description of Instructions (par. 2(b))	138
3.	Statement of Independence (par. 2(c))	139
4.	Statement of Facts (par. 2(d))	140
5.	Expert's Opinions and Conclusions (par. 2(e))	140
6.	Language (par. 2(f))	141
7.	Affirmation of Genuine Belief (par. 2(g))	141
8.	Signature (par. 2(h))	142
9.	Attribution to Several Authors (par. 2(i))	142
V.	Rebuttal Expert Reports (par. 3)	142
VI.	Expert Meeting (par. 4)	145
VII.	Right to Examination of Party-Appointed Experts	145
A.	No General Duty to Appear Before the Arbitral Tribunal	145
B.	Waiver of Appearance (par. 6)	146
C.	Failure to Appear (par. 5)	147
1.	General Rule	147
2.	Waiver of Appearance by the Parties	147
3.	Waiver of Appearance by the Arbitral Tribunal	147
4.	Experts Who are Unavailable for Examination Because of Objective Reasons	148
5.	Unexcused Non-Appearance	149
Article 6	Tribunal-Appointed Experts	151
I.	2010 and 2020 Revisions	153
II.	Appointment of Experts by the Arbitral Tribunal	154
A.	General Remarks (par. 1)	154
B.	Duty to Appoint an Expert	155
C.	Exclusion of the Arbitral Tribunal's Power	156
D.	Duty to Consult with the Parties (par. 1)	157
E.	Choosing the Expert	157
F.	Contractual Relationship of the Expert	158
G.	Right of the Arbitral Tribunal to Release the Expert	158
H.	Scope of the Expert's Task	159
III.	Expert's Terms of Reference (par. 1)	159

Table of contents

IV.	Qualification and Independence of Expert (par. 2)	161
A.	Description of Qualifications	161
B.	Statement of Independence	161
C.	Objections by the Parties	162
V.	The Parties' Duty to Provide Information (par. 3)	163
A.	In General	163
B.	The Expert's Power to Request Information and Documents	163
C.	The "Relevant and Material"-Test and Exclusion from Evidence or Production	164
D.	Providing Access to Documents etc.	164
E.	Right to be Heard	165
F.	Failure to Comply with Expert's Request	165
VI.	Expert Report (par. 4)	165
A.	Submission	165
B.	Content	166
1.	Identity of the Expert (par. 4(a))	166
2.	Statement of Facts (par. 4(b))	166
3.	Expert's Opinion and Conclusions (par. 4(c))	167
4.	Language (par. 4(d))	167
5.	Affirmation of Genuine Belief (par. 4(e))	168
6.	Signature (par. 4(f))	168
7.	Attribution to Several Authors (par. 4(g))	168
VII.	Parties' Right to Respond to the Expert's Report (par. 5)	168
VIII.	Parties' Right to Question the Expert (par. 6)	169
IX.	Assessment of Expert Report (par. 7)	170
X.	Cost Allocation (par. 8)	171
XI.	Appointment of an Additional Expert	172
Article 7	Inspection	173
I.	2020 Revision	173
II.	Introduction	173
III.	The Arbitral Tribunal's Power to Order Inspections	174
A.	Issues to Be Considered by the Arbitral Tribunal	174
B.	On the Arbitral Tribunal's Own Motion or upon Request of a Party	176
C.	Inspection by the Arbitral Tribunal or by Tribunal- or Party-Appointed Experts	176
D.	Limitations Pursuant to Art. 9(2) and 9(3)	176

Table of contents

IV. Parties' Right to Attend	177
V. Conduct of the Inspection	177
Article 8 Evidentiary Hearing	179
I. 2020 Revision	181
II. Introduction	182
A. Scope of Application	182
B. Applicable Procedural Law	183
III. Appearance of Witnesses (par. 1)	184
IV. Remote Hearing (par. 2)	185
V. Leading Role of the Arbitral Tribunal (par. 3)	187
VI. Sequence of Witness and Expert Presentation (par. 4)	188
A. Sequence of Direct Testimony (par. 4(a))	189
B. Sequence of Cross-Examination and Re-Direct Examination (par. 4(b))	190
C. Sequence of Testimony of Party-Appointed Experts (par. 4(c))	191
D. Questioning of Tribunal-Appointed Experts (par. 4(d))	191
E. Bifurcation of Arbitral Proceedings (par. 4(e))	191
F. Variations of Sequence/Witness Conferencing (par. 4(f))	191
G. Arbitral Tribunal's Power to Ask Questions (par. 4(g))	192
VII. Witnesses' Affirmation of Telling the Truth and Written Witness Statements in Lieu of Direct Testimony (par. 5)	193
VIII. Witnesses or Experts Requested by the Arbitral Tribunal (par. 6)	195
IX. Some Practical Aspects of Managing the Evidentiary Hearing	195
Article 9 Admissibility and Assessment of Evidence	199
I. 2010 and 2020 Revisions	201
II. Assessment of Evidence by Arbitral Tribunals (par. 1)	202
A. Introduction	202
B. Admissibility of Evidence	202
C. Burden of Proof	203
D. Standard of Proof	204
E. Weight of Evidence	205
F. Stay of Proceedings	206
III. Exclusion of Evidence (par. 2)	207
A. Legal Privilege (par. 2(b) and 4)	207
1. Introduction	207
2. In-House Counsel	209

Table of contents

3. Conflict of Law Issues	210
4. List of Elements to Consider (par. 4)	213
B. Other Reasons to Exclude Evidence (par. 2(a-g))	215
1. Lack of Relevance or Materiality (par. 2(a))	215
2. Legal Impediment (par. 2(b) and 3)	216
3. Unreasonable Burden to Produce (par. 2(c))	216
4. Loss or Destruction (par. 2(d))	217
5. Commercial and Technical Confidentiality (par. 2(e))	218
6. Political or Institutional Sensitivity (par. 2(f))	218
7. Considerations of Procedural Economy, Proportionality, Fairness or Equality (par. 2(g))	219
IV. Exclusion of Evidence Obtained Illegally (par. 3)	220
V. Confidentiality Protection (par. 5)	221
VI. Adverse Inference (par. 6-7)	222
A. Introduction	222
B. General Requirements	224
C. Production of all Corroborating Evidence by Requesting Party	225
D. Evidence Accessible to the Other Party	226
E. Reasonable Inference	226
F. Consistence with Facts in the Record	227
G. Logical Relation to Evidence Withheld	228
H. <i>Prima Facie</i> Evidence by Requesting Party	228
I. Sufficient Opportunity for Requested Party to Produce	228
VII. Cost Sanctions for Bad Faith Conduct (par. 8)	229
Annex: Comparison IBA Rules 2010 and 2020	231
Index	259

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able to the party that wants to rely on them. In contrast, Art. 3(2-9) relate to documents that a party wishes to use as evidence but cannot introduce on its own since they are in the **control**¹⁰¹ of the other party to the arbitration or of a third party not participating in the arbitration.

- 7 Art. 3 is drafted to generally apply the same set of rules to all forms of documents (whilst providing for some additional rules as to certain aspects of electronic documents).¹⁰²

III. What Is a "Document" Under the Rules?

- 8 The Rules define "Document" to mean "a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means".¹⁰³
- 9 The 2020 Revision did not bring any change to the definition of "Document".
- 10 The definition is very broad and includes, *inter alia*, letters, faxes, emails, deeds, instruments, contracts, minutes, notes of phone conversations, invoices, etc.
- 11 There is general consensus that the definition of "Document" in the 2020 Rules includes any form of electronic evidence.¹⁰⁴ In particular, metadata (i.e. data about electronically stored data) as a form of electronic data also falls within the scope of Documents.¹⁰⁵ Other forms of electronic evidence include, e.g. word processing files, spreadsheet programmes, presentations, software applications, text messages, photos, files from servers, laptops, mobile phones or MP3 players, GPS information, etc.¹⁰⁶

101 In full language of the Rules (see Art. 3(3)(c), 3(4), 3(7)): "in the possession, custody or control"; see also below, N 141-152.

102 See below, N 8-11.

103 See also above, Definitions N 2.

104 IBA REVIEW TASK FORCE 2020, 4; MARGHITOLA, Document Production, 5; KHO-DYKIN/MULCAHY/FLETCHER, N 3.6; REDFERN/HUNTER/BLACKABY/PARTASIDES, N 6.110.

105 COHEN KLÄSENER/DOLGORUKOW, 305. As to electronic documents in particular, see also below, N 44-52.

106 KNEISEL/LECKING, 152.

IV. Documentary Evidence in International Arbitration in General

A. Importance of Documentary Evidence

The taking and presentation of documentary evidence is an important feature in any legal proceedings. Documentary evidence, in particular contemporary documents, often plays a **major role** compared to other means of evidence.¹⁰⁷ In international arbitration, documentary evidence is generally seen as more credible and thus stronger than other evidentiary means.¹⁰⁸ This view is generally shared among international arbitration practitioners - irrespective of which country they received their legal training in. This can be illustrated, e.g., by the following two comments:

- In the words of English practitioners: "In international arbitrations, the best evidence that can be presented in relation to any issue of fact is almost invariably contained in the documents that came into existence at the time of the events giving rise to the dispute."¹⁰⁹
- Similarly, from a Swiss perspective: "In many disputes, documents constitute the most important evidence. They are usually the most accurate form of contemporaneous evidence. They provide a straightforward and objective record of what the parties did, omitted to do, agreed to do or intended to do in the course of contract negotiations or during the performance of the contract before or at the time when their transaction or project broke down."¹¹⁰

The general preference for documentary evidence can also be explained by the fact that it is usually easier, more efficient and less costly than evidence introduced by witnesses. An additional element is that the content of witness evidence is not "fixed" until the hearing even if written witness statements are used. Hence, it is more difficult to firmly rely on witness evidence in the written pleadings before the hearing.

107 O'MALLEY, Document Production, 186.

108 GIRSBERGER/VOSER, N 991; PILS (Basel)-SCHNEIDER/SCHERER, Art. 184 N 18.

109 REDFERN/HUNTER/BLACKABY/PARTASIDES, N 6.90.

110 BERGER/KELLERHALS, N 1323.

B. Terminology and Its Limits

- 14 In the context of document production, the terms “**discovery**” (as used, e.g., in US state court litigation) or “**disclosure**” (as used, e.g., in English state court litigation) are often applied.
- 15 It has been suggested that the term “**discovery**” **should not be used** in connection with international arbitration and that terms such as “**disclosure**” or “**evidence-taking**” should be preferred. In the words of eminent arbitration practitioners: “[...] it is better to avoid the use of the term ‘discovery’ because it is an ambiguous term. To a civil lawyer it means nothing; to a US lawyer it encompasses production of documents and depositions of potential witnesses and experts as well as inspection of the subject-matter of the dispute; to an English lawyer it refers only to production of documents.”¹¹¹
- 16 Another approach recognises that the terms “**discovery**” and “**disclosure**” both refer to tribunal-ordered (or court-ordered) production of materials for use in substantiating the parties’ claims in the arbitral proceedings, and that the actually relevant issue is not the terminology, but rather the **scope** of the documents that must be produced.¹¹²
- 17 Given that discovery and disclosure may mean quite different things, and since the prevailing view is that neither US-style court-litigation discovery nor English court-litigation disclosure (or similar features from other systems) should be practiced in international arbitration (at least under the Rules),¹¹³ this **Commentary** (generally and in line with the language of the Rules) uses the term “**document production**”.
- 18 Similarly, this **Commentary** generally refers to “**submitting**” and “**submission**”, respectively, where parties introduce documents **voluntarily** to support their case.

C. Controversy as to Document Production Due to Differing Concepts

- 19 Whether, to what extent, under what conditions and requirements and how a party may request production of **documents from the other party** (in partic-

¹¹¹ REDFERN/HUNTER/BLACKABY/PARTASIDES, 4th ed., N 6–71.

¹¹² BORN, 2496, also pointing out that disagreements over terminology in this context “do not advance analysis materially” and that the term “discovery” does not necessarily encompass a broader notion and range of materials than “disclosure”.

¹¹³ See in more detail below, N 25–32 and 77.

ular, **internal and potentially adverse documents**¹¹⁴) was and still is to some extent **controversial**. The topic of document production in international arbitration has also generated quite some **scholarly writing**.¹¹⁵

The issue was lively debated and is still under discussion because the traditions, concepts and rules with regard to document production vary fundamentally between the different legal systems, in particular between common law and civil law jurisdictions.¹¹⁶ There are important **differences between the legal traditions** in state court litigation of civil law and common law jurisdictions regarding documentary evidence and the taking and presentation of such evidence.

In general, it seems fair to say that civil law countries tend to regard **documents** as the primary source of evidence, whilst common law countries put more weight on **witnesses**.¹¹⁷ In state courts in common law countries, facts are mainly proved by direct oral testimony, and even documentary evidence must in principle be introduced by a witness.¹¹⁸

Moreover, state court litigation in many common law countries usually involves **automatic “discovery”** of documents. This means that each party must disclose to the other party the existence of all relevant documents, whether favourable

¹¹⁴ In this context, one can generally distinguish between three categories of documents: (1) documents that are favourable to a party which has them in its possession; (2) documents that are unfavourable; and (3) documents that are neutral. The first and the third category usually raise no particular difficulty as to submission or production (whilst they may raise issues as to their authenticity and their evidentiary weight with regard to the allegations they are submitted for), in contrast to the category of unfavourable documents; REDFERN/HUNTER/BLACKABY/PARTASIDES, 4th ed., N 6–70.

¹¹⁵ KAUFMANN-KOHLER/BÄRTSCH, 14. See, as an illustration, the publications listed above, for example by ASHFORD, O’MALLEY, MARGHITOLA, SACHS, VON SEGESSER, RAESCHKE-KESSLER, and others.

¹¹⁶ IBA REVIEW TASK FORCE 2020, 8: “The vigour with which this issue was debated demonstrated that the question of document production was the key area in which practitioners from common law countries and civil law countries differ.” SACHS, 194: “Civil law practitioners generally have an allergic reaction to any attempt by their common law opponents to introduce pre-trial discovery proceedings or common law style document production in international arbitration proceedings. Any such attempt is immediately rejected as an inadmissible ‘fishing expedition’ or ‘unzulässiger Ausforschungsbeweis’. [...] By contrast, document discovery is seen by common law practitioners as an indispensable tool for determining the truth.”

¹¹⁷ SHENTON, 122.

¹¹⁸ O’MALLEY, Rules of Evidence, N 3.02.

or adverse to their case and, in particular, including internal papers such as notes and memoranda. There is no such obligation in civil law systems.¹¹⁹

- 23 Yet, **generalisation is always risky**, and one should bear in mind that, whilst the distinction between common law and civil law countries as regards discovery or disclosure is obvious, there are also important differences between countries of the same group.¹²⁰ For example, in the United States, discovery is much wider in its scope than in many other common law countries in that it is not limited to production of documents, but includes depositions of potential fact and expert witnesses as well as inspections of the subject-matter of the dispute.¹²¹
- 24 **National legislation** on document production in state court litigation is developing over time. This development may bring the ancestral positions closer together. For example, Germany has introduced legislation providing for document production which could be considered as broader than the Rules, whilst England has narrowed the scope of disclosure.¹²²

D. Harmonised Rules and Document Production in Arbitral Practice

- 25 The procedural systems differ from jurisdiction to jurisdiction. Arbitration practitioners – arbitrators and counsel alike – are generally influenced by their own **national procedural background**, in particular their legal training and experience.¹²³
- 26 Nevertheless, international arbitration has continuously developed its own practice and established **harmonised “transnational” rules**, in the sense of a blend of different legal traditions and systems.¹²⁴ This approach has become particularly manifest in the field of document production, where the usual practice in international arbitration today is a **combination** of the approaches

119 KAUFMANN-KOHLER/BÄRTSCH, 14.

120 SHORE, 76.

121 REDFERN/HUNTER/BLACKABY/PARTASIDES, 4th ed., N 6-71; KAUFMANN-KOHLER/BÄRTSCH, 15.

122 SACHS, 198.

123 HANOTIAU, Document Production, 113.

124 The ICC Bulletin 2006 Special Supplement on Document Production in International Arbitration provides an overview of document production practice in arbitration in different parts of the world.

taken by civil and common law jurisdictions.¹²⁵ Despite this harmonised approach, arbitral tribunals should still discuss the issue of document production with the parties at the outset of the proceedings to ensure that everybody has the same understanding. This is in particular true if persons with less experience in arbitration are involved as they will often refer back to their experience in state court proceedings.

The issue of document production in international arbitration has led and may sometimes still lead to **heated discussions** (and even more so when dealt with under the term “discovery”).¹²⁶ It is, however, worthwhile to note that the *“power on the part of the arbitral tribunal to require the parties to produce documentary or other materials, relevant to resolving the matters in dispute, is a venerable and important aspect of the arbitral process.”*¹²⁷

Today it seems fair to say that document production is **standard in international arbitration**.¹²⁸ It is also common knowledge that the number and scope of requests for document production in international arbitrations have increased over the years.¹²⁹ It has been suggested that the increase of document production was in part also a result of the 1999 Rules which introduced a comprehensive set of provisions on this question.¹³⁰ There is also a pattern that, as soon as one party starts to make requests for document production, the counterparty will usually do the same.¹³¹

Consequently, in international arbitral practice, the actual issue nowadays is not whether there should be document production or not, but rather **to what extent**.

125 REDFERN/HUNTER/BLACKABY/PARTASIDES, 4th ed., N 6-74: *“The usual practice in international commercial arbitration is for the parties, and for the tribunal, to follow a blend of common law and civil law procedures, with the latter being predominant.”*

126 See also above, N 19; SACHS, 193.

127 BORN, 2495.

128 Id., 2521-2522 (*“it is fair to say that some measure of document disclosure occurs in a substantial proportion of contemporary international commercial arbitrations (and in most investment arbitrations).”*); KAUFMANN-KOHLER/BÄRTSCH, 14 (*“there is hardly an arbitration nowadays without a request for document production”*). The above is actually attested by the Rules themselves and the large space document production takes in the Rules.

129 SACHS, 197: *“[...] and this independently of whether Anglo-American parties or counsel are involved in the proceedings.”*

130 HANOTIAU, Document Production, 114.

131 SACHS, 197.

- 30 However, it is clear that “*there is no practice of automatic discovery in international commercial arbitration.*”¹³² National laws or institutional rules do not grant parties to international arbitrations an automatic right to request documents to be produced by the counterparty. There is **no general obligation** on parties to disclose any or all documents that may be relevant to the dispute.¹³³
- 31 Typically, arbitral tribunals will provide for document production with **relative restraint**. In particular, they will refuse to grant expansive “fishing-expedition” production requests. “*There is no tradition or practice of the wholesale (or ‘warehouse’) production of documents.*”¹³⁴
- 32 There are a number of reasons for the relative restraint of arbitral tribunals in ordering document production. In part, this approach may stem from the legal background and traditions of the members of an arbitral tribunal.¹³⁵ In addition, arbitral tribunals will take into account that document production is normally **time-consuming and expensive**, two features that are inconsistent with the overall aspirations of arbitration. There seems to be a tendency to avoid the often-used document production phase between the first and second exchange of briefs, which often leads to a delay of proceedings without much added value. Arbitral tribunals and/or the parties nowadays more often propose to handle document production as a side issue without agreeing on a specific timetable upfront. It remains to be seen whether this approach will actually increase the efficiency of the process. Furthermore, arbitral tribunals will take into account that most parties will have agreed to arbitration and the confidentiality that normally is connected with it in the expectation that the arbitral proceedings will not expose them to broad discovery.¹³⁶ Challenges may also result from the production of confidential documents.¹³⁷

E. The Arbitral Tribunal’s Power to Order Document Production in General

- 33 All arbitration is ultimately based on the parties’ agreement to arbitrate. Usually, **arbitration clauses or agreements** do not expressly deal with document pro-

132 REDFERN/HUNTER/BLACKABY/PARTASIDES, 4th ed., N 6–71.
 133 BORN, 2522.
 134 REDFERN/HUNTER/BLACKABY/PARTASIDES, 4th ed., N 6–71.
 135 See above, N 20–22 and 25.
 136 BORN, 2533.
 137 KNEISEL/LECKING, 151.

duction.¹³⁸ Occasionally, arbitration agreements refer to the Rules.¹³⁹ In order to avoid later discussions as to whether there should be document production or not and – if there should be – to what extent, one may wish to consider providing for clear language on the issue in the arbitration agreement.¹⁴⁰

International arbitrations are generally governed by the **national arbitration law** of the place or seat of the arbitration (*lex arbitri*). 34

Certain national arbitration laws **expressly** provide for the power of the arbitral tribunal to order document production. E.g., Sect. 7 of the United States Federal Arbitration Act and Sect. 34(2)(d) of the 1996 English Arbitration Act grant the power to order document production to the arbitral tribunal, as well as Art. 1467(3) of the French *Code de Procédure Civile*. However, most national arbitration laws are **silent** in this regard.¹⁴¹ 35

The **UNCITRAL Model Law** is also silent on the issue of document production. 36 Under the broad language of Art. 19 Model Law, however, and the broad discretion granted to the arbitral tribunal to determine the procedure, the power to order document production is generally deemed to be conferred to the arbitral tribunal.¹⁴²

Since document production is seen as a **procedural** issue, the arbitral tribunal’s 37 power to order document production is governed by the rules on procedure. In accordance with the general principle of party autonomy, the procedural rules are determined by the parties’ agreement. The parties may agree on the procedure directly or indirectly by reference to a set of arbitration rules which is in practice the more frequent approach.¹⁴³

In the absence of an agreement in this regard between the parties, the **arbitrators have the power** to set the rules on procedure and therefore to determine if and under what requirements they may order document production.¹⁴⁴ 38

The majority of international arbitration rules provide that the arbitral tribunal 39 has the **power to order the parties to produce documents**. In most cases, the rules state that production orders may be made on the arbitral tribunal’s own

138 SACHS, 196; DRAETTA, 334.
 139 SACHS, 196; KNEISEL/LECKING, 151.
 140 Cf. SACHS, 196, 198.
 141 KAUFMANN-KOHLER/BÄRTSCH, 14; SACHS, 194.
 142 SACHS, 194; BORN, 2500.
 143 KAUFMANN-KOHLER/BÄRTSCH, 14.
 144 Id., 14.

motion. Some rules state that production orders may be rendered either at a party's request or on the arbitral tribunal's own motion. Certain rules contain more specific provisions, while others contain a more general rule pursuant to which the arbitral tribunal must establish the facts "by all appropriate means". Some rules state that the requests for document production must relate to specific documents. Normally, confidentiality issues are not addressed. While most of the widely used institutional arbitration rules deal with the production of documents, they generally do not deal with the issue in great detail.¹⁴⁵

40 This may be illustrated by the following examples:¹⁴⁶

- Art. 25(4) ICC Rules 2021 (former Art. 25(5) ICC Rules 2012) provides that "at any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence". Usually, this provision is invoked in connection with document production requests. A party has no right to the production of documents in an ICC arbitration. However, document production is not excluded either; it is for the arbitral tribunal to decide.¹⁴⁷
- Pursuant to Art. 26(2) Swiss Rules 2021 (former Art. 24(3) Swiss Rules 2012), the arbitral tribunal may, at any time during the proceedings, require the parties to produce documents. The arbitral tribunal may do so at its own initiative or at the parties' request.¹⁴⁸

41 The arbitral tribunal's power to order document production is well established today.¹⁴⁹

42 Moreover, "practice does confirm that arbitrators have no hesitation assuming the power to order document production",¹⁵⁰ and this regardless of whether such power is expressly granted by the relevant national legislation, the parties' agreement or the applicable arbitration rules. In the absence of an express granting of such power, arbitrators regard it as **inherent in their general authority** to determine the procedure.¹⁵¹

¹⁴⁵ Id., 14–15; SACHS, 195; BORN, 2517; O'MALLEY/CONWAY, 383; KNEISEL/LECKING, 151.

¹⁴⁶ Under Art. 27(3) UNCITRAL Rules, the arbitral tribunal may require the parties to produce documents.

¹⁴⁷ DERAIS/SCHWARTZ, 281; SACHS, 195.

¹⁴⁸ NATER-BASS/ROUVINEZ in COMMENTARY SWISS RULES, Art. 24 N 28.

¹⁴⁹ KAUFMANN-KOHLER/BÄRTSCH, 14–15; GIRSBERGER/VOSER, N 981.

¹⁵⁰ KAUFMANN-KOHLER/BÄRTSCH, 15.

¹⁵¹ Id., 15.

Generally, neither national arbitration laws nor institutional arbitration rules set out the requirements and standards for document production. Consequently, arbitral tribunals generally have **broad discretion** in this regard, and they decide on a case-by-case basis.¹⁵² 43

F. Production of Electronic Documents in Particular

Electronically stored documents, in particular emails and the attachments thereto, have become a **very important**, perhaps the most important, **source of information** in business life and hence in commercial disputes.¹⁵³ The importance of electronic information and data is likely to increase even more in time. There can be no doubt that the production of electronic documents can generally be requested in international arbitration. 44

However, it still is a controversial issue to what extent the production of electronically stored data and electronic documents (often labelled as "**e-discovery**" or "**e-disclosure**"¹⁵⁴) should be permitted in international arbitration. In this context, it has been stated that "*if 'discovery' is a dirty word in international arbitration, 'e-discovery' promises to be downright obscene*".¹⁵⁵ In some countries, in particular the United States, the discovery of electronic documents has become a big issue in state court litigation and detailed rules have been adopted. In international arbitration, there is no general tendency to give more importance to the topic than necessary. This is illustrated by the fact that the IBA Review Task Force 2020 did not add any rules specifically dealing with the production of electronic documents to the IBA Rules. Indeed, a pragmatic approach to the topic seems warranted. 45

A main reason for the scepticism towards e-discovery, as it is known from US state court litigation, is the great concern that allowing e-discovery to a bigger extent would jeopardise arbitration as an efficient tool for dispute resolution. In particular, it would aggravate a growing concern that arbitration is in danger of becoming too expensive and taking too much time, which concern is to quite some extent based on the increasing volume of documents filed in arbitral proceedings. It is generally felt that there were good reasons not to have US-style discovery in international arbitration, and that there are even **stronger reasons** 46

¹⁵² Id., 15.

¹⁵³ IBA REVIEW TASK FORCE 2020, 10.

¹⁵⁴ As with discovery and disclosure in general (see above, N 14–18), the terminology is not clear.

¹⁵⁵ SMIT/ROBINSON, 105.

not to have US-style e-discovery, since e-discovery is seen as multiplying the negative implications of traditional paper discovery. Considering the volume of e-documents, the question arises under what circumstances the production of e-documents reaches the level of an unreasonable burden.¹⁵⁶

- 47 On the other hand, obtaining access to electronic documents of the counterparty has become **indispensable**, as many businesses store the bigger part of their documents, and even their core documents, only electronically. In addition, experience shows that people are often less concerned with putting potentially adverse information in an email than they would on paper. The “smoking gun” is more often thought to be hiding in a sloppy email than in formal minutes of a board meeting. The development of more and more sophisticated electronic archiving and search tools has rendered the search and production of electronic documents in reality often less time-consuming, more efficient and less costly than a search by traditional means.¹⁵⁷
- 48 The definition of “documents”¹⁵⁸ under the Rules includes electronic documents, meaning that the Rules **govern the production of all types of documents**, regardless whether in paper or in electronic form.
- 49 The Rules are intended to be **neutral** as to whether electronic documents should be produced in arbitral proceedings.¹⁵⁹ They simply provide a framework in case the parties agree to, or the arbitral tribunal orders, the production of electronic documents.¹⁶⁰ When deciding on the production of e-documents, finding the right balance between the conflicting interests of efficiency and the right to evidence is a particularly difficult task for the arbitral tribunal.¹⁶¹ The Rules leave flexibility to the parties and the arbitral tribunal to deal with the specific requirements of a case. In any event, the Rules clarify that there is no US-style e-discovery when they are applicable.¹⁶² In line with their general approach, “*the Rules are concerned to ensure that if e-disclosure occurs it is done efficiently and without unnecessary cost*”.¹⁶³

¹⁵⁶ MARGHITOLA, Document Production, 36; see also below, Art. 9 N 39–41.

¹⁵⁷ HILL, 90.

¹⁵⁸ See above, N 8–11.

¹⁵⁹ IBA REVIEW TASK FORCE 2020, 10–11; GILL/TAWIL/KREINDLER, 29; cf. MARGHITOLA, Document Production, 42–44.

¹⁶⁰ IBA REVIEW TASK FORCE 2020, 10–11; GILL/TAWIL/KREINDLER, 29.

¹⁶¹ MARGHITOLA, Document Production, 36.

¹⁶² IBA REVIEW TASK FORCE 2020, 8; ASHFORD, IBA Rules, N 3–13; BOUCHENAKI, 181.

¹⁶³ GILL/TAWIL/KREINDLER, 29.

The ongoing move from information that is (or rather was) predominantly on paper to information that is predominantly **stored electronically** requires no general or fundamental reconsideration of the principles of document production in international arbitration.¹⁶⁴ 50

Issuing an **entire set of new rules** for production of electronic documents as part of the Rules would have been likely to lead to unwanted and unfortunate results. In particular, new detailed rules may well have led to an increase of the production of electronic documents and hence document production in general. As mentioned above,¹⁶⁵ it is thought that the 1999 Rules contributed to an overall increase of document production in international arbitration practice, and the same might have happened if the 2010 or 2020 Rules had been amended by detailed rules on e-disclosure. Accordingly, a well-intended “cure” may have eventually become a part of the “disease” itself. Moreover, a new set of rules on the production of electronic documents might, in effect, jeopardise the flexibility of the parties and the arbitrators to address such issues in view of the particular circumstances of the case.¹⁶⁶ 51

There will be **different views** on the issue among practitioners. Some will feel there is a lack of clear rules that would have been helpful. It has been suggested that the general reference to e-discovery in the Rules raises a fundamental difficulty of preparing for e-discovery in international arbitration.¹⁶⁷ It has been further suggested that, in light of this lack of specific guidance, the practice of United States courts might offer detailed insights into possible approaches regarding electronic evidence and that it may be possible to draw principles from the United States practice, of course limiting the application of such principles to suit the particular nature of international arbitration.¹⁶⁸ It is submitted that the United States practice should be considered only with great caution and restraint. If, however, the parties to an arbitration require specific rules for 52

¹⁶⁴ IBA REVIEW SUBCOMMITTEE 2010, 9; SMIT, 203.

¹⁶⁵ N 28.

¹⁶⁶ Cf. also SMIT, 203.

¹⁶⁷ BOUCHENAKI, 181, also pointing out that a broad discretion of individual arbitrators means that decisions do not offer much predictive value and that there are only few published decisions regarding procedural and evidentiary matters.

¹⁶⁸ Id., 181–182, recognising that this proposal is unlikely to win many friends, but that there is a difference between simply following an approach and drawing lessons from others, also with regard to the issues of an “arbitration hold” (similar to a “litigation hold”, that is a prohibition to delete any documents pending the proceedings) and whether backup tapes are considered accessible (BOUCHENAKI, 182–185).

a given case, detailed guidelines for production of electronically stored information in international arbitration have been suggested by some authors.¹⁶⁹

G. Statutory and Contractual Rights to Production

- 53 The IBA Rules are **procedural rules** only, not substantive rules. This follows clearly from the Foreword to the Rules and from their terms and content. The Rules govern the taking and presentation of evidence only in the framework of arbitral proceedings.¹⁷⁰
- 54 Document production based on procedural rules, and in particular the IBA Rules, is to be clearly distinguished from the right to obtain documents from another party derived from other sources, in particular **statutory rules or contractual rights**. For example, depending on the applicable law and/or the contract, an agent or sales representative is entitled to obtain information about certain business activities, in particular to the extent that his or her remuneration depends on such figures.¹⁷¹
- 55 The Rules **do not limit substantive rights** to documents based on statutory rules or contractual rights. Accordingly, a party may not use the Rules to limit its statutory and/or contractual obligations to disclose certain documents.¹⁷²
- 56 In practice, a party may nevertheless try to use the Rules as a **defence against contractual or statutory obligations** to disclose documents. Such attempts must fail. Form and substance of document production requests having their basis in statutory law and/or the contract are governed exclusively by, and have to be examined against, the applicable substantive rules.¹⁷³

169 SMIT/ROBINSON, 130–133.

170 SCHERER, 195.

171 *Id.*, 195.

172 *Id.*, 195.

173 SCHERER, 195, giving the example of a bank that is obliged under the applicable banking regulations and/or the contract to disclose to its customers information regarding the customer's account so that it may not object to the customer's disclosure request on the ground that the request would not comply with the Rules.

H. General Remarks on the Provisions of Art. 3

It is generally held that Art. 3 constitutes a **well-balanced compromise** between civil and common law systems.¹⁷⁴ Art. 3 is an emanation of the development of transnational procedural rules and of the standardisation of international arbitration and reflects **best practice**. In essence, the standards that have emerged from international arbitration practice have been "codified" in the Rules.¹⁷⁵

Yet, there is also **criticism**. It has, e.g., been suggested that the 1999 Rules were "a misguided combination of various aspects of different traditions", that it was doubtful whether the compromise was a significant advance for arbitration, and that the Rules preferred documentary evidence far too strongly over evidence introduced by witnesses.¹⁷⁶ The Rules on document production are criticised for not containing any effective sanction for their violation,¹⁷⁷ and the possibility to request the production of documents that are identifiable only by category (Art. 3(3)(a)(ii)) is criticised for having the potential to turn into inadmissible "fishing expeditions".¹⁷⁸ Furthermore, it has been submitted that the Rules imply that document production is a regular part of an arbitration proceeding, rather than the exception.¹⁷⁹

Art. 3 is **particularly useful in arbitrations involving parties from civil and common law countries**.¹⁸⁰ A civil law party may find the Rules helpful when seeking to limit an extensive request for document production by a common law party; and a common law party may be able to use the Rules to obtain at least some internal documents from a civil law party which this party would otherwise not provide.¹⁸¹

174 However, it has been submitted that the document production provisions of the Rules end up introducing common law features in a phase of the arbitration proceedings which essentially follows the civil law system, leading to "widespread criticism of the IBA Rules concerning document production" (DRAETTA, 334).

175 KAUFMANN-KOHLER/BÄRTSCH, 17–18; SACHS, 196; ELSING/TOWNSEND, 61; RAE-SCHKE-KESSLER, Production, 416, 429; MÜLLER, 57; IBA REVIEW TASK FORCE 2020, 8. In view of the 2020 Review Task Force, the document production rules are "a balanced compromise between the broader view generally taken in common law countries and the more narrow view generally held in civil law countries" (IBA REVIEW TASK FORCE 2020, 9).

176 SHORE, 76, 78.

177 DRAETTA, 337.

178 DRAETTA, 336; see also below, N 99 and 109.

179 DRAETTA, 338.

180 IBA REVIEW TASK FORCE 2020, 9.

181 *Id.*, 9.

- 60 Art. 3 is a **core provision** of the Rules.¹⁸² Within Art. 3, the great importance of document production (compared to document submission) is reflected in the structure of this provision: Whilst the voluntary submission of documents that are available to one party is basically dealt with by a single paragraph (Art. 3(1)),¹⁸³ the production of documents is dealt with by nine paragraphs (Art. 3(2-10)).
- 61 Like the Rules in general, Art. 3 may also be used (merely) as a source of **inspiration or guideline** for dealing with document production; in practice, this approach is more frequent than the adoption of the Rules.¹⁸⁴ Indeed, the Rules may not always present the best approach to a given case. The most adequate procedure for document production will differ from case to case, depending on the dispute, the parties and their legal representatives.¹⁸⁵
- 62 Irrespective of whether Art. 3 is directly applicable by reference or merely used as a source of inspiration, this should be set forth in the terms of reference or a procedural order, preferably in agreement with the parties and at the outset of the proceedings.¹⁸⁶

V. Submission of Documents That Are Available to Each Party (par. 1)

- 63 Art. 3(1) provides that each party shall submit to the arbitral tribunal and to the other parties all documents **available** to it on which it relies, within the time ordered by the arbitral tribunal. Pursuant to Art. 3(1), the parties shall submit **public documents** and **documents in the public domain** on which they rely as well, but they do not need to and should not submit documents that have already been submitted by another party.
- 64 The **2020 Revision** did not bring any changes to the text of Art. 3(1).

¹⁸² KAMMELER, 2010 Revision, 158, refers to Art. 3 as arguably being "the mainstay of the IBA Rules".

¹⁸³ Art. 3(11) provides for a second round of submission of additional documents.

¹⁸⁴ The reason being that many arbitrators prefer to keep some flexibility when dealing with evidentiary issues and, as explained by one tribunal, to guard against attempts to set aside awards on the grounds that the tribunal failed to follow the Rules. EXTRACTS FROM ICC Case Materials on the Taking of Evidence with References to the IBA Rules 129; O'MALLEY, Rules of Evidence, N.W.J.L. SACHS, 196.

¹⁸⁵ HANOTTAU, Document Production, IIA; WEIDEN, Document Production, 60.

¹⁸⁶ SACHS, 196.

Art. 3(1) embodies the general rule that the parties shall introduce the documents available to them and which they wish to rely on as evidence.¹⁸⁷ This rule can be found expressly or implicitly in the major arbitration rules.¹⁸⁸ It is common practice in international arbitration for each party to submit to the arbitral tribunal and to the other party the documents on which it relies in support of its case.¹⁸⁹ This is also in line with the general principle that the parties have a **burden to introduce the evidence supporting their case**,¹⁹⁰ which is generally accepted both in civil and in common law jurisdictions.¹⁹¹

The wording of Art. 3(1) clarifies that a party is only required to submit the documents it relies on. Consequently, a party is *per se* not required to submit documents that are adverse to its case. Thus, failure to submit or disclose adverse documents (or adverse evidence in general) is – in the absence of an order of the arbitral tribunal to this extent – not an infringement of the Rules,¹⁹² and in particular no violation of the good faith principle set out in par. 3 of the Preamble.¹⁹³

It is for the arbitral tribunal to specify the manner in which the parties shall present the documents they submit. In general, it would be useful for the arbitral tribunal to indicate early in the proceedings how this should be done. In the interest of efficiency, the arbitral tribunal should also prevent any attempts by a party to over-complicate the arbitration by submitting an enormous amount of documents.

It is common practice for the parties to file all documents they regard as relevant along with their written submissions.¹⁹⁴ Art. 20(3) Swiss Rules provides, for example, that in principle the claimant shall annex to its statement of claim

¹⁸⁷ IBA REVIEW TASK FORCE 2020, 7.

¹⁸⁸ See, e.g., Art. 20(3) and 21(2) Swiss Rules, Art. 24(1) Model Law, Art. 15(2)-(3) ICSID Rules, Art. 20(4) and 21(2) UNCITRAL Rules.

¹⁸⁹ REDFERN/HENDER/BLACKABY/PARTASIDIS, N 692.

¹⁹⁰ IBA REVIEW TASK FORCE 2020, 7.

¹⁹¹ *Id.*, 7.

¹⁹² O'MALLEY, Document Production, 186.

¹⁹³ Cf. also BERS, 515 (critical on the good faith duty); see also above, Preamble N 14.

¹⁹⁴ BANGER/KELLERHALS, N 1324 (recommending that the arbitral tribunal can insist on compliance with a rule that any document shall be attached to the written submission first referring to it).

all documents and other evidence on which it relies, including a copy of the contract.¹⁹⁵

- 69 There are, of course, different possibilities and practices for the presentation of documents. Apart from, or possibly also in addition to, the above-mentioned practice of filing documents along with the parties' submissions, there is also a practice of preparing so-called **bundles** for the arbitral tribunal.¹⁹⁶
- 70 The documents must be submitted **to the arbitral tribunal and to the other parties**. This ensures that the other parties are in a position to study the documents in due course and may comment on them and present their own evidence in order to defend their rights of due process and their right to be heard.
- 71 Under Art. 3(1), if a party wishes to rely on documents that are **public or in the public domain**, it must also submit those documents.
- 72 There is no need to submit any documents that have **already been submitted** by another party (Art. 3(1)).
- 73 Art. 3(1) does not contain a specific time limit for the submission of documents (in contrast to an early draft of the Rules).¹⁹⁷ The Working Party of the 1999 Rules (as well as the Review Subcommittee of the 2010 Rules and the Review Task Force of the 2020 Rules) were of the opinion that the best route to take was to provide for maximum flexibility for the parties and the arbitral tribunal.¹⁹⁸ Consequently, the Rules leave the time frames to be determined by the arbitral tribunal ("**within the time ordered by the arbitral tribunal**"¹⁹⁹), presumably after consulting with the parties.²⁰⁰ Time frames will generally vary depending on the complexity and the concrete circumstances of the case, the parties' resources, etc.²⁰¹
- 74 With regard to the submission of written pleadings, the arbitral tribunal will usually set **time limits** for the submission of documents. Within the time limit

¹⁹⁵ The same rule applies as per Art. 21(2) last sentence Swiss Rules to the respondent's statement of defence.

¹⁹⁶ REDFERN/HUNTER/BLACKABY/PARTASIDES, N 6.116.

¹⁹⁷ IBA REVIEW TASK FORCE 2020, 8.

¹⁹⁸ IBA REVIEW SUBCOMMITTEE 2010, 6; IBA REVIEW TASK FORCE 2020, 8.

¹⁹⁹ Art. 3(1) contains, for the first time in the Rules, the wording "within the time ordered by the arbitral tribunal". The same wording is used throughout the Rules when a submission is to be made or a step to be taken by the parties; IBA REVIEW TASK FORCE 2020, 7-8.

²⁰⁰ IBA REVIEW TASK FORCE 2020, 8.

²⁰¹ *Id.*, 8.

ordered by the arbitral tribunal, each party is required to submit all documents that are available to it and on which it relies. This is to prevent the other parties – and the arbitral tribunal – from being surprised by new documents shortly before a hearing or even during a hearing.

If a party fails to submit the documents that are available to it and on which it relies within the time limit set by the arbitral tribunal, the arbitral tribunal may deny the admission of the evidence, in particular if a party fails to give legitimate reasons for its **belated submission**.²⁰² In the latter case, an arbitral tribunal may even be compelled to deny the evidence based on considerations of efficiency and economy. Past decisions by arbitral tribunals denying the admissibility of documents submitted by a party because they were submitted after a deadline have been upheld by reviewing courts as consistent with due process principles.²⁰³

Once an initial submission of documents has been completed, later submissions in the arbitration of, e.g., witness statements or expert reports may make it necessary for the parties to submit **additional documents** to rebut statements contained in these submissions.²⁰⁴ Consequently, Art. 3(11) provides for a **second round** of submission of documents. It is again for the arbitral tribunal to determine when such second round shall take place.²⁰⁵

VI. Production of Documents

A. Principles Governing Document Production (par. 2-9)

The 1999 Working Party, the 2010 Review Subcommittee and the 2020 Review Task Force agreed on and were guided by certain **principles** that resulted in Art. 3(2-9).²⁰⁶

²⁰² However, if the admission of the documents does not cause serious delay to the proceedings or prejudice the other party's ability to present its case, arbitral tribunals are generally inclined to admit the evidence to safeguard the submitting party's right to be heard.

²⁰³ O'MALLEY, Rules of Evidence, N 3.06 with further references.

²⁰⁴ *Id.*, 8.

²⁰⁵ *Id.*, 8; N 230-232 below.

²⁰⁶ IBA WORKING PARTY 1999, 5-6; IBA REVIEW SUBCOMMITTEE 2010, 7-8; IBA REVIEW TASK FORCE 2020, 8-9; RAESCHKE-KESSLER, Production, 415-416; SACHS, 196.

- a) **Extensive** US-style discovery or English-style disclosure is, in general, **inappropriate** in international arbitration.²⁰⁷ In particular, so-called “**fishing expeditions**” shall be **excluded** from the outset. In addition, a “general discovery procedure” was not desired. Consequently, in international arbitration, a party is not required to submit any and all documents and other documentary evidence, including internal documents such as internal memoranda, file notes, minutes, expert reports, etc., regardless of whether they may be relevant and would support the counterparty’s case. Rather, requests for document production should be carefully tailored to issues that are relevant and material to the determination of the merits of the case.²⁰⁸
- b) There was a general consensus that **some level of document production is appropriate** in international arbitration, even among practitioners from civil law countries. It is a principle reflected in the rules of some of the major international arbitration institutions that an arbitral tribunal shall establish the facts of the case “by all appropriate means”.²⁰⁹ This includes the competence of the arbitral tribunal to order a party to produce certain internal documents in the arbitration upon request of the other party. This position is also based on the fact that some civil law systems entitle state courts to order a party to produce internal documents.²¹⁰
- c) It is for the **arbitral tribunal to decide** whether a party must produce internal documents against its will, and to decide on the scope of document production. Furthermore, only the arbitral tribunal has the competence to make a decision on the request if the opposing party refuses to produce the requested documents.²¹¹
- d) The **scope** of what is to be produced is **limited** by certain objections as set out in Art. 9(2) and (as added by the 2020 Review Task Force) 9(3) or the requirements set forth in Art. 3(3).²¹² If the other party does not wish to comply with the request for production, it may defend its position by raising any of the reasons for **objection**.²¹³ The 2020 Revision introduced

207 IBA REVIEW TASK FORCE 2020, 8; GIRSBERGER/VOSER, N 994: O’MALLEY, Document Production, 187.

208 IBA REVIEW TASK FORCE 2020, 8; SACHS, 196.

209 E.g., Art. 25(1) ICC Rules 2021.

210 IBA REVIEW TASK FORCE 2020, 8; SACHS, 196.

211 IBA REVIEW TASK FORCE 2020, 9; SACHS, 196.

212 IBA REVIEW TASK FORCE 2020, 9.

213 Id., 9; SACHS, 196.

- the (in practice frequently used) possibility of a response to an objection (Art. 3(5)).²¹⁴
- e) If an objection (and response) is made, the arbitral tribunal may first invite the parties to consult (Art. 3(6)). If the objection is not resolved by way of such consultation, either party may request the arbitral tribunal to decide. The arbitral tribunal shall order the production if it is convinced, first, that the issues the requesting party wishes to prove are **relevant to the case and material to its outcome**; second, that none of the reasons for objection set forth in Art. 9(2) or 9(3) applies; and third, that the requirements of Art. 3(3) have been satisfied.²¹⁵

The rules set out in Art. 3(2–9) are derived from these principles.²¹⁶

78

B. Production of Documents in the Control of the Opposing Party (par. 2–7)

1. Introduction

Art. 3(2–7) provide for the production of documents that are in the control of an opposing party and set out the requirements and limits under which a party may **request the production** of such documents and under which the arbitral tribunal may **order** document production from **another party**.

79

2. Request to Produce to the Arbitral Tribunal and to the Other Parties (par. 2)

Pursuant to Art. 3(2), a party may submit to the arbitral tribunal and to the other parties a **request to produce**, within the time ordered by the arbitral tribunal.

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A “**Request to Produce**” is characterised in the Definitions section²¹⁷ to mean “a written request by a Party that another Party produce Documents”. The definition and Art. 3(2) make clear that a request to produce may not be made *ex parte* and that a request to produce is, at the outset, **primarily a request to the other party rather than a request for an order** of the arbitral tribunal.²¹⁸ The arbitral tribunal, unless it decides otherwise, only becomes involved if there is

81

214 See below, N 168–169.

215 IBA REVIEW TASK FORCE 2020, 9.

216 Id., 9; SACHS, 196.

217 See above, Definitions N 1–3.

218 VON SEGESSER, IBA Rules, 742–743.

as well as Art. 9(2) and 9(3) presuppose that a requested document existed at some time. A party only can and only has to produce those documents that are in its possession, custody or control, but it cannot produce a non-existing document, even if it does not raise objections to a request to produce such document.³⁴³ As stated above, arbitral tribunals should not reject document production requests on a mere unsubstantiated statement from the requested party that a requested document does not exist.³⁴⁴

c) *Response to Objections*

168 Art. 3(5) of the 2010 Rules only accounted for one round of exchange regarding document requests (the initial request and an objection). Thereafter, it was incumbent on the parties and the arbitral tribunal to resolve the objection either amicably or by decision. Nevertheless, it has become customary for arbitral tribunals to allow a **second round for the requesting party** to permit it to **respond to an objection**.³⁴⁵ In line with this global international arbitration practice, the **2020 Review Task Force** added the final sentence in Art. 3(5) stipulating that, if so directed by the arbitral tribunal, and within the time so ordered, the requesting party may respond to the objection.³⁴⁶ Some parties may still prefer that no response to objections is allowed. Hence, arbitral tribunals should discuss this question with the parties when drawing up the timetable for the proceedings.

169 According to the 2020 Review Task Force, such response to objections may **resolve or narrow disputed requests**.³⁴⁷ On the other hand, a response increases the duration of the document production phase and may lead to **higher complexity and costs**. Furthermore, a "second round" in document production has the downside that the requesting party is no longer compelled to present its arguments conclusively in the request, because it knows it has

343 RAESCHKE-KESSLER, Production, 422; as to non-existing documents see also above, N 116–120. In order to make the issue clear, and in order to avoid possible negative consequences or negative inferences pursuant to Art. 9(5), the party should set out within the time limit as ordered by the arbitral tribunal for objections that the requested document never existed. A document that never existed does not come within the scope of Art. 9(2)(d) which only relates to documents that existed but were lost or destroyed (see also Art. 9 N 42–43).

344 See N 116 above.

345 IBA REVIEW TASK FORCE 2020, 11; this practice is often seen as a support of the parties' fundamental right to be heard.

346 Id., 11.

347 Id., 11.

another chance to submit its arguments in the response ("frontloading"). However, such frontloading is preferable for the same reasons as frontloading is indicated for the parties' written submissions.

6. Invitation to Consult (par. 6)

Art. 3(6) provides that the arbitral tribunal, upon receipt of any objection and response³⁴⁸ (as per Art. 3(5)), may invite the relevant parties to **consult with each other** with a view to resolving the objection themselves. 170

This provision is in line with the general principle that the evidence-taking procedure should be conducted as efficiently as possible. **Party-to-party consultation** may in some cases be the more **effective** way of resolving objections, including those based on insufficient descriptions and other deficiencies in the form of the request.³⁴⁹ Also, such discussion may give the requested party the opportunity to propose producing other documents than the ones requested, which contain the same information, but are, e.g., less burdensome to produce. 171

An **invitation** of the arbitral tribunal to discuss disputes over evidence imposes some burden on the parties to try to act reasonably and resolve the issue, and it may well resolve the issue, so that the arbitral tribunal does not need to decide upon the request. 172

Particularly in large and complex cases, where there are often extensive production requests by both sides and usually each party will dispute the other party's requests, a meeting between the arbitral tribunal and the parties' counsel, aiming at finding a compromise, may be **an efficient way forward**. This process may involve meetings between the parties' counsel, with the encouragement of the arbitral tribunal, in order to attempt to limit the scope of the production requests. 173

The arbitral tribunal may invite the parties to consult, or it may deem such consultation **unnecessary**.³⁵⁰ When doing so, the arbitral tribunal should bear 174

348 The 2020 Revision added "and response" to the text of Art. 3(6), to reflect the possibility of a response to an objection as per the revised Art. 3(5).

349 IBA REVIEW TASK FORCE 2020, 11.

350 IBA REVIEW TASK FORCE 2020, 11; According to KHODYKIN/MULCAHY/FLETCHER, even in matters where there is no scope for agreement between the parties, it would be wrong to shut out the possibility of negotiation altogether. In such cases, an arbitral tribunal had better keep the period within which consultation between the parties was to take place relatively short, while only deciding not to invite the parties to consultation in exceptional circumstances (KHODYKIN/MULCAHY/FLETCHER, N 6.231).

arbitral tribunal seeks judicial enforcement of its production orders in national courts.³⁷³ On the one hand, the specifics of the admissibility of such enforcement are at times unclear, on the other hand, this type of enforcement contradicts the consensual nature of arbitration and is perceived by parties and arbitrators as cumbersome and inefficient.³⁷⁴

- 188 Rather than imposing coercive sanctions or seeking judicial enforcement of production orders, arbitral tribunals in international arbitrations have the option to draw **adverse inferences** from a party's refusal to produce requested documents.³⁷⁵ Art. 9(6), in line with contemporary international arbitration practice, expressly provides arbitrators with the power to draw adverse inferences in case a party fails without satisfactory explanation to produce any document requested to which it has not objected in time or which has been ordered to be produced by the arbitral tribunal.³⁷⁶ Drawing adverse inferences means concluding that the content of the requested document would be **disadvantageous** to the interests of the party failing to produce without satisfactory explanation. It follows that the arbitral tribunal may **consider a fact to be proven** as a consequence of an adverse inference.³⁷⁷ However, it has been submitted that arbitral tribunals are still reluctant, according to a common observation among practitioners, to explicitly draw adverse inferences in their arbitral awards.³⁷⁸ Furthermore, it has been suggested that such an inference may be meaningful only with respect to a request for some specific allegation, but in most cases it may be difficult for the arbitral tribunal to determine which inference should be drawn.³⁷⁹

373 BORN, 2565; KNEISEL/LECKING, 153.

374 KNEISEL/LECKING, 153.

375 BORN, 2565–2566, stating that the arbitrators' authority to draw adverse evidentiary inferences is "a fundamental aspect of the arbitrators' inherent adjudicative mandate and is subsumed within the tribunal's general authority over the admissibility and assessment of evidence"; cf. MARGHITOLA, New Findings, 90.

376 See also below, Art. 9 N 59–75.

377 MARGHITOLA, New Findings, 90.

378 Id., 90. Cases where arbitral tribunals refrained from drawing adverse inferences may be found at EXTRACTS from ICC Case Materials on the Taking of Evidence with References to the IBA Rules, 147, 150 and 152.

379 DRAETTA, 338, adding that an adverse inference can hardly be considered an effective sanction for not complying with a production order.

Another (likely less important) sanction is the **allocation of costs** based on Art. 9(8) to the party refusing document production.³⁸⁰ 189

C. Review of the Document by a Neutral Expert (par. 8)

Art. 3(8) provides that in exceptional circumstances, if the propriety of an objection can be determined only by review of the document, the arbitral tribunal may determine that it should not review the document itself. In this case, the arbitral tribunal may, after consultation with the parties, appoint an independent and impartial **expert**, bound to confidentiality, to review any such document and to report on the objection. To the extent the objection is upheld by the arbitral tribunal, the expert shall not disclose to the arbitral tribunal and to the other parties the contents of the document reviewed. 190

A request to produce should not open the door for the requesting party to gain access to commercial or other secrets of the other party. Similarly, document production should not impair privilege. Consequently, commercial or technical **confidentiality** or special political or institutional **sensitivity** or **privilege** are listed as **objections** in Art. 9(2)(e), 9(2)(f) and 9(2)(b).³⁸¹ 191

Normally, the arbitral tribunal will not be in a position to decide whether an objection based on these grounds is valid unless and until it has had an opportunity to **review** the requested documents. Consequently, the arbitral tribunal would, as a standard procedure, first order the other party to produce the document to it but not to the requesting party in order to decide on the objection(s) raised. 192

However, this approach may **not always seem appropriate**. In particular, the arbitral tribunal may not wish to review the document itself, because it is concerned that it could not eliminate its knowledge of the document once it has reviewed it and has upheld the objection. In addition, there may also be concerns with regard to the other party's interests as to confidentiality and secrecy. Some cases may even involve a risk (or at least raise fear on the part of the 193

380 See also below, Art. 9 N 76–77; cf. EXTRACTS from ICC Case Materials on the Taking of Evidence with References to the IBA Rules, 152.

381 See also below, Art. 9 N 45–49 and N 19–36. See Award at 5(14), *Piero Foresti v Republic of South Africa* (ICSID Case ARB(AF)/07/1), unreported 3 August 2010, available at <https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf> [last visited 10 June 2021], where a neutral third party recommended by the arbitral tribunal and agreed upon by the parties acted as an independent expert; see also O'MALLEY, Document Production, 190.