INTERNATIONAL ARBITRATION: LAW AND PRACTICE

FOURTH EDITION

Gary B. Born

Wolters Kluwer

Table of Contents

Table of Contents

confirm the arbitrators' authority to "apportion" legal costs, allowing awards of less than 100% of a party's costs.

Even where applicable institutional rules do not expressly grant the tribunal power to award legal costs, an international arbitration agreement should ordinarily be interpreted to impliedly grant such authority. An implied agreement granting the arbitrators power to award the costs of the arbitration, including legal costs, is an inherent aspect of the tribunal's authority (absent contrary text). That position is adopted by the overwhelming weight of authority.[90]

In order to fulfill its mandate to award the costs of the arbitration, a tribunal will almost always direct the parties to make submissions regarding their legal expenses. Such submissions will usually be written, often consisting principally of documents (substantiating cost claims); parties are usually reluctant to submit invoices from their lawyers, for fear of waiving privilege or disclosing confidential information, but statements from in-house personnel or lawyers' attestations can provide adequate alternative proof.

Tribunals frequently permit the parties to make comments on their adversary's cost claims, typically by challenging the reasonableness of such claims. Such comments are often only in writing, with little or no opportunity for oral submission. The tribunal's decision on costs will typically be included in either its final award or, alternatively, in a separate award on costs, made after the final award dealing with the merits (e.g., a "Final Award Save as to Costs"). As a practical matter, arbitrators in international cases routinely award the costs of legal representation, usually without detailed substantive or choice-of-law analysis. Most awards either rely exclusively on grants of discretion (or other standards) pursuant to applicable institutional rules, or simply award a "reasonable" or "appropriate" amount.[91]

Where the parties' arbitration agreement addresses legal costs, tribunals will virtually always give effect to its terms. More frequently, the parties will not have addressed legal costs, or will have simply granted the tribunal discretion to make an award of legal costs. In exercising their discretion, tribunals have often awarded some of the costs of legal representation to the "prevailing party." In doing so, arbitrators take into account the extent to which that party recovered the amounts that it initially claimed, the extent to which each party's position was substantively reasonable, the extent to which a party's conduct needlessly complicated the proceedings, and similar factors.[92]

90. *See* G. Born, *International Commercial Arbitration* 3350–55, 3340–49 (3d ed. 2021).
91. *See id.*, at 3350–55.
92. *See id.*

CHAPTER 9

Disclosure and Evidence-Taking in International Arbitration

The arbitral tribunal's power to require the parties to produce documentary or other materials, relevant to resolving the matters in dispute, is a critical aspect of the arbitral process. The existence and scope of disclosure are issues which arise in many international arbitrations, with parties often disagreeing over both the existence and proper exercise of disclosure authority.

§9.01 AUTHORITY OF ARBITRAL TRIBUNALS OVER DISCLOSURE AND EVIDENCE-TAKING

Virtually all decisions about disclosure in international arbitration are made in the arbitration itself, by the parties or tribunal, as distinguished from national courts. (This reflects the general principle of judicial non-interference, as discussed in Chapter 8 above.) As with other aspects of evidence-taking, disclosure in international arbitration is governed in the first instance by the procedural law of the arbitration and the arbitration agreement (including any applicable institutional arbitration rules). These sources define the extent and scope of the arbitral tribunal's power to order disclosure.

Typically, national law gives effect to the parties' agreements regarding disclosure and, in the absence of agreement, recognizes the arbitrators' inherent authority to order the parties to disclose evidentiary materials. Less frequently, even absent agreement by the parties, arbitrators are authorized by national law to request third parties to provide disclosure and, in some instances, obtain judicial assistance in enforcing such requests. Of equal importance, as a practical matter, a tribunal's actual exercise of its disclosure authority depends on a range of factors (including the circumstances and needs of particular cases, the backgrounds of the arbitrators and parties, the terms of the arbitration agreement, and the law and practice of the seat).

Questions about the scope of the arbitrators' authority arise in two contexts. First, they may arise in the arbitral proceeding, when the parties make or resist requests for tribunal-ordered disclosure; in these circumstances, decisions about the

scope of disclosure will be made by the tribunal. Second, as discussed below, a tribunal can generally only coercively enforce its disclosure orders by seeking the assistance of national courts, particularly *vis-à-vis* third parties; in such enforcement actions, the extent of the tribunal's disclosure authority can also arise before a national court.

[A] Arbitral Tribunals' Disclosure Authority under National Arbitration Legislation

The arbitral tribunal's power to order disclosure is defined in the first instance by the procedural law of the arbitration (virtually always, the law of the arbitral seat). Most national arbitration legislation recognizes the parties' autonomy to agree upon the existence, scope and timing of disclosure (as an aspect of the parties' general procedural autonomy); in practice, parties not infrequently agree upon the scope and manner of disclosure, either in their original arbitration agreement or subsequent discussions. Where the parties do not agree upon the scope of disclosure, most national arbitration legislation recognizes the inherent power of arbitral tribunals to order disclosure by the parties to the arbitration, including the power to determine the scope and procedures for such disclosure.

[1] UNCITRAL Model Law

The UNCITRAL Model Law does not deal specifically with the subject of disclosure. Instead, Article 19(1)'s general recognition of the parties' procedural autonomy applies to disclosure, just as to other procedural matters.[1] Where the parties' agreement addresses issues of disclosure, directly or by incorporating institutional rules, Article 19(1) requires giving effect to that agreement.

In the absence of any agreement, Articles 19(2) and 27 of the Model Law grant tribunals broad authority with respect to evaluating evidence[2] and "taking evidence,"[3] but make no specific reference to "disclosure." However, the Model Law's drafting history leaves no question that a tribunal's powers include the authority to order disclosure by the parties.[4] Nothing in the Model Law limits the scope of disclosure that a tribunal is entitled to order from the parties, with this being left to the arbitrators' procedural discretion.

1. *See supra* pp. 194–95.
2. UNCITRAL Model Law, Art. 19(2) ("The arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.").
3. *Id.*, at Art. 27 ("The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."). *See infra* p. 230.
4. *See Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/264, Art. 19, ¶6, XVI Y.B. UNCITRAL 104 (1985).

[2] Other National Legislation

The general approach in most civil law jurisdictions to disclosure parallels the Model Law. As discussed above, most civil law jurisdictions give effect to agreements by parties regarding procedural matters.[5] This rule extends to matters of disclosure, notwithstanding the fact that disclosure was historically almost unknown in domestic civil law litigation systems.

Where no agreement exists, some civil law arbitration statutes do not expressly address the subject of disclosure. For example, the Swiss Law on Private International Law is largely silent on matters of disclosure, only providing generally that the tribunal has authority over the arbitral procedure and the power to seek judicial assistance in evidence-taking from national courts.[6] Other civil law arbitration statutes are more explicit in authorizing the arbitrators to exercise disclosure powers. For example, the French Code of Civil Procedure expressly authorizes arbitrators to order the parties to produce evidentiary materials (without addressing disclosure by non-parties).[7] Other civil law statutes are similar (either expressly or impliedly authorizing orders that the parties disclose evidentiary materials).[8]

Legislation in common law jurisdictions is often more specific in its treatment of disclosure in arbitral proceedings. The U.S. FAA expressly addresses the arbitrators' powers, in U.S.-seated arbitrations, with regard to both parties and non-parties. Section 7 authorizes arbitrators, in a "proper case," to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which shall be deemed material as evidence in the case," and to seek judicial assistance if their disclosure orders are not complied with. Additionally, U.S. state law frequently provides parties to locally seated arbitrations with the authority to request the attendance of witnesses and production of documents (e.g., in §17 of the Revised Uniform Arbitration Act or §7505 of the N.Y. C.P.L.R.).

The English Arbitration Act is even more detailed in its treatment of disclosure than the FAA. It provides in §34(2)(d) that a tribunal has the power to determine "whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage." There is no

5. *See supra* pp. 194–95.
6. Swiss Law on Private International Law, Arts. 182(2), 184. The same is true for German and Austrian law. German ZPO, §1042; Austrian ZPO, §594. The right to seek judicial assistance in obtaining evidence implies a power to order disclosure of evidence by the parties. *See, e.g.*, Swiss Law on Private International Law, Art. 184(2) ("If the assistance of state judiciary authorities is necessary for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the state judge at the seat of the arbitral tribunal; the judge shall apply his own law").
7. French Code of Civil Procedure, Art. 1467(3) ("If a party is in possession of an item of evidence, the arbitral tribunal may enjoin that party to produce it, determine the manner in which it is to be produced and, if necessary, attach penalties to such injunction").
8. *See, e.g.*, Belgian Judicial Code, §1700(4) ("If a party holds a piece of evidence, the arbitral tribunal may enjoin it to disclose the evidence ..."); Japanese Arbitration Law, Art. 32(3) ("hearing ... to ... inspect goods or documents").

question but that this provision grants tribunals broad powers to order disclosure by parties to an arbitration. Where the parties have agreed to particular disclosure provisions, the Act's general respect for party autonomy requires giving effect to such agreements.[9] Other common law arbitration legislation is similar.[10]

[3] *Arbitral Tribunals' Implied Disclosure Authority*

Even in the absence of statutory grants of disclosure powers, most national arbitration regimes afford tribunals broad inherent authority over the fact-finding process, which includes authority to order parties to the arbitration to make disclosure. This is consistent with the historically broad discretion of arbitrators over procedural and evidence-taking matters, and with the arbitrators' mandate to resolve disputes in the manner they deem expedient and just.[11] In principle, the only limitations under most national laws on the disclosure powers of international arbitral tribunals are those imposed by the arbitration agreement or principles of equality and due process. That is true even if applicable arbitration legislation is silent on the subject of disclosure: the arbitrators' authority over disclosure and evidence-taking is inherent as part of their overall mandate.

In practice, arbitral tribunals have repeatedly exercised the authority to order disclosure, virtually never even questioning whether such power exists. One award addressed the issue as follows:

> "[W]hile the ICC Rules do not contain any provision dealing with 'discovery' properly speaking, it is enough to recall here that according to article 4(1) [of the 1975 ICC Rules], '[t]he arbitrator shall proceed within as short a time as possible to establish the facts of the case by all appropriate measures.' This provision allows the arbitrators to ask the parties to produce the documents in their possession or control, which in their view are relevant to the case."[12]

Consistent with this, virtually no reported arbitral awards deny the existence of an arbitrator's authority to order the parties to disclose materials relevant to the dispute.

[4] *Arbitral Tribunals Not Limited to Disclosure and Evidence-Taking Authority of Local Courts*

There are sometimes suggestions that the disclosure or other evidence-taking powers of tribunals should be limited to those of local courts in the arbitral seat under domestic rules of civil procedure. Almost all authorities have rejected such arguments. As discussed above, the procedural law of the arbitration is prescribed by the arbitration legislation of the arbitral seat, which ordinarily gives effect to the parties'

9. English Arbitration Act, 1996, §§1(b), 34(1).
10. *See* G. Born, *International Commercial Arbitration* 2499–506 (3d ed. 2021).
11. *See supra* pp. 194–95.
12. Order in ICC Case No. 5542, in D. Hascher (ed.), *Collection of Procedural Decisions in ICC Arbitration 1993–1996* 62, 64–65 (1997). *See* G. Born, *International Commercial Arbitration* 2507 (3d ed. 2021).

procedural autonomy and grants broad procedural discretion to the tribunal, rather than by domestic court procedures. This principle applies specifically to the disclosure powers of tribunals, which are not limited by the powers granted to local courts by domestic rules of civil procedure. As one commentator has observed, "[d]iscovery which is ordered by international arbitral tribunals is very different from the discovery ordered by national courts."[13]

[B] Arbitral Tribunals' Disclosure Authority under Institutional Arbitration Rules

Most institutional rules provide arbitrators, in language of varying degrees of clarity, with express authority to order disclosure by the parties. Where parties have agreed to arbitrate pursuant to these rules, there is little question regarding the tribunal's authority to order disclosure in accordance with them. In practice, tribunals virtually never conclude that they lack authority to order disclosure under leading institutional rules, although the scope of the disclosure that is ordered may be very limited.

[1] *LCIA Rules*

Among leading institutional rules, the 2020 LCIA Rules are most explicit in their treatment of disclosure. Articles 22(1)(iii) and 22(1)(iv) of the LCIA Rules empower the tribunal "to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient [;] [and] to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party, and any expert to the Tribunal."[14] Article 22(1)(v) goes on to provide the tribunal with specific powers to order the disclosure of documents: "to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant."[15]

These provisions grant an LCIA tribunal broad authority to order the parties to the arbitration (but not non-parties) to make disclosure to one another. They do not address the procedures by which disclosure is to be ordered, including whether the parties may make disclosure requests or what form those requests should take, instead leaving this to the arbitrators' discretion.

[2] *UNCITRAL Rules*

The UNCITRAL Rules also confirm the tribunal's disclosure authority. Article 27(3) of the Rules permits the tribunal to order the production of "documents, exhibits or other evidence." This provision is directed towards the arbitrators' powers, and does

13. Order in ICC Case No. 5542, in D. Hascher (ed.), *Collection of Procedural Decisions in ICC Arbitration 1993–1996* 62 (1997).
14. 2020 LCIA Rules, Art. 22(1)(iii)–(iv).
15. Id., at Art. 22(1)(v).

not expressly provide the parties with the right to request (much less compel) disclosure by their counterparties.

However, there is nothing in the UNCITRAL Rules that precludes a tribunal from ordering discovery of relevant documents, if that is what the tribunal concludes is most appropriate. Thus, as the practice of the Iran-U.S. Claims Tribunal confirms, a tribunal may order discovery of all "relevant" or "material" documents.[16] Nor is there anything in Article 27(3) that would prevent a tribunal from providing for the parties to make disclosure requests to one another, with the tribunal granting or denying such requests. Applying procedural rules modeled on Article 27(3) (formerly Article 24(3) of the 1976 UNCITRAL Rules), the Iran–U.S. Claims Tribunal not infrequently adopted such an approach, ordering parties to produce documents requested by a counterparty.[17]

[3] ICC Rules

Other institutional rules are less explicit, but nonetheless clearly authorize tribunals to order disclosure. Article 25(1) of the 2021 ICC Rules is representative, providing that "[t]he Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means," while Article 25(4) provides that the tribunal "may summon any party to provide additional evidence." This language does not expressly empower arbitrators to order disclosure, but in practice, ICC tribunals almost uniformly hold such authority is implicit.[18] Similarly, as with the UNCITRAL Rules, it is clear that the tribunal's authority over the evidence-taking and disclosure processes extends to permitting the parties to make requests for disclosure from their counterparties, upon which the tribunal may base its disclosure orders.[19]

[C] Arbitral Tribunals' Disclosure Powers Generally Limited to Parties

The disclosure powers of the tribunal in international arbitration are ordinarily limited to the parties to the arbitration and do not extend to non-parties. This

16. D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 567 (2d ed. 2013) ("Rather than a standard of possibly relevant, the party requesting the production must establish the materiality of the documents to a claim or defense").
17. *See, e.g.*, *INA Corp. v. Iran*, Award in IUSCT Case No. 184-161-1 of 13 August 1985, 8 Iran-US CTR 373, 382 (1985).
18. *See* G. Born, *International Commercial Arbitration* 2506–09 (3d ed. 2021).
19. *See, e.g.*, Order in ICC Case No. 13225, excerpted in ICC, *Decisions on ICC Arbitration Procedure (2003–04)* 97 (2010) ("The parties shall … as the case may be, request the production of specific documents or witness testimony of documents/witnesses over which it has no control"); Order in ICC Case No. 12761, excerpted in *id.*, at 72 ("On the condition that they are identified in detail, the Arbitral Tribunal may order the Parties to produce those relevant documents which are within their [possession] and which have not been presented. The Arbitral Tribunal will exercise this power on its own authority or on petition of a party."); Order in ICC Case No. 12296, excerpted in *id.*, at 45 ("each Party shall submit to the Arbitral Tribunal and to the other Party any Request to Produce Documents"). *See also* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 587–600 (2d ed. 2013) (miscellaneous disclosure orders).

limitation is in substantial part a result of the consensual nature of arbitration. In principle, the powers conferred by an arbitration agreement (and any institutional rules it incorporates) extend only to the parties to that agreement. Accordingly, the tribunal will generally lack authority to order third parties to provide disclosure in the arbitration, just as it will generally lack the power to grant provisional measures or final relief against non-parties to the arbitration.

Nonetheless, there are potentially important exceptions to this general rule. As discussed below, there are instances in which national law grants arbitrators the power to take evidence from non-parties with the judicial assistance of national courts. The UNCITRAL Model Law, the FAA in the United States, and the Swiss Law on Private International Law are leading examples of this approach. Under these statutes, tribunals have the power to order disclosure from third parties and, if refused, the parties or the arbitrators may seek judicial enforcement of the tribunal's orders.[20]

[D] Arbitral Tribunals' Exercise of Discretion to Order Disclosure and Structure Evidence-Taking

As discussed above, arbitration statutes and institutional rules almost universally permit arbitral tribunals to order the parties to the arbitration to make disclosure of documents and other materials as part of the evidence-taking process. At the same time, national law and institutional rules provide virtually no guidelines regarding the scope or exercise of a tribunal's disclosure authority. Rather, as a practical matter, scope and procedures for disclosure in an international arbitration depend on the parties' agreement and the tribunal's exercise of its discretion, largely unconstrained by national law limitations.

Preliminarily, in international arbitration, disclosure not infrequently proceeds with a measure of agreement, reached between the parties in their arbitration agreement or during the arbitral proceedings. Arbitration agreements sometimes address the subjects of disclosure or evidence-taking, for example, by forbidding any disclosure or by providing for disclosure in accordance with a set of standards (e.g., IBA Rules on the Taking of Evidence in International Arbitration, U.S. Federal Rules of Civil Procedure). Even if no such provision is included in the parties' agreement to arbitrate, the parties may agree to use the IBA Rules on the Taking of Evidence before decisions are made by the tribunal as to disclosure. The parties' agreement may, for example, select the IBA Rules (together with a timetable for disclosure requests and responses), define the scope and character of disclosure by reference to

20. Under the IBA Rules on the Taking of Evidence, a party seeking disclosure from third parties may request the tribunal to exercise whatever powers it may have under relevant national law. 2020 IBA Rules on the Taking of Evidence, Art. 3(9) ("If a Party wishes to obtain the production of documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested documents …. The Arbitral Tribunal shall decide on this request and shall take the necessary steps if in its discretion it determines that the documents would be relevant and material.").

a national law, or establish a tailor-made set of procedures (including standards for disclosure and a timetable for implementation).

Where no agreement between the parties is reached, the arbitrators are required to decide whether disclosure is appropriate and, if so, what its scope should be and when and how it should proceed. The tribunal will generally do so after hearing from the parties what legal and factual issues the case presents, why disclosure is necessary (or not), and how each would prefer any disclosure be structured. In practice, the tribunal's decisions will usually be issued in procedural orders defining the scope, mechanisms and timetable of disclosure.

[1] *Availability and Scope of Disclosure: Civil Law Versus Common Law*

A tribunal's approach to disclosure (like other aspects of evidence-taking) will inevitably be significantly influenced by the legal training and experience of its members. In particular, there historically have been, and still remain, important differences between civil law and common law approaches to disclosure.[21]

In most civil law jurisdictions, inquisitorial traditions do not provide for party-initiated (or other) disclosure. Evidence-taking is largely controlled by the court and the parties have virtually no rights to demand relevant materials from one another or from witnesses; equally, civil law courts seldom order parties to produce materials which they had not voluntarily proffered as evidence. Consequently, a tribunal composed entirely of civil lawyers, particularly civil lawyers with limited international experience, will not infrequently be reluctant to order disclosure and skeptical about the benefits of doing so.

On the other hand, common law practitioners have historically viewed a broad, party-initiated disclosure process as an almost inevitable feature of dispute resolution and are often reluctant to deny either party that right. Thus, a tribunal of three English, U.S. or Singapore-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 procedural rules used in local courts. Moreover, individual characteristics of the arbitrators—age, experience, temperament, intelligence, time commitments—influence their procedural preferences. Also important are the identities and procedural preferences of counsel to the parties: where both parties' counsel have similar expectations and legal backgrounds, this will significantly influence the tribunal's procedural decisions.

As a practical matter, the specifics of the parties' dispute also significantly affect the availability and nature of disclosure. Indeed, one of the advantages of

21. *See* G. Born, *International Commercial Arbitration* 2518–21 (3d ed. 2021).

arbitration is the possibility of tailoring procedures to a specific set of factual and legal issues to provide an efficient and accurate fact-finding mechanism. In cases where one party alone has access to essential factual materials (e.g., a licensee's sales of a product, the value/profitability of a business in a post-M&A dispute), disclosure may be particularly appropriate. On the other hand, where a party seeks to conduct a fishing expedition into its adversary's files in order to challenge a witness's credibility, disclosure will usually be inappropriate.

The foregoing considerations make it impossible to identify a single "standard" approach to disclosure in international arbitration. Nevertheless, there is an emerging consensus that a measure of document disclosure is desirable in most commercial disputes. Justice is almost always best served by a degree of transparency, which brings the relevant facts before the arbitrators; justice, as well as efficiency, is also best served by ensuring disclosure of the relevant facts sufficiently in advance of the hearing so that the parties can prepare their cases in light of these facts. This consensus is reflected in the IBA Rules on the Taking of Evidence (discussed below), as well as in the weight of contemporary arbitral practice.[22]

[2] *No Automatic Right of Parties to Request Disclosure*

As discussed above, even where disclosure is permitted, institutional rules and national law generally do not grant the parties any automatic right to make disclosure demands on other parties (or non-parties) as a matter of course. As a practical matter, disclosure instead generally occurs only if provided for by the tribunal, usually as part of its initial procedural timetable for the arbitration; if disclosure is contemplated, that timetable will provide the parties with specified opportunities to make requests for disclosure (but not a general, unqualified right to seek discovery). This reflects the practice in international arbitration for the tribunal to retain reasonably close control over the proceedings—as distinguished from the party-directed procedures in some common law jurisdictions.

[3] *Commonly Used Procedural Frameworks for Document Disclosure*

Although generalizations are risky, the IBA Rules on the Taking of Evidence set forth a relatively frequently used, and sensible, procedure for tribunal-ordered document disclosure in international arbitration, which seeks to bridge differences between diverse legal traditions. Under this procedure, each party will disclose in advance all of the documents on which it intends to rely in support of its case (usually, but not invariably, appended to its principal written submission). Thereafter, under Article 3 of the IBA Rules, each party will be permitted (on or by a date fixed by the tribunal) to request that specified documents or categories of documents be disclosed by its adversary. The parties' document requests are required to detail the relevance and

22. *See id.*, at 2532–40.

materiality of the requested documents by reference to the parties' submissions regarding their claims and defenses.

The parties will then typically be allowed a specified time period (generally, a few weeks) to respond to the document requests, either by producing the requested documents or setting forth reasons for refusing to do so, including objections on grounds of immateriality, privilege or burdensomeness.[23] These objections are sometimes ordered to be presented in the form of a table (occasionally termed a "Redfern Schedule," after the arbitrator credited with introducing this mechanism to the international arbitral process, or the "Stern Schedule," after the arbitrator identified with proposed variations to the mechanism) listing categories of documents that are requested and the objections to production. The requesting party is often permitted a brief period of time in which to respond to objections (often also in tabular form).

If a party's discovery requests are not voluntarily complied with by the adverse party, an application requesting an order compelling disclosure can be made to the tribunal. The tribunal will typically encourage the parties to comply voluntarily with one another's requests; if its encouragement is not heeded, the tribunal will make an order either granting or denying the parties' requests and providing summary explanations for the tribunal's rulings.[24]

[4] *Scope of Disclosure*

One of the most significant issues to arise if disclosure is permitted in an arbitration is the scope or extent of the materials that must be produced by a party. Although disclosure in international arbitration is common, the scope of such disclosure continues to differ significantly from its counterpart in common law courts. As one U.S. court succinctly put it:

> "The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one and its superfluity and utter incompatibility in the other."[25]

These comments are in fact overbroad. There are cases where disclosure is not "incompatible" with the arbitral process, but instead essential. Equally, there are many cases where, for precisely this reason, arbitrators order a considerable measure of disclosure. Nonetheless, as a practical matter, arbitral tribunals are often reluctant to order disclosure as readily, or to the same extent, as in some common law litigations.

Rather, in ordering disclosure, arbitrators typically require only production of reasonably well-identified documents or categories of documents that are material to disputed issues. Tribunals do not typically require broader document discovery

23. 2020 IBA Rules on the Taking of Evidence, Arts. 3(4)-(5), 9(2)-(3).
24. *See* G. Born, *International Commercial Arbitration* 2522-24 (3d ed. 2021).
25. *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957).

(absent agreement to this effect by the parties), and sometimes order even more limited disclosure. These limitations are reflected in the IBA Rules on the Taking of Evidence.

The basic standard established under the IBA Rules is that parties will be required to produce documents in their possession, custody or control that are relevant and material to issues in dispute between the parties in the arbitration. According to Article 3(7) of the 2020 IBA Rules:

> "The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) *the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome*; (ii) none of the reasons for objection set forth in Articles 9.2 or 9.3 applies."

In practice, tribunals generally exercise their disclosure powers consistently with the IBA Rules. Tribunals are usually unwilling to permit "fishing expeditions" aimed at identifying possible claims or sources of further inquiry, rather than at adducing evidence in support of existing claims. Instead, in most instances, disclosure is ordered only of documents that are "relevant and material" to issues that are decisive to the "outcome of the case."[26]

[5] *Privilege*

Most national litigation systems recognize various sorts of privilege from otherwise applicable disclosure obligations. Issues of privilege and related matters often arise in international arbitrations when disclosure is ordered. These can include traditional testimonial privileges or rules of confidentiality (such as attorney-client privileges, doctor-patient privileges, or state secrets), as well as the admissibility of settlement communications and communications between counsel.[27]

There is limited authority concerning the treatment of privileges in international arbitration. Arbitration statutes are uniformly silent regarding the treatment of issues of privilege. Neither the Model Law, nor any other arbitration legislation, addresses the subject. The same is true of many institutional rules, including the UNCITRAL, ICC, ICDR, LCIA and ICSID Rules. Nonetheless, tribunals almost uniformly recognize parties' rights to rely on evidentiary privileges. This is consistent with the general principle that, unless otherwise agreed, the tribunal in an international arbitration will give effect to the parties' legal rights under applicable law. Similarly, national courts have generally assumed that otherwise-applicable

26. Documents need only be *prima facie* relevant and material to resolution of the parties' dispute—in the sense that they appear likely to contain information material to resolving what appear to be disputed issues. At the stage of document disclosure it is impossible to be certain that particular documents will in fact contain relevant information, or that this information will be material: the most that can be done is make *prima facie* judgments of likely materiality. *See* G. Born, *International Commercial Arbitration* 2537-38 (3d ed. 2021).
27. *See id.*, at 2549-62.

privileges are unaffected either by the parties' agreement to arbitrate or the fact that it is the tribunal (rather than a court) that has ordered disclosure.[28]

Assuming that privileges can, in principle, be asserted in international arbitration, the question arises as to what law governs the existence and scope of a privilege.[29] Potentially applicable laws include the procedural law of the arbitration, the law governing the parties' arbitration agreement, and the law most closely connected to the allegedly privileged communication.

The conflict of laws principles developed in the context of international litigation should, in principle, be relevant in international arbitral proceedings. This litigation has usually concerned the privileges associated with legal advisers. In the United States, courts have looked to the center of gravity of communications, often applying the law of the jurisdiction in which the lawyer whose communications are at issue is qualified.[30] Other authorities have looked to the jurisdiction with which communications have their "closest connection," often applying the law of the place where the communication was made or the client is located.[31] In contrast, although disfavored, a few tribunals have adopted a different approach, applying the most protective privilege standard applicable to *either* party to *both* parties on the apparent theory of equality of treatment.[32]

[6] Electronic Disclosure

An increasingly common issue in international arbitration is "electronic disclosure" of emails and other electronic documents (or "e-discovery"). As in national court litigations, electronic disclosure raises important questions of cost, practicality and timing. In general, arbitral tribunals have been willing to order, and efficiently manage, the disclosure of electronic documents as part of their broader mandate of ascertaining the facts at issue in the arbitration.

[E] Sanctions for Failure to Comply with Disclosure and Other Orders

Parties sometimes fail to comply with an arbitral tribunal's disclosure orders (e.g., by refusing to produce requested documents). When this occurs, the question arises as to what sanctions, if any, a tribunal may impose.

28. *See id.*, at 2553–54.
29. Although most developed states recognize the existence of privileges, there are significant differences in the nature and scope of privileges in different legal systems. In particular, there are differences in the categories of privilege that are recognized, the treatment of waiver of privileges, the persons entitled to invoke privileges (e.g., in-house counsel) and the scope of privileges. As a consequence, choice-of-law disputes frequently arise regarding the existence and contents of privileges in international arbitration.
30. G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1169–71 (7th ed. 2022).
31. *Id.*, at 2558–61.
32. Investment arbitrations can raise particular issues of privilege concerning the effects of "state secrets" or similar claims to governmental secrecy.

In many jurisdictions, arbitrators lack the power to impose criminal or quasi-criminal sanctions (e.g., civil contempt, monetary fines) like those which may be imposed by a national court in domestic litigation. Nothing in the Model Law or other leading common law or civil law arbitration legislation empowers arbitrators to impose fines or other penalties on either parties or non-parties to an arbitration; there are few exceptions to this approach (Belgium being most notable). In the absence of such legislation, commentary and awards frequently observe that arbitrators lack coercive authority.[33] Despite this, a number of courts have upheld the authority of tribunals to impose monetary sanctions on a party for its refusal to comply with disclosure orders; it is difficult to see why, if the parties' arbitration agreement permits such sanctions, tribunals should not be free to impose them.[34]

It is possible, but unusual, for arbitrators to seek enforcement of their disclosure orders in national courts. (As discussed below, many national laws authorize the tribunal and/or the parties to seek judicial assistance in obtaining disclosure of evidentiary materials that have not been voluntarily produced to the tribunal.[35]) In general, however, the delays and uncertainty that arise from applications to national courts ordinarily make this an unattractive option.

Rather than impose sanctions or seek judicial enforcement of disclosure orders, arbitrators are more likely to draw adverse inferences from a party's refusal to produce requested documents or witnesses. This authority is recognized in some institutional rules, as well as the IBA Rules.[36] The tribunal's power to draw adverse inferences is also well-recognized in arbitral authority and national court decisions.[37] There are cases where national courts have concluded that a tribunal exceeded its authority in drawing adverse inferences, but this is rare.

33. G. Born, *International Commercial Arbitration* 2564–65 (3d ed. 2021).
34. *See, e.g.*, *Torres v. Morgan Stanley Smith Barney, LLC*, 839 Fed.Appx. 328, 334 (11th Cir. 2020) (quoting *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 914 (11th Cir. 2006)) ("'to further the purposes of the FAA and to protect arbitration as a remedy' courts may 'consider imposing sanctions in appropriate cases'"); *Superadio Ltd P'ship v. Winstar Radio Prods., LLC*, 844 N.E.2d 246 (Mass. 2006) ("The [provisions of the AAA Rules granting arbitrators' remedial and discovery authority], construed together, and supported by the broad arbitration provision in the agreement and the absence of any limiting language prohibiting a monetary sanction for discovery violations, authorized the panel to resolve discovery dispute by imposing monetary sanctions").
35. *See infra* pp. 242–43.
36. *See* 2020 IBA Rules on the Taking of Evidence, Arts. 9(6), 9(7) ("If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party").
37. *See, e.g.*, Award in ICC Case No. 15248, in J.-J. Arnaldez, Y. Derains & D. Hascher (eds.), *Collection of ICC Arbitral Awards 2012–2015* 135, 139 (2018); Final Award in ICC Case No. 6497, XXIV Y.B. Comm. Arb. 71, 75–79 (1999); *INA Corp. v. Iran*, Award in IUSCT Case No. 184-161-1 of 13 August 1985, 8 Iran-US CTR 373, 382 (1985); *Forsythe Int'l, SA v. Gibbs Oil Co.*, 915 F.2d 1017, 1023 n. 8 (5th Cir. 1990). *See also* G. Born, *International Commercial Arbitration* 2565–68 (3d ed. 2021).

§9.02 ROLE OF NATIONAL COURTS IN OBTAINING EVIDENCE FOR USE IN INTERNATIONAL ARBITRATIONS

As discussed above, most disclosure in international arbitration occurs within the context of the arbitration, between the parties and under the control of the tribunal. Nevertheless, there are instances in which the tribunal (or, more rarely, the parties) may seek the assistance of a national court in obtaining disclosure for use in the arbitration. This is particularly likely where disclosure is sought from non-parties to the arbitration, but may also be available against parties (or their affiliates). Judicial assistance of this sort is available only when provided for by national law and, as a practical matter, is infrequently sought.

[A] National Arbitration Legislation

Arbitration legislation in many jurisdictions provides that a tribunal may obtain the assistance of a national court in taking evidence. These legislative provisions are broadly similar to statutes providing for judicial assistance in granting provisional relief (discussed below).[38]

[1] UNCITRAL Model Law

Article 27 of the Model Law is representative of arbitration statutes providing for judicial assistance in evidence-taking. Article 27 provides:

> "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

The Model Law provides for the tribunal, or a party "with the approval of the arbitral tribunal," to seek judicial assistance in evidence-taking. Importantly, Article 27 does not permit a party—acting without the tribunal's approval—to seek judicial assistance in taking evidence. Rather, as with other aspects of the arbitral procedure, the arbitrators retain control over applications for judicial assistance. It also appears that Article 27 is available only for tribunals seated within national territory (and not for foreign-seated arbitrations), although a contrary interpretation is plausible.

It is generally accepted that the tribunal enjoys broad discretion over evidence-taking and determining whether particular items are, or are not, subject to disclosure and/or admissible as evidence. The purpose of Article 27 of the Model Law is to enable tribunals to seek assistance from courts in enforcing a disclosure order (not to disable tribunals from ordering and receiving the production of evidence). The drafting history of the Model Law underscores this point by explaining that a court "may take the evidence itself … or it may order that the evidence be provided directly

38. *See infra* pp. 273–76.

to the arbitral tribunal, in which case the involvement of the court is limited to exerting compulsion."[39]

[2] Other National Arbitration Legislation

Likewise, Article 184(2) of the Swiss Law on Private International Law provides that arbitral tribunals seated in Switzerland may seek the assistance of Swiss courts in taking evidence:

> "Where state legal assistance is required for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the participation of the state court at the seat of the arbitral tribunal."

Swedish law is similar, with §26 of the Swedish Arbitration Act granting parties to an arbitration seated in Sweden the right, with the approval of the arbitrators, to seek the assistance of local courts in sworn witness testimony or the production of documents ("as evidence"). Other arbitration legislation is comparable.[40]

[3] United States

The FAA adopts a somewhat different approach to court-ordered discovery than the Model Law. Section 7 of the FAA grants a tribunal seated in the United States authority to order testimony and document production, including by third parties, in certain circumstances. At the same time, §7 also provides for judicial assistance in taking evidence at the request of one of the parties to the arbitration (as distinguished from the arbitrators). If the arbitrators' orders are not complied with, §7 authorizes the tribunal to seek judicial assistance in compelling compliance.

U.S. courts have adopted divergent approaches to the scope of judicial assistance in ordering "discovery" under §7. Some lower courts have held that §7 does not permit a tribunal to obtain judicial assistance in obtaining pre-hearing "discovery" from third parties (whether document disclosure or depositions), but instead only permits a tribunal to require the production of "evidence" at an evidentiary hearing.[41] Other U.S. courts appear to have held that §7 allows an arbitrator, in principle, to obtain judicial assistance to compel third parties to provide pre-hearing

39. Report of the Secretary-General on the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264 (1985).

40. G. Born, International Commercial Arbitration 2573–74 (3d ed. 2021).

41. See, e.g., Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1160 (11th Cir. 2019) ("we conclude that 9 U.S.C. §7 does not permit pre-hearing depositions and discovery from non-parties"); CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017) ("the FAA does not grant arbitrators the power to compel the production of documents from third parties outside of a hearing"); MMS Grp. LLC v. Buddy's Franchising & Licensing, LLC, 2024 U.S. Dist. LEXIS 42673, at *9 (M.D. Fla. 2024) (Section 7 of FAA prohibits pre-hearing discovery from non-parties and instead requires witnesses to appear before arbitrators). See G. Born, International Commercial Arbitration 2576–79 (3d ed. 2021).

discovery, but have limited the scope of such assistance, requiring either showings of need or materiality.[42] In one court's words:

> "However great a respect we owe the arbitrators, it is a fact that when the statute [§7 of the FAA] imposed upon the District Court the duty to determine whether or not to compel the attendance of a witness and his production of papers, it imposed upon the Court the duty to determine whether or not the proposed evidence is material."[43]

Some U.S. courts have been reluctant to second-guess arbitrators' determinations concerning materiality, and have enforced what appear to be fairly broad pre-hearing disclosure orders issued by arbitrators pursuant to §7, including orders requiring disclosure from third parties.[44]

Section 7 of the FAA is the leading exception to the general rule that parties (as distinguished from an arbitral tribunal) cannot independently obtain judicial assistance from national courts in taking evidence for use in an international arbitration. Applying the FAA, a number of U.S. courts have held that §7 permits court-ordered discovery at the request of a party in "exceptional circumstances."[45] These courts have generally required a fairly compelling need for particular evidence, that otherwise will likely be unavailable, in an arbitration, as well as a showing that the tribunal itself is unable to take or safeguard the evidence.

Nonetheless, a few lower U.S. courts have found what appear to be fairly routine requests for pre-arbitration disclosure by parties to the arbitration to be sufficiently "exceptional" to grant relief. These decisions have typically placed emphasis on the absence of any delay to the arbitral process resulting from court-ordered disclosure.[46] Despite the foregoing decisions, some U.S. courts have refused requests by parties for court-ordered disclosure in aid of arbitration.[47] These

42. *See, e.g., COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269, 271 (4th Cir. 1999) (Section 7 "does not authorize an arbitrator to subpoena third parties during pre-hearing discovery, absent a showing of special need or hardship"); *ImClone Sys. Inc. v. Waksal*, 22 A.D.3d 367, 368 (1st Dep't 2005) ("We subscribe to the view that depositions of nonparties may be directed in FAA arbitration where there is a showing of 'special need or hardship' "); G. Born, *International Commercial Arbitration* 2576–79 (3d ed. 2021).
43. *Oceanic Transp. Corp. of Monrovia v. Alcoa Steamship Co.*, 129 F.Supp. 160 (S.D.N.Y. 1954).
44. *See* G. Born, *International Commercial Arbitration* 2576–79 (3d ed. 2021).
45. *See, e.g., In re Deiulemar Compagnia di Navigazione SpA v. MV Allegra*, 198 F.3d 473, 479–80 (4th Cir. 1999) (extraordinary circumstances before permitting court-ordered pre-hearing discovery); *COMSAT Corp.*, 190 F.3d at 278.
46. *See, e.g., Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Leona Lee Corp.*, 434 F.2d 192 (5th Cir. 1970) (apparently not requiring any showing of exceptional circumstances); *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F.Supp. 240 (E.D.N.Y. 1973) (relying principally on size of claim, minimal cost of court-ordered discovery and absence of any showing that arbitration would be delayed).
47. *See, e.g., Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) ("Section 7 explicitly confers authority only upon *arbitrators*; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents or witnesses") (emphasis added); *Suarez-Valdez v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648 (11th Cir. 1988); *McConnell v. Advantest America, Inc.*, 309 Cal.Rptr.3d 526, 540 (Cal. App. 4th 2023) ("discovery is not a permissible purpose of an arbitration hearing subpoena, the arbitrator abused his discretion by overstepping his statutory authority under section 1282.6").

have generally cited the concerns identified above regarding judicial assistance to parties (rather than the arbitrators).

In addition to the FAA, state law in the United States often provides local courts with authority to order disclosure in connection with locally seated arbitrations. For example, §7505 of the N.Y. C.P.L.R. authorizes arbitrators and parties to arbitrations seated in New York to issue subpoenas demanding the testimony of witnesses or production of documents; enforcement of the subpoena is, in principle, available in New York courts. Similar authority exists under §17 of the Revised Uniform Arbitration Act.

[B] Judicial Assistance in Evidence-Taking in "Foreign" Arbitrations

[1] *Section 1782*

In addition to §7 of the FAA, 28 U.S.C. §1782 grants U.S. courts the power to order discovery "for use in a proceeding in a foreign or international tribunal."[48] Section 1782 was designed principally to provide U.S. judicial assistance in connection with foreign judicial proceedings. Nevertheless, the provision was historically relied upon by some U.S. district courts for court-ordered discovery in aid of foreign arbitrations, while other courts declined to do so. The U.S. Supreme Court largely, albeit incorrectly, resolved this controversy in *ZF Automotive US, Inc. v. Luxshare, Ltd*, rejecting the argument that an arbitral tribunal is a "foreign or international tribunal" within the meaning of §1782. Although the plain language of §1782 indicated that the provision extends to arbitral "tribunal[s]," the Court held that the provision applied only to tribunals with "governmental" or "official authority," and not arbitral tribunals resolving commercial disputes pursuant to so-called "private" arbitration agreements.[49]

The Supreme Court left open the question whether investor-state arbitral tribunals constituted under the ICSID Convention, as distinguished from international commercial arbitral tribunals, fell within the scope of §1782. To date, lower courts that have addressed the issue have consistently held that such tribunals do not qualify as "foreign or international tribunals" under §1782, though the possibility remains that future decisions could reach a different conclusion.[50] Assuming that §1782 applies to at least some investor-state arbitral tribunals, application of the provision then presents the question of *who* may seek judicial assistance from a U.S.

48. 28 U.S.C. §1782 ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.").
49. *ZF Automotive US, Inc. v. Luxshare, Ltd*, 596 U.S. 619, 633 (U.S. S.Ct. 2022).
50. Compare *In re Alpene, Ltd*, 2023 WL 5237336 (E.D.N.Y.) with *Webuild SPA v. WSP USA Inc.*, 2024 WL 3463380 (2d Cir.).