

RULES OF  
EVIDENCE IN  
INTERNATIONAL  
ARBITRATION:  
AN ANNOTATED GUIDE  
SECOND EDITION

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the contention pursuant to which disclosure was sought was in fact immaterial to the outcome of the arbitration.

3.80 A tribunal may also reject a request for disclosure because to order it would only delay the procedure, and in particular the rendering of a final award, without yielding additional evidence that would have a likely effect on the outcome.<sup>125</sup> If a tribunal believes that the evidence before it is sufficient to decide a matter, further document requests may be judged to be immaterial to the final award.<sup>126</sup>

#### Other standards

3.81 It has been argued in the past that some arbitration rules, such as those requiring that a document request be granted only if the evidence sought is necessary to a case, impose a "higher" burden on the requesting party than the relevance and materiality test in the IBA Rules.<sup>127</sup> This point was addressed by the *Tidewater v Venezuela* ICSID tribunal when it opined as follows: "The Tribunal further considers that in deciding whether or not it is necessary to order production for a document, it should be guided by the tests of relevance and materiality in the IBA Rules. The Tribunal finds no underlying conflict between these concepts."<sup>128</sup> Therefore, a tribunal will judge what may be "necessary" for disclosure by determining whether the requested evidence is relevant and material.

payments by Owners without satisfying their debt towards Claimant, it would not modify or influence in any way the decision of the Arbitral Tribunal." *National Company (State X) v (1) Company A (State Y), (2) Company B (State X), (3) Company C (State X)*, Final Award, ICC Case No. 11490, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2012* – Volume XXXVII, Yearbook Commercial Arbitration, Vol. 37, pp. 30–42 (Kluwer Law International, 2012).

125 See the procedural conduct of an arbitral tribunal as reported in *JJ-CC Ltd v Transwestern Pipeline Co*, Lexis 7090, para. 19 (Tex App 12 November 1998): "The panel held a hearing regarding this discovery request in April 1995 to determine if this request would delay proceedings, whether the request was reasonable, and if a compromise could be reached. After lengthy discussions with counsel from both sides, the panel decided to allow appellant part of its requested additional discovery, but not so much that the scheduled hearing date would be postponed." See also the decision of the ICSID tribunal in *El Paso v Argentina* wherein it rejected further document production requests on the following grounds: "The information in possession [was] sufficient to decide the jurisdictional issues raised by Respondent, and that, if the proceedings would reach the merits of the dispute it would be open to Respondent to reiterate the above document production requests." *El Paso Energy International Co v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, p. 4 (27 April 2006).

126 *Ruckersicherung-Gesellschaft X v Versicherungs-Gesellschaft Y*, *supra* n. 42. The decision of the Swiss Federal Tribunal stated that: "arbitral tribunals are not obliged to admit further requests for evidence if they conclude by means of an anticipatory assessment of the evidence that the new evidence is not relevant or properly offered." See also: *BSG Resources Ltd, BSG Resources (Guinea) Ltd and BSG Resources (Guinea) SARL v Republic of Guinea*, ICSID Case No. ARB/14/22, Decision On The Proposal To Disqualify All Members Of The Arbitral Tribunal (2016). Claimant attacked the Tribunal's independence and impartiality and stated that "by concluding that the production of the Emails and Deliberations (that until a few weeks ago were considered relevant and material) will no longer meaningfully contribute to the resolution of the dispute, the Tribunal has undoubtedly prejudged the fiercely contested issues in this arbitration." *Ibid.*, p. 4, §24. However, the Chairman's decision recalled that the tribunal decided that: "pursuing these issues of document production at this stage of the proceedings [would] make no meaningful contribution to the resolution of the dispute" and offered further opportunities to the Claimants to address these evidentiary matters later in the proceedings. *Ibid.*, §§64–65. The Chairman concluded that: "[w]hile the Claimants may not be satisfied with the Tribunal's Decision, the mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality, as required by Articles 14 and 57 of the ICSID Convention." *Ibid.*, p. 15, §68.

127 See, for example: ICSID Arbitration Rule 34.

128 *Tidewater v Venezuela*, *supra* n. 81, Procedural Order No. 1, p. 7.

3.82 The IBA Rules capture the pre-eminent test on this point, to which questions of whether a requested document is "necessary", required or otherwise important to a case, are established by demonstrating the likely relevance and materiality of the evidence.

#### Failure to meet the requirements of article 3.3

3.83 The third criteria of article 3.7 introduces an express "form objection", which is to say an objection which may be raised where it is found that a request does not meet the formal requirements of article 3.3. The revised article 3.3 itself contains a number of pleading requirements that should be complied with when filing a request. Failure to meet the requirements of article 3.3 means that a request may be simply denied on its face as not compliant with the standards found in the IBA Rules.<sup>129</sup>

3.84 It has been common practice for parties to object to a request as "overly broad" when it does not meet the "narrow and specific" criteria found in article 3.3(a)(ii).<sup>130</sup> However, no express objection of this type is listed in article 9.2. With the additional language found in the 2010 version of article 3.7 (and also article 3.5), the Rules now expressly contemplate an objection that a request is overly broad.

#### Using experts to resolve document disputes

**Article 3.8 2010 IBA Rules:** 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. In that event, 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 that 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.

#### General discussion

3.85 IBA Rules, article 3.8 allows a tribunal to appoint an expert to review sensitive documents for which an objection to production or admissibility has been made.<sup>131</sup> Tribunals

129 For example, one arbitrator noted when confronted with a number of broadly worded requests for disclosure, "the tribunal rules that the Request to Produce as formulated in each such item . . . is not in conformity with art. 3 of the IBA Rules, and the Request to Produce is declined." *Grand River Enterprises et al. v United States of America*, NAFTA/UNCITRAL, Procedural Order, paras 3 and 5 (14 May 2007). See also: *CME v The Czech Republic*, *supra* n. 79, Partial Award, para. 47, where the tribunal ruled that requests for productions of general categories of documents were inappropriate under the IBA Rules.

130 See: *Bivwater Gauff v Tanzania*, *supra* n. 38, Procedural Order No. 2.

131 See: *Eli Lilly and Company v Government of Canada*, Case No. UNCT/14/2, Procedural Order No. 1, §3.81 (2014): "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. In that event, the Arbitral Tribunal may, after consultation with the Disputing Parties, appoint an independent and impartial expert ("Confidentiality Advisor"), bound to confidentiality, to review any such document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the Confidentiality Advisor shall not disclose

may be faced at various times with the need to determine "threshold" questions concerning the nature of the record in question, such as whether it is covered by a privilege or other legal impediment, in order to rule on admissibility and production. As issues involving sensitive governmental documents have arisen more frequently with the growth of investment arbitration, there also has arisen the need to consider special governmental privileges as well.<sup>132</sup> These issues may at times be difficult for a tribunal to rule on because either the volume of the documents in question is quite large or the issues involve highly fact-sensitive questions that require a review of the document to determine the legitimacy of the objection. It is those types of scenarios that will likely qualify as "exceptional" as per the wording of article 3.8.

#### Appointing an expert

3.86 If a party claims that a document may not be disclosed due to the existence of a legal impediment or other reason, a tribunal may decide to review the document *in camera*, before ordering its disclosure to the opposing party. There is the risk, however, that such an action would subject the tribunal to accusations of bias or failing to treat the parties equally. In reviewing a challenge to an arbitral award rendered under the SIAC rules, where a party complained that its counterpart had sent documents *ex parte* to the tribunal in order for it to determine an objection to production based on confidentiality, the Singapore High Court provided the following analysis of this issue:

In applications for production of documents, an arbitral tribunal often has to deal with 'threshold questions' on whether a particular document is in fact not relevant or whether it falls outside the relevant parameters for production or disclosure as alleged. There will be instances where the 'threshold questions' can only be determined by a review of the contents of the document itself. A party, who may well be prepared to disclose the document to the tribunal for its review, may not necessarily want to disclose it to the other party often for reasons of confidentiality. But when the party seeking production insists on inspecting the document so that it can submit on the 'threshold questions' (and perhaps also reassure itself that the other party has in fact acted in good faith in opposing the production), then the procedure to adopt for the determination of the 'threshold questions' can be rather contentious unless the procedure has been pre-agreed or pre-determined by the parties as early as possible... This minimizes any possible challenge from any party on the basis that there has been contravention of article 18 of the Model Law, which states, *inter alia*, that the parties shall be treated with equality.<sup>133</sup>

3.87 In its further analysis of this issue, the High Court noted that article 3.8 was a commonly accepted procedural rule in international arbitration that assisted tribunals to avoid offending mandatory law which provides for equal treatment of the parties when dealing

to the Arbitral Tribunal or to the other Disputing Party the contents of the Document reviewed. Any such Confidentiality Advisor shall be required to sign an appropriate confidentiality undertaking." See also: *South American Silver Ltd v The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 2, §33 et seq (2014), where the Arbitral Tribunal considered certain documents to be "highly confidential" and prepared, along with the Parties, a Protective Order for Respondent to appoint an expert to comment on the documents (see Annex A of PCA Case No. 2013-15 for a sample protective order).

<sup>132</sup> As an example, see: *Piero Foresti, Laura de Carli v The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, para. 14 (4 August 2010).

<sup>133</sup> Hwang (2008), *supra* n. 96.

with "threshold questions" that may be ruled upon only after reviewing the document in question.<sup>134</sup> In certain instances, tribunals have adopted the alternative procedure discussed by the Singapore High Court, that is, the tribunal has received the documents subject to an objection in order to determine whether the objection may be upheld or whether the document must be produced to the other side.<sup>135</sup> However, of the two procedures, namely the *in camera* review of the document by the tribunal or the appointment of an expert to assist the tribunal, the article 3.8 approach is to be preferred because it minimises any risk of offending due process norms.<sup>136</sup>

#### The independence and impartiality of an expert

3.88 The only criteria which article 3.8 imposes when selecting an expert is that the candidate is "independent", "impartial" and bound to confidentiality. The term "independent" generally refers to relationships with the parties, to which it may be prudent to request an expert to provide a declaration of his or her independence from the litigants in the matter.<sup>137</sup> Arbitrators have, in the past, felt comfortable appointing the secretary to a tribunal to perform this function, demonstrating that it is not the relationship between the expert and the tribunal that is at issue.<sup>138</sup> Not all tribunals may approve of this approach. In some cases, a tribunal may wish to appoint an uninvolved third party as the expert. This is done for several reasons, including the need to engage an expert with particular linguistic capacities, technical understanding or procedural knowledge. This was the case in the *Guyana v Suriname* boundary delineation arbitration administered by the Permanent Court of Arbitration.<sup>139</sup>

<sup>134</sup> *Ibid.*, p. 145.

<sup>135</sup> See: *Jardine Lloyd Thompson Canada v Western Oil Sands Inc* [2005] AJ No. 943, para. 13, where the court noted the tribunal's directions and orders: "(a) that the Standstill Agreement be produced by Western to the Panel for inspection, following which the Panel will determine whether it meets the test of relevance and should be produced to the Underwriters." See also the decision taken by a Society of Maritime Arbitrators tribunal to review documents over which privilege had been claimed *in camera*: "Owner, thereafter, requested the production of certain documentation, some of which Charterer contended were protected under the attorney-client privilege and attorney work-product doctrine. The parties submitted extensive briefs addressing their positions and a Privilege Log identifying those documents that Charterer considered were protected. On August 24, 2009, the Panel issued its Majority Interlocutory Ruling granting some of Owner's requests and denying others. It directed Charterer to produce certain documents listed in its Privilege Log for *in camera* review by either the full panel or chairman at Charterer's option." *In the Matter of an Arbitration between Scope Navigation Inc, and Standard Tankers Bahamas Ltd*, SMAAS, Final Award, WL 5490766 (2010).

<sup>136</sup> See: *Glamis Gold v United States of America*, *supra* n. 35, Procedural Order No. 8 (31 January 2006): "Given the numerous complications raised with an *in camera* review [of documents over which privilege is raised], this possible final step in the procedure was suspended temporarily by the Tribunal..."

<sup>137</sup> "The expert should in all events be impartial and independent. He should be subject to the same conflict of interest standards as the arbitrators. Before accepting the appointment, he should likewise submit a statement of independence, as an arbitrator does." Hans van Houtte, "The Use of an Expert to Handle Document Production: IBA Rules on the Taking of Evidence (art. 3(7))", in Albert Jan van den Berg (ed.), *ICCA Congress Series No. 13* (Montreal, 2006), pp. 622, 637 (2007).

<sup>138</sup> *Dr Horst Reineccius v Bank for International Settlements*, PCA, Procedural Order No. 6, p. 1 (11 June 2002).

<sup>139</sup> *Guyana v Suriname*, UNCLOS/PCA, Procedural Order No. 1, para. 4 (18 July 2005).

*The role of an expert*

3.89 Article 3.8 does not describe the procedure for the appointment of an expert, nor does it give guidelines for that expert to follow in the discharge of his or her mandate. However, tribunals in the past have solicited comments from the parties when selecting the expert,<sup>140</sup> issued defined terms of reference to the expert and sought input on those terms<sup>141</sup> and required that the expert review the submission of each party so that adequate opportunity to be heard is given.<sup>142</sup> The expert is not to make a decision him or herself, but is rather commissioned to provide a "report" under the terms of article 3.8. If the tribunal were to outsource a decision to an expert, it may exceed its mandate by allowing procedural determinations to be made by a non-member of the tribunal who is not empowered by the parties to decide the matter. This obstacle may be overcome if the parties consent to the expert rendering a final decision.<sup>143</sup>

3.90 The content of a final report will generally include recommendations and considerations, without revealing the contents of the documents.<sup>144</sup> After receiving the report, the tribunal may determine that the expert should continue in his or her role with regard to further activities. He or she may be asked to supervise the exchange of information, review redactions that have been made to ensure compliance with the report or other activities that are required to bring the document production phase to a successful conclusion.

140 See: ICC Case No. 6497, *supra* n. 103, para. 3.62: "By its Procedural Ordinance No 3, with detailed motivation, the arbitral tribunal decided to order an independent expertise. The arbitral tribunal decided in particular 'At any point of time, if some particular difficulty appears (in particular, if some debits apparently corresponding to the credits had been transferred to other accounts of the claimant group), the expert will report to the arbitral tribunal. After having heard the parties, the arbitral tribunal will give to the expert the appropriate directions and possibly complete the present mission. Claimant is invited to confirm in writing to the arbitral tribunal whether they accept to co-operate in principle with the expert to be appointed. In the affirmative, the arbitral tribunal will appoint an expert. The parties will have a time-limit of ten days to present possibly their grounds for challenging such expert. In the negative, the arbitral tribunal will renounce to such expertise, taking such attitude of claimant in consideration for its final decision."

141 *Guyana v Suriname*, *supra* n. 139, Procedural Order No. 3, para. 2 (12 October 2005).

142 *Ibid.*, Procedural Order No. 4, para. 3 (12 October 2005).

143 Van Houtte, *supra* n. 137, p. 626. The author notes that, "However, parties who can agree in an arbitration clause that their dispute will be settled by arbitrators and not by the state court, *a fortiori* also can agree that a limited and preliminary aspect of this dispute settlement . . . will be carried out by an expert."

144 *Guyana v Suriname*, *supra* n. 139, Procedural Order No. 5 (16 February 2006). Regarding the report and the communications that may take place between an appointed expert and the tribunal generally, the question may arise whether such information is confidential, or should be exposed to the comments of the parties. A case of the Singapore High Court, *Luzon Hydro Corp (Philippines) v Transfield Philippines Inc* [2004] 4 SLR 705 considered whether the communications of a tribunal-appointed expert, which arose out of an ICC arbitration, were subject to disclosure to the parties. The expert in this matter was appointed originally with the intention that he would provide an expert report on technical matters in a manner consistent with art. 6.1. Nevertheless, it was eventually decided that he would not provide such a report, and instead rendered only administrative assistance to the tribunal. That the work of the expert was merely administrative was one of the determinative factors for the High Court in its decision that the challenge to the Tribunal's decision to maintain confidentiality over the communications should be rejected. One may consider by analogy that the same view should be applied to the expert under art. 3.8. Here it is clear that the expert is not providing evidence for the tribunal to consider in its deliberations, but is rather providing administrative or procedural assistance. In this regard, it would seem that the expert's recommendations or general assistance is a procedural matter which the tribunal may consider *in camera* without invitation to the parties for their comments.

*Failure by a party to cooperate with expert*

3.91 Failure to cooperate with a tribunal-appointed expert on issues of evidence may constitute grounds for drawing an adverse inference against the non-complying party. This was the case in an ICC arbitration where a party had resisted the disclosure of documents based upon its opinion that they concerned, "business secrets over matters which are not in dispute." The tribunal appointed an expert to review the records in question after consulting the parties. When the resisting party challenged the expert's mandate the tribunal regarded such behaviour as obstructionist and made its position clear in a following procedural order:

The arbitral tribunal considers therefore that, by their letter claimant now refuses to co-operate with the expertise, as decided in Ordinance No. 3. Consequently, such expertise will not take place. The arbitral tribunal will take account of these circumstances in its final Award.

Claimant should be given a last possibility to accept to co-operate with the expertise as decided in Procedural Ordinance No. 3. Such a decision may be notified to the other party and to the arbitrators latest [within one week]. After such date, refusal of claimant will be deemed to be final.<sup>145</sup>

3.92 In such circumstances where a party has failed to cooperate with an expert by, for example, either criticising an expert's credentials after the opportunity for vetting his or her selection has passed, or by questioning his or her instructions, a tribunal may decide that such obstructionist behaviour warrants the drawing of an adverse inference on the merits or should be considered in regard to the determination of costs.

**Court assistance in taking documentary evidence**

**Article 3.9 2010 IBA Rules:** If a Party wishes to obtain the production of Documents from a person or organization 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, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies.

**Related Rule**

Article 27 UNCITRAL Model Law:

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.

145 ICC Case No. 6497, *supra* n. 103, p. 78.

## General discussion

3.93 The taking of evidence in international arbitration is not necessarily confined to the boundaries of the arbitration nor is it restricted only to the parties involved in the dispute before an arbitral tribunal. There are instances where a party may seek to utilise local courts to obtain documents from third parties.<sup>146</sup> To the extent that these documents are prima facie relevant and even necessary to the arbitration proceedings, a tribunal may endorse such actions and/or assist the party seeking to obtain the evidence. In such situations, questions may arise over the appropriateness of a tribunal's involvement in evidence taking outside of the arbitration, and also the control that a tribunal may exercise over such activities.<sup>147</sup>

3.94 Under the provisions of this article, a party may petition a tribunal to assist it in the taking of evidence from a third party if it meets a number of threshold requirements discussed below.<sup>148</sup> As is noted in this section, article 3.9 is the evidentiary rule that complements *lex arbitri* provisions, such as article 27 of the Model Law, or other national laws that authorise a court to render assistance to arbitrators, or parties in securing documentary evidence. While generally seen as a rule which empowers a tribunal to act, article 3.9 has also been interpreted as having a restrictive function in limiting a party's freedom to approach a court for assistance in obtaining evidence, without first seeking the approval of the tribunal. The current version of this rule replaces the text found in the 1999 IBA Rules that contained less detail.<sup>149</sup> Finally, it should also be noted that article 3.9 is concerned with the taking of evidence from non-parties and thus does not apply to a tribunal's right to petition a court for assistance in taking evidence from a party in the arbitration.

146 See: *Mesa Power Group LLC v Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 3, §63 (2013): "The principal submission of the Respondent is that the Tribunal should reject the Section 1782 documents, essentially because they have been procured without the authorization of the Tribunal through US court proceedings in which the Respondent was not involved. The Tribunal has sympathy with some of the Respondent's concerns, but is unable to agree with the position as it has articulated it here." However, "if the Claimant wishes to initiate new proceedings for gathering evidence or to make new requests for further evidence in the existing proceedings, it shall seek the authorization of this Tribunal in advance." *Ibid.*, §68.

147 See: *Euroflon Tekniska Produkter AB v Flexiboy's I Motala AB*, *supra*, n. 124.

148 See: *The Lao People's Democratic Republic v Sanum Investments Ltd* [2013] SGHC 186, Singapore High Court (2013), in which subpoenas were issued for third parties in arbitration to testify and to produce documents to the arbitral tribunal. The tribunal stated that "[a]fter the first hearing before me on . . . I informed counsel that I was minded to grant the orders. I then asked counsel to agree on rewording the subpoenas to reflect the suggested amendments made by me." *Ibid.*, p. 16, §30.

149 Article 3.8, 1999 IBA Rules: "If a Party wishes to obtain the production of documents from a person or organization 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 Party shall identify the documents in sufficient detail and state why such documents are relevant and material to the outcome of the case. 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." Both the 1999 art. 3.8 and the present 3.9, provide a procedural link between the rules of the arbitration and national laws empowering courts to assist tribunals, and parties, to obtain evidence. In this respect, the rules of the arbitration are to be seen as congruent with such laws. This point was made by an ICDR tribunal in response to a party's complaint that it could not subpoena evidence from a third-party under the arbitral rules. "Respondent also argues that it could not under the Rules get a subpoena for the information on the computer server. But that ignores the statutory basis for subpoenaing that information. Respondent was not sufficiently diligent in pursuing the information it says it needs." ICDR Case No. 50117, Award of Arbitrator, para. 6 (2011) (unpublished).

## Threshold issues regarding court involvement

3.95 Historically, international tribunals have been reluctant to involve local courts in the taking of evidence. In this respect, article 3.9 is often seen as a measure of last resort.<sup>150</sup> In line with this general reluctance, article 3.9 requires a party to approach a tribunal only after it has shown that it is unable to secure the evidence itself.<sup>151</sup>

3.96 Therefore one may ask what steps must a party take to secure evidence itself. As will be discussed below, whether a party may approach a court unilaterally without prior approval from the tribunal to secure evidence is controversial. Therefore, where article 3.9 refers to a third party from whom the requesting party "cannot obtain the Documents on its own"; the safest interpretation would be that this language refers to an inability to obtain voluntary production of the evidence from that third party.<sup>152</sup> Thus, a party must first satisfy the tribunal that it indeed cannot obtain voluntary compliance with a request for documents from a non-party before it can succeed on a petition under article 3.9.<sup>153</sup>

3.97 While reasons why a party may not obtain documents from a non-party to the proceedings may come down to the simple unwillingness to get involved, there may also be legal barriers to cooperation. If so, as was noted by a tribunal in an ICC arbitration seated in Geneva, a tribunal will have to determine whether a court is capable of rendering the needed assistance.<sup>154</sup> As will be discussed below, the assistance which courts are permitted to provide to arbitral tribunals varies widely between judicial systems, and in this respect reference to relevant local laws is necessary.

3.98 Once it is shown that a party is unable to obtain the documents of its own efforts, and a court is available to provide the needed assistance, a tribunal must be further convinced that the requested evidence could be a subject of a disclosure order within the arbitration. This is made plain by the 2010 version of this article, where it is stated that the standards in article 3.3 and article 9 apply to a party's request for assistance.<sup>155</sup> Thus, any

150 *Methanex Corp v United States of America*, *supra* n. 7, Final Award, Part II, chapter H, para. 25 (3 August 2005).

151 Moreover, as noted above in regard to art. 3.3, it is generally required that a party obtain documents on their own to the extent that access is reasonably open to them.

152 As will be noted below, however, there is authority to suggest that this language would encompass efforts to gain the documents through legal process. See: *Methanex Corp v United States of America*, *supra* n. 7.

153 *Ibid.*, *Methanex Corp v United States of America*, Orders on Requests to Gather Additional Evidence and to Reconsider First Partial Award, para. 2 (16 March 2004). The tribunal noted that Methanex had not satisfied the prerequisites for obtaining assistance in petitioning a court under art. 3.9 because it had not shown that it could not obtain the documents on its own. This was so, as it appeared that there was a reasonable chance that the witnesses and documents which Methanex had petitioned for help in securing would be produced by the adverse party during the proceedings.

154 As was noted in regard to Swiss law by the tribunal in ICC Case No. 6401: "It should be mentioned that Swiss law and practice impose a duty of confidentiality to the members of certain profession, that authorize them to refuse to testify. It is generally accepted that the same duty authorizes them to refuse to produce documents." The tribunal would then go on to note that courts in Geneva may have the power to lift such confidentiality. ICC Case No. 6401, Procedural Order, Dominique Hascher (ed.), *Collection of Procedural Decisions in ICC Arbitration 1993-1996*, p. 156 (2nd edition, 1998).

155 English courts have also held that a subpoena issued with the permission of a tribunal for a witness to attend a hearing and produce documents should be narrowly construed, similar to the manner in which document disclosure occurs in arbitration. In considering this issue one court noted in particular that this view was justified given the limited document production procedures in international arbitration: "One should not necessarily expect to find complete symmetry between the documentary procedures that apply in arbitral

request for the disclosure of evidence must meet the criteria of article 3.3 of the IBA Rules, which is to say, *inter alia*, that it is narrow and specific and seeks documents relevant to the case and material to its outcome.<sup>156</sup> Moreover, in addition to this, the petitioning party would also have to demonstrate that the person or corporation to whom the petition would be aimed is in a position to divulge the information (e.g., that it has the documents in their possession, custody, control).

3.99 Given the complications that arise when a petition to a court for assistance is involved, a tribunal may determine to postpone a decision on a request for court assistance until it is certain that the evidence that is sought is sufficiently relevant to a party's case and material to the outcome of the matter.<sup>157</sup>

#### The scope of article 3.9

3.100 The text of article 3.9 authorises the arbitral tribunal to take "whatever steps are legally available to obtain the requested Documents", or in its place, authorise a party to take such measures itself. The term "legally available" steps is generally seen as a direct reference to utilising national or domestic laws that afford a tribunal the right to issue subpoenas or otherwise petition a local court for assistance in taking evidence. The options may be wider.

3.101 When confronted with the scenario where a non-party who bears a relationship with a party to the arbitration is in possession of the relevant documentary evidence, a tribunal may consider exercising its authority to assist in obtaining disclosure of the documents. A tribunal may, for instance, order a party to the arbitration who is aware of the location or type of documents in possession of a third party to make that information known.<sup>158</sup> Or to the extent that it believes a party to the arbitration is capable of obtaining the documents, a tribunal may issue a procedural order requesting the party to take reasonable steps to obtain and disclose the documents.<sup>159</sup> Furthermore, to the extent that the tribunal believes it would be effective, and would not violate any confidentiality obligations, arbitrators may send an inquiry directly to the third party seeking disclosure of the evidence.<sup>160</sup>

proceedings and those that apply to proceedings in court." *Tajik Aluminium Plant v Hydro Aluminium AS* [2005] EWCA Civ 1218, para. 26.

156 In denying the petition before it, the ICC tribunal seated in Switzerland noted, "The Request is not a request for production of documents within the meaning of Swiss law and practice. It aims at allowing the Defendants to make their own search through the files and corporate documents of a certain number of companies belonging to third parties, in order to discover whether they contain evidence to support the Defendants' case." ICC Case No. 6401, *supra* n. 154, p. 159.

157 As an example, an *ad hoc* arbitral tribunal seated in Canada noted that before issuing an order allowing a party to petition a local court for assistance in obtaining discovery, it considered the relevance of the witnesses that were to be summoned, their role in the factual issues before the tribunal, and the necessity of hearing them. *Jardine Lloyd Thompson Canada Inc v SJO Catlin* [2006] AJ No. 32.

158 *Waste Management v Mexico*, *supra* n. 66, Final Award, para 30: Ordering claimant to obtain documents in possession of a third-party.

159 See for example: the actions taken by an arbitrator under the AAA rules cited to in *Life Receivables Trust v Syndicate 102 at Lloyd's of London*, 549 F.3d, p. 210 (2d Cir. 2008).

160 See: where the tribunal in *Aguas del Tunari v Bolivia* wrote to the Netherlands Ministry of Foreign Affairs to obtain information concerning the interpretation of the relevant treaty. *Supra* n. 50, Final Award. See also: the procedural rule adopted by the tribunal in ICC Case No. 12761 affording itself wide authority to request documents from third-parties: "On its own authority or on the petition of a party, the Arbitral Tribunal may request

3.102 If it is not possible to obtain the documents in question without initiating a legal process, arbitrators may consider national laws that authorise a local court to assist a tribunal in the taking of evidence or allow it to issue subpoenas itself. In this regard, laws like article 27 of the UNCITRAL Model Law countenance court assistance to a tribunal in the taking of evidence.<sup>161</sup> However, the level of assistance available under national laws similar to article 27 will vary according to jurisdiction. Some courts may interpret their domestic legislation, which is similar to article 27, as not permitting court assistance to secure documentary evidence,<sup>162</sup> while others may make provision for only limited assistance, expressly prohibiting pre-hearing disclosure to be ordered on behalf of an arbitral tribunal,<sup>163</sup> whereas others have accepted a more liberal interpretation.<sup>164</sup>

3.103 In the United States, section 7 of the Federal Arbitration Act, the US provision that roughly corresponds in scope to article 27, has received varying interpretations by different Federal Circuits as to the level of evidentiary assistance may be given to an arbitral tribunal. Section 7 provides that a tribunal may issue a subpoena to an individual to appear before them and, "in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case". As to the breadth of possible disclosure or discovery that may be ordered pursuant to this provision, some Federal Circuits adopt the position that this subpoena power includes the ability to request pre-hearing disclosure of documents. Other circuits have denied wide-ranging pre-hearing discovery prior to a hearing.<sup>165</sup>

the relevant documents which are in the possession of third parties joined to this arbitral proceeding. However, if the third party recipient of such application does not respond or refuses to cooperate, the Arbitral Tribunal may proceed without said third party or the required documents." ICC Case No. 12761, Procedural Order of 12 March 2004, *ICC Bulletin, 2010 Special Supplement: Decisions on ICC Arbitration Procedure*, p. 73.

161 Article 27, UNCITRAL Model Law.

162 See: the discussion by the tribunal in ICC Case No. 6401 concerning the non-availability of assistance in obtaining document disclosure from a third-party from local courts in Switzerland. ICC Case No. 6401, *supra* n. 154.

163 As an example of the English view, see: *BNP Paribas v Deloitte & Touche*, *supra* n. 56, p. 236: "This clause [art. 27] is dealing with the taking of evidence and not the disclosure process. The taking of evidence is assisted by the issuing of a subpoena to produce, for introduction into the evidence, particular documents. Thus art. 43 gives effect to this Article. There is nothing in the model law which suggests that the court should assist with the process of disclosure." Hong Kong courts have also adopted this view in the past. See: *Vibroflotation AG v Express Builders Co* [1996] 2(3) MALQR in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration*, Vol. XX, p. 287 (1995).

164 In Alberta, Canada, an opposite interpretation of art. 27 was arrived at in *Jardine Lloyd Thompson v Catlin*, *supra* n. 157, pp. 40-41: "The ordinary and plain meaning of evidence includes evidence gathered by way of discovery. In Alberta such evidence may be read in at the trial or otherwise used in pre-trial applications. If the drafters of art. 27 had intended that assistance would only be given for taking evidence at the hearing, they could have expressly said so. This distinction was not made and in the context of an arbitration proceeding conducted in Alberta, the word 'evidence' must be given its ordinary meaning which includes all evidence whether pre-hearing or at the hearing itself. Article 27 should be interpreted in the light of its objects and purposes. The obvious purpose of art. 27 is to facilitate the tribunal in its search for the truth. I do not conceive that a tribunal has any less desire for, or need for, the truth to reach a fair and proper result than does a court of law."

165 *Life Receivables v Syndicate 102*, *supra* n. 159, p. 213. See also the following excerpt from Report of The International Commercial Disputes Committee of the Association of the Bar of the City of New York summarising the position of US law on this issue: "Two main issues have confronted courts under § 7. The first issue is whether § 7 authorizes arbitrators to compel pre-hearing document production or testimony from non-parties. There is a conflict regarding this issue among the circuits and between federal and state courts in New York. The Second and Third Circuits have held that § 7 does not authorize arbitrators to order the pre-hearing production of documents or testimony from non-parties; rather, non-parties may be ordered to provide documents and testimony only at a

3.104 As noted in article 3.9, a tribunal may simply authorise a party to pursue court action to obtain documents on their own – which may mean permitting a party to issue a subpoena or apply to a court for assistance. In so doing, a tribunal may issue a written directive recording its acquiescence to such an action. Nevertheless, the extent of a tribunal's actual involvement in subpoenaing documents or otherwise petitioning a court to order disclosure of them may depend on the requirements of the relevant domestic law. In the instance of section 7 of the Federal Arbitration Act, the tribunal must sign the subpoena, whereas a similar provision in the English Arbitration Act, section 43, provides that a party itself, with the acquiescence of the tribunal, may issue the subpoena.<sup>166</sup> Article 27 does not make specific reference to the procedure to be followed by the tribunal, but the practice in some jurisdictions which have enacted the Model Law is that a party, following a procedural order by the tribunal authorising it to do so, may pursue the subpoena on its own.<sup>167</sup> For reasons owing to expediency, cost, and need to maintain its neutrality, a tribunal will likely wish to limit its actual involvement in the process to as little as possible.

3.105 Two additional issues regarding the scope of article 3.9 are worth further consideration. First, the language of the rule should not be interpreted as implying a duty upon a tribunal to pursue evidence in the possession of third parties. Both domestic courts and international tribunals have recognised that irrespective of the claimed (or even proven) probity of a piece of evidence, the decision to order, or to authorise, further attempts at disclosure through the courts is within the tribunal's discretion and it may decline to take further measures if it so chooses.<sup>168</sup> Secondly, the question has arisen as to whether article 3.9 would prohibit an attempt to pursue assistance from a court without the consultation or approval of the tribunal. That issue is discussed below.

hearing before one or more of the arbitrators. The Fourth Circuit has suggested that a federal court may compel a non-party to comply with an arbitrator's subpoena for prehearing document production or testimony upon a showing of 'special need or hardship'. In New York, the Appellate Division for the First Department, purporting to follow the Fourth Circuit, has held that, under § 7, courts may require pre-hearing document production and testimony from non-parties in cases of 'special need.' The Sixth and Eighth Circuits have concluded that arbitrators are authorized by § 7 to issue orders requiring pre-hearing production of documents from non-parties, but have not addressed the question whether pre-hearing testimony is also permitted." *American Review of International Arbitration*, Vol. 20, No. 2, pp. 422–423.

166 Title 9 section 7 of the US Code, reads in part: "Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court." Section 43 of the English Arbitration Act reads (in part): "A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence. This may only be done with the permission of the tribunal or the agreement of the other parties." Where the cooperation of a tribunal with a party's efforts may be implied from the actions of the arbitrators, Hong Kong courts have tended to waive the requirement of formal approval. *Vibroflotation v Express Builders*, *supra* n. 163.

167 *Jardine Lloyd Thompson v Western Oil Sands*, *supra* n. 135.

168 As noted by the *ad hoc* committee in the *Wena Hotels v Egypt* ICSID annulment application: "The Applicant tries to turn the discretionary nature of the rules on evidence to their contrary when it asserts the existence of an obligation on the tribunal to call for evidence on any item critical to the outcome of the dispute . . . The Applicant fails to demonstrate the existence of a fundamental rule of procedure which would have put the tribunal under an obligation to call for further evidence concerning Mr. Kandil [an alleged witness]." *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, para. 73 (2002). See also: the comments to art. 3.2.

### *A tribunal's authority over ancillary evidence gathering*

3.106 The tribunal is vested with authority over evidentiary procedure within the boundaries of the *lex arbitri* and the agreement to arbitrate. In light of this basic presumption, article 3.9 (and its predecessor article 3.8 of the 1999 Rules) has been interpreted to restrict a party's right to unilaterally seek assistance from a court without permission from the tribunal. This issue comes to the fore when a party seeks to utilise domestic laws that allow it to seek assistance directly from a court in securing evidence from a relevant party.

3.107 One of the most wide-ranging laws permitting a court to assist a party in gathering evidence for potential use in international arbitration is the often discussed section 1782 of Title 28 of the *United States Code*.<sup>169</sup> This provision permits federal courts in the United States to potentially order wide-ranging US-style discovery on behalf of a party to an international arbitration. To the extent that this law or other similar laws permit a party to petition a court on its own, the question has arisen in the past whether article 3.9 requires a party to first seek approval from a tribunal before approaching local courts for assistance.<sup>170</sup>

3.108 Article 3.8 of the 1999 version of the Rules made no specific reference to unilateral attempts by a party to approach a court for the purpose of obtaining evidence, and in fact stated that the rule was to apply where a party needed assistance in obtaining evidence it could not obtain on its own (the same language appears in the new article 3.9). However, article 3.9 in the 2010 Rules now states that, in addition to petitioning a tribunal for help in obtaining court-assisted disclosure, a party "may . . . seek leave from the Arbitral Tribunal to take such steps itself". In a similar vein, article 3.9 states in its final sentence that "The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate . . ." The additional wording appears to presuppose that a party to the arbitration may not act without the prior acquiescence of the tribunal.<sup>171</sup>

169 28 USC § 1782(a): "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, including criminal investigations conducted before formal accusation. 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. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."

170 See: *Re the Republic of Ecuador*, No. C 11-80171 CRB, 2011 WL 4434816, at \*2 (N.D. Cal. 23 September 2011): "A district court may grant an application under 28 U.S.C. § 1782 where (1) the person from whom discovery is sought resides or is found in the district of the district court to which the application is made; (2) the discovery is for use in a foreign tribunal; and (3) the application is made by a foreign or international tribunal or "any interested person." 28 U.S.C. § 1782. Respondents do not dispute that these statutory requirements have been met." See also: *Re Broadsheet LLC*, No. 11-CV-02436-PAB-KMT, 2011 WL 4949864, at \*2 (D. Colo. Oct. 18, 2011): The Court also "may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court . . . abroad to U.S. federal-court judicial assistance. [ . . . ] Finally, although the subpoenas request many categories of documents, the Court does not find that on their face the requests are "unduly intrusive or burdensome."

171 The official comments of the Review Subcommittee state that: "Ultimate oversight and control over this process should remain with the arbitral tribunal. However, there may be circumstances under which a party is

3.109 In *Methanex v United States of America*, an UNCITRAL arbitration, the investor-party announced its intention to seek court assistance in securing documents via section 1782, without first obtaining the permission of the tribunal. In this instance, it was clear that the investor-party interpreted article 3.8 of the 1999 Rules as not requiring a party to seek prior approval from a tribunal before unilaterally petitioning a court for assistance.<sup>172</sup> In that case the tribunal agreed with the investor-party's understanding of article 3.8, adopting the view that the qualifying language in article 3.8 "from whom the Party cannot obtain the Documents on its own", assumed that a party was free on its own to file an application such as the one under section 1782.<sup>173</sup>

3.110 The *Methanex* interpretation was not followed in a federal district court decision that interpreted article 3.8 of the 1999 Rules in regard to a petition filed in connection with the ICSID arbitration, *Caratube v Republic of Kazakhstan*. In this case the investor-party initiated a parallel section 1782 application to obtain further evidence from the state-party.<sup>174</sup> The tribunal was presented with the investor's decision to begin the section 1782 application *post facto*, when it received the state-party's request to order the investor-party to desist from its application to the court. The tribunal declined to do so, but noted that "whilst the tribunal might have been minded to find that its prior consent should have been sought by Claimant before the presentation of its Section 1782 petition, the Tribunal concludes that it is not necessary for it to order Claimant to cease and desist from the US action."<sup>175</sup>

3.111 The matter was then heard by the US District Court for the District of Columbia. In its decision denying the application, the District Court noted that *Caratube's* unilateral petition had "side-stepped" article 3.8, thus undermining "the Tribunal's control over the discovery process."<sup>176</sup> In a footnote to the decision, the court further interpreted article 3.8 of the 1999 version of the Rules:

Although *Caratube* does not make this argument in its briefs, it previously contended in a letter to the Tribunal that the IBA Rules anticipate that parties may seek unilateral discovery via a section 1782 petition. Specifically it noted that IBA Rule 3.8 applies only to discovery from entities 'from whom the party cannot obtain documents on its own', and asserted that this text anticipates that parties may file section 1782 petitions to obtain such discovery. The Court disagrees; the better reading, given the context of this rule, is that the sentence refers to efforts to obtain documents without legal process.<sup>177</sup>

better positioned to undertake such steps, including, for example, due to presence in the country in question." *Commentary on the revised text of the 2010 IBA Rules*, *supra* n. 61, p. 11.

172 *Methanex v United States of America*, *supra* n. 7, Final Award II, chapter G, para. 21.

173 *Ibid.*

174 *Re application of Caratube International Oil Co*, 730 F. Supp. 2d 101, Case No. 10-0285 (US Dist. D.C. 2010).

175 *Ibid.*, p. 104.

176 *Ibid.*, p. 108.

177 *Ibid.* See also: the decision by the Illinois Court of Appeals, where the court was seized of the issue, *inter alia*, of whether it ought to approve a petition for discovery by a party who had a dual role as a litigant in a pending ICC arbitration and in state court proceedings. In consideration of whether it should order the discovery, the court specifically took note that it would be tantamount essentially to side stepping the rulings of the arbitral tribunal: "In this case, if the circuit court permitted discovery in the declaratory judgment action prior to the resolution of the Underlying Action [the ICC Arbitration], plaintiffs would then be allowed to 'lay the groundwork' for both a later denial of coverage and circumvent the discovery rulings made in the Underlying Action [the ICC Arbitration]. This result unfairly would benefit the dual-role Reinsurers participating both as plaintiffs in this case and as Underlying Claimants." *Certain Underwriters at Lloyd's London et al. v Boeing et al.*, *supra* n. 44, p. 50. See also:

3.112 According to the *Caratube* court, therefore, the reference in article 3.8 of the 1999 Rules to documentary evidence which a party cannot "obtain . . . on its own", is best understood as referring to documents which cannot be obtained by means other than legal process (e.g., voluntary production). This is, of course, a more restrictive ruling than that given by the *Methanex* tribunal.

3.113 However, it is arguably more consistent with the 2010 version of this article. As article 3.9 states that a party may "seek leave from the Arbitral Tribunal to take such steps itself", or "The Arbitral Tribunal shall decide on this request and . . . authorize the requesting Party to take . . . such steps", this language presumes that any attempt by a party to gain evidence through the courts (e.g., through section 1782) should fall under the authority of the tribunal.<sup>178</sup>

#### *Treatment of evidence obtained by unauthorised ancillary legal process*

3.114 The tribunal in *Caratube* considered how it might treat evidence obtained through a non-authorised ancillary legal process. The tribunal commented that it would have to consider whether any evidence could be admitted "having regard to its obligation to accord procedural fairness . . .", particularly the need to allow the opposing party to

the decision of the Singapore High Court in relation to a request by a party to a SIAC arbitration to unilaterally subpoena a witness to appear at an arbitral hearing. Here the court also noted that to act on the petition would in fact side-step the tribunal's authority: "In my view, from the aforementioned express provisions under Procedural Order No. 1, IBA Rules and the correspondence between both the parties and the Arbitrator, it was clear that the parties had contractually agreed on the procedure to be adopted with regard to the calling of witnesses. These were agreed procedural terms by which both parties entered in good faith, and to circumvent and sidestep these directions seemed to obviate the very purpose of entering into such detailed directions with the Arbitrator in the first place." Michael Hwang and Zihua Su, "ALC v ALF, SGHC Case No. 231 (2010)", *A Contribution by the IBA Board of Reporters*, para. 29. For an opposite result, however, see *Re Ecuador*, where in 2011 a US district court considered a request for assistance under s. 1782, to obtain documents held by an expert retained by a party to an UNCITRAL arbitration. The court found in this instance that rule 3.9 permitted a party to take measures on its own to obtain documents via a s. 1782 application. The relevant portion of the court's reasoning is as follows: "There is no provision in the UNCITRAL Rules for production of documents from a non-party. Article 3, of the Rules adopted by the 'Members of the IBA [International Bar Association] Rules of Evidence Review Subcommittee,' which the tribunal may consult on an advisory basis, only applies to the process of obtaining documents from a non-party 'from whom the Party cannot obtain the Documents on its own . . .', and the party may only ask the Tribunal to 'take whatever steps are legally available'. Ecuador can obtain documents from Dr. Hinchee by means of § 1782. Thus, on its face this rule is not available to Ecuador to obtain documents from Dr. Hinchee." *Re Ecuador*, *supra* n. 78. Therefore, the court reasoned that this rule does not prevent a party from taking measures on its "own", such as lodging an application under s. 1782, to obtain documents (the opposite conclusion to what was reached in *Caratube*). Further, the court took note of the above mentioned position adopted in *Methanex* to find that the arbitral tribunal would not consider that a s. 1782 application should first be approved by the tribunal. In the view of the court, the *Methanex* precedent indicated that it was the inclination of the arbitrators to permit the courts in the US to determine the propriety of such applications.

178 In the case *Re Rhodiantyl*, a US district court denied an application under s. 1782 even where the petitioning party argued that the evidence it was seeking had been ordered by the tribunal to be disclosed, and was being withheld by the adverse party in breach of its procedural duty to observe the tribunal's procedural order directing disclosure. The district court still denied the application, noting that the tribunal had the necessary authority to compel production or otherwise draw an inference, because the party from whom the discovery was sought was a party to the arbitration: "While applicants allege that respondents have refused to comply with discovery orders of the Arbitral Tribunal, the applicants also have an effective remedy for such alleged violations by seeking an adverse inference from the Tribunal. And indeed, applicants have followed this route, and requested such inference. The court finds that the requested information is not "unobtainable absent § 1782 aid." The clear inference to be drawn by the court's view is that the tribunal's authority over the process was sufficient for the petitioning party to obtain procedural relief for its complaint, and thus, unless the tribunal sought the s. 1782 assistance, the court was not prepared to assist the party seeking the documents. *Rhodiantyl*, *supra* n. 56, p. 52.

respond to such documents and produce counter-evidence.<sup>179</sup> This comment pinpoints two key considerations: procedural economy and fairness to the opposing party.<sup>180</sup> These grounds are both stated within the revised article 9.2(g) as a basis for excluding documents from a procedure, empowering a tribunal to refuse the fruits of the ancillary legal process if a tribunal regards such an attempt as a violation of its authority under article 3.9 (see Chapter 9). Moreover, a tribunal may under article 3.1 set time frames. Therefore, a failure to file evidence obtained through court assistance within the procedural timetable may be grounds for exclusion of those documents.<sup>181</sup> Nevertheless, even in this respect a tribunal would most likely consider the potential probative value of such evidence before ruling to exclude it.<sup>182</sup>

### General powers of a tribunal to order disclosure

**Article 3.10 2010 IBA Rules:** At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.

Other Statements of the Rule  
Article 27(3) UNCITRAL  
Rules:

At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

<sup>179</sup> See: generally comments to art. 3.11.

<sup>180</sup> See: generally comments to art. 9.2(g).

<sup>181</sup> See: the example of an UNCITRAL tribunal sitting in Switzerland, which ordered in relation to all documents obtained through an ancillary discovery process under s. 1782, that such evidence, "would have to be produced according to the procedural timetable, as provided by Procedural Order No. 2", as reported in *CEH Lempa v Nejava Power*, *supra* n. 9. See also: the procedural rule adopted by the tribunal in ICC Case No. 12279 where the tribunal informed the parties of their obligation to submit any evidence obtained from third-parties by use of subpoenas prior to any hearing. "The Parties acknowledge the possibility of subpoenas being necessary to obtain documents from third parties which are not parties to the present arbitration. The Parties should endeavor to obtain such documents in advance of the hearing, so that documents are available prior to written submissions and do not cause unnecessary delay." ICC Case No. 12279, *supra* n. 66.

<sup>182</sup> It may also be that a tribunal regards unilateral petitions to local courts in violation of art. 3.9 to be in "bad faith", thus invoking the powers granted to arbitrators in art. 9.7 to award the costs of the arbitration against a party it believes "has failed to conduct itself in good faith in the taking of evidence". Other tribunals have adopted similar approaches but have left the door open to challenges to the admissibility of such documents, referencing objections based on article 9.2(g) of the IBA Rules. "[T]he Tribunal does not believe that it should summarily reject – in advance of their filing – all the Section 1782 documents that the Claimant may one day submit, for the sole reason that they have been procured through court proceedings. Once the documents are before the Tribunal, the Respondent will be able to object to them on the basis of the IBA Rules on the Taking of Evidence or any other applicable rules of arbitral procedure . . . Finally, the Tribunal agrees with the Respondent's request that further efforts by the Claimant to obtain evidence on Section 1782 be pursued exclusively under the supervision of the Tribunal." Charles H. Brower II, *Mesa Power Group, LLC v Camada*, Procedural Order No. 3, High Court, 28 March 2011, A contribution by the ITA Board of Reporters, (Kluwer Law International).

### General discussion

**3.115** The principle aim of article 3.10 is to empower the tribunal to initiate requests for document production of its own accord.<sup>183</sup> Under article 3.10 the arbitral tribunal's best efforts to procure or obtain documentary evidence from a non-party, or (3) itself take steps it deems appropriate to obtain documents from persons or organisations that are not a party to the proceedings. The earlier version of this article, article 3.9 of the 1999 version of the Rules, merely authorised tribunals to request a party to produce documents that were deemed relevant and material; however, non-parties and related entities were not addressed.

**3.116** The tribunal's powers in this article should be distinguished from that set forth in the preceding article 3.9 which also grants the tribunal the right to petition a court for assistance in obtaining production of documents. Whereas article 3.9 is directed towards obtaining documentary evidence from third parties based upon a party's request for production, article 3.10 empowers a tribunal of its own initiative to seek to obtain evidence from one of the parties presently before them in the arbitration or to take appropriate measures to obtain documents from a third-party, which may include seeking court assistance.<sup>184</sup>

**3.117** Under subparagraph (ii), a tribunal may also request a party to use its best efforts (including ancillary legal process) to obtain documents. Presumably a tribunal would direct a request to a party only if it felt comfortable with the burden such a request would impose (see comments to article 9.2(c)).

<sup>183</sup> See: *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 1, §16.4 (2015): "The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2)." See also: *South American Silver Ltd v The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 2, §19 (2014): "Section 6.1 of Procedural Order No. 1 provides that the Tribunal may use as a guideline the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "IBA Rules") . . .". See also: *Cortec Mining Kenya Ltd, Cortec (Pty) Ltd and Stirling Capital Ltd v Republic of Kenya*, ICSID Case No. ARB/15/29, Procedural Order No. 1 (2016), §15.10: "The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2). In that case, the documents shall be submitted to the other Party and to the Tribunal in accordance with §16 below and shall be deemed on record." See also: *David Aven et al. v The Republic of Costa Rica*, Arbitration Proceeding Under Chapter 10 of the Dominican Republic-Central America-United States Free Trade Agreement and the UNCITRAL Arbitration Rules (2010) (UNCT/15/3), Procedural Order No 1 (2015), §15.4: "The Tribunal may call upon the parties to produce documents or other evidence within such a period as the tribunal shall determine."

<sup>184</sup> See: *X. (International) v A. (Switzerland)*, 4A\_596/2012, a civil appeal from an International Chamber of Commerce (ICC) Award filed before the First Civil law Court of the Swiss Federal Tribunal. The Swiss Federal Tribunal stated that "in the Procedural Orders under appeal, the Arbitral Tribunal ordered the production of a document under the control of the Appellant. In doing so, it relied on Art. 20 (4) of the rules of arbitration of the ICC (hereafter: the ICC Rules) and on Art. 3 (10) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration." On adverse inference, the Swiss Federal Tribunal stated that "[i]f a party fails to produce a pertinent document without satisfactory reasons after the other party requested its production or when it was ordered by the Arbitral Tribunal and has not objected in due time, the Arbitral Tribunal may infer according to Art. 9 (5) of the IBA Rules that such document would be adverse to the interests of that party." Finally, the Swiss Federal Tribunal stated that the IBA Rules are exclusively procedural in nature and not substantive, and, "consequently, it is not a decision that can be appealed within the meaning of Art. 77 BGG." Because the production of evidence was not a matter capable of appeal, the civil appeal before the Swiss Federal Tribunal was rejected.