Regeln gelten müssten. Der Investor stehe regelmäßig einem Staat gegenüber, so dass Grundsätze öffentlichen Rechts herangezogen werden müssten. Danach seien Einreden gegen die Zulässigkeit eines Investitionsrechtsstreits etwa aus *lis pendens* oder *res iudicata* in jedem Stadium des Verfahrens und ggf. auch *ex officio* vom Schiedsgericht zu berücksichtigen bzw. zu ermitteln. Dies ist nicht überzeugend. Es würde ein Schiedsgericht zwingen, unabhängig vom Parteivortrag den Streitstoff, die Klageanträge und Parteien eines anderweitig anhängig gemachten oder anhängig gewesenen Verfahrens zu überprüfen. Die Aufgabe der Voraussetzung identischer Parteien für das Vorliegen von *res iudicata* bei Investitionsschutzverfahren würde zu Rechtsunsicherheit und Komplizierung von Prozessen führen, das vom Römischen Recht[37] entwickelte und bewährte Rechtsinstitut entwerten[38].

Auch die Einsetzung eines internationalen Oberschiedsgerichts[39] zur Vermeidung divergierender Entscheidungen wäre als Antwort auf diesen ungewöhnlichen Fall die falsche Medizin. Ein solches Oberschiedsgericht wäre dem Zugriff nationaler Interessen ausgesetzt und würde letztlich zu einem die Rechtsprechung verzögernden Instanzentzug führen. Ein Oberschiedsgericht stünde vor der selben Entscheidungslage wie etwa der *SVEA Court of Appeal*. Im übrigen bedeutet Rechtsschutz für Auslandsinvestitionen nicht nur, dass entsprechende Gesetze erlassen und internationale Abkommen geschlossen werden, sondern auch, dass der im konkreten Einzelfall durch ein Schiedsgericht gewährte Rechtsschutz von der internationalen Rechtsgemeinschaft respektiert wird. Materiell ist auf die klaren vom Ständigen Gerichtshof in Sachen *Factory at Chorzów* entwickelten Grundsätze zu verweisen. Auf diese kann im Interesse der Rechtssicherheit beim Schutz von Auslandsinvestitionen nicht verzichtet werden.

37) *Ulpian, „res iudicata pro veritate accipitur"*; *Gaius*, Institutiones III, 180, 181 und IV, 160 ff.; *Fänge*, in: Alternativkommentar zur ZPO, § 322, Rdnr. 2; *Macer* D 42, 1, 63: *„Res inter alios iudicatas aliis non praeiudicare (Saepe constitutum est)"*; *Meier-Mali*, Römisches Recht, 2. Auflage, S. 214; *Menner*, Julian und die Entwicklung der Exceptio rei judicate, in: Abonis Bona Discere, Festgabe für Janos Zlinszky zum 70. Geburtstag, Herausgeber: *Peter/Zsabo*, 1998, S. 119 ff.

38) Die Möglichkeit paralleler Prozesse auf der Basis verschiedener Investitionsschutzabkommen könnte dadurch vermieden werden, dass die Vertragspartner der Investitionsschutzabkommen die Folgen der Erweiterung der Klagebefugnis auch zu Gunsten des mittelbaren Investors dadurch regeln, dass die zunächst erhobene Klage eines Investors eine weitere Klage eines mit ihm verbundenen Investors aus dem selben Sachverhalt etwa nach dem selben oder einem anderen Investitionsschutzabkommen ausschließt. Dies bedarf einer Änderung der derzeit geltenden Investitionsschutzabkommen, die vielfach (vgl. die von den USA geschlossenen Investitionsschutzabkommen) im Interesse des Schutzes der Investition auch eine erweiterte Klagebefugnis für den mittelbaren Investor enthalten. Alternativ wäre eine Ergänzung des Wiener Übereinkommens über das Recht der Verträge (Vienna Convention on The Law of Treaties, 22. 5. 1969) denkbar. Eine Beschränkung der Klagebefugnis etwa auf den unmittelbaren Investor würde den beabsichtigten Investitionsschutz vielfach entwerten, da die Investition in der Regel durch eine Investitionsgesellschaft im Gastland getätigt wird, die bei Durchsetzung ihrer Rechte durch nationale Gesetze des Gastlandes behindert werden kann.

39) Wie anlässlich des 10. Geneva Global Arbitration Forum am 3./4. 12. 2003 diskutiert, siehe auch *Schwebel*, The Creation and Operation of an International Court of Arbitral Award, in: The Internationalization of International Arbitration, 1995, S. 115 ff.; *Holtzmann*, A task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards, in: The Internationalization of International Arbitration, 1995, S. 109 ff.

*Von Prof. Gabrielle Kaufmann-Kohler/Philippe Bärtsch, Genf**

Discovery in international arbitration: How much is too much?[1]

Nowadays it is well established that the arbitral tribunal has the power to order production of documents, and in consequence hardly an arbitration is without a request for it. However, the question is how the arbitral tribunal should exercise this power and what requirements must be met to order discovery. In view of the fact that national arbitration legislation as well as institutional arbitration rules are silent on these requirements, standards have emerged from practice, codified in particular in the IBA Rules on the Taking of Evidence in International Arbitration. Under these rules the documents sought, i. a. must be identified with reasonable specificity, must be relevant to the outcome of the dispute, must be in the possession or under the control of the opponent and must not be protected by evidentiary privileges. The authors of the following contribution finally point out that there are a number of alternatives for an arbitral tribunal if a party refuses to produce the requested documents.

Die Befugnis des Schiedsgerichts, die Vorlage von Dokumenten anzuordnen, ist heutzutage allgemein anerkannt, und deshalb findet heute kaum ein Schiedsverfahren ohne entsprechende Anträge der Parteien statt. Es stellt sich allerdings die Frage, wie das Schiedsgericht die ihm eingeräumte Befugnis ausüben und unter welchen Bedingungen eine Discovery angeordnet werden kann. Angesichts der Tatsache, dass sowohl nationale Schiedsrechte als auch institutionelle Schiedsordnungen an dieser Stelle schweigen, haben sich in der Praxis Standards entwickelt, die zu einem wesentlichen Teil in den IBA Rules on the Taking of Evidence in Internationale Arbitration zusammengefasst worden sind. Nach diesen Regelungen müssen die vorzulegenden Dokumente u. a. hinreichend bestimmt, für die zutreffende Entscheidung von maßgeblicher Bedeutung, in Besitz oder zumindest im Einflussbereich des Antragsgegners sein, und sie dürfen nicht einem Beweiserhebungsverbot unterliegen. Die Verfasser des nachfolgenden Beitrags erläutern schließlich, welche Möglichkeiten das Schiedsgericht hat, wenn eine Partei sich weigert, ein angefordertes Dokument vorzulegen.

I. Introduction

Document production or discovery is a fashionable topic in present-day international commercial arbitra-

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1) Expanded version with added footnotes of a presentation of Prof. Gabrielle Kaufmann-Kohler at the Petersberger Schiedstage in February 2003.

tion. It has generated a wealth of scholarly commentary[2] and there is hardly an arbitration nowadays without a request for document production.

If the arbitral tribunal's power to order document production is now well established (Section II below), many other issues remain less clear: How should the arbitral tribunal exercise its power (Section III below)? What requirements must be met for the arbitral tribunal to order production and what are the limits to document production? What additional factors should be considered when ordering discovery (Section IV below)? What is the consequence of a party's failure to produce documents in breach of an arbitral tribunal's order (Section V below)?

In court litigation, the traditions and rules on document discovery vary significantly between common law and civil law jurisdictions. In common law jurisdictions, the parties are required to produce all the evidence available to them, including evidence detrimental to their case. They are also entitled to request that their opponent produce documents and that the tribunal order production. The scope of discoverable documents is generally broad. By contrast, in civil law jurisdictions the parties are under no duty to tender documents which may damage their position (subject to the general requirement not to mislead the court). They are not entitled to request the other party to disclose documents nor to request court-ordered production or only to a limited extent.

Unless advised by counsel experienced in international arbitration, parties tend to import into the arbitration the procedural culture of their home jurisdiction. Opponents with different legal traditions may thus face the arbitral process with conflicting expectations, which will make document discovery a truly contentious matter. Fortunately enough, over the years international arbitration has achieved a balance between the two different traditions, merging elements from both into uniform transnational standards. The purpose of this paper is to review these standards and to identify the answers which they bring to the questions listed above.

II. The arbitral tribunal has the power to order document production

International arbitration proceedings are generally governed by the national arbitration law of the place or seat of arbitration. Some national arbitration laws expressly provide for the power of the arbitral tribunal to order document production. For example, under Section 34(2)(d) of the 1996 English Arbitration Act, an arbitral tribunal sitting in England has the power to order the parties to produce documents. In the United States, the Federal Arbitration Act and a number of state statutes also grant such power to the arbitral tribunal[3].

Other national legislations are silent on this topic. Being a procedural matter, the power of the arbitrators to order document production is governed by the rules on procedure. According to the general principle of party autonomy, the rules on procedure are determined by the parties' agreement. The parties can agree procedure either directly or, which is more frequent, indirectly by reference to a set of arbitration rules. Failing an agreement by the parties, be it direct or indirect, the arbitrators have the power to set the procedural rules[4] and thus decide whether and under which standards they may order document discovery.

The majority of international arbitration rules give arbitral tribunals the power to direct the parties to provide documents. As illustrations, let us quote the following provisions:

- Article 20(5) 1998 ICC Rules provides that "[a]*t any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence* [including documents]"[5].
- Article 22.1 LCIA Rules provides that "[u]*nless the parties at any time agree otherwise in writing, the*

2) See for example: *King/Bosman*, Repenser la problématique de la discovery dans l'arbitrage international, au-delà du clivage entre common law et droit romain, in: ICC Bulletin, vol. 12 n° 1, 2001, pp. 25 et seq. [hereinafter referred to as King/Bosman]; *Jarvin*, Die Praxis der Beweiserhebung in internationalen Schiedsverfahren – Ein einführender Beitrag zum Thema Disclosure of Documents, in: Beweiserhebung in internationalen Schiedsverfahren, ed. by *K.-H. Böckstiegel*, 2001, pp. 87 et seq.; *Böckstiegel*, Optionen und Kriterien der Beweiserhebung in internationalen Schiedsverfahren, in: Beweiserhebung in internationalen Schiedsverfahren, *op. cit*, pp. 1 *et seq.*; *Patocchi/Meakin*, Procedure and the Taking of Evidence in International Commercial Arbitration, in: International Business Law Journal, n° 7 1996, pp. 884 et seq. [hereinafter referred to as Patocchi/Meakin]; *Hunter*, Modern Trends in the Presentation of Evidence in International Commercial Arbitration, in: The American Review: Essays in honor of Hans Smit, vol. 3, 1992, pp. 204 et seq. [hereinafter referred to as Hunter]; *Morgan*, Discovery in Arbitration, in: Journal of International Arbitration, vol. 3 n° 3, 9/1996, pp. 9 et seq. [hereinafter referred to as Morgan]; *Rogers*, Improving Procedures for Discovery and Documentary Evidence, in: Planning Efficient Arbitration Proceedings, ICCA Congress series n° 7, General editor *van den Berg*, 1996, pp. 131 et seq. [hereinafter referred to as Rogers]. See also excerpts of the following commentaries: *Born*, International Commercial Arbitration, Commentary and Materials, 2nd edition, 2001, pp. 469 et seq. [hereinafter referred to as Born]; *Redfern/Hunter*, Law and Practice in International Commercial Arbitration, 3rd edition, 1999, para. 6-68 et seq. [hereinafter referred to as Redfern/Hunter]; *Craig/Park/Paulsson*, International Chamber of Commerce Arbitration, 3rd edition, 2000, pp. 449 et seq. [hereinafter referred to as Craig/Park/Paulsson]; *Derains/Schwartz*, A guide to the new ICC Rules of Arbitration, 1998, pp. 261–262 [hereinafter referred to as Derains/Schwartz]; *Fouchard/Gaillard/Goldmann* on International Commercial Arbitration, edited by *Emmanuel Gaillard & John Savage*, para. 1272 et seq. [hereinafter referred to as Fouchard/Gaillard/Goldmann]; *Mustill/Boyd*, The Law and Practice of Commercial Arbitration in England, 2nd edition, 1989, pp. 324–326; *Suton/Kendall/Gill*, Russel on Arbitration, 21st edition, 1997, para. 5-156 et seq.; *Sachs*'s article entitled "Use of documents and document discovery: "Fishing expeditions" versus transparency and burden of proof, in: SchiedsVZ 2003, pp. 193 et seq. appeared after finalization of this article and could therefore not be taken into consideration any more.

3) See for example Section 7 U.S. Federal Arbitration Act; Section 7 Uniform Arbitration Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1955 and amended in 1956, adopted by app. 36 states in some form.

4) On party autonomy and arbitrators' powers, see for instance with respect to statutory provisions: Article 19 UNCITRAL Model Law on International Commercial Arbitration and Article 182 Swiss Private International Law Act; and with respect to writings, *Kaufmann-Kohler*, Qui contrôle l'arbitrage? Autonomie procédurale des parties, pouvoirs des arbitres et impératif d'efficacité, Mélanges Claude Reymond, publication forthcoming 2004, with ref.

5) It should be noted that before the adoption of Article 20(5) of the ICC Rules in 1998, the ICC Rules contained no express provision giving the arbitral tribunal the power to order the production of documents. Such authority was then based on the general rule in Article 20(1), which provides that the arbitral tribunal should proceed to establish the facts *"by all appropriate means"*. The adoption of Article 20(5) of the ICC Rules responded to the increasing number of requests for document production in ICC arbitration and the more frequent use and normalization of document production by ICC arbitral tribunals (see *Craig/Park/Paulsson*, op. cit., p. 449 and *Jarvin*, Aspects of the Arbitral Proceedings, in: ICC Bulletin, Supplement 1997 reporting the proceedings of the ICC Conference on " The New 1998 ICC Rules of Arbitration ", p. 40).

arbitral tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views, to order any party to produce to the arbitral tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the arbitral tribunal determines to be relevant".

- According to Article 24(3) UNCITRAL Rules, "[a]*t any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as the arbitral tribunal shall determine*".
- Article 19(3) AAA International Arbitration Rules reads as follows: "[a]*t any time during the proceedings, the arbitral tribunal may order parties to produce other documents, exhibits or evidence it deems necessary or appropriate*".
- Article 34(2) of the ICSID Arbitration Rules provides that "[t]*he tribunal may, if it deems it necessary at any stage of the proceedings: (a) call upon the parties to produce documents, witnesses and experts;* [...]".
- According to Article 27(1) DIS Arbitration Rules, *"The arbitral tribunal shall establish the facts underlying the dispute. To this end it has the discretion to give directions and, in particular, to hear witnesses and experts and order the production of documents.".*

Other rules contain no specific provision, but only a more general one, pursuant to which the arbitral tribunal must establish the facts *"by all appropriate means"* or similar wording. In such case, it is accepted that this wording includes the authority to order document production[6].

Practice does confirm that arbitrators have no hesitation assuming the power to order document production (even where they subject production to strict standards, which is a different issue). Practice also shows that they do so whether or not such power is expressly granted by the competent national legislation, the applicable arbitration rules or the parties' agreement. Where there is no express power, they regard it as included within their general authority to determine the procedure failing an agreement by the parties.

III. How should the arbitral tribunal exercise this power?

National arbitration statutes and the main institutional arbitration rules are silent on the requirements which must be met for discovery to be granted. They leave broad discretionary powers to the arbitral tribunal. Hence, the latter will decide on a case by case basis whether and how much discovery should be allowed. How should it make such decision? Before addressing this question (Subsection 2 below), it may be useful to briefly review the civil procedure rules on the basis of which international arbitration has gradually built its own standards (Subsection 1 below).

1. Background: different civil procedure traditions

a) "Pre-Trial Discovery of Documents" in the United States[7]

The United States Federal Rules of Civil Procedure provide for broad pre-trial discovery, one of the most important instruments of discovery being document production[8]. Indeed, after initial disclosures in which parties have to disclose all documents they may use to support their own claims or defenses[9], each party can request to inspect and copy any other documents which are in the possession or control of the other party and which are relevant or may lead to relevant evidence, even if those documents are unfavorable to the party who possesses them[10].

Pre-trial discovery is conducted for the most part by counsel without the need for involvement of the court. Thus, counsel notifies opposing counsel directly that he/she requests the production of documents. Judicial intervention in the discovery process typically occurs only after negotiations between the parties have failed. A party can then request the court to compel the production of the evidence at issue. Alternatively, a party resisting discovery can seek a protective order from the court relieving it from any obligation to comply with the discovery request which it oppposes. Judicial intervention is also needed in the event that the documents are in the possession of a third party not involved in the litigation.

It is only after the discovery process is completed that the court will hear the evidence so gathered at the trial.

Discovery is broad, but not unlimited. As a first limit, the information sought must be "relevant" to the claim or defense of a party (even though the notion of relevance is broad)[11]. Second, discovery can be denied where it is being abused to annoy, embarrass, or oppress a party, e. g. by repeated requests to produce the

6) *Craig/Park/Paulsson*, op. cit., p. 450; Commentary on the new IBA Rules, IBA Working Party, January 2000, in: Beweiserhebung in internationalen Schiedsverfahren, op. cit., p. 152 [hereinafter referred to as Commentary on the new IBA Rules, IBA Working Party].

7) On that subject, see: *Teply/Whitten*, Civil Procedure, New York, 2000, pp. 735 et seq. [hereinafter referred to as Teply/Whitten]; *Born*, International Civil Litigation in United States Courts, Commentary and Materials, 1996, pp. 843 et seq.; *Brower*, Discovery and Production of Evidence in the United States, in: Taking of Evidence in the Arbitral Proceedings, ICC Publishing 1990, pp. 9 et seq. For commentary in German, see: Schack, Einführung in das US-amerikanische Zivilprozessrecht, 1995, pp. 44 et seq.; *Eschenfelder*, Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren, 2002, pp. 41–69 [hereinafter referred to as Eschenfelder].

8) Other discovery instruments are depositions, interrogatories and requests for admissions.

9) See Rule 26(a)(1) Federal Rules of Civil Procedure.

10) Rule 26(b)(1) of the Federal Rules of Civil Procedure reads as follows: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2) (i), (ii) and (iii)". For commentary of Article 26 Federal Rules of Civil Procedure and of the history of its amendments, see in particular: Notes to Rule 26, Legal Information Institute, Cornell Law School available on the web (http://www.gamd.uscourts.gov/FRCP%20Amendments.pdf).

11) See Rule 26(b)(1) Federal Rules of Civil Procedure.

same documents, or where the burden or expense of the proposed discovery outweighs its likely benefits[12].

Third, discovery is limited by privileges, such as attorney-client privilege or protection of business secrets, which shield certain information from compulsory disclosure[13]. Fourth, also protected from discovery are internal documents prepared specifically in connection with the litigation itself, such as legal research memoranda, witness statements, findings and opinions of experts[14]. The theory underlying this protection is that while all parties should have access to the underlying facts of the case, they are not entitled to discover each other's legal strategy. Some parts of an attorney's work product, however, can be subject to production if a party has substantial need for it and cannot otherwise obtain the information without undue hardship. The mental impressions, conclusions, opinions, or legal theories of an attorney concerning the litigation, however, cannot be discovered under any circumstances.

Pre-trial discovery is intended to allow all parties early and equal access to information which they may use as evidence and to avoid trial by "ambush". It is also meant to permit the parties to narrow down the disputed issues to focus at trial on matters of real controversy. Undoubtedly a powerful fact-finding instrument, pre-trial discovery bears the risk of abuses and excessively high costs.

b) "Disclosure and inspection of documents" in England[15]

Under the English Civil Procedure Rules, each party must serve upon its opponent a list of documents in its possession. Before the Woolf Reform came into force in April 1999, such list was to cover all documents relevant to the case. This included documents which did not constitute evidence but contained information directly or indirectly enabling a party to advance its own case or to damage the case of its adversary[16]. Such an extensive notion of relevance made the range of discoverable documents virtually unlimited.

The 1999 Civil Procedure Rules changed the scope and nature of discovery, now called "disclosure". Under Rule 31 of the new Civil Procedure Rules, the range of documents that must be disclosed depends on the "track" to which a case is assigned and the track depends on the amount at stake and/or the difficulty of the case[17].

The track to which many commercial disputes are likely to be assigned calls for "standard" disclosure, which is narrower than former discovery[18]. Indeed, the new rules[19] provide that each party must disclose the documents on which it intends to rely and the documents which (a) adversely affect its case (b) adversely affect another party's case (c) support another party's case (d) are disclosed by any practice directions of the court. As regards (b) and (c), the parties are only required to make a *reasonable* search for those documents and they need not search at all if searching would be *disproportionate*, i. e. the number of documents to be searched far outweighs the evidential weight of the documents which might be discovered[20]. Of course, disclosure is further limited by privileges.

If a party believes that disclosure of documents given by a disclosing party is inadequate, it may make an application for an order for specific disclosure[21].

As opposed to the earlier discovery, disclosure is limited, in particular by the introduction of a requirement of proportionality. It nevertheless remains a feature of English civil procedure that distinguishes it from civil law jurisdictions, mainly by the obligation to disclose documents detrimental to one's own case[22].

c) Document production in civil law countries: the example of Germany[23]

Civil law jurisdictions know no such thing as discovery. They are based on the concept that each party produces the documents on which it relies to support its case. Subject to the prohibition not to mislead the court, there is no obligation to provide evidence that may adversely affect one's case or assist the adversary. The court has control over the evidentiary proceedings and, upon request or of its own motion, can order production of a specific document, a power that is sparingly used. If relevant documents are not on record, the court would rather tend to find that one of the parties has not met its burden of proof.

The basic difference between the two systems is obviously linked with the diverse understanding of the

12) See in particular Rule 26(b)(2) Federal Rules of Civil Procedure which limits the scope of discovery as follows: "(...) *The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that : (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rules 26(c)*". See also Rule 26(b)(5).

13) See Rule 26(b)(5) Federal Rules of Civil Procedure.

14) See Rule 26(b)(3) Federal Rules of Civil Procedure.

15) On that subject, see in particular: Lord Chancellor's Department's Practice Direction supplementing Part 31 of the New Civil Procedure Rules in England & Wales (Disclosure and Inspection), available on the web (http://www.lcd.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part31.htm); *Lord Wolf*, Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England & Wales, Chapter 21, available on the web (http://www.law.warwick.ac.uk/Woolf/report) [hereinafter referred to as Lord Wolf].

16) See also: *Patocchi/Meakin*, op. cit., p. 885.

17) *Redfern/Hunter*, op. cit., p. 316 (footnote 2).

18) Commentators note, however, that before the Commercial Court there should in practice be few changes in the nature of the disclosure orders made (See: *Sherrinton*, Summary – The New Civil Procedure Rules in England, available on the web (http://www.prac.org/materials/1999_Singapore/Woolf).

19) Rule 31.6 1999 Civil Procedure Rules.

20) See Rule 31.7 1999 Civil Procedure Rules. The party giving disclosure must make a "disclosure statement" (Rule 31.10 (5) and (6) 1999 Civil Procedure Rules), which confirms the position of the person making the statement, the authority to give such a statement and to make the search, the extent of the search and, where applicable, justifying the specific reason why a search was not made on the ground of lack of proportionality.

21) See Rule 31. 12 1999 Civil Procedure Rules.

22) *Lord Wolf*, op.cit., Chapter 21, para. 1.

23) See for example in this respect: Bericht der Abgeordneten Bach*maier, Stünker, Geis, Röttigen, Beck, Funke, Kenzler* über die ZPO-Reform, available on the web (http://www.jura.uni-tuebingen.de/hess/Lehrstuhlthemen/zpo_ref3.pdf), p. 149; *Gehrlein*, Zivilprozessrecht nach der ZPO-Reform 2002, 2001, p. 146; *Lücke/Way*, Münchener Kommentar zur Zivilprozessordnung, ad § 142 and § 420–430 ZPO; *Lehrbuch/Schellhammer*, Zivilprozess, Gesetz – Praxis – Fälle, 1999, § 594-595; *Eschenfelder*, op. cit., p. 104.

role of the truth in court proceedings. Does the court make a judgment on the full truth of the facts, whatever the cost of finding the truth? Or does it rule on a approximation of the truth, a "judicial" truth that is the result of the "judicial" game, a game with its own rules and limits deemed to achieve a balance between resources invested and fair outcome?

In spite of this difference, the gap between the different systems of civil procedure is narrowing[24]. The English Woolf Reform is one example. German law on document production is another one. The amended version of § 142 ZPO (Zivilprozessordnung)[25], which came into force on January 1, 2002 provides that courts can order the production of documents which are in the possession of a party or third party and on which one party relies in support of its position. If the party so ordered fails to come forward with the document, the court may draw an adverse inference and deem the fact allegations about the contents of the document to be proven[26].

Prior to the amendment of § 142, there was in principle no ground upon which to order a party which did not bear the burden of proof to tender evidence in support of its opponent's position when the opponent had not been able to produce the documents[27]. The new § 142 appears to change this; a party can always be ordered to produce a document irrespective whether it has the burden of proof or not. The duty of third parties is subject to a reasonableness or "*Zumutbarkeit*" test and to privileges. It remains to be seen how the courts will resort to their new powers.

It is striking that German law expands the duty to provide documents at the very time when English law proceeds to narrow the scope of discovery. Obviously, the two systems are still far apart, but they seem to recognize that the better solution lies somewhere in the middle.

2. Arbitration: where civil law meets common law

Let us come back to our question: How should the arbitral tribunal exercise its power to order discovery?

International arbitration combines elements of the two systems just described. This comes as no surprise. Unlike national court proceedings, arbitration is a place where lawyers, counsel and arbitrators, who are trained in different jurisdictions, work together to achieve a result, i.e. to solve a specific dispute. To reach a result, they have no choice but to find a *modus vivendi* and for that mode to be acceptable to all involved, it must necessarily constitute a compromise drawing on each participant's culture. As a result of such necessity much more than out of a theoretical recognition that the ideal system is one situated in between the extremes, practices in international arbitration have been harmonized to a large extent. Accordingly, a consensus has emerged on the following three principles to guide the tribunal in determining whether and to what extent to order document production[28]:

- American- or even English-style disclosure is not available in international arbitration[29] (unless of course the parties have agreed on it);
- Some level of document discovery is appropriate;
- The determination of the level allowable in a specific case lies within the discretionary powers of the arbitral tribunal.

It is often said that there is no right to document discovery[30]. It is true that national courts, even US courts[31], have repeatedly held that a decision by the arbitrator limiting or refusing document production does not constitute a ground for challenging the award[32]. The present authors have not identified any case in which an award was annulled or denied enforcement because the arbitral tribunal had allowed or, on the contrary, refused a document request.

However, one can see two situations in which an award would run a risk of annulment or non-enforcement for the reason that the arbitrator did not allow discovery. This is so, first, if the parties have agreed on discovery. Under some national laws an award may be annulled because the arbitral tribunal did not follow the procedure agreed by the parties[33]. The same is true with respect to non-enforcement of awards under Article V(d) New York Convention. Second, one cannot rule out that the refusal to order production of documents may in certain circumstances be a breach of a party's opportunity or right to be heard. Such right includes the right to present evidence in support of one's case. If a party lacks documents indispensable to establish relevant facts for which it bears the burden of proof and such documents are demonstrably within the control of its opponent, one could reasonably argue that a refusal to grant a production request may deprive the party seeking discovery from its opportunity to be heard[34].

IV. What requirements must be met for the arbitral tribunal to order discovery?

The requirements which must be met for the arbitral tribunal to order document production are neither set

24) On the harmonization of court procedures, see e.g. *Kessedjian*, La modélisation procédurale; in: *Loquin/Kessedjian (Eds)*, La mondialisation du droit, Dijon 2000, pp. 237–255.

25) Article 142 ZPO reads as follow: "(1) Das Gericht kann anordnen, dass eine Partei oder ein Dritter die in ihrem oder seinem Besitz befindlichen Urkunden und sonstigen Unterlagen, auf die sich eine Partei bezogen hat, vorlegt. Das Gericht kann hierfür eine Frist setzen sowie anordnen, dass die vorgelegten Unterlagen während einer von ihm zu bestimmenden Zeit auf der Geschäftsstelle verbleiben. (2) Dritte sind zur Vorlegung nicht verpflichtet, soweit ihnen diese nicht zumutbar ist oder sie zur Zeugnisverweigerung gemäss den §§ 383 bis 385 berechtigt sind. Die §§ 386 bis 390 gelten entsprechend."

26) § 427 ZPO.

27) *BGH*, NJW 1990, p. 3152.

28) See also Commentary on the new IBA Rules, IBA Working Party, op. cit., p.152.

29) *Born*, op. cit., p. 485; Commentary on the new IBA Rules, IBA Working Party, op. cit., p. 152.

30) For ICC proceedings, see: *Derains/Schwartz*, op. cit., p. 261; more generally, see Commentary on the new IBA Rules, IBA Working Party, op. cit., pp. 152–153; *Rogers*, op. cit., p. 136.

31) For international arbitration in the United States, where there is generally no right to document production, see in particular *Redfern/Hunter*, op. cit., p. 317 and *Morgan*, op. cit., pp. 15–18.

32) See in particular the cases cited by *Craig/Park/Paulsson*, op. cit., p. 453, footnote 6.

33) For references, see *Kaufmann-Kohler*, referred to in footnote 4 above.

34) See in this respect the note by *Derains*, in: Revue de l'Arbitrage, 1997, pp. 429–432, on a decision rendered by the *Cour d'Appel de Paris* on January 21, 1997. Even though the Cour d'Appel de Paris recognized the arbitral tribunal's discretionary power to order documents production, it implicitly suggested that there may be limits to such discretionary power in certain circumstances.

forth in national arbitration legislations nor in institutional arbitration rules. In spite of such silence, standards have emerged from practice. They have in particular been "codified" in the IBA 1999 Rules on Taking of Evidence in International Arbitration (the "IBA Rules")[35]. The IBA Rules are a well-balanced compromise between the broader views held in common law jurisdictions and the more reserved approach of civil law jurisdictions. Even where they are not directly applicable, they provide useful guidance to tribunals and parties[36].

Under the standards developed by practice, the documents sought must be identified with reasonable specificity (Subsection 1 below); they must be relevant to the outcome of the dispute (Subsection 2 below); they must be in the possession or under the control of the opponent (Subsection 3 below); they must not be protected by evidentiary privileges (Subsection 4 below). When applying these standards, the arbitral tribunal should take a number of additional factors into account related to the parties' expectations, the proportionality of the request for production, and the effective management of the dispute resolution process (Subsection 5 below).

1. The documents must be identified with reasonable specificity

A request to produce documents must identify the documents sought in sufficient detail. The description will comprise the following elements: the presumed author and/or recipient of the document, the date or presumed time period within which the documents was established and the presumed content of the document[37]. The specificity of the information will assist the party subject to discovery to identify the document and determine whether it will comply voluntarily. If it does not so comply, then the specific description will allow the tribunal to decide whether to order production[38].

May a party obtain the production of documents identified as a category as opposed to documents identified individually? The IBA Rules allow parties to ask for the production *"of a narrow and specific (...) category of documents"*[39] that are reasonably believed to exist[40]. In practice, arbitrators generally accept requests for production of categories of documents if they are carefully tailored to produce relevant documents[41].

2. The documents must be relevant to the outcome of the dispute

The party seeking discovery must establish that the documents are relevant. Relevant to what? Simply "related" to the dispute or relevant to the outcome of the dispute[42]? The IBA Rules choose the second definition of relevance and added a materiality test: the documents must be *"relevant and material to the outcome of the dispute"*[43]. A relevant document is one likely to prove a fact from which legal conclusions are drawn. A material document is one that is needed to allow complete consideration of the legal issues presented to the tribunal[44]. Hence, if the document is sought to establish a fact already proven otherwise, the tribunal will not order production. This specification which is found in the IBA Rules must be deemed implied in the general relevance standard[45].

3. The documents must be in the possession or under the control of the opponent

The documents must be in the possession or under the control of the party from which production is sought. The requesting party should therefore state the facts on which it relies to assert that the documents are available to its adversary.

Three questions must be addressed in this context. First, may an arbitral tribunal direct its order at a third party? Second, what if the documents are in the hands of an affiliated company? Third, what if a party alleges that the documents do not exist?

Unless there are specific provisions to this effect in the national arbitration statute at the place of arbitration, which is the case for the United States[46] and England[47], an arbitral tribunal lacks the power to make orders directed towards third parties. Can the courts help? For practical reasons, not really. Admittedly, in many countries the courts at the place of arbitration have jurisdiction to assist the arbitration process, for instance by ordering third party witnesses to attend a hearing and bring documents[48]. However, such judicial assistance is rarely an effective remedy.

35) For commentary on the IBA Rules, see: Commentary on the new IBA Rules, IBA Working Party, op. cit., pp. 147 et seq.; *Raeschke-Kessler*, The Production of Documents in International Arbitration – A commentary on Art. 3 of the New IBA-Rules, in Law of International Business and Dispute Settlement in the 21st Century, edited by *Briner/Fortier/Berger/Bredow*, 2001, pp. 641 et seq. [hereinafter referred to as Raeschke-Kessler]; *Raeschke-Kessler*, Die IBA-Rules über die Beweisaufnahme in internationalen Schiedsverfahren, in: Beweiserhebung in internationalen Schiedsverfahren, op. cit., pp. 41 et seq.; *Veeder*, Evidentiary Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules, in: Arbitration, The Journal of the Chartered Institute of Arbitrators, vol. 65, number 4, November 1999, pp. 291 et seq.

36) *Raeschke-Kessler*, op. cit., p. 646.

37) *Raeschke-Kessler*, op. cit., p. 647.

38) See Commentary of the new IBA Rules, IBA Working Party, op. cit., p. 153.

39) Article 3.3(a) IBA Rules.

40) Permitting parties to ask for documents by category prompted discussion within the IBA Working Party. The Working Party did not wish to open the door to fishing expeditions. However, it understood that documents may not be capable of specific identification although they may be relevant and should be produced to the other side (see, in this respect, Commentary of the IBA Rules, IBA Working Party, op. cit. p. 154).

41) The IBA Working Party gives the following example, which illustrates the issue: if an arbitration involved the termination by one party of a joint venture agreement, the other party may know that the notice of the termination was given on a certain date, that the Board of the other party must have made the decision to terminate at a meeting shortly before that notice and that certain documents must have been prepared for the Board's consideration of that decision and minutes must have been taken concerning the decision. The requesting party cannot identify the dates or the authors of such documents, but nevertheless the requesting party can identify with some particularity the nature of the documents sought and the general time frame in which they have been prepared. In such a case, production of a category of documents may be ordered, since it is carefully tailored (Commentary of the IBA Rules, IBA Working Party, op. cit., p. 154).

42) *King/Bosman*, op. cit., p. 36. See also Article 9.2(a) IBA Rules.

43) Article 3.3(b) IBA Rules.

44) See in particular *Raeschke-Kessler*, op. cit., pp. 656–657.

45) It is in line with the requirements of due process, where it is generally considered that a party is entitled to produce such evidence which is relevant and necessary, i.e. not already existing on record in another form (*Redfern/Hunter*, op. cit., para. 6–65).

46) Section 7 Federal Arbitration Act.

47) Section 43 1996 Arbitration Act.

48) E.g. Article 27 UNCITRAL Model Law; § 1050 German ZPO; Article 184(2) Swiss Private International Law Act.

Indeed, it is unlikely that the third party will be within the reach of the courts at the place of arbitration, since that place is usually chosen for its neutrality or lack of ties with the transaction giving rise to the dispute. The 1970 Hague Convention on the taking of evidence abroad in civil and commercial matters is of no assistance, as arbitrators are not authorized to resort to the treaty mechanisms[49]. Except in rare countries in which courts are empowered to render assistance to arbitrations pending abroad[50], it will be difficult, not to say impossible to compel third parties to submit documents[51].

Let us turn to the second issue about documents in possession of another company of the same group. Can the tribunal order production? Some argue that the answer depends on the scope of the arbitration agreement, which is to be determined by way of interpretation. If the arbitration agreement is meant to target the group as such, the arbitral tribunal can order production from any member of the group[52]. Other possible answers may be to focus on effective control, irrespective of the fact that separate legal entities may be involved, or to examine whether there is ground for piercing the corporate veil[53].

Finally, a party resisting production may argue that the documents sought do not exist. The tribunal will then have to review whether the argumentation is plausible. In the negative, it may apply the sanctions for breach of a production order[54].

4. The documents must not be protected by evidentiary privileges

Parties often oppose production with the allegation that the documents sought are protected by some privilege. A privilege is a legally recognized right to withhold certain testimonial or documentary evidence from legal proceeding, including the right to prevent another from disclosing such information. The most important privileges are:

- professional privileges, such as attorney-client privilege, medical privilege, journalist privilege;
- the privilege against self-incrimination;
- protection of business secrets;
- privileges protecting sensitive governmental information.

Should the arbitral tribunal take these privileges into account[55]? If so, how?

Leaving aside the IBA Rules, the statutory and institutional rules do not provide much guidance. Most national arbitration laws are silent, and so are many arbitration rules. Some arbitration rules require the arbitrators to consider privileges[56], most often without further indications.

The first question arbitrators need to answer is the one of the governing law: what law applies to the existence and scope of the privilege? Alternatives include the procedural law of the arbitration, the law governing the arbitration agreement, the law of the judicial forum where enforcement of the document production order is sought, and the law most closely connected to the allegedly privileged communication[57].

Before attempting to choose among these alternatives, one should stress that certain privileges, such as the attorney-client privilege, are now well-established in comparative civil procedure. On the ground that they are widely recognized in legal systems of different traditions and rules, the arbitrators may regard them as general principles and apply them without reference to any national law[58].

Where the privilege at issue has not achieved the status of a general principle, or where the issue turns upon a controversial aspect of an otherwise well settled principle, it will become inevitable to choose the applicable law. For that purpose, it will be necessary to decide whether privileges are matters of procedure or of substance. Although different national laws adopt different characterizations of privileges, it appears reasonable to say that privileges do not fit neatly into either category; they carry elements from both[59].

A procedural characterization leads to the law governing the arbitration (but not to the civil procedure rules applicable in court at the place of arbitration), and a substantive characterization to the law with the closest relationship to the privileged communication or information[60]. In order to take into consideration the dual nature of privileges, one may think of submitting them both to the law of the arbitration and to the law of the closest relationship to the evidence. In the event of conflict, the most protective would apply.

This cumulative application[61] may provide a workable solution as long as no issues of equal treatment arise. What if a German corporation faces a US firm in an arbitration in Switzerland and each of them seeks

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49) See Article 1(1). On that subject, see also *Volken*, Internationale Rechtshilfe in Zivilsachen, Zurich 1996, p. 95 with references (footnote 140).

50) So German courts (see § 1050 ZPO and for example Practioner's Handbook on International Arbitration, edited by *Weigand*, 2002, pp. 776–777 and *Poudret/Besson*, Droit comparé de l'arbitrage international, Zurich 2002, n° 598). By contrast, in the United States, Courts in New York (in *NBC v. Bera Stearns & Co.*, 165 F.3 d 184, 1999 U. S. App. LEXIS 933 (2 d Cir. N. Y. 1999)) and in Texas (in *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3 d 880, 1999 U. S. App. LEXIS 4252 (5th Cir. Tex. 1999)) held that local courts would not grant assistance to a foreign arbitral tribunal, as it did not qualify as an *"international tribunal"* under the relevant provision of the Federal Rules of Civil Procedure (28 USC § 1782).

51) Of the same opinion: *Hunter*, op. cit., p. 207.

52) See *Raeschke-Kessler*, op. cit., p. 649; ICC Award 4131, Yearbook Commercial Arbitration 1984, pp. 131 *et seq.*, at 136–137.

53) This will necessarily have to imply a determination of the law(s) governing the admissibility and the conditions for piercing the corporate veil.

54) Section V below.

55) See in particular: *Born*, op. cit., pp. 490 et seq.; *Mock/Ginsburg*, Evidentiary Privileges in International Arbitration, in: International and Comparative Law Quarterly, 2001, pp. 345 et seq. [hereinafter referred to as Mock/Ginsburg].

56) For example: Article 9 IBA Rules; Article 38 International Arbitration Rules of Zurich Chamber of Commerce; Article 20.6 AAA International Arbitration Rules.

57) *Born*, op. cit., p. 490.

58) *Mock/Ginsburg*, op. cit., p. 379.

59) Privileges are considered substantive under some national laws, and procedural in others. According to *Mock/Ginsburg*, privileges have both procedural and substantive qualities and do not fit into either category of procedure or substance (Mock/Ginsburg, op. cit., p. 377).

60) So *Mock/Ginsburg*, p. 381. It appears correct not to resort to the law governing the substance of the dispute. A choice of law clause in a contract would not cover issues such as privileges, nor would the law determined to be applicable failing a contractual choice. Applying the law with the closest connection to the evidence at issue also appears in line with the parties' legitimate expectations.

61) Which resembles to some extent the cumulative application of the law of the court of origin (the court in which the action is pending and which issued the letters rogatory) and the court of execution (the court which carries out the request and takes the evidence) found in Article 11 Hague 1970 Evidence Convention.

the production of communications between management and inhouse counsel of its opponent? The law of the arbitration is Swiss law. It provides that matters of procedure are agreed by the parties or otherwise determined by the arbitral tribunal. The law with the closest relationship in respect of the communications between the US firm and its inhouse legal department is US law, which protects such communications under the attorney-client privilege[62]. The law governing the communications between the German firm and its inhouse counsel is German law, which does not protect such communications[63]. If it accepts one set of communications and not the other, the tribunal may well be in breach of the general principle of equal treatment in procedural matters. Hence, it may end up applying the law of the arbitration, which leaves broad discretion and allows a solution taking both the need for protection and the need for equal treatment into account, not to speak of the need to assemble the evidence required to resolve the dispute.

Rather than choosing the applicable law, the difficulty in practice is often to determine whether the documents sought or passages of them are *in fact* covered by the alleged privilege. In some cases, the parties will agree on production subject to a confidentiality agreement. In others, it may be possible to produce redacted documents, i. e. documents from which the protected information is deleted. Still in others, it may be necessary to review the contents of the documents to decide if and to what extent protection is due. The tribunal can review the documents itself without the party requesting the documents having access to them. On the basis of this review, it will then either accept production in whole or in part or reject it.

Such "private inspection" by the tribunal appears unobjectionable if the parties consent to it[64]. Failing consent, it is more problematic. It does not under all circumstances properly protect the interests of the party which claims a privilege[65]. Nor does it account for due process owing to the other party, which has no access to information to which both the tribunal and its opponent are privy[66]. Hence, it may be preferable to entrust the review of the controversial materials to a third party expert or adviser whose assignment is to report to the arbitral tribunal on the principle and scope of the protection[67]. In addition, under certain circumstances in which protection is granted, the expert or adviser may also report on the contents of the privileged materials in such a fashion that the necessary evidence is gathered without violating the privilege.

Article 3.7 of the IBA Rules permits the arbitral tribunal to appoint an expert to decide on the objection. The WIPO Arbitration Rules also have detailed mechanisms in this respect[68], which are a source of inspiration for tribunals even in non IP arbitrations.

5. Other elements to be taken into consideration by the arbitral tribunal

Such are the standards: specifically identified, relevant, not privileged documents in the possession or control of one of the parties. The application of these standards gives the arbitral tribunal broad discretion regarding the decision on document production. In exercising this discretion, the arbitral tribunal would be well inspired to take into account a number of additional elements.

a) The parties' procedural cultures and reasonable expectations

The arbitral tribunal should take account of the parties' backgrounds. Indeed, certain parties to arbitration agreements, particularly from civil law countries, may be surprised – to say the least – to learn that their agreement to arbitrate imposes on them a general obligation to disclose all relevant documents, including internal communications, which would not be subject to disclosure under their own domestic civil procedure laws[69]. The tribunal may also pay attention to the legal cultures of counsel, which often impact heavily on the manner in which the proceedings are conducted.

b) The proportionality of the request

The arbitral tribunal may further assess the proportionality of the request for production. Hence, it should weigh the potential use of the documents against the burden imposed on the party bound to produce them. If the burden is disproportionate or unreasonable, it should not grant the request[70].

c) Efficient management of the arbitration process

Another aspect which the arbitral tribunal must bear in mind is the efficient management of the arbitration process. Document production may increase the duration of the procedure and make it more costly in terms of counsel and arbitrators' fees. Whether these drawbacks offset potential benefits of document production is sometimes a delicate question.

In this context, the question arises at which stage of the proceedings discovery should be provided. Arbitration rules simply mention *"at any time during the proceedings"*[71]. What time is best to plan discovery?

Neither too early nor too late, is the general answer which is necessarily subject to the specificities of a given case. Not too early, because the parties will be unable to know which documents they need to request before they have exchanged a first round of fully devel-

62) See Rule 26(b)(3) Federal Rules of Civil Procedure. See also *Teply/Whitten*, op. cit., p. 748.

63) See for example *Lücke/Walchshüfer*, Münchener Kommentar zur Zivilprozessordnung, ad § 383, n° 37and § 203 StGB (Strafgesetzbuch).

64) Pro *Poudret/Besson*, Droit comparé de l'arbitrage international, Zurich 2002, n° 654; contra: *Fouchard/Gaillard/Goldmann*, op. cit., para. 1265.

65) Even if the tribunal declares the information to be privileged, it will have seen it and may remain influenced by it (*King/Bosman*, op. cit., p. 38; *Raeschke-Kessler*, op. cit., p. 654).

66) Poudret/Besson, loc. cit.

67) If the arbitral tribunal appoints an expert to decide on the privilege objection, it will order the party to produce the requested documents to the expert for its review. It is then for the expert to decide whether or not the privilege objection is legitimate. If he/she considers the privilege objection to be legitimate, he/she will inform the arbitral tribunal, which will then reject the request on the grounds of the expert's report. Should the expert consider the privilege objection not to be legitimate, he/she will then pass the documents on to the arbitral tribunal, which may then decide without restriction if it orders the production of such documents. The same procedure applies if the expert considers the objection to be legitimate with regard to some parts of the requested documents only but not to all of them. He/she is then to make the confidential parts of the documents unrecognizable, before he/she passes the sanitized version on to the arbitral tribunal.

68) See Article 52 WIPO Arbitration Rules.

69) *Craig/Park/Paulsson*, op. cit., p. 452.

70) Article 9.2(c) IBA.

71) Article 20(5) ICC Rules; see also as examples, Article 24 UNCITRAL Rules; Article 19 AAA International Arbitration Rules.

oped factual and legal submissions. Neither would the arbitrators be in a position to make a determination on the relevance of the evidence sought.

Discovery should not be scheduled too late either. Otherwise the parties will have set out their full case without the benefit of the discoverable evidence and will later require extra time to comment on the additional documents. Hence, a good time is often between the first and second exchanges of written briefs. At such time, the parties and the tribunal have sufficient information to deal with discovery matters and there is still a further round of written briefs forthcoming, which may comprise comments on the new evidence.

V. What if a party fails to produce documents in breach of the arbitral tribunal's order?

If an arbitral tribunal requests the production of a document, and the party concerned refuses to produce it, the arbitral tribunal has a number of alternatives.

1. Enforcement by state court of the arbitral tribunal's document production order

The arbitral tribunal itself does not have the power to compel production. In some jurisdictions, the arbitral tribunal or a party to the arbitration can seek the assistance of a domestic court to enforce the document production order[72]. Although the remedy does exist, neither parties nor tribunals in reality use to resort to it. It is apparently thought to be cumbersome and ineffective compared to the other alternatives[73].

2. Drawing adverse inferences

More often an arbitral tribunal will draw an adverse inference: it will infer from the party's failure to comply with the production order that the contents of the document would have been adverse to the interests of that party. More specifically, it may deem the facts sought to be established by the missing document to be proven. This is a widely accepted solution[74] which is incorporated into the IBA Rules[75].

In some cases, the adverse inference may not be wholly sufficient. Where a party is unable to sustain its claim, without documents allegedly in the other party's possession, a mere adverse inference drawn from non-production will not suffice to sustain a claim or defense for which no evidence of record exists[76].

Even if the arbitral tribunal does not draw adverse inferences from a party's failure, such conduct may in fact adversely influence the arbitral tribunal's assessment of that party's case. Although adverse influence is less tangible than adverse inference, it may be damaging as well.

3. Shifting the burden of proof to the party with access to the evidence

This solution has similar benefits to drawing adverse inferences. It should not be used, however, whenever a party is genuinely prevented from producing the evidence required to discharge the burden of proof, e. g. when the documents requested have been destroyed.

4. Statutory example

Section 41(7) of the 1996 English Arbitration Act provides a statutory example of possible sanctions for a party's non-production of evidence:

"If a party fails to comply with any other kind of peremptory order, then [...] the tribunal may do any of the following: (a) direct that the party in default shall not be entitled to reply upon any allegation or material which was the subject matter of the order; (b) draw such adverse inferences from the act of non-compliance as the circumstances justify; (c) proceed to an award on the basis of such materials as have been properly provided to it; (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance".

VI. In conclusion: transnational standards

In conclusion, transnational standards have emerged on many matters of document discovery in international arbitration: the existence and scope of document discovery, the powers of the arbitrators to make related orders, the requirements for such orders to issue, the sanctions for non-compliance. Certain issues, mainly privileges, would benefit from further developments of transnational practice.

The observations made in respect of document production are in line with the general harmonization trend of arbitration procedure, which is the product of a happy merger of civil law and common law traditions.

72) See for example, Section 43 1996 English Arbitration Act 1996; Article 184 Swiss International Law Act; § 1036 German Civil Procedure Code; Article 27 UNCITRAL Model Law.

73) Moreover, it seems that courts are reluctant to enforce discovery orders (*Rogers*, op. cit., p. 138).

74) See for example: *Redfern/Hunter*, op. cit., p. 317–318; *Rogers*, op. cit., pp. 139–140; *Derains/Schwartz*, op. cit., p. 262; *Born*, op. cit., p. 489; *Fouchard/Gaillard/Goldmann*, op. cit., para. 1275. See also: Arrêt de la *Cour d'Appel de Paris*, Revue de l'arbitrage, 1997, p. 429; ICC case 8694/96, Journal du Droit International, 1997, p. 1056; ICC Case 6497/1994, Yearbook Commercial Arbitration 1999, p. 71.

75) Article 9.4 and 9.5 IBA Rules.

76) See for example: *Craig/Park/Paulsson*, op. cit., p. 456.

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Der Schiedsgerichtsobmann als Vertragspartner

Dem Schiedsgerichtsobmann kommt in einem Schiedsverfahren in mehrerlei Hinsicht eine wesentliche Rolle als Vertragspartner zu. Im Mittelpunkt steht dabei zunächst die finanzielle Infrastruktur des Schiedsgerichts. Der Schiedsgerichtsobmann verwaltet im Rahmen eines mehrseitigen Treuhandverhältnisses im eigenen wie im Interesse seiner Mitschiedsrichter den von de Parteien zu zahlenden Sicherheitsvorschuss. Dabei ist er verpflichtet, den eingezahlten Betrag zu Gunsten der Parteien verzinslich anzulegen und ihnen über dessen Verwendung Rechnung zu legen. Von praktischer Relevanz ist in diesem Zusammenhang die Frage, wer das Risiko eines eventuellen Verlustes des einbezahlten Vorschusses zu tragen hat.

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