Chapter 5: Interpretation of the IBA Rules

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§5.01. INTRODUCTION

The success of the IBA Rules is remarkable.(1) Their acceptance by the arbitration literature is exceptional.(2) They are considered to be 'an internationally applicable standard'(3) or 'best practices'(4) by leading commentaries.

More importantly, they are frequently used in practice.(5) In a survey conducted with 173 practitioners from 30 countries, 43% stated that they used the IBA Rules in nearly every or most arbitrations by reference to a procedural order or other stipulation and 42% indicated that they use them in some or few arbitrations.(6) The IBA Rules are applied irrespective of the legal background of the parties.(7)

The IBA Rules contain several undefined or only partly defined terms.(8) Contrary to the view stated in a leading book on international arbitration,(9) the provisions of the IBA Rules are not 'self-explanatory'. The IBA Rules and the Commentary of the IBA Rules of Evidence Review Subcommittee(10) neither define relevance to the case,(11) nor *page "33"* materiality to its outcome,(12) nor the expression 'possession, custody or control',(13) nor the 'unreasonable burden' to produce the requested documents.(14) Furthermore, the IBA Rules only partly define what constitutes a 'narrow and specific requested category of Documents'.(15)

These broad terms are both a blessing and a curse for the IBA Rules.(16) On the one hand, the resounding success of the IBA Rules would not have been possible if they set rigid requirements. Flexibility was the key for the acceptance of the IBA Rules. Paragraph 2 of the Preamble to the IBA Rules holds that: 'The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, ...'.

On the other hand, the interpretation of the IBA Rules is very controversial. In a recent unpublished(17) arbitration case, one of the parties submitted a document production request of one hundred pages while the counterparty submitted one consisting of a single page. Both parties were represented by major law firms. This extreme example shows how differently the IBA Rules are handled even by experienced practitioners.

The approaches adopted by arbitral tribunals on the extent of document production under the IBA Rules differ considerably. For example, two English practitioners observe:

> Some arbitrators will accede to requests that are almost tantamount to a common law-style discovery of all documents potentially relevant to the case, whereas others will be wary of requests for anything other than very closely circumscribed categories of document.(18)

This makes it very difficult to predict the result of the application of the IBA Rules.[19] If it cannot be said in advance, with a reasonable degree of probability, whether a document production request will be granted or denied, the value of the IBA Rules is reduced.[20]

This chapter offers insight into the interpretation of the IBA Rules and aims to assist counsel and arbitrators to find their way through the jungle of opinions. By way of comparison, other guidelines such as the International Centre for Dispute Resolution (ICDR) Rules as well as the International Institute for Conflict Prevention & Resolution (CPR) Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (CPR Protocol) [21] are briefly addressed.

page "34"

§5.02. OVERVIEW OF THE REQUIREMENTS OF DOCUMENT PRODUCTION

Article 3(3) IBA Rules prescribes four requirements for a document production request. Simplified, it can be said that the two main requirements refer to the specificity of the request and the importance of the requested documents, while the two other requirements refer to the access to the requested documents.

More precisely, the requirement of specificity can be fulfilled by a request for specific documents or for specific and narrow categories of documents.[22] Moreover, the requested documents must be prima facie material to the outcome of the case (Article 3(3)(b) IBA Rules and Article 9(2)(a) IBA Rules). The requirements of specificity and materiality might be seen against the backdrop of the prohibition of fishing expeditions.

Furthermore, it is required that the requested documents are not in the possession, custody or control of the requesting party or that it is unreasonably burdensome for the requesting party to produce the documents (Article 3(3)(c)(i) IBA Rules). Finally, the requested documents must be in the possession, custody or control of the requested party (Article 3(3)(c)(ii) IBA Rules).

In contrast to the 1983 IBA Rules, neither the 1999 IBA Rules nor the current 2010 IBA Rules exclude the production of internal documents (see Chapter 3 section §3.04 *supra*).

Article 9(2) IBA Rules provides several exclusions from the duty to produce documents. In brief, a party is not obliged to produce privileged, confidential, lost or destroyed documents. Furthermore, a party has the right to object against unreasonably burdensome or disproportionate production of documents.

The issue of adverse inferences (Article 3(5) IBA Rules) is covered in the chapter on sanctions. Judicial assistance (see Article 3(9) IBA Rules) is excluded from the scope of this book.

§5.03. THE CHALLENGE OF ELECTRONIC DOCUMENT PRODUCTION

One of the new challenges for arbitrators is to deal with requests for the production of electronic documents (hereinafter ‘e-documents’). [23] Compared with the production of paper documents, the production of e-documents presents additional difficulties.

E-documents have significantly raised the volume of business documents. In addition, such documents are often widely dispersed

(see Chapter 5 section §5.13 [A] *infra*). Such burden entails the risk of deterring users from international arbitration.[24] By contrast, e-documents are a valuable source of evidence, which should not be ignored.[25] Parties use e-mails to exchange drafts of contracts, discuss technical problems and admonish the other party for alleged breaches of contract.

page "35"

Owing to the increasing stream of electronic communications, businesspeople are often less cautious when writing e-mails. E-mails may contain information that the concerned individuals would not have disclosed in a formal letter.[26] It is obvious that such communications generate the interest of lawyers when it comes to a dispute.

When deciding on the production of e-documents, finding the right balance between the conflicting interests of efficiency and the right to evidence is a particularly difficult task for the arbitral tribunal.[27] Considering the volume of e-documents, the question arises under what circumstances the production of e-documents reaches the level of an unreasonable burden (see Chapter 5 section §5.13 *infra*). Another controversial issue is whether a request for categories of e-documents can include search terms (see Chapter 5 section §5.05 [D] *infra*).

§5.04. GENERAL COMMENTS ABOUT THE INTERPRETATION OF THE IBA RULES

Originally, the IBA Rules were a compromise between common law and civil law.[28] This historical background can be helpful for the interpretation of the IBA Rules. Still today, the IBA Rules build a bridge between civil law and common law practitioners. Therefore, one-sided interpretations of the IBA Rules need to be rejected. The room for interpretation left by the IBA Rules should not be abused to reinterpret them as civil law or common law rules.

However, two authors consider that the extent of document production under the IBA Rules is similar to that under English law:

> It has been observed that document production under the IBA Rules is narrower than discovery under the FRCP in the United States, similar in scope to disclosure in the United Kingdom and broader than disclosure in most civil law systems.[29]

While it can be agreed that the extent of document production under the IBA Rules is narrower than in US court proceedings and broader than in most civil law proceedings, the basis and sources of the comparison with English law are not clear. The authors provide no detail as to the extent to which the IBA Rules and English law provide a similar extent of document production. Rather, this seems to be an isolated opinion.

It is difficult to maintain that the scope of document production under the IBA Rules equates with that under the laws of a typical common law country such as England. Rather, one of the principles laid down in the Commentary of the IBA Rules of Evidence Review Subcommittee reads as follows: ‘Expansive American- or English-style discovery is generally inappropriate in international arbitration.’ Consequently, a reasonable interpretation of the IBA Rules lies in between civil law and common law.

page "36"

The nature of the IBA Rules as a compromise is also reflected in the applicable principles. The intended characteristics of document production are mentioned in the preamble, namely that the process should be 'efficient, economical and fair'. The principles of efficiency and economy on the one hand and fairness on the other are in tension. This antagonism is a key issue in the interpretation of the IBA Rules. For every requirement of the IBA Rules, the conflicting principles need to be balanced.

According to the President of the IBA Rules of Evidence Review Subcommittee, the 2010 Revision of the IBA Rules was guided by the conservative maxim: 'If it is not broken, do not fix it.'(30) There was no intention to make radical changes to the 1999 IBA Rules.(31) Therefore, the 1999 IBA Rules are still helpful for the interpretation of the current IBA Rules. In cases of doubt, the current IBA Rules should be interpreted in line with the 1999 IBA Rules.

§5.05. SPECIFICITY

[A] . Introduction

Specificity is one of the two key requirements of document production. This chapter examines the degree of specificity of requests for individual documents and of requests for categories of documents. It also analyses whether e-documents must be produced under the IBA Rules. Moreover, it explores the much discussed issue of whether requests for categories of e-documents can include search terms.

[B] . Specific Documents

In the first alternative, a document production request is specific enough if it contains 'a description of each requested Document sufficient to identify it' (Article 3(3)(a)(i) IBA Rules). With respect to this requirement, the Commentary of the IBA Rules of Evidence Review Subcommittee simply states: 'The description of an individual document is reasonably straightforward. The IBA Rules of Evidence simply require that the description be "sufficient to identify" the document.'(32)

Compared with the controversial interpretation of a narrow and specific category of documents, it may be true that the interpretation of a sufficiently identified document can be less problematic.(33) Nonetheless, the interpretation is not as straightforward as it might appear at first sight.

No abstract rule determines what is sufficient to identify a document.(34) In particular, a document can be identified by its author, recipients, possessors, date or *page "37"* time frame of its establishment, title, content, type (e-mail, minutes, etc.), file number or storage location.(35)

If a party indicates a file number, this alone is normally sufficient to identify a document. Similarly, it is usually sufficient to identify a document if a party requests the production of a document to which reference has been made in another party's submission or in a document already submitted into the record of the arbitration.(36)

The requirements of a sufficiently identified document and of relevance should not be mixed. The only issue in relation to the first requirement is whether the document has been specified in a way that the requested party can identify it. There is no connection

between the two requirements. By contrast, the requirement for a narrow and specific category of documents has a link to the relevance of the requested documents (see Chapter 5 section §5.05 [C] *infra*).

The following example illustrates a request for an individual document, which this book considers to be admissible under the IBA Rules.[37] A British Virgin Islands (BVI) company agrees at the beginning of 2013 to sell the shares of a Russian company to an English company. The purchase contract is not executed. The English company suspects the BVI company of having sold the shares for a higher price to a Cypriot company and claims damages. In the arbitration proceedings, the English company requests the BVI company to produce the purchase agreement regarding the shares of the Russian company which was concluded between the BVI company and the Cypriot company in the first half of 2013.

A procedural decision published in extracts in the 2006 ICC Bulletin (Special Supplement) required document production requests to be highly specific.[38] The arbitral tribunal was seated in Switzerland and composed of continental European arbitrators.[39] It gave the following explanation:

> For example, the request must describe the kind of document, identify the authors and the addressees, cover a narrow time period, describe the contents and the other characteristics of the document sought and in general allow one to foresee precisely what documents are responsive to the request.[40]

Furthermore, the arbitral tribunal made the following example of an admissible document production request:

> Pursuant to … the Terms of Reference, the party could then request production of the minutes of the board meeting by specifying in its request that it seeks the written minutes of the meeting of XYZ Company's board, which took place on XYZ *page "38"* date, was attended by Messrs. X, Y and Z, at which meeting the board made decision XYZ.[41]

This arbitral tribunal imposed higher requirements than the IBA Rules. While the IBA Rules require that the request is specific, the arbitral tribunal required that the request is highly specific. By comparison, an example of an arbitral tribunal composed of European and North American arbitrators that required a 'reasonable degree of specificity' is also cited in the 2006 ICC Bulletin (Special Supplement).[42]

Furthermore, the example given by the arbitral tribunal seated in Switzerland contains more elements than necessary to identify the document. In particular, it is not necessary to name the board members that attended a board meeting in order to identify the requested document. A request for 'the written minutes of the meeting of XYZ Company's board, which took place on XYZ date, at which meeting the board made decision XYZ' is specific enough to identify the document in question.

[C] . Narrow and Specific Requested Category

In the second alternative, a document production request is specific enough if it contains 'a description in sufficient detail (including subject matter) of a narrow and specific requested category of

Documents that are reasonably believed to exist' (Article 3(a)(ii) IBA Rules). It follows that Article 3(3)(a)(ii) IBA Rules names one of the criteria of a narrow and specific requested category: the description of the category of documents must include the subject matter.

The Commentary of the IBA Rules of Evidence Review Subcommittee explains that requests for categories of documents should enable the production of relevant and material documents, even if the requesting party is not able to identify specifically the requested documents.(43) Furthermore, it emphasizes that requests for categories of documents need to be 'carefully tailored to produce relevant and material documents'.(44)

This explanation must be seen against the background of the tension between the right to evidence and efficiency (see Chapter 5 section §5.04 *supra*). The requirement of specificity is crucial with regard to the efficiency of the proceedings, since it excludes requests for broad categories. Such requests are one of the main reasons for the exorbitant costs of litigation in some common law countries.

The Commentary of the IBA Rules of Evidence Review Subcommittee gives an example of an admissible document production request.(45) In this example, the requesting party specifies the presumed time frame in which the documents have been established and the nature of the requested documents.(46) The request concerns the minutes of a board of directors meeting at which a decision to terminate an agreement *page "39"* was made as well as the documents prepared for the board's consideration of that decision.(47)

The Commentary of the IBA Rules of Evidence Review Subcommittee does not list the criteria to be fulfilled in order for a request for categories of documents to be considered to be narrow and specific. By contrast, several commentaries suggest definitions of a request for a narrow and specific category.

A commentary on the IBA Rules explains that a document production request must be 'reasonably limited in time and subject matter in view of the nature of the claims and defenses advanced in the case'.(48) Hence, this commentary provides for two requirements of a request for categories of documents. However, several commentaries defend the opinion that a request for categories of documents usually needs to specify the following three elements to be narrow and specific: presumed author and/or recipients, presumed date or time frame and presumed content.(49)

In addition to these elements, another authority requires that a request also indicates the location and the nature of the documents sought.(50) According to this opinion, 'a category must be as specific as possible' so that a document production request has a good chance of being granted.(51)

While it is true that a specific as possible request for a category of documents will increase the chances of obtaining the category of documents sought, such criterion should not be turned into a requirement for document production. If the requested category of documents is narrowly defined, this should be considered to be sufficient by an arbitral tribunal to order production.

The suggested requirement that the author needs to be specified directly contradicts the Commentary of the IBA Rules of Evidence Review Subcommittee, which describes the example of an admissible request for a category of documents as follows:

> The requesting party cannot identify the dates or the authors of such documents, but nevertheless can identify with some particularity the nature of the documents sought and the general time frame in which they would have been prepared.(52)

Article 3(a)(ii) IBA Rules only provides for one indispensable requirement for a request for a narrow and specific category, namely the description of the subject matter. In other words, the other specifications of a request for a category of documents are left open. This incompleteness is not accidental, but rather in accordance with the objective of flexibility.

It must be decided on a case-by-case basis whether a request for a category of documents is narrow and specific.(53) A request for a category of documents may be specified by the same criteria as a request for a specific document, namely the authors, *page "40"* recipients, possessors, date or time frame of establishment, title, content, type (e-mail, minutes, etc.), file numbers or storage location.(54)

Common law-style document production requests will generally not satisfy the criteria of a narrow and specific requested category. For example, a document production request that begins with 'All memoranda, minutes and correspondence …' is typically considered to be too broad in arbitration.(55) In addition, a request for all documents relating to a specific contract or for all minutes of the board meetings for the past three years generally does not satisfy the requirement of specificity.(56) Similarly, in a case cited in the 2006 ICC Bulletin (Special Supplement), an arbitral tribunal considered the request for 'all Field Site Instruction for Areas [A], [B], [C] and [D]' to be insufficiently specific.(57)

By contrast, the following requests are considered to be sufficiently specific: a request for the minutes of the meetings of the board of directors of company XYZ between 22 May 2014 and 1 December 2014 at which project XY was discussed,(58) a request for the fee schedules annexed to the license agreement between Y and Z dated 20 September 2015 or a request for the letters between U and V concerning the issue W between 15 March 2015 and 10 September 2015.(59)

A popular ploy to circumvent the requirement for a narrow and specific category is to divide a request for a broad category of documents into numerous sub-requests for narrow categories of documents.(60) Instead of requesting all e-mails from the management of X to the management of Y, a party may request all e-mails from manager X1 to manager Y1, from manager X1 to manager Y2 and so on. Such disguised common law-style requests should be treated as requests for broad categories of documents and therefore be dismissed.

A commentary on ICC arbitration points out that lawyers from common law and civil law countries often interpret differently the requirement for a narrow and specific category of documents:

> For example, for common law lawyers, requests for 'minutes of directors' meetings' or 'account statements for account no.1234' or 'import authorisations relating to computer hard drives' are narrow and specific categories of documents. For other lawyers, the issue may be which directors' meetings and why, which account statements and which import authorisations.(61)

When interpreting the requirement for a narrow and specific requested category, it should be kept in mind that this criterion aims to distinguish document production in international arbitration from document production in civil law jurisdictions, where page "41" requests for categories of documents are in general unavailable (see Chapter 3 section §3.03 *supra*), and from discovery proceedings in common law countries, where broad categories of documents must be disclosed (see Chapter 3 section §3.02 *supra*).[(62)] In international arbitration, the requirements of specificity should strike a balance between the two extremes.[(63)]

[D] . Requests for Electronic Documents

The 1999 IBA Rules did not provide any special rules for e-documents. E-documents were simply included in the definition of documents and, therefore, they had to be produced under the same requirements as paper documents.[(64)] One of the purposes of the 2010 Revision of the IBA Rules was to lay down specific rules for the production of e-documents.[(65)]

The new definition of the term 'Document' is only a cosmetic change, however, and reads as follows: '"*Document*" means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means.'

More importantly, the current IBA Rules amended the provision on request for categories of documents. Article 3(3)(a)(ii) IBA Rules now states that:

> in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner.

The Commentary of the IBA Rules of Evidence Review Subcommittee further points out that the identification of individuals can mean, for example, specifying custodians or authors.[(66)]

A fundamental issue in relation to the production of e-documents is whether they should be treated in the same way as paper documents are. The following statement in the Commentary of the IBA Rules of Evidence Review Subcommittee may lead to misunderstandings:

> The revised Rules are neutral regarding whether electronic documents should be produced in any given arbitration; they simply provide a framework for doing so where the parties agree or the arbitral tribunal orders production of such documents.[(67)]

If this statement were interpreted literally, the IBA Rules would provide no guidance on whether or not e-documents must be produced. The IBA Rules would be simply 'neutral' on this issue. As a consequence, decisions of an arbitral tribunal on the page "42" production of e-documents would be difficult to predict. This would be a major step backwards compared with the 1999 IBA Rules.

In a panel discussion, a practitioner from the United States expressed the need for guidance on the production of e-documents in clear words: 'To pretend that international arbitration on a going-

forward basis does not have to deal with ESI[68] is to put not one blind eye, but to completely close your eyes, to modern realities.'[69]

Article 3(3)(a)(ii) IBA Rules does not imply that e-documents should be treated fundamentally differently from paper documents. Based on the wording of the IBA Rules, e-documents are still included in the definition of documents and the duty to produce documents also covers e-documents. The literal interpretation of the IBA Rules is in line with the general approach of the 2010 Revision to adhere to the existing standard.

Furthermore, the ICC Arbitration Commission Report on Managing E-Document Production postulates that paper documents and e-documents are treated equally:

> There is and there should be no difference in principle between the production of paper documents and the production of electronic documents in arbitration. The mere fact that relevant and material information is or may be stored electronically rather than on paper (or may be stored in both formats) is not, in itself, a reason to grant or deny production of that information.[70]

The President of the IBA Rules of Evidence Review Subcommittee explains that 'the 2010 IBA Rules treat electronic documents the same as paper documents'.[71] Similarly, an article on the IBA Rules states the following:

> Rather than prescribe new rules for the disclosure of electronic documents, the 2010 IBA Rules maintain the basic approach of the 1999 Rules: the 2010 IBA Rules continue to define 'Documents' to include electronic documents, and prescribe a single set of rules to govern the production and disclosure of *all* types of documents, paper and electronic alike.[72] (emphasis original)

Furthermore, a member of the IBA Rules of Evidence Review Subcommittee explains in an article that the identification by file names, search terms, individuals or means of searching constitutes an option.[73] Hence, the IBA Rules do not exclude e-documents from the duty to produce documents, but rather provide an additional rule for such requests. The statement of the Commentary of the IBA Rules of Evidence Review Subcommittee might be understood as meaning that the IBA Rules are neutral on whether specific rules are applied to e-documents. Moreover, the Commentary can be interpreted as clarifying that the IBA Rules provide the possibility to include file *page "43"* names, search terms, individuals or other means of searching in a request for document production, but do not provide a duty to do so.

Of these possibilities, the use of search terms is the most controversial issue. Search terms can determine the characteristics of document production requests. While some authors from common law jurisdictions promote this method,[74] practitioners from civil law countries are typically sceptical about the use of search terms.

An article on e-document production suggests that 'a limited number of word searches' combined with 'a specific date range and/or a specific list of individuals' should be considered to be a request for a narrow and specific category under the 1999 IBA Rules.[75]

Under the current IBA Rules, a request for a category of documents

needs to include at least a description of the subject matter. Instead, the above-mentioned article used search terms to identify the requested documents. It is doubtful whether search terms can be equated with a subject matter. Such a classification usually requires assessment by a human being. For instance, the results of keyword searches need to be reviewed manually and any results unrelated to the requested subject matter need to be excluded. This additional step avoids in particular the production of documents that belong to unrelated transactions. Therefore, the suggested example would need to be amended to include a description of the subject matter in accordance with Article 3(3)(a)(ii) IBA Rules.

A commentary on the IBA Rules gives an example of an admissible request for e-documents under the current IBA Rules:

> all emails and letters between A (acting by its employees C, D or E) to B (acting by its employees F, G or H) in the period from J to K relating to L, together with any documents attached or enclosed, located in the paper files in the offices at M, or on the computer servers at M, and containing one or more of the following words N, P or Q.(76)

This example indicates the authors and recipients (C, D or E and F, G or H), time period (J to K), subject matter (L), nature of the documents (e-mails, letters and attached or enclosed documents), location of the requested documents (offices or servers at M) and three search terms (N, P and Q).

The above example contains sufficient elements to describe a specific and narrow category of documents. In many cases, however, the requesting party will have problems indicating the location of the requested documents. It can hardly be assumed that the requesting party knows where the requested party stores its documents. Therefore, this requirement may be too strict. However, not only is the number of elements that describe a category of documents important, but so are the elements that narrowly define the category.

The Commentary of the IBA Rules of Evidence Review Subcommittee specifies that the purpose of indicating the file name, specified search terms or individuals is to *page "44"* additionally identify the requested documents.(77) Therefore, the importance of search terms is limited under the IBA Rules, even if an arbitral tribunal decides to apply the optional rule to e-documents.

A different question is whether the application of the optional rule of Article 3(3)(a)(ii) IBA Rules is recommendable. As discussed in Chapter 8 section §8.07 [B] below, this book does not recommend allowing search terms in document production requests, since they do not increase the efficiency of document production proceedings in international arbitration.

An author from a common law country explains that e-disclosure applications automatically organize e-documents according to the similarity of their content.(78) The author gives the example on how the data can be reduced in a first step by identifying relevant individuals and range of dates to 100 gigabytes, in a second step by agreeing keywords to ten gigabytes, and in a third step by the de-duplication and filtering of documents to five gigabytes.(79)

However, the IBA Rules do not provide for such a procedure, which requires several steps and a close cooperation of the parties. According to the IBA Rules, the request must be so specific that the requested party can directly produce the documents.

Another author considers the possibility that arbitrators could allow the requesting party, its experts or a tribunal appointed expert to have access to the accounting systems and databases of the requested party.[80] Under the IBA Rules, this possibility is not mentioned. The IBA Rules do not provide a duty of a requested party to allow access to its accounting systems and databases.[81] Such general access to accounting systems and databases would be in flagrant contradiction to the system of the IBA Rules to grant access to documents only on the basis of specific requests.

In summary, requests for e-documents can either have the same form as requests for paper documents or additionally 'identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner' under the IBA Rules. In addition, the requested party does not have a duty to allow access to its accounting systems and databases under the IBA Rules.

[E] . Other Guidelines on E-Document Production

The issue of e-document production has led to numerous publications of arbitral institutions. Most of them present (or attempt to present) alternatives to the IBA Rules. The ICC Commission on Arbitration opted for a different approach. The ICC Arbitration Commission Report on Managing E-Document Production mainly focuses on explaining the IBA Rules (see Chapter 5 section §5.05 [D] *supra*).

page "45"

The Chartered Institute of Arbitrators issued a Protocol for e-Disclosure in Arbitration[82] (CIArb Protocol) which is largely inspired by the IBA Rules. CIArb Protocol, note 4, reiterates, almost word for word, the requirements of Article 3(3) 1999 IBA Rules. In addition, CIArb Protocol, note 7, explicitly excludes the restoration of back-up tapes as a rule (Chapter 5 section §5.13 [D] *infra*). However, there is no material difference to the IBA Rules in this respect. In principle, the restoration of back-up tapes is considered to be an unreasonable burden under the IBA Rules (see Chapter 5 section §5.13 [D] *infra*).

Like the IBA Rules, the ICDR Rules, in principle, do not provide different requirements for the production of e-documents than for the production of paper documents.[83] The specific provision on e-documents[84] only complements the general rules on document production.[85]

Under the ICDR Rules, the extent of the duty to produce e-documents is more limited than that to produce paper documents. While the general rules on document production do not contain the limitation that document production must be limited to narrow classes of documents,[86] only narrow requests for e-documents are admissible: 'Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible.'[87]

Commentators recommend attaching a list of search terms to a request for e-documents to satisfy this requirement.[88] This proposal seems to be in line with the general approach of the ICDR Rules to provide a slightly broader extent of document production compared with the IBA Rules (see Chapter 4 section §4.03 [F] *supra*). As outlined above, the IBA Rules provide an optional rule that allows search terms (see Chapter 5 section §5.05 [D] *supra*).

The International Institute for Conflict Prevention and Resolution has adopted a substantially different model than the IBA Rules. In line with the principle of party autonomy and the objective of flexibility, the CPR Protocol emphasizes the free choice of the parties.(89) The CPR Protocol provides four modes of disclosure of electronic information that vary between no document production at all (Mode A) and document production similar to US law (Mode D).

However, it is doubtful whether it was a wise approach to use extreme solutions for model clauses in international arbitration. Rather, it seems to be recommendable to focus on differentiated solutions. For example, a US practitioner commented on Mode D of the CPR Protocol in a panel discussion as follows: *page "46"*

> The CPR protocol, for example, has an option which includes disclosure pursuant to the Federal Rules of Civil Procedure. I do not know how that got into an international arbitration protocol, but it did.(90)

In summary, the ClArb Protocol provides the same and the ICDR Rules a slightly broader extent of e-document production compared with the IBA Rules. Additionally, the ICC Arbitration Commission Report on Managing E-Document Production comments on the IBA Rules. Further, the CPR Protocol provides four modes of disclosure of electronic information, from which at least the two extreme variants (Modes A and D) are not recommendable.

[F] . Summary

No abstract rule determines what is sufficient to identify a document or a category of documents. Rather, the requirements of specificity depend on the circumstances of the particular case. Requests for individual documents and requests for categories of documents may be specified by the following criteria: the authors, recipients, possessors, date or the time frame of the documents' establishment, title, content, type (e-mail, minutes, etc.), file number or storage location. Requests for categories of documents also need to include the subject matter pursuant to Article 3(3)(a)(ii) IBA Rules.

It results from the wording of the IBA Rules, from the ICC Arbitration Commission Report on Managing E-Document Production, and from articles written by members of the IBA Rules of Evidence Review Subcommittee that the IBA Rules also provide a duty to produce e-documents. The IBA Rules leave open whether an arbitral tribunal should allow search terms in requests for categories of documents. Article 3(3)(a)(ii) IBA Rules provides an optional rule that allows for the inclusion of search terms. By comparison, requests for categories of documents can include search terms under the ICDR Rules.

§5.06. RELEVANCE AND MATERIALITY

[A] . Introduction

Article 3(3)(b) IBA Rules contains the second set of key requirements for document production. The requested documents must be material to the outcome of the case. In addition, Article 3(3)(b) IBA Rules requires that the requested documents are relevant to the case. Both relevance and materiality concern the importance of the requested documents.

This chapter analyses the relation between the relevance and the

materiality requirements as well as their legal bases and origins. It further formulates suggestions regarding the definition of such terms. It examines whether likely or potential materiality to the outcome of the case is required. A controversial issue is whether

page "47" document production requests should be granted only when the requesting party bears the burden of proof for the facts that it intends to prove with the requested documents.

In addition, this chapter offers some examples of material and immaterial documents. Finally, it analyses the relevance and materiality of internal documents and metadata.

[B] . Two Legal Bases

Relevance and materiality are such important criteria that the drafters of the IBA Rules mention them twice. First, Article 3(3)(b) IBA Rules states that a document production request must be relevant to the case and material to its outcome. Moreover, Article 9(2)(a) IBA Rules reiterates that the arbitral tribunal can exclude evidence due to a 'lack of sufficient relevance to the case or materiality to its outcome'.

The second provision is almost redundant. If relevance and materiality are requirements of document production requests, it logically follows that the arbitral tribunal can exclude evidence due to a lack of relevance or materiality. In addition to the rule of Article 3(3)(b) IBA Rules, Article 9(2)(a) IBA Rules only specifies that the relevance need be sufficient.(91)

[C] . Different Origins of the Two Requirements

Article 3(b) 1999 IBA Rules required that the requested documents are relevant and material to the outcome of the case. According to several commentaries, the modification of the wording in the current IBA Rules only aimed to clarify that the two requirements are separate and that they both need to be fulfilled.(92)

For a better understanding of the relation between these two requirements, it might be helpful to have a closer look at their origins. Relevance to the case is a requirement that is typically used in common law jurisdictions (see Chapter 3 section §3.02 *supra*). In general, common law proceedings have a broad understanding of relevance to the case. It is not enquired whether the requested documents are ultimately necessary for the court to decide the case. Such an analysis would not be possible, because the parties have yet to plead their cases in detail at the discovery or disclosure stage. Rather, the focus is on the parties' perspectives. The documents need to be relevant for the parties to prepare the trial (see Chapter 3 section §3.02 *supra*).

Civil law concepts strongly influence the requirement that a document must be material to the outcome of the case. In civil law countries, after the pleadings have been submitted, the judge examines the underlying nature and requirements of a claim. For each requirement, the judge enquires whether the corresponding allegations of the parties are disputed. As a rule of thumb, in civil law countries, a document production request is granted if it aims to prove a disputed allegation that is not otherwise proven.

page "48"

These origins provide guidelines on how to interpret the requirements of relevance to the case and materiality to its outcome. While relevance to the case is a lower threshold,

materiality to the outcome of the case is a higher threshold. Nonetheless, civil law and common law origins can only serve as a starting point for the interpretation. In international arbitration, such requirements are interpreted autonomously.(93)

The Commentary of the IBA Rules of Evidence Review Subcommittee provides little guidance on the interpretation of relevance and materiality. It merely states that the request must explain the relationship between the requested documents and the issues in the case with sufficient specificity.(94) Also, most relevant literature is surprisingly silent on the definitions of relevance and materiality.

From the point of view of a party's ability to present its case, relevance and materiality are the key requirements. Their interpretation determines what documents a party needs in order to present its case.

[D] . Different Thresholds of Relevance under the 1999 and 2010 IBA Rules

In contrast to the current IBA Rules, Article 3(b) 1999 IBA Rules did not require that the requested document must be 'relevant to the case', but 'relevant to the outcome of the case'. The previous wording was influenced by civil law concepts.

An article published in 2004 defines 'relevant to the outcome of the case' under the 1999 IBA Rules as follows: 'A relevant document is one likely to prove a fact from which legal conclusions are drawn.'(95) The influence of civil law concepts on this definition is strong. A comparison with the Swiss Code of Civil Procedure(96) (hereinafter 'CPC (Switz.)') illustrates this connection. Article 150(1) CPC (Switz.) reads as follows: 'Evidence is required to prove facts that are legally relevant and disputed.'

A recent commentary on the IBA Rules refers to the definition of the article published in 2004 to define what qualifies as a relevant document.(97) However, the above definition relates to the 1999 IBA Rules and defines the term 'relevant to the outcome of the case'. Therefore, it is hardly accurate to use this very same definition for the term 'relevant to the case' under the current 2010 IBA Rules.

The amendment to the wording involved a change of perspective. Contrary to the term 'relevant to the outcome of the case', the term 'relevant to the case' considers the relevance from the parties' perspectives. 'Relevant to the case' does not imply an analysis by the arbitral tribunal regarding whether the requested document will be needed to resolve the case. Rather, the issue is whether the requesting party can use the requested document to present its case.

page "49"

The purpose of the requirement 'relevant to the case' is to exclude documents that do not relate to the case, such as document production requests that aim to search for new claims. Furthermore, documents not sufficiently relevant are excluded. This means in particular that the requested document itself must be relevant. In contrast to the US Federal Rules of Civil Procedure(98) (FRCP),(99) the mere expectation that the requested document may lead to relevant documents is not sufficient in international arbitration.

One author expresses the view that a requested document has to refer to 'an important contention' to be relevant to the case:

> In the context of document production requests, a tribunal will generally analyse whether a party has put forward a credible argument as to the likely or prima facie relevance of the requested evidence in support of an important contention in the petitioning party's case.(100)

'Credible argument' and 'important contention' are vague terms that leave broad discretion to the arbitral tribunal. Compared with the definitions used in common law proceedings, the suggested limitation that the contention to be proven must be important clearly limits the number of documents that may be considered to be relevant.

However, it is questionable whether the criterion that the contention must be important is consistent with the requirement of sufficient relevance. The requirement that the requested document must support an important contention implies that the requested documents are highly relevant.

In US proceedings, a method called 'sampling' is used to evaluate the likelihood that back-up tapes (or other electronically stored information) may contain relevant information.(101) One US author posits that the IBA Rules seem to be broad enough to allow the application of the same approach in international arbitration.(102) However, it is here argued that relevance and materiality must also be shown in order to request samples.(103) 'Sampling' should only be used to reduce an unreasonable burden (see Chapter 5 section §5.13 [F] *infra*), but it cannot replace the requirements of relevance and materiality. The IBA Rules do not provide that the decision on document production can be based on a sample that the requested party must have previously produced. If sampling was applied in such a manner, this would risk allowing a party to shoot in the dark.

An English author argues that, in cases of doubt, the arbitral tribunal should look at the requested documents in order to determine relevance and materiality:

> Arbitral tribunals faced with contested issues of relevance and materiality may decide that the submissions of the parties are sufficient to enable it to rule on *page "50"* objections. If they remain troubled they can view the documents themselves to determine relevance and materiality.(104)

However, this procedure is not consistent with the procedure described under Article 3(7) IBA Rules. If a party needs to produce a document to the arbitral tribunal before the arbitral tribunal has decided on the relevance and materiality of the requested documents, the requirement of prima facie relevance and materiality is de facto waived.(105) Production only to the arbitral tribunal is problematic from the points of view of both the right to be heard and the right to equal treatment.(106) Hence, an arbitral tribunal should not determine relevance and materiality on the basis of a review of the requested documents.

A scholar from a common law country provides some examples of relevant documents. In particular, he considers background documents to be relevant, even if the agreement contains an entire agreement clause:

> For example, one party might seek background documentation to a contract that contains an entire agreement clause. If the party seeking the background documents has claimed that context

> should be considered, then the documents are relevant to that claim.[107]

Indeed, background documentation to a contract, such as drafts and minutes of negotiations, are typically relevant for the interpretation of a contract. Such documents may be relevant notwithstanding the entire agreement clause. An entire agreement clause excludes that an agreement is amended by other documents, but does not prevent the use of other documents to interpret the agreement.

As a rule, documents that contradict a written witness statement are also relevant to the case.[108] A party can typically use such documents to present them to an opponent's witness during cross-examination.[109]

By contrast, a requested document is irrelevant to the issues of the case if it only concerns the credibility of a witness.[110] For establishing the facts of the case, it is usually sufficient for the arbitral tribunal to ascertain a personal impression of the witness at the hearing. In addition, document production requests that only aim to destroy the credibility of a witness can be considered to be overly aggressive and inappropriate in an international arbitration setting. This point of view is shared in an article by an English practitioner, which holds even in a model procedure order for 'Full Discovery' that 'Discovery need not be given of documents to be used solely for impeachment.'[111]

As a result, the 2010 Revision lowered the threshold for the first of the two requirements concerning the impact of the requested documents on the case. The *page "51"* following subsection examines the second requirement, i.e., materiality to the outcome of the case.

[E] . Definition of Materiality to the Outcome of the Case

The definitions and descriptions of what materiality to the outcome of the case means vary between different authorities. Referring to the 1999 IBA Rules, an article by a member of the IBA Working Party[112] defines materiality to the outcome of the dispute as follows:

> In addition, the term *materiality* means that the arbitral tribunal must deem it necessary that the document is needed as an element to allow complete consideration whether a factual allegation is true or not.[113]
> (emphasis original)

This definition of materiality to the outcome of the case focuses on arbitral discretion. However, it is questionable whether the additional specification that 'the arbitral tribunal must deem it necessary' should be included in a definition of materiality.

Moreover, this definition of materiality needs to be read in the context of the definition of relevance to the outcome of the case under the 1999 IBA Rules suggested in the same article. The latter definition only includes factual allegations on which a party bases its legal conclusions.[114] The drawing of legal conclusions links the allegations to the outcome of the dispute. Therefore, this requirement needs to be included in the definition of materiality to the outcome of the dispute under the 2010 IBA Rules.

Similar to the above definition, an article on document production defines materiality to the outcome of the case as follows:

> A material document is one that is needed to allow complete consideration of the legal issues presented to the tribunal.(115)

It can be assumed that this definition was meant to lay down similar requirements of materiality as the definition discussed above. More precisely, however, the definition should be read as meaning that a material document allows complete consideration of the *factual* issues from which legal conclusions are drawn.

Documents that concern legal rather than factual issues, such as excerpts of commentaries and case law, are often submitted to an arbitral tribunal. However, such documents are never the subject of a document production order.

Hence, this book suggests using this definition, but slightly modifying the wording as follows: *page "52"*

> A document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn.

Compared with the original, this definition clarifies that factual rather than legal issues are meant. The limitation to facts from which legal conclusions are drawn excludes legally irrelevant allegations that are put forward only to cast the other party in an unfavourable light.

By contrast, another scholar from a common law country promotes a much broader interpretation of 'materiality to the outcome of the case' under the 2010 IBA Rules:

> To be 'necessary' to the case being made does not mean that the case cannot be won without it, but that the case cannot be presented optimally without it.(116)

Contrary to those cited above, this definition does not consider materiality from the arbitral tribunal's perspective, but rather from those of the parties.

However, the optimal presentation of the case requires a relatively wide range of documents. A vast array of documents might still be considered to be useful for the optimal presentation of the case without being decisive. In view of the efficiency of the proceedings, this definition seems to be too broad.

The definition suggested by this book requires that the requested documents are 'needed to allow complete consideration of the factual issues from which legal conclusions are drawn'. Consequently, the requesting party needs to make factual allegations and link them to its document production requests.(117) The requested documents must serve to support one party's allegations or to disprove those of the other.(118) Hence, it is not sufficient that a document production request is somehow related to one of the issues in dispute.(119) However, no overly formalistic requirements should be imposed with regard to the specificity of the allegations that a document production request aims to prove.

Furthermore, materiality to the outcome of the case implies that document production requests can be denied if the arbitral tribunal considers that there is sufficient evidence to decide the matter and that further documents would be immaterial.(120) For example, a request for the production of a tenth document may be denied if nine other documents have already been submitted on a certain issue.(121)

Similarly, documents that seek to prove undisputed allegations are immaterial.[122] For example, evidence of consent to a transaction might be relevant, but it is not material if the requested party does not dispute having agreed to the transaction in question.[123]

page "53"

[F] . Overall Threshold Is the Same as under the 1999 IBA Rules

Under the 1999 IBA Rules, materiality to the outcome of the case was already a stricter criterion than relevance to the outcome of the case. This has become much clearer under the current IBA Rules. The 2010 Revision lowered the threshold for the required relevance and did not modify the requirement that the requested documents must be material to the outcome of the case.

A document that is material to the outcome of the case is always relevant to the case.[124] If Article 3(3)(b) IBA Rules only required that a document production request must be material to the outcome of the case, the overall threshold would be exactly the same. Hence, only the requirement of materiality to the outcome of the case is decisive. As a result, the 2010 Revision did not change the overall threshold.

[G] . Prima Facie Relevance and Materiality

According to best practices, document production requests are examined after the first round of pleadings (see Chapter 3 section §3.04 *supra*). At this point, the parties have already presented most of the facts to the arbitral tribunal. Nonetheless, the situation is different from that of civil law proceedings, where document production orders typically occur after the closure of the pleadings and the arbitral tribunal has full knowledge of the parties' allegations. After the first round of pleadings, it is not possible to conclusively determine the relevance and materiality of the requested documents.[125]

According to Article 3(7) IBA Rules, the arbitral tribunal determines the relevance and materiality of the issues that the requesting party is aiming to prove. The Commentary of the IBA Rules of Evidence Review Subcommittee interprets this provision as requiring that the arbitral tribunal needs to be convinced of the relevance and materiality of the requested documents to order document production.[126]

Several scholars argue that a document must be prima facie relevant to the case and material to its outcome under the IBA Rules.[127] The term 'prima facie' can be equated with that of 'likelihood'.[128] In other words, it must be more likely than not that a document is required to allow the complete consideration of factual issues from which legal conclusions are drawn.

In the 2006 ICC Bulletin (Special Supplement), an unpublished decision of a Swiss arbitrator is cited that only required 'a reasonable position, i.e., that the requested document may be relevant'.[129] Hence, this arbitrator only required possible relevance. This standard is considerably lower than the one of the IBA Rules.

page "54"

A commentary on the IBA Rules combined the above standards as follows:

> In result, the threshold of relevance and materiality will be lowered, on the one hand, in order not to prejudice the arbitral tribunal's final finding and, on the other hand, to ensure that documentary evidence that may be potentially *(prima facie)* be relevant and material is made available by way of production.(130)

While it is true that the threshold of relevance and materiality will be lowered as a result, potential and prima facie relevance and materiality are two different thresholds that should not be confused. An arbitral tribunal does not need to be convinced of the relevance and materiality of the requested documents that a document is potentially relevant and material. If this threshold applied, a relatively low probability of relevance and materiality would already be sufficient.

However, in line with the prevailing view of scholars, this book considers that prima facie materiality to the outcome of the dispute is the applicable threshold under the IBA Rules. Prima facie materiality means that, with a degree of probability of over 50%, the requested documents are required to allow complete consideration of the factual issues from which legal conclusions are drawn. Only if this threshold were reached would the arbitral tribunal conclude that it is convinced of the materiality of the requested documents.

A well-known author notes that many arbitrators examine the substance of the case only in the preparation of the witness hearing.(131) This seems to be too late. The criterion of prima facie materiality to the outcome of the case requires that the arbitral tribunal studies the facts of the case at an early procedural stage, at the latest when it decides for the first time on a document production request.(132) Otherwise, the arbitral tribunal is not able to appreciate the importance of the requested documents.

A procedural order cited in the 2006 ICC Bulletin (Special Supplement) pointed out that the prima facie establishment of materiality to the outcome of the case does not bind the arbitral tribunal with respect to the arbitral award.(133) This reasoning also applies in the absence of such a procedural order. As a rule, the arbitral tribunal is not bound by the prima facie considerations of its procedural decisions when it issues the final award.

[H] . Burden of Proof Is Not a Requirement

Neither the 1999 IBA Rules nor the current 2010 IBA Rules mention the burden of proof. According to a member of the IBA Rules of Evidence Review Subcommittee, one of the issues of the 2010 Revision was whether only a party bearing the burden of proof could file a document production request.(134) Despite this discussion, no such rule was introduced in the current IBA Rules. Therefore, the silence of the IBA Rules may be *page "55"* interpreted as meaning that it is not a requirement under the IBA Rules that the requesting party bears the burden of proof on a matter to be proved by the requested documents.

By contrast, several scholars argue that the requesting party has to show that the requested documents are needed to discharge its burden of proof. According to some commentaries on the IBA Rules, a document is only relevant if it serves to discharge the burden of proof.(135) Likewise, an arbitral decision mentioned in the 2006 ICC Bulletin (Special Supplement) considered that a requested document is necessary if the requesting party is otherwise unable to discharge the burden of proof in relation to the fact in question.(136) Other scholars consider that the burden of proof is an additional

requirement to that of relevance and materiality.[137]

However, according to a book written by a common law author, the requirement that the requested documents have to be material to an issue for which the requesting party carries the burden of proof should not be applied 'as a blanket rule'.[138] The book points out that document production requests by the opposing party can reveal the selective presentation of the party that bears the burden of proof.[139] It provides the following example:

> [I]f a company director produced a personal file note but did not produce minutes of directors meetings, the latter could be highly relevant to either corroborate or contradict the notes.[140]

Indeed, a requested document is not only material to the outcome of the dispute if it helps the requesting party discharge the burden of proof.[141] It is also material if it prevents the requested party proving a fact. In both cases, the requested document may influence the outcome of the dispute.

When the arbitral tribunal examines document production requests, it usually does not yet know whether the requested party will discharge its burden of proof. Typically, the parties have not yet submitted all written evidence and the witnesses have not yet been heard. The arbitral tribunal cannot know when it decides on document production requests whether the requesting party will need the requested document to furnish proof to the contrary. Therefore, the requirement of the burden of proof can be in conflict with the right to obtain evidence.

The importance of the burden of proof should not be overestimated. At least under Swiss law, the burden of proof does not play any role if a party was able to prove a fact.[142] The burden of proof only comes into play when both parties were not able to prove certain disputed facts. Therefore, the burden of proof may be irrelevant when both parties furnished evidence of a fact. In such a situation, the arbitral tribunal may *page "56"* decide that the claimant or the respondent has proven the fact, but the arbitral tribunal will hardly conclude that both parties did not prove their allegations.

It is noteworthy that in certain civil law countries, the burden of proof is not a specific requirement for document production. According to Article 160 CPC (Switz.), both parties have a procedural duty to produce documents that does not depend on the burden of proof.[143] In Germany, the procedural duty to produce documents does not depend on the burden of proof if the court orders document production on its own initiative.[144]

In general, German and Swiss civil procedures have strict requirements for the production of documents. It would contradict the spirit of the IBA Rules, a compromise between civil law and common law countries, to apply an additional requirement for document production under the IBA Rules, which is not known in some civil law countries.

Furthermore, one of the most appreciated features of arbitration is that it is less formal than litigation. The objection that the requesting party does not bear the burden of proof is of formal nature. Therefore, the application of the burden of proof requirement would corroborate the (unwelcome) trend towards more formalism.[145]

Moreover, the burden of proof requirement is problematic from the point of view of the equal treatment of the parties as this criterion places the party that does not bear the burden of proof at a

disadvantage. Often, the document production requests of the defendant would be dismissed for this reason. However, if the defendant did not honour the claim because he set-off an undisputed claim against a controversial damage claim, the situation would be reversed. In this case, the claimant is put at a disadvantage in the document production procedure because he cannot request documents that relate to the set-off defence. As a result, the risk of the unequal treatment of the parties corroborates the view that the burden of proof should not be used as a requirement for document production under the IBA Rules.

Nevertheless, it would be disproportionate to set aside or refuse to enforce an award for the violation of the equal treatment of the parties if an arbitral tribunal applies the burden of proof as a requirement for document production (see Chapter 10 section §10.09 *infra*).

The most important argument against the suggested requirement of the burden of proof is based on the wording of the IBA Rules. The fact that the drafters did not include the controversial requirement suggests that it has been deliberately omitted.

[I] . Examples of Material and Immaterial Documents

In arbitration, parties usually submit material documents together with their submissions. If document production can be requested after the initial submissions of the parties (see Chapter 3 section §3.04 *supra*), only a manageable number of documents *page "57"* that have not yet been submitted would usually be material to the outcome of the dispute.

For example, in a liability case, the test results of an allegedly defective product are typically material to the outcome of the case. If, in the same case, the scope of the application of a liability waiver is disputed, the minutes of contractual negotiations may be essential to understand the extent of such a waiver.

In addition, the claimant may request the production of marketing documents to demonstrate that false promises were made to promote the defective product. However, contractual duties are typically not included in marketing documents, but in the contract. Hence, marketing documents are typically immaterial to the outcome of such a dispute.

Documents that help quantify a claim are typically material to the outcome of the case. If, for example, the royalties under a license agreement depend on the sales of the licensed products, the grantor of the license needs the related statistics established by the licensee to quantify its claim for royalties. Hence, the grantor of the license has a right to request the production of such documents.

This right cannot depend on specific allegations by the grantor of the license on the number of sales. Typically, a grantor of the license has no such knowledge. Such a requirement would deprive it from the right to evidence.

[J] . Materiality of Internal Documents

The production of internal documents is one of the most controversial issues (see Chapter 3 section §3.04 *supra* and Chapter 8 section §8.05 [B] *infra*). An author from a civil law country explains that requests for internal documents often include an implicit accusation of bad faith.(146) Another practitioner from a civil law country argues that internal documents are not relevant to prove

the compliance of a party with its contractual duties:

> Discovery of internal information also presumes that such undisclosed intentions are relevant to the case. In most legal systems, the failure of a party to comply with its obligations is sufficient to establish its liability. It is the objective facts that count. Good or bad intentions normally make no difference.(147)

Indeed, the intentions of a party are rarely crucial for the question of whether it complied with the contract.(148) Nonetheless, internal documents are not per se immaterial to the outcome of the dispute. In particular, internal documents can be important for the interpretation of contracts, because they can demonstrate how a party understood the contractual provisions at the conclusion of the contract.(149) If the reasons for the termination of a contract are in dispute, internal documents might provide material *page "58"* information.(150) In addition, internal documents can be crucial to assess a fraud claim.(151)

[K] . Materiality of Metadata

Metadata is defined as information embedded in an e-document.(152) In particular, metadata contains information about the timing and author of amendments to an e-document.(153)

In international arbitration, documents are typically produced without metadata. The form of production of e-documents is governed by Article 3(12)(b) IBA Rules, which reads as follows:

> Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise.

Article 21(6) ICDR Rules provides a similar rule. According to the Commentary of the IBA Rules of Evidence Review Subcommittee, it results from Article 3(12)(b) IBA Rules that the requested party can, in principle, determine the form in which the e-documents are produced, unless otherwise agreed by the parties or ordered by the arbitral tribunal.(154) The only requirement is that the form must be reasonably usable for the requesting party.(155) A requested party will often choose to produce the requested documents as PDF files.

By contrast, a commentary on the IBA Rules argues that the production of PDF and TIFF files may violate Article 3(12)(b) IBA Rules: 'Production in PDF or TIFF is generally accepted albeit that that may not be compliant with Article 3.12.'(156) This opinion seems to derive from an incomplete reading of Article 3(12) IBA Rules. The commentary reproduces the content of Article 3(12)(b) IBA Rules as follows: '… the submission or production must be in the form most convenient or economical and reasonably usable by the recipients'.(157) This passage omits the words 'to it' after 'convenient or economical'. The missing words indicate that the form must be the most convenient or economical to the requested party. A PDF file is often convenient and economical for the requested party.

Usually, the important information is included in the document itself and metadata is immaterial.(158) If the requesting party aims to obtain the original *page "59"* e-documents that include metadata, it must describe the relevance and materiality of the

metadata.(159)

In particular, metadata can be material to the outcome in cases where a party has reasonable grounds for suspicion that the other party committed fraud.(160) However, a simple allegation of fraud is not sufficient. There must be indications of fraud to justify an arbitral order to produce metadata.

Metadata can also be material if the author or timing of the creation of an important document is disputed.(161) If it is, for example, disputed, whether the minutes of a meeting originate from final or preliminary negotiations, metadata can be helpful. Such facts can be disputed even if no party is acting in bad faith. In particular, if the relevant facts occurred a long time ago and some witnesses are unavailable, the fact finding can become more difficult and metadata can help bridge these gaps.

Nonetheless, such circumstances are rather extraordinary in international arbitration. In general, the inconveniences of the production of metadata prevail. The analysis of metadata is time-consuming and unduly increases the total amount of time and money spent on document production. In view of the efficiency of proceedings, the production of metadata should remain the exception.

[L] . Summary

The requirements of relevance to the case and materiality to its outcome have two legal bases: Article 3(3)(b) IBA Rules and Article 9(2)(a) IBA Rules. Since these provisions are very similar, the second is almost superfluous.

The first of the two requirements is also redundant. Materiality to the outcome of the case is a stricter requirement than relevance to the case. There are no situations in which documents would be considered to be material to the outcome of the case but not relevant to the case.

This book suggests the following definition: ‘A document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn.’ As a rule, prima facie materiality is sufficient. The requesting party does not need to bear the burden of proof for the facts that it intends to prove with the requested documents.

The test results regarding an allegedly defective product, the minutes of contractual negotiations and documents that help quantify a claim are typically considered to be material documents. Conversely, marketing documents are usually immaterial. Internal documents may be material for interpreting contracts, providing information on the reasons for the termination of a contract or supporting fraud claims. Usually, metadata are not material to the outcome of the case.

page "60"

§5.07. THE PROHIBITION OF FISHING EXPEDITIONS

In international arbitration, perhaps no phrase carries more negative connotations than ‘fishing expedition’. Scholars almost unanimously agree that fishing expeditions are not admissible in international arbitration.(162) Hence, fishing expedition is one of the most frequent objections to a document production request.(163)

Even though the term ‘fishing expedition’ belongs to the standard vocabulary of international arbitration, its meaning is less than clear. There are almost as many definitions as authors. Many scholars seem to use definitions inferred from national law.

Unsurprisingly, the prohibition of fishing expeditions is an issue that matters to civil law authors rather than common law authors. Furthermore, civil law scholars tend to prefer broader definitions of fishing expedition than common law authors do. However, even amongst authors belonging to the same legal system there are considerable differences.

Scholars disagree as to which requirements of document production the term ‘fishing expedition’ relates, if any. Some of them relate fishing expedition to the specificity of the request, some to the relevance of the requested documents and some to both requirements. Others define fishing expeditions independently of these requirements.

According to two publications of civil law authors, fishing expeditions are characterized by a lack of specificity of the document production request. An article of a Finnish scholar circumscribes fishing expeditions as follows: ‘… so-called “fishing expeditions” where a party requests production of a very vaguely identified group of documents in the hope of finding supporting material in the adversary’s evidence’.(164) According to the book of an Austrian scholar, fishing expeditions are requests for unspecific and broad categories of documents.(165)

Hence, in the view of these authors, the term ‘fishing expedition’ is equivalent to an unspecific request for a category of documents. This implies that the prohibition of fishing expeditions does not have any independent significance. Therefore, how useful these definitions are seems to be questionable.

According to a commentary of two scholars from civil law countries, the term ‘fishing expedition’ relates to both specificity and materiality. The commentary defines fishing expeditions as requests that generally refer to documents and neither describe
page "61"
the content of the requested documents nor identify the specific allegations that the requesting party intends to prove with these documents.(166)

According to this definition, a fishing expedition is comparable to an inadmissible document request. Also under this definition, the term ‘fishing expedition’ does not have an autonomous meaning. Therefore, this definition seems to be of limited value.

A Swiss practitioner argues that the term ‘fishing expedition’ relates to the plausibility of the allegation that the requesting party intends to prove:

> Fishing expeditions might be defined as requests for the production of documents which are not intended to prove or to substantiate a general allegation that is highly plausible in the circumstances.(167)

Pursuant to this definition, the allegation that the requesting party intends to prove with the document production request must be highly plausible. Simple plausibility is not sufficient according to this definition. High plausibility is a typical civil law standard. This requirement would be an additional hurdle for the requesting party. However, it is doubtful that the term ‘fishing expedition’ should be used to justify a very restrictive interpretation of the IBA Rules. Rather, it is meant to avoid certain excesses in international arbitration.

By contrast, the publications of two well-known practitioners use a much narrower definition of fishing expedition. According to an article written from a common law perspective, a fishing expedition occurs 'where the foundation for a cause of action is found only after the judicial procedure has been initiated'.(168) According to the description of a French author, a party is on a fishing expedition if it has not yet presented its case and seeks to establish its case on documents that it hopes to find in the counterparty's possession.(169)

Clearly, the majority of scholars agree that a search for new claims falls under the term 'fishing expedition'. However, it seems to be too narrow to limit the term 'fishing expedition' to a search for new claims. Under the two latter definitions, even very broad document production requests could not be considered to be fishing expeditions as long as they relate to the claim or a defence. Such a narrow definition of fishing expeditions thus seems to be inconsistent with the general use of the term.

Two publications of practitioners put forward definitions that are not directly derived from the requirements of document production. An article published in Austria uses a dictionary definition: 'Fishing Expedition is defined "as a search for information without knowledge of whether such information exists".'(170) Similarly, a Swiss arbitrator points out that the purpose of fishing expeditions is to gather information instead of proving allegations.(171)

page "62"

These definitions are imprecise as fishing expeditions are directed to obtain documents and not information. If a requested party complies with a fishing expedition, it obtains a huge amount of documents and not a long list of answers, as in the case of an interrogatory in US court proceedings (see Chapter 2 section §2.03 [B] *supra*).

According to a typical civil law understanding, to which the latter author refers, a fishing expedition is directed to obtain documents that do not refer to allegations already made. However, such a definition seems to be too broad, as the IBA Rules allow a further search for truth than the mere proof of allegations (see Chapter 3 section §3.04 *supra*).

Based on the civil law notion of fishing expeditions, two German authors illustrate the legal situation in international arbitration as follows: '[F]ishing expeditions are not always excluded, but the would-be angler must have some idea of what kind of fish he might catch'.(172) This is an alternative viewpoint. Instead of limiting the definition of fishing expedition in international arbitration, these authors use the same definition as under German law and conclude that fishing expeditions are partly allowed in international arbitration.

In the chapter on fishing expeditions, a scholar from a common law country considers that documents are not material to the outcome of the dispute if they amend the claim to add new matters.(173) A leading book on arbitration applies a similar reasoning. Its definition of fishing expeditions reads as follows:

> Tribunals are usually unwilling to permit 'fishing expeditions' aimed at identifying possible claims or sources of further inquiry, rather than at adducing evidence in support of existing claims.(174)

This definition of fishing expedition includes the search for new

claims and issues. This book suggests a similar definition that uses the terms ‘amend the claim’ and ‘add new matters’ to define fishing expeditions:

> A fishing expedition can be defined as a document production request that seeks to amend the claim or add new matters.

This definition not only covers the search for new claims. A document production request is also inadmissible if it seeks to add new matters without searching for new claims. This definition of fishing expedition excludes a document production request being directed to seek a new line of argument. Therefore, this definition is broader than those excluding only the search for new claims.

However, this definition of fishing expedition is narrower than the definitions used in civil law countries. This definition does not exclude that a document production aims to discover new facts in relation to the issues in dispute. Moreover, the expressions ‘amend the claim’ and ‘add new matters’ leave some room for interpretation. Therefore, this definition of fishing expeditions should not be too rigid.

page "63"

Nonetheless, the importance of the term ‘fishing expedition’ should not be overstated. The requirements of Article 3(3) IBA Rules and the objections of Article 9(2) IBA Rules are the relevant test. The prohibition of fishing expeditions only analyses the extent of document production from a different angle.

§5.08. POSSESSION, CUSTODY OR CONTROL

[A] . Overview of Requirements

In general terms, the rule of Article 3(3)(c) IBA Rules is simply explained thus: A document production request is only granted if the requesting party does not have access to the requested documents, but the requested party does. While this principle seems to be unproblematic, the devil is in the detail.

Article 3(3)(c)(i) IBA Rules is fulfilled if either the requested documents are not in the possession, custody or control of the requesting party or if it was unreasonably burdensome for the requesting party to produce the requested documents. In addition, Article 3(3)(c)(ii) IBA Rules requires that the requested documents are in the possession, custody or control of another party.

[B] . Definition of Possession, Custody or Control

The definition of the terms possession, custody and control is a delicate issue. These terms have specific meanings for lawyers all over the world. Most national laws define these terms, but not in a uniform way. For example, the definition of ‘possession’ differs between English law(175) on the one hand and German(176) and Swiss law(177) on the other.

However, the wording ‘possession, custody or control’ is derived from common law rules. FRCP Rule 34(a) reads as follows:

> A party may serve on any other party a request within the scope of Rule 26(b):

> (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: ...

Similarly, the previous English Rules of the Supreme Court referred to 'possession, custody or power'.[178] The adoption of common law terms in the IBA Rules is remarkable, since this is an exception to the general principle stated in the Commentary to the IBA Rules that US or English-style discovery is inappropriate.[179] As a consequence, some common law authors refer to the definitions of the laws of their *page "64"* home countries.[180] However, an autonomous interpretation of the expression 'possession, custody or control' is preferable in international arbitration. Applying one national case law would be contrary to the idea of a level playing field for counsel, arbitrators and parties in international arbitration.[181] The Commentary of the IBA Rules of Evidence Review Subcommittee is silent on the definitions of 'possession, custody or control'. The discussion of these terms in international arbitration is marked by the division between common law and civil law. While some authors from civil law jurisdictions favour a 'restrictive approach',[182] several common law authors favour a broad interpretation of these terms.[183] One English practitioner explains that these terms include every description of holding or right.[184] Similarly, another leading common law author concludes that 'control' is a practical concept that should be interpreted liberally.[185]

This book suggests first comparing different definitions of national laws to derive common principles. Under several laws, the definition of 'possession' is marked by Roman law. Under Roman law, possession required the actual physical control of an object and the intention of exercising control over it.[186] The concept of possession also encompassed holders who exercised physical control through another person such as a borrower, depositee or lessee.[187] The same principles apply in Swiss[188] and German[189] law, where such possession is called 'indirect possession',[190] and in Austrian[191] law, where the term 'legal possession'[192] is used. A similar definition of 'possession' derived from Roman law is also applied under French law.[193] All these laws recognize the concept of 'indirect possession'.

Under US and English procedure law, such 'indirect possession' is not covered by the term 'possession', but rather only by the term 'control'. According to a US authority, '[c]ontrol is defined as the legal right, authority or ability to obtain documents upon demand'.[194] Under Rule 31.8(2) of the Civil Procedure Rules[195] (CPR) of England and Wales, 'control' is defined as follows: *page "65"*

> For this purpose a party has or has had a document in his control if –
>
> (a) it is or was in his physical possession;
> (b) he has or has had a right to possession of it; or
> (c) he has or has had a right to inspect or take copies of it.

Hence, it results from a comparison of US, English, French, Swiss, German and Austrian law that, under all these laws, the terms 'possession, custody or control' cover documents that are in the possession of a third party that holds a document for the party to the proceedings. This accordance of the rules of major jurisdictions justifies interpreting the IBA Rules in such a sense.

The question may thus arise whether a party has the duty to produce further documents to which the party has access. At the core of the debate in international arbitration with respect to this question are requests for documents in the hands of a company that is part of the same group of companies as a party to the arbitration. Opinions in international arbitration are divided with regard to the duty to produce such documents. An article of two Swiss practitioners requires that the arbitration agreement targets the group, that the requested party has 'effective control' or that 'there is ground for piercing the corporate veil'.(196)

These requirements are strict since arbitration agreements mostly do not target the whole group of companies. Furthermore, serious grounds are required for piercing the corporate veil. The criterion of 'effective control' seems to mean that the requested party has effective control over the company that holds the requested documents. Interpreted in this sense, the above definition includes documents that are in the hands of a subsidiary of the requested company, but excludes documents that are in the hands of a parent or sister company.

By contrast, some common law scholars and an unpublished arbitral decision cited in the 2006 ICC Bulletin (Special Supplement) hold that the duty to produce documents extends to documents that are in the possession, custody or control of a person or entity within the same group.(197) However, the arbitral tribunal did not require that the requested party carry out any research within the group of companies.(198) It only provided the production of the documents of which the requesting or the requested party had actual knowledge.(199) The reasoning behind the inclusion of documents in the hands of affiliated companies is that the requested party can reasonably be expected to gain access to such documents.(200) An Australian scholar states that control is less clear in the case of a parent company, but explains that 'the logic could be that a simple request would normally be responded favourably within a corporate group'.(201)

page "66"

In addition, these authorities consider that a contractual or other right to obtain documents is also sufficient.(202) This includes documents in the possession of advisers or agents.(203)

Indeed, the wording of Article 3(3)(c) IBA Rules favours a broad interpretation. The provision mentions no less than three alternative criteria for access to the requested documents. If a restrictive approach was intended, the drafters of the IBA Rules would have accepted fewer alternatives for access to the requested documents. Hence, there does not seem to be a form of access to documents that Article 3(3)(c) IBA Rules excludes.

Furthermore, it is generally accepted that arbitration should be less formal than litigation. Therefore, it is questionable whether formal objections to the production of documents that are in the possession of affiliated companies are valid arguments in international arbitration.(204)

If admissible at all, mutual assistance proceedings to obtain documents from third parties are often time-consuming (see Chapter 2 section §2.01 [C] *supra*). Therefore, it would be inappropriate and inefficient to request mutual assistance for documents that are in the possession of an entity belonging to the same group of companies as a party to an arbitration. Rather, the requested party can be expected to make 'best efforts' to obtain such documents.(205)

The duty to make 'best efforts' to obtain documents from companies of the same group needs to be distinguished from the 'group of companies doctrine'. The latter concept is controversial and serves to extend the effects of an arbitration agreement that an entity of a group of companies concluded with other entities of the same group.(206) In relation to document production, the purpose is not an extension of the arbitration agreement. Rather, the idea is that a party of the arbitration agreement has a duty to obtain documents from the other entities of its group of companies. This is only a duty of the party to the arbitration. The other entities of the group of companies are only indirectly concerned.

Furthermore, the 'effective control of documents' in the hands of an affiliated company needs to be distinguished from the 'effective control of an affiliated company'. Usually, a party is able to obtain documents from an affiliated company even though the party does not control the affiliated company.

As a result, the wording and purpose of Article 3(3)(c) IBA Rules seem to favour a wide interpretation of the expression 'possession, custody or control'. Accordingly, this book suggests the following definition:

> Documents are in the possession, custody or control of a party if the party or an entity of the same group of companies holds the requested documents or has a right to obtain the requested documents.

page "67"

This definition seeks to include the situation in which a party or an entity of the same group of companies only has a right to obtain copies of the requested documents. A broad interpretation of 'possession, custody or control' facilitates obtaining evidence in international arbitration. In addition, such an interpretation is not in conflict with the objective of efficiency. The alternative, namely mutual assistance procedures, is generally less efficient than document production within the arbitration procedure. This definition aims to promote a practical approach that is detached from the rigid concepts of national law.

[C] . Unreasonable Burden for the Requesting Party

Usually, a requesting party cannot request documents that are already in its possession. An exception applies if the burden of producing the documents is unreasonable. In particular, this can be the case if the requesting party has deleted e-documents and had to restore them.(207)

Unreasonable burden for the requested party is examined in detail in Chapter 5 section §5.09 below. These considerations apply, mutatis mutandis, to the unreasonable burden for the requesting party.

[D] . No Production of Parties' Correspondence and of Public Documents

Some authors point out that a document production request for the entire correspondence between the parties is normally denied because, in general, the parties already possess it.(208) According to a well-known arbitrator, a party should bear the consequences if it did not diligently keep the correspondence.(209) By contrast, two practitioners defend the opinion that a party should be allowed to request document production if it is no longer in possession of the correspondence between the parties.(210)

Sanctioning a party for incomplete document retention seems to be an overly strict approach. Arbitration proceedings often occur many years after the conclusion of the contract and the occurrence of the facts giving rise to the cause of action.(211) Therefore, it is hardly objectionable if a party did not keep the entire correspondence between the parties.(212)

As a result, correspondence between the parties does not have to be produced as a rule. However, an exception applies if a party can demonstrate that it is no longer in possession of the requested documents, for example, as a consequence of its document retention policy.

page "68"

Similarly, a party cannot request the production of documents that are in the public domain, since it has access to the requested documents.(213) For example, entries in land registers are typically public. Document production requests for public documents unnecessarily harass the other party.

[E] . No Implicit Condition That a Party Submits Its Own Evidence

A Swiss arbitrator provides the example that document production requests for internal notes of specific meetings should be granted if the requesting party submitted its notes and the requested party alleges a different content of the conversation.(214) This raises the issue of whether Article 3(3)(c) IBA Rules includes an implicit condition that a party needs to submit its own evidence.

There does not seem to be a basis for a strict rule. A party can also request document production on an issue before having submitted its own evidence on the disputed facts.

However, the IBA Rules confer broad discretion on the arbitral tribunal. It favours the acceptance of a document production request if a party has submitted its evidence on the disputed facts that should be proven by document production. Fairness demands that the requesting party is prepared to submit its meeting notes when it requests the meeting notes of the other party.

As a result, it is not a requirement of document production under the IBA Rules that a party has submitted its own evidence on the disputed fact, but submitting one's own evidence will still increase the chances that a document production request will be granted.

[F] . Summary

In summary, Article 3(3)(c) IBA Rules requires that the requested party or an entity of the same group of companies holds the requested documents or has a right to obtain the requested documents. Second, it is required that neither the requesting party nor an entity of the same group of companies holds the requested documents or has a right to obtain the requested documents. Alternatively, it is sufficient that it is unreasonably burdensome for the requesting party to produce the documents, for example, because it would have to restore deleted e-documents.

As a rule, correspondence between the parties and public documents do not have to be produced since the requesting party usually has access to these documents. Finally, it is not a requirement of document production under the IBA Rules that a

party has submitted its own evidence on the disputed fact.

page "69"

§5.09. PRIVILEGES

[A] . Introduction

Privileges are the most important reason to exclude material documents from production. In a highly regulated world, the importance of lawyers, and of documents created by them, is continuously growing. This is particularly true for commercial relationships. In-house counsel draft contracts, legal advisors are consulted when a dispute arises and managers lead settlement negotiations. In all these circumstances, documents are created and in case of a dispute, the question arises whether these documents have to be disclosed.

At the same time, privileges are one of the most complex aspects of international arbitration.(215) The difficulty lies in the interaction between national provisions on privileges and procedural considerations of international arbitration. Authorities are divided on the question of how to determine the law applicable to privilege. Should national conflict of law rules be followed? Should a uniform international standard be established? Or is the so-called most favoured nation approach the best solution?

From a systematic perspective, this chapter first answers the question whether privileges in international arbitration are of substantive or procedural nature. This issue is not only academic, but has important practical consequences.

After defining privilege, the chapter gives an overview of the content of Article 9(2)(b) and (3) IBA Rules. Moreover, it analyses whether the IBA Rules refer to an international standard or to national rules on privilege. Thereafter, it examines how the laws applicable to privileges should be established. In particular, the question of whether the same or different standards of privilege should be applied to the parties in a particular arbitration is raised.

In addition, this chapter provides an analysis of comparative law on the most important privileges in commercial arbitrations, namely the legal professional privilege and the settlement privilege, as well as on the waiver of privileges. The analysis covers US, English, German and Swiss law.

Finally, this chapter assesses the methods currently used for determining rules on privilege in international arbitration and suggests an improvement of current standards. A concrete application will be suggested in the chapter on model clauses (see Chapter 8 section §8.08. *infra*).

[B] . Procedural or Substantive Nature of Privileges?

Commentaries disagree whether privileges are of a substantive or procedural nature.(216) This is an important preliminary issue as the flexibility of the arbitral tribunal largely page "70" depends on the nature of privileges.(217) While arbitral tribunals have the duty to grant the parties their substantive rights,(218) the arbitral tribunal is free to determine the arbitral procedure within the limits of the parties' agreement.

Neither the IBA Rules nor the Commentary to the IBA Rules

answers the question of whether privileges are of a procedural or substantive nature.[219] However, the fact that privileges are governed by the IBA Rules is itself a strong indication that privileges are considered to be of a procedural nature under the IBA Rules, since the IBA Rules govern a part of the arbitral procedure and not the substantive rights of the parties.[220] In addition, the discretionary elements of Article 9(3) IBA Rules are difficult to reconcile with the idea of substantive rights and themselves indicate the procedural nature of privileges.

A leading authority takes the opposite view, arguing that '[p]rivileges are like other substantive legal rights, which are given full effect in the arbitral process unless otherwise agreed'.[221] Similarly, a commentary concludes that the substantive character of privileges limits the discretion of arbitral tribunals.[222]

However, these commentaries do not state on what basis they characterize privileges as substantive. Moreover, the idea of a 'full effect' of privileges does not appear to be in line with the IBA Rules that are less rigid. Article 9(3)(c) IBA Rules provides that the expectations of the parties and their advisors may be taken into account. This method does not intend to strictly follow the provisions of a national law on privileges.

An analysis of comparative law helps to classify privileges. A common oversimplification is that privileges are considered to be procedural in civil law countries and to be substantive in common law countries.[223] However, these comments on the supposed differences between civil law and common law are not fully in line with authorities of national law. Privileges are governed by procedural codes[224] and are part of the rules of evidence under US,[225] Swiss[226] and German[227] law. For example, a US book on civil procedure states: 'The various privileges are rules of evidence, not substantive rules.'[228]

page "71"

The qualification of privileges under English law is controversial.[229] The litigation privilege[230] and the without prejudice privilege[231] tend to be considered as rules of evidence. In a leading case decided in 1996, the English House of Lords considered the legal professional privilege to be 'a fundamental condition on which the administration of justice as a whole rests'.[232] Obviously, the administration of justice is not a substantive, but a procedural issue.

In contrast, the qualification of the legal advice privilege is more delicate.[233] The House of Lords held that the legal advice privilege is both a procedural and a substantive right.[234]

An English commentary explains that privileges need to be considered both a rule of evidence and a substantive legal right due to the role of privileges in investigations by regulatory authorities.[235] Hence, one of the reasons for the qualification of privileges as substantive rights under English law is the narrow definition of the term 'procedural' which only refers to adversarial proceedings.[236] Under other laws, such as Swiss law, the term 'procedural' is construed more broadly to also include governmental investigations.[237]

It is also noteworthy that several English authorities consider legal professional privileges to be protected by the right to a fair trial.[238] Consequently, such privileges are not only considered to also be procedural, but to even be part of the fundamental procedural rights of the parties (see Chapter 10 section §10.07 *infra*).

Under these aforementioned laws, privileges need to be distinguished from a lawyer's duty of confidentiality.[239] In the relationship between a lawyer and his or her client, the lawyer's duty of confidentiality is of a substantive nature under English,[240] US,[241] Swiss[242] and German[243] law. A lawyer has a contractual duty towards his or her *page "72"* client to keep information on the client's case secret. Under some laws, such as the Swiss[244] and German,[245] a violation of this duty can be punished not only by disciplinary, but also criminal sanctions.

As a conclusion, Swiss, German, English and US law all characterize privileges as procedural. The characterization of the legal advice privilege as also being substantive under English law does not change the overall picture: The above-made analysis of comparative law heavily speaks in favour of characterizing privileges as procedural.

According to an (isolated) opinion, distinction ought to be drawn between legal professional privileges of common law countries and rights to withhold evidence based on professional confidentiality in civil law countries.[246] According to this opinion, the second ones 'are not identified as "privileges"'.[247]

However, privileges in common law countries are rights to withhold evidence, same as privileges in civil law countries.[248] Hence, there is no reason to make such a distinction. Privileges are recognized in all developed jurisdictions, whether civil law or common law.

Some authorities conclude that the classification of privilege as procedural is unsatisfactory since it would lead to the national procedural law of the seat of arbitration which is not yet known at the moment of the privileged communication.[249] This book takes a different position. The classification of privilege as procedural leads to procedural rules that are applied in international arbitration, namely the IBA Rules.[250] As a rule, national rules of civil procedure are inapplicable in international arbitration.[251]

According to several publications, privileges are qualified as substantive in international arbitration due to the underlying public policy judgments.[252] However, these authorities do not seem to sufficiently distinguish between the notions of fundamental and substantive rules. The classification of privileges as part of public policy does not mean that privileges become substantive rules. Rather, they form part of the *procedural public policy* under some national laws (see Chapter 10 section §10.07 *infra*).

As a conclusion, privileges are part of the right to a fair trial and, accordingly, are procedural. A qualification of privileges as procedural is also in line with an analysis of comparative law covering Swiss, German, English and US law. Finally, a qualification of privileges as substantive would be contrary to the flexible approach of the IBA Rules with regard to privileges.

page "73"

[C] . Definition of Privilege in International Arbitration

The nature of privileges influences the definition of privileges. Some commentaries propose the following definition of privilege: 'A privilege is a legally recognized right to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information.'[253] This definition leaves open whether the 'legally recognized right' is of a

procedural or substantive nature. However, the concept of privilege as a 'right' seems to be derived from national law.(254) As explained above, the classification of privilege as a 'right' differs from the approach of the IBA Rules which provide to take into consideration expectations of parties and their advisors.

By contrast, some commentaries suggest that 'evidentiary privileges are rules that allow a party (or a witness) to withhold evidence from the other side'.(255) This book suggests applying this definition which is in line with the procedural nature of privileges. As the definition discussed first, this definition is very open and allows taking into account all kind of privileges of national law in international arbitration.

[D] . Overview on the Content of the IBA Rules

Unchanged from the 1999 IBA Rules, Article 9(2)(b) IBA Rules provides the exclusion of privileged documents.

In addition to the 1999 IBA Rules, Article 9(3) IBA Rules contains five criteria that arbitral tribunals should take into account when excluding privileged documents. These criteria are not a complete checklist, but rather a selection of particularly important issues that an arbitral tribunal should take into consideration.(256)

Article 9(3)(a) and (b) IBA Rules relate to two of the most important privileges, namely the legal professional privilege and the settlement privilege. Mentioning these two kinds of privileges gives some guidance to arbitral tribunals, even if the list of privileges is incomplete. Besides, it would have been virtually impossible to create a complete list of privileges taking into account that all national laws would have to be considered. The legal professional privilege is recognized by all developed jurisdictions (see Chapter 5 section §5.09 [G] et seq. *infra*). Its inclusion in Article 9(3)(a) IBA Rules provides little additional guidance.

In contrast, the mention of the settlement privilege in Article 9(3)(b) IBA Rules is not a matter of course. It raises the question of whether Article 9(3)(b) IBA Rules recognizes a general settlement privilege in international arbitration or whether the application of the settlement privilege depends on national law (see Chapter 5 section §5.09 [E] *infra*).

page "74"

Article 9(2)(b) IBA Rules provides that the determination of 'the legal or ethical rules' applicable to privilege is in the discretion of the arbitral tribunal. Article 9(3)(c) IBA Rules specifies that the 'expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen' should be taken into consideration. The Commentary to the IBA Rules specifies that these expectations are often in line with the home jurisdiction of such persons.(257)

Hence, the IBA Rules give some guidance for the choice of law decisions to be taken by arbitral tribunals.(258) In particular, the IBA Rules tend to exclude some of the variants that have been discussed in the legal literature(259) such as the application of the law of the seat of the arbitration or the law governing the dispute.(260) The IBA Rules tend to limit the choice of law by favouring the application of the laws of the home jurisdictions of the parties and their legal advisors.(261)

Furthermore, the time mentioned by the IBA Rules is important. The

expectations at the time of the privileged communication are decisive. In contrast, the expectations of the parties and their advisors during the arbitration are irrelevant.

Article 9(3)(d) IBA Rules provides that arbitral tribunals should take into consideration the waiver of privileges or legal impediments. The provision mentions consent, affirmative use or earlier disclosure as forms of a waiver. However, this provision does not contain an autonomous interpretation of waiver in international arbitration, but refers to national laws applicable to privilege. The law applicable to the waiver of privileges should be determined in the same way as the applicable law defining the admissibility, requirements and scope of privileges.(262)

Article 9(3)(e) IBA Rules provides that arbitral tribunals should respect the fairness and equality of the parties when deciding on privileges. The provision emphasizes the importance of this principle if the parties are subject to different rules on privilege. The Commentary to the IBA Rules explains that unfairness could be created if one party benefits from a type of privilege and the other party does not.(263) As examples, the commentary mentions that only the law applicable to one of the parties provides a settlement privilege or a legal professional privilege extending to in-house counsel. Hence, the IBA Rules favour the so-called most favoured nation approach(264) which will be explained in more detail below (see Chapter 5 section §5.09 [F] *infra*).

page "75"

Some common law authors suggest applying a privilege log in international arbitration.(265) Privilege logs exist, for example, under English law, according to which a party has to disclose the existence of privileged communications to the other party, but is not required to provide them for inspection (see Chapter 2 section §2.03 [C] *supra*). However, there is neither a general disclosure obligation under the IBA Rules, nor does the distinction between disclosure and inspection exist under the IBA Rules. Hence, there is no basis to require a privilege log under the IBA Rules.

[E] . Applicable Law to Privileges

Several commentaries favour the application of a ‘closest connection test’(266) or, in the terms of US law, a ‘centre-of-gravity test’(267) to determine the law applicable to privileges.(268) These tests are national conflict of law rules that are typically applicable to contractual relationships.(269) The application of these tests is a consequence of their qualification of privileges as substantive law. These tests often result in applying the law to the privilege which applies to the confidentiality obligation of the lawyer.

The IBA Rules are conceptually distinct. They have not adopted such a conflict of law rule, but instead refer to the expectations of the parties and their advisors in Article 9(3)(c) IBA Rules. According to the Commentary to the IBA Rules, these expectations are often formed by the laws of the home jurisdictions of these persons.(270) Hence, the arbitral tribunal may either apply the laws of the seat of the parties or of the home jurisdiction of their lawyers.

These options still leave significant discretion to arbitral tribunals. For example, if a German company was advised by an US in-house counsel, the arbitral tribunal could apply US or German law to the issue of privilege. Obviously, the application of US or German law could influence which documents are privileged.

Commentaries disagree on the issue of whether arbitral tribunals should give preference to the expectations of the parties or of their advisors.[271] A leading authority favours the lawyers' state of qualification considering that '[t]he external lawyer will often be more sensitive and alert to issues of privilege, and will most naturally and efficiently consider them from the perspective of his or her legal system'.[272]

It is definitely accurate that the parties' lawyers are typically more sensitive to the issue of privilege than the parties themselves. Nevertheless, according to most laws, *page "76"* legal professional privilege should not protect the lawyers, but the clients.[273] Hence, it seems problematic to give priority to the lawyers' expectations over the clients' expectations: it is still the parties' arbitration.

Accordingly, some commentaries plead for applying the law of the jurisdiction where the party has its seat due to the importance of the parties' reliance interest.[274] However, the application of the law of the seat of the parties could lead to awkward results. If a US company and a French company both consult their US in-house counsel for legal advice on US law, an application of US law to the US company and French law to the French company would lead to the (absurd) result that the communications of US in-house counsel of the US company would be privileged, but not those of the US in-house counsel of the French company.

This result may not only be unsatisfactory, but also inconsistent with the parties' expectations. Numerous privileges relate to a specific status of a person, such as being an attorney or a doctor. Hence, parties expect documents to be privileged based on the status of these persons rather than based on their own status.

For example, a German party may expect that notes of a French doctor are privileged because the doctor is admitted to practice in France. Hence, the application of French law on privileges may be in line with the parties' expectations in this example. Similarly, parties may associate the legal professional privilege of a French attorney with French law.

In summary, the IBA Rules lead to two options, namely applying the laws of the home jurisdiction of counsel or of the parties to privilege. According to this book, parties' expectations should be given priority over advisor's expectations. Where privileges relate to the status of the advisor, parties will often expect that the law defining this status will apply to privileges. In other words, applying the law of the home jurisdiction of the advisor is often in line with both the parties' and the advisors' expectations.

A similar situation exists if lawyers from several states are involved in a communication. A commentary suggests applying 'the privilege law of the state in which the senior external lawyer involved in the communications is qualified'.[275]

This book doubts whether this is an adequate solution. Rather, parties expect that the law of each lawyer protects the confidentiality of the information. If an additional lawyer from a different country is involved in a communication, this involvement should not have any negative influence on the privileged nature of the communication. Rather than prioritizing the law of the most senior lawyer, the law granting the highest protection should be applied. In other words, this book suggests that the 'most favoured nation approach', which will be explained in more detail below, should also be applied if a party is advised by several lawyers.

Legal doctrine makes a distinction between the law applicable to the settlement privilege and that applicable to other privileges. According to the prevailing view, page "77" transnational principles define the scope of the settlement privilege in international arbitration.(276) This opinion is in line with Article 9(2) ICC Mediation Rules (2014),(277) which expressly provides the settlement privilege for mediation communications under these rules.

According to the Commentary to the IBA Rules, 'Article 9.3(b) IBA Rules expresses a generalized understanding of the so-called "without prejudice" or "settlement" privilege.'(278) Nevertheless, this does not mean that the IBA Rules provide uniform rules on the settlement privilege.(279) Rather, the Commentary to the IBA Rules emphasizes that the settlement privilege is (only) recognized in certain jurisdictions.(280) The Commentary to the IBA Rules states that there is a need for the 'most favoured nation approach' when the home jurisdiction of one party recognizes the settlement privilege and the other party's home jurisdiction does not.(281) Hence, the scope of the settlement privilege is not governed by transnational principles under the IBA Rules, but by the most favourable national law.

Contrary to the legal professional privilege, the settlement privilege is not necessarily linked to the status of a person. In many cases, the parties' expectations will be in line with the law of their home jurisdictions. However, if mediation takes place in a formal setting, the parties may expect these rules to govern the privilege.

A German article suggests applying the '[s]ophisticated case law of U.S. courts' in international arbitration where specific rules on the settlement privilege are missing.(282) However, this solution neither finds support in the IBA Rules nor in the Commentary to the IBA Rules. Quite the contrary, such a rule is in disagreement with the 'most favoured nation approach' favoured by the IBA Rules. Furthermore, such a solution is not recommendable in international arbitration, since this would import all technicalities of US law on privileges into arbitration proceedings with no connection to the US.

[F] . 'Most Favoured Nation Approach'

Article 9(3)(e) IBA Rules and the Commentary to the IBA Rules favour the 'most favoured nation approach' (see Chapter 5 section §5.09 [D] *supra*). According to this approach, the rules on privilege granting the broadest protection apply to all parties.(283) The 'most favoured nation approach' is supported by most authorities in international page "78" arbitration.(284) In addition, Article 22 ICDR Rules expressly provides the 'most favoured nation approach'.

However, a leading authority rejects the 'most favoured nation approach' by considering that '[p]rivileges are only applied at all because they are created, like other legal rights, by national law'.(285)

As discussed above, in a dispute between commercial parties, privileges are not substantive rights of a party against another party, but are instead procedural objections against the production of documents (see Chapter 5 section §5.09 [B] *supra*). Just as the same requirements should apply to document production requests of both parties, both parties should have the same objections against document production requests at their disposal. As implied by Article 9(3)(e) IBA Rules, such an approach is in line with the objectives of fairness and equality of treatment.

The contrary point of view tends to favour parties who can base their objections on the laws of common law countries where the law of privileges is generally more developed than in civil law countries. For example, in a dispute between a Swiss and an English party where both parties are advised by in-house counsel from their home country, the communications of English in-house counsel would be privileged, while the communications of Swiss in-house counsel would not (for more detail see Chapter 5 section §5.09 [G] et seq. *infra*).

In this context, an article draws an amusing, but accurate analogy: it compares the situation of a party who cannot invoke the same extent of privilege as its opposing party with that of the tennis legend Björn Borg playing tennis with a wooden racket at his unsuccessful comeback.(286) According to another sporting analogy, the 'most favoured nation approach' is needed to avoid 'an uneven playing field'.(287)

In practice, such inequalities can also be avoided by parties' agreement. A common law author observes that legal representatives frequently agree on the exclusion of communications of in-house counsel from document production in international arbitration.(288)

Against the 'most favoured nation approach', a commentary argues that privilege should not be extended to a party which has no reasonable expectation of such privilege at the time of the communication.(289) Referring to the above example, it is true that a Swiss party may not expect that a communication of Swiss in-house counsel is privileged. However, a Swiss party may also assume that the advice will not be subject *page "79"* to involuntary document production due to the limited amount of document production available under Swiss procedure law. Hence, the result of the application of the 'most favoured nation approach' does not contradict the parties' expectations.

The application of the 'most favoured nation approach' leads to the application of national laws. Some of them, namely US, English, German and Swiss law are examined in the following analysis of comparative law. The reason for this analysis is obviously not only scientific interest, but the practical application of domestic rules on privilege in international arbitration.

[G] . Legal Professional Privilege under US and English Law

US Federal and English law both recognize two types of legal professional privilege: a privilege for legal advice, known as attorney–client privilege in the US, and a litigation privilege, known as attorney work-product doctrine in the US.(290)

In essence, the scope of these privileges results from their name. Under English(291) and US(292) law, the legal advice privilege (or attorney–client privilege) requires that the communication was made for the purpose of seeking, obtaining or giving legal advice.

Under both laws, the litigation privilege (or attorney work-product doctrine) applies to both pending and contemplated litigation.(293) It requires that the documents were prepared for the dominant (or primary) purpose of being submitted to a legal advisor for advice or use in litigation.(294) However, it is not sufficient to copy an in-house counsel in an electronic conversation to consider that the primary purpose of a communication was to receive legal advice.(295)

In a leading English case, whether a report establishing the cause

of a train accident was privileged was a legal question that needed to be decided upon.(296) The report was prepared for the double purpose of increasing safety on trains and preparing litigation.(297) The House of Lords denied that the report was mainly prepared for litigation and concluded that the report was not privileged.(298)

Under English(299) and US(300) law, the privilege for legal advice (or attorney–client privilege) applies to confidential communications between lawyers and their clients or agents, but not to communications between lawyers and third parties. In comparison, the litigation privilege (or attorney work-product doctrine) also applies to communications between lawyers and non-parties under both laws.(301)

page "80"

The legal advice privilege applies to confidential documents. For example, correspondence between the parties and notes of meetings between opposing counsel are considered to not be confidential under English and US law.(302) However, such documents can be privileged based on a settlement privilege (see Chapter 5 section §5.09 [I] *infra*).

Under US Federal and English law, the legal professional privileges extend to in-house counsel as long as the latter do not work in a business or administrative role, but in a legal function.(303) The same rule also applies to outside counsel.(304) In other words, documents of lawyers acting as business people are not protected by legal privilege.(305)

Under English(306) and US law,(307) a joint privilege exists when several persons instruct a lawyer. A joint privilege needs to be distinguished from a common interest privilege.(308) Under English law, a common interest privilege protects communications between several parties in a litigation procedure who have a common interest.(309) A joint defence privilege also exists under US law, but requires the presence of a lawyer.(310)

English and US law contain a number of technicalities that limit the scope of the attorney–client privilege.

In particular, it is controversially discussed in both countries which employees of a corporate client should be considered to be clients in an attorney–client relationship.(311) In the case of *Three Rivers District Council v. Bank of England*, the English House of Appeal held that only three bank officials who had been responsible for the communication between the bank and the inquiry were considered to be the client.(312)

In an obiter dictum of a subsequent decision concerning the same dispute, a member of the House of Lords emphasized concerns that the Court of Appeal may have gone too far by treating employees of the bank as third parties, since corporate clients 'can only communicate through their employees and officers'.(313) In addition, the decision of the Court of Appeal is subject to sharp criticism in English legal writing.(314) *page "81"* Nonetheless, the controversial decision in the case *Three Rivers District Council v. Bank of England* is current English law.(315)

A similar rule, called 'control group test', was applied under US Federal law until the landmark case *Upjohn Co v. United States* in 1981.(316) In this case, the US Supreme Court held that:

> The control group test thus frustrates the very

> purpose of the attorney–client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client.[317]
>
> Nonetheless, the control group test is still applied under the laws of Illinois.[318]

Today's legal situation under US Federal law and under several laws of US states that rejected the 'control group test' is controversial. Pursuant to one opinion, a 'subject matter test' is applied in these jurisdictions.[319] According to another view, there is a need to distinguish between the 'subject matter test' and the *Upjohn* test.[320] The criteria of these tests are also controversial.[321]

Simplified, it can be said that these tests aim at extending the number of employees to be considered as clients to a larger group of employees beyond that of the 'control group', but without including all employees. By contrast, some US states apply the attorney–client privilege to all employees of the client company.[322]

In conclusion, the legal professional privilege under English and US law are very similar. In principle, both laws provide a broad protection of privilege which includes documents created by in-house counsel. However, both laws use a restrictive definition of the term 'corporate client' in an attorney–client relationship.

[H] . Legal Professional Privilege under Swiss and German Law

Contrary to English and US law, Swiss[323] and German[324] law do not distinguish between two kinds of legal professional privilege, but only provide one type of legal professional privilege.

Swiss and German law focus on the person in possession of the potentially privileged documents. Both laws distinguish between documents in the hands of lawyers and document in the hands of clients. In addition, Swiss law provides a rule for *page "82"* attorney–client correspondence that applies independently of who is in possession of the correspondence.[325]

The civil procedure codes of both countries provide rights of lawyers to refuse participating in the taking of evidence when they would risk criminal prosecution for violations of professional secrecy.[326] Since the obligation of lawyers to keep documents secret is broad, the legal professional privilege for documents that are in the hands of outside counsel is also broad.[327] It also covers documents that are not privileged in the hands of the client.[328]

For example, an attorney typically has an obligation to keep secret a contract attached to an e-mail sent by a client. As a consequence, the contract in possession of the attorney is privileged under Swiss and German law.

The legal professional privilege is significantly less broad under Swiss and German law if the documents are not in the hands of the attorney.

Article 160(1)(b) CPC (Switz.) provides that parties have no duty to produce documents from the correspondence between a party or a third party and a lawyer. Just as in English and US law, this privilege relates to the object,[329] i.e., the privileged documents. In other words, the existence of the privilege of Article 160(1)(b) CPC (Switz.) does not depend on the person who is in possession of

documents. The documents are privileged even if they are in the hands of a third party.[330]

Swiss commentaries disagree as to whether documents attached to lawyer's correspondence have to be produced.[331] The better view is that the legal professional privilege only covers documents resulting from the professional activity of the lawyer.[332] Documents in the hands of a party that existed independently of the attorneyclient relationship do not get privileged by handing them over to a lawyer.[333] If the attorney's entire file is considered to be privileged, as a publication suggests,[334] a party could bury facts by handing over all damaging documents to its lawyer.

In contrast to Swiss law, German law lacks an explicit provision granting privilege to attorney–client correspondence in the hands of a party. German authorities agree that the provisions granting lawyers a right not to participate in the taking of evidence do not apply to attorney–client correspondence in the hands of a party, not even by analogy.[335]

page "83"

According to the prevailing opinion in Germany, courts can and must consider the legal professional privilege when using their discretion.[336] However, a commentary defends the opinion that Article 142 ZPO (Ger.) does not provide any rights of the parties to refuse document production based on the legal professional privilege of their lawyers.[337] Taking into account that the legal professional privilege is part of the right to a fair trial under German law,[338] this point of view seems to be overly restrictive.

Just as under US and English law, the legal profession privilege does not apply to business activities of lawyers under Swiss law, but only to activities that are typical for a lawyer.[339] In particular, Swiss case law has denied the legal professional privilege for the board mandates of lawyers and activities as a trustee.[340]

Under both German[341] and Swiss law,[342] it is controversial as to whether the legal professional privilege applies to in-house counsel.

The Swiss Federal Tribunal explicitly left this question open in a 2008 decision.[343] While most Swiss commentaries[344] deny the existence of such a privilege, some commentators[345] defend the opinion that the legal professional privilege also applies to in-house counsel. According to the latter opinion, in-house counsel have the same task as external counsel, i.e., giving legal advice, and, therefore, the legal professional privilege should also apply to them.[346]

However, the Swiss Code of Civil Procedure[347] refers to the provision of Swiss Criminal Law[348] which provides criminal sanctions for lawyers who violate their duty of confidentiality. Based on principles of criminal law, this provision cannot be applied by analogy to in-house counsel.[349] This would violate the principle of *nulla poena sine lege*.[350] Hence, the legal professional privilege does not apply to in-house counsel under Swiss law.

The introduction of a new act on in-house counsel was discussed in Switzerland. If passed, it would have introduced a legal professional privilege for in-house counsel.[351] In the political and legal discussion, in-house counsel of international companies defended the opinion that Swiss law needs to protect the confidentiality of their legal *page "84"* advice.[352] Even if these arguments did not

prevail in the political discussion in Switzerland, these considerations may be valuable in international arbitration, because they show the expectations of users of international arbitration.

Contrary to the legal situation in Switzerland, in-house counsel can be admitted to the bar in Germany.(353) Many, but by no means all, German in-house counsel are admitted to the bar in practice.(354)

Documents of in-house counsel not admitted to the bar are not privileged according to German legal doctrine.(355) It is highly controversial whether or not documents of in-house counsel admitted to the bar are privileged and, if they are, under what requirements.(356)

According to one opinion, documents of in-house counsel admitted to the bar are only privileged if the in-house counsel does not act for his or her company, but for a third party.(357) If this view is followed, the scope of the legal professional privilege is very limited: the typical case, in which an in-house counsel creates documents for his or her employer, is excluded.(358)

In summary, the protection of the legal professional privilege is broad under Swiss and German law with regard to documents that are in the possession of outside counsel. The attorney–client correspondence is also protected under Swiss law if the correspondence is in the possession of the client. In contrast, German courts have free discretion to decide whether or not such documents are privileged under German law.

According to the prevailing opinion in Switzerland, documents of in-house counsel are not privileged. In Germany, it is controversial whether or not documents of in-house counsel registered to the bar are privileged.

[I] . Comparative Overview on Settlement Privilege

Many, if not most, developed countries recognize a mediation privilege. For example, § 4 Mediation Act (Ger.) provides a duty of confidentiality for the mediator and the persons involved in a mediation. Pursuant to German law of civil procedure, such a statutory duty of confidentiality is both a right to refuse to testify(359) as well as to produce documents.(360) As further examples, section 4 Uniform Mediation Act (US), Article 131-14 French Code of Civil Procedure(361) (hereinafter 'CPC (Fr.)') and Article 216(2) CPC (Switz.) provide that mediation communication is privileged.

page "85"

Some laws provide a general settlement privilege that goes beyond mediation. For example, under the English 'without prejudice' rule, statements made in the course of settlement negotiations are both inadmissible and privileged.(362) Rule 408 Federal Rules of Evidence(363) ('FRE') (US) provides the inadmissibility of statements made during settlement negotiations.

Swiss law recognizes a privilege for formal conciliation proceedings.(364) However, neither Swiss(365) nor German(366) law provides a general settlement privilege.

[J] . Further Types of Privileges

The following privileges are also common, but less important in international arbitration: medical professional privilege,

psychotherapist–patient privilege, priest–penitent privilege, reporters' privilege, privilege against self-incrimination, marital and other family privileges.(367)

Furthermore, an accountant–client privilege is recognized under US Federal and state law.(368) Since accountants play a key role in some cases, the question of whether or not this privilege applies in a specific arbitration can be important.

[K] . Waiver of Privileges under English and US Law

In principle, it is only the client who has the power to waive the privilege under US(369) and English(370) law. However, a lawyer's authority to represent his or her client typically includes the authority to waive privilege under these laws.(371)

Under both English and US law, inadvertent waiver of privilege is a delicate issue. Under US Federal law, the issue of inadvertent waiver of privileges is governed by Rule 502(b) FRE.(372) According to this provision, disclosure is not considered to be a waiver of privilege, if the following conditions are met:

(1) the disclosure is inadvertent
(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

page "86"

According to English law, the inclusion of documents in the non-privileged section of the list of documents is not considered to be a waiver, as long as no inspection took place.(373) As a rule, privilege is waived after inspection of the documents if the error is not obvious.(374)

Furthermore, a party cannot use privileged communications both as 'a sword and a shield' under US(375) and English(376) law. If a party alleges to have acted according to the advice of its counsel, the party cannot refuse document production based on legal professional privilege.(377)

English rules of waiver on privileges are closely related to English civil procedure and the distinction between inspection and disclosure which does not exist in international arbitration.

Similarly, the provisions of US law on inadvertent disclosure must be seen in the context of the role of discovery in US proceedings. In particular, the provisions require parties to take reasonable steps to prevent inadvertent disclosure. Such steps cannot necessarily be expected of non-US companies who are not used to broad discovery of documents. In US procedures, parties often conclude agreements which allow them to claw back documents that they inadvertently disclosed to the other side (so-called clawback agreements).(378)

[L] . Waiver of Privileges under German and Swiss law

According to several commentaries on international arbitration, the legal professional privilege belongs to the attorney in civil law countries.(379) At least for Swiss and German law, this generalization

is inaccurate. Just as in common law countries, under Swiss[(380)] and German[(381)] law, the secrecy belongs to the client who has the power to waive the privilege.

Under German law, the attorney has to give testimony and produce documents if the client has waived the attorney–client privilege.[(382)] Under Swiss law, however, the attorney can refuse to participate in the taking of evidence even if the client waived its privilege.[(383)]

Due to the narrow scope of document production, inadvertent waiver of privileges is not an issue under Swiss and German law.

page "87"

[M] . Summary

Privileges allow a party (or a witness) to withhold evidence from the other side. Contrary to the opinion of several commentaries, privileges are of procedural nature.

Pursuant to Article 9(3)(c) IBA Rules, the arbitral tribunal determines the law applicable to privileges based on the expectations of the parties and their advisors. Parties will often relate the legal professional privilege to their counsel and, accordingly, expect it to be governed by the law of their counsel's home jurisdiction.

In contrast, the settlement privilege does not necessarily relate to the status of a person. Consequently, parties will often expect the settlement privilege to be in line with the law of their home jurisdiction.

Article 9(3)(e) IBA Rules favours the 'most favoured nation approach' according to which the rules on privilege granting the broadest protection apply to all parties.

English and US law both consider documents created by in-house counsel to be privileged. Documents of Swiss in-house counsel are not privileged. In Germany, it is controversial whether documents of in-house counsel admitted to the bar are privileged. Contrary to German and Swiss law, English and US law use a restrictive definition of the term 'corporate client' in an attorney–client relationship.

Many national laws provide for a mediation privilege. A general settlement privilege is recognized under English and US law, but does not exist under Swiss and German law.

Under both English and US law, specific requirements exist as to when an inadvertent waiver of privileges is considered to be a waiver of privilege.

[N] . Comments on the Current Version of the IBA Rules

The 'most favoured nation approach' favoured by the IBA Rules and most commentaries typically leads to relatively satisfactory results if two common law parties or a common law party and a civil law party are involved. In these situations, the developed rules on privilege of a common law country are applied.

Nonetheless, the application of privilege rules of a common law country is not entirely unproblematic. First, the tendency of US and English law to consider communications between counsel and lower-level employees not to be privileged can be a real pitfall for companies from other regions. Second, parties not used to common

law rules on the waiver of privileges will be surprised by these rules and may end up in inadvertently waiving the privilege.

In the third place, the application of common law rules on privilege is highly complex. The 'most favoured nation approach' includes all these rules in international arbitration and, thereby, substantially increases the complexity of international arbitration.

page "88"

In both civil and common law countries, the content of privileges is often very controversial.(384) In civil law countries, such as Germany, the law of privileges tends to be rather underdeveloped and requires significant interpretation. The 'most favoured nation approach' imports these controversies and vague rules into international arbitration.

In a pure civil law setting, the legal situation can be even more problematic. If both applicable laws provide narrow privilege, the 'most favoured nation approach' only adds complexity.(385) In particular, the legal professional privilege may not be extended to legal advice and communications of in-house counsel.

Accordingly, the currently prevailing approach typically extends the scope of document production compared to civil law proceedings, but often leaves the scope of privilege unchanged in arbitral proceedings between civil law parties.(386) The application of current doctrines on privileges leads to an imbalance between the scope of document production and that of privileges. However, the scope of privileges should be in line with the extent of document production.(387)

This may result in less documents being discoverable in an arbitral procedure between common law parties than in an arbitral procedure between civil law parties, since the applied common laws recognize privileges to a greater extent. This result is more than questionable since common law parties may expect wide document production, while civil law parties may expect narrow document production.

A book on privileges under German, French and English law made the following comparison: the scope of document production and privileges are like Siamese twins: if one is growing, the other one must necessarily grow, too.(388) This comparison may be exaggerated. It is not an absolute necessity that privileges be extended when the scope of document production is extended. Nonetheless, it is a reasonable and a logical consequence of widening the scope of document production to also broaden the scope of privileges.

One of the reasons why there are no extensive rules on privilege in court proceedings of civil law countries is that there is no need to develop such rules, since document production typically is very limited.(389) In international arbitration, the extent of document production is typically broader. Hence, there should be no mechanical application of national laws on privileges.(390)

page "89"

In summary, the current 'most favoured nation approach' leads to relatively satisfactory results in proceedings where at least one common law party is involved. In a pure civil law setting, the resulting extent of privileges is typically too narrow in relation to the scope of document production.

From a procedural point of view, the determination of the most favoured law is often very complex. Since one of the goals of

arbitration is to be an efficient form of dispute resolution, the need for simplification is obvious.

A commentary on the IBA Rules considers the current rules on privilege to be 'less innovative and less forward-looking than many other new provisions'.(391) This is definitely an accurate description. The chapter below on model clauses contains one clause, namely Model Clause 7, which is dedicated to resolve this problem (see Chapter 8 section §8.08. *infra*).

§5.10. LEGAL IMPEDIMENT

Besides privilege, Article 9(2)(b) IBA Rules mentions 'legal impediment' as a further ground for exclusion of document production. Furthermore, Article 9(3) IBA Rules also applies to legal impediments according to its wording. The IBA Rules and the Commentary to the IBA Rules are silent with regard to the definition and content of the term 'legal impediment'. In addition, legal doctrine has not yet focused on this issue.

A legal impediment can be defined as a rule of law or an order of a public authority which prohibits disclosure. An example of a legal impediment is an order of a public prosecutor to not disclose specific documents. A public prosecutor may issue such an order when the disclosure would compromise the investigations. Further examples include data privacy laws prohibiting the disclosure of personal data. Such laws may require the redaction of some personal information.

§5.11. COMMERCIAL OR TECHNICAL CONFIDENTIALITY

[A] . Introduction

The issue of commercial and technical confidentiality is underestimated by a considerable part of the arbitration literature which tends to focus more on the legal professional and settlement privileges as well as on the confidentiality of arbitral proceedings. However, commercial and technical confidentiality is an important reason to limit document production in practice.(392)

This objection must be seen against its economic background. Companies can protect their know-how through two different methods: either by registering a patent or by keeping the know-how secret.(393) The first method has the disadvantage that the know-how becomes public, but the benefit of exclusivity for a limited period of time. *page "90"* In the opinion of the German Federal Court of Justice, a trade secret is often more valuable than an intellectual property right.(394)

This issue is particularly salient when the parties in dispute are competitors and the facts of the case occurred recently.(395) In such situations, the fear that the opposing party gains a competitive advantage by learning trade secrets can be a dominant factor in the party's considerations on document production.(396)

[B] . Distinction between Confidentiality and Privileges

Sometimes the issue of commercial and technical confidentiality is examined under the denomination of 'privilege for trade-secrets'(397) or 'business or trade secret privilege'.(398) In contrast, this book follows the terminology of Article 9(2)(e) IBA Rules.

The distinction between privileges and commercial or technical confidentiality is important, since the IBA Rules include particular rules on privilege in Article 9(3) IBA Rules that do not apply to commercial or technical confidentiality.[399] Article 9(3) IBA Rules only refers to Article 9(2)(b) IBA Rules when defining its scope of application.

There is a difference in the determination of the applicable law to privileges and to commercial and technical confidentiality. While the Commentary to the IBA Rules favours the most favoured law approach with regard to privileges (see Chapter 5 sections §5.09 [D] and §5.09 [F] *supra*), the rules on technical and commercial confidentiality do not refer to national laws. Rather, the Commentary to the IBA Rules emphasizes the discretion of the arbitral tribunal in determining whether the concerns of technical and commercial confidentiality are compelling.[400]

[C] . Complete Exclusion of Evidence Is the Exception

The IBA Rules provide two rules that limit document production due to technical or commercial confidentiality. Pursuant to Article 9(2)(e) IBA Rules, technical and commercial confidentiality is a reason to exclude document production if the confidentiality concerns are 'compelling'.[401] In addition, Article 9(4) IBA Rules provides the possibility of 'suitable confidentiality protection' when evidence is presented.

Neither the IBA Rules nor the Commentary to the IBA Rules defines technical and commercial confidentiality. Moreover, the word 'compelling' is not defined. The following two subsections make suggestions with regard to the definitions of these terms.

page "91"

[D] . Definition of Technical and Commercial Confidentiality

Even if national laws on confidentiality are inapplicable, an analysis of comparative law can be helpful for the definition of technical and commercial confidentiality. Under German[402] and Swiss[403] law, the definition of technical and commercial confidentiality contains the following elements:

1) Business related facts
2) Known only by a limited number of persons
3) That are not obvious
4) With regard to which the company has an economic interest to maintain secrecy
5) That the company intends to keep secret.

Section 1(4) US Uniform Trade Secrets Act[404] ('UTSA'), as amended in 1985, contains similar elements for the definition of a 'trade secret':

> [I]nformation […] that:
>
> (i) derives independent economic value, […], from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[405]

The UTSA is a statutory source in most US states, but does not apply in New York.(406) While the terms used by the UTSA are different from those of Swiss and German law, it is difficult to see significant differences with regard to the definitions. Facts and information are both very broad terms.(407) The phrase '[k]nown only by a limited number of persons' is equivalent to 'not generally known'.(408) The terms 'economic interest' and 'economic value' are synonymous. With regard to this criterion, it is relevant whether the company or competitors can use the secret.(409) 'Not obvious' and 'not being readily ascertainable by proper means' are also interchangeable expressions.

Companies' intent to maintain evidence is typically shown by the companies' efforts.(410) However, while it is examined under the UTSA whether the companies' efforts have been reasonable,(411) any expression of intent to maintain the secrecy is *page "92"* sufficient under Swiss(412) and German(413) law. Hence, the requirement of the UTSA is slightly more difficult to fulfil than the requirement under German and Swiss law.

Similarly, trivial or useless information is considered to not be confidential under English law.(414) An English commentary suggests that confidentiality must provide some value to the party and that a reasonable party in the position of the party would regard the information in question as confidential.(415) These criteria are vaguer than those under Swiss and German law and the UTSA. Furthermore, the second criterion seems circular: the suggested requirement that confidential information is what a reasonable person considers to be confidential is not a distinctive criterion. It might be overstated, but this definition is not far away from saying: 'Confidential is what is confidential.'

Examples of technical confidentiality are formulas, know-how and models.(416) Examples of commercial confidentiality are price calculations, financial records, tax records and documents covered by confidentiality agreements with third parties.(417)

In conclusion, an arbitral tribunal may be inspired by the similar criteria of Swiss law, German law or the UTSA. Put in simple terms, confidentiality is characterized by three elements under these laws: (i) the limited number of persons knowing the information, (ii) the objective value of keeping the information secret, and (iii) the subjective intent or the efforts to do so.(418)

[E] . Compelling Grounds to Exclude Documents

Moreover, the question arises what are compelling grounds to exclude evidence for commercial or technical confidentiality. According to this book, the complete exclusion of documents is justified if the secret has a high economic value. The other side of the coin is that there are compelling grounds if the requested party would incur significant damage in the event that the secret is divulged. In other words, the secret must be so important, that you cannot expect the party to disclose it in judicial proceedings.

For example, a company specializing in credit card security that has a dispute with a credit card company regarding the quality of its services, cannot be expected to disclose its highly secret security mechanisms even to its client. Similarly, a chocolate manufacturer, which has a dispute with a distributor regarding the quality of the chocolate, cannot be expected to disclose a secret recipe.(419) Finally, a pharmaceutical company, which has a dispute with a

supplier, will not be ready to disclose know-how about the development of a drug not yet protected by a patent.

All these examples describe situations in which the companies' 'crown jewels' are at stake. In general, companies are not ready to share such secrets with anyone. *page "93"* They cannot be expected to produce them even in a confidential arbitration procedure and independently from confidentiality measures that would be taken.

[F] . Confidentiality Agreements

Decisions on document production are particularly delicate if a party claims that it cannot produce documents due to a confidentiality agreement with a third party.

On the one hand, it may seem unfair that the requested party benefits from a limitation that the requested party itself created by undertaking the confidentiality agreement.(420) On the other hand, confidentiality agreements are a usual business practice and there can be legitimate reasons to conclude such agreements. Furthermore, arbitral tribunals should respect the principle of *pacta sunt servanda* even in relation to third parties.

Therefore, the analysis should focus on whether a party breaches the confidentiality agreement with the third party if the party discloses the documents in question.(421) In contrast, whether a party becomes liable to pay damages to the third party if the party breaches the confidentiality agreement should not be the relevant criterion. Generally speaking, an arbitral tribunal should not require that a party breaches an agreement with a third party. In addition, there may be other consequences of a breach of an agreement than damages. In particular, this can be a reason for the third party to terminate the agreement or a reason not to conclude new contracts with the concerned party.

An exception to this rule should be made if a party concludes the confidentiality agreement with the third party in bad faith. For example, a party can act in bad faith if it concludes the confidentiality agreement with the third party already knowing about the dispute in question.

For confidentiality agreements, there is a well-established practice of arbitral tribunals that aims at finding amicable solutions with third parties.(422) The arbitral tribunal may ask the requested party to write a letter or an e-mail to the third party asking for its consent to the production of the documents in the arbitration procedure.(423)

[G] . Overview on Confidentiality Measures

In cases, where documents are confidential, but not highly confidential, Article 9(4) IBA Rules applies. According to this provision, the arbitral tribunal can take measures to protect confidentiality.

Typical measures to protect technical or commercial confidentiality include: (i) the redaction of sensitive information, (ii) the production of documents for *page "94"* counsel-eye review only, or (iii) the use of a confidentiality expert. The use of 'clean teams' is a further, but probably less common option.

In general, an in-camera review by the arbitral tribunal is problematic from the point of view of the right to be heard and cannot be recommended.

[H] . Redactions

Redactions are widely used in international arbitration.(424) For example, if minutes of a board meeting contain different topics and only one relates to the arbitration procedure, the requested party usually redacts the unrelated parts of the minutes.(425) In such cases, the requested party typically has two arguments to justify redactions: irrelevance and confidentiality.(426)

[I] . Confidentiality Experts

In practice, the appointment of a confidentiality expert is an important method to deal with confidentiality issues. In addition, the terms of 'confidentiality advisor', 'document production master'(427) or 'discovery agent'(428) are sometimes used for the same or a similar function.

The possibility of appointing a confidentiality expert is expressly provided by Article 3(8) IBA Rules. According to this provision, a confidentiality expert should be used in exceptional circumstances where the review of the document is indispensable to decide on the validity of the objection. Such a confidentiality expert has the task of reviewing the document and reporting his or her findings to the arbitral tribunal which will subsequently decide whether to accept or to reject the exception.(429)

An article on protective orders in international arbitration considered appointing the tribunal's secretary as discovery agent to be a 'smooth option'.(430) However, it can be doubted whether this low-cost solution is appropriate. As other experts, a confidentiality expert should be independent,(431) not only from the parties, but also from the arbitral tribunal. The chairman and the tribunal's secretary typically belong to the same law firm and work closely together in the arbitration procedure. Hence, the tribunal's secretary lacks the required independence.(432)

The arbitral tribunal is authorized to appoint a confidentiality expert without the agreement of the parties. Where the parties agreed to delegate the decision-making power to the confidentiality expert, the confidentiality expert is authorized to accept or reject the privilege objection.

page "95"

Whether the arbitral tribunal can appoint a confidentiality expert who has the power to decide on privilege objections without the agreement of the parties is controversial in arbitration doctrine.(433) Several arbitration statutes of important arbitration centres(434) as well as leading institutional rules(435) state that the arbitral tribunal is competent to decide on evidentiary issues.

For example, the taking of evidence is the responsibility of the arbitral tribunal pursuant to Article 184(1) PILA. Consequently, the arbitral tribunal cannot delegate procedural decision-making power under Swiss law without the parties' agreement.(436)

Independent of the legal issue of whether or not the arbitral tribunal has the power to appoint a confidentiality expert with decision-making powers under any given arbitration statutes or rules, such a delegation without the agreement of the parties would be insensitive and cannot be recommended.

[J] . Only-Counsel Review

Another common measure to protect the confidentiality of documents is the only-counsel review.(437) Outside counsel sign a confidentiality undertaking in which they agree not to disclose the documents to third persons, including to their own clients.(438) An only-counsel review should be agreed to only if such an agreement is admissible under the laws applicable to the conduct of outside counsel.(439)

Furthermore, such a measure requires trust of the requested party in counsel of the opposing party.(440) On the one hand, it is not self-evident that such trust would be present, considering the fact that there is a dispute and that there is never a relationship of trust with opposing counsel.(441) On the other hand, attorneys are bound by professional ethics and, therefore, can be expected to comply with confidentiality undertakings.(442)

Moreover, additional confidential measures may need to be taken with regard to the award.(443) The award should be formulated in a way that ensures the secret is not disclosed.(444)

The only-counsel review does not lead to an effective representation of the requesting party if outside counsel depends on the input of the client to assess the relevance of the confidential documents, e.g., if he or she requires technical comments from the party's engineers.

page "96"

[K] . Clean Teams

A further confidentiality measure is the use of so-called clean teams.(445) A 'clean team' consists of specific persons that sign confidentiality agreements.(446) Confidential documents are disclosed only to these persons.(447) 'Clean teams' only provide a weak protection of confidentiality. Furthermore, this method requires great confidence in the opposing party. Unsurprisingly, such confidence is rather exceptional in case of a dispute.(448)

[L] . Summary

The IBA Rules do not refer to national rules on technical or commercial confidentiality, but grant arbitral tribunals broad discretion with regard to this issue. According to Article 9(2)(e) IBA Rules, complete exclusion of document production is the exception. An arbitral tribunal should take such a decision only if there are compelling reasons to do so.

The rule is that arbitral tribunals should take the necessary confidentiality measures to protect confidentiality. The redaction of sensitive information is often used. The appointment of a confidentiality expert is also a fairly common measure to protect confidentiality. However, the decision-making power on the confidentiality objection cannot be delegated to the confidentiality expert without parties' agreement under several laws and institutional rules, e.g., under Swiss law.

As a rule, arbitral tribunals should respect confidentiality agreements with third parties except where the party concluded the confidentiality agreement in bad faith. An only-counsel review is a method used regularly to protect confidentiality, which, however, requires trust in opposing counsel. The appointment of 'clean

teams' offers only weak confidentiality protection.

§5.12. POLITICAL OR INSTITUTIONAL SENSITIVITY

The requirements that apply to technical and commercial confidentiality also apply to the protection of political or institutional sensitivity. Pursuant to Article 9(2)(f) IBA Rules, 'grounds of special political or institutional sensitivity' are only a reason to exclude document production if they are compelling. In all other cases, an arbitral tribunal may take the same confidentiality measures as in case of technical or commercial confidentiality (see Chapter 5 section §5.11 *supra*).

page "97"

National laws often bind governments and their administrations to keep their internal communication secrets.(449) The same is true for some international institutions.(450)

The expression 'special political or institutional sensitivity' is broader than the term 'state secrets'.(451) State secrets concern core national interests such as defence or security.(452)

Obviously, political or institutional sensitivity is typically only an issue when at least one of the parties is a state or a state-owned company.

The ICSID(453) case of *Biwater Gauff v. Tanzania* is instructive with regard to the objection of political or institutional sensitivity.(454) In this case, Tanzania objected to the production of certain categories of documents on the basis of public interest immunity provided by Tanzanian law.(455) The arbitral tribunal rejected this objection by considering the following:

> This is an international tribunal, governed by an international convention, which is mandated to enquire into the conduct and responsibility of a State in light of its international treaty and customary international law obligations. It is hardly conceivable that, in this setting, a State might invoke domestic notions of public interest and policy relating to the operations of its own Government as a basis to object to the production of documents […].(456)

However, the arbitral tribunal added that Tanzania should refer the matter immediately to the arbitral tribunal if any of the documents to be produced contain politically sensitive documents, namely state secrets.(457) This distinction shows that arbitral tribunals will not simply follow national law, but make an independent assessment of the sensitivity of the documents in question.

§5.13. UNREASONABLE BURDEN

[A] . Production of E-Documents Bears the Risk of a High Burden

For several reasons, the phenomenon of e-document production has an influence on the burden of document production. First, e-documents have significantly raised the number of business documents.(458) This development can be observed in daily life. It is incredibly easy to transmit, duplicate and forward e-documents.(459) Office employees write dozens of e-mails every day. Thirty years

ago, they would not have sent so many page "98" letters. E-mails have partly replaced oral communication.[460] As a result, electronic archives contain substantially more documents than traditional archives of paper documents used to contain.[461]

A further factor that can raise the burden of the production of e-documents is that e-documents are often widely dispersed.[462] E-documents can be stored, in particular, on mainframe computers, on network servers or the back-up media of the company, on the personal desktops, laptops or smartphones of an employee or on the servers of cloud providers.[463] Depending on how a company is organized, it can be a Herculean task to find e-documents in all these different places.[464] The search for responsive documents usually causes an important part of the production costs of e-documents.[465]

The production of certain types of e-documents is more onerous. This is particularly the case if deleted data or back-up tapes need to be restored. That said, search tools are becoming more and more efficient, facilitating the discovery of e-documents[466] and reducing the additional burden of their production.

Legal costs also influence the burden of the production of e-documents. Numerous legal issues in relation to the production of e-documents have not yet been resolved in international arbitration.

In contrast to lawyers from civil law countries, practitioners from common law countries often have considerable experience from their home jurisdictions of dealing with the production of e-documents.[467] Some of them suggest filling the gaps with solutions inspired by the practices used in common law countries such as the Sedona Principles for Electronic Document Production (Sedona Principles).[468] This approach typically triggers resistance from practitioners from civil law countries.[469] The conflicting interpretations of the IBA Rules are a fertile ground for long disputes on the production of documents.

In summary, the high volume and wide dispersion of e-documents increase the burden of document production even though the additional burden can be reduced with the help of sophisticated search tools. Additionally, there is a risk of long disputes on legal issues, since the interpretation of requirements related to the production of e-documents is controversial. As a result, the production of e-documents risks becoming a very costly and time-consuming exercise in international arbitration.[470]

page "99"

[B] . Delicate Exclusion of Material Documents

Article 9(2)(c) IBA Rules provides that the unreasonable burden of producing requested documents is a reason to exclude them from production. While this criterion plainly seems to be common sense, its application is much more delicate than it initially appears.

Article 9(2)(c) IBA Rules is not a general clause that applies every time a document production request is too burdensome. Nonetheless, parties often invoke an unreasonable burden when document production should be rejected on other grounds.[471]

Two examples of document production requests that an arbitral tribunal considered to be an unreasonable burden are cited in the 2006 ICC Bulletin (Special Supplement). The first document production request concerned all communications between the

respondent and a third party and all documents created or held by the respondent or the third party relating to the sale of a company.[472] The second document production request concerned 'any and all documents relating to valuations … carried out in the period since the Sale'. Moreover, the second request specified that the 'term "valuation" should be interpreted broadly'.[473]

The first request neither named the presumed authors or recipients of the documents nor provided a period when the communications were established. Also, the request for all documents relating to the valuations only named the subject and was, therefore, overly broad. Hence, the requests should have been rejected because they were not limited to a narrow and specific category of documents (see Chapter 5 section §5.05 [C] *supra*). As a consequence, it would not have been necessary to apply the provision on the unreasonable burden.

Some commentaries state as an example of an unreasonable burden that 'the evidence already submitted or produced is sufficient to prove the requesting party's allegations'.[474] This is not an issue of unreasonable burden, but one of lack of materiality to the outcome of the case (see Chapter 5 section §5.06 [E] *supra*).[475]

According to several commentaries, the burden should be weighed against the potential use of the documents to determine whether the burden is unreasonable.[476] However, this is not an issue of the extent of the burden to the requested party, but of the lack of proportionality, which is a different ground to exclude documents from production according to Article 9(2)(g) IBA Rules.

If a document production request is too broad, the burden may be high, but Article 9(2)(c) IBA Rules does not apply, because the request should have already been dismissed because of a lack of specificity. The unreasonable burden only comes into *page "100"* play when a document production fulfils the requirements of Article 3 IBA Rules. In other words, it is the purpose of Article 9(2)(c) IBA Rules to exclude material documents and categories of documents if their production is too burdensome.[477]

[C] . Definition of an Unreasonable Burden

Neither the Commentary of the IBA Rules of Evidence Review Subcommittee nor other commentaries seem to define an unreasonable burden. This book thus suggests the following definition: 'A burden is unreasonable if it exceeds a commercially acceptable degree.' It follows that the threshold is below the limit of an insupportable burden. It would not be in the interest of arbitration to test the limits of the financial and temporal capacities of the parties.

Rather, the business needs for efficient dispute resolution to be taken into account. For this reason, the suggested definition uses the word 'commercially'. This indicates that arbitral tribunals should view the issue of an unreasonable burden not only from a purely legal perspective, but also from a business perspective.

In the first place, the commercially acceptable degree of the burden depends on the amount in dispute.[478] Time and money that are reasonably spent on document production increase with a higher amount in dispute.

The amount of time and money reasonably spent on document production does not proportionally increase with the amount in

dispute, but at a much slower rate. By comparison, this can also be seen in the scales of arbitrators' fees.[479] Consequently, the higher the amount in dispute, the higher are the reasonable costs in absolute figures, but the lower is the percentage of the amount in dispute that leads to an unreasonable burden.

The costs related to document production are only one of several items of the total cost of arbitration, while the costs of the production of a category of documents are only a part of the costs of the document production procedure. Hence, a relatively small amount compared with what is in dispute can be commercially unreasonable.

In many cases, the employees of the parties bear a large part of the burden of document production. As a rule, time that needs to be spent by the employees of the parties to comply with a document production request should be measured in hours. Conversion into money would help compare the theoretical costs with the amount in dispute. However, the financial element is rarely the most disturbing factor of internally spent hours. In general, document production proceedings have the consequence that the concerned employees will have less time to spend on other projects or will have to work overtime.

This factor should not be underestimated. Arbitration should not interfere with the ordinary course of business. The document production procedure should not be burdensome to such an extent that IT staff have problems with their daily support or *page "101"* that in-house counsel have insufficient time to prepare the annual meeting of shareholders. It is one of the purposes of Article 9(2)(c) IBA Rules to avoid such situations.

A further temporal element is that the document production procedure should not considerably delay the arbitration proceedings.[480] Usually, the document production procedure extends over some weeks or, at most, two or three months.[481] If the approval of document production requests has the consequence that a longer period of time is needed for the document production procedure, the issue arises of whether the burden of producing the requested documents is unreasonable.

The second main issue is the costs of the production of documents.[482] These costs can be high if external experts are needed, for example, to restore deleted data. Lawyers' fees are another important source of costs. In particular, document reviews to ensure that privileged documents are not produced can be time-consuming and, therefore, expensive.

When deciding on the unreasonable burden, the arbitral tribunal should take the expectations of the parties into account.[483] The commercially acceptable degree of the burden may be different in a dispute between two civil law parties than in a dispute between common law parties.[484] Parties with a civil law background may not expect to incur costs in relation to document production and, therefore, consider a relatively small amount of time and money to be an unreasonable burden. By contrast, parties who mainly have experience in common law countries may be more tolerant towards burdensome document production requests. The expectations of the parties are examined in more detail in Chapter 7.

[D] . Unreasonable Burden of Restoring Data from Back-Up Tapes

Deleted documents can often be found on back-up tapes.[485] The

question arises of whether the recovery of data from back-up tapes is unreasonably burdensome. However, this issue only arises if it is established that the requested documents are material to the outcome of the case. The materiality of deleted data and back-up data is determined in the same way as for other documents.

Back-up tapes provide security in the case of disaster such as a major fire.(486) Their purpose is to replicate the system after such an incident.(487) Back-up tapes are not used in daily business and are not designed to be available for litigation and arbitration.(488)

The CIArb Protocol and the CPR Protocol are more specific on the restoration of back-up tapes than the IBA Rules. Both reject the restoration of back-up tapes in principle. The CIArb Protocol, note 7, states: *page "102"*

> In the absence of particular justification it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations.

Similarly, section 1(d)(1) CPR Protocol reads as follows:

> Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

Furthermore, several authors from civil and common law countries and the ICC Commission on Arbitration defend the opinion that the restoration of back-up tapes is overly burdensome in most cases.(489)

Nevertheless, technological progress has made it easier and cheaper to recover data from back-up tapes.(490) Despite this development, the restoration of back-up tapes still requires an extra effort that is not made in daily business. Most arbitration users would not expect such extra efforts, since arbitration is considered to be an informal and efficient form of dispute resolution. Hence, the restoration of back-up tapes would be a negative surprise for them. In line with most authorities, this book suggests that the restoration of back-up tapes should still be considered to be overly burdensome under Article 9(2)(c) IBA Rules.

The legal situation is more difficult to assess under the ICDR Rules, which do not explicitly provide that an unreasonable burden is a ground to exclude document production.

Nonetheless, an article published in 2008 defends the opinion that the wording of the ICDR Guidelines, at 4, which is identical to the current Article 21(6) ICDR Rules, excludes the recovery of deleted data.(491) The article bases its conclusion on the fact that the ICDR Guidelines, at 4, use the word 'documents', but do not use the words 'data' or 'information'.(492)

This terminological argument can be questioned, however. Neither the ICDR Rules nor the ICDR Guidelines defines the word 'document'. According to the generally accepted definition of the IBA Rules, the word 'document' includes data of any kind (see Chapter 2 section §2.01 [A] *supra*). Therefore, the use of the word 'document' does not seem to exclude the recovery of deleted data.

Nonetheless, the recovery of deleted data is difficult to reconcile with the purpose of the ICDR Guidelines (and of the ICDR Rules) that aim to exclude time-consuming and costly discovery proceedings from international arbitration.(493) As a rule, the restoration of back-up tapes would contradict these purposes.

page "103"

[E] . An Estimation of Time and Money to Support the Objection

A party that raises the objection of an unreasonable burden may estimate the time and costs that it would need to comply with the request. Even a rough estimation helps the arbitral tribunal decide on the objection. If external experts are needed to comply with the document production request, the objecting party may ask an offer of experts and submit it to the arbitral tribunal. However, if the involvement of external experts is considered unreasonable per se, there is no need to ask an offer of experts.

It would be excessive for an arbitral tribunal to generally require an estimation of time and costs for the objections of an unreasonable burden. Rather, an estimation of time and costs should be considered to be a possibility of the requested party to support an objection of an unreasonable burden.

[F] . Use of 'Sampling' to Reduce the Burden

The Commentary of the IBA Rules of Evidence Review Subcommittee provides the example that the amount of requested documents creates an unreasonable burden.(494) This can be the case if the accuracy of a repetitive business operation is disputed between the parties.(495) In particular in accounting disputes, a huge amount of e-documents may be relevant to the case and material to its outcome.(496)

In such cases, the 'sampling' method can be used to reduce the burden of document production.(497) Instead of the production of all these documents, the production of a sample helps drastically reduce the burden of production.(498) However, it must be ensured that a sample is selected on a random basis.(499)

[G] . Summary

Article 9(2)(c) IBA Rules is not a general clause that applies every time a document production request is too burdensome. Rather, the provision only applies when a document production fulfils the requirements of Article 3 IBA Rules.

A burden is unreasonable if it exceeds a commercially acceptable degree. In an individual case, the threshold depends on the amount in dispute and the expectations of the parties. The higher the amount in dispute, the higher 'reasonable' costs are in absolute terms, but the lower is the percentage of the amount in dispute that leads to an unreasonable burden. The burden of restoring data from back-up tapes is usually unreasonable. A requested party may use an estimation of time and costs to support the objection of an unreasonable burden. 'Sampling' can be used to reduce the burden of document production.

page "104"

§5.14. NON-EXISTENCE, LOSS AND DESTRUCTION OF

DOCUMENTS

[A] . Introduction

Non-existent, lost or destroyed documents are a particularly thorny issue for arbitral tribunals. While an arbitral tribunal can determine, based on legal criteria, whether a document production request is specific enough or a requested document is material to the outcome of the case, the question of whether a document exists is, in the first instance, a factual issue.

Even worse, it normally is a factual issue of which the arbitral tribunal has no actual knowledge. In most cases, the record does not provide any information as to whether the requested documents exist(ed). Furthermore, a request for categories of documents implies that the requesting party does not know exactly whether documents exist (see Chapter 3 section §3.04 *supra*). If the requesting party had specific information on the requested documents, it would most likely have made a request for individual documents.

Against this background, the question arises of under what conditions an arbitral tribunal should accept the objections that the requested documents do not exist, have been lost or destroyed. Furthermore, this book examines whether the same requirements should be applied to the non-existence, loss and destruction of documents.

[B] . Non-existing Documents

As one of the requirements of a document production request, the requesting party must reasonably believe that the documents or categories of documents exist pursuant to Article 3(3)(a) IBA Rules. Hence, the requesting party neither needs to prove the existence of the requested documents nor does it have to demonstrate the likelihood of the existence of the requested documents in order to make a document production request. The threshold of reasonable belief is lower. Reasonable assumptions should be sufficient,(500) such as the one that a specific matter has been discussed at a board meeting of the requested party and that the minutes of this meeting exist.

If this low standard is fulfilled, the decision on the existence of requested documents should depend on the answer to the document production request. In the 2006 ICC Bulletin (Special Supplement), unpublished procedural orders of three arbitral tribunals are cited on this issue.(501) A procedural order required that the requests for internal documents contain concrete indications of their existence.(502) The other two arbitral tribunals waited to see whether the requested party disputed the existence of the requested documents.(503)

page "105"

The second approach seems to be preferable and more in line with the IBA Rules. In the first case, the requesting party relied ‘on the general presumption that companies do establish and keep internal documents relating to their business dealings’.(504) Contrary to the decision of the arbitrator, this could have been considered to be sufficient for reasonable belief.

If the requested party does not challenge the existence of the requested documents, an arbitral tribunal may conclude that the

requested documents exist.[505] This conclusion is normally justified, since a requested party rarely forgets to invoke the non-existence of the requested documents. If the requested party, nevertheless, omits to object in due time that the requested documents do not exist, it risks the arbitral tribunal drawing adverse inferences from the non-production pursuant to Article 9(5) IBA Rules (see Chapter 9 section §9.02 *infra*).[506]

If the requested party disputes the existence of the requested documents, the question of the standard of evidence arises. According to one of the unpublished arbitral decisions cited in the 2006 ICC Bulletin (Special Supplement), the requesting party is required to show the likely existence of the requested documents.[507] Two Swiss scholars come to a similar conclusion, but consider the issue from a different angle. According to the latter authors, the arbitral tribunal examines the plausibility of the objection.[508]

By contrast, a commentary of an English author states that arbitral tribunals assume the good faith of parties and counsel and usually accept the argument that the requested documents do not exist:

> A party may say, through counsel, that it has searched and cannot find a document or class of documents. Absent very good reason such explanations will be accepted at face value. The good faith of counsel is invariably assumed and that of the parties taken as read although evidence can be adduced to the contrary.[509]

Similarly, another common law scholar explains:

> It takes an exceptionally unscrupulous client or lawyer to hide or destroy evidence. Exceptions should not define normative rules and practices for document production in international arbitration. … Parties acting in good faith will explain the evidence, not hide or destroy it.[510]

Hence, the two latter authorities apply a different test than the two Swiss scholars and the arbitral tribunal in the case cited in the 2006 ICC Bulletin (Special Supplement). If the existence of the requested documents is disputed, the two Swiss scholars and the mentioned arbitral decision analyse the *likelihood* that the requested documents exist. By contrast, according to the commentary of the English author, the requesting party *page "106"* needs to *prove* the existence of the requested documents in order to reverse the assumption of the good faith of the requested party.

The IBA Rules only define the threshold for the loss or destruction of a document, but not for the existence of a document. Pursuant to Article 9(2)(d) IBA Rules, the requested party needs to show that the loss or destruction of the requested document has occurred 'with reasonable likelihood'. From a systematic point of view, the same criteria should be used as if the existence of the requested documents is disputed. However, the burden of proof is reversed. While the requested party must show the likelihood of the loss or destruction of the requested documents, the requesting party is required to demonstrate that the requested documents are likely to exist.

[C] . Lost and Destroyed Documents

Pursuant to Article 9(2)(d) IBA Rules, a party may object that a requested document has been lost or destroyed. This objection

implicitly recognizes that the document once existed. Hence, the issue of non-existing documents, on the one hand, and of lost or destroyed documents, on the other, should not occur in relation to the same documents.

According to Article 9(2)(d) IBA Rules, the requested party must show 'with reasonable likelihood' that the loss or destruction of the requested documents has occurred. The Commentary of the IBA Rules of Evidence Review Subcommittee points out that it may be impossible to prove the loss of a document.(511)

In particular, a party can submit its document retention policy to demonstrate that a document was likely to have been destroyed.(512) The destruction of a document in accordance with a reasonable document retention policy is not objectionable under the IBA Rules.(513) Rather, it is one of the purposes of Article 9(2)(d) IBA Rules that such policies are considered to be valid grounds to exclude documents from production. Nevertheless, an arbitral tribunal may not accept that a document retention policy that has been implemented or modified after the dispute arose could be a valid ground for the exclusion of evidence.(514)

Furthermore, the exclusion of documents from production is justified if the destruction of the requested documents was in accordance with general business practices.(515) Such practices may depend on the industry and regional characteristics.

In contrast to the procedural rules in common law countries, no provision in the IBA Rules provides for a duty of the parties to retain documents. In particular, the principle of good faith does not impose an affirmative duty to preserve documents or to prevent the destruction of potentially material documents.(516) In other words, there is no 'arbitration hold' similar to the 'litigation hold' in US court proceedings under the *page "107"* IBA Rules.(517) In 2010, when the current IBA Rules were adopted, there was no such rule in international arbitration at all.

However, this changed when the IBA Council adopted, on 23 May 2013, the IBA Guidelines on Party Representation in International Arbitration(518) (IBA Guidelines).(519) Like the IBA Rules, the IBA Guidelines apply if the parties have agreed on them or if the arbitral tribunal uses its discretion to apply them.(520) However, the introduction of the IBA Guidelines led to unusually sharp criticism by practitioners.(521) Even supporting voices(522) have doubts whether the IBA Guidelines will be widely used.(523)

IBA Guideline 12 aimed to indirectly introduce a duty of the parties to preserve all potentially relevant documents:

> When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration.

Hence, the IBA Guidelines introduced a duty of counsel to inform the party of its duty to retain documents that the party would not have if only the IBA Rules applied.(524) De facto, the IBA Guidelines amended the IBA Rules through the backdoor.(525) The introduction of an 'arbitration hold' is a major change in international arbitration.(526)

An article justifies the introduction of IBA Guideline 12 as follows: 'Since no document production can be effective without a litigation hold it is understandable that the IBA wanted to include Guideline 12.'(527) This book takes a different viewpoint. A costly 'arbitration hold' is by no way required for an effective document production. If there is no 'arbitration hold' in place, this does not mean that the parties can start destroying their documents. Rather, this means that the parties just follow their usual document retention policies.

page "108"

The divergence between the IBA Rules and IBA Guidelines may be seen against the backdrop of the tensions between civil law and common law practitioners when it comes to the establishment of international standards. Even if legal cultures are equally represented in the elaboration of different guidelines, the results are not necessarily the same.(528)

The duty to retain documents is very broad under IBA Guideline 12, since the provision concerns all documents that are potentially relevant to the arbitration.(529) A document is potentially relevant if the possibility of it being used by a party in the arbitration proceedings to present its case cannot be excluded. For example, the internal notes of witnesses of minor importance are potentially relevant to a case. Hence, this duty covers a huge amount of documents in a typical arbitration case.

The IBA Guidelines justify this broad duty based on the early stage of the proceedings, when counsel advise their parties on the preservation of evidence.(530) At this stage, counsel usually does not know yet whether a document will be material to the outcome of the dispute.(531)

The rule of IBA Guideline 12 seems to be inspired by US law,(532) particularly by the Sedona Principles.(533) Sedona Principle 1 provides in particular that 'organizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation'.

In contrast to the Sedona Principles, IBA Guideline 12 does not seem to apply in reasonable anticipation of legal proceedings, but from the beginning of arbitration proceedings. A common law author admits that this appears to be the 'plain meaning' of IBA Guideline 12, but considers that such a reading would be 'unfortunate'.(534) Taking into account that an 'arbitration hold' would be a major and controversial change in international arbitration, there seems to be no basis for an interpretation of IBA Guideline 12 that goes significantly further than its wording. IBA Guideline 12 does not aim at fully implementing common law rules on litigation hold.

The condition that 'arbitral proceedings involve or are likely to involve Document production' is fulfilled in almost every arbitration, since document production has become a standard in international arbitration.(535)

The formulation 'need to preserve' is a softer version of the wording 'obligation to preserve' used in the Sedona Principle 5. Nonetheless, the existence of a 'need to preserve' also implies that there must be a duty to preserve documents. Otherwise, the provision would be toothless.

page "109"

The restriction that documents must be preserved 'so far as reasonably possible' is vague. Many companies offer services for

the retention of e-documents to comply with US law. Therefore, it is in most cases possible to preserve e-documents that would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business.

The question of whether it is reasonable to take such measures is a cost issue. In the US, the duty to preserve documents in anticipation of litigation causes enormous costs. By contrast, IBA Guideline 12 only applies to ongoing arbitration proceedings and, therefore, causes lower costs. Nonetheless, it can be expected that companies incur considerable costs if they have to mandate specialized companies for the preservation of e-documents. Whether these costs are reasonable depends on the amount in dispute and on the expectations of the parties.

Moreover, a party may have duties to retain documents under national law that should be taken into consideration.(536) In particular, such duties may exist under corporate and tax law.(537) An arbitral tribunal may consider that the destruction of documents in violation of such provisions to be no valid ground for the exclusion of document production. Obviously, the wilful destruction of evidence is no grounds for exclusion under Article 9(2)(d) IBA Rules.(538)

[D] . Summary

In cases of the disputed existence, loss or destruction of the requested documents, reasonable likelihood is the applicable standard under the IBA Rules. If the requested party disputes the existence of the requested documents, the requesting party is required to demonstrate that the requested documents are likely to exist. If the requested party alleges that the requested documents have been lost or destroyed, it must show the likelihood of their loss or destruction. For example, a party can show the likelihood of destruction by the production of its document retention policy.

§5.15. PROCEDURAL ECONOMY, PROPORTIONALITY, FAIRNESS AND EQUALITY

Pursuant to Article 9(2)(g) IBA Rules, compelling ‘considerations of procedural economy, proportionality, fairness or equality of the Parties’ are grounds to exclude documents from production. The Commentary of the IBA Rules of Evidence Review Subcommittee describes Article 9(2)(g) IBA Rules as ‘a catch-all provision’.(539)

At first sight, the potential scope of the application of Article 9(2)(g) IBA Rules seems to be broad, because four principles are mentioned. However, Article 9(2)(g) IBA Rules is of subsidiary nature. The provision only applies if the requirements of Article 3(3) IBA Rules are fulfilled and if there is no other grounds for the exclusion of *page "110"* Article 9(2) IBA Rules.(540) Furthermore, its threshold is high, since the considerations must be compelling.

In particular, compelling reasons of fairness and equality are grounds to exclude documents from production under Article 9(2)(g) IBA Rules. Most or all arbitration statutes require fairness and equality.(541)

In the 2010 Revision of the IBA Rules, the most important application of Article 9(2)(g) IBA Rules, i.e., equal treatment in relation to privileges,(542) was included in Article 9(3)(e) IBA Rules. In relation to privileges, the application of different national laws requires the application of this grounds for exclusion from

production (see Chapter 5 section §5.09 [F] *supra*). In contrast, an international standard applies to the requirements of document production and to the other objections against document production requests (see Chapter 1 section §1.01 and Chapter 5 section §5.11 [F] *supra*). Hence, beyond the issue of privilege, there is less reason to exclude documents from production based on the equality of treatment.

A significant ground for exclusion from production is the criterion of procedural economy. Some authors from common law countries express concerns that the concept of procedural economy is 'unfamiliar',(543) 'uncertain'(544) and 'nebulous'.(545)

Procedural economy is an important procedural principle in several civil law countries. Therefore, it may not be of surprise that authors from civil law countries do not share the concern that this concept is 'unfamiliar'. For example, under Swiss law, procedural economy means accomplishing the goals of the procedure in the shortest possible time and with minimal costs.(546)

In international arbitration, procedural economy may be defined as meaning that the parties spend minimal time and costs properly establishing the facts. Therefore, the term 'procedural economy' requires conflicting interests to be reconciled. Although the burden of the requested party should be as low as possible, the establishment of facts should be complete. The term 'compelling' means that documents should only be excluded in serious cases. An exclusion of document production is justified if an approval of a document production request led to an inefficient document production procedure.

The criterion of proportionality also relates to the burden of the requested party. Proportionality means that the arbitral tribunal weighs the burden against the potential use of the documents.(547)

The subsidiary nature of Article 9(2)(g) IBA Rules considerably restricts the scope of these grounds for exclusion. If the burden alone is unreasonable, Article 9(2)(c) IBA Rules applies. If the requested documents are not material to the outcome of the case,
page "111"
the requirement of Article 3(3)(b) IBA Rules is not fulfilled and Article 9(2)(g) IBA Rules does not apply either.

Article 9(2)(g) IBA Rules only applies if the documents are material to the outcome of the dispute and if the burden is not unreasonable per se. Additionally, it is required that either the burden is not as low as it could be for the complete establishment of facts or that the production of the requested documents is too burdensome in view of their limited importance. These conditions can hardly be simultaneously fulfilled. However, this is in line with the purpose of a 'catch-all provision'. As an objection, Article 9(2)(g) IBA Rules is a last resort.

§5.16. NO DUTY TO SUBMIT ADVERSE DOCUMENTS BASED ON GOOD FAITH

In preparation of the 2010 Revision of the IBA Rules, several modifications were suggested. According to a member of the IBA Working Party, it was discussed to introduce:

> an express obligation to produce any document that, to that party's actual knowledge, is manifestly relevant to the substantive issues to be decided by the arbitrators in their award. This obligation would derive from a party's general duty to conduct its case in good faith, without improper means, in all

consensual arbitrations.[548]

Now, paragraph 3 of the Preamble of the IBA Rules states: 'The taking of evidence shall be conducted on the principles that each Party shall act in good faith …'. In view of the discussion before the 2010 Revision, the question arises of whether the principle of good faith imposes a duty to produce documents that are manifestly relevant to substantive issues.

A member of the IBA Rules of Evidence Review Subcommittee points out that the duty of good faith does not require a party to submit documents beyond the limits of Article 3 IBA Rules.[549] Indeed, Article 3 IBA Rules only provides that documents must be produced on request (by a party or the arbitral tribunal). It would be contrary to the purpose of this provision to oblige a party to spontaneously submit adverse documents based on the principle of good faith.

Furthermore, it is the purpose of the Preamble to provide some explanations of but not to modify the IBA Rules. In addition, a duty to spontaneously submit adverse documents would be a radical change from the system of the 1999 IBA Rules.[550] The drafters of the current IBA Rules did not intend such changes (see Chapter 5 section §5.04 *supra*). As a result, the duty of good faith does not imply a duty to spontaneously submit adverse documents.

A commentary on the IBA Rules explains that requests for 'intentionally burdensome, excessive, irrelevant or immaterial' documents violate the principle of good *page "112"* faith.[551] According to the commentary, the duty of good faith can be relevant for the decision-making process with regard to such requests.[552]

However, the mentioned types of requests do not fulfil the requirements of Article 3(3) IBA Rules or the requested documents are excluded from production based on Article 9(2) IBA Rules.[553] As a consequence, there is no need to base the dismissal of document production on the principle of good faith.

Rather, a violation of good faith can be relevant to the decision on costs (see Chapter 9 section §9.03 *infra*). Article 9(7) IBA Rules reads as follows:

> If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

Hence, the arbitral tribunal can take into consideration when deciding on costs that a party intentionally requested 'burdensome, excessive, irrelevant or immaterial' documents. The party that acted in bad faith may thus have to bear the full costs related to such requests.

§5.17. CONCLUSION

The interpretation of the IBA Rules is crucial in arbitration practice. This chapter suggested definitions of several terms that neither the IBA Rules nor the Commentary of the IBA Rules of Evidence Review Subcommittee defines. In particular, it defined 'materiality to the outcome of the case', 'possession, custody or control', 'fishing expeditions', 'privilege', 'legal impediment', 'technical or commercial

confidentiality', 'unreasonable burden' and 'procedural economy'.

The first key requirement, specificity, should not be interpreted too rigidly. Contrary to the opinions of several authors, there is no abstract rule about what is sufficient to identify a document or a category of documents. Of the numerous possible specifications, only the subject matter is imperative in requests for categories of documents pursuant to Article 3(3)(a)(ii) IBA Rules. The most important issue of e-document production is whether a request for categories of e-documents can include search terms. However, the current IBA Rules leave this question open. The corresponding rule of Article 3(3)(a)(ii) IBA Rules is only optional.

Materiality to the outcome of the case is the second key requirement. A document that is material to the outcome of the case is necessarily relevant. Hence, the criterion of relevance to the case is redundant. In addition, it is not sufficient that the requested documents are potentially material to the outcome of the case, since an arbitral tribunal must be convinced of the materiality of a requested document according to the *page "113"* Commentary of the IBA Rules of Evidence Review Subcommittee. The requested documents must be prima facie material.

It is controversial whether the burden of proof is an additional requirement for document production. According to this book, the requesting party does not need to bear the burden of proof for the facts that it intends to prove with the requested documents. It would be contrary to the idea of the IBA Rules of being a compromise between civil law and common law countries to apply an additional requirement that does not even apply in some civil law countries.

Furthermore, the wording and purpose of Article 3(3)(c) IBA Rules favour a broad interpretation of 'possession, custody or control'. If documents are in the hands of an affiliated company of a party, mutual assistance proceedings before state courts are not a viable alternative.

Practitioners often overestimate the importance of the grounds for the exclusion of document production. Article 9(2) IBA Rules only apply if the requirements of Article 3(3) IBA Rules are fulfilled.

Privilege is the most important reason to exclude documents from production. The IBA Rules refer to national laws on privilege. Based on the expectations of the parties and their advisors, the legal professional privilege will be often governed by the law of the counsel's home jurisdiction and the settlement privilege by the law of the parties' home jurisdiction. In line with Article 9(3)(e) IBA Rules, the more favourable law is applied to both parties.

It results from the analysis of comparative law that US and English law generally provide broader protection of privilege than Swiss and German law. However, rules on inadvertent waiver and restrictive definitions of the term 'corporate client' limit this protection. The application of the 'most favoured nation approach' is complex and jeopardizes the efficiency of the document production procedure.

The complete exclusion of documents based on technical or commercial confidentiality requires compelling reasons and is the exception. As a rule, arbitral tribunals take confidentiality measures to protect the confidentiality of documents. The most important measures are the redaction of documents, only-counsel review and the appointment of a confidentiality expert.

The unreasonable burden of producing the requested documents is further grounds for exclusion from production. The threshold of an unreasonable burden depends on the amount in dispute and the

expectations of the parties. It usually constitutes an unreasonable burden to restore data from back-up tapes. A requested party may use an estimation of time and costs to support the objection of an unreasonable burden.

The non-existence, loss and destruction of requested documents are further grounds for exclusion from document production. If the requested party disputes the existence of the requested documents, the requesting party is required to demonstrate that the requested documents are likely to exist. By contrast, if the requested party alleges that the requested documents have been lost or destroyed, the requested party must show the likelihood of the loss or destruction of the requested documents.

page "114"

Overall, an overly formalistic approach should be avoided and the IBA Rules should not be reinterpreted as civil law or common law rules. Rather, a balanced and practical approach in the interpretation of the IBA Rules deserves to be promoted.

§5.18. OUTLOOK: IBA RULES SHOULD NOT BECOME A CODE

Despite the great importance of the IBA Rules, a better understanding of them may not be sufficient to master the challenges of document production in international arbitration. It can neither be the only nor the ultimate goal to achieve greater convergence in the interpretation of the IBA Rules. Otherwise, it would be pursued that the IBA Rules become a code of evidence for international arbitration proceedings.

This risk may seem to be remote, because most authors do not agree with such a level of harmonization.(554) However, the standardization of arbitration procedures can develop its own momentum, as an experienced arbitrator points out:

> Many para-regulatory texts seek to [sic] further unification, but many unify even if this is not their goal. In fact, *any text*, once it is written, makes borrowing easy and leads to unexpected unification of law.(555) (emphasis original)

The overwhelming success of the IBA Rules has triggered a flood of commentaries on them. When the second and following editions of these books appear, the opinions may have converged to some degree and influenced arbitration practice. This conceivable development implies the risk that evidentiary proceedings become fully standardized in arbitration practice.

This should be considered to be a danger, since it would be the end of arbitration as a flexible form of dispute resolution. Chapters 7 and 8 search for new solutions for document production. The goal is to maintain the flexibility of international arbitration despite the trend towards more detailed rules.

page "115" *page "116"*

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1 Cohen Kläsener & Dolgorukow, 302.

2 See Chapter 1 section §1.02 *supra*.

3 Finizio & Speller, 63; see Greenberg, Kee & Weeramantry, n. 7.135; see Kaufmann-Kohler & Bärtsch, 18.

[4] See Chapter 1 section §1.02 *supra*.
[5] Girsberger & Voser, n. 736; Hanotiau, Best Practices, 114; Hill, 89; Honlet, 706; Roney & Müller, 61; see Sachs, 'Fishing expeditions', 196; Tirado et al., § 23-15; Veeder, IBA Rules, 321; Waincymer, Evidence, 760.
[6] Von Segesser, IBA Rules, 736.
[7] Munk Schober, 21; Wirth, 13.
[8] See Martinez-Fraga, 71.
[9] Blackaby et al., n. 6.108 (referring to the 1999 IBA Rules).
[10] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (2010), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (accessed 29 May 2015).
[11] Article 3(3)(b) IBA Rules et Art. 9(2)(a) IBA Rules.
[12] Article 3(3)(b) IBA Rules et Art. 9(2)(a) IBA Rules.
[13] Article 3(3)(c) IBA Rules.
[14] Article 9(2)(c) IBA Rules.
[15] Article 3(3)(a)(ii) IBA Rules.
[16] See Barkett, Panel Discussion, 270 et seq.
[17] The scientific value of unpublished arbitral case law is reduced because the analysis cannot be verified. However, this is an unavoidable consequence of the confidential nature of arbitration. This book only occasionally refers to unpublished case law.
[18] Tse & Peter, 30.
[19] See Hafter, 350.
[20] Cf. Bouchenaki, 181 ('First, the broad discretion of individual arbitrators means that decisions do not offer much in the way of predictive value.')
[21] http://www.cpradr.org/RulesCaseServices/CPRRules.aspx (accessed 29 May 2015).
[22] Article 3(3)(a) IBA Rules.
[23] See von Segesser, IBA Rules, 745.
[24] Hill, 87.
[25] A. Meier, 180; Range & Wilan, 61.
[26] Robertson & Corcoran, 9.
[27] Smit & Robinson, 121.
[28] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 9.
[29] El Ahdab & Bouchenaki, 94.
[30] Kreindler, 2010 Revision, 157.
[31] See R.H. Smit, E-Disclosure, 203; see von Segesser, IBA Rules, 751.
[32] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 9.
[33] Waincymer, Evidence, 861.
[34] Cf. Hanotiau, Best Practices, 117 ('The degree of precision required will be determined on a case-by-case basis.').
[35] See Raeschke-Kessler, Production of Documents, 647; see Tschanz, 228; see Waincymer, Evidence, 860 et seq.; see Zuberbühler et al., Art. 3 n. 110.
[36] Brower & Sharpe, 604; cf. § 423 ZPO (Ger.) (providing a similar duty: 'The opponent is also under obligation to produce a record or document to which he has referred in the proceedings by way of tendering evidence, even where he did so only in a preparatory written pleading.').
[37] See also the example of Raeschke-Kessler, Production of Documents, 647.
[38] Hamilton, 71.

[39] *Ibid.*, 71.
[40] *Ibid.*, 71.
[41] *Ibid.*, 71.
[42] *Ibid.*, 72.
[43] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 9.
[44] *Ibid.*, 9.
[45] *Ibid.*, 9.
[46] *Ibid.*, 9.
[47] *Ibid.*, 9.
[48] O'Malley, Evidence, n. 3.34.
[49] Kaufmann-Kohler & Bärtsch, 18; Munk Schober, 23; Raeschke-Kessler, Production of Documents, 648; Tercier & Bersheda, 95; Zuberbühler et al., Art. 3 n. 113.
[50] Ashford, IBA Rules, n. 3-30.
[51] *Ibid.*, n. 3-10.
[52] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 9.
[53] Hanotiau, Best Practices, 117.
[54] Ashford, Discovery, 100; see Dutson et al., 166; see O'Malley, Evidence, n. 3.34 et seqq.; see Raeschke-Kessler, Production of Documents, 648; see Waincymer, Evidence, 860 et seq.; see Zuberbühler et al., Art. 3 n. 113.
[55] See Ashford, IBA Rules, n. 3-28; Lowenfeld, Omelette, 27.
[56] See Hanotiau, Massive Productions, 358; see Tercier & Bersheda, 95; see Wirth, 12.
[57] Hamilton, 72.
[58] Berger & Kellerhals, n. 1325.
[59] Hill, 90; Tse & Peter, 30.
[60] Hill, 89; Howell, Panel Discussion, 146.
[61] Webster & Bühler, n. 25-69.
[62] Ashford, IBA Rules, n. 3-34; O'Malley, Article 3, 187.
[63] Malinvaud, 375.
[64] Hilgard, 123; see Howell, Electronic Disclosure, 405.
[65] See von Segesser, IBA Rules, 737.
[66] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 9.
[67] *Ibid.*, 9.
[68] 'ESI' stands for electronically stored information.
[69] Ragan, Panel Discussion, 268.
[70] ICC Arbitration Commission Report on Managing E-Document Production (2012), http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Repor... (accessed 29 May 2015), n. 3.11.
[71] Kreindler, 2010 Revision, 158.
[72] R.H. Smit, E-Disclosure, 203.
[73] See von Segesser, IBA Rules, 745.
[74] Ashford, Discovery, 105; Born, Int. Comm. Arb., Vol. II, 2371 et seqq.; R.H. Smit, E-Disclosure, 204.
[75] Hill, 93.
[76] Ashford, IBA Rules, n. 3-30.
[77] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 9.
[78] Hill, 96 et seq.
[79] *Ibid.*, 97.
[80] Fletcher, Technology, 106.
[81] See Raeschke-Kessler, IBA-Rules, 50.
[82] http://www.ciarb.org/guidelines-and-ethics/guidelines/practice-guidelines-protocols-and-rules (accessed 29 May 2015).

[83] Gusy, Hosking & Schwarz, ICDR Rules, n. 17.209.
[84] Article 21(6) ICDR Rules.
[85] Gusy & Illmer, 289 (referring to the ICDR Guidelines which have been included in the current ICDR Rules).
[86] Article 21(4) ICDR Rules.
[87] Article 21(6) ICDR Rules.
[88] Gusy & Illmer, 289.
[89] See Range & Wilan, 54 et seq.
[90] Ragan, Panel Discussion, 284.
[91] See Ashford, Discovery, 98.
[92] O'Malley, Evidence, n. 3.68; see von Segesser, IBA Rules, 743 et seq.; Zuberbühler et al., Art. 3 n. 135.
[93] See generally Alvarez, Autonomy, n. 6-1 et seqq.
[94] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 9 et seq.
[95] Kaufmann-Kohler & Bärtsch, 18; see Raeschke-Kessler, Production of Documents, 657 (using the same elements to define 'relevant to the outcome of the case').
[96] Swiss Civil Procedure Code of 19 Dec. 2008 (Status as of 1 Jul. 2014), SR 272.
[97] Zuberbühler et al., Art. 3 n. 136.
[98] 28 U.S.C. Appendix (As amended to 1 Dec. 2014).
[99] FRCP Rule 26(b)(1).
[100] O'Malley, Evidence, n. 3.69.
[101] FRCP Rule 34(a)(1); Barkett, IBA Rules, 65.
[102] Barkett, IBA Rules, 82 et seq.
[103] Cf. Malinvaud, 387.
[104] Ashford, IBA Rules, n. 3-41.
[105] See Schwarz & Konrad, n. 20-245.
[106] See O'Malley, Evidence, n. 3.82 et seq.; see Waincymer, Evidence, 877.
[107] Waincymer, Evidence, 858.
[108] *Ibid.*, 833–858.
[109] *Ibid.*, 833–858.
[110] Webster & Bühler, n. 25-68.
[111] Ashford, Discovery, Appendix A, no. 10.
[112] Working Party of Committee D (Arbitration and ADR) of the Section on Business Law of the International Bar Association.
[113] Raeschke-Kessler, Production of Documents, 657.
[114] *Ibid.*, 657.
[115] Kaufmann-Kohler & Bärtsch, 18.
[116] Waincymer, Evidence, 859.
[117] Hanotiau, Best Practices, 116.
[118] Brower & Sharpe, 611 et seq.; Raeschke-Kessler, Production of Documents, 648.
[119] Ashford, IBA Rules, n. 3-33.
[120] O'Malley, Evidence, n. 3.75; Raeschke-Kessler, Production of Documents, 657.
[121] Ashford, IBA Rules, n. 3-38.
[122] Webster, n. 27-94.
[123] *Ibid.*, n. 27-94.
[124] Born, Int. Comm. Arb., Vol. II, 2362; Zuberbühler et al., Art. 3 n. 137.
[125] Tercier & Bersheda, 99.
[126] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 8.
[127] Born, Int. Comm. Arb., Vol. II, 2363; Brower & Sharpe, 612; Hamilton, 69; Hanotiau, Best Practices, 117; Schumacher, Urkundenbeweis, n. 222; Waincymer, Evidence, 858.

[128] See Born, Int. Comm. Arb., Vol. II, 2363; Hamilton, 69; Hanotiau, Best Practices, 117; see O'Malley, Evidence, n. 3.75.
[129] Habegger, 31.
[130] Zuberbühler et al., Art. 3 n. 143.
[131] Derains, Efficiency, 88.
[132] *Ibid.*, 88 et seq.
[133] Hanotiau, Best Practices, 117.
[134] See von Segesser, IBA Rules, 738.
[135] Ashford, IBA Rules, n. 3-37; O'Malley, Evidence, n. 3.72.
[136] Hamilton, 69.
[137] Derains, Efficiency, 87; Hanotiau, Best Practices, 116; Zuberbühler et al., Art. 3 n. 138.
[138] Waincymer, Evidence, 860.
[139] *Ibid.*, 860.
[140] *Ibid.*, 860.
[141] See Born, Int. Comm. Arb., Vol. II, 2364.
[142] Spühler et al., 231.
[143] E.F. Schmid, Art. 160 n. 31.
[144] Stadler, § 142 n. 7.
[145] Hanotiau, Arbitration, 99; C. Müller, 146.
[146] Hafter, 350.
[147] Schneider, 'Forget E-Discovery', 24.
[148] See Hwang, 434.
[149] See Finizio, 67; see Robinson, 104.
[150] Sachs, 'Fishing expeditions', 197.
[151] Finizio, 67; see Gordon, n. 31 et seq.; see Tercier & Bersheda, 82.
[152] Fletcher, Technology, 105.
[153] *Ibid.*, 105.
[154] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 12.
[155] *Ibid.*, 12.
[156] Ashford, IBA Rules, n. 3-80.
[157] *Ibid.*, n. 3-78.
[158] Fletcher, Technology, 105; ICC Arbitration Commission Report on Managing E-Document Production (2012), http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Repor... (accessed 29 May 2015), n. 4.10.
[159] A. Meier, 186.
[160] ICC Arbitration Commission Report on Managing E-Document Production (2012), http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Repor... (accessed 29 May 2015), n. 4.10; Malinvaud, 384.
[161] Waincymer, Evidence, 852.
[162] Arnott, 203; K.P. Berger, Arbitrator's Dilemma, 229; Bernini, Civil Law Approach, 585; Böckstiegel, Beweiserhebung, 6; Bühler & Jarvin, 15.811; Caron & Caplan, 567; Craig et al., 450; Derains & Schwartz, 282; Frignani, 208; Habegger, 28; Hanotiau, Massive Productions, 358; Hobér, Arbitration, n. 6.116; Horvath, Judicialization, 261; 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 8 et seq.; Karrer & Straub, n. 12.107; Kozlowska, 53; Lazareff, Foreword, 5; C. Müller, 152; Raeschke-Kessler, IBA-Rules, 51; Tirado et al., § 23-13; Tweeddale & Tweeddale, n. 9.31.
[163] Pinkston, 90.
[164] Kozlowska, 53.
[165] Schumacher, Urkundenbeweis, n. 221.
[166] Schwab & Walter, 123.

[167] Hafter, 360.
[168] Craig, 15.
[169] Derains, Preuve, 791.
[170] Pinkston, 90, fn. 11.
[171] Habegger, 28.
[172] Fischer-Zernin & Junker, 17.
[173] Waincymer, Evidence, 862 et seq.
[174] Born, Law, 186.
[175] Matthews & Malek, n. 5.43 et seq. ('Thus under the revised RSC possession mean[t] "right to the possession of a document"')
[176] § 854(1) BGB (Ger.) ('Possession of a thing is acquired by obtaining actual control of the thing.').
[177] Article 919(1) CPC (Switz.) ('Effective control over a thing constitutes possession of it.').
[178] Matthews & Malek, n. 5.39.
[179] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 7.
[180] Ashford, IBA Rules, 57 ('These words equate (in part) to the discovery obligations in England pre-1999. Under that jurisprudence …'); Born, Int. Comm. Arb., Vol. II, 2365 ('There is substantial authority in some common law jurisdictions as to the meaning of the term "control" in the context of disclosure matters, which is broadly relevant in international arbitral proceedings.').
[181] Blessing, Arbitration, n. 378.
[182] Zuberbühler et al., Art. 3 n. 150; see Raeschke-Kessler, Production of Documents, 649.
[183] Ashford, IBA Rules, 57; see Born, Int. Comm. Arb., Vol. II, 2365.
[184] Ashford, IBA Rules, 57.
[185] Born, Int. Comm. Arb., Vol. II, 2365.
[186] Mousourakis, 158.
[187] *Ibid.*, 159.
[188] Schmid & Hürlimann-Kaup, n. 114.
[189] Bömer, 1.
[190] In German 'mittelbarer Besitz'.
[191] M. Binder, Sachenrecht, 49; Iro, 22.
[192] In German: 'Rechtsbesitz.'
[193] Dross, n. 235 et 247.
[194] Wright et al., 149.
[195] http://www.justice.gov.uk/courts/procedure-rules/civil/rules (accessed 29 May 2015).
[196] Kaufmann-Kohler & Bärtsch, 19.
[197] Hamilton, 74; O'Malley, Evidence, n. 3.49 et seq.; cf. Mangan et al., n. 10.27 (regarding SIAC Rule 24(g); Waincymer, Evidence, 864.
[198] Hamilton, 74.
[199] *Ibid.*, 74.
[200] Waincymer, Evidence, 864.
[201] *Ibid.*, 864.
[202] Hamilton, 74; O'Malley, Evidence, n. 3.49 et seq.; Waincymer, Evidence, 864.
[203] O'Malley, Evidence, n. 3.50.
[204] Tercier & Bersheda, 92.
[205] Born, Int. Comm. Arb., Vol. II, 2366; O'Malley, Evidence, n. 3.49.
[206] Berger & Kellerhals, n. 573 et seqq.
[207] See Ashford, IBA Rules, n. 3-42 et seq.; Cohen Kläsener & Dolgorukow, 305.
[208] Webster & Bühler, n. 25-62; Wirth, 12.

[209] Wirth, 12.
[210] Webster & Bühler, 393, fn. 45.
[211] Robinson, 109.
[212] Cf. *ibid.*, 109.
[213] Born, Int. Comm. Arb., Vol. II, 2364; O'Malley, Evidence, n. 3.44.
[214] Wirth, 12.
[215] Cf. K.P. Berger, Best Practices, 501 et seq. (emphasizing differences between civil and common law countries with regard to privileges).
[216] Von Schlabrendorff & Sheppard, 764; cf. F. Meier, 160 ('[…] increasing recognition that evidentiary privileges are not merely a procedural issue but have, in fact, (also) a substantive character.'); Metzler, 262.
[217] See Waincymer, Evidence, 803.
[218] Born, Int. Comm. Arb., Vol. II, 2379.
[219] Reiser, 661.
[220] See O'Malley, Evidence, n. 9.20.
[221] Born, Int. Comm. Arb., Vol. II, 2379.
[222] Von Schlabrendorff & Sheppard, 765.
[223] See Alvarez, Privileges, 664 and 676; see K.P. Berger, Best Practices, 507; see Burckhardt, 289; Kuitkowski, 82 et seq.; Sindler & Wüstemann, 615 et seq.
[224] Webster, n. 27-14.
[225] FRE Rule 501; see FRCP Rule 26(b)(1); Mueller & Kirkpatrick, Evidence, 293; Teply & Whitten, 874.
[226] Article 160(1)(b), 163 and 166 CPC (Switz.).
[227] § 142(2) ZPO (Ger.) in combination with §§ 383-385 ZPO (Ger.); Magnus, 4 et seq.
[228] Hazard et al., 340.
[229] Cf. Heaps & Falkof, 97 (qualifying privileges as substantive rights); cf. Matthews & Malek, n. 11.09 (qualifying the legal advice privilege as both a procedural and a substantive right).
[230] *Waugh v. British Railways Board*, [1979] 2 All ER 1169, 1776 (1979) (UKHL) (Eng.); *General Mediterranean Holidings S.A. v. Patel*, [2000] 1 WLR 272, 280 (1999) (EWHC (QB)) (Eng.); Dennis, 437; see Zuckerman, n. 16.15 et seq.
[231] Matthews & Malek, n. 11.122.
[232] *R v. Derby Magistrates' Court Ex p. B.*, http://www.bailii.org/uk/cases/UKHL/1995/18.html, para. 58 (1995) (UKHL) (Eng.).
[233] *Three Rivers District Council v. Bank of England*, [2004] UKHL 48, http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm (accessed 29 May 2015), para. 21 (2005) (UKHL) (Eng.).
[234] *Ibid.*, para. 21.
[235] Hollander, n. 23-02.
[236] See *ibid.*, n. 23-02.
[237] See Fritsche, 306.
[238] *General Mediterranean Holidings S.A. v. Patel*, [2000] 1 WLR 272, 273 (1999) (EWHC (QB)) (Eng.); Dennis, 437; Hollander, n. 23-07; Zuckerman, n. 16.2.
[239] See Epstein, Vol. I, 19; Kuitkowski, 68; Mann, 22; Mueller & Kirkpatrick, Rules, 755; Zuckerman, n. 16.3; cf. *General Mediterranean Holidings S.A. v. Patel*, [2000] 1 WLR 272, 280 et seqq. (1999) (EWHC (QB)) (Eng.) (describing legal professional privilege as a rule of evidence and the right to legal confidentiality as a substantive right).
[240] *General Mediterranean Holidings S.A. v. Patel*, [2000] 1 WLR 272, 288 (1999) (EWHC (QB)) (Eng.); see Zuckerman, n. 16.3.

[241] See Epstein, Vol. I, 16.
[242] See Sprenger, 179.
[243] Mann, 37 et seq.
[244] Article 321 CC (Switz.); Sprenger, 179 et seq.
[245] § 203(1) no. 3 Criminal Code ('CC') (Ger.) and §43a(2) Federal Lawyers' Act ('BRAO') (Ger.); Mann, 32 et seqq.; Rützel & Christ, 147.
[246] Metzler, 232.
[247] *Ibid.*, 232.
[248] See Gross et al., 241 (regarding Switzerland); see Nater & Rauber, 16.
[249] K.P. Berger, Best Practices, 507 et seq.; see Kuitkowski, 85; Meyer, 368; see Hunter & Travaini, 617; see Sindler & Wüstemann, 624.; see Tirado et al., §§ 23–31.
[250] See Metzler, 262; Cf. Waincymer, Evidence, 803 ('If privilege is procedural, the lex arbitri will typically leave it as part of the broad discretion of the tribunal with no further guidance').
[251] See Waincymer, Evidence, 803.
[252] Alvarez, Privileges, 676; K.P. Berger, Best Practices, 509.
[253] Carter, 177; see Kuitkowski, 68; see Metzler, 232; see Molitoris & Abt, 188; Mosk & Ginsburg, 346; Tevendale & Cartwright-Finch, 824.
[254] Mosk & Ginsburg, 346, fn. 2 (referring to an article on 'Foreign Privileges in U.S. Litigation').
[255] F. Meier, 145; See von Schlabrendorff & Sheppard, 744.
[256] See K.P. Berger, IBA Rules, 171; contra Zuberbühler et al., Art. 9 n. 28 (stating that the IBA Rules are silent on this issue; however, this comment seems to be based on authorities referring to the 1999 IBA Rules).
[257] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 25.
[258] See K.P. Berger, IBA Rules, 175.
[259] See F. Meier, 163 et seqq.; cf. Ashford, IBA Rules, n. 9-50 and 52 (enumerating seven arguably relevant laws in total); cf. Sindler & Wüstemann, 619, and Zuberbühler et al., Art. 9 n. 28 (both enumerating nine factors to establish the applicable law in total); see von Schlabrendorff & Sheppard, 769 et seqq.; see Tevendale & Cartwright-Finch, 831; see Webster, n. 27-12.
[260] See K.P. Berger, IBA Rules, 175.
[261] Contra F. Meier, 152 et seq. (concluding that the IBA Rules do not give any guidance on the applicable law to privileges; however, this statement does not appear to be in line with the Commentary to the IBA Rules which contains clear references to specific laws, i.e. those of the home jurisdiction of the parties and of their advisors).
[262] Ashford, IBA Rules, n. 9-45.
[263] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 25.
[264] Carter, 179; cf. Metzler, 270 (concluding that '[t]he IBA Rules are thus only one step away from adopting a most favourable privilege standard'.); see O'Malley, Evidence, n. 9.62.
[265] See Born, Int. Comm. Arb., Vol. II, 2378; McIlwrath & Savage, n. 5-189.
[266] Von Schlabrendorff & Sheppard, 768; see Zuberbühler et al., Art. 9 n. 29.
[267] Ashford, IBA Rules, n. 9-53.
[268] Born, Int. Comm. Arb., Vol. II, 2384.
[269] E.g. Art. 117(1) PILA (Switz.).
[270] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 25.
[271] Born, Int. Comm. Arb., Vol. II, 2385, Heitzmann, 219, Kuitkowski, 92 et seq. and von Schlabrendorff & Sheppard, 771

(preferring all the law where the attorney practices); K.P. Berger, Best Practices, 512, and Zuberbühler et al., Art. 9 n. 28 (preferring both the party's expectations).

272 Born, Int. Comm. Arb., Vol. II, 2385.

273 Dennis, 404 (regarding English law); Mann, 7 (regarding German law); Mueller & Kirkpatrick, Evidence, 299 (regarding US law); Raschle, 113 (regarding Swiss law).

274 See Ashford, IBA Rules, n. 9-53; K.P. Berger, Best Practices, 512; see Metzler, 264.

275 Born, Int. Comm. Arb., Vol. II, 2385.

276 Ashford, IBA Rules, n. 9-38; K.P. Berger, Settlement Privilege, 266, 272 et seqq.; F. Meier, 170; O'Malley, Evidence, n. 9.32; Zuberbühler et al., Art. 9 n. 32; but see Born, Int. Comm. Arb., Vol. II, 2381 (leaving it open whether national law rules or international principles apply).

277 http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/ (accessed 29 May 2015).

278 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 25.

279 However, Born, Int. Comm. Arb., Vol. II, 2378 et seq. (concluding that the IBA Rules require the recognition of the settlement privilege).

280 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 25.

281 *Ibid.*, 25.

282 Haller, Without Prejudice, 314.

283 Ashford, IBA Rules, n. 9-57.

284 Ashford, IBA Rules, n. 9-57; K.P. Berger, Best Practices, 519 et seq.; Gusy, Hosking & Schwarz, Guide ICDR Rules, n. 19.11; Heitzmann, 223; Hunter & Travaini, 623 et seq.; Kuitkowski, 97; F. Meier, 173 et seqq.; Metzler, 267; O'Malley, Evidence, n. 9.62; Schumacher, Urkundenbeweis, n. 241 et seq.; von Schlabrendorff & Sheppard, 771 et seqq.; Zuberbühler et al., Art. 9 n. 30; cf. Tevendale & Cartwright-Finch, 838 (suggesting during the revision of the 1999 IBA Rules that the 'closest connection' approach and the 'most favoured nation' approach should have been included as alternatives in the IBA Rules.); but Meyer, 373 (analyzing US case law and concluding 'For these reasons, there is unlikely to be an international consensus for a most-favoured nation approach').

285 Born, Int. Comm. Arb., Vol. II, 2386.

286 Tevendale & Cartwright-Finch, 823.

287 Shaughnessy, 466.

288 Webster, n. 27-16.

289 Shaughnessy, 467.

290 Abrahams et al., Federal Law, 270; see Abrahams et al., New York, 294; Bushell & Evans, 71 (regarding English law).

291 Zuckerman, n. 16.73.

292 Epstein, Vol. I, 65.

293 Hazard et al., 345; Zuckerman, n. 16.81.

294 See Epstein, Vol. II, 875; Zuckerman, n. 16.81.

295 Greenwald & Schaner, 330.

296 *Waugh v. British Railways Board*, [1979] 2 All ER 1169 (1979) (UKHL) (Eng.).

297 *Ibid.*, 1169.

298 *Ibid.*, 1169.

299 Matthews & Malek, n. 11.14 and 11.26; Zuckerman, n. 16.73.

300 Epstein, Vol. I, 134 and Vol. II, 791; Greenwald & Schaner, 327 et seq.

301 Epstein, Vol. II, 791; Zuckerman, n. 16.78.

302 Matthews & Malek, n. 11.28 (regarding English law); see Epstein, Vol. I, 233 (regarding US law).

[303] Abrahams et al., Federal Law, 270 (regarding US law); Bushell & Evans, 71 (regarding English law); Heaps & Falkof, 102 (regarding English law); Matthews & Malek, n. 11.19 (regarding English law).
[304] Greenwald & Schaner, 327 (regarding US law); Heaps & Falkof, 101 (regarding English law).
[305] Matthews & Malek, n. 11.10.
[306] *Ibid.*, n. 11.74.
[307] Mueller & Kirkpatrick, Evidence, 340.
[308] Matthews & Malek, n. 11.60.
[309] *Ibid.*, n. 11.15.
[310] Mueller & Kirkpatrick, Evidence, 344.
[311] Epstein, Vol. I, 141 et seqq.; Zuckerman, n. 16.78.
[312] *Three Rivers District Council v. Bank of England*, [2003] EWCA Civ 474, http://www.bailii.org/ew/cases/EWCA/Civ/2003/474.html (accessed 29 May 2015), para. 3 (2003) (EWCA) (Eng.).
[313] *Three Rivers District Council v. Bank of England*, [2004] UKHL 48, http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm (accessed 29 May 2015), para. 21 (2005) (UKHL) (Eng.).
[314] Matthews & Malek, n. 11.16 et seq.; Zuckerman, n. 16.68.
[315] Matthews & Malek, n. 11.16 et seq.; Sharman, n. pag.
[316] Epstein, Vol. I, 142 and 149 (with further references).
[317] *Upjohn Co. v. United States*, https://supreme.justia.com/cases/federal/us/449/383/case.html (accessed 29 May 2015), para. 1(b) (1981) (U.S.) (US).
[318] Epstein, Vol. I, 142 and 149; Greenwald & Schaner, 329.
[319] Epstein, Vol. I, 143 and 150 (with further references).
[320] Greenwald & Schaner, 329 et seq.
[321] Epstein, Vol. I, 142 et seqq.; cf. Greenwald & Schaner, 329 et seq.
[322] Epstein, Vol. I, 149; Smerek, 268.
[323] See Burckhardt, 288.
[324] See Rützel & Leufgen, 102.
[325] Article 160(1)(b) CPC (Switz.); see Hasenböhler, Art. 160 n. 12.
[326] § 142(2) ZPO (Ger.) in combination with § 381(1)no. 6 ZPO (Ger.);Article 163(1)(b) and 166(1)(b) CPC (Switz.).
[327] See Burckhardt, 282 (regarding Swiss law).
[328] *Ibid.*, 281 (regarding Swiss law).
[329] Hofmann & Lüscher, 134.
[330] Hasenböhler, Art. 160 n. 12.
[331] Livschitz & Schmid, 746 (arguing that the legal professional privilege covers the entire defense material of a lawyer); I. Meier, 304 (stating that Art. 160(1)(b) covers only the lawyers' correspondence and does not cover the attached documents).
[332] Nater & Rauber, 16; Rüetschi, Art. 160 n. 28.
[333] Gäumann & Marghitola, n. 27.
[334] Livschitz & Schmid, 746.
[335] Greger, § 142 n. 14; Magnus, 271; Prütting § 142 n. 11.
[336] Greger, § 142 n. 14; Prütting § 142 n. 11.
[337] Magnus, 271.
[338] *Ibid.*, 26 et seq.
[339] H. Schmid, Art. 163 n. 18; Trezzini, Arts 166, 806 et seq.
[340] DFT 101 Ib 245, cons. 2c; DFT 112 Ib 606, 608.
[341] Von Hase, 83.
[342] Hasenböhler, Art. 166 n. 32.
[343] DFT 1B_101/2008, 28 Oct. 2008, cons. 4.3 (Switz.).
[344] Burckhardt, 285; Gross et al., 241; Higi, Art. 166 n. 16; Niedermann et al., 238; Pfeifer, 166 et seqq.; Rodriguez, 318; Rüetschi, Art. 160 n. 29; E.F. Schmid, Art. 160 n. 20; H. Schmid,

Art. 163 n. 10; Schwarz, 340; Trezzini, Art. 166, 806 et seq.
345 Huber, 508; Niggli, 280; Sprenger, 302 et seqq.
346 Huber, 499 et seq.
347 Article 166(1)(b) CPC (Switz.).
348 Article 321 CC (Switz.).
349 See Oberholzer, Art. 321 n. 6; see Raschle, 123 et seq.; see Trechsel & Vest, Art. 321 n. 5.
350 See Article 1 CC (Switz.); see de Capitani, 68.
351 See Raschle, 143 et seqq. (describing the legislative history in detail).
352 De Capitani, 69 et seq. (former General Counsel of Credit Suisse); Henrich, 55 et seqq. (former in-house counsel of Novartis); see Niggli, 280 (author of an expert report for the industry holding of Bern [today Swiss-Holdings]).
353 Rützel & Leufgen, 101.
354 Rützel & Christ, 149.
355 Rützel & Leufgen, 101.
356 Magnus, 36; Rützel & Leufgen, 101.
357 Magnus, 36; Rützel & Leufgen, 101 et seq.
358 See Rützel & Christ, 149.
359 § 383(1) no. 4 ZPO (Ger.).
360 § 142(2) ZPO (Ger.).
361 Last modification: 1 Apr. 2015.
362 See Matthews & Malek, n. 11.122 et seqq.; Zuckerman, n. 17.2.
363 28 U.S.C. (As amended to 1 Dec. 2014).
364 Article 205(1) CPC (Switz.).
365 Articles 163–167 CPC (Switz.) *e contrario*.
366 §§ 383–385 ZPO (Ger.) *e contrario*.
367 See Mosk & Ginsburg, 353 et seqq.
368 *Ibid.*, 357.
369 Greenwald & Schaner, 333.
370 Matthews & Malek, n. 12.02.
371 Greenwald & Schaner, 333 (regarding US law); Matthews & Malek, n. 12.02 (regarding English law).
372 Greenwald & Schaner, 334.
373 Heaps & Falkof, 108; Matthews & Malek, n. 12.17.
374 Heaps & Falkof, 108; Matthews & Malek, n. 12.17 et seq.
375 Greenwald & Schaner, 333.
376 Matthews & Malek, n. 12.06.
377 Greenwald & Schaner, 333 (regarding US law); Matthews & Malek, n. 12.06 (regarding English law).
378 Kneisel & Lecking, 155.
379 Ashford, IBA Rules, n. 9-45; K.P. Berger, Best Practices, 504.
380 De Capitani, 64.
381 Mann, 7 and 23.
382 § 385(2) ZPO (Ger.).
383 Article 166(1)(b) CPC (Switz.); see E.F. Schmid, Art. 166 n. 7 et seq.
384 Cf. Born, Int. Comm. Arb., Vol. II, 2377 (characterizing the content of privileges in common law jurisdictions to be ‘often obscure’).
385 Cf. Metzler, 271 (‘On the other hand, even the most favourable privilege approach may lead to a rather low standard of legal privilege depending on the laws applicable to both parties.’).
386 Cf. von Schlabrendorff & Sheppard, 772 (‘Applying civil law doctrines to document production of common law kind is to do so wholly out of context’).
387 See Metzler, 276.

[388] Magnus, 3.
[389] Born, Int. Comm. Arb., Vol. II, 2377; Meyer, 370; von Schlabrendorff & Sheppard, 772; cf. Waincymer, Evidence, 804 ('The policy choices made at the domestic level are also highly influenced by the view the country takes to issues of discovery. Generally speaking, the more extensive the document production obligation, the more clearly defined are the exceptions such as privilege.').
[390] Von Schlabrendorff & Sheppard, 773.
[391] Ashford, IBA Rules, n. 9-59.
[392] Shaughnessy, 464.
[393] Sawang, 10.
[394] BGH, 25 Jan. 1955, I ZR 15/53, https://www.jurion.de/Urteile/BGH/1955-01-25/I-ZR-15_53 (accessed 29 May 2015) (Ger.).
[395] See Pörnbacher & Knief, 208 et seq. (providing a practical example).
[396] See Gaillard & Savage, n. 1265.
[397] Shaughnessy, 464.
[398] Alvarez, Privileges, 675; K.P. Berger, Best Practices, 504; see Kuitkowski, 69.
[399] See O'Malley, Evidence, n. 9.91.
[400] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 26.
[401] *Ibid.*, 26.
[402] Götz, 11 et seqq.
[403] Stäuber, 11.
[404] Http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf (accessed 29 May 2015).
[405] See Quinto & Singer, 3 et seqq.; cf. § 39 Restatement (Third) of Unfair Competition (1995) (US) (providing a more simple definition).
[406] Http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act (accessed 29 May 2015); See Denicola, 21.
[407] See Quinto & Singer, 3.
[408] See Götz, 16; see Quinto & Singer, 15; see Stäuber, 11 et seqq.
[409] See Götz, 16; Quinto & Singer, 13; Stäuber, 16.
[410] Stäuber, 15.
[411] Quinto & Singer, 16.
[412] See Stäuber, 15.
[413] See Götz, 16.
[414] Toulson & Phipps, 81.
[415] *Ibid.*, 79.
[416] See H.-J. Ahrens, § 383 n. 71; see O'Malley, Evidence, n. 9.84; see Sawang, 9.
[417] See H.-J. Ahrens, § 383 n. 71; see O'Malley, Evidence, n. 9.86 et seq; see Sawang, 9.
[418] Cf. Stäuber, 11.
[419] See Fromer, 3 et seqq.
[420] Cf. O'Malley, Evidence, n. 9.87 (characterizing confidentiality agreement as 'often inherently self-serving and commercial in nature').
[421] See *ibid.*, n. 9.86.
[422] *Ibid.*, n. 9.89.
[423] *Ibid.*, n. 9.89.
[424] Pörnbacher & Knief, 223.
[425] *Ibid.*, 223.
[426] See *ibid.*, 223.

[427] Van Houtte, 1148 et seq.
[428] Haller, Business Secrets, 140.
[429] Ashford, IBA Rules, n. 3-62.
[430] Haller, Business Secrets, 139 et seq.
[431] Van Houtte, 1153.
[432] See Ashford, IBA Rules, n. 3-61.
[433] Van Houtte, 1152 et seq; see Zuberbühler et al., Art. 3 n. 202.
[434] E.g. section 34(1) Arbitration Act 1996.
[435] E.g. Article 26(1) SCC Rules.
[436] Berger & Kellerhals, n. 1310.
[437] Pörnbacher & Knief, 225.
[438] *Ibid.*, 225.
[439] *Ibid.*, 226.
[440] *Ibid.*, 226.
[441] See Haller, Business Secrets, 139.
[442] *Ibid.*, 139.
[443] Pörnbacher & Knief, 226.
[444] *Ibid.*, 226.
[445] *Ibid.*, 224.
[446] *Ibid.*, 224.
[447] *Ibid.*, 224.
[448] See *Ibid.*, 225.
[449] O'Malley, Evidence, n. 9.92.
[450] *Ibid.*, n. 9.92.
[451] *Ibid.*, n. 9.98.
[452] *Ibid.*, n. 9.98.
[453] International Centre for Settlement of Investment Disputes.
[454] *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 dated 24 May 2006, http://www.italaw.com/cases/157 (accessed 29 May 2015).
[455] *Ibid.*, 4.
[456] *Ibid.*, 8.
[457] *Ibid.*, 9.
[458] Range & Wilan, 47; Smit & Robinson, 106 et seq.
[459] Malinvaud, 377; Smit & Robinson, 107.
[460] Ashford, IBA Rules, n. 3-16; Malinvaud, 383; Range & Wilan, 47; Smit & Robinson, 107.
[461] Fletcher, Technology, 102; Tse & Peter, 30.
[462] Smit & Robinson, 107.
[463] See Barkett, IBA Rules, 56; See Finizio, 77; Fletcher, Technology, 102; see Malinvaud, 377; Smit & Robinson, 107.
[464] See Fletcher, Technology, 102.
[465] ICC Arbitration Commission Report on Managing E-Document Production (2012), http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Repor... (accessed 29 May 2015), n. 5.6.
[466] Howell, Introduction, 5 et seq.; Malinvaud, 378; Smit & Robinson, 109.
[467] Barnett, 125; Berghoff, 36.
[468] Ashford, IBA Rules, n. 3-19 et seqq.; Bouchenaki, 181 et seq.; Hill, 91 et seqq.; Howell, Introduction, 6 et seq.; Robertson & Corcoran, 26 et seq.; Tse & Peter, 30.
[469] Berghoff, 36; Schneider, 'Forget E-Discovery', 26 et seqq.
[470] Dutson et al., 165; Finizio & Speller, 238; Fletcher, Technology, 102; A. Meier, 180; Range & Wilan, 47; Robertson & Corcoran, 18; Schumacher, Urkundenbeweis, n. 276.
[471] Waincymer, Evidence, 866.
[472] Hamilton, 73.

[473] *Ibid.*, 73.
[474] Zuberbühler et al., Art. 9 n. 38, emphasis original; see also Raeschke-Kessler, Production of Documents, 658.
[475] Waincymer, Evidence, 866.
[476] Brower & Sharpe, 609; Hamilton, 73; Hanotiau, Best Practices, 117; O'Malley, Evidence, n. 9.67.
[477] Waincymer, Evidence, 866 et seq.
[478] *Ibid.*, 867.
[479] E.g. ICC Rules, Appendix III, Art. 4.
[480] See Kaufmann-Kohler & Bärtsch, 20.
[481] Cf. Hamilton, 64 et seq.
[482] O'Malley, Evidence, n. 9.70.
[483] See O'Malley, Evidence, n. 9.75; Waincymer, Evidence, 868.
[484] Waincymer, Evidence, 868.
[485] Hill, 99.
[486] *Ibid.*, 99.
[487] *Ibid.*, 99.
[488] *Ibid.*, 99.
[489] Ashford, IBA Rules, n. 3-45 et seqq.; Hill, 99; Howell, Electronic Disclosure, 410; ICC Arbitration Commission Report on Managing E-Document Production (2012), http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Repor... (accessed 29 May 2015), n. 5.10; Malintoppi, 420.
[490] Bédard & Frank, 57.
[491] Gusy & Illmer, 289.
[492] *Ibid.*, 289.
[493] See ICDR Guidelines, Introduction; see Reed & Hancock, 348.
[494] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 26.
[495] Fletcher, Technology, 105.
[496] Fletcher, Technology, 105; Hanotiau, Massive Productions, 360.
[497] Hanotiau, Massive Productions, 360.
[498] *Ibid.*, 360.
[499] Fletcher, Technology, 105; Hanotiau, Massive Productions, 360.
[500] See Hafter, 349 ('The requesting party may assume that they must exist, without, however, having any actual knowledge.').
[501] Habegger, 30 et seq.
[502] *Ibid.*, 30.
[503] *Ibid.*, 30 et seq.
[504] *Ibid.*, 30.
[505] *Ibid.*, 31.
[506] Raeschke-Kessler, IBA-Rules, 55.
[507] Habegger, 30.
[508] Kaufmann-Kohler & Bärtsch, 19.
[509] Ashford, IBA Rules, n. 3-40.
[510] Robinson, 110.
[511] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 26.
[512] Blackaby et al., n. 6.130.
[513] *Ibid.*, n. 6.130.
[514] *Ibid.*, n. 6.130.
[515] O'Malley, Evidence, n. 9.81.
[516] Cohen Kläsener, 161.
[517] See Bouchenaki, 182; see Finizio, 68; see Franklin, 100 et seq.
[518] http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

(accessed 29 May 2015).
[519] See Born, Int. Comm. Arb., Vol. II, 2368 et seq.
[520] IBA Guideline 1.
[521] Dasser, IBA Guidelines, 68 ('And indeed, the Task Force has managed to turn an uncontroversial minimum standards concept into a legal bomb shell.'); Geisinger, Schneider & Dasser (on behalf of the board of Swiss Arbitration Association), n. 4.2 ('The Guidelines inappropriately expand the duties of the parties […]'); Honlet, 707 ('[…] it is likely to be one of those Guidelines that proves to be more controversial and difficult to implement in practice.'); Park, Guidelines, 411 ('The qualms expressed by the ASA have been echoed and amplified by critics from other quarters.'); Schneider, IBA Guidelines, 497 ('Yet another opportunity to waste time and money on procedural skirmshes'); cf. Veeder, LCIA, 65 ('Les arguments défavorables aux directives générales et, encore davantage, aux codes d'éthique détaillés à destination des praticiens de l'arbitrage international sont bien connus, et jusqu'ici, plutôt convaincants.')
[522] Webster, n. 27-39 ('IBA Guidelines 12-17 […] basically set out best practices […]').
[523] *Ibid.*, n. 27-36 ('As this point, it is too early to whether parties will adopt the IBA Guidelines on Party Representation as such in international arbitrations.')
[524] Geisinger, Schneider & Dasser, n. 4.2; Schneider, IBA Guidelines, 498.
[525] See Meier & Gerhardt, 13.
[526] See Schneider, IBA Guidelines, 498.
[527] Meier & Gerhardt, 13.
[528] See Dasser, IBA Guidelines, 66 ('When the IBA Guidelines were published, it did not go unnoticed that 7 out of the 23 members hailed from North America and they were obviously not the back benchers.')
[529] Dasser, IBA Guidelines, 79.
[530] IBA Guidelines, 21.
[531] *Ibid.*, 21.
[532] Dasser, IBA Guidelines, 78.
[533] 2nd ed., Jun. 2007, http://www.sos.mt.gov/Records/committees/erim_resources/A%20-%20Sedona%20Principles%20Second%20Editi... (accessed 29 May 2015).
[534] Waincymer, Counsel, 540.
[535] Dasser, IBA Guidelines, 78.
[536] O'Malley, Evidence, n. 9.80; Waincymer, Evidence, 853.
[537] Waincymer, Evidence, 853.
[538] O'Malley, Evidence, n. 9.78.
[539] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 26.
[540] Schumacher, Urkundenbeweis, n. 251.
[541] See Zuberbühler et al., Art. 9 n. 49.
[542] Raeschke-Kessler, IBA-Rules, 61 (referring to the 1999 IBA Rules).
[543] Newmark, 168.
[544] Waincymer, Evidence, 870.
[545] Newmark, 168.
[546] Stern 2; cf. Pflughaupt, 130 et seq. (referring to German law).
[547] Kaufmann-Kohler & Bärtsch, 20.
[548] Veeder, IBA Rules, 322.
[549] Cohen Kläsener, 161.
[550] Cf. Tse & Peter, 29 et seq.
[551] Ashford, IBA Rules, n. P-19.

[552] *Ibid.*, n. P-19.
[553] *Ibid.*, n. P-19.
[554] E.g. Born, Int. Comm. Arb., Vol. II, 2197 et seq.
[555] Karrer, Para-Regulatory Texts, 298.