[B] Several Meanings of Production

While a part of case law and commentaries use the term *production* to refer only to the production of documents on request (of a party or the arbitral tribunal),[7] other publications use it also to refer to the production of documents on which a party relies to support its case.[8] It goes without saying that a party has an unconditional right to submit documentary evidence.[9] This aspect is hardly ever an issue.[10] For this reason, the term production as used in this book always refers to the narrow definition of document production on request, unless specified otherwise.

[C] Definition of Document Production

International arbitration is such a practical field that legal authorities have not yet discussed the definition of *document production*. This book hereby proposes a simple definition: document production is a procedural device to obtain documents.

Some typical elements of document production are intentionally not included in this definition, because they are dispensable. As discussed below, document production is typically, but not necessarily, a procedural device of a party to obtain documents from the opposing party.

A document production request is usually first made from party to party.[11] Procedural rules often provide that the arbitral tribunal receive a copy of the request.[12] If the requested party refuses to produce the documents, the requesting party can request the arbitral tribunal to order document production.[13] Even though it will take such a step only on rare occasions,[14] the arbitral tribunal also has the power to order document production on its own initiative.[15] Therefore, document production is not, by definition, a procedural device of a party.

In most jurisdictions, it is not possible to obtain documents from third parties in arbitration proceedings.[16] If a third party does not provide documents voluntarily, documents can be obtained by way of mutual legal assistance in a number of

7. E.g. Zuberbühler et al., Art. 3 n. 18 et seq.
8. E.g. Blackaby et al., n. 6.101; Girsberger & Voser, n. 737.
9. Article 271 CC (Switz.) which prohibits unlawful activities on behalf of a foreign state does neither apply to the taking of evidence in arbitration nor to the submission of supportive documents (Husmann, Art. 271 n. 15 et 32).
10. Blackaby et al., n. 6.103; Hobér, Sweden, 185.
11. Article 3(2) IBA Rules; Girsberger & Voser, n. 738; O'Malley, Evidence, n. 3.20; R.H. Smit, Efficiency, 97; Waincymer, Evidence, 842; Zuberbühler et al., Art. 3 n. 88.
12. See Art. 3(2) IBA Rules; R.H. Smit, Efficiency, 97; see Waincymer, Evidence, 842; Zuberbühler et al., Art. 3 n. 87; but see O'Malley, Evidence, n. 3.20.
13. See Art. 3(7) IBA Rules; Girsberger & Voser, n. 738; R.H. Smit, Efficiency, 98.
14. See Madsen, 215 et seq.; see Landolt, 222; R.H. Smit, Efficiency, 98 et seq.
15. See section 34(2)(d) et (g) English Arbitration Act 1996; Art. 3(10) IBA Rules; Art. 22.1 LCIA Rules; Art. 27(3) UNCITRAL Arbitration Rules; Berger & Kellerhals, n. 1325; Landolt, 180 et seqq.; O'Malley, Evidence, n. 3.114; Zuberbühler et al., Art. 3 n. 220 et seqq.
16. Aden, 477; Blackaby et al., n. 6.127; Capper, 102; Derains, Preuve, 790; Kaufmann-Kohler & Bärtsch, 18; R.H. Smit, Efficiency, 98; Zuberbühler et al., Art. 3 n. 209.

jurisdictions if the requirements of the applicable law are fulfilled.[17] Such judicial assistance is often time-consuming in an international context.[18] If possible, arbitral tribunals and parties try to avoid such proceedings.[19]

The legal situation is different in international arbitration proceedings in the US, where document production can also be obtained from third parties under some circumstances.[20] Hence, document production is not necessarily a device to obtain documents from a party.

§2.02 DISTINCTION BETWEEN PROCEDURAL AND SUBSTANTIVE OBLIGATION

A procedural obligation to produce documents must be distinguished from an obligation to produce documents under substantive law.[21] Substantive rights for access to documents may be derived from statutes, case law or contracts.[22]

For example, under Swiss law, an agent has the duty to return, at the request of the principal, everything that he has received as a result of his agency activities.[23] Moreover, cooperation agreements such as joint venture agreements typically provide rules for access to documents.[24]

It may happen in an arbitration case that both substantive and procedural obligations to produce documents are in dispute between the parties.[25] In any case, arbitral tribunals should separately examine substantive and procedural obligations.

On the one hand, requirements of substantive law do not need to be fulfilled in requests of a procedural nature. On the other hand, the IBA Rules do not limit substantive rights to produce documents.[26] An unpublished partial award which is quoted in an article granted, based on substantive rights, document production requests of an independent broker claiming fees from a hedge fund.[27] The arbitral

17. See Art. 3(9) 2010 IBA Rules; Berger & Kellerhals, n. 1326; Born, Int. Comm. Arb., Vol. II, 2396 et seqq.; Derains, Efficiency, 91; Greenberg, Kee & Weeramantry, n. 7.118 et seqq.; Grigera Naón, 19; Hinchey & Baer, 214; Leahy & Bianchi, 28 et seq.; Schwarz & Konrad, n. 20-256; Zuberbühler et al., Art. 3 n. 210 et seqq.
18. Derains, Efficiency, 91; Girsberger & Voser, n. 741a.
19. Girsberger & Voser, n. 741a; see Kaufmann-Kohler & Bärtsch, 18 et seq; Zuberbühler et al., Art. 3 n. 219.
20. Section 7 FAA; Allen, United States, 284; Bennett, 52; Born, Int. Comm. Arb., Vol. II, 2327 et seq.; Capper, 102; Coe, 281 et seq.; Griffin, 23 et seq; Hinchey & Baer, 214 et seqq.; Kimmelman & MacGrath, 55 and seq.; McCaffrey & Main, 479; R.H. Smit, Efficiency, 98.
21. Habegger, 23; O'Malley, Evidence, n. 3.177; Matthias Scherer, 195; Tschanz, 228; Waincymer, Evidence, 834.
22. Matthias Scherer, 195.
23. Article 400 (1) CO (Switz.).
24. See Matthias Scherer, 195; see Waincymer, Evidence, 833.
25. E.g. DFT 4A_596/2012, 15 Apr. 2013, cons. 3.4; see Matthias Scherer, 198; see Waincymer, Evidence, 833 et seq.
26. See O'Malley, Evidence, n. 3.178; Matthias Scherer, 195.
27. Matthias Scherer, 196 et seq.

tribunal ordered the hedge fund to produce account statements and performance results and dismissed the objections of the hedge fund on the following grounds:

> The arguments of the Respondent, which are grounded on procedural considerations and the IBA Rules (which are also of procedural nature), are inapposite. The Claimants have a contractual right to receive the information identified in the Agreement.[28]

The procedural or substantive character of the request to produce documents determines the form of the arbitral tribunal's decision. While an arbitral tribunal issues a procedural order in case of a request based on procedural rules, it renders an award if the request is based on substantive rights.[29] In the typical case, in which a party seeks production of documents to quantify its claim, the arbitral tribunal renders a partial award when granting the request to produce documents based on substantive rights and decides on monetary claims in the final award.[30]

In developed jurisdictions, the distinction between procedural order and partial award is typically crucial to the question of whether the decision can be challenged before a state court.[31] According to the principle of judicial non-interference in international arbitral proceedings, state courts usually cannot review procedural orders to produce documents.[32]

This book focuses only on the procedural device to produce documents. In practice, however, counsel need to take both substantive and procedural rights to produce documents into consideration, in particular when drafting prayers for relief and procedural requests.

§2.03 DISTINCTION BETWEEN DOCUMENT PRODUCTION, DISCOVERY AND DISCLOSURE

[A] Introduction

Debates over terminology cannot resolve the issue of the extent of document production.[33] Nevertheless, some clarification can be achieved by distinguishing document production in international arbitration from similar terms used in the most important common law jurisdictions.[34] Document production is known under the term *discovery of documents* in the US and is called *disclosure* in England and Wales.[35]

28. *Ibid.*, 196.
29. See O'Malley, Evidence, n. 3.181; Matthias Scherer, 197.
30. See Matthias Scherer, 197.
31. E.g. DFT 4A_596/2012, 15 Apr. 2013, cons. 3.3.
32. Born, Int. Comm. Arb., Vol. II, 2189 et seqq.
33. Born, Int. Comm. Arb., Vol. II, 2322.
34. Derains, Efficiency, 85; See Gusy, Hosking & Schwarz, Guide ICDR Rules; n. 19.10; McIlwrath & Savage, n. 5-181; Poudret & Besson, n. 652; Zuberbühler et al., Art. 3 n. 15 et seqq.
35. E.g. Finizio & Speller, 62.

[B] Distinction between Document Production and Discovery in the US

In the US, discovery of documents is one of several discovery devices to obtain information before the trial.[36] In addition, discovery includes in particular depositions,[37] interrogatories[38] and requests for admissions.[39] A deposition is a testimony of a witness taken under oath outside of court by counsel from both parties.[40] Interrogatories are written questions of a party to the other party that must be answered in writing and under oath.[41] A request for admission is a request of a party to the other party to admit (or deny) a statement.[42] Depositions, interrogatories and requests for admissions are widely disapproved and fairly unusual in international arbitration.[43] They are occasionally used in international arbitration proceedings with a predominant influence of practitioners from the US or if the arbitration agreement provides such devices.[44]

The term *discovery* is sometimes also used in international arbitration.[45] However, in view of the different scope of discovery in the US and of document production in international arbitration, the two terms should be clearly distinguished.

[C] Distinction between Document Production and Disclosure in England

In connection with new guidelines for the production of electronic documents, well known authors from common law jurisdictions proposed in 2008 to use the term *disclosure* in international arbitration to make a terminological distinction from *discovery*.[46] This terminology has been partly followed by the international arbitration community.[47]

The term *disclosure* is used in England and Wales.[48] In English court procedures, a party must disclose a list of all documents on which it relies, which adversely affect

36. Craig, 14 et seqq.
37. FRCP Rule 30 (US).
38. FRCP Rule 33 (US).
39. FRCP Rule 36 (US).
40. E.g. Armas & Smith, 57 et seq.; Craig, 16 et seq.
41. E.g. Davies & Pieper, 238 et seqq.; Finizio, 62; Lowenfeld, Litigation, 666.
42. E.g. Reed & Hancock, 345; Wetter, 15.
43. Article 21(10) ICDR Rules; Armas & Smith, 56; Böckstiegel, Evidence, 142; Born, Agreements, 88 and seq.; Elsing & Townsend, 61; see Finizio, 62 et seq.; Gardiner et al., 285; Gusy & Illmer, 289; Kaufmann-Kohler, Globalization, 1328; C. Müller, 152; O'Malley, Evidence, n. 2.05 et 2.21; Reed & Hancock, 348; but see Haigh & Beck, 292 ('Due to the cross-border nature of international commercial arbitrations, written interrogatories are a valuable tool to get information from parties without the need for costly oral discoveries.').
44. Armas & Smith, 56; Born, Agreements, 88 and seq.; Elsing & Townsend, 61; Kaufmann-Kohler, Globalization, 1328; O'Malley, Evidence, n. 2.06 et 2.22; Tschanz, 228.
45. E.g. Brower & Sharpe, 593; Griffin, 20.
46. R.H. Smit & Robinson, 122.
47. E.g. CIArb Protocol; Finizio, 57; Range & Wilan, 46 et seq.
48. E.g. Matthews & Malek, n. 1.01.

its own or another party's case or support another party's case.[49] The disclosure of documents is followed by inspection of the documents by the other party.[50] Not all documents that have to be disclosed must be made available for inspection to the other party. Privileged documents must be disclosed on the list, but are not subject to inspection.[51]

The use of the term *disclosure* in international arbitration would give reason for concern, as there might be a need to distinguish the terminology used in international arbitration from the terms of English law. Document production in international arbitration differs from disclosure in England and Wales as it refers to the production of specifically requested documents (or categories of documents) and does not constitute an obligation to disclose automatically a list of all documents of certain relevance at the outset of the case. Furthermore, the distinction of English law between disclosure and inspection does not exist in international arbitration.[52]

[D] Summary

Even if the terminology used by legal scholars is far from being uniform, it can be noted that a majority of authors[53] prefer using the term *document production* in international arbitration. This use of an independent terminology accentuates the autonomy[54] of arbitration.

The difference between document production in international arbitration and discovery proceedings in common law jurisdictions is not only terminological. The following chapter points out that the underlying concepts vary considerably.

49. CPR, r31.6 et 31.10; Adler & Johnson, 17 et seq.; Davies & Pieper, 257 et seq.; Matthews & Malek, n. 6.02 et seqq.
50. Adler & Johnson, 18; Davies & Pieper, 257; Matthews & Malek, n. 9.01.
51. Adler & Johnson, 18; Davies & Pieper, 257; Matthews & Malek, n. 8.11 et seq.
52. Knoblach, 168.
53. E.g. Blackaby et al., n. 6.103; Bouchenaki, 180; Derains, Efficiency, 85; Gusy, Hosking & Schwarz, Guide ICDR Rules; n. 19.10; Habegger, 27; Hamilton, 63; Hanotiau, Best Practices, 113; Hill, 88, fn. 1; McIlwrath & Savage, n. 5-181; Pinkston, 90; Poudret & Besson, n. 652 et seqq.; Raeschke-Kessler, Production of Documents, 641; Schneider, 'Forget E-Discovery', 14 et seq.; Shore, 77; Tercier & Bersheda, 92; Waincymer, Evidence, 19; Zuberbühler et al., Art. 3 n. 18.
54. See generally Alvarez, Autonomy, n. 6-1 et seqq.

CHAPTER 3
Purpose of Document Production

§3.01 CLASH OF VIEWS IN CROSS-CULTURAL ARBITRATION

In international arbitration, parties, counsel and arbitrators from different jurisdictions and cultural backgrounds come together. The parties and their counsel often have concepts of their home jurisdictions in mind.[1] Even more than the knowledge of substantive law, expectations of the procedure are deep-seated in the legal culture.[2]

Principles and rules on document production are entirely different in common law and civil law systems.[3] Nevertheless, slight rapprochements between the systems could be observed during the last decades.[4] The most notable examples for this development are the limitations of disclosure that resulted from the English Woolf Reform in 1999[5] and the expansion of the duty to produce documents in Germany in 2002.[6] As a consequence of still fundamentally different legal traditions,[7] fierce disputes occur particularly frequently if parties from the common law and the civil law system are involved in an arbitration.[8]

For arbitration practitioners, the understanding of both civil law and common law concepts is of paramount importance. Counsel need this comprehension to anticipate broad requests or rigorous resistance of the other party and to adapt their strategy accordingly (see Chapter 6 *infra*).[9] Arbitrators are, of course, expected to understand fully both parties' positions and to find a suitable compromise in a

1. See Dutson, 129; see Gaillard & Savage, n. 1259; see 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 25; Wirth, 10.
2. Gerstenmaier, 22; Tercier & Bersheda, 82 et seq.
3. E.g. Greenberg, Kee & Weeramantry, n. 7.112; Tackaberry & Marriott, n. 9-129.
4. El-Kosheri & Abdel Wahab, 9.
5. Matthews & Malek, n. 1.28 et seq.
6. Sachs, 'Fishing expeditions', 198.
7. Siefarth, 20.
8. Bernini, Civil Law Approach, 575; Elsing & Townsend, 60; Lew, 19; Marossi, 511; Sachs, 'Fishing expeditions', 194; Siefarth, 9.
9. Eijsvoogel, 4; see Franklin, 98 et seq.; see Gaillard & Pinsolle, 149; see Hinchey & Baer, 210 et seq.

cross-cultural situation. In this sense, a former US ambassador pointed out: 'an empathetic tribunal should do its best to make both litigants feel at home'.[10]

However, the importance of the cultural clash should not be overestimated. In many arbitration cases, both parties come either from civil law or common law countries. In such a situation, the arbitral tribunal should take into consideration that the parties share a similar cultural background (see Chapter 7 section §7.02 *infra*).

The analysis of the civil law and the common law approach to document production is not only important to understand the concepts that the parties might have in mind. In addition, it constitutes the basis for subsequently examining the purpose of document production in international arbitration.

§3.02 THE COMMON LAW SEARCH FOR THE TRUTH

Even if rules on discovery of documents vary considerably between common law jurisdictions, the underlying principles are the same or at least similar.[11]

In the common law world, discovery of documents is regarded as an indispensable element of the fact-finding process.[12] The English Court of Appeal used the image of 'cards face up on the table' to describe the purpose of the system.[13] In other words, the starting point is the principle that all documents relevant to the dispute must be disclosed to the other party.[14]

'Why is it not sufficient to rely on its own documents?' a lawyer from a civil law country may ask. A lawyer from a common law country would probably answer that discovery of documents is necessary to find out the truth.[15] Even some civil law authors recognize a particular need for document production in case of an imbalance of information between the parties.[16] This need becomes particularly pressing if all relevant documents regarding a fact are in the hands of one party.[17] Discovery of documents can be the only means of ascertaining the truth in such cases.[18]

The duty to disclose unfavourable documents is also seen as a condition for justice in the common law world.[19] No party should benefit from hiding a relevant document.[20] Equal access to documents aims at establishing equality of arms, guaranteeing fair proceedings and is regarded as an important aspect of due process.[21]

10. Wilkey, 79.
11. Allen, Overview, 15.
12. Craig, 15; Webster & Bühler, n. 25-58.
13. *Davies v. Eli Lilly & Co. and Others*, [1987] 1 WLR 428, 431(EWCA) (Eng.).
14. Ashford, Discovery, 90; Bennett, 142; Born & Rutledge, 965; Brower & Sharpe, 593; Craig, 14; R.H. Smit, Efficiency, 95; Welser & De Berti, 87.
15. Craig, 15; Dutson et al., 129; Haigh & Beck, 289.
16. C. Müller, 151; Reiner, ICC-Schiedsgerichtsbarkeit, 214.
17. Born, Int. Comm. Arb., Vol. II, 2346; Fischer-Zernin & Junker, 17; Morgan, 9; Mustill & Boyd, 324.
18. Morgan, 9; Mustill & Boyd, 324.
19. Brower & Sharpe, 594; Mustill & Boyd, 324; Rogers, 133.
20. Pinkston, 87.
21. Griffin, 20; Marossi, 515.

A further purpose of discovery of documents relates to the typical structure of common law proceedings. Discovery of documents usually occurs after short pleadings and before an uninterrupted trial.[22] It is conducted by the parties and serves to inform them about the facts of the case.[23] They need to know relevant documents before the trial begins to avoid unwelcome surprises.[24] Since pleading requirements are lax in common law jurisdictions,[25] and documentary evidence does not need to be attached to the pleading notes, the parties typically cannot know from the pleadings on which documents the counterparty's case is built.[26] If a party were to learn from unfavourable documents for the first time at the trial, such party would hardly be able to react adequately and defend its case.

In common law proceedings, the court usually does not receive the documents exchanged between the parties in the pre-trial phase.[27] At this stage, it intervenes only if a party is uncooperative or objects to discovery.[28] Only at the trial, the parties submit evidence to the court.[29]

This system is adversarial as the parties are in charge of conducting the proceedings.[30] An adversarial system facilitates the acceptance of broad discovery of documents. Different from civil law jurisdictions, discovery of documents generally does not constitute an intervention of the state, which should be limited as much as possible according to principles of public law.[31] Rather, discovery of documents is conducted as a continuation of the private dispute according to specific procedural rules.[32]

In common law proceedings, only a small part of the discovered documents are normally used at trial.[33] Hence, the purpose of discovery of documents is typically not to prove particular facts.[34] Rather, discovery of documents aims at informing the parties about the existence and the content of relevant documents in possession of the other party or of third parties.[35]

According to authors from Singapore and the United States, a further purpose of discovery of documents is to determine whether the claimant has a good cause of action.[36] This reasoning demonstrates that the reluctance to initiate judicial proceedings is often less in common law than in civil law jurisdictions.[37]

22. Bishop, 317; McCaffrey & Main, 429 et seq.; H. Smit, 164; R.H. Smit, Efficiency, 94.
23. Wetter, 14 et seq.
24. Adler & Johnson, 16; Armas & Smith, 55; Brower & Sharpe, 594; Matthews & Malek, n. 1.02; R.H. Smit, Efficiency, 94.
25. Armas & Smith, 55; Craig, 13; Davies & Pieper, 234.
26. McCaffrey & Main, 430; Reed & Hancock, 342.
27. Craig, 14.
28. R.H. Smit, Efficiency, 94; Wetter, 16.
29. Craig, 14.
30. *Ibid.*, 13.
31. See Born & Rutledge, 969.
32. See *ibid.*, 969.
33. Derains, Efficiency, 85; see Davies & Pieper, 238.
34. See Davies & Pieper, 234 et seq.
35. See McCaffrey & Main, 430.
36. Hwang & Chin, 34; Wetter, 15.
37. See Poudret & Besson, n. 652.

From a common law perspective, a lack of discovery would lead to a 'trial by ambush'.[38] As a consequence, common law practitioners sometimes perceive civil law proceedings as proceedings 'in the dark'.[39]

§3.03 CIVIL LAW APPROACH IS BASED ON THE BURDEN OF PROOF

The civil law approach to the taking of evidence in general and to document production in particular focuses on the burden of proof.[40] Document production is seen as a means of a party to discharge its burden of proof. It serves only to prove facts that the requesting party alleged in its pleadings.[41]

Different from common law jurisdictions, document production is not considered to be an instrument to inform the parties about the facts of the case.[42] No procedural stage of civil law proceedings has such a purpose.[43] The underlying idea of the civil law approach is that both parties have a version of what happened when they go to court.[44]

The pleading stage, which typically constitutes the first part of civil law proceedings, serves to compare the opposing versions.[45] It typically consists of two submissions by each party.[46] The parties plead the factual and legal circumstances of the case in detail and submit documentary evidence that supports their allegations.[47] The parties are not usually required to produce documents at the request of the opposing party at this stage.[48]

As a rule, the parties cannot make new allegations after the pleading phase.[49] As a consequence of severe pleading requirements,[50] there is usually no substantial risk of surprises at oral hearings and little or no room for ambush tactics.[51]

In many civil law jurisdictions, the division of the procedure into a pleading phase and evidentiary proceedings is considered to be a matter of course.[52] It would be perceived as unfair if a party could adapt its allegations to discovered documents.[53] From a civil law point of view, the advantages of a pleading stage could disappear if a

38. Hinchey & Baer, 208.
39. Lowenfeld, Litigation, 667.
40. Ceccon, 69; Dieryck, 269; Rubino-Sammartano, Italy, n. 8.125; Schwarz & Konrad, n. 20-237.
41. Gäumann & Marghitola, n. 6; Habegger, 23 et seq.; Hafter, 357; Rützel, Wegen & Wilske, 60.
42. Gäumann & Marghitola, n. 7.
43. See Bernini, Civil Law Approach, 590.
44. See Schlosser, Schiedsgerichtsbarkeit, n. 637.
45. See Lionnet, 493.
46. Habegger, 22; Lowenfeld, Litigation, 670.
47. Bühring-Uhle, 19; Demeyere, Differing Approaches, 282; Habegger, 22; Hafter, 347; Siefarth, 2 et seq.; Schwarz & Konrad, n. 20-229.
48. Habegger, 24; Wirth, 11.
49. See Bühring-Uhle, 19; Habegger, 22.
50. Gordon, n. 19; Tercier & Bersheda, 80 et seq.
51. Borris, 11; Lionnet & Lionnet, 311 et seq.
52. See Court of Cassation of Zurich, 6 Feb. 1995, ZR 95 No. 62, cons. 5.3 (1996) (Switz.); see Wirth, 10.
53. Cf. Demeyere, Search for 'Truth', 250 ('whereas the common law approach is for each party to be given an opportunity to consult all the documents of the case before deciding its arguments.'); Elsing & Townsend, 60.

party obtains evidence of the opposing party before having made its detailed allegations.

The scope of document production requests and orders is, in general, very narrow in civil law proceedings.[54] It is only slightly overstated to say that the request to produce the original of a contract of which the requesting party has only an unsigned version is a typical example of a successful document production request.[55] A decision of the Commercial Court of Zurich, by which a third party was ordered to produce its valuation report in a real estate dispute, might be another typical example.[56]

As a rule, courts of civil law countries order document production only if the requesting party is able to identify with precision the requested documents.[57] Since it is often difficult for a party to make detailed allegations of documents that are in the hands of the opposing party or third parties, there is frequently no disputed allegation that can be proven by document production. Hence, document production orders are rarely issued in civil law jurisdictions,[58] and if they are, they usually cover only a small number of clearly identified documents.

The judge is in charge of conducting evidentiary proceedings in civil law jurisdictions. Therefore, such proceedings are, at least partly, of an inquisitorial nature.[59] A court intervention is always required for document production.[60] The judge usually orders document production at the request of a party or, in rather exceptional cases, on its own initiative.[61]

The inquisitorial characteristics of evidentiary proceedings are one of the reasons civil law practitioners typically focus on the limitations of document production. Document production in court proceedings is considered to be an intervention of the state into a private law setting.[62]

From a common law point of view, it might seem unfair that a favourable document in the hands of the counterparty will not appear in the proceedings if a party does not know about its existence.[63] From a civil law perspective, such a result does not contradict the principles of justice.[64] Civil law practitioners commonly argue that a party should not file a claim and only subsequently search for reasons its claim was founded.[65] Accordingly, document production does not aim at establishing facts of which the requesting party is not already aware.[66]

54. E.g. Quintana & Fortún, 162.
55. Elsing & Townsend, 60.
56. Commercial Court of Zurich, 9 Jul. 1992, ZR 91/92 No. 4, cons. A (1992/93) (Switz.).
57. Angell, 227; Frignani, 207; Gäumann & Marghitola, n. 14; Habegger, 24.
58. Bühring-Uhle, 80; Cavasola & Paton, 169; Hanotiau, Best Practices, 114; Kaufmann-Kohler & Bärtsch, 16.
59. See Bühring-Uhle, 18 et seq.; see Rubino-Sammartano, Evidence, 184 et seq.
60. Bernard, 24.
61. See Angell, 226 et seq.; see Derains, Efficiency, 83; see Kaufmann-Kohler & Bärtsch, 16.
62. See McCaffrey & Main, 438.
63. See Pinkston, 87.
64. See Habegger, 24.
65. Habegger, 24; Paulsson, Presenting Evidence, 115; Poudret & Besson, n. 652; Tercier & Bersheda, 80.
66. Lowenfeld, Litigation, 671.

The civil law approach to document production limits litigation, as a party is discouraged from initiating judicial proceedings if such party is not already able to prove its claim.[67]

Discovery of documents as practiced in the United States is vigorously rejected in the civil law world.[68] Discovery of business documents, such as minutes of the meetings of the board of directors, is considered to be an intrusion, difficult to accept, into internal matters of a company.[69]

Although common law practitioners do not generally share this opinion, there is some understanding of this viewpoint among them. Even the English Court of Appeal recognized that 'discovery of documents involves a serious invasion of privacy'.[70] Moreover, an English commentary explained the civil law rejection of producing internal documents as follows:

> Many foreigners view with incredulity a system which requires them to produce (for example) documents passing within their own organisation, which were never intended for general distribution; and they point out with justice that the possibility of disclosure must serve to inhibit their freedom to express themselves frankly in writing.[71]

For many civil law practitioners, it is a nightmare scenario that a party can analyse the files of its opponent and then construe a story based on the discovered documents.[72] Rather than a method of finding the truth, civil law practitioners consider discovery to be a playground where lawyers search for new claims.[73]

§3.04 PURPOSE OF DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION

Well-known arbitrators affirm that the purpose of document production in international arbitration is clear.[74] However, they disagree on the actual purpose of document production. While most civil law authors tend to consider that the purpose of document production in international arbitration is to prove disputed allegations,[75] common law authors typically argue that the search for truth is the objective.[76]

67. Poudret & Besson, n. 652; see Dutson et al., 129; Gordon, n. 28; see Schneider, 'Forget E-Discovery', 16 et seq.
68. Blessing, Arbitration, n. 898; Böckstiegel, Deutschland, 6; Bouchenaki, 180; Borris, 10; Elsing & Townsend, 61; Fischer-Zernin & Junker, 16; Kronke, 79; C. Müller, 150 et seq.; Sachs, 'Fishing expeditions', 194; Schwarz & Konrad, n. 20-229; Weigand & Baumann, n. 1.229.
69. Hobeck et al., 233; Paulsson, Arbitrations, n. 10-174; E.F. Schmid, Art. 160 n. 28.
70. *Davies v. Eli Lilly & Co. and Others*, [1987] 1 WLR 428, 432 (EWCA) (Eng.).
71. Mustill & Boyd, 325.
72. See Hobeck et al., 233; see Siefarth, 2; Wirth, 12.
73. See Lowenfeld, Omelette, 26; McCaffrey & Main, 427.
74. Brower & Sharpe, 593; Giovannini, 7; Habegger, 28.
75. Derains, Efficiency, 87; Giovannini, 7 et seq. (describing a trend towards the search for truth, but focusing on the burden of evidence to limit document production); Habegger, 28; Hanotiau, Massive Productions, 357; Tercier & Bersheda, 82; see Zuberbühler et al., Art. 3 n. 138 et seq.
76. Finizio, 67; see Haigh & Beck, 289; see McDowell, 94; Reed & Hancock, 351; see R.H. Smit, Efficiency, 94.

In the light of these opinions, it is more appropriate to conclude that the purpose of document production in international arbitration is highly controversial. Even though mutual understanding has grown considerably during the last decades, the discussion among experienced arbitration practitioners is still marked by antagonism between civil law and common law.

The question of the purpose of document production cannot be answered for all arbitration proceedings. It results from the guiding principle of party autonomy that the arbitral procedure should be flexible.[77] Every arbitration has its own procedure.[78] The purpose of document production can and should vary from arbitration to arbitration.

Nevertheless, it is useful to examine the issue. First, the purpose of document production can be determined for arbitration proceedings that are governed by perceived best practices such as the International Bar Association (IBA) Rules. Second, the understanding of possible variations of the purpose of document production helps to tailor the rules that apply in an arbitration proceeding to a purpose suitable for a particular case.

Arbitration proceedings became, to a certain degree, standardized in the last decades.[79] The written phase typically follows the procedure known in civil law jurisdictions.[80] Both parties plead the case in detail and attach documentary evidence to their submissions.[81] The subsequent witness hearings are usually conducted according to a modified common law procedure including written witness statements and cross-examination.[82] Subject to exceptions, the submission of new written evidence is normally excluded after the pleading phase.[83] This procedural rule is designed to prevent ambush tactics and to minimize the risk of unwelcome surprises at witness hearings.[84] Hence, an important purpose of document production in common law jurisdictions is hardly ever relevant in international arbitration. If the typical arbitration procedure is followed, document production is not necessary to prevent surprises at witness hearings.[85]

It is unanimous that document production is a tool of the parties to prove disputed allegations. The crucial issue is whether the search for truth goes beyond the mere discharge of the burden of proof.

The purpose of the search for truth has gained some acceptance among arbitration specialists from civil law countries. A professor from Germany admits that civil law systems prematurely interrupt the search for truth in certain cases.[86] Another German professor comes to the conclusion that the common law system outmatches

77. See Raeschke-Kessler, IBA-Rules, 41.
78. Finizio, 59.
79. E.g. Briner, Podiumsdiskussion, 111 et seq.; Elsing & Townsend, 59; Ginsburg, 1340; Kaufmann-Kohler, Globalization, 1325; Lazareff, Foreword, 5; Lynch, 295 et seq.; Mourre, 448; C. Müller, 150 et seq.; Tercier & Bersheda, 84 et seq.
80. E.g. Craig et al., 423; Gaillard & Savage, n. 1260; Griffin, 19; Lionnet, 497.
81. E.g. Carlevaris, 362; Schwarz & Konrad, n. 20-241; Wirth, 10.
82. E.g. Griffin, 19.
83. See Madsen, 219 et seq.
84. Berghoff, 40.
85. Lionnet, 497.
86. Kronke, 80.

the civil law system in the establishment of the truth.[87] Likewise, a well-known arbitrator from Switzerland explains that an award is easier to accept for the unsuccessful party if the facts have been fully established.[88] He states that, for this reason, arbitrators from civil law countries find inspiration in a procedural law that focuses particularly on finding the truth.[89]

The IBA Rules provide for broader document production than the procedural rules of virtually all civil law jurisdictions.[90] In particular, the IBA Rules include the possibility of requesting the production of categories of documents,[91] which usually does not exist in civil law jurisdictions.[92] A request for a category of documents typically includes a search for unknown facts.[93] If the requesting party could clearly identify the documents, it would usually not have to rely on a request for a category of documents.[94]

Another difference compared to many civil law jurisdictions is that the production of internal documents can be ordered.[95] Initially, the Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (1983 IBA Rules) excluded requests for the production of internal documents.[96] After intense discussion, the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999 IBA Rules) included the production of internal documents.[97] The current IBA Rules only slightly amended the 1999 IBA Rules and maintained the possibility of ordering the production of internal documents.[98]

It is readily understood that the requesting party rarely knows the content of internal documents in the hands of the requested party. If it were required that a document production request contain detailed allegations as to the content of the requested documents, internal documents would be indirectly excluded. Such a result would be inconsistent with the formation of the 1999 and the current IBA Rules.

The inclusion of internal documents has the consequence that facts unknown by the requesting party are regularly brought to light by way of document production. Accordingly, the IBA Rules allow a further search for truth than the mere proof of allegations.

87. Schütze, Ausgewählte Probleme, 74.
88. Wirth, 11.
89. *Ibid.*, 11.
90. *Ibid.*, 12.
91. Art. 3 (3)(a)(ii) 2010 IBA Rules.
92. See Rubino-Sammartano, arbitrato, 756; Tse & Peter, 29; Wirth, 12.
93. Pinkston, 90 et seq.
94. *Ibid.*, 91.
95. See 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, 7.
96. Ashford, Discovery, 97; Brower & Sharpe, 620; Craig et al., 454; see Kühner, 668; Lionnet, 499 et seq.; O'Malley, Evidence, n. 3.31; Shore, 77; Waincymer, Evidence, 846; Zuberbühler et al., Art. 3 n. 105.
97. Ashford, Discovery, 97; Brower & Sharpe, 620 et seq.; Craig et al., 454; Kühner, 668; Lionnet, 499; O'Malley, Evidence, n. 3.32; Schneider & Scherer, Art. 184 n. 19; Shore, 77; Waincymer, Evidence, 846; Zuberbühler et al., Art. 3 n. 83.
98. Brower & Sharpe, 620 et seq.; Kühner, 677.

This thesis is reinforced by the widely accepted[99] timing of the document production procedure between the first and the second round of written submissions. If the purpose of document production were only to allow a party to discharge its burden of proof, the document production procedure would logically have to take place after the pleadings. The timing between statement of defence and reply allows the parties to complete their factual allegations in the second round of submissions with information obtained from the documents produced by the opposing party.

Nevertheless, in 'standard' arbitration proceedings, the search for truth goes only slightly beyond the mere discharge of the burden of proof. The IBA Rules lay down a number of requirements that limit document production. In particular, documents must be material to the outcome of the case according to Article 3(3)(b) IBA Rules.

Compared to the requirements of the IBA Rules, the purpose of proving allegations to discharge the burden of proof would further limit document production. The following example[100] illustrates this subtle, but important distinction.

In a dispute about the termination of a long-term supply agreement, the respondent has terminated the agreement for good cause. The claimant argues that the respondent has invented the alleged reasons for the termination of the agreement only during the course of the arbitration. The claimant requests the production of the minutes of the respondent's board of directors' meetings for a period beginning a month before the termination was communicated.

If proving allegations to discharge the burden of proof were considered the purpose of document production, the respondent could hardly be ordered to produce the minutes of the board of directors' meetings. First, the respondent generally bears the burden to prove the underlying facts that allowed him to terminate the agreement for good cause. In this respect, the claimant could not obtain document production only to contest the case of the respondent.[101] Second, the claimant cannot make, in good faith, detailed allegations related to the respondent's board of directors' meetings at which its representatives were not present.

If a further search for truth is allowed, the minutes of the board of directors' meetings can be qualified, prima facie, as being material to the outcome of the dispute. It can be expected that they give information about the reasons the respondent terminated the contract. This knowledge of the respondent's motives at the moment when the dispute arose is likely to be a part of the basis for the arbitral tribunal's decision.

This example of a request for internal documents demonstrates the importance of discussion about the purpose of document production for practice. It is not a surprise

99. Born, Int. Comm. Arb., Vol. II, 2367; Derains, Efficiency, 89; Finizio, 68; Hanotiau, Best Practices, 115; O'Malley, Evidence, n. 3.17 et seq.; Tercier & Bersheda, 98; cf. Waincymer, Evidence, 843; Zuberbühler et al., Art. 3 n. 92; but see Gardiner et al., 280; but see Hamilton, 64 et seq. (giving two different examples); but see McIlwrath & Savage, 437 et seq. (providing another model provisional timetable).
100. See also the case examples in Sachs, 'Fishing expeditions', 197 and the example in Zuberbühler et al., Art. 3 n. 118.
101. See Webster & Bühler, n. 25-68.

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.

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).

§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.

22. Article 3(3)(a) IBA Rules.
23. See von Segesser, IBA Rules, 745.
24. Hill, 87.
25. A. Meier, 180; Range & Wilan, 61.

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.

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.

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

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.').

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 date, was attended by Messrs. X, Y and Z, at which meeting the board made decision XYZ.[41]

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.

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

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.

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,

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.

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

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.

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

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.

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

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-Report-on-Managing-E-Document-Production/ (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.

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

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.

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*).

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.

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:

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.

> 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 CIArb 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

90. Ragan, Panel Discussion, 284.

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.

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.

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.

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.

§7.02 COMMON EXPECTATIONS OF THE PARTIES

[A] Generally Recognized Concept in International Arbitration

Few principles are so widely accepted in international arbitration as the common expectations of the parties. According to this principle, an arbitral tribunal should take into account the common expectations of the parties when it establishes the arbitral procedure.[1]

The taking into account of the common expectations of the parties is an autonomous concept of international arbitration. In litigation, the procedure is not adapted to the expectations of the parties, but is conducted in accordance with the provisions of national codes of civil procedure. Therefore, the same concept cannot apply to litigation. Hence, only sources of international arbitration are relevant for the concept of common expectations of the parties.

The common expectations of the parties must be seen against the background of party autonomy.[2] Party autonomy is one of the most important principles in international arbitration. It guarantees that the parties can determine the arbitration procedure.[3] The common expectations of the parties can be considered a smaller counterpart of party autonomy. This concept creates the duty of the arbitrators to take into account the common expectations of the parties when the parties do not agree on procedural issues.

In contrast to party autonomy, the concept of common expectations of the parties is not based on conventions or arbitration statutes. Rather, it has been developed by legal doctrine and arbitral practice.

[B] Definition of Parties' Expectations

Commentaries commonly use the expression *expectations of the parties*, but do not yet seem to have defined it. Consequently, the question arises as to how to determine the expectations of the parties in international arbitration.

First, common expectations of the parties must be distinguished from the requirements for the conclusion of a contract. For example, under Swiss law, the 'conclusion of a contract requires a mutual expression of intent by the parties'.[4] By contrast, expectations of the parties do not have to be pronounced or otherwise expressed. Silent expectations are sufficient. This implies certain difficulties in evidencing such expectations.

1. See Brower & Sharpe, 630; El Ahdab & Bouchenaki, 65; Elsing, 116; see Hanefeld, n. 7.93; see Hanotiau, Best Practices, 115; Kaufmann-Kohler, Globalization, 1328; Lew, 11; see Liebscher, Beweisaufnahme, n. 9; see Malintoppi, 420; see Martinez-Fraga, 3; cf. Park, Truth-Seeking, 4; see Smit & Robinson, 132.
2. See El Ahdab & Bouchenaki, 65.
3. Born, Int. Comm. Arb., Vol. II, 2130.
4. Article 1(1) CO (Switz.).

Also in contrast to the conclusion of a contract, no intention to be bound is required for expectations. Expectations are not expressions of intent, but rather projections for the future that a party considers to be realistic.

This does not mean that the expectations of a party must be realistic to be taken into consideration. For example, if two parties from common law countries, both inexperienced in international arbitration, expect document production to be similar to US court proceedings, the arbitral tribunal should take into account this expectation even if such an extent of document production is unusual and seemingly unrealistic in international arbitration. 'Taking into account' does not mean strictly following the expectations of the parties. Rather, in this example, the arbitral tribunal may also take into consideration other objectives of international arbitration such as the efficiency of the proceedings.[5] Nevertheless, the procedural rules on document production should be established on the basis of the expectations of the parties to such extent that broader document production than usual in international arbitration should apply in this case.

Furthermore, expectations can be vaguer than expressions of intent. For example, it is sufficient to be taken into consideration that a party expects no or little costs in relation to document production. As a rule, there are no requirements of specificity for expectations.

Consequently, the expectations of a party correspond to how such party believes the arbitration procedure to be conducted. In addition, the parties may also have expectations as to how a procedure will *not* be conducted. For example, two civil law parties may not expect internal documents to be produced. Such expectations should also be taken into account.

[C] Ex Ante or Ex Post Parties' Expectations?

A crucial issue is the relevant moment in time for the determination of the common expectations of the parties. The common expectations of the parties could be determined at the moment of the conclusion of the contract or at the beginning of the arbitration procedure.

This distinction is important. Often, when a party files a request for arbitration, many years have passed since the conclusion of the underlying contract. The employees who have negotiated the contract may not work for the parties anymore.

A scholar concludes that the procedure should be established based on the ex ante expectations of the parties:

> As William Park notes, adjudicatory neutrality promotes economic cooperation because a relatively neutral arbitrator can be relied upon to respect the *ex ante* shared expectations of the parties when they entered into the transaction, rather than the *ex post facto* desires of the parties when a dispute arises.[6]

Similarly, an article states that experienced arbitrators take into account the expectations at the moment of the conclusion of the contract:

5. See Malintoppi, 420.
6. Lynch, 12.

> They consider whether the parties come from jurisdictions with broad, limited, or no disclosure at all; whether they expected disclosure when they entered into the arbitration agreement, or whether they would be shocked to learn that, by agreeing to arbitrate, they had made all their documents available to their adversary.[7]

However, the common expectations of the parties are not a contractual concept, but a procedural concept. Therefore, it could appear questionable to determine the expectations at a moment in time when the arbitration procedure has not yet been initiated. At first sight, the conclusion of the contract seems to be the relevant moment in time for the application of contractual concepts, but not for procedural concepts.

This logic is followed by a scholar, who explains that the expectations of the parties correspond to those of their counsel.[8] Following his opinion means that the expectations of the parties are determined during the arbitral procedure based on the parties' submissions and pleadings.

However, it appears to be problematic to determine the expectations of the parties at the beginning of the arbitration. Typically, winning is the only goal of the parties once an arbitration has begun.[9] While the focus lies on a balance of interests at the time of the conclusion of the contract, the perspective changes when it comes to a dispute.[10] The parties' submissions and pleadings on procedural issues have to be viewed against this backdrop.

Consequently, the procedural submissions of the parties cannot be considered a reflection of their procedural expectations. Hence, it seems problematic to take into account the expectations of the parties in the course of the arbitration. At this moment in time, the parties do not have an objective view anymore, but rather one that is marked by their interest in reaching a favourable outcome.[11]

However, the determination of the parties' expectations at the moment of the conclusion of the contract can be difficult, too. The arbitration procedure is usually not an issue that is discussed at the moment of the conclusion of the arbitration agreement. Many parties focus on the essential elements of the arbitration clause and give no thought to document production. Accordingly, many parties may not have any specific expectations regarding the extent of document production at the conclusion of the contract. It is mainly parties with experience in international arbitration that have such expectations.

However, more general expectations should also be taken into consideration. For example, if an inexperienced party expects proceedings resembling the laws of its home country, such views should be taken into account as expectations of the extent of document production.

By contrast, the parties usually have expectations regarding the extent of document production once the procedure has begun. At this moment in time, a dispute

7. Kaufmann-Kohler, Globalization, 1328.
8. Alvarez, Autonomy, n. 6-10.
9. Park, Forum, 172.
10. *Ibid.*, 172.
11. Cf. Park, Forum, 174.

is no longer an eventuality that both parties hope to avoid, and the procedural expectations are becoming more specific.

Furthermore, parties could also agree on procedural issues in the course of the arbitration. Given that the concept of common expectations can be considered a smaller counterpart of party autonomy (see Chapter 7 section §7.02 [A] *supra*), there is no compelling reason to ignore common expectations at the beginning of the arbitration procedure. However, reasonable expectations of the parties at the beginning of the proceedings should be distinguished from tactical behaviour during such proceedings. This distinction can be difficult to draw.

As a result, the expectations of the parties at the moment of the conclusion of the contract should be taken into account in the first place, since this moment in time guarantees objectivity and predictability. If, as in many cases, the parties do not have any expectations regarding document production at the moment of the conclusion of the contract, the arbitral tribunal may take into account their expectations at the beginning of the procedure.

[D] Difficulties in Determining Expectations of Global Companies

In international arbitration, most parties are companies. Therefore, the question arises as to whose expectations are relevant to the determination of the parties' expectations.

It might be obvious, but it is still noteworthy: A company as such does not have any expectations, only its employees and representatives do. Therefore, the procedural expectations of a company cannot be directly deduced from the laws of its seat.

Rather, the concept of common expectations of the parties relates to the conclusion of the arbitration agreement. Therefore, the expectations of the employees that were involved in the conclusion of the contract are relevant. If external counsel have negotiated the contract, their expectations also need to be taken into consideration. Their expectations regarding document production are particularly important since technical issues such as the negotiation of the arbitration clause are typically delegated to them.

The most important factor for determining the expectations of a party representative is typically his legal background. In particular, the legal background can be marked by such representative's legal education and professional experiences.[12] If a party representative has only experience in relation to a particular court system, he is likely to expect that the extent of document production in arbitration will be similar to such a court system.[13]

If small or medium-sized companies with local employees are involved in an arbitration case, the analysis of their expectations will often be as clear as in the following example of a practitioner:

> However, to ensure a basic measure of equity, an arbitral tribunal is required to take into account the expectations of the parties. In fact, a party from a civil-law

12. See Kimmelman & MacGrath, 53 et seq.
13. See *ibid.*, 53 et seq.

> jurisdiction typically has virtually no experience with discovery, while a party with a common law background usually assumes discovery to be entirely appropriate.[14]

The analysis of the expectations of global companies is more complex. For example, the expectations of a large Danish company may be different depending on whether it's English or German in-house counsel negotiated the arbitration clause. The English in-house counsel may expect broader document production than his German colleague. However, if both in-house counsel have extensive experience in international arbitration, they may expect a similar extent of document production.

The more employees are involved in the decision to conclude a contract, the more complex is the task of analysing the parties' expectations. Important contracts are often negotiated by a team consisting of businessmen, in-house counsel and external lawyers from different countries. In such complex constellations, the determination of the parties' expectations can be difficult. However, parties tend to expect the application of an international standard in such situations.

Furthermore, the legal background of the employees who negotiate the contract might not be the only relevant factor. Their expectations may also depend on the seat of arbitration.[15] A party that concludes two arbitration agreements, one with seat in Singapore and one with seat in Vienna, may expect that the extent of document production will be broader in the arbitration proceedings in Singapore than those in Vienna.

However, in a globalized world, there are no compelling reasons for this conclusion. Due to convergence in international arbitration, the seat of arbitration is a criterion of losing value. An article on the globalization of the arbitration procedure gives the example that three different arbitrations could take place in Geneva, New York and Hong Kong, involving the same people and being conducted in the same way.[16]

However, a German article defends the opinion that the seat of arbitration has great influence.[17] The article explains that the parties submit the dispute to the imperative provisions of the corresponding law when they choose a seat of arbitration.[18] It deduces that this choice also implies a preference for the law of evidence of the seat of arbitration.[19]

This last conclusion is highly questionable. The imperative provisions of a seat of arbitration constitute only very basic limits for the conduct of arbitration (see Chapter 4 *supra*). By contrast, national laws of civil procedure provide detailed rules of evidence. Most authorities in international arbitration do not recommend applying them to arbitration.[20] Therefore, the choice of the seat of arbitration does not imply a preference for a national law of evidence. Such a conclusion appears rather far-fetched.

14. Marossi, 517.
15. Hunter, 160.
16. Kaufmann-Kohler, Globalization, 1314.
17. Schütze, Ermessensgrenzen, 4.
18. *Ibid.*, 4.
19. *Ibid.*, 4.
20. Blessing, Arbitration, 377; Born, Int. Comm. Arb., Vol. II, 2200; Capper, 101; Eijsvoogel, 6; Fischer-Zernin & Junker, 17 et seq.; Grigera Naón, 19; Horvath, Judicialization, 261; Najar, 523; O'Malley, Evidence, n. 1.17 et seqq.; Schneider & Scherer, Art. 182 n. 25; Tercier & Bersheda, 102; contra: Schütze, Ausgewählte Probleme, 132; but cf. Rees, 509 ('The Civil Procedure Rules do not apply to arbitration, but it is still commonplace to see counsel and tribunals falling back on the CPR rather on the tools that are available to them.'); but cf. Sachs & Lörcher, Introduction, n. 2 ('As a consequence, the detailed procedural rules governing state court proceedings do not apply to arbitral proceedings under German law. However, these procedural rules may, particularly in domestic arbitrations, provide guidance on how to solve certain procedural issues.').
21. Alvarez, Autonomy, n. 6-10.
22. Waincymer, Evidence, 868.

With regard to the expectations of a party during the arbitration proceedings, an arbitrator states: 'For example, the expectations of the parties with respect to procedural fairness are usually those of the counsel representing them.'[21]

However, it is irreconcilable with the fundaments of arbitration to equate the procedural expectations of the parties with the procedural expectations of their counsel. Counsel have the function to represent the parties in arbitration proceedings, not to replace the parties. Expectations of the parties and of their counsel are seldom identical. Counsel usually have much more arbitration experience than their clients. Their procedural expectations are marked by these experiences. Furthermore, their legal culture can be different from that of their clients. Hence, the expectations of arbitration counsel should be considered irrelevant for the determination of the parties' expectations.

As has been shown, the legal background and the arbitration experience of the negotiating employees and counsel typically influence the expectations of the parties. Other factors that may influence the expectations of the parties are the seat of arbitration, the seats of the parties, the type of the dispute,[22] or the expected amount in dispute.

[E] In Which Cases Do Expectations of the Parties Coincide?

As discussed above, several factors may influence the expectations of a party. Consequently, expectations of the parties often do not fall under a clearly defined category such as 'expectations of a common law party' or 'expectations of a civil law party'. Rather, there are differences in degree that need to be taken into account.

The question arises in which cases the expectations of the parties coincide. Common expectations need to be distinguished from identical expectations. It is not required that the parties have exactly the same expectations for the arbitral tribunal to take them into account. Rather, it seems to be sufficient that the parties have generally similar expectations to consider them to be common. In the following, three typical constellations in which the parties have common expectations are analysed.

If both parties were represented during the contractual negotiations by persons with a typical common law background, it can be assumed that the procedural expectations of the parties widely coincide. Both parties will expect rather broad document production, approve requests for categories of documents and internal documents, and consider that the search for truth is the purpose of document

production (see Chapter 3 section §3.02 *supra*). However, reduced discovery costs compared to litigation is seen in common law countries as one of the main advantages of arbitration compared to litigation, and as a reason to choose arbitration.[23] Therefore, many common law party representatives will expect a smaller extent of document production in international arbitration than in court proceedings in their home countries.

As do party representatives of common law parties, party representatives with a typical civil law background also have common expectations regarding document production. For example, an article published in Austria points out that civil law parties do not expect broad document production: 'As outlined above, customers from civil law countries generally have no desire or expectation of conducting a broad document production exercise.'[24] Indeed, party representatives from civil law countries expect narrow document production that causes no or only low costs, and they are opposed to the production of internal documents (see Chapter 3 section §3.03 *supra*).

As a consequence of the harmonization of evidentiary proceedings in international arbitration, in-house counsel with extensive experience in international arbitration may have similar expectations regarding the extent of document production. This will typically be the case for long-term employees of global companies. In particular, these in-house counsel may expect that the IBA Rules will be used as guidelines.

However, it cannot be automatically assumed that a global company generally expects the application of an international standard. The experience of an employee responsible for contractual negotiations does not correspond to the collective experience of a global company. Only the personal expectations of the negotiators are relevant for the determination of a party's expectations.

As a result, expectations can be considered to be common if the parties have generally similar expectations. Typically, the parties' expectations coincide if both parties are represented either by negotiators with a typical civil law, common law or international arbitration background.

[F] Summary

It is generally recognized in international arbitration that an arbitral tribunal should take into account the common expectations of the parties when it establishes procedural rules on document production. As a rule, the expectations of a party correspond to how a party, at the conclusion of the contract, expects the arbitration procedure to be conducted. Legal background and arbitration experience of the employees and counsel who negotiated the arbitration agreement are typically the most important factors for determining the parties' expectations on the extent of document production. Only if the parties had no expectations regarding document production at that moment in time, the parties' expectations at the beginning of the arbitration procedure can be taken into account.

23. Born, Int. Comm. Arb., Vol. II, 2359; McCaffrey & Main, 479.
24. Pinkston, 108.

Expectations coincide if the parties have mainly similar expectations. This is typically the case if both parties are represented either by negotiators with a typical civil law, common law or international arbitration background.

§7.03 LEGITIMATE EXPECTATIONS OF ONLY ONE PARTY ARE INSUFFICIENT

It is widely accepted that an arbitral tribunal should take into account the legitimate expectation of a party that a certain document is privileged (see Chapter 5 section §5.09 *supra*).[25] In particular, this practice protects the trust that a party has in the confidentiality of a communication with its lawyer.[26] The question arises whether procedural rules on document production can be based on legitimate expectations of only one party.

If a common law party expects broad document production and a civil law party expects narrow document production, the expectations of both parties have the same legitimacy. There is no particular relationship of trust that needs to be protected. Hence, procedural rules on the extent of document production cannot be based on legitimate expectations of only one party.

§7.04 NO DUTY OF ARBITRAL TRIBUNALS TO BALANCE DIFFERENT EXPECTATIONS

According to a German article, arbitral tribunals have the duty to balance different procedural expectations of civil law and common law parties.[27] More generally, this comment raises the question whether an arbitral tribunal has a duty to find a compromise between procedural expectations of the parties that are mutually opposed.

Commentaries do not mention such a duty. A duty to follow a middle path between the expectations of the parties would determine for all cases how arbitral tribunals should use their discretion. As such, the flexibility of international arbitration would be severely limited. In addition, the connection of such a duty to party autonomy is vague, since this approach would not be based on something that the parties have in common. The only function of such a duty would be to bridge different expectations.

For example, two parties from civil law countries with a different level of experience may have different expectations of the extent of document production. The one with broad experience may expect the IBA Rules to be applied as guidelines. The other party with no experience in international arbitration may expect the application of the same level of document production as under the laws of its home country, e.g., under German law. In such a case, the question arises whether the arbitral tribunal has a duty to find a middle path between the IBA Rules and the ZPO (Ger.).

25. E.g. Cohen, 432.
26. See Art. 9(3)(a) IBA Rules.
27. Elsing, 123.

The arbitral tribunal should have the possibility of using the IBA Rules as guidelines in this case. Such a solution would not unduly favour the party experienced in international arbitration. Both parties must accept that the arbitral tribunal may apply international standards if the parties have different expectations on the extent of document production. This example demonstrates that a mandatory compromise would be too strict. As a result, an arbitral tribunal does not have the duty to find a compromise between different procedural expectations of the parties.

§7.05 PROCEDURAL NEUTRALITY

Procedural neutrality is frequently mentioned as an objective of international arbitration.[28] Neutrality is important since distrust of the home courts of the opposing party is one of the most important reasons for choosing international arbitration.[29] Therefore, arbitral tribunals should not conduct arbitral proceedings as if they were national courts in one of the parties' home jurisdictions. The application of procedural laws of one of the parties' home jurisdictions would unduly favour the party that would benefit from being much more familiar with the procedural characteristics than the opposing party.[30]

Current doctrine provides different definitions of procedural neutrality. According to one authority, procedural neutrality excludes the application of unfamiliar procedures before a foreign tribunal.[31] Another definition of procedural neutrality is similar, but contains an additional element that excludes the influence of a party's home jurisdiction and judicial system:

> Finally, international arbitration is intended to be neutral, in that it usually seeks to provide a dispute resolution mechanism that takes place outside either party's home jurisdiction and judicial system, and that adopts no single nation's litigation procedures.[32]

This definition contains two elements. First, the proceedings should take place outside each party's home jurisdiction or judicial system. It can be agreed with this part of the definition which does not relate to document production.

The second part of the definition excludes the application of a single nation's litigation procedures. For example, this definition would exclude Swedish arbitrators applying in a dispute between a Polish and an English party the provisions of the Swedish court procedure. Moreover, pursuant to the above-cited definition, procedural neutrality would be violated in this case, since Swedish law is unfamiliar to both parties.

However, since both parties are in the same situation, the application of Swedish law does not seem to be a violation of procedural neutrality. Nonetheless, the

28. Born, Int. Comm. Arb., Vol. II, 2123; See Borris, 18; Bühring-Uhle, 17; see Derains, Preuve, 783; Lynch, 12; Park, Forum, 164.
29. Bühring-Uhle, 17.
30. Born, Int. Comm. Arb., Vol. II, 2123 et seq.; Borris, 18; Bühring-Uhle, 17.
31. Lynch, 12 et seq.
32. Born, Agreements, 2.

application of national laws of civil procedure is not recommendable for international arbitration (see Chapter 8 section §8.09 [B] *infra*).

Moreover, a violation of procedural neutrality exists not only when an arbitral tribunal applies the entire national law of civil procedure of a party's home jurisdiction. Already the application of a part of such national law seems to be difficult to conciliate with the principle of procedural neutrality. In the above example, it would be inconsistent with procedural neutrality and unduly favour the English party if the arbitral tribunal applied the provisions of the CPR on disclosure. In other words, already the application of some procedural provisions of one party's home jurisdiction is not in accordance with procedural neutrality.

Consequently, this book suggests using this definition, but slightly modifying its wording:

> Procedural neutrality requires that the dispute resolution mechanism takes place outside of both parties' home jurisdictions and judicial systems, and that procedural rules of a party's home jurisdiction are not adopted.

As a consequence, neutrality is a negative criterion. It indicates only how the arbitral procedure should not be established. An arbitral tribunal should not apply the rules of one of the parties' home jurisdictions to document production. Apart from this exclusion, the concept of procedural neutrality does not indicate how an arbitral tribunal should establish procedural rules on document production.

§7.06 DISCRETION OF THE ARBITRAL TRIBUNAL

The simplest answer to the question of legal principles would be that unless the parties agreed on procedural rules, the establishment of procedural rules is at the mere discretion of the arbitral tribunal. In other words, this means that the arbitral tribunal would take into account only considerations of due process when establishing procedural rules on document production (see Chapter 10 section §10.06 *infra*).

There are sound reasons for this theory. The broad discretion of arbitral tribunals is deeply rooted in international arbitration.[33] National legislations and institutional rules provide that an arbitral tribunal can determine the arbitral procedure unless the parties agreed on procedural rules (see Chapter 4 *supra*). Furthermore, according to the traditional concept of arbitration, an arbitral tribunal conducts the arbitral proceedings as it considers appropriate (see Chapter 8 section §8.03 [C] *infra*).

From the point of view of national law, this approach is perfectly justified. In addition, flexibility is an important objective of international arbitration.[34] If the establishment of the procedural rules is at the mere discretion of the arbitral tribunal, flexibility is not restricted. The arbitral tribunal is free to adapt the procedure to the specifics of the case.

However, the previously discussed objectives of international arbitration also need to be taken into account. In particular, the concept of discretion of the arbitral

33. E.g. Born, Int. Comm. Arb., Vol. II, 2145.
34. E.g. Bernini, Flexibility, n. 3-9.

tribunal is in tension with that of common expectations of the parties. On the one hand, discretion signifies that the arbitral tribunal is free to determine the procedural rules.[35] On the other hand, the concept of common expectations of the parties gives guidance as to how an arbitral tribunal should establish procedural rules on document production (see Chapter 7 section §7.02 *supra*). Thus, the principle of common expectations of the parties limits to a certain extent the discretion of the arbitral tribunal to establish procedural rules.

As a result, the establishment of procedural rules is at the mere discretion of the arbitral tribunal only from the point of view of national laws and institutional rules. Principles and objectives of international arbitration give guidance as to how arbitrators should use their discretion. An arbitral tribunal has to take into account the common expectations of the parties. In addition, an arbitral tribunal should not apply the rules of one of the parties' home jurisdictions to document production pursuant to the principle of procedural neutrality (see Chapter 7 section §7.05 *supra*).

Besides these two principles, there do not seem to be further principles of international arbitration that need to be taken into consideration. Apart from the exclusion of procedural rules of either party's home country, principles of international arbitration do not determine how an arbitral tribunal should establish rules on document production if the parties do not have common expectations about the extent of document production. In these situations, the establishment of procedural rules on document production is at the mere discretion of the arbitral tribunal.

§7.07 PRESUMED INTENT, HYPOTHETICAL BARGAIN AND IMPLIED TERMS

[A] Introduction

The chapters above examined to what extent procedural rules on document production can be based on principles of international arbitration. This chapter searches for alternative solutions based on contract law.

Virtually every contract law provides mechanisms for filling gaps in a contract. The filling of some gaps is almost a necessity, since it seems to be impossible for parties to foresee all circumstances that could be a matter of dispute.[36] In addition, many parties lay down only basic rules in their contracts.[37] In such situations, gaps must be filled for the contract to become complete.

Since most arbitration clauses are silent on document production, the question arises as to whether this gap in the contracts can be filled by the application of contractual concepts. In a first step, this chapter analyses the concepts of presumed intent of the parties, of hypothetical bargain and of implied terms. The first principle applies under the legislation of some civil law countries, the second under US law and the third under English law.

35. See Born, Int. Comm. Arb., Vol. II, 2145.
36. Austen-Baker, n. 2.24; Bénabent, n. 276; Charny, 1819; Posner, 147; Sullivan & Hilliard, n. 8.18.
37. Charny, 1819.

Subsequently, this chapter analyses whether the national contract law of the seat of arbitration applies to the filling of gaps in the arbitration procedure. For example, it will be examined whether an arbitral tribunal must respect the presumed intent of the parties when it establishes the procedural rules of an arbitration seated in Germany. Finally, the question will be answered whether the concepts of presumed intent of the parties, hypothetical bargain and implied terms are similar enough that they can be considered to be a commonly accepted basis for establishing procedural rules in international arbitration.

[B] Presumed Intent of the Parties in Some Civil Law Countries

Under the contract laws of some countries, in particular under Swiss,[38] German[39] and Austrian[40] law, gaps in a contract can be filled according to the presumed intent of the parties (also called hypothetical intent of the parties). Under these laws, filling a gap in a contract requires that the parties did not agree on a contractual provision for a legal issue that needs to be resolved by the judge.[41]

Under Swiss,[42] German[43] and Austrian[44] law, the judge has to find a solution that the parties would have reasonably agreed on if they had considered the problem. Pursuant to some Swiss commentaries, the judge should take into account the interests of the parties and the balance of power between them at the conclusion of the contract.[45] According to this opinion, the judge should search for a solution that the parties would have actually agreed on, even in cases where one party had more negotiation power and was able to impose one-sided contract terms.[46]

According to other Swiss commentaries, the court should fill gaps according to the principle of good faith.[47] This approach does not try to guess the contractual solution that the parties would have effectively agreed upon, but it rather determines how reasonable and serious parties would have filled the gaps in the contract had they been in the same situation.[48] This second approach also applies under German law.[49] According to German doctrine, it is generally assumed that the parties intended a fair

38. B. Berger, n. 1128; Corboz, Contrat, 279; Furrer & Müller-Chen, 124; Gauch, Verträge, 224; Hadžimanović, 214; Huguenin, n. 306; Kramer & Probst, n. 200; Zeller, 489.
39. M. Ahrens, § 133 n. 28; Backmann, § 157 n. 30; Dörner, § 157 n. 4; Ellenberger, § 157 n. 7; Jauernig, § 157 n. 4; Roth, § 157 n. 30; Sandrock, 102; Wiedemann, 1281.
40. M. Binder, ABGB, § 914 n. 179 et seqq.; Bollenberger, § 914 n. 9; Graf, 10 et seq.
41. E. Bucher, Art. 2 n. 8; Corboz, Contrat, 279; Gauch et al., n. 1257; Dörner, § 157 n. 4; see Huguenin, n. 299; see Kramer & Probst, n. 199; Piotet, 370.
42. E. Bucher, Art. 2 n. 17; Corboz, Contrat, 279; Furrer & Müller-Chen, 124; Gauch, Verträge, 224; Hadžimanović, 214; Huguenin, n. 306; Kramer & Probst, n. 200; Piotet, 376; Yung, 63.
43. Backmann, § 157 n. 30; Brinkmann, § 157 n. 24; Dörner, § 157 n. 4; Ellenberger, § 157 n. 7.
44. M. Binder, ABGB, § 914 n. 182; Bollenberger, § 914 n. 9; Graf, 10 et seq.
45. E. Bucher, Art. 2 n. 16; see Huguenin, n. 309; Koller, 150.
46. Koller, 150.
47. Corboz, Contrat, 281; Gauch, Verträge, 224; Hadžimanović, 217 et seq.; Yung, 63.
48. Corboz, Contrat, 281; Gauch et al., n. 1260; Yung, 63.
49. Backmann, § 157 n. 30; Brinkmann, § 157 n. 24; Ellenberger, § 157 n. 7; Jauernig, § 157 n. 4; Roth, § 157 n. 31.

balance between performance and consideration in the case of an exchange contract.[50] Therefore, unexpected advantages and disadvantages are typically shared equally under German law.[51]

The concept of presumed intent of the parties is controversial even in countries where it is applied.[52] According to a well-known Swiss professor, the hypothetical intent of the parties corresponds to the imagined intent of reasonable and respectable parties and has nothing to do with the reality.[53] Another Swiss professor concludes that the application of the concept of presumed intent of the parties does not lead to one solution, but to a range of possible solutions.[54] An Austrian author stresses that a party should be bound by its intent only if the party expressed such intent.[55] By definition, a presumed intent is never expressed.[56]

In addition, the concept of hypothetical intent of the parties is not common to all civil law countries. Under French law, judges can fill gaps in a contract based on equity, usage or statutory law.[57] The French Civil Code[58] (hereinafter 'CC (Fr.')) does not provide that the presumed intent of the parties can be taken into consideration when gaps of contracts are filled.[59] A French commentary equates the determination of what the parties would have agreed on with divination.[60]

The concept of presumed intent of the parties is derived from the principle of party autonomy.[61] The concept aims to refine the approach of the parties when deciding an issue that the parties did not consider at the conclusion of the contract.[62] However, the presumed intent is a fictive intent, since the parties never actually had this intent.[63] It is rather the judge or the arbitrator who speaks for the parties when this concept is applied.[64] Therefore, it is difficult even for the parties to say in advance what a judge would consider to have been their intent if they had considered the issue in question.[65] Hence, the concept of presumed intent of the parties is not closely related to the principle of party autonomy, even if the former is derived from the latter.[66]

50. Busche, § 157, n. 47; Roth, § 157 n. 30.
51. Ellenberger, § 157 n. 7.
52. Gauch et al., n. 1259 (with further references); Graf, 13.
53. Gauch, Mensch, 190 et seq.
54. Koller, 147.
55. Graf, 30.
56. *Ibid.*, 31.
57. Article 1135 CC (Fr.); cf. Art. 1160 CC (Fr.).
58. Last modification: 22 Mar. 2015.
59. Article 1135 et 1160 CC e contrario; Bénabent, n. 276; see Fabre-Magnan, 497.
60. Bénabent, n. 276.
61. Giger, 315; Grabau, 155; Yung, 50.
62. Koller, 149; Wiedemann, 1281.
63. Graf, 18; Hadžimanović, 217; Yung, 62.
64. Gauch, Mensch, 200 et seq; see Giger, 314; see Koller, 148; Kramer & Probst, n. 200; Sandrock, 124; Yung, 48.
65. Cf. Wiedemann, 1281.
66. Roth, § 157 n. 4, cf. Graf, 32.

[C] Hypothetical Bargain under US Law

Under US law, similar forms of contract interpretation are discussed.[67] According to the hypothetical bargain approach, judges examine what the parties would have agreed on if they had considered the issue at the conclusion of the contract.[68] In other words, analysis involves how the parties would have bargained to resolve the dispute if they had known during the negotiations that the specific problem would arise.[69] A US author suggests conducting an economic analysis that examines how the parties would have assigned the risk.[70]

Other approaches discussed under US law analyse what rules most people would have chosen in the place of the parties or which rules are the most efficient.[71] These approaches are similar to the analysis applied under German law. Under German law, the terms that reasonable and serious parties would have chosen in the situation of the parties are implied (see Chapter 7 section §7.07 [B] *supra*).

Like the concept of presumed intent in civil law countries, the above-mentioned approaches are subject to controversy in the United States.[72] In particular, critics question whether judges are able to determine the best terms in retrospect.[73]

The hypothetical bargain approach is more concrete than the concept of presumed intent of the parties. Under the above-mentioned civil laws, the judge examines only which rules the parties would have agreed on if they had considered the issue in an abstract manner, but does not suppose that the parties would have known the specific situation in advance. In contrast to German courts, US courts do not examine how reasonable persons would have resolved the issue in the situation of the parties, but how the parties in question would have negotiated the terms. Despite these differences, the hypothetical bargain approach can be considered similar to the concept of presumed intent of the parties.

[D] Implied Terms under English Law

English law distinguishes between express and implied terms.[74] As the name suggests, express terms are those that the parties expressly agree on.[75] Besides express terms, a contract may contain terms implied by statute.[76] Under restrictive conditions, terms can also be implied by courts.[77]

67. Bix, 56 et seq.; Charny, 1877 et seq.
68. Bix, 57; Charny, 1815.
69. Charny, 1815 et seq; Posner, 134.
70. Posner, 135.
71. Bix, 56.
72. Posner, 137.
73. *Ibid.*, 137.
74. McKendrick, 153.
75. *Ibid.*, 153.
76. Austen-Baker, n. 2.14.
77. Macdonald, n. 3.20; see Peel, n. 6-033.

Traditionally, the interpretation of a written contract was limited to a textual interpretation.[78] According to the so-called parol evidence rule, extrinsic evidence such as correspondence or oral evidence cannot be used to add, vary or contradict a contract under English law.[79] However, authorities have developed numerous exceptions to this principle.[80] An English commentary considered that the parol evidence rule has become rather a presumption than a rule.[81]

Nonetheless, the approach of English law to contract interpretation is, still today, narrower than that of many other laws.[82] An English commentary states that judges should not, in principle, amend the contract of the parties:

> In the absence of statutory provision the cases in which the Courts will imply a term into a contract are strictly limited: it is not their task to make contracts for the parties concerned, but only to interpret the contracts already made.[83]

Another English commentary considers the implication of terms contrary to the sanctity of contract and the idea of freedom of contract: 'Neither Parliament nor the court is a party to a contract and it is therefore not for the court to intermeddle in the terms the parties have agreed.'[84] Some commentaries consider it an artificial process to impute an intention to the parties.[85]

Implied terms are one of the exceptions to the parol evidence rule.[86] In particular, English courts may imply terms if they correspond to a custom.[87] Similarly, standardized terms in common relationships may be implied into contracts.[88] In addition, English case law has developed two tests for the implication of terms: The 'business efficacy test' and the 'officious bystander test'.[89]

The 'officious bystander test' requires that the parties would immediately answer, 'Oh, of course!' if an officious bystander suggested an express clause in the agreement.[90] The 'business efficacy test' is fulfilled if implying the term is necessary for the contract to be workable.[91] It is not sufficient that it would be reasonable to imply the term.[92] Typically, the results of the two tests coincide.[93]

The two tests aim at limiting implied terms to exceptional circumstances as a commentary stated: 'These tests have confined the search for the parties' intention to its least disputable area and have thus provided some assurance that the courts are not rewriting the parties' bargain.'[94]

78. Beatson et al., 138; McKendrick, 162.
79. Beatson et al., 138; see Elliott & Quinn, 123; McKendrick, 153; Peel, n. 6-013; Sullivan & Hilliard, n. 8.55.
80. Beatson et al., 138.
81. Macdonald, n. 3.5.
82. McKendrick, 167.
83. Beatson et al., 151.
84. Austen-Baker, n. 1.03.
85. McKendrick, 162; see Sullivan & Hilliard, n. 8.26.
86. Peel, n. 6-016.
87. Beatson et al., 157 et seqq.
88. *Ibid.*, 154 et seqq.
89. *Shirlaw v. Southern Foundries* [1939] 2 KB 206;*The Moorcock* (1889) 14 PD 64; Beatson et al., 152 et seqq.; Elliott & Quinn, 130; Peel, n. 6-034 et seq.
90. *Shirlaw v. Southern Foundries* [1939] 2 KB 206, 227; Beatson et al., 152.
91. Beatson et al., 152; Elliott & Quinn, 130; Macdonald, n. 3.20.
92. Beatson et al., 153.
93. Macdonald, n. 3.20; Peel, n. 6-036.

The implication of terms is very common in oral contracts, where parties usually agree on only the most basic points.[95] However, English courts rarely imply terms in detailed written agreements.[96]

Like the presumed intent in civil law countries, implied terms are designed to give effect to the parties' intentions.[97] The main difference between implied terms under English law, on the one hand, and the presumed intent of the parties under Swiss, German and Austrian law and the hypothetical bargain approach under US law, on the other, is that the range of application of implied terms is more limited. In contrast to the hypothetical intent of the parties under German law, the court does not examine what reasonable persons would have agreed upon in the position of the parties, but what the actual parties would have agreed on.[98]

[E] Would These Concepts Allow Filling Gaps in Arbitration Agreements?

The question arises whether the concept of presumed intent of the parties, the hypothetical bargain approach or implied terms would allow implying procedural rules on document production in arbitration agreements. This issue is particularly interesting, since it is new and relates to concepts of national law that some arbitrators may have in mind when they establish procedural rules.

Since virtually all contract laws provide mechanisms to fill gaps in a contract, the question arises whether these concepts are similar enough to provide a common basis for the establishment of procedural rules on document production in international arbitration.

The concept of presumed intent of the parties and the hypothetical bargain approach could fill the gaps in arbitration agreements. According to these concepts, arbitral tribunals would have to apply such rules to document production as the parties would have agreed on if they had considered the problem of document production at the moment of the conclusion of the contract. Even if there are some differences between the requirements of various national laws, these concepts are sufficiently similar for an application in international arbitration. The underlying idea is the same for both approaches. The judge examines how the parties would have filled the gap in the contract at the moment of its conclusion.

Under English law, the implication of terms on document production would require a custom, their qualification as standardized terms in common relationships or the fulfilment of the 'business efficacy test' or the 'officious bystander test'. An arbitration agreement does not require a clause on document production to be

94. Macdonald, n. 3.20.
95. Sullivan & Hilliard, n. 8.18.
96. Richards, 151; Sullivan & Hilliard, n. 8.22.
97. Peel, n. 6-032.
98. Elliott & Quinn, 131.

workable. In addition, the parties would not consider that it is obvious that their contract includes a clause on document production. Therefore, a clause on document production neither fulfils the 'business efficacy test' nor the 'officious bystander test'. In addition, rules on document production cannot be implied by custom nor have they become standardized terms. Hence, the English law concept of implied terms cannot be used as a basis for procedural rules on document production in international arbitration.

As a result, only the concept of presumed intent of the parties and the hypothetical bargain approach could be a basis for establishing procedural rules on document production in international arbitration. However, the requirements of English law would not allow implying terms on document production in international arbitration agreements.

[F] No Application of Contractual Law of Seat of Arbitration

Given that the concept of presumed intent of the parties and the hypothetical bargain approach would allow filling the gaps in arbitration agreements, the question arises whether these concepts should be used to establish procedural rules on document production in international arbitration. This section examines whether the contract law of the state where the arbitration has its seat should be applied to fill gaps in the arbitration procedure.

Several authors from civil law countries have considered the issue of whether procedural rules in international arbitration should be established based on the hypothetical intent of the parties. They came to different conclusions.

According to several German authors, an arbitral tribunal seated in Germany is bound to take the hypothetical intent of the parties into consideration (see Chapter 10 section §10.05 [B] *infra*). A German scholar even defends the opinion that a violation of this duty is a ground to set aside the award (see Chapter 10 section §10.05 [B] *infra*).

Pursuant to a Swiss commentary, it results from Article 182(2) PILA (Switz.) that there is no need to apply the principles of Swiss contract law to fill gaps in international arbitration proceedings.[99] Similar to § 1042(4) ZPO (Ger.), Article 182(2) PILA (Switz.) provides that the arbitral tribunal establishes the arbitral procedure if the parties did not agree on the procedural rules (see Chapter 4 section §4.02 [A] *supra*).

Indeed, the mandatory application of a national contract law to the establishment of procedural rules in international arbitration proceedings seems to be irreconcilable with the autonomy[100] of international arbitration. Virtually no national arbitration statutes, including German law, provide for the application of the national contract law of the seat of arbitration to the establishment of the arbitration procedure (see Chapter 4 section §4.02 *supra*). Therefore, it seems to be highly questionable to conclude that

99. Schneider & Scherer, Art. 182 n. 6.
100. See generally Alvarez, Autonomy, n. 6-1 et seqq.

an arbitral tribunal seated in Germany is bound to take the provisions of German contract law into account when it establishes procedural rules.

As a general rule, the national contract law of the seat of arbitration should not be applied to establish procedural rules on document production.

[G] The Concepts Are Not Internationally Recognized

The non-application of a single contract law to fill gaps in the arbitration agreement does not necessarily mean that the concept of presumed intent of the parties and the hypothetical bargain approach are not applied to establish procedural rules. The question arises as to whether these concepts can be considered internationally recognized principles that should be applied in international arbitration proceedings.

The concept of presumed intent of the parties or the hypothetical bargain approach is applied in five of the seven examined jurisdictions, including jurisdictions with completely different legal traditions such as Germany and the United States. Even if this analysis is geographically limited, it still indicates that these concepts are relatively widely recognized. In addition, these principles are not entirely unfamiliar to English lawyers, since English courts also take into consideration the hypothetical intent of the parties in the limited cases in which they consider that the 'business efficacy test' or the 'officious bystander test' is fulfilled.

Nonetheless, it can be expected that most English and French practitioners would fiercely oppose the application of the concept of presumed intent of the parties or of the hypothetical bargain approach in international arbitration. It is a matter of principle, since the power of arbitrators to amend the contract depends on the interpretation of party autonomy. As English and French law are still influential beyond the borders of these countries,[101] the points of view of English and French law have considerable weight in international arbitration.

In addition, these concepts are controversial in the countries where they are applied (see Chapter 7 section §7.07 [B] *supra*). Thus, it can be expected that many practitioners from these countries would be sceptical towards the application of these concepts in international arbitration. For these reasons, the concept of presumed intent of the parties and the hypothetical bargain approach can hardly gain worldwide acceptance. However, a broad international consensus would be required to implement principles of national law into international arbitration. Without such a consensus, the application of these principles may be considered an unwelcome intrusion of national law that conflicts with the autonomy of international arbitration.

As a result, this book does not consider that the presumed intent of the parties and the hypothetical bargain approach should be recognized as principles of international arbitration.

101. Austen-Baker, n. 1.02 (referring to English law).