

Art. 3 IBA-Rules of Evidence - a Commentary on the Production of Documents in International Arbitration

**by: Professor Hilmar Raeschke-Kessler
Rechtsanwalt beim Bundesgerichtshof
Karlsruhe, Germany**

Introduction

1. The IBA-Rules on the Taking of Evidence in International Commercial Arbitration – IBA-Rules - were adopted by the IBA-Council in June 1999. They were prepared by a working group, the members of which represented major legal systems mainly from the Anglo-American and continental legal cultures.¹ They reflect – by now undisputed – best practice in international arbitration. They are also frequently used in international investment arbitrations based on bilateral investment treaties – BITs – or multilateral treaties like NAFTA.
2. Art. 3 of the IBA-Rules deals with documents which the parties wish to introduce as evidence into the arbitral proceedings. At least in civil law countries, documents are regarded as the most reliable type of evidence in arbitration.² The IBA-Rules refer to three classes of documents which procedurally are to be treated differently. The first class pertains to documents which are at the party's own disposal so that it can introduce these documents as evidence into the arbitral proceedings without any problem, Art. 3 sect. 1. The second class – regulated in Art. 3 sect. 2 through 8 - relates to documents which the party wants to use as evidence for its submissions but cannot produce on its own because they are in the possession of either the other party of the arbitral proceedings or of a third party outside of the arbi-

¹ Members were: *Hans Bagner*, Stockholm, Schweden; *John Beechey*, London, England; *Jaques Buhart*, Paris, France; *Peter S. Caldwell*, Hong Kong; *Bernardo M. Cremades*, Madrid, Spain; *Emmanuel Gaillard*, Paris, France; *Paul A. Gelin*, Paris, France; *Hans van Houtte*, Brussels, Belgium; *Pierre A. Karrer*, Zurich, Switzerland; *Wolfgang Kühn*, Düsseldorf, Germany; *Jan Paulsson*, Paris, France; *Hilmar Raeschke-Kessler*, Karlsruhe, Germany; *David W. Rivkin*, New York, USA; *Giovanni M. Ughi*, Milan, Italy; *Van Vechten Veeder QC*, London, England; *OLO de Witt Wijnen*, Rotterdam, Netherlands. At that time voices from Asian countries were still counted as belonging to the Anglo-American legal culture (Hongkong, Singapore). The same holds true for the Arabic world. This has changed in the mean time. A commentary on the IBA-Rules has been prepared by some members of the working group, *IBL 2000*, 16 et sequ..

David Rivkin and *Hilmar Raeschke-Kessler* have been rapporteurs on Art. 3.

² *Redfern/Hunter*, *Law and Practice of International Commercial Arbitration*, 4. ed. 2004, ann. 6-69.

tration. The third class refers to documents which neither party has introduced or wants to introduce as evidence, but which are seen as relevant and material by the arbitral tribunal because of the pleadings of the parties. The arbitral tribunal itself can then order one of the parties to produce these documents, Art. 3 sect. 9. In addition Art. 3 contains several general principles for the treatment of documents as evidence by the parties and by the arbitral tribunal, see Art. 3 sect. 11 and 12. This paper deals only with Art. 3 as it presently stands (*de lege lata*). It does not comment on the “work in progress” by a sub-committee of Committee D presently reviewing the IBA-Rules (*de lege ferenda*).

The IBA-Rules including its Art. 3 already deal with **electronic documents** as the “Definitions” in its Art. 1 make clear. Whether this is sufficient in view of the extra ordinary developments in electronic and computerized communications, is at present hotly debated, but not the subject of this paper, the aim of which is to describe the present “*status quo*”. Everything being said below therefore applies likewise to documents stored electronically.

It must be noted at the beginning that the entire IBA-Rules including its Art. 3 are not set in stone. Art. 3 may be adopted in any way that fits the purpose of any actual arbitration, including investment arbitrations.

I. Production of Documents Available to One Party, Art. 3 sect. 1

Each party shall introduce those documents available to it that it wishes to use as evidence for its allegations and submissions into the arbitral proceedings in good time.³ Usually parties will attach the documents they want to rely on as exhibits to their written pleadings. There are no fundamental differences between civil law countries and common law countries with regard to the production of documents available to a party. As far as differences do exist, they are mostly of a practical kind and concern above all the treatment of presented documents in the party’s own written pleadings.

In any case, the arbitral tribunal is free to specify the way the parties are to present and discuss the documents submitted by them. Such an indication by the arbitral tribunal will generally be useful.⁴ Increasingly the tendency can

³ See Art. 23 Model Law, Art. 20 sect. 2 ICC-Rules, Art. 15.6 LCIA-Rules.

⁴ See UNCITRAL-Notes on Organizing Arbitral Proceedings, sect. 42 and 48 et seq.

be observed that lawyers – not only from common law countries - try to “flood” the arbitral tribunal and the other party sometimes with thousands of pages of documents, without presenting or explaining the purpose or use of these documents in the party’s line of evidence. This tendency should be stopped by the arbitral tribunal right from the beginning. The first opportunity to do so is normally a procedural order issued prior to or during a preparatory conference – when arbitral tribunal and parties meet for the first time to discuss and decide on the management of the arbitration in progress.

1. Recipient of the Submitted Documents

The party submitting documents available to it that it wants to rely on, must present these documents to the arbitral tribunal and to the other parties of the arbitral proceedings. This guarantees from the beginning that the other parties can reply in writing and in due course to the documents submitted, and if necessary present own evidence in defense of the content of the documents, before the hearing takes place, thereby maintaining their right of due process. The obligation to file the document with the Arbitral Tribunal ensures cost efficiency and is a safeguard against fishing expeditions for documents which are neither relevant nor material to the outcome of the case.

2. Time-limits

Since the arbitral tribunal usually sets time-limits for the submission of written pleadings⁵, it is only natural that time-limits should also be set for the production of documents. Art. 3 sect. 1 therefore regulates that all documents available to the party introducing them must be submitted “within the time ordered by the arbitral tribunal”. This prevents the other parties from being surprised or overrun by new documents as evidence close to the hearing or even in a hearing.

3. Second Round of Documents to be Submitted

Allegations or documents submitted by the other party, the content of written Witness Statements⁶ or the content of an Expert Report⁷ may make it

⁵ See Art. 4 LCIA-Rules, Art. 42, 43, 56 WIPO-Rules, sect. 48 UNCITRAL-Notes.

⁶ Art. 4 sect. 4 IBA-Rules.

⁷ Art. 6 IBA-Rules: a report by a tribunal-appointed expert; Art. 5 IBA-Rules: reports by party-appointed experts.

necessary for one party to submit additional documents to further strengthen its point of view. Art. 3 sect. 10 makes this possible, the arbitral tribunal setting again time-limits for the production of additional documents during a second round of exchange.

4. Copies as Documents, Art. 3 sect. 11

Usually only copies, not the originals, will be introduced into the arbitral proceedings. Of course the copies have to conform fully to the originals. This obligation is specifically mentioned in Art. 3 sect. 11 and follows from the experience that parties sometimes tend to submit incomplete, glossed over or even forged copies.

The copy of the original must only conform to the document as it was initially established by the author. The recipient of a letter, for example, may later add handwritten notes on that letter. These notes do not belong to the original document of the sender. If the recipient wants to introduce the letter into the arbitral proceedings as a document written by the sender, he may remove from the copy his own handwritten notes on the original because they do not belong to the original document.

This is of course different, if the recipient has written own manifestations of legal importance on the document. If, for *example*, he received an offer to conclude a contract from the sender and signed the document, a contract between sender and recipient will have been concluded by that signature. When introducing this document into the arbitral proceedings, the signature of the recipient must remain visible on the copy. Should the recipient present a copy – with his signature covered up – as evidence for the fact that no contract was concluded, this will constitute attempted forgery.

Art. 3 sect. 11 is applicable to all types of Requests to Produce.⁸

5. Inspection of Originals, Art. 3 sect. 11

The arbitral tribunal may have reason to believe that copies submitted do not conform fully to the originals. It may then order the party which has submitted the copy to present the original of the document for inspection by

⁸ See below sect. II.

the arbitral tribunal and the other parties during an evidentiary hearing according to Art. 8. The other parties may apply for such a procedural order, if they suspect that the copies submitted do not correspond in full with the originals.

Should the party which submitted the copies fail to comply with an order to produce the originals by the arbitral tribunal without giving valid reasons and choose not to produce them for inspection, the arbitral tribunal may draw negative inferences, Art. 9 sect. 4 .

6. Confidentiality, Art. 3 sect. 12

All documents introduced by one party (or by a non-party pursuant to Art. 3 sect. 8) into the arbitral proceedings must be kept confidential by the other parties and the arbitral tribunal. Art. 3 sect. 12 insofar contains an express obligation of confidentiality. The other parties and the arbitral tribunal are therefore not entitled to use the documents presented by one party for other purposes outside of the arbitral proceedings.⁹

Art. 3 sect. 12 is applicable to all documents introduced into the proceedings, regardless of why or how they were introduced.

II. Documents in the Possession of the Opposing Party as Evidence, Art. 3 sects. 2 - 9

One party will often not be capable of producing evidence with documents available to itself, but will know that the other party has the needed document in its possession. The issue of whether and on what conditions one party should be able to request production of documents from another party occupied the IBA working group to a large extent, but the group was able to reach agreement on the principles set out in Art. 3 sects. 2-9 relatively easily.

⁹ It is a debated issue, whether and to what extent an arbitrator may use his knowledge of a document submitted in another separate arbitration, if that document is not introduced into the second arbitration, but may have an influence on its outcome.

1. Principles

1.1. Art. 3 has been based on four principles:

(1) There shall be no US-style pre-trial discovery including depositions. Excluded are also so-called „fishing expeditions“. All of this has no place in international arbitration. The same is true for a „general discovery procedure“. ¹⁰ An arbitral tribunal may not initiate these procedures and require a party to submit all documents and other documentary evidence, including internal memoranda, protocols and expertises for inspection by the other party regardless of whether or not they support the other party's case.

(2) According to the procedural rules of the leading institutions in the field of international arbitration, an arbitral tribunal is to establish the facts of the case „by all appropriate means“. ¹¹ This has always included the competence of the arbitral tribunal to order one party to introduce certain internal documents into the arbitral proceedings upon request of the other party. ¹²

(3) The decision on whether or not a party must introduce internal documents into the arbitral proceedings against its will shall lie solely with the arbitral tribunal. The request of one party stating that it wants the other party to introduce an internal document into the arbitral proceedings is therefore to be directed towards the arbitral tribunal, not towards the other party. Only the arbitral tribunal has the competence to make a decision on the request, should the other party refuse to introduce the requested document. It shall order the production, if it is convinced that the requested documents could be relevant and material to the outcome of the arbitral proceedings.

It follows from this principle that the request to produce internal documents in arbitral proceedings cannot be put before a state court under the guise of an application for interim measures (see Art. 9 UNCITRAL-Model Law). Art. 3 sect. 2 et seq. guarantee that the arbitral tribunal has exclusive juris-

¹⁰ *Berger*, International Economic Arbitration, Kluwer 1993, pp. 430 et seq.; *Born*, International Commercial Arbitration in the United States, Kluwer 1994, p. 837; *Bernstein/Tackabery/Mariott/Wood*, Handbook of Arbitration Practice, Sweet & Maxwell 1998, 2-308.

¹¹ See Art. 20 sect. 1 ICC-Rules, Art. 22.1 (c) LCIA-Rules.

¹² *Jarvin*, The ICC International Court of Arbitration Bulletin, *The new 1998 ICC-Rules of Arbitration*, 1997, p. 40.

diction over the request for production of documents by one party against the other.

(4) If the other party does not want to fulfill the request for production voluntarily, it can defend itself with objections listed in Art. 9 sect. 2. Should it raise any of these objections, the arbitral tribunal must make a decision on the request for production as well as on the objections brought forward against it. The arbitral tribunal will only impose the production of internal documents on the other party against its will in a procedural order if it does not consider the objections raised to be conclusive.

- 1.2. The content of the rules set forth in Art. 3 sects. 2 - 8 follows from the principles (1) – (4). These rules are a well-balanced compromise between the sometimes possibly broader view of the members of the working group from common law countries on the production of internal documents by the other party and the more reserved view of the members of the drafting group from civil law countries. Especially when parties from civil law and common law countries meet in arbitral proceedings, the arbitral tribunal should be careful not to interpret Art. 3 too broadly. In my opinion, it may therefore not authorize a party in international arbitration to inspect or search the files of another party.

2. **Definition of the Request to Produce**

A party which believes that it needs documents from the other party not available to itself in order to be able to prove its submissions in the arbitral proceedings can bring a “Request to Produce” before the arbitral tribunal. Such request is defined in Art. 1: *“Request to Produce’ means a request by a Party for a procedural order by which the arbitral tribunal would direct another Party to produce documents.”*

Should the other party not fulfill the Request to Produce voluntarily, the arbitral tribunal must make a decision on it. This is done by way of a procedural order, in which the arbitral tribunal either grants or rejects the request. Of course it can also grant the request only partially and thereby partially reject it.

3. Requirements for a Request to Produce

A party has to fulfill several requirements set out in Art. 3 if it wishes to file a Request to Produce.

3.1 Time-limit

The Request to Produce is to be made within the time-limit set by the arbitral tribunal for such a request, Art. 3 sect. 2. If the requesting party does not meet the set time-limit and does not excuse this properly, the arbitral tribunal may reject the request on formal grounds.

3.2 Requirements Regarding Content

Art. 3 sect. 3 refers to the required substantive content of the Request to Produce. Its purpose is to prevent fishing expeditions by the requesting party based on claims made at random. At the same time, this is to enable the other party to decide, whether it wants to comply voluntarily with the Request to Produce, Art. 3 sect. 4, or wants to raise objections, Art. 3 sect. 5. The requirements regarding the substantive content of the Request to Produce are also meant to make it possible for the arbitral tribunal to reach a decision on whether it should grant or reject the request, Art. 3 sect. 6.

The arbitral tribunal may grant the Request to Produce only, even though no objections have been raised by the other party, if it is convinced that „the issues that the requesting Party wishes to prove are relevant and material to the outcome of the case“, Art. 3 sect. 6. The content of the request must therefore allow the arbitral tribunal to assess whether or not the requested document is relevant and material to the outcome of the proceedings.¹³

3.2.1 Individual Document

The requesting party is to describe an individual document in such sufficient detail that it can be identified, Art. 3 sect. 3 (a) (i). The description will usually need to be composed of three elements: (1) the presumed author and/or recipient of the document, (2) date or presumed time frame within

¹³ See below sect. 6.

which the document was established and (3) the presumed content of the document.

An example: The English licensee A, who was terminated after a relatively short period of time and who considers the termination to be ineffective, suspects that his German licensor B managed to conclude a new and better licensing agreement with another English company X shortly before he terminated the existing agreement. A assumes that this was the actual reason for the termination. A is therefore claiming damages from B and requests a procedural order according to Art. 3 sect. 2 of the IBA-Rules which requires B to produce his new licensing agreement with X. This new contract between B and X, which A believes exists, need not be set out in only one contractual document. It could also follow from an exchange of letters. A should therefore request the production of either the contract between B and X or the exchange of letters between B and X, which together constitute a contract. A should include in his request the period of time – spring of 1999 – during which these documents were most probably established.

3.2.2 Category of Documents

The requesting party may also request the production „of a narrow and specific (...) category of documents“, Art. 3 sect. 3 (a) (ii). This encompasses a line of same or similar documents, whose common denominator is that they all pertain to one topic, which the requesting party wants to prove with their help. When initiating such a request, the requesting party must again first indicate the presumed author and/or recipient of the documents, the date or time frame within which they were presumably established and the presumed content of the documents.

An example: The parties A and B are disputing whether the defendant B has an implied contractual obligation. This is what claimant A alleges to support his claim. According to the applicable material law, the arbitral tribunal would no longer be able to infer an implied obligation from the contract, if the obligation was specifically discussed during negotiations and was explicitly refused by B, as B alleges and wishes to prove. Should B succeed in proving its allegation, A's claim will have to be dismissed. B knows that the head of the negotiations on the side of A informed its board about each step

of the negotiations and assumes that B's own refusal of that obligation was also part of the information passed on to the board. The board protocols of A concerning the information passed from the head of A's negotiations team to the board about the negotiations with B are „a narrow and specific category of documents“. B should therefore ask the arbitral tribunal in its Request to Produce, to order A to produce those board protocols concerning negotiations with B that contain the issue of B's obligation.

But the category of documents should not open the door for inadmissible fishing expeditions. If a Request to Produce does not concern one certain document but a narrow and specific category of documents, the arbitral tribunal will have to examine very closely, whether or not these documents are actually relevant and material to the outcome of the proceedings.

3.2.3 Description of the Issues

The requesting party is to give “a description of how the documents requested are relevant and material to the outcome of the case”, Art. 3 sect. 3 (b). The content of the requested documents needs to relate to the procedural or substantive allegations made by the requesting party. Only when this has been properly set forth, the arbitral tribunal is in a position to decide if the requested documents are in fact appropriate proof for allegations of the requesting party, which are deemed by the arbitral tribunal to be relevant for the outcome of the arbitration.

A requested document may serve to support own allegations of the requesting party, or on the contrary, may be needed to repudiate allegations made by the other party. The submission of the requesting party regarding the issues must be specific enough for the arbitral tribunal to comprehend clearly for what purpose this party needs the requested documents for its marshalling of evidence.

3.2.4 Statement as to the Relevancy of the Issues

As a matter of efficient and economical proceedings (Preamble, Sect. 1) only those means of evidence should be used in proceedings by the arbitral

tribunal that may be relevant and material to the substantial issues.¹⁴ An arbitral tribunal may therefore only grant a procedural order in favor of the requesting party, when it is convinced that „the issues that the requesting party wishes to prove are relevant and material to the outcome of the case“, Art. 3 sect. 6 (i).¹⁵ It follows from this that the requesting party must show substantially, why in its opinion the issues it wants to prove with the help of the requested documents are relevant and material to the outcome of the case.

3.2.5 Statement Concerning Possession, Custody or Control

Finally the requesting party is also to explain why it cannot produce the requested document itself, namely because the document is not in its possession, custody or control, but in that of the other party, Art. 3, sect. 3 (c). It must also state the facts on which it bases its assumption that the requested document is at the disposal of the other side.

It is the purpose of this provision to prevent unnecessary hassling of the other party by the requesting party. If the other party owns the original document, of which the requesting party already has a copy, the requesting party must present the copy to the arbitral tribunal as its own available document according to Art. 3 sect. 1. Only if the requesting party claims that its copy is forged and therefore differs from the original, while the content of the original alone is relevant to its legal position, it may ask for the production of the original.¹⁶

It may be difficult for an arbitral tribunal to decide what falls under the term „possession, custody or control“.¹⁷ This will generally follow from the scope of the arbitration agreement between the parties. If necessary, the arbitral tribunal will therefore have to determine the scope of the arbitration agreement by interpretation. Should it apply the so-called „group concept“¹⁸, it may order the production of documents that are not owned directly by the other party, but by a member-company of the group, to which the other

¹⁴ See IBA-Rules, Preamble sect. 3, Art. 9 sect.1 and sect. 2(a).

¹⁵ See below sect. 6.

¹⁶ See above sect. I.5.

¹⁷ See below sect. 6.

¹⁸ ICC Award Nr. 4131, Yearbook Commercial Arbitration 1984, p. 130, 134 et seq.; ICC Award Nr. 6519, *Clunet* 1991, p. 1065; *Berger*, supra, p. 159 et seq..

party belongs. But the group-concept should be used restrictively, especially in arbitral proceedings where parties from civil law countries and from common law countries meet.¹⁹ If the arbitral tribunal wants to issue a procedural order concerning the production of documents even though the document belongs to another enterprise that is not formally a party to the arbitral proceedings, it will always have to make sure that the other enterprise is incorporated into the sphere of the arbitration agreement between the parties. Other than that the requesting party and the arbitral tribunal can only fall back on Art. 3 sect. 8.²⁰

3.3 Earliest Period in Time for Request to Produce

The requirements regarding the substantive content of the Request to Produce also determine the earliest period in time when it will make sense for a party to file such request and for the arbitral tribunal to decide on it.

It follows from the requirements regarding its content discussed above that, as a rule, a Request to Produce cannot simply be included by the claimant in a Request for Arbitration according to Art. 4 sect. 3 ICC-Rules or Art. 1 LCIA-Rules. Should the respondent wish to file a Request to Produce, he may not do so simply on the basis of a general Answer to the Request for Arbitration according to Art. 5 sect. 1 ICC-Rules or the Response according to Art. 2 LCIA-Rules. These documents, which are needed to initiate an arbitration proceeding, often contain only very rudimentary information of the dispute. This will of course be different if the Request for Arbitration / Statement of Claim or Answer to the Request / Response consists already of a fully developed legal brief, in which the requesting party has commented on all procedural, factual and legal questions of the arbitral proceedings in great detail – as is customary in some European arbitrations, so that the arbitral tribunal already has a broad enough basis for its decision on whether the request is relevant and material to the outcome of the case at this early stage of the proceedings.

As a rule the arbitral tribunal will not be able to make a decision on the Request to Produce by a party, until the parties have exchanged fully devel-

¹⁹ *Berger*, supra, p. 159 et seq..

²⁰ See below sect. 9.

oped factual and legal submissions in a first round in which all means of evidence available to them have been fully used and discussed. Only then will it be possible for the arbitral tribunal to determine whether the issues that the requesting party wants to prove are relevant and material to the outcome of the case.

4. No Objections by the Other Party: Obligation to Produce, Art. 3 sect. 4

The other party must make up its mind whether it is going to comply with the Request to Produce voluntarily or whether it wants to raise objections against it. Both ways of action presuppose that the arbitral tribunal has forwarded the Request to Produce to the other party without delay, should this not already have been done by the requesting party. If the other party chooses not to raise objections within the time-limit set by the arbitral tribunal, it automatically comes under the duty to produce the requested documents, Art. 3 sect. 4. The arbitral tribunal then merely orders that it must present the requested documents to the tribunal and the requesting party within a certain period of time.

This rule is based on the assumption that the parties are always obliged to actively exercise their procedural rights in an arbitration. If a party has valid reasons to object against the Request to Produce, such as that the document is privileged (Art. 9 sect. 2 (b)), it must do so within the time-limits set by the arbitral tribunal. A non-action by the requested party is regarded as waiver of its procedural right to object.

5. Objections by the Other Party

The other party wishing to defend itself against the Request to Produce, may only do so by presenting its objections in writing to the arbitral tribunal.

5.1 Time-limits

The other party is to present its objections to the arbitral tribunal – and at the same time to the requesting party – within the time ordered by the arbitral tribunal, Art. 3 sect. 5. Should it not excuse any delay sufficiently, the arbitral tribunal need not take its objections into consideration when making a

decision on the request. The tribunal must then merely examine if „the issues that the requesting Party wishes to prove are relevant and material to the outcome of the case“, Art. 3 sect. 6 (i).²¹

5.2 Procedural Objections

First of all, the other party may submit procedural objections against the Request to Produce. These are not explicitly mentioned in the IBA-Rules, but follow from Art. 3 sects. 2 and 3. It may therefore set forth that the Request to Produce is late, because the requesting party did not adhere to the time-limit set by the arbitral tribunal, Art. 3 sect. 2. It can further propound that the requesting party did not fulfill the formal requirements for the Request to Produce according to Art. 3 sect. 3. In case of valid procedural objections, the arbitral tribunal is to deny the request.

5.3 Substantive Objections, Art. 9 sect. 2

The substantive objections which can be raised by the other party against the Request to Produce are listed in Art. 9 sect. 2. They will be discussed below in section 11.

5.4 The Non-existing Document

One important substantive objection has not been included in the catalogue of Art. 9 sect. 2.: the non-existing document, that it is a document which has never existed and leads only a virtual life in the mind of the requesting party. A non-existing document does not come within the scope of Art. 9 sect. 2 (d), which is only concerned with the loss or destruction of documents.

A document which never existed from the very beginning is unable to be produced by the other party. From a logical point of view, no explicit regulation is necessary for such non-existence and non-ability. Art. 3 sect. 2 as well as Art. 9 sect. 2 have as a precondition that a requested document at least existed at one time. Even if a party does not raise objections against a Request to Produce, it only has to produce those documents which are actually in its possession or custody. Obviously, non-existing documents do not

²¹ See below sect. 6.

belong to this category. But if the other party wants to avoid the negative consequences or any negative inferences according to Art. 9 sect. 5, it should in its own interest set forth within the time-limit ordered by the arbitral tribunal for objections that the requested document never existed.

In the *example* mentioned above under *section 3.2.1*, there must actually exist a written licensing agreement concluded between B and X, if A is to be able to request the production of this contract from B. If, though, contrary to the allegation made by A, no written document had been signed by B and X, B should submit among his objections that the desired document never existed, because B and X did not conclude a written licensing agreement with each other.

The question of which party is to prove whether or not a document was actually established and possibly to whose disadvantage a *non liquet* would be, will have to be answered by the arbitral tribunal according to the applicable law governing the burden of proof. In the example above this would normally be A, who carries the burden of proof for his allegations according to general rules of evidence.

6 Decision by the Arbitral Tribunal = Procedural Order, Art. 3 sect. 6

If the other party submits the requested documents and introduces them into the arbitral proceedings on its own without raising any objections against the Request to Produce, there is no need for an explicit decision by the arbitral tribunal concerning this request, Art. 3 sect. 4.²²

6.1 Procedural Order, Art. 3 sect. 6

Should the other party raise procedural or substantive objections against the request, the arbitral tribunal must decide on the Request to Produce and on the objections against it. This is done by way of a procedural order, in which the request is either denied or entirely or partially granted, after the arbitral tribunal has given both parties the opportunity to state their positions, Art. 3 sect. 6. Should the arbitral tribunal entirely or partially grant the request, it

²² See above sect. 4.

orders the other party to present the documents identified by it to the arbitral tribunal and to the other parties of the arbitral proceedings.

The arbitral tribunal may only rule in favour of the requesting party if two requirements are fulfilled. It must *ex officio* be convinced that (1) „the issues that the requesting Party wishes to prove are relevant and material to the outcome of the case“ and that (2) „none of the reasons for objections set forth in Art. 9.2 apply“, Art. 3 sect. 6.

Coming back to the *example* from above under *section 3.2.1*:

B defends himself against the action of A mainly with the submission that the claim for damages made by A has become time-barred according to the applicable law. However, regarding A's Request to Produce concerning B's new licensing agreement with X, B only raises the objection according to Art. 9 sect. 2 (e), namely „grounds of commercial confidentiality“, because of a secrecy-clause in the contract between B and X. The arbitral tribunal will not consider B's objection according to Art. 9 sect. 2 (e) to be a valid one, because B and X cannot agree to keep their new contract secret to the disadvantage of the aggrieved A. The arbitral tribunal however deems the asserted claim to have become altogether time-barred according to the applicable law. Then it must deny A's Request to Produce. The question of whether or not B concluded a new contract with X and with what content is no longer relevant and material to the outcome of the case, Art. 3 sect. 6 (i). It is not decisive that B failed to explicitly plead the Statute of Limitations against A's Request to Produce.

6.2 Procedure to be Followed by Arbitral Tribunal

It is at the discretion of the arbitral tribunal as to how it issues the procedural order according to Art. 3 sect. 6, but it is obliged to hear the parties before deciding on the request and the objections raised against it. It may hold a separate hearing on those issues. If both parties ask for such a hearing, it will generally have to do so, but it may also decide in written proceedings. During its decision-making process the arbitral tribunal must always observe the fundamental rights of the parties concerning fair and equal

treatment and due process. What is by now almost universally used is the so called “*Redfern Schedule*”²³

6.3 No Judicial Review of Procedural Order

A procedural order concerning a Request to Produce is not an interim or partial award. It is therefore not necessary for the arbitral tribunal to give written reasons for it. However, a procedural order is an excellent opportunity to inform the parties in accordance with the Preamble of the IBA-Rules, sect. 3, about the views of the arbitral tribunal as to which issues it regards as relevant and material to the outcome of the case.

In most jurisdictions a procedural order may not be appealed independently before a state court. Setting aside proceedings are reserved for final or at least partial awards, Art. 34 UNCITRAL Model Law (UNCITRAL-ML)²⁴.

²³ *Redfern/Hunter*, Law and Practice of International Commercial Arbitration, 4. ed. 2004, ann. 6-77.

²⁴ Art. 34 UNCITRAL-ML - Application for setting aside as exclusive recourse against arbitral award

1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

2. An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4. The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in

A review of the procedural order will regularly only be possible as part of a setting aside or enforcement procedure, after a final arbitral award has been issued. There a party could claim, for example, that the rejection of the Request to Produce by the arbitral tribunal had violated its right of due process.

7. Review of the Document by a Neutral Expert, Art. 3 sect. 7

A Request to Produce should not make it possible for the requesting party to gain unauthorized knowledge of commercial or other secrets of the other party which are not in the public domain. Therefore grounds of commercial or technical confidentiality or special political or institutional sensitivity are valid objections according to Art. 9 sect. 2 (e) and (f).

The arbitral tribunal generally will be unable to make a decision with regard to the objection on grounds of commercial confidentiality or political sensitivity according to Art. 9 sect. 2 (e) and (f), until it has had an opportunity to review the requested documents. It will therefore normally first order the other party to produce the document for its own exclusive review to be able to decide on the objections raised by the other party.

This procedure does not under all circumstances completely protect the legitimate interests regarding secrecy or confidentiality of the other party. Experience shows that it is not always guaranteed in international arbitration that arbitrators appointed by the parties are really and completely cut off from the appointing parties during the arbitral proceedings. Each experienced arbitrator has his or her own stories of arbitrations where a party had in some way access to the internal dealings of the tribunal. Therefore Art. 3 sect. 7 makes an exception from standard procedure, allowing the arbitral tribunal to appoint an independent and impartial expert, who is bound to confidentiality, to decide on the objection.

In such specific procedure according to Art. 3 sect. 7, the arbitral tribunal will order the other party to produce the requested document to the expert for his review. It may, of course, only do so if it is convinced that the content of the documents requested may be relevant to the outcome of the case.

order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

It is then for the expert to decide whether or not the objection of confidentiality is legitimate. The expert may not forward the document in question to the arbitral tribunal or the other parties until he has made his decision. If he considers the objection of confidentiality to be legitimate, he will inform the arbitral tribunal, which then rules in a procedural order to reject the request on the grounds of the expert's report. Should the expert consider the objection of confidentiality not to be legitimate, he will pass the document on to the arbitral tribunal, which may then decide without restriction on the Request to Produce and the objections raised against it according to Art. 3 sect. 6. The same procedure applies, if the expert considers the objection to be legitimate with regard to some parts or portions of the requested document but not to all of it. He is then to make the confidential part of the document unrecognizable, before he passes the censured version on to the arbitral tribunal.

8. Negative Inferences, Art. 9 sects. 4 and 5

Should one party fail to comply with a procedural order of an arbitral tribunal to produce a requested document, it may be inferred from this failure to comply that the content of the document requested but not produced would be adverse to the interests of that party. This also applies when the other party fails to produce the requested documents even though it did not raise objections against the Request to Produce within the set time-limit.²⁶ The arbitral tribunal may even assume that the content of the requested document, which has not been produced, is true as alleged by the requesting party.

Art. 9 sect. 5 contains a similar rule for the consideration of other relevant evidence that a party has failed to produce upon an order of the arbitral tribunal.

9. Request to Produce Against a Third Party, Art. 3 sect. 8

An arbitral tribunal generally does not have the competence to decide on issues concerning a third party which is not a party to the arbitration, since it derives its competence exclusively from the authority of the parties.

²⁶ See *supra* sect. 4.

9.1 Discretion by Arbitral Tribunal

Should the requesting party demand the production of documents of a third party which is not a party to the arbitration, and which does not provide the document of its own free will, the arbitral tribunal cannot issue a procedural order against it, because it does not have jurisdiction over that third party. The arbitral tribunal can merely take steps available to it according to the legal system under which it operates and ask the competent state courts for assistance in taking evidence, see Art. 27 UNCITRAL-ML²⁵. German state courts as do courts in other countries as well, will render such assistance also to an arbitral tribunal having its seat outside of Germany. However, an arbitral tribunal may only ask for such court assistance, “if in its discretion it determines that the documents would be relevant and material”, Art. 3 sect. 8. This corresponds to the rule in Art. 4 sect. 10 concerning witnesses who are not willing to appear at an evidentiary hearing or to submit a witness statement voluntarily at the request of a party. The state court will only grant such assistance as is available under its own procedural system.

The requirements regarding form and content of the Request to Produce directed against a third party correspond in essence to the requirements listed in Art. 3 sect. 3.²⁶ This follows from Art. 3 sect. 8, 2nd sentence. Until the arbitral tribunal has decided „that the documents would be relevant and material“, Art. 3, sect. 8, 3rd sentence, it may not exercise its discretion concerning the steps it will take to obtain the requested document. This too corresponds in essence to the requirements in Art. 3 sect. 6 (i).²⁷

9.2 No Negative Inferences

If the arbitral tribunal takes those steps that are in its exclusive discretion to obtain the requested documents from a third party and they turn out not to be successful, it may not apply Art. 9 sect. 5 and draw negative inferences

²⁵ Article 27 UNCITRAL-ML - Court assistance in taking evidence

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

²⁶ See *supra* sect. 3.2.

²⁷ See *supra* sect.6.1.

to the detriment of the other party. It must then decide the case according to the general rules concerning the burden of proof, should it deem that the document requested from a third party and not produced by it is of relevance to the outcome of the case.

10. Request to Produce by Arbitral Tribunal, Art. 3 sect. 9

Since the arbitral tribunal is regularly required to establish the facts of the case by all appropriate means,³² it is also entitled to order on its own initiative one party to produce documents which thus far have not been introduced as evidence into the proceedings, Art. 3 sect. 9. It may only do so, though, if it first legitimately assumes that the requested documents are relevant and material to the outcome of the proceedings.

Under these circumstances the arbitral tribunal may not issue a procedural order right from the beginning. It must allow the party being asked to produce a document to raise substantive objections against the request by the arbitral tribunal. The substantive objections available are the same ones that may be raised against the request originating from one party and directed against another.²⁸ Should the requested party raise such objections, the arbitral tribunal must make a decision on them. In doing so, it is bound to the same conditions as when making a decision on objections against a request to produce by one party.²⁹ It may only order the production of the requested documents with the help of a procedural order if it does not consider the objections of the party to be conclusive. Should the requested party fail to comply with the procedural order, the arbitral tribunal may draw adverse inferences according to Art. 9 sect. 5.³⁰

11. Art. 9 sect. 2: Substantive Objections Against the Request to Produce

Substantive objections against a request to produce documents according to Art. 9 sect. 2 (a) – (g) are a necessary counterbalance to ensure the fairness of the arbitral proceedings. They apply to all other means of evidence avail-

³² See Art. 20 sect. 1 ICC Rules.

²⁸ See *supra* sect. 5.3 – 5.4 and *below* sect. 11.

²⁹ See *supra* sect. 6.

³⁰ See *supra* sect. 8.

able and dealt with in the IBA-Rules, like an on-site inspection by the arbitral tribunal itself, Art. 7, or by a tribunal-appointed expert, Art. 6 sect. 3.

11.1. Lack of Sufficient Relevance or Materiality, Art. 9 sect. 2 (a)

Art. 9 sect. 2 (a) states as first valid objection “*a lack of sufficient relevance or materiality*”. While the terms relevance and materiality are similar, there are nuances in meaning. *Relevance* suggests that the document must be useful for the line of evidence by the requesting party in order to establish the truth of its factual allegations, on which its legal conclusions are based. In addition, the term *materiality* means that the arbitral tribunal must deem it necessary that the document is needed as an element to allow complete consideration whether a factual allegation is true or not. If the arbitral tribunal does not require the requested document for its decision making process, because the requesting party has already shown sufficient proof with other evidence available, it may not order the production of the document. This provision reminds the arbitral tribunal to take the principle of reasonability into account when making its decision.

11.2. Legal Impediment or Privilege, Art. 9 sect. 2 (b)

Art. 9 sect. 2 (b) contains the objection of “legal impediment or privilege”, which is especially important for Anglo-American in-house counsel. In common law countries the internal legal report of an in-house counsel to the management is not available to the other party by a discovery procedure.³¹ As far as a witness has the right to refuse to give evidence, documents related to that witness must also not be produced during discovery. For any Anglo-American lawyer engaged in an international arbitration and accustomed to discovery, the objection of legal privilege is an important defense in arbitral proceedings.

The Countries of the European Union with the British exception are an example of a rather different practice, where the notion of legal privilege does not apply to in-house counsel, who are regarded as ordinary employees of a

³¹ Federal Rule Civil Procedure 26 (b)(3), as a result of *Hickman v. Taylor*, 329 US 945 (1947); see to this „work product rule“: *Kane*, Civil Procedure, 1985, pp. 143 et seq..

company. This follows from decisions by the European Court of Justice beginning with *AM&S* of 1982³².

11.3. Objection of Compelling Considerations of Fairness and Equality, Art. 9 sect. 2 (g)

Closely related to Art. 9 sect. 2 (b) is Art. 9 sect. 2 (g), which names as a possible objection “*considerations of fairness or equality of the parties.*” This concerns mainly the objection that the parties may not have been treated fairly and equally during a discovery procedure. Should one party be extensively protected by a system of legal privilege, which is unavailable in the legal system of the other party, the “equality of arms” may be endangered. It is a fundamental right of the parties that they are treated with equality, Art. 18 UNCITRAL ML³³. This objection is especially important for parties from countries like those of the European Union in whose legal system the notion of an extensive legal privilege is not fully developed or even non-existing as far as inhouse counsels are concerned.

An example: During a dispute about the interpretation of a contract, internal documents about the content and result of the negotiations might play a decisive role. In an arbitration a German party could not request the production of internal documents prepared by the in-house counsel of the American party, because they are protected by legal privilege. Its request would have to be rejected because of Art. 9 sect. 2 (b). The American party, on the other hand, would be able to request the production of similar internal documents prepared by the in-house counsel of the German party, because they are not protected by legal privilege. If the arbitral tribunal would issue an order against the German party to produce documents prepared by its in-house counsel, while refusing a similar order against the American party based on the objection of an existing legal privilege, this would result in a considerable imbalance regarding the rights of each party to request the production of internal documents. It is the sole purpose of Art. 9 sect. 2 (g) to eliminate this imbalance.

³² *AM&S v. Commission*, C-155/79, [1982] ECR 1575M; *Akzo/Akros v. Commission*, ECJ T-125/03 and T-253/03 of 17 Sept. 2007, OJ C 269, 10.11.2007, p. 43.

³³ Article 18 UNCITRAL-ML - Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

One party shall only be able to ask for the production of internal documents of the other party as far as itself is required to produce documents of the same type, when referring to Art. 9 sect. 2 (b) for its own protection. Art. 9 sect. 2 (g) suggests especially to parties from a civil law background that they should – for their own protection – be informed about the extent of the legal privilege of the American side well in advance, in order to be able to use the objection in Art. 9 sect. 2 (g) effectively.

11.4. Objection of Unreasonability or Impossibility, Art. 9 sect. 2 (c) and (d)

According to Art. 9 sect. 2 (c) a party can object that it would be an unreasonable burden to produce the requested evidence. There may be many different reasons for such unreasonability. It is at the discretion of the arbitral tribunal to decide on these reasons. For example, it might be obvious to the arbitral tribunal, because of other documents or witness statements already produced, that these are sufficient for the requesting party's line of evidence. In such a case it would be unreasonable to require the other party to additionally produce an internal document. The objection contained in Art. 9 sect. 2 (c) can overlap with the objection in sect. 2 (a).

Art. 9 sect. 2 (d) is self-explanatory and concerns documents that have been lost or destroyed.

11.5. Objection on Grounds of Confidentiality or Political Interests, Art. 9 sect. 2 (e) and (f)

The objections mentioned in Art. 9 sect. 2 (e) include compelling grounds of commercial or technical confidentiality of one party and therefore aim to protect valid business secrets. Art. 9 sect. 2 (f) refers to compelling grounds of political sensitivity.

It should be obvious that a request to produce may not be used by one party to gain unwarranted insight into business secrets of the other party. Art. 9 sect. 2 (f), on the other hand, was added upon suggestion of Professor *Böckstiegel* and Professor *Hermann*, then Secretary of UNCITRAL. The reason for this provision is to allow the protection of compelling political interests of international institutions such as the UN, the World Bank or the IMF, as far as these institutions conclude contracts containing arbitration clauses.

The same is true for compelling confidentiality interests of governments. *Per example* in arbitral proceedings concerning an arms procurement contract between a country and an arms producer, it should not be possible for the producer to require the production of documents that are “secret” on a NATO level. It is for the arbitral tribunal to develop the necessary feeling combined with diplomatic instincts, whether it regards such political considerations to be compelling.

If the IBA-Rules are used in **investment arbitrations** based on a BIT, NAFTA or ICSID procedure, a state as responded may try to abuse the objection of political interest, thereby eliminating any chance for the claimant to prove its case. Most of the facts which have given rise to the investment arbitration will have occurred within the state. An arbitral tribunal dealing with such objections by a state or state entity must carefully balance the interests of the claimant to be able to prove its case against the interest of the state not to disclose certain facts. In case of doubt, it are the claimants’ rights under the BIT or other investment treaty, which result from an obligation of the state as part of public international law, which point the way according to which the arbitral tribunal will decide.

11. 6. Protection of Confidentiality concerning Documents Produced, Art. 9 sect. 3

Should an arbitral tribunal order the production of documents containing confidential information of the requested party, which needs to be protected, it may in its discretion provide at the same time for measures of protection concerning the way these documents are inspected, Art. 9 sect. 3. It may order that the documents are to be produced exclusively to an independent and impartial expert bound to confidentiality, chosen by the arbitral tribunal. The tribunal-appointed expert will then inspect the document and present his findings to the arbitral tribunal and the parties, taking justified confidentiality requirements into consideration, thereby not following the normal pattern of Art. 3 sect. 6.³⁴ This is standard procedure in the sensitive area of intellectual or industrial rights related to patents and/ or know how license agreement, where the know how and trade secrets may have a high

³⁴ See *supra* sect. 6.1.

commercial value, which the party having to produce a document related thereto wishes legitimately to protect against prying eyes.

An *example* from German court practice: A licensor claiming damages from the licensee for excess and unauthorized use of the license may not inspect the books of the licensee itself. Instead, an expert bound to confidentiality does this for the court and the parties.³⁵ It is up to the ingenuity and discretion of the arbitral tribunal to balance the right to know of the requesting party with the right of the requested party to have valuable confidential information adequately protected.

III. Conclusion

Art. 3 and Art. 9 sect. 2 – 5 of the IBA-Rules contain a well balanced system on the production of documents and valid objections against a request to produce, which is suitable for international arbitration including investment arbitration. They are by now established “best practice in international arbitration”. They give the parties sufficient advance knowledge of the procedure which needs to be followed, and of conditions which must be fulfilled prior to an order by the arbitral tribunal for the production of documents. The available objections protect legitimate interests of the requested party not to produce. These procedural rules enable arbitral tribunals sitting anywhere in this world to establish the facts of the case in a fair, predictable and efficient way.

³⁵ See BGH v. 13.2.1976 – I ZR 1/75, GRUR 1978, 52, 53.