DISCOVERING NEMO: A DOCUMENT PRODUCTION IN INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

International commercial arbitration may involve not only the parties but the arbitrators who come from different jurisdictions. After comparing the perceptions of document production present in common law and civil law jurisdictions, the thesis examines the expectations of the parties in international commercial arbitration. As a result of the analysis, it is shown that despite different perceptions on document production, in international commercial arbitration the parties' expectations is guided by the principle of cost-effectiveness. Subsequently, the thesis discusses the document production regimes offered by ICC 2012 and ICDR 2014 Rules. The thesis establishes that ICC Rules adopt flexible document production regime, while ICDR fixes criteria in its own rules. Consequently, the author comes to the conclusion that adoption of the strict document production regime as used in ICDR Rules, could preserve parties' expectations to limit the costs of document production. However, not every party to the arbitration would be willing to give up the flexibility of arbitration. Therefore, the thesis then discusses the standards set in the soft law depicted in IBA Rules on the Taking of Evidence in International Arbitration 2010, as a possible solution for preserving flexibility and reducing the costs of arbitral proceedings.

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Finally: To my flatmate Chris Li, for tolerating me burning buckwheat all the time. Sorry.

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LIST OF ABBREVIATIONS

¶	Paragraph
¶¶	Paragraphs
Art.	Article
Art(s)	Article(s)
German CCP	German code of civil procedure
CIETAC	China International Economic and Trade Arbitration Commission
ed.	Edition
et al	and others
etc.	*etcetera* (others)
FRCP	Federal Rules of Civil Procedure
IBA	International Bar association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010
ICC	International Chamber of Commerce
ICDR	International Center of Dispute Resolution
ICSID	The International Centre for Settlement of Investment Disputes
i.e.	idest (that is)
Int'l	International
Ltd.	Limited
No.	Number
p.	Page
PO	Procedural Order
pp.	Pages
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States
USD	US Dollar
v.	Versus
Vol.	Volume

"Well, Nemo, all new explorers
must answer a science question"

-Mr. Ray, Finding Nemo

INTRODUCTION

In 2003, a heart-warming movie, Finding Nemo came out[1], which depicted the greatest international "fishing expedition" of all time. However, not all kinds of "fishing expeditions" are pleasant ones to watch, especially in the realm of commercial disputes. It cannot be denied that sometimes relevant documents for the resolution of the case are in the possession of the opposing party. However, often requests for document production are framed so broad that they result in costly and time-consuming "fishing expeditions", as requesting party may "fish" for the information that can be used for supporting its case[2]. Therefore, sometimes such a request[3] "serves as a vacuum cleaner" to gather all relevant information from the requested party[4] which results in suffering excessive amount of costs.

Although parties can rely on variety of evidences, documents can be very important, sometimes more important than the hearings because of "the permanent nature of documents"[5]. That is why documents have a very essential place not only in court proceedings but in international commercial arbitration[6]. However, contrary to domestic court and arbitral proceedings, international commercial arbitration involves parties from culturally diverse jurisdictions. Attorneys as well as arbitrators themselves may be "trained in the different legal traditions of the

[1] *See* Finding Nemo, description available at: http://www.imdb.com/title/tt0266543/ accessed on: 31.01.2016.
[2] Hancock ,Ginger, Reed, Lucy, "US-Style Discovery: Good or Evil ?" in Teresa Giovannini and Alexis Mourre (eds), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, *Dossiers of the ICC Institute of World Business Law*, Vol. 6 (Kluwer Law International; International Chamber of Commerce (ICC) (2009): 343.
[3] Discovery is a term used in the USA, defined in Federal Rules of Civil Procedure, Rule 26, as amended through December 1, 2015.
[4] Park, William W., "Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", *Arbitration International*, Vol. 19, No. 3 (LCIA, 2003): 287.
[5] Mistelis, Loukas A, Kröll, Stefan M. Lew,Julian D.M., *Comparative International Commercial Arbitration*, (2003), 563, ¶22-39.
[6] *Ibid.*

common law and civil law"[7]. Those diversities shape not only the expectations of the parties but the conduct of arbitration proceedings[8]. The rules governing the scope and the notion of document production in court litigation still varies between the common law and civil law countries[9]. While in common law jurisdictions such as the USA, a scope of document production is considered broad[10], in civil law countries it is very limited in scope[11]. Therefore, in international commercial arbitration "parties from different legal backgrounds frequently have very different expectations as to how the evidence-gathering process should be conducted"[12]. However, despite different backgrounds, parties in international commercial arbitration agree that document production has become very costly. The fact that costs related to the document production is one of the main drawbacks of international commercial arbitration has also been affirmed by various surveys. In 2012 for instance, BLP, an International law firm conducted a survey about "the perceptions of document production in the arbitration process"[13]. Lawyers were asked about the costs involved in document production and 64 % of them answered that document production significantly increases the costs of arbitration[14]. This corresponds to the view that current international commercial arbitration is facing an excessive number of documents[15].

Furthermore, in order to see the extent of document production in international commercial arbitration one has to look into the practice of arbitrators and the practitioners. At the round table discussion where arbitrators and practitioners shared their experience, Lu Ariel Ye shared her own experience regarding the document production and said that in a Stockholm arbitration her client

[7] Rubinstein, Javier, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions." *Chicago Journal of International Law* 5, No. 1 (June 1, 2004): 303.

[8] Marossi, Ali Z. "The Necessity for Discovery of Evidence in the Fact-Finding Process of International Tribunals." *Journal of International Arbitration* 26, No. 4 (2009): 515.

[9] Kaufmann-Kohler, Gabrielle, and Philippe Bartsch. "Discovery in International Arbitration: How Much Is Too Much?" *SchiedsVZ : Zeitschrift Für Schiedsverfahren-German Arbitration Journal* 1 (2004): 14.

[10] Philippe Fouchard et al., *Foucahrd Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), 689, ¶ 1258.

[11] Kaufmann-Kohler and Barth, *supra* note 9, at 14.

[12] Marossi, *supra* note 8, at 515.

[13] Berwin Leighton Peisner survey, available at: http://www.blplaw.com/media/how-can-we-help-you/dispute-resolution/International_Arbitration_Survey_2013.pdf , accessed on: 10.28.2015.

[14] *Ibid*., at 2.

[15] Elgueta, Giacomo Rojas. "Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey inside the Minds of Parties and Arbitrators." *Harvard Negotiation Law Review* 16 (2011): 18.

was asked to produce "copies of vouchers and invoices which amounted to 300,000 pages"[16]. Lu Ariel Ye called this the "environmental disaster"[17] as the number of requested copies indeed, was extremely high.

In order to find his son Nemo, the protagonist of Finding Nemo, Marvin swam thousands of kilometres which resulted in a satisfactory "fishing expedition" as Nemo was found in the end. However, not every "fishing expedition" into the tons of documents may lead to the satisfactory result, especially in the realm of international commercial arbitration as costs incurred during extensive document production may be so high that it may even outweigh the benefits of participation in the arbitral proceedings. For instance, in an AAA arbitration clients of Lu Ariel Ye "withdrew from the case and then received a default award against it, for the sole reason that they could not afford to go through this very painful process of document production"[18].

Therefore, according to the survey and the findings, obstacles faced in international commercial arbitration can be identified. All parties involved in the international commercial arbitration consider that proceedings have become very costly and one of the main reasons for that is extensive document production. This may be a result of a different understanding of the parties regarding the scope of document production and absence of specific rules for deciding the case.

Thus, taking into consideration above-mentioned obstacles, the "research expedition" into the realm of international commercial arbitration will determine how the interests of the parties in relation to the document production are balanced in these international arbitral proceedings. In the first chapter, document production will be discussed from the common law and then from the civil law perspective to identify the general expectations of the parties coming from those jurisdictions. As the notion of document production, as well as other evidence gathering techniques have been introduced and influenced by civil procedural codes of jurisdictions, the paper will thus compare

[16] The Future – What Will Change? Round Table Discussion in Albert Jan van den Berg (ed), Arbitration: The Next Fifty Years, ICCA Congress Series, Volume 16 (Kluwer Law International, 2012): 190.
[17] *Ibid*., at 191.
[18] *Ibid*., at 190.

the regimes of document production present in civil procedural codes of respective countries. Although one can count many common law countries, legal systems of England and the USA can be considered as more influential than others. That is why the author will limit the scope of the paper to these jurisdictions. As for the Civil law, the paper will address the jurisdictions of Germany and France. Lastly, the first chapter will discuss the characteristics of arbitration which determine and shape the expectations of parties in international commercial arbitration regarding the document production.

Subsequently, in the second chapter, institutional Rules of ICC 2012 and ICDR 2014 Rules will be compared. It has been argued that rules of institutional arbitration, such as ICC give arbitrators wide discretion, therefore allowing in theory granting requests related to the wide range of document production[19]. On the other hand, recently ICDR has adopted new Rules for international arbitration in which it has chosen a different solution[20]. Revised ICDR Rules of 2014 "do not provide broad discretion to the arbitral tribunal, but specific rules for document production"[21]. Therefore, in order to determine the existing frameworks regarding the document production in above-mentioned institutions, a study will compare ICC 2012 and ICDR 2014 rules with each other. After the comparison author will discuss pros and cons of both document production regimes.

The second chapter will be followed by the third one, in which the standards set in IBA Rules on the Taking of Evidence in International Arbitration 2010 will be discussed. Although institutional rules may contain some guidance, soft laws may play a significant role in creating a cost-efficient regime for document production. It is noteworthy, that IBA Rules are considered to constitute a compromise between the common law and civil law views on scope and limits of document

[19] Elgueta, Giacomo Rojas. "Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey inside the Minds of Parties and Arbitrators." *Harvard Negotiation Law Review* 16 (2011): 167.

[20] Marghitola Reto , Document Production in International Arbitration, *International Arbitration Law Library*, Vol. 33 (Kluwer Law International, 2015), 30.

[21] *Ibid.*

production[22]. However, IBA Rules have been criticized as it may allow "fishing expeditions". Therefore, the thesis will evaluate whether IBA Rules really meet the expectations of the parties coming from different jurisdictions and provide the cost-effective regime for document production.

[22] Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, *Dispute Resolution International*, Vol. 5, Issue 1 (May 2011): 54.

CHAPTER 1-DOCUMENT PRODUCTION FROM DIFFERENT PERSPECTIVES

1.1. Document production from common law perspective

The parties, counsels and arbitrators, they all may be influenced by the legal traditions they have dealt with. That is why, in order to understand the true notion and limits of document production in the USA, one has to look into the federal rules of civil procedure, which define the process and limits of document production[23]. However, it is noteworthy, that Rule 26 of FRCP does not use a term "document production" but the term such as "discovery" [24]. It is not coincidence that FRCP use a different term, as discovery is very different from the document production process used in the civil law countries. Discovery includes the more extensive kinds of document production and it also encompasses more tools for evidence gathering such as depositions, admissions etc[25]. However, it is difficult to get the full notion of discovery in the USA, without realizing the scope of adversarial proceedings. In fact, it is the principle of adversariality from which the rationale of the discovery in the US derives from[26]. In the USA, it is considered that the proceedings can only be adversarial and fair if the parties "have access, as far as possible, to the same materials"[27]. Therefore, disclosing information which may even contain facts detrimental to the disclosing party creates a fair opportunities for litigants to argue their case. That is why parties coming from the USA may try to bring to the table of international commercial arbitration the notion of adversarial proceedings as understood in US, meaning that the parties should have access to all documents which may contain not only beneficial but detrimental information.

[23] Federal Rules of Civil Procedure, Rule 26, as amended through December 1, 2015, available at: https://www.federalrulesofcivilprocedure.org/frcp/title-v-disclosures-and-discovery/ accessed on: 27.01.2016.
[24] Art. 26(a) of FRCP defines an initial disclosure, a disclosure of witness testimony and pretrial disclosure. Art. 26(b)(1) defines the general scope of discovery.
[25] Ashford, Peter "Document Production in International Arbitration: A Critique from Across the Pond." *Loyola University Chicago International Law Review*, Vol.10 Issue 1 (2012): 1.
[26] *Ibid.*
[27] *Ibid.*

Another reason for use of discovery in US courts is based on the nature of the legal system of the US itself[28]. The feature which distinguishes US civil procedure from others is that under FRCP, upon filling a claim, a litigant in the USA is not required to submit documents supporting its case[29], but "short and plain statement of the claim"[30]. As a result, after the submission of the case, when there are not enough documents presented by the litigant, in "practice, requests for 'any and all documents' are common"[31].

However, in recent years several changes were made to the rule setting the limits and notion of discovery in the USA. In 2010, with the support of the advisory committee on civil rules, a symposium on civil litigation was conducted in the USA[32], which attracted lawyers (including judges) from various fields of expertise. Participants of the symposium concluded that "in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts" [33]. As a result of debates, new amendments to FRCP were introduced, which came into effect on December 1, 2015[34]. New amendments established the concept of proportionality in Rule 26(b)(1) of FRCP[35]. The inclusion of the proportionality has thus set "reasonable limits on discovery"[36]. Moreover, according to the Rule 26(b)(1) of FRCP, while deciding on the issue of obtaining discovery, the judge now considers "the importance of the issues at stake in the action"[37], the value of the dispute[38], "the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues"[39].

[28] Hancock ,Ginger, Reed, Lucy, US-Style Discovery: Good or Evil ? in Teresa Giovannini and Alexis Mourre (eds), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, *Dossiers of the ICC Institute of World Business Law, Vol. 6* (Kluwer Law International; International Chamber of Commerce (ICC) 2009): 340.
[29] *Ibid*., at 341.
[30] FRCP Art.8(a), *Ibid*., at 341.
[31] Lotfi, Courtney "Documentary Evidence and Document Production in International Arbitration", *Yearbook on International Arbitration*, Vol. 4, Y.B. on Int'l Arb. 99 (2015): 103.
[32] 2015 Year-End Report on the Federal Judiciary, available at: http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf accessed on: 27.01.2016.
[33] *Ibid*., at 4.
[34] *Ibid*., at 5; the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States, available at:http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf ,accessed on: 01.02.2016.
[35] *See* 2015 Year-End Report on the Federal Judiciary, available at: http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf at p.6, accessed on: 27.01.2016.
[36] *Ibid*., at 6.
[37] Art. 26(b)(1) of Federal Rules of Civil Procedure, as amended on December 1, 2015, available at: https://www.federalrulesofcivilprocedure.org/frcp/title-v-disclosures-and-discovery/ accessed on: 27.01.2016.
[38] Art. 26(b)(1) of FRCP.
[39] Art. 26(b)(1) of FRCP.

Lastly, according to the Rules 26(b)(1) of FRCP, the judge evaluates whether the burden regarding the possible costs incurred in discovery "outweighs its likely benefit"[40]. Therefore, new amendments have established new tests for granting the requests of discovery which may in practice limit its scope and reduce costs associated with discovery proceedings. That is why those amendments were regarded as a "major stride toward a better federal court system"[41]. Although it remains to be seen how the amended rules will decrease the costs of the litigation and make it less time-consuming, one point can be raised with certainty, the USA has made a major move to change its civil procedure and the reason for doing that was the increasing costs of discovery proceedings.

Not only the USA has changed its civil procedure to reshape the rules of discovery, but England has done the same. In 1996, Lord Woolf published the report on civil justice system in England and Wales[42]. Lord Woolf identified the problem regarding the discovery in existing civil procedural rules and suggested to "curtail the process for discovery of documents"[43]. It was Lord Woolf who then suggested amending the existing term "discovery" and adopting the term "disclosure"[44]. According to Woolf, "the process [*of discovery*] had become disproportionate"[45]. Woolf explained that in case of disclosure of vast amount of documents only a few may be significant to the case[46]. Despite of that, Woolf believed that the process of disclosure should not be abolished, but be limited in scope as it "contributes to the just resolution of disputes"[47]. As a result of Woolf's suggestions the CPR abolished the term "Discovery" and adopted more limited form-disclosure. That is why the amendments have affected the way arbitrators see the document

[40] Art. 26(b)(1) of FRCP.
[41] 15 Year-End Report on the Federal Judiciary, available at: http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf p.9, accessed on: 27.01.2016.
[42] *See* ACCESS TO JUSTICE Final Report by the Right Honourable the Lord Woolf, Master of the Rolls JULY 1996, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm accessed on: 27.01.2016.
[43] *See* chapter 12, ¶37, ACCESS TO JUSTICE Final Report By The Right Honourable the Lord Woolf, Master of the Rolls JULY 1996, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec3b.htm#c12 accessed on: 27.01.2016.
[44] Lord Woolf , ACCESS TO JUSTICE Final Report By The Right Honourable the Lord Woolf, Master of the Rolls JULY 1996, Chapter 12, ¶37, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec3b.htm#c12 accessed on: 27.01.2016.
[45] *Ibid.*, at ¶ 37.
[46] *Ibid.*
[47] *Ibid.*

production process as now tribunals sitting in England will usually discourage "fishing expeditions" and would not expect parties to request US-style discovery[48].

In conclusion, contrary to the existing view that the scope of document production tends to be very broad in common law countries, it has been established that that there is a trend of limiting its scope by amending the legislation. However, parties coming from common law countries can still be influenced by their understanding of adversarial proceedings which requires them to create fair possibility of having all the materials to their disposal to argue the case.

1.2. Document production from civil law perspective

While "Discovery" is not unknown to the common law jurisdictions, this "procedural device" "is alien to the civil law tradition"[49]. Contrary to the USA, where the parties are not required to submit all the evidence they are relying on but "the short and plain statement of the claim"[50] while filling a lawsuit, in civil law countries the parties have to make the factual allegations available to the opponent from the very beginning of the proceedings[51]. Therefore, from the beginning of the proceedings parties may present all the necessary documents for the resolution of the case. Although procedural codes of civil law countries allow the document production, it is more limited in scope than the discovery allowed in the USA[52] . The reason of such a difference can be found in different understanding of the principle of adversariality. While in the USA for instance, principle of adversariality reflected in discovery proceedings requires parties to disclose evidence

[48] Tirado, Joseph, Petit , Sherina, et al., Chapter 23: Factual Evidence in Julian D. M. Lew , Harris Bor , et al. (eds), *Arbitration in England, with chapters on Scotland and Ireland*, (Kluwer Law International, 2013), 486.
[49] Elgueta, *supra* note 15, at 171
[50] FRCP Art.8(a), Ginger and Reed, *supra note* 28, at 341.
[51] Elgueta, *supra* note 15, at 173.
[52] Lotfi, Courtney "Documentary Evidence and Document Production in International Arbitration", *Yearbook on International Arbitration*, Vol. 4, 99 (2015): 103.

which may be even detrimental to its case at the pre-trial stage[53], in civil law countries parties present the evidence on which they rely in the court proceedings and then, if necessary a judge can order the party to produce the relevant evidence.

According to Art. 142(1) of the code of civil procedure of Germany, "the court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference"[54]. Therefore, in Germany the civil court has the power to order another party to produce the documents. However, the issue is not about the power but about the scope of such production. Art. 142(1) has been interpreted to oblige the requesting party to name the documents it is seeking as well as describing the contents of requested documents in more details[55]. As a result, a court may deny the request if the requesting party fails to specify the documents and meet the other requirements of the request.

The limited scope of the document production can be explained due to characteristics of German proceedings. According to the regime set in German civil procedure, "not the "real" or the "true" facts but the facts as shaped by the parties are the basis upon which the law has to be applied"[56]. This has been interpreted as application of the "relative truth" in the civil proceedings, meaning that not the objective truth, but the relative truth is looked for[57] which does not require the access to every information.

The power of the court to ask the parties production of documents exists in France as well. In France, according to the Art. 11 of French code of civil procedure, the parties are required to cooperate in terms of fact finding procedure and if "a party holds evidence material, the judge may, upon the petition of the other party, order him to produce it, where necessary under a periodic

[53] Ashford, Peter "Document Production in International Arbitration: A Critique from Across the Pond." *Loyola University Chicago International Law Review*, Vol.10 Issue 1 (2012): 1.
[54] Art. 142 section 1 of German code of civil procedure [*Hereinafter* German CCP], as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette) last amended by Article 1 of the Act dated 10 October 2013 (Federal Law Gazette I page 3786), translation available at: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0584 accessed on: 17.02.2016.
[55] Lotfi, Courtney "Documentary Evidence and Document Production in International Arbitration", *Yearbook on International Arbitration*, Vol. 4, 99, (2015): 103.
[56] Allen, Ronald J.; Kock, Stefan; Riechenberg, Kurt; Rosen, D. Toby. "German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship."*Northwestern University Law Review* 82.3 (1987-1988): 725.
[57] *Ibid.*

penalty payment"[58]. In Art. 145 of French civil procedural code the judge has the power to order the party production of documents if it believes that there is the legitimate reason for such request, namely fact upon which the resolution of the case depends can be established by the production of the evidence[59]. Therefore, in France requests for document production are granted if the judge finds that the requested documents are material to the outcome of the case which in essence, limits the document production regime by the test of materiality.

In conclusion, contrary to the common law perception regarding the document production, in civil law countries such as France and Germany, document production is required only in exceptional cases, if the material facts for the dispute has to be established for instance, which in its essence limits the extent of document production. Such perception may be also shared by the parties to the arbitration coming from these jurisdictions.

1.3. Document production from the perspective of International commercial arbitration

In order to determine the expectations of the parties regarding the document production in international commercial arbitration, first it is important to emphasize the characteristics of the arbitration itself, which distinguishes arbitration from the court proceedings. It has been argued, that there are "four fundamental features of arbitration"[60]. They include: the alternative nature of the arbitration in comparison to the courts, private nature for dispute resolution, a fact that the process is controlled by the parties and "final and binding determination of parties' rights and obligations" [61]. It has also been argued that the "lower costs and greater efficiency of the process"[62] distinguishes the arbitration from the court proceedings. Although, in context of international

[58] Art. 11 of French code of civil procedure, entered into force on 14-05-2005; translation available at: https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations, accessed on: 1.02.2016.
[59] Art. 145 of French code of civil procedure.
[60] Mistelis, Loukas A, Kröll, Stefan M. Lew,Julian D.M., Comparative International Commercial Arbitration, (2003), 2.
[61] *Ibid.*
[62] Born, Gray, International Commercial Arbitration , 2nd edition, (Kluwer Law International, 2014), 85.

arbitration, it has been stated that low costs is not such feature because of which parties refer a case to international tribunals, but neutrality and easier enforcement regime created by the New York convention[63]. However, it cannot be excluded that the cost-efficiency of proceedings are the features which can be decisive while choosing the right dispute resolution mechanism. It is no secret that the cost-effectiveness is a feature that has been worsening in the dimension of international commercial arbitration which may affect the parties' choice. While agreeing to arbitrate, parties clearly "prefer that the proceeding be cost-effective" [64]. Such considerations have also been evidenced by the surveys conducted in the recent years. Nowadays, many consider that international arbitration has become more "judicialised" giving rise to the excessive costs[65]. It has even been argued the international arbitration would be subject to the "evolution" and may even be replaced by other "species" such as mediation and other alternative dispute resolution mechanisms as they "are better equipped to deal with cross-border commercial disputes"[66].

In a survey conducted in 2015, respondents were asked to determine the 3 worst characteristics of the arbitration[67]. Majority, 68 % of respondents identified costs to constitute the worst characteristic of the arbitration[68]. Then, the same respondents were asked: "what could arbitration counsel do more or better?" [69]. 62 % of respondents answered that the counsel should "seek to work with opposing counsel to limit document production[70]". This findings indicate that parties to international commercial arbitration are more than concerned about costs incurred in document production proceedings.

[63] Gerbay, Remy, "Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration" *American Journal of International Arbitration,* Vol.25, No.2 (2014): 245-46.
[64] Elgueta, Giacomo Rojas. "Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey inside the Minds of Parties and Arbitrators." *Harvard Negotiation Law Review* 16 (2011): 185.
[65] Pfitzner, Tanja V. Schroeder,Hans-Patrick Do we need a "Woolf Reform" for international arbitration? *Yearbook on International Arbitration*, Vol. 1 (2010): 176.
[66] The view is derived from the interview mentioned in: Gerbay, Rémy, "Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration" *American Journal of International Arbitration*, Vol.25, No.2. (2014): 224.
[67] Queen Mary school of London, White&Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf , p.30, accessed on: 10.28.2015.
[68] *Ibid.*, at 7.
[69] Queen Mary school of London, White&Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf , p.30, accessed on: 10.28.2015.
[70] *Ibid.*, at 30.

Furthermore, in 2012, another study was conducted to find out "the perceptions of document production in the arbitration process" [71]. In the above-mentioned study[72], lawyers were asked about the costs involved in document production and 64 % of them answered that document production significantly increases the costs of arbitration[73]. 65% of respondents also said that "document production is always permitted in arbitrations they handle[74].

Considering the findings of the study, it can be said that the document production is commonly used in international commercial arbitration and all the parties as well as lawyers involved in those proceedings acknowledge the increasing number and costs of document production. Therefore, a party to the arbitration would likely aim to decrease the future costs of the proceedings as much as possible. Making arbitral proceedings more cost-efficient will be the one of the main concerns of such party, taking into consideration the fact that it could face excessive costs in contemporary arbitration. When it comes to choosing the appropriate regime for document production, parties and arbitrators from the common law and the civil law countries may have different considerations about the document production as discussed in the previous subchapters. The survey conducted in 2012 interviewed lawyers and counsels from different jurisdictions: 39 % of respondents had training in civil law, 42 % in common law and 19% had training in both legal systems[75]. Survey considered "whether an arbitrator from a common law background was thought to be more likely to grant a document production application than an arbitrator from a civil law background" [76]. The answer was that "60 % of respondents believed an arbitrator from a common law background was

[71] Berwin Leighton Peisner survey, available at: http://www.blplaw.com/media/how-can-we-help-you/dispute-resolution/International_Arbitration_Survey_2013.pdf , accessed on: 10.28.2015.
[72] *Ibid.*
[73] *Ibid*., at 2.
[74] Berwin Leighton Peisner survey, p.2, available at: http://www.blplaw.com/media/how-can-we-help-you/dispute-resolution/International_Arbitration_Survey_2013.pdf , accessed on: 10.28.2015.
[75] Berwin Leighton Peisner survey, p.8, available at: http://www.blplaw.com/media/how-can-we-help-you/dispute-resolution/International_Arbitration_Survey_2013.pdf , accessed on: 10.28.2015.
[76] *Ibid*., at 11

more likely to grant a document production application than an arbitrator from a civil law background"[77].

Thus, indicating that the perceptions towards document production in different jurisdictions still vary. Despite the fact that parties from different jurisdictions may have different perceptions of acceptable scope of document production, one thing remains undisputed, that all parties want to reduce the costs associated with the document production. Solutions for reducing costs may be found not only in practical considerations but in institutional or soft laws, containing clear, economic and cost-effective criteria for document production.

[77] Berwin Leighton Peisner survey, p.11, available at: http://www.blplaw.com/media/how-can-we-help-you/dispute-resolution/International_Arbitration_Survey_2013.pdf , accessed on: 10.28.2015.

CHAPTER 2-DOCUMENT PRODUCTION UNDER ICC AND ICDR RULES

Nowadays, International chamber of commerce, as well as International centre for dispute resolution can be considered as most influential institutions operating in the field of the international commercial arbitration. ICC was established in 1919[78]. After its creation, the first rules of ICC arbitration were adopted in 1922, followed by the establishment of the ICC International Court of Arbitration in 1923[79]. Since then the rules were revised several times but the current version was adopted in 2012[80]. Caseload of ICC Court of Arbitration is very impressive, as from its creation it "has administered more than 20,000 disputes involving parties and arbitrators from some 200 countries and independent territories"[81]. Only in 2014, "791 Requests for Arbitration were filed with the ICC Court"[82] involving "2222 parties from 140 countries and independent territories"[83]. Across the Europe, the International Centre for Dispute Resolution (ICDR) stands out with number of cases it is handling. The ICDR was established as an "international division of the American arbitration association (AAA) in 1996"[84]. Only in 2013 the number of cases it has handled exceeded the number of cases administered by ICC court and reached 1165 cases[85].

Although both institutions share the same success judging by its caseload, they have adopted the different solutions for the rules concerning the document production. Those procedures are compared in the following chapter.

[78] Verbist,Herman, Schäfer, Erik, et al. *ICC Arbitration in Practice*, second edition, (Kluwer Law International, 2015), 12.
[79] *Ibid*., at 12
[80] Herman and Schäfer, *supra* note 78, at 13.
[81] *S*tatistics of ICC court of arbitration cases available at: http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ accessed on: 27.01.2016.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] The news alert drafted by the AAA http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7Bcc5e36bc-7d95-4271-ad3b-70f8ddd0227e%7D_ICDR_PressRelease_ICDR_Rules.pdf p.2, accessed on: 27.01.2016.

2.1. Power of the tribunal to grant the request for document production

2.1.1. Flexible framework for document production under ICC Rules

ICC Rules 2012 do not address the issue of document production specifically[86]. However, the Rules provide the general authority to the tribunal to request a new evidence. Pursuant to Art. 25(1) of ICC Rules, "the arbitral tribunal shall proceed within as short time as possible to establish the facts of the case by all appropriate means"[87]. Therefore, based on Art. 25 of ICC Rules the tribunal has the maximum discretion to decide what constitutes an appropriate measure for establishing the facts of the case. However, the measure adopted by the tribunal depends on specific circumstances of the case. Those circumstances may be "nature of each case, including the expectations of the parties and the value of the dispute"[88]. However, power of the tribunal is discussed in more details in Art. 25(2), according to which: "any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence". As there can be various kinds of evidences, including documentary evidence, Art. 25 is considered to vest the power to the tribunal to request the production of documents[89]. Moreover, such power has not been denied in any reported arbitral awards as well[90].

It is noteworthy, that despite giving such power to the tribunal, ICC Rules do not provide any specific guidance or criteria for granting requests for document production[91]. ICC Rules only generally address the conduct of evidentiary power of the tribunal. Art. 22(1) of ICC Rules oblige the arbitrators to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute"[92]. Additionally, according to

[86] Grierson, Jacob, Van Hooft, Annet, *Arbitrating under the 2012 ICC Rules*, (Kluwer Law International, 2012), 172.
[87] Art. 25(1) of ICC Rules 2012.
[88] Grierson and Van Hooft, *supra* note 86, at 174.
[89] *Ibid.*, at 173.
[90] Born, Gary, *International Arbitration: Law and Practice*, (Kluwer Law International, 2012), 179.
[91] Grierson and Van Hooft, *supra* note 86, at 173.
[92] Art. 22(1) of ICC Rules 2012.

the Appendix IV of ICC Rules 2012, par. d(ii), the tribunal may "avoid requests for document production when appropriate in order to control time and cost"[93]. However, those articles only provide the general principles for the document production regime. Those rules fail to address the issues in more details and therefore, the tribunals will most likely, try to adopt more specific criteria for document production in their procedural orders.

However, it is not coincidence that ICC Rules do not identify the criteria for granting the requests for document production. ICC intentionally abstains from adopting more specific guidelines or rules regarding the document production. ICC commission on arbitration stated in its report on E-document production that adoption of "such rules or guidelines may compromise the parties' and arbitrators' flexibility to address issues in light of the particular circumstances of each case"[94]. ICC commission believes that such restrictions on arbitrators' power may "jeopardize the efficient and cost-effective use of arbitration"[95].

However, ICC does not leave the questions unanswered but provide some non-mandatory guidelines for the arbitrators. ICC commission on arbitration created a task force to elaborate on techniques "used for organizing the arbitral proceedings and controlling their duration and cost"[96] which resulted in creation of 2012 ICC Report on Techniques for Controlling Time and Costs in Arbitration[97]. In its report commission encourages the parties and tribunals to establish clear document production procedures and even refers to the IBA Rules on the Taking of Evidence in International Arbitration as a guideline[98]. Therefore, ICC commission finds that although tribunals enjoy flexible authority given by ICC Rules, it is necessary to have clear rules establishing a

[93] ICC Rules 2012, Appendix IV, ¶ d(ii).
[94] ICC Commission on Arbitration and ADR, ICC Arbitration Commission Report on Managing E-Document Production, ICC Commission on Arbitration and ADR, (2012), p.3., ¶2.2 available at:http://www.iccwbo.org/Data/Policies/2012/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production,-2012/ accessed on 06.03.2016.
[95] *Ibid*., at 3, ¶2.2.
[96] *Ibid*., at 5.
[97] ICC Arbitration Commission Report on Managing E-Document Production, ICC Commission on Arbitration and ADR, (2012), available at:http://www.iccwbo.org/Data/Policies/2012/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production,-2012/ accessed on 6.03.2016
[98] ICC Arbitration Commission Report on Managing E-Document Production, ICC Commission on Arbitration and ADR, (2012): 12, ¶51.

document production framework. Moreover, in order to efficiently organize the requests for document production, ICC commission encourages the parties to rely on schedule which was created by Alan Redfern for the purposes of document production[99]. This schedule has four columns: in the first column parties have to identify the requested documents; in the second column short descriptions and the reasons for ordering document production shall be mentioned; in the third column requested party can summarize the objections for document production and the fourth column is left blank for the tribunals' decision[100]. The schedule can be used as a tool for framing the requests and making the document production process easier. However, just the schedule is not enough to establish the relevant criteria for the document production regime. Tribunal should refer to the clear rules based on which the requests for document production should be evaluated.

Thus, it is evident that ICC rules have adopted a flexible approach for document production regime; however, flexibility has its own drawbacks. For instance, in absence of specific guidance concerning the document production, tribunals may have inconsistent approaches which may be contrary to the expectations of the parties[101]. For instance, a party coming from civil law jurisdiction will be surprised if an arbitrator orders "discovery"[102] or very extensive kind of document production. It is quite possible as relying on Art. 25, an arbitrator coming from the common law jurisdiction, based on his own experience may find that discovery is an appropriate measure for establishing the facts of the case[103]. This may lead to increasing costs of the proceedings. Moreover, in absence of specific guidelines, tribunals will try to determine applicable standards from various sources. For instance, in ICC case NO. 5542 the tribunal was seated in Ethiopia[104]. In order to decide the issue of discovery the tribunal relied on the procedural code of

[99] ICC Arbitration Commission Report on Managing E-Document Production, ICC Commission on Arbitration and ADR, (2012): 12, ¶52.
[100] *Ibid.*
[101] Grierson, Jacob, Van Hooft, Annet, *Arbitrating under the 2012 ICC Rules*, (Kluwer Law International, 2012), 174.
[102] *Ibid.*
[103] *See* Gary Born stating that under Art. 25 of ICC Rules tribunals have an implied authority to order discovery: Born, Gary, *International Arbitration: Cases and Materials* (Second Edition) (2015), 836.
[104] Procedural Order in ICC CASE NO. 5542, published in Born, Gary, *International Arbitration: Cases and Materials* (Second Edition) (2015), 811-13.

seat of arbitration, and coming to the conclusion the discovery is not alien to Ethiopia granted the request for discovery[105]. However, as Born states "most contemporary authorities reject the view that the local procedural rules of the arbitral seat's domestic courts must be applied in international arbitrations"[106]. Such views have been also adopted in ICC Case No. 5029 and ICC Case No. 7626 where tribunals denied application of local procedural rules[107]. Another approach was taken by the tribunal in ICC Case No. 16655, where the tribunal relied on the IBA Rules on the Taking of Evidence in International Arbitration as guidelines[108]. Therefore, taking into consideration the fact that ICC Rules give flexible discretionary powers to the tribunals to adopt the appropriate document production regime, it cannot be excluded with certainty that tribunals would possibly allow costly discovery of documents or extensive documents production.

2.1.2. Standards set for document production under ICDR Rules

Contrary to the ICC Rules, ICDR Rules are more complex and thorough regarding the document production. In 2008, ICDR deviated from its previous approach of flexible document production regime and adopted "guidelines for arbitrators concerning the exchanges of information"[109]. Although rules were called guidelines, they became "effective in all international cases administered by the ICDR commenced after May 31, 2008"[110]. Therefore, they were automatically applicable and mandatory in its nature. However, parties could have excluded their application by

[105] Procedural Order in ICC CASE NO. 5542, published in Born, Gary, *International Arbitration: Cases and Materials* (Second Edition) (2015), 812.
[106] Born, Gary, *International Arbitration: Cases and Materials* 2nd edition, (2015), 785.
[107] Parts of Final award in ICC case No.7626 and parts of Interim award in ICC Case No. 5029 produced in Born, Gary, *International Arbitration: Cases and Materials*, 2nd edition (2015), 779-81.
[108] IBA M, LLC (United Arab Emirates) v. D, SAS (France), Award, ICC Case No. 16655/EC/ND, 23 December 2011 produced in: *International Journal of Arab Arbitration*, Vol. 4 Issue 2 (2012): 125-215.
[109] See https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2021624&RevisionSelectionMethod=LatestReleased accessed on: 27.01.2016.
[110] *Ibid*., at 1.

the written agreement. In 2014, ICDR amended its arbitration rules and incorporated the guidelines in those rules which became effective from June 1, 2014[111].

By adopting rules which set criteria for granting the requests for document production, ICDR rules adopted the approach opposite from ICC Rules. While ICC Rules have created more flexible document production regime by adopting general principles which make the foundation of the arbitrators' discretion, ICDR Rules limited such discretion by setting the specific criteria for document production regime.

To start with the general authority, as in ICC Rules, Art. 20 of ICDR rules provides the tribunal with the discretion to conduct the proceeding as it considers appropriate, however the discretion is limited by the notions of right to be heard and right to equal treatment[112]. The discretion of the tribunal regarding the document production is more specifically dealt in Art. 20(4), according to which "at any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate"[113] . Contrary to the ICC Rules, which provides the tribunal with the power to request additional evidence, without specifying which kind of evidence it refers to, ICDR rules specifically mentions the documentary evidence. Therefore, Art. 20(4) explicitly gives the tribunal the power for ordering another party production of documents. However, what really distinguishes ICDR Rules from ICC Rules is article 21 of ICDR Rules which provides criteria for exercising the discretion of the arbitral tribunal regarding the document production. While in ICC Rules there are no default criteria for granting requests for document production, article 21 of ICDR rules lays down such criteria. However, it must be noted that article 21 can be excluded by the parties' written agreement[114].

[111] *See* ICDR rules 2014 available at: https://www.icdr.org/icdr/faces/i_search/i_rule accessed on: 27.01.2016.
[112] ICDR Rules Art. 20(1) states: "subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case". Therefore, the tribunal has a discretion to adjust the proceeding to the specific circumstances of the case.
[113] International arbitration rules of International Centre for Dispute Resolution (ICDR) as effective from June 1, 2014. Available at:https://www.icdr.org/icdr/ShowPDF?url=/cs/groups/international/documents/document/z2uy/mdi4/~edisp/adrstage2028458.pdf accessed on: 1.02.2016.
[114] Art. 20(4) ICDR Rules state: "unless the parties agree otherwise in writing, the tribunal shall apply Article 21".

Before amendments made in 2014, article 21 of ICDR Rules only provided that the tribunal had the power to order the party production of documents it considered necessary to resolve the case[115]. However, new article incorporated the new requirements. In fact, it is considered that ICDR Rules have incorporated standards from IBA Rules on the Taking of Evidence in International Arbitration[116]. According to Art. 24(4), requested documents must not be in the possession of the requesting party, they might not be otherwise available to the requesting party and reasonable grounds for their existence must be present[117]. In terms of substantive requirements, Art. 21(4) requires the request to "contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case". Therefore, firstly, a party requesting the production of the documents under ICDR Rules has to demonstrate that the requested documents are not in its possession and the party should present convincing arguments that requested documents are in fact in the possession of the requested party. Secondly, the party has to reasonably identify the documents in details. However, it should be mentioned, that Art. 21 allows not only the requests directed at the production of specific documents, but "classes" of documents. This category of requests may in reality lead to the production of vast amount of documents. Therefore, bearing in mind that Art. 21 allows the exclusion of Art. 21, parties may wish to exclude this part of the article in order to limit broad requests for document production. Lastly, as in IBA Rules, party has to demonstrate why the requested documents are relevant and material to the outcome of the case.

Although one can say that ICDR is an "American product", article 21 of ICDR Rules is named "exchange of information", instead of "discovery". By doing so, ICDR Rules explicitly discourages the use of discovery as used in US courts. According to the Art. 21(10) "depositions, interrogatories, and requests to admit as developed for use in US court procedures generally are

[115] John Fellas and Rebeca Mosquera, AAA/ICDR International Arbitration Rules, in Loukas A. Mistelis (ed), *Concise International Arbitration* ,2nd edition (Kluwer Law International, 2015), 591.
[116] *Ibid*.
[117] Art. 21(4) ICDR Rules 2014.

not appropriate procedures for obtaining information in an arbitration under these Rules"[118]. Even from the title of Art. 21(Exchange of information), it is evident that ICDR rules avoid to mention the term "discovery" as "ICDR has kept with the trend in international arbitration to steer away from the designation of 'Discovery'"[119].

Therefore, contrary to ICC Rules, where the tribunal has the maximum discretion for exercising its power regarding the document production (which includes adopting the specific document production regime or rules), new ICDR Rules already incorporated requirements for using such power. In terms of clarity, that can be more beneficial to the party to the arbitration as it may have a clear idea about the scope of the document production which it may have to deal in the future. Furthermore, ICDR Rules specifically encourages tribunals to not allow requests for "discovery".

2.2. Laws applicable to privilege and confidentiality

The scope of document production depends not only on relevance or materiality of those documents but on other considerations as well. In arbitral proceedings not every piece of information is disclosed based on privilege and confidentiality considerations. A privilege can be defined as "a right to withhold certain documentary or testimonial evidence from a legal proceeding" and it includes several types of information such as attorney-client information for instance[120]. The confidential information may be even broader than the privilege, containing not only the business secrets but information which is preserved from disclosure based on various considerations. That is why privilege and confidentiality determinations have an impact on the availability and admissibility of evidence[121]. Revealing privileged or confidential documents

[118] Art. 21(10) ICDR Rules 2014.
[119] John Fellas and Rebeca Mosquera, in A. Mistelis, Loukas (ed), *Concise International Arbitration (Second Edition)*, (Kluwer Law International 2015), 591.
[120] Kuitkowski, Diana. 'The Law Applicable to Privilege Claims in International Arbitration', *Journal of International Arbitration* 32, No. 1 (2015): .68.
[121] *Ibid*., at 65.

could be detrimental to the party. However, most institutional rules are silent on applicable rules on confidentiality and privilege giving rise to variety of approaches for choosing such laws including: "procedural law of the arbitration, the law governing the parties' arbitration agreement and the law most closely connected to the allegedly privileged communication" [122]. Moreover, possible applicable laws may include "the law of the jurisdiction where enforcement of the award will be sought; - general principles, without reference to any national law"[123].

The laws chosen by the tribunals may affect the document production regimes and procedures associated with them. The scope of applicable rules of confidentiality may be relevant for reducing the amount of documentary submissions. If the scope of confidentiality is broad and covers more information, than the party raising the objection to confidentiality may have to submit less documents and thus, may incur less costs than it would have incurred in case of applying narrow notion of confidentiality. Therefore, the following subchapter analyzes the frameworks adopted by ICC and ICDR Rules concerning confidentiality and privilege.

2.2.1. Law governing the confidentiality and privilege under ICC rules

ICC Rules do not specify which regime of privilege or confidentiality is applicable under the Rules. Pursuant to ICC Rules Art. 21(1) "the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute"[124]. In case there is no agreement, the tribunal applies the "rules of law which it determines to be appropriate"[125]. Therefore, several questions have to be answered by the tribunal to determine the applicable rule to the privilege or the confidentiality. First, tribunal has to evaluate whether the parties have chosen the applicable law. Then, if the answer is yes, the tribunal has to decide whether the applicable law applies to the

[122] Born, Gary, *International Arbitration: Law and Practice*, (Kluwer Law International, 2012), 186.
[123] Kuitkowski, Diana. 'The Law Applicable to Privilege Claims in International Arbitration'. *Journal of International Arbitration* 32, No. 1 (2015): 87.
[124] Art. 21(1) of ICC Rules 2012.
[125] Art. 21(1) of ICC Rules 2012.

confidentiality and the privilege at the present case. In case parties have not chosen the applicable law or the tribunal decides that the law chosen by the parties does not necessarily govern the issues of confidentiality and the privilege argued in the case, the tribunal has to choose the appropriate rule. Therefore, in cases discussed above, the tribunal still has to find the appropriate applicable law either by direct choice, choosing the law without referring to the conflict of laws or by relying on conflict of law rules to find the guidance in finding the appropriate law[126]. This flexible regime may lead to the unpredictable result as in many jurisdictions scope and notion of privilege and confidentiality differs.

It cannot be denied that the tribunals should have the flexibility to choose the appropriate rule governing the confidentiality or privilege. However, the flexibility of the arbitration may be preserved by providing the starting point for the tribunals, such as general rule governing confidentiality or privilege; namely adoption of most favored approach rule, which favors the privilege more or the least favored rule[127]. In conclusion, ICC Rules provide flexible framework for the arbitrators to choose the applicable rules of law for evaluating the considerations of confidentiality and privilege. However, discretionary power of the tribunal may be considered too broad in certain circumstances, the use of such broad discretionary power may lead to choosing different rules for confidentiality and privilege, which in principle may lead to a different outcome which could undermine the clarity of the proceedings.

2.2.2. Most favored privilege approach under ICDR Rules

Contrary to ICC Rules, ICDR Rules have adopted the preferred framework for the privilege considerations. Art. 22 of ICDR Rules state that "the arbitral tribunal shall take into account

[126] Verbist,Herman, Schäfer, Erik, et al. *ICC Arbitration in Practice*, 2nd edition (Kluwer Law International 2015), 115.
[127] Guido Santiago Tawil Ignacio J. Mirorini Lima, "Privilege-Related Issues in International Arbitration" in Teresa Giovannini and Alexis Mourre (eds), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, *Dossiers of the ICC Institute of World Business Law*, Vol. 6 (Kluwer Law International; International Chamber of Commerce (ICC) 2009): 48.

applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client". The second sentence of Art. 22 states in more details that in case there is the difference between the rules "the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection". Therefore, contrary to ICC Rules the discretionary power of the tribunal constituted under ICDR Rules is more limited. Firstly, the tribunal has to ensure that it applies the same rules for confidentiality and privilege to both parties. Secondly, ICDR Rules clearly adopts the most favored privilege approach[128]. Under this approach the discretionary powers of the tribunal is limited in a sense that it has to try to adopt the rule which protects the privilege or confidentiality more than other rules. Therefore, under ICDR Rules the tribunals have more clear guidance, to adopt the rule which favors the confidentiality and privilege and then use that rule for both parties.

2.3. Opt-in clauses versus opt-out-should the discretion be limited?

As illustrated by the comparison, ICC Rules and ICDR Rules have adopted different document production regimes. ICC Rules give tribunals the maximum discretion to adopt the rules of procedure for the document production regime which they deem appropriate, while ICDR Rules limit such discretion by the requirements laid down in its own rules (however, article 21 of ICDR Rules can be excluded by the written party agreement). The ultimate question that needs to be addressed is which document production regime contributes to the expectations of the parties to limit the costs and minimize the time of the proceedings. The answer to that "ultimate question" is not as simple as 42. Both flexible rules and the rules which adopt the strict criteria for document production have their pros and cons. On the one hand, flexibility of arbitration is a feature which is considered to be the essential part of the arbitration as it allows "creation of norms appropriate

[128] Grando, Michelle T. "An international law of privileges", *Cambridge Journal of International and Comparative Law* 3(3) (2014): 670.

to the contours of each dispute"[129]. One the other hand, such flexibility may endanger the clarity of the proceedings leading to additional costs and undesired outcome.

Park has compared the parties' reliance on the existing regime of arbitrators' discretion to the "diners in a fancy restaurant with a menu"[130] "which allows the chef to feed them whatever he wants, as long as each gets the same meal"[131]. By this reference Park indicates that in contemporary international commercial arbitration arbitrators have extremely wide discretionary powers which is limited by the notions of equal treatment and the right to be heard. Park calls such menu [a regime] "procedural light" as the starting point for the arbitrators is "a menu" without any fixed rules[132]. In contrast, Park suggests that it would be better to choose a "procedure heavy or' rules rich menu'"[133], i.e. parties face the fixed rules for the document production and then choose which ones to exclude or add[134].

The first option is used by ICC Rules. Under the regime created by ICC Rules, there are no set criteria for document production requests. The parties can adopt the appropriate rules for document production, e.i. choose an opt-in clause. The second option is used by ICDR Rules, as demonstrated in the second chapter, Art. 21 of ICDR Rules already contains substantive criteria based on which the tribunal can grant the requests for document production. However, under the written party agreement application of this article can be excluded. Therefore, in case of ICDR, Rules have adopted the "opt-out" regime. Firstly, by choosing the ICDR as institution, parties chose criteria provided by it and only by the written party agreement application of those standards will be excluded. The written agreement is the high threshold for the exclusion of the standards. Parties may not even do so, as if they exclude standards set in article 21 of ICDR Rules, tribunal will then have to choose the rules or criteria it deems appropriate, which may not be acceptable

[129] Park, William W. "Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", *Arbitration International*, Vol. 19, No. 3 (LCIA, 2003): 281.
[130] *Ibid*.
[131] *Ibid*., at 289.
[132] *Ibid*., at 281.
[133] *Ibid*., at 289.
[134] *Ibid*., at 289.

for the parties. This will bring the arbitral proceedings conducted in the realm of ICDR, closer to the ICC proceedings were the tribunal is vested with the discretionary powers to apply the rules for taking evidence, outcome of which may not be as clear for the party as it would have thought.

In order to establish the pros and cons of both regimes, it needs to be acknowledged, that at the time of the conclusion of the arbitration agreement the parties most likely would seek cost-effective arbitral proceedings[135]. Arbitrators must try "to preserve this *ex ante* commitment of the parties"[136]. However, the expectations of the parties to limit the costs may be distorted once a dispute arises as the party may "use everything at its disposal to prevail"[137]. Therefore, at the time of the conclusion of the arbitration agreement in which the parties have chosen the "opt out" regime for document production, it would be difficult for one party to opt out from the cost-effective regime without written consent of the other party. This may preserve the expectations of the parties (limiting costs) which they had at the time of conclusion of the arbitration agreement.

However, according to Park, limiting the flexible regime of document production by writing down the specific rules or criteria in advance, may not necessarily reduce the costs[138]. For instance, while negotiating the arbitration agreement and the arbitral institution, which contains detailed rules for document production regime, parties may spend more time discussing such rules in more details, compared to the rules which allow flexible regime; this in words of Park may "add costs at contract signature"[139]. However, it must not be forgotten that in case parties choose the institutional rules such as ICC Rules, which adopts the flexible framework for the document production regime, the parties and the arbitrators still have to adopt clear and precise rules which would be depicted in the procedural order. In that case, the same or even more time may be spent on discussions about the appropriate document production regime as the dispute has already arisen and parties may have

[135] Elgueta, Giacomo Rojas, author of "Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey inside the Minds of Parties and Arbitrators." *Harvard Negotiation Law Review* 16 (2011): 185.
[136] *Ibid*., at 185.
[137] *Ibid*.
[138] Park, William W. "Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion", *Arbitration International*, Vol. 19, No. 3 (LCIA, 2003): 296.
[139] *Ibid*.

changed considerations they had at the time of the conclusion of the arbitration agreement to conduct the proceedings in a cost-effective way. Such discussions would not necessarily result in reaching the party agreement, leaving the tribunal with maximum discretion to choose such regime or rules for document production it seems appropriate. This could leave the door open for the adoption of the regime which favors extensive document production.

According to Elgueta[140], behavioural law and economics analyses suggests that without clear guidance arbitrators may rely on their past experiences, which may be derived from their respective jurisdictions[141]. That is why, Elgueta considers the same solution as Park for limiting the costs associated with the document production, which is reducing tribunals' flexibility by adopting the specific criteria for document production. Elgueta refers to the "libertarian-paternalism"[142], according to which "in cases where individuals remain silent about their preferences, a legal system should set rules that steer people's choices in directions that will improve their welfare (paternalism approach)".

Therefore, one thing can be said without a doubt, in both cases, where the rules provide "opt in" or "opt-out" regimes for document production, tribunals still need to rely on specific rules to establish the cost-efficient document production regime. In case of "opt out" regime however, tribunals and parties will face clear guidance for taking evidence, as criteria will already be provided in the rules. The "opt-out" regime for document production may preserve parties' aspiration to conduct the proceeding in less costly manner. While in case of "opt in" clauses tribunals may be faced with the situation where the adopted rules are not binding but the flexible guiding principles. In these cases tribunals will have more flexibility for "cherry picking" the applicable criteria. One party will try every procedural tool for its disposal to prevail in the dispute

[140] Elgueta, Giacomo Rojas, author of "Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey inside the Minds of Parties and Arbitrators." *Harvard Negotiation Law Review* 16 (2011).
[141] *Ibid*., at 186.
[142] Elgueta, Giacomo Rojas, "Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey inside the Minds of Parties and Arbitrators." *Harvard Negotiation Law Review* 16 (2011): 189.

deviating from its commitment to limit the costs. This could endanger the clarity of the document production regime and even result in costly proceedings.

In conclusion, the author suggests that adopting cost-efficient document production regime in the rules of institutional arbitration has clear benefits. This regime would honour the expectations of the parties to limit the costs associated with the document production. However, it should not be forgotten, that regardless of the benefits, not every party to the arbitration may be willing to abide to the binding document production regime as parties might still prefer flexible rules. In this case, the clarity regarding the document production regime can be provided by the soft law, such as IBA Rules on the taking of evidence in international arbitration. Therefore, the standards of these rules will be discussed in the following chapter.

CHAPTER 3 - DOCUMENT PRODUCTION UNDER IBA RULES 2010

As illustrated in the Chapter 2, along with majority of arbitral institutions, ICC Rules not provide the specific document production regime leaving tribunals with the discretionary power to adopt the appropriate rules for taking evidence. Such rules can be found in IBA Rules on the Taking of Evidence in International Arbitration. IBA Rules are regarded to provide international standard for "effective and economical regime for document production"[143]. Furthermore, it is considered that "IBA Rules offer helpful guidance to the arbitral tribunal to determine the rules of evidence"[144]. In 2012, a survey was conducted which asked the respondents about their attitudes on IBA Rules[145]. According to the study, the IBA Rules have been applied in 60 % of the cases in international arbitration[146]. Out of those 60 %, IBA Rules were used "in 53% as guidelines and in 7% as binding rules"[147]. Later, interviewees explained that they preferred adopting the "IBA Rules as guidelines rather than binding rules because this provides for more flexibility"[148]. Therefore, the survey indicates that although parties will look for the ways to minimize the costs, they may not necessarily give up the flexibility arbitration rules may offer to them. That is why, tribunals will look for the way to accommodate the parties' aspirations for limiting the costs of arbitration with flexible document production regime at their disposal.

The scope of document production depends on the agreement of the parties and the discretion of the arbitral tribunal[149]. Provided that parties have not excluded some specific regime for document production or the institutional rules do not limit the discretionary power of the tribunal, the tribunal

[143] Nigel Blackaby , Constantine Partasides , et al., *Redfern and Hunter on International Arbitration*, 6th edition (2015), ¶6.95
[144] Brekoulakis, Stavros, *Handbook Vienna Rules: A Practitioner's Guide* (VIAC 2014), 172, ¶5.
[145] White&Case, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, available at:http://www.arbitration.qmul.ac.uk/docs/164483.pdf , accessed on: 10.28.2015.
[146] *Ibid*., at 11.
[147] *Ibid*.
[148] White&Case, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, p.11, available at:http://www.arbitration.qmul.ac.uk/docs/164483.pdf , accessed on: 10.28.2015.
[149] Born, Gary, *International Arbitration: Law and Practice*, (Kluwer Law International, 2012), 181.

can rely on IBA Rules as guidelines. While exercising its discretion various tribunals have already relied on IBA Rules even in absence of the party agreement[150].

It is also noteworthy, that often in international commercial arbitration, contrary to domestic arbitration or court proceedings, one party may come from civil law jurisdiction when the other one may come from common law jurisdiction. In those cases parties may have different perceptions of appropriate scope and the notion of document production as illustrated in Chapter 1. Therefore, in order to meet the needs of both parties in the realm of international commercial arbitration, it is necessary to find the common ground between those parties. It has been claimed that IBA Rules can be especially helpful in these circumstances, as IBA Rules are seen as a compromise between common law and civil law jurisdictions[151]. While drafting the Rules, the working party was guided by the principle that "expansive American- or English-style discovery is generally inappropriate in international arbitration"[152]. Therefore, the drafters of IBA Rules claim that they have provided the framework for document production which avoids extensive document production present in the USA. The following chapter analyses the standards set in IBA Rules 2010. The first part discusses the article 3(3) of IBA Rules, which sets standards for the requests for document production. The second part addresses Art. 9(2), which lists objections, satisfaction of which may justify the refusal for the requests for document production[153].

[150] See *ICC Case No. 16655; SCC Case No. V 116/2010, Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11* , p. 31

[151]Hanotiau, Bernard, International Arbitration in a Global Economy: The Challenges of the Future, *Journal Of International Arbitration* 28, no. 2 (April 2011): 96.

[152] 1999 IBA Working Party 1/2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International* (2010): 7.

[153] 1999 IBA Working Party 1/2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International* (2010): 8.

3.1. Criteria set in Art. 3 for granting requests for document production

Article 3 of IBA Rules refers not only to the documents which are in possession of the party, but to the documents which are in possession of the opposing and the third party[154]. However, as the scope of the research is limited to the document production from the opposing party, requirements set for requests directed at the opposing party is discussed in this sub-chapter. Article 3(3) of IBA Rules indeed lists such requirements "regarding the content of a request to produce"[155].

3.1.1 Narrow and specific documents

Firstly, according to IBA Rules Art. 3(3)(a): "A Request to Produce shall contain:

a) (i) a description of each requested Document sufficient to identify it, or

(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist;

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"[156].

Article 3(3)(a) of IBA Rules contains different criteria for different types of documents. Article 3(3)(a) distinguishes between "a document", the "category of documents" and "documents maintained in electronic form". The general rule which applies to the requests for a document is that the request should be sufficiently detailed for the party to identify the requested documents. However, Art. 3(3)(a)(ii) sets different criteria for category of documents. Art. 3(3)(a)(ii) additionally mentions the "subject matter" which has to be described apart from the other

[154] 1999 IBA Working Party 1/2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International* (2010): 6.
[155] *Ibid*., at 8.
[156] IBA Rules on the taking of evidence in international arbitration 2010, Art. 3(3)(a).

information provided in the request. However, it has been acknowledged that apart from subject matter, a party has to limit the time frame of the request[157]. For instance, in PO No. 2 a tribunal, relying on IBA Rules Art. 3(3)(a) interpreted terms "narrow and specific" and reasoned that the tribunal interprets them "to mean narrowly tailored, i.e., reasonably limited in time and subject-matter in view of the nature of the claims and defenses advanced in the case[158]". However, while evaluating whether the description of the requested category of documents is sufficiently narrow and specific, the tribunal should consider the reasonable degree of specificity[159]. The requirement that a request for document production is highly specific is considered to be contrary to IBA Rules[160]. IBA working party acknowledged that in some cases requested documents can be relevant and material but they "may not be capable of specific identification"[161]. That is why under the framework set by IBA Rules parties who request the category of documents are not expected to name exact titles of the documents[162].

Although it cannot be denied that in some cases party may not be able to specify the request for category of documents in more details, it has been argued that such requests, if allowed, in reality will lead to fishing expeditions[163]. It has also been argued that only the production of specific documents should be allowed by IBA Rules and not the production of entire category of documents as it "enables "fishing expeditions" aimed at collecting information in the hopes of finding new grounds for additional allegations"[164]. Therefore, framework for document production regime provided in IBA Rules 2010 is clearly broader than the framework used in civil law countries. As

[157] *See* O'Malley, Nathan D. "Document production under Art.3 of the 2010 IBA Rules of Evidence." International arbitration law review, Vol.13 (2010): 187.

[158] PO. NO 2 in *International Thunderbird Gaming Corporation v. The United Mexican States, Award, NAFTA (26 January, 2006)*, reproduced in *O'Malley, Nathan D*, Procedural Rules Governing the Production of Documentary Evidence in International Arbitration - As Applied in Practice, *The Law and Practice of International Courts and Tribunals* 8 (2009): 44.

[159] Marghitola Reto , Document Production in International Arbitration, *International Arbitration Law Library*, Vol. 33 (Kluwer Law International;2015), 43.

[160] *Ibid.*

[161] 1999 IBA Working Party 1/2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International* (2010): 9.

[162] O'Malley, Nathan D., The Procedural Rules Governing the Production of Documentary Evidence in International Arbitration - As Applied in Practice, *The Law and Practice of International Courts and Tribunals 8* (2009): 45.

[163] Elgueta, Giacomo Rojas. "Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey inside the Minds of Parties and Arbitrators." *Harvard Negotiation Law Review* 16 (2011): 190

[164] *Ibid.*

illustrated in chapter 1[165], document production regime present in civil law jurisdictions is familiar with production of specific documents and not the category of documents. Misapplication of Art. 3(3)(a)(ii) of IBA Rules indeed can lead to the fishing expeditions as production of category of documents can result in "avalanche of documents". Therefore, parties or arbitrators, while relying on IBA Rules as guidelines may wish to exclude the production of category of documents in order to avoid the costs associated with the production.

It is also noteworthy, that apart from category of documents, the second sentence of Art. 3(3)(a)(ii) addresses electronic documents. This article has been newly introduced in the version of IBA Rules 2010. In contemporary world it is no secret that parties store information not only in written documents but also in electronic ones. The advent of electronic communications has affected the arbitration as well. In case of requests related to the electronic documents, it may be difficult to identify documents in more specific terms and request which is too broad may result in covering irrelevant information and documents[166]. However, in its report on Managing E-Document Production ICC commission stated that the mere fact the document is stored electronically is not a reason to deny granting the request for document production[167]. Therefore, according to the Art. 3(3)(a)(ii) of IBA Rules, tribunal may order the party to "identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner"[168]. Such terms may be the names of parties taking part in the communication, the names of the parties to the contract, names of the individuals and the dates when those information were exchanged or produced etc.

However, it cannot be excluded that even though the request is broad, the tribunal may grant the request for document production by identifying the relevant documents itself[169]. Moreover,

[165] *See* sub-chapter 1.2. Document production from the civil law perspective pp.8-10.

[166] Marghitola Reto , Document Production in International Arbitration, *International Arbitration Law Library*, Vol. 33 (Kluwer Law International; Kluwer Law International 2015), 43.

[167] ICC Commission on Arbitration and ADR, ICC Arbitration Commission Report on Managing E-Document Production, ICC Commission on Arbitration and ADR, (2012): p.5., ¶3.11

[168] IBA Rules on the taking of evidence in international arbitration 2010, Art. 3(3)(a)(ii) second sentence

[169] See: Procedural Order in ICC CASE NO. 5542, published in Born, Gary, *International Arbitration: Cases and Materials* (Second Edition) (2015), 811-13.

according to regime created by IBA Rules the parties may be ordered to produce even their own internal documents[170]. Therefore, even if the requested documents are contained in different forms that do not *per se* deter the granting requests for document production.

In conclusion, IBA Rules are considered to create a cost-effective document production regime. However, by applying Art. 3(3)(a)(ii) and allowing production of category of documents, arbitrators may be opening the door of "Great Barrier Reef" which may lead into "fishing expeditions". It is advisory for the arbitrators to limit the production of category of documents to accommodate the expectations of the parties.

3.1.2. Documents that are relevant to the case material to the outcome

Art. 3(3)(b) of IBA Rules requires that requested documents must "be relevant to the case and material to the outcome". This criteria shall be evaluated according to the individual case[171]. Documents are relevant to a case "when they are associated with the subject matter of the dispute"[172]. Moreover, not only the contractual but pre-contractual documents may be relevant to the case as "the may help the tribunal to reach a better understanding of the parties' relationship, intentions and agreement"[173]. Background documents can also be relevant to the case for determination of the context of negotiations as well[174].

Document production may be material to the outcome of the proceedings if production of documents "is relevant to the establishment of the facts of the case"[175]. Moreover, documents are truly material if they contain information which allows "complete consideration of the factual

[170] Mistelis, Loukas A, Kröll, Stefan M. Lew,Julian D.M., *Comparative International Commercial Arbitration* (2003): 565

[171] ICC Commission on Arbitration and ADR, ICC Arbitration Commission Report on Managing E-Document Production, ICC Commission on Arbitration and ADR, (2012): 5., ¶3.8

[172] Sameer, Sattar, "Document production and the 2010 IBA Rules on the Taking of Evidence in International Arbitration." *International Arbitration Law Review,* 14(6) (2011): 215.

[173] Lew, Julian D. M., "Document Disclosure, Evidentiary Value of Documents and Burden of Evidence" reproduced in: Alexis Mourre and Teresa Giovannini (eds), "Written Evidence and Discovery in International Arbitration: New Issues and Tendencies." *Dossiers of the ICC Institute of World Business Law*, Vol. 6 (2009): 16.

[174] Waincymer, Jeff, *Procedure and Evidence in International Arbitration,* (Kluwer Law International, 2012): 857

[175] Brekoulakis, Stavros, *Handbook Vienna Rules: A Practitioner's Guide* (VIAC 2014), 174,¶13.

issues from which legal conclusions are drawn"[176].The applicable threshold under IBA Rules is "prima facie materiality" to the outcome of the dispute[177]. It is not required for the requested party to "bear the burden of proof for the facts that it intends to prove with the requested documents"[178]. The fact that document may be contained in different form does not make it immaterial too[179]. For example, in an AAA arbitration, the party requested production of documents to determine the damages for amount of advertising revenues owed[180]. After the party did not produce documents, the tribunal therein could not render an award for contract damages[181]. That case illustrates that in some instances, in particular involving calculation of damages, the document production offers the necessary fact finding tool for the tribunal. However, in order to limit the scope of document production, tribunals must rely on the narrow notion of materiality. It is highly disputed that every document or category of document will be material for the outcome of the case. Therefore, the tribunal shall be cautious while determining the materiality of the requested document in order not to enter into the realm of "fishing expeditions".

3.1.3. Documents that are in possession, custody or control of the party

Another requirement which has to be satisfied in order for the request for document production to be granted is that the requesting party must claim that the requesting documents "are not in the possession, custody or control of the requesting Party"[182]. In alternative, the requesting party must provide "a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents"[183]. However, Art. 3(3)(c) contains a cumulative criteria,

[176] Marghitola Reto , Document Production in International Arbitration, *International Arbitration Law Library*, Vol. 33 (Kluwer Law International, 2015), 54.
[177] *Ibid*.
[178] *Ibid*.
[179] *Ibid.*
[180] Superadio Ltd. Partnership v. Winstar Radio Productions, LLC 446 Mass. 330, 844 N.E.2d 246 Mass.,2006, p.333
[181] Superadio Ltd. Partnership v. Winstar Radio Productions, LLC 446 Mass. 330, 844 N.E.2d 246 Mass.,2006, p.333
[182] IBA Rules on the taking of evidence in international arbitration 2010, Art. 3(3)(c)
[183] IBA Rules on the taking of evidence in international arbitration 2010, Art. 3(3)(c)

according to which, after requesting party provides the above-mentioned reasons, it should also provide the "statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party"[184]. Therefore, based on requirements of the Art. 3(3)(c) the tribunal "would likely focus on the cost borne by the party seeking the records if it were required to retrieve them, and the probative value which the documents will have"[185].

It has been established that "a document is in the 'possession, custody or control' of a party if that party actually has the document or is able to obtain it"[186]. If the party does not have the documents or gathering documents is legally or factually impossible or burdensome for the requested party, than the party will not be obliged to produce such documents.

Issues of possession or control may rise not only in relation to written documents but electronic documents too. As e-mail allows storing evidence into an electronic inbox, the information requested by the party can be restored even if it is deleted by the user[187]. Therefore, according to the requirement set in Art. 3(3)(c), the requesting party has to provide sufficient reasons for the arbitrator to find that it cannot obtain the documents by itself. However, the requesting party cannot prove something which is "negative" in its essence, therefore burden of proof must be *prima facie* in this case. Therefore, providing arbitrators with reasonable reasons must be sufficient to satisfy this criteria.

3.2. Objections for request to document production

A party requesting the production of documents has to demonstrate that the requirements set forth in Art. 3 of IBA Rules are fulfilled. Failure can be a reason for declining the request. However, a

[184] IBA Rules on the taking of evidence in international arbitration 2010, Art. 3(3)(c)

[185] O'Malley, Nathan D. "Document production under Art.3 of the 2010 IBA Rules of Evidence." *International arbitration law review*, Vol.13 (2010): 188.

[186] Grierson, Jacob, Van Hooft, Annet, *Arbitrating under the 2012 ICC Rules*, (Kluwer Law International, 2012), 178.

[187] ICC Commission on Arbitration and ADR, ICC Arbitration Commission Report on Managing E-Document Production, ICC Commission on Arbitration and ADR, (2012): 16-17.

requested party can also raise the objections, satisfaction of which may also result in not granting the request. The following sub-chapter discusses those objections the requested party may raise.

3.2.1. Confidentiality and privilege

One of the reasons for declining the request for document production is that requested documents are confidential, protected under the privilege or they are sensitive. Therefore, IBA Rules contain three grounds. Firstly, according to Art. 9(2)(b), the tribunal may deny the request for document production for the reasons of "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable"[188]. Secondly, according to Art. 9(2)(e), the tribunal can also deny the requests based on the "grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling"[189]. The last ground relates to the sensitive information, namely, according to the Art. 9(2)(f), the tribunal still can deny the request even if the information is not strictly confidential, but there are compelling "grounds of special political or institutional sensitivity"[190].

According to Art. 9(3) of IBA Rules, for determination of the issue of confidentiality, the tribunal may rely on the rule which it determines applicable. This determination refers not only to the grounds of confidentiality but the privilege as well. Therefore, the tribunal has the discretionary power to choose the appropriate applicable rule or the law. There can be several options that tribunal may choose from, such as least favored approach, the law of *lex arbitri* or the law setting most favorable privilege etc[191]. Moreover, tribunal is not obliged to rely on any national law but can rely on the soft law or on the general principles. For instance, in ICC case No. 11258, Respondent requested document created during the mediation process in which the claimant took

[188] IBA Rules on the taking of evidence in international arbitration 2010, Art. 9(2)(b)
[189] IBA Rules on the taking of evidence in international arbitration 2010, Art. 9(2)(e)
[190] IBA Rules on the taking of evidence in international arbitration 2010, Art. 9(2)(f)
[191] Alvarez C., Henri, "Evidentiary Privileges in International Arbitration" in Albert Jan van den Berg (ed), "International Arbitration 2006: Back to Basics?" *ICCA Congress Series,* Vol. 13 (2007): 685.

part in[192]. The tribunal relied on Art. 10 of UNCITRAL Model Law on International Commercial Conciliation and denied the request without looking into any national law[193].

As provided by Art. 9(2)(f), a request for document production may denied even in absence of confidentiality and privilege, if documents contain the sensitive information of political or institutional nature. This can be the case in disputes involving the states where the information of political sensitivity may be disclosed. However, the tribunal can consider the relevance of the possible information and the effect the disclosure may have on the party to arbitral proceedings or the third party. Therefore, the tribunal has to determine whether the importance of the documents outweigh the possible effects of the disclosure.

However, under the regime created by IBA Rules, the requests for document production may be granted even if documents contain confidential or sensitive information, as in international arbitration documents may be produced even if they contain "highly probative financial information"[194]. Under Art. 3(13) of IBA Rules, produced document can be kept confidential by the arbitral tribunal and the other parties. The tribunal may also issue the order binding the disputing parties as well as expert witnesses by confidentiality. Therefore, under the framework created by IBA Rules, even if requested documents contain confidential information, the tribunal may order the requested party to produce such documents.

3.2.2 Unreasonable burden to produce the requested documents

Another reason for rejecting the request for document production is elaborated in Art. 9(2)(c) of IBA Rules. According to it, the tribunal may refuse production of document if it imposes an "unreasonable burden to the party". Based on this article, provided that the production of

[192] Unpublished, ICC No. 11258, Procedural Order No. 2 (2003), reproduced in: The Procedural Rules Governing the Production of Documentary Evidence in International Arbitration - As Applied in Practice, *The Law and Practice of International Courts and Tribunals 8* (2009): 64.
[193] *Ibid.*
[194] O'Malley, Nathan D, Procedural Rules Governing the Production of Documentary Evidence in International Arbitration - As Applied in Practice, *The Law and Practice of International Courts and Tribunals* 8 (2009): 69.

documents is really burdensome to the party, not only irrelevant, but "relevant and material evidence can be validly rejected"[195]. This article can be especially relevant for the party who is concerned about the costs incurred during document production, as in reality, costs can be of utmost importance.

In determining whether the production of documents will lead to imposing such burden the tribunal has the discretion[196]. This objection may be raised not only in case of written submissions but electronic documents, as IBA Rules also refer to the electronic documents. In case of electronic documents, "the effectiveness of keyword searching depends upon the ability to identify search terms that are likely to feature in relevant material"[197]. If requests are framed in a broad manner, then the production of documents can be really costly for the party. Some parties or arbitrators may wish to access the documents in written form. That is why, the printing or copying process may increase the costs.

Although it should be noted, that properly used electronic evidence will contribute to the resolution of the dispute in an "efficient and cost-effective way"[198]. In some cases production of electronic documents is far easier, "particularly where the provider is not required to discretely present electronic documents but can instead provide an overly comprehensive disc with an effective search mechanism"[199]. Under Art. 3(12)(b) of IBA rules, the tribunal may order a party to produce documents in electronic form, thus preserving costs. However, it must be also noted, that tribunals have the discretionary power and not the obligation to deny requests under Art. 9(2)(c). Even if tribunals consider that the document production is burdensome for the opposing party, they may still order the document production. There can be cases when the documents are so material for

[195] Waincymer, Jeff, *Procedure and Evidence in International Arbitration*, (Kluwer Law International, 2012), 865.
[196] Marghitola Reto , *Document Production in International Arbitration*, International Arbitration Law Library, Vol. 33 (Kluwer Law International, 2015), 26.
[197] ICC Commission on Arbitration and ADR, ICC Arbitration Commission Report on Managing E-Document Production, ICC Commission on Arbitration and ADR, (2012): 8,¶ 4.12, b.
[198] Malinvaud, Carole , Will Electronic Evidence and e-discovery Change The Face of Arbitration ? Reproduced in: Alexis Mourre and Teresa Giovannini (eds), Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossiers of the ICC Institute of World Business Law, Volume 6 (2009): 390.
[199] Waincymer, Jeff, *Procedure and Evidence in International Arbitration*, (Kluwer Law International, 2012), 865.

the outcome of the case that the tribunal will still order the other party to produce them. That is why, "the burden imposed on the producing Party should be weighed against the potential use of the documents"[200].

In conclusion, the party concerned about the costs of during document production may raise this ground and ask the tribunal to deny requests for document production. However, the party has to demonstrate the extent of these costs. If costs are minimal and the evidentiary value of requested documents is high, tribunal will order the requested party to produce requested documents.

3.2.3 Loss or destruction of the document that has been shown with reasonable likelihood to have occurred

The tribunal may also refuse to grant the request for document production if requested documents are no longer in existence or they are lost[201]. As a matter of burden of proof, "it is impossible to conclusively prove a negative"[202]. That is why according to Art. 9(2)(d) of IBA Rules, the requested party does not have to prove that requested documents are lost or destroyed in reality, but is has to direct tribunal to the facts which would be enough to establish the reasonable likehood that requested documents are destroyed or lost. Of course, there can be cases when the documents are no longer in existence because one party has destroyed them. In such cases "the tribunal will need to consider whether there were valid grounds for their destruction"[203]. Failing to give valid reasons for the destruction of documents, which may be seen as the "attempt to destroy adverse evidence[204], the tribunal can infer an adverse inference out of such conduct[205].

[200] See: PO No. 2 in ICC No. 11258, (2003); reproduced in: The Procedural Rules Governing the Production of Documentary Evidence in International Arbitration - As Applied in Practice, *The Law and Practice of International Courts and Tribunals 8* (2009): 64.
[201] Art. 9(2)(d) of IBA Rules 2010.
[202] Waincymer, Jeff, *Procedure and Evidence in International Arbitration*, (Kluwer Law International, 2012), 864.
[203] *Ibid.*
[204] Waincymer, Jeff, *Procedure and Evidence in International Arbitration*, (Kluwer Law International, 2012), 864.
[205] *Ibid.*

3.2.4 Considerations of procedural economy, proportionality, fairness or equality of the parties

According to Art. 9(2)(g), a tribunal may deny the request for production of documents based on "considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling"[206]. This provision is regarded as a "catch-all provision"[207] as it encompasses many broad tests, which may even be vague at some point. The main purpose of this article is to "help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing"[208]. The notion of procedural economy mainly refers to the costs incurred in the process of submission of evidence or any other process associated with the document production. It may involve the translation, duplication etc.

The test of proportionality refers to the relevance and materiality on the one hand, and the other considerations on the other hand. For instance, it cannot be excluded that the requested documents are indeed sensitive, confidential or even burdensome for the party to produce, but they are material to the outcome. In these circumstances the tribunal has to evaluate the benefits and the negative effects of granting requests for document production.

Fairness and the equality are the fundamental notions of every procedural framework present in arbitration. These notions can be used in relation to every requirement irrespective of the fact whether it is given in Art. 3 or Art. 9 of IBA Rules. For instance, in commentary on IBA Rules, the working party stated that "the need to protect fairness and equality among the parties may arise when the approach to privilege prevailing in the parties' home jurisdictions differs" [209], requiring the tribunal to apply the chosen rule equally to the both parties[210]. Therefore, according to specific circumstances of the case, the tribunal may rely on the notions of equality and fairness and deny the requests for document production.

[206] Art. 9(2)(g) of IBA Rules on the taking of evidence in international arbitration 2010.
[207] 1999 IBA Working Party 1/2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International* (2010): 26.
[208] *Ibid.*
[209] 1999 IBA Working Party 1/2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International* (2010): 25.
[210] *Ibid.*

CONCLUSION

The journey into the "fishing expeditions" of international commercial arbitration has come to an end. Firstly, before analyzing the existing regimes of document production in international commercial arbitration, the author provided the insight into the understanding of the document production regimes in common law and civil law countries. The author has established that in common law countries, mainly in the USA, the extensive document production regime is a result of the characteristics of the adversarial civil procedure. The notion of adversariality in the USA, requires the parties to have access to the same materials before arguing the case. While in civil law countries, such as Germany and France, where only relative truth is relevant, document production remains more limited in scope.

After establishing the perceptions of document production in common law and civil law jurisdictions, the author described the current problems associated with extensive document production in international commercial arbitration. According to the findings, majority of parties believe that the enormous costs incurred in relation to document production proceedings constitute the worst characteristic of international arbitration and this problem needs to be tackled. Consequently, two major institutional rules: ICC 2012 and ICDR Rules of 2014 were chosen, in order to compare the document production regimes adopted by those rules. As a result of the comparison, the author concluded that those two institutions provide completely different document production regimes. ICC Rules remain flexible, leaving it up to the tribunal to choose the appropriate document production regime and the criteria for granting requests for document production, while the new ICDR Rules adopted in 2014, have incorporated fixed criteria in their rules.

Subsequently, the pros and cons of having the fixed document production regime in institutional rules, contrary to the flexible regime were discussed. At the time of the conclusion of the arbitration agreement the parties may wish to have cost-effective proceedings, but once the dispute

arises they may do everything for winning the case, thereby deviating from their initial commitment. Therefore, to preserve such initial commitments, the author suggested to rely on fixed document production regime provided in institutional rules, contrary to the flexible regime, which is adopted in case of ICC Rules.

However, parties may still wish to remain in the realm of flexible arbitration. That is why, the thesis evaluated the soft law depicted in IBA Rules on the taking evidence in international arbitration, as those rules are considered to provide the most appropriate standards for document production. Consequently, the paper analyzed the criteria set in Art. 3(3) and Art. 9(2) of IBA Rules. Coming to the conclusion that Art. 3(3) of IBA Rules may in reality encourage "fishing expeditions" due to allowing requests aimed at production of category of documents, the author suggested exclusion of certain category of documents. However, the analyses of the objections to document production requests set in Art. 9(2) of IBA Rules suggest that the proper application of these standards, which may lead to the denial of the requests in burdensome circumstances, can indeed protect the commitments of the parties to preserve the costs incurred in arbitral proceedings.

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