# Notes on Document Production in International Commercial Arbitration

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## Introduction

It is a truism that arbitration needs to be a dispute resolution form capable of producing decisions which are substantively correct. To that end the applicable procedural rules should be conducive to attaining that goal whilst at the same time providing reasonable guarantees that the decision-making meets basic principles of fairness and legality. Prominent among these principles are the right to be heard and that of equal treatment.

To establish the facts necessary for proper decision-making written evidence plays an important role. Documents are often seen to be less prone to intentional and unintentional distortion. Many jurisdictions, particularly among the civil law systems, traditionally attribute higher evidentiary value to documentary evidence than to oral. Rules on document production ("DP") exist in most developed legal systems.

It is well established that arbitral tribunals, within their general mandate to establish the facts by all appropriate means, are authorized to issue DP orders[1]. In addition, arbitration practitioners have developed "soft law" rules on the subject. DP issues arise in many arbitrations. Dealing with those is often costly and time consuming. This paper will discuss some of the issues arising in connection with DP Requests, with particular focus on the *IBA Rules on the Taking of Evidence in International Arbitration 2010* (the "IBA Rules"). The perspective is international commercial arbitration with a bit of North European bias.

An obvious starting point is that arbitral disputes should be decided based on evidence presented to the arbitrators by the parties. The duty to present evidence lies with the parties. It is for them to determine how their cases should be structured and what evidence they should invoke. A ground rule is that a party is required to prove the factual assertions that

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1 See e.g. the ICC Rules Art. 25(5), the UNCITRAL Arbitration Rules 2010 Art. 27(3), the LCIA Rules Art. 22.1(iv) and the SCC Rules Art. 31(3)

it advances in support of its case[2]. In theory the arbitral tribunal, to some extent, can take evidentiary initiatives to request presentation of evidence not invoked by a party. The mandate given to the tribunal under Art. 25(1) of the current ICC Rules is broad. It permits the tribunal to "*…establish the facts of the case by all appropriate means*". The mandate of the tribunal to take evidentiary initiatives of its own is reflected in Art. 25(3) with respect to experts and in Art. 25(5) in respect of summoning the parties to provide "*additional evidence*". The Model Law in Art. 26 contains a similar provision with respect to tribunal appointed experts. In large measure this attitude would seem to be rooted in inquisitorial ideas, to some degree favoured by parties and arbitrators from the civil law tradition[3]. However, a common view among international arbitrators is that the evidence is to be presented by the parties as they see fit and without evidentiary initiatives by the tribunal except in very special circumstances and then only in respect of experts.

There is no duty on the parties on their own initiative to disclose evidence that is detrimental to their case. Hence documents may be withheld by a party if that party considers disclosure not to be in its best interest[4]. A duty to disclose, however, may arise from an order by the tribunal.

In international arbitration different systems meet. Differences in procedural notions create a need to find compromise acceptable to all participants. This is the objective of various projects which by way of soft law rules on evidentiary matters seek to bring about workable solutions. The most ambitious current set of rules in this area are the IBA Rules. Similar rules have been developed by other bodies. *The Rules on the Taking of Evidence*

[2] An expression of this principle can be found in Art. 3.1 of the IBA Rules on the Taking of Evidence in International Arbitration (2010) which provide that within the time set by the tribunal" *each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies … except for any Documents that have already been submitted by another Party*". That principle is also expressed other well recognized sets of rules e.g. in Art. 24(1) of the UNCITRAL Arbitration Rules. When the UNCITRAL Model Law was prepared it was considered to introduce such an explicit rule. That idea, however, was discarded on the basis that such rule might conflict with other provisions in the law. It should be noted, however, that this broad starting point indicates a difference from the evidentiary theory e.g. in Sweden where evidence is not required for facts that are uncontested. The broader rule has the disadvantage of requiring the parties to burden the case with evidence which is not strictly needed. Another thing is that a party may wish to submit in "evidence" documents with *per se* are undisputed as to content but which the party considers useful for pedagogical reasons or to provide general background. The broad evidence rule does not cater for situations where the burden of proof has shifted.

[3] In arbitral practice in Scandinavia inquisitorial evidentiary initiatives bringing in evidence which has not been invoked by a party are rare. In Continental Europe this seems not to be at all unusual.

[4] Counsel may of course also be required under deontological rules to abstain from factual statements which counsel knows to be incorrect.

*in Arbitration* (2010) of the Danish Arbitration Association are one such example. Another important set of soft law rules concerning DP in relation to electronic documents has been developed by the Chartered Institute of Arbitrators, the *Protocol for E-Disclosure in International Arbitration* (the "CIArb Protocol").

The IBA Rules have come to gain substantial success[5]. A widely held perception is that, whilst clearly inspired by Anglo-American discovery notions, these rules constitute a reasonable procedural compromise between common and civil law traditions. The IBA Rules are largely seen by practitioners as a formulation of current best practice and as contributing to fairness and a reasonably even playing field.

Arbitral tribunals frequently adopt the IBA Rules to inspire the DP process, sometimes by formal inclusion into the arbitral agreement, but more often as adopted guidelines for the evidentiary process[6]. The discussion below will in chiefly center on the principles set out in the IBA Rules.

## Court Assisted Document Production vs Soft Law Discovery

Document production is typically one of the areas in which domestic courts offer assistance to the arbitral process. Hence national procedural law usually permits parties to bring DP Requests to national courts, typically to the courts at the seat of the arbitration. A pre-requisite is often that the tribunal has given its permission to such an excursion from the arbitral process[7].

[5] According to a survey conducted by the *Global Arbitration Review (GAR)* in 2017 the IBA Rules are used in more than 50 per cent of reported arbitrations in Europe, North America, the Middle East, and Asia Pacific bur far less often in Africa and South America.

[6] The formal inclusion of evidentiary rules into the arbitration agreement (or otherwise into the agreed mandate of the arbitrators) may bring the arbitral process into jeopardy in that any deviation from the agreed rules may be seen as a breach of the arbitration agreement or of a party instruction binding upon the tribunal and hence forming a basis for a challenge of the award. Tribunals, having an overriding duty to deliver an enforceable award, do not relish that possibility and therefore usually prefer the more risk-free flexibility inherent in using the rules as "guidelines". However, an advantage in making the guidelines "agreed" may be that some of its mechanisms, e.g. the drawing of adverse inferences becomes a procedural measure more safely applied. See decision of the Paris Court of Appeal in *Dresser-Rand v Diana Capital et al*, an enforcement case (reported by GAR in its March 2017 issue)

[7] See Model Law Art. 27 and UNCITRAL Arbitration Rules Art. 27(3). Sweden, as a Non-Model Law country, has adopted the same mechanism by Section 26 of the Arbitration Act 1999.

Anecdotal evidence suggests that in recent years court applications for DP in international arbitration have become less frequent. Possible explanations for this perceived trend may be that applications to the courts are time consuming, especially so in jurisdictions where a court order for DP is subject to appeal. In addition, many disputants look at national courts with suspicion based on notions of bias in favour of domestic parties and even, in some countries, of corruption. Further disadvantages may lie in that, in some jurisdictions, court proceedings are public which may result in public disclosure of facts concerning the dispute which one of the parties considers confidential, an aspect which, to many parties, was an essential element of their agreement to arbitrate in the first place. These disadvantages notwithstanding court issued DP rulings would typically be required where the DP Request must be directed to a third party outside the jurisdiction of the arbitral tribunal or where it is clear from the outset that a party (within the court's jurisdiction) will not voluntarily comply with an order made by the tribunal. A tribunal order, however, may in theory be directed to a party in the arbitration requiring that party to use its best efforts to influence a third party to produce the document sought. The efficiency of such an order would often seem to be questionable.

Soft law rules, such as the IBA Rules and the CIArb Protocol, are meant to be applied by arbitral tribunals rather than by the courts. They contain a set of rules which are more developed than are many national court DP rules. An advantage with a DP process controlled by the tribunal is that, in setting the procedural time plan for the arbitration, a schedule may be included for the DP process so as to fit in with the principal submissions of the parties. A DP decision by an arbitral tribunal may also be made more flexible and hence better adjusted to the particular needs of the parties, e.g. by inclusion of tailor made confidentiality provisions.

A major difference between court orders for DP and DP orders issued by tribunals is that, typically, court orders are only enforceable within the jurisdiction of the court. Foreign enforcement of court orders is more problematic and requires support by international conventions. Hence, very often an order by a court at the seat of the arbitration does not have much value if it has to be enforced against a recalcitrant party in another jurisdiction.

A DP order issued by a tribunal is usually not enforceable at all. However, the ability of an arbitral tribunal to put some teeth into its DP order is not entirely fictitious. First, and perhaps most importantly, there is a psychological factor. At the stage of the proceedings where DP orders are typically sought and issued, the parties are usually eager to please the tribunal or, at least, not to strike a direct conflict by openly refusing to comply with a DP order. Such behaviour may be seen as contrary to the duty of loyalty inherent in the arbitral process and hence frowned upon by the arbitrators.

If a party nonetheless should refuse to comply the prime sanction would be the drawing of adverse inferences (See e.g. Art 9.5 of the IBA Rules and Art. 5.5 of the CIArb Protocol). However, that mechanism, whilst having attractions in theory, entails considerable problems in practise. One difficulty is often to determine exactly what adverse inference should be drawn from the fact that a certain document is not produced. Other issues may arise on the procedural side[8]. In practise it is believed to be rather unusual that arbitrators explicitly say that they have actually drawn an adverse inference due to refusal by a party to comply with a DP order. The attitude of the courts to the drawing of adverse inferences largely remains to be seen. Whether in real life arbitral tribunals draw adverse inferences without explicitly saying so eludes fact based analysis. However, it would appear to be a safe guess that such reasoning is not entirely beyond tribunals.

An alternative sanction to the drawing of adverse inferences, in some cases, may be to shift the burden of proof. A theoretical basis for that would be the application of the proximity of evidence rule[9].

## General Aspects of the DP Process

### A Duty of Loyalty?

In international arbitration parties, counsel and the arbitrators typically come from different legal traditions. It is widely accepted that fairness is important prerequisite for the good arbitral process[10]. This requires a degree of loyalty between the parties. The duty of loyalty may flow from deontological rules. Such duty of loyalty is sometimes also embodied in the applicable arbitral rules[11]. However, this said, there is considerable uncertainty as to what such a duty of loyalty encompasses.

[8] Must a party seeking the drawing of an adverse inference plead that with a degree of specificity, must the respondent party be allowed to respond etc. One reported case in which a court has considered the effect of the drawing adverse inferences (the only?) is the French *Dresser-Rand* case mentioned in note 6 above.

[9] See e.g. Schlechtriem & Schwenzer: Commentary on the CISG, 4th ed, p. 619 and 838 f.

[10] A duty of fairness arises out of several international instruments. The IBA Rules clearly express that principle. On the deontological side and with relevance principally for European Union lawyers see e.g. the *Code of Conduct for European lawyers* 2006 in Art. 4.2 and 4.5. See also Art. 14.5 of the LCIA Arbitration Rules (2014) and paragraph 2 of the Annex thereto. It is submitted that few lawyers within the arbitration community would seriously dispute the validity of that principle. Another thing is what the fairness principle really entails.

[11] Whilst the existence of a general principle of good faith would seem to be questionable as a matter of English law the principle is nevertheless referred to in e.g. the LCIA Arbitration

At a general level there is wide consensus among arbitration practitioners that parties should display a co-operative attitude and that they should strive for a process that provides for a fair and even playing field. That sense of loyalty is naturally informed by the cultural background of the parties and – perhaps more importantly – of their advisers. Here differences are apparent. Discovery, including DP is ingrained in Anglo-American lawyers as forming part of due process. The importance of discovery is usually not equally appreciated by civil law lawyers. Whereas, as observed by Professor William H. Park *"(i)n jurisdictions following Anglo-American models, lawyers consider themselves under a duty not to supress documents whose production has been ordered*[12]" such commendable attitude may not be as strongly rooted in the minds of all civil law lawyers. In order to overcome differences in the behaviour of the parties and of counsel the IBA in 2013 adopted the *IBA Guidelines on Party Representation in International Arbitration* (the "Guidelines"). The focus of the Guidelines is the behaviour of counsel in advising the client[13]. One of the objectives of this instrument is to guide and inspire tribunals and counsel towards a fairer DP process. At any rate, it should be an important task for an international tribunal to seek to ensure that cultural differences are not permitted to create an uneven playing field and an unfair process.

## Timing Aspects

Usually the DP issues come to the fore early in the arbitral process. They may be triggered by a party initiative. Questions on DP may also be raised by the tribunal as to whether the parties envisage a round for DP. Some arbitrators take the view that the tribunal should abstain from raising such question *sua sponte*. The theory is that the mere question will trigger Requests to Produce which would otherwise not have materialized. This, in my view, is not a practical approach. In international disputes the DP issue will very often arise. The parties typically know from the outset where

Rules Art. 14.5 and the Annex thereto. To civil lawyers there is little doubt that the duty of loyalty is a general principle also applicable to arbitration.

12 *"A Fair Fight: Professional Guidelines in International Arbitration" Arbitration International* Vol 30:3 p. 412.

13 The Guidelines in Rules 12–17 deal with loyalty issues such as the duty to preserve documents, not to seek DP for purposes of harassment or delay and the duty not to suppress evidence. It should be noted that whilst the applicability of these principles is endorsed by many they are not shared by all. An argument against the Guidelines is naturally that voluntary guidelines of this kind must not take precedence over the fundamental duty of the lawyer to act in the best interest of the client. Another argument is that arbitration, in the view of some, tends to become over regulated. To what extent the Guidelines will be accepted by the "arbitration community" remains to be seen.

their evidence needs supplementation by way of DP. If not dealt with at the inception of the process the tribunal may well be faced with a late application. Late applications outside the set time plan often cause unnecessary complications. Better then to have the issue on the table early on so as to allow for good time planning. If the parties say nothing the tribunal should ask[14]. If the parties want DP this process can be included in the initial time plan. Sometimes the need for DP arises out of the subsequent pleadings, typically by the Statement of Defence or the Reply/Rejoinder. This may cause successive Requests to Produce with the ensuing risk of delay in the "main" process. This is obviously not desirable but cannot always be avoided.

## The Request to Produce

### Substantive vs Procedural DP

A Request to Produce can be based on an alleged *substantive* right for the applicant party to obtain access to a document. Alternatively, it can be based on *a procedural* right. A substantive basis would arise out of a contract containing a right for the party to be provided with the document in question. An example of this would be the right of a licensor under a licence agreement to take part of the sales records of the licensee in order to determine the licence fees payable under a licencing agreement. However, the most commonly invoked basis for a Request to Produce is procedural, viz. that the document is relevant as evidence in an on-going dispute. The difference between the two may be crucial, e.g. in respect of the enforceability of a DP order. This aspect will be discussed below.

### The Content of a Request to Produce

The requirements for a successful Request to Produce are rather straightforward. The IBA Rules[15], by illustration, require that the Request to Produce identifies the document sought or, if that is not possible, a "*narrow and specific*", description of the documents concerned. A further requirement is that the documents are reasonably believed to exist and that they are alleged to be "*relevant to the case and material to its outcome*". In addition, the applicant needs to state that the documents sought are not in its *possession*,

[14] The CIArb Protocol by Art. 1.1.2 requires the tribunal to raise the issue at "the earliest opportunity".

[15] See Article 3.3 (a)–(c). The CIArb Protocol in Article 2 sets out very similar requirements.

*custody, or control* (or, if they are, why it would be unreasonably burdensome to produce them). The satisfaction of those requirements often causes controversy.

## Some Recurring DP Issues

### Introduction

DP issues can and do take many forms. Some recurring bones of contention will be discussed below. This paper, obviously, does not pretend to be exhaustive. It is more in the nature of the proverbial "smorgasbord" with several dishes missing.

### The Format

A popular format for dealing with Requests to Produce and replies thereto is the standardized Redfern Schedule[16]. This is a chart model which will work best if the parties are succinct in their argumentation. If this is not possible it may be better to choose a model that permits more extensive submissions, the risk being that the DP process develops far beyond what the tribunal considers desirable or the time table permits. The tribunal's decision using the Redfern Schedule format can be set out in a simple column for that purpose. The format of the tribunal's decision will be further discussed below. Be it here just noted that some arbitrators adopt the principle of simplicity to such a degree that they require the DP Respondent to submit its objections only in standardized form, e.g. by numbering the defence catalogue in Article 9(2) of the IBA Rules and to submit the defence only by citing the appropriate number(s). This method, it is suggested, may be a bit of efficiency overkill.

[16] Named after a prominent English Arbitrator, Alan Redfern. The model, in its basic form, consists of a simple chart with some few columns: One for the Applicant's specification of a document (or more often a narrowly defined class of documents) sought, one for a brief explanation of the evidentiary value of the document(s), one for the DP Respondent's objections, one for the Applicant's Reply and (often) one for the Respondent's Rejoinder. In a last column the decision of the tribunal can be inserted.

## The DP Procedure

A recurring issue relates to the process that should be laid down for the DP exercise. This is to be determined by the tribunal. Usually it would follow the pattern of Request/Answer sometimes followed by a Reply/Rejoinder. As to actual production of documents, voluntarily or on the basis of a ruling by the tribunal, the IBA Rules in Article 9.7 now make it clear that production should not be made to the tribunal, but only to the requesting party, unless otherwise ordered by the tribunal. An important reason for this is that it is for the requesting party to determine if a certain document produced should be invoked as evidence and so submitted to the tribunal and included in the case materials. Only then does the document become a relevant part of the case file. If before that the documents to be produced by the DP Respondent are sent to the tribunal it may become unclear whether or not the documents are actually part of the file. It has happened that lack of clarity on that point creates severe problems if, later in the process, perhaps at the oral hearing, the DP Applicant suddenly invokes a document not earlier invoked in evidence whilst the other party had no clue that this would happen and therfore had not prepared a defence to counter that evidence. If such behaviour is permitted by the tribunal – and it sometimes is – this may cause delay or, in worst case, amount to a due process violation.

Another issue is to what extent the arbitral tribunal should be involved in the DP process before the parties have completed their respective arguments, perhaps by several written briefs. Some tribunals do not want to be involved until the parties have exchanged pleadings and, often, completed a Redfern schedule. Other tribunals want continuously to follow the DP process throughout. The disadvantage with late involvement is that the arbitrators do not get an early sense of the DP issues in dispute and therfore cannot act to assist before the parties are finally entrenched in an aggravated DP dispute. This may be a disadvantage. Where it becomes clear what the DP controversy is all about it may be useful for the arbitrators to involve themselves in the issues early on. This may allow the tribunal to issue a guidance note to the parties so as to lay to rest unnecessary sub-issues. This suggests a preference for an exchange of DP arguments such that it can be followed by the tribunal and so to enable a degree of control that the process proceeds as ordered. A further advantage is that familiarity with the arguments of the parties facilitates for the tribunal to hand down a speedy decision once the argumentation has been completed.

### Translations

If documents produced as a result of a Request to Produce should be originally drafted in a language that the requesting party does not understand it happens that the applicant requests that the DP Respondent be ordered to provide translations. This may be a cumbersome and costly exercise.

DP concerns existing evidence. A DP order is directed to the DP Respondent whose duty it is to produce the document ordered in native form but not to create a new one. A translation order should therefore be denied unless special reasons are at hand. It should be for the DP Applicant to procure translations in the event that it finds that the documents sought and produced do indeed have evidentiary value and should therefore be relied on. Translations should not, at that stage, burden the DP Respondent. Another thing is that such cost may ultimately have to be borne by the DP Respondent as a result of the tribunal's final cost order.

## The Defences

### General

The IBA Rules, in Article 9 (2), purport to set out the defences available to the DP Respondent. The rules may be taken to lay down (by Articles 3.5 and 9.2) that the defence catalogue should be seen as exhaustive. It is suggested that such should not be the case. A tribunal, having decided that the rules are only adopted for purposes of guidance, may of course also consider any defence that it deems valid. Moreover, the catalogue, whilst comprehensive, may not cover all conceivable defences (although, admittedly, the catalogue does seem to be comprehensive). The IBA Rules themselves in Article 3.5 say that failure to meet the requirements in Article 3.3 does in effect amount to a defence although these requirements are not set out in the Article 9 (2) defence catalogue.

All the possible defenses will not be discussed here. Some frequently arising issues are the following.

### Lack of Specificity

A very common objection to a Request to Produce is that it is lacking in specificity. Frequently the applicant seeks "all documents" falling within a loosely described category. Such request may be quite difficult or impossible to comply with. Meeting that requirement may entail a duty to search

for documents stored in several documentary banks, electronic and physical, created over a long period of time. The search may be very costly.

A defence could then be "lack of specificity" or, perhaps, that compliance would be unreasonably burdensome because of the lack of specificity (as provided for e.g. under Article 9.2. (c) of the IBA Rules. Such a widely shaped request, for it to be accepted by the arbitral tribunal, may need to be delimited e.g. in time, by creator/recipient or in some other way so as to make it more finite.

In this context it is appropriate to deal briefly with what is today often the most interesting source of discovery – electronically stored documents.

The advent of DP of electronically stored documents was recognized in the IBA Rules 2010 e.g. by inclusion of a rule in 3.3 (a) on possible requirements for DP Applicant to specify search methods and tools to be used for document search and generally in Section 12 (b). That provision, however, does not deal with the specific issues that arise in respect of electronic documents. The Commentary to the 2010 IBA Rules, produced by the Working Party in charge of the review of the IBA Rules, provides more substance. It points out that electronic documents may be identified by file name, by specified search terms, and by individuals involved. It is also pointed out that whether the tribunal should order disclosure of meta data needs special consideration. Disclosure of a document in its full native form (including meta data) may entail substantial cost issues.[17] A more elaborated set of rules for e-discovery is contained in the CIArb Protocol[18].

## No Possession

Fundamental to a DP Request is that the respondent, directly or indirectly, "possesses" the document requested. This requirement gives rise to several issues.

A first issue is how a tribunal should treat a blank statement by the DP Respondent to the effect that the document concerned is not in its possession. If no objection is raised by the applicant the tribunal would have to accept that as an absolute defence. Very often, however, the applicant contests this and has questions on how non-possession was determined. One such question may be to ask specifics on the investigation carried out. The search process of course may be a demanding exercise where, as is often the case, the DP Respondent is a large corporation with many people involved, perhaps at different locations. The process chosen can be

[17] For a broader discussion of the problems inherent in DP of electronic documents in international arbitration see e.g. Richard D. Hill in *Arbitration International* 2009 volume 25:1 pp 87–103.

[18] In Art. 3.2 of the CIArb Protocol.

more or less efficient and broad. A requirement in that regard would be that the respondent makes a reasonable investigation encompassing those document collections where the requested document may be expected to have been stored. Use of reasonable electronic search tools would typically be required. At the request of the DP Applicant those exploratory efforts should be accounted for. A statement by counsel that the result of reasonable efforts is that no possession has been established should be accepted by the tribunal except for instances where fairly clear reasons to question the veracity of that statement are at hand.

Most companies have routines for destruction of corporate documents. Storage times may vary but can hardly be shorter than that which by law is required, typically in respect of financial documents. If the DP Respondent says that it has destroyed a document that it did possess the question may arise as to whether or not destruction was made in accordance with the document retention policy of the company. Retrieval efforts for deleted documents or damaged files may have to be made.

A further issue may arise where the DP Respondent truthfully says that it does indeed possess the document but that it is prevented from disclosing the document because of confidentiality rules or undertakings vis-à-vis a third party. In that case the nature of the confidentiality duty may have to be looked into.

A defence related to the no-possession defence arises where the DP Respondent says that it does indeed possess the document but that the application should be denied because the document can be obtained by the DP Applicant from other sources, perhaps even from open sources. This situation is somewhat referred to in the IBA Rules. It believed that tribunals take different positions on this issue. In my view such defence should not succeed unless the document is easily accessible from another (specified) source. Otherwise the evidence gathering process may be unduly prolonged because the DP Applicant is required to spend time, perhaps considerable time, trying out all sorts of alternative sources before making a DP Request to the counterparty. The decisive point should be whether the applicant is able to state, as it must, that it does not have possession and that it is reasonably believed that the DP Respondent does. Such statement should be made on the basis of due diligence rather than as an absolute guarantee. In large organisations an absolute no-possession guarantee is rarely possible.

It sometimes happens that the DP Respondent resists the application because it alleges to have supplied the document sought to the DP Applicant in the course of the performance of the contract. If that assertion is denied what should the tribunal do? The veracity of the defence should in my view, be tried as any other statement of fact. Hence, if the DP Respondent says that it has supplied the document it must show that this is correct. A blank statement would rarely suffice.

Another not uncommon situation is that the DP Request includes a request for an order that the DP Respondent should compile information contained in a number of other documents and so to hand over the compilation to the DP Applicant. Such a request would fall outside the scope of DP which, again, is about disclosing existing documents and not the creation of new. However, if the tribunal is of the view that the compilation requested is relevant to the case and the creation thereof does not impose an unreasonable burden, there is, in my view, nothing to prevent the Tribunal from issuing such an order on the basis of its general mandate.

A special issue related to possession is whether the tribunal, at the request of a party, as a first step in the DP process, can issue an order imposing upon the DP Respondent a duty to preserve documents which may turn out to have evidentiary value. Such an order entails several issues which will not be addressed here. I do not believe that a tribunal would be prevented from issuing such an order if indeed it finds this to be justified in the circumstances. Another thing is what sanctions are available in the (presumably rare) event of proven non-compliance. The drawing of adverse inferences may be such an option.

### *Undue Burden*

A defence to the effect that compliance with the request will put an undue burden on the DP Respondent may have to be accepted if properly motivated. A wide search for documents in large corporations may put considerable burden on that party and on its legal advisers. A counterargument may be that substantive justice is critical in a one-tiered dispute resolution process and that convenience should not hinder the administration of justice. How that conflict of interests should be resolved in case naturally depends on the specific circumstances. One is the resourcefulness of the DP Respondent. A small and impecunious party may have better chances of succeeding on an undue burden defence than is the case with the large and resourceful multinational. On the other hand, a sweeping order against a major corporate player may be unduly burdensome e.g. because of the multitude of locations that may have to searched. Questions concerning the cost of resources to be spent can be dealt with in the cost distribution phase.

### *Protected Documents*

This is a wide category of documents. It includes documents which should be confidential because of commercial or technical considerations. It also includes documents subject to attorney-client privilege. It further involves

documents falling under confidentiality agreements between the disputant parties or between one of the parties and a third party. A further group concerns personal notes and unfinished work products. Some brief observations are these.

It is not uncommon that the DP Respondent objects to disclosure on the ground that it has undertaken vis-à-vis a third party not to disclose a certain document. Acceptance of that defence would often be problematic. If accepted it may provide a basis to avoid disclosure by making a voluntary third-party undertaking. If a legitimate need to protect the document is at hand this would often be because of a need to protect a trade secret (of a technical or commercial nature). If such is the case the objection should be so motivated. A tribunal faced with such objection may have to consider to what extent the objection can be overcome by appropriate confidentiality directions by the tribunal.

Expert evidence is very common, arguably often in excess of the real evidentiary needs. Parties frequently wish to test the quality of an expert opinion by exploring the circumstances in which a written report was created. This may lead to a request for production of draft reports. The question then arises as to whether such desire should be condoned by the tribunal. It is apparent that disclosure of a draft report may be highly detrimental to a legitimate and rational work process between counsel and the expert. It may also encroach upon the attorney-client privilege. But even if it does not, e.g. because counsel was not at all involved in retention of the expert and production of the expert report, an application to see drafts should normally be resisted. A draft does not represent a finished work product. Forced disclosure of such drafts may typically create undue complications in the work of the expert. A DP Request for drafts should be resisted unless very special reasons are at hand[19]. This said it must also be recognized that opposing counsel may well wish to pry into the creation process by way of cross-examination. Subject to relevance this can hardly be denied by the tribunal.

## Inequality

Requests to Produce are often submitted by both sides. It may then be that the application of one party requires much broader and voluminous disclosure than is requested from the other side. A defence may then be

[19] There seems to be broad consensus among arbitration practitioners that, subject to certain exceptions, a presumption of non-discoverability is at hand. The exceptions would primarily be materials relied on or referenced by the expert (or by counsel) and instances of abuse. See Paul Friedland and Kate Brown De Vejar in *Arbitration International* 2012, Vol 28:1 pp 1–18.

raised to the effect that the more demanding disclosure burden should be alleviated because the burdens would otherwise be unequally shared. On the basic assumption that the extensive application is *per se* sufficiently motivated such inequality defence, in my view, has little appeal. One reason for that view is that the burden of proof is rarely equally distributed and that the burden upon one of the parties may be much more demanding than that resting upon the opposing party[20].

## The Mandate of the Tribunal

In some cases, it is apparent to the tribunal that a defence raised by the DP Respondent may be incomplete in that an obviously available defence has not been invoked. (An example being that the application concerns a document which almost certainly would be protected by attorney-client privilege. Other examples are that the evidentiary purpose is insufficiently described or that the request is clearly lacking in specificity). Such deficiencies notwithstanding the DP Respondent may not raise these possible defences – by choice or by mistake. The question is then whether the tribunal should decide the application on the basis of the defences actually raised or it the tribunal may deny the application on defences which, in the view of the tribunal, would have been be available. In my view the tribunal should respect the pleadings of the parties and abstain from grounding its decision on arguments that were not raised. This approach would be best in line with the principle that the mandate of the tribunal is defined by the pleadings of the parties. In addition, it would often be very difficult for the tribunal to formulate its decision e.g. where a confidentiality restriction should be attached to the DP order.

[20] This equality notion seems to be related to the idea that the parties are to be given equal time to present their cases. That idea in my view often misplaced. The fundamental aspect is that each party should be given all the time it reasonably needs to present its case. The parties may have very different timing needs e.g. depending the complexity of the plea and the evidentiary burden resting on a party. If the party with the lighter burden claims that it needs time at par with the more burdened party, then more time should be offered – on condition that the party is capable of usefully filling that time space. Dark forces may suggest that the real reason behind the "equal time"-notion is often that this is (superficially) fair in a situation where the parties are given insufficient hearing time by arbitrators who, in the light of other commitments, have limited time to spend on each case, especially on oral hearings. Such dark forces may be right in suggesting that this is not good arbitral practice.

## The Decision of the Tribunal

Tribunal orders on DP are usually not enforceable through the state systems. Nor are they enforceable under the New York Convention if the order is procedurally based. Such a decision is not a final decision of the dispute before the tribunal as required under Art. V.1(e) of the Convention. A DP order does not gain legal force and can be revoked or modified by the tribunal at any time. It therefore lacks the required finality under the Convention[21]. By contrast an order based on a *substantive* right to take part of the document may be enforceable outside the seat under the New York Convention. This would be the case if the DP decision is given the form of a final interim award binding and enforceable on that basis.

In most cases the tribunal's decision can be made in simple form. In its simplest form the decision can be handed down by insertion of the outcomes in the Decision column of a Redfern schedule. The decision of the tribunal should normally be brief. It would only in special cases be necessary for the tribunal to say much more than "granted" if such is the outcome. If the application is denied brief standardized reasons would normally be enough.

If a party is dissatisfied, the tribunal's decision can, in some jurisdictions such as the Swedish, be reviewed not by formal appeal but by a request by the dissatisfied party to bring the DP issue before the courts. An application to seek court assistance may or may not be granted by the tribunal. Another possibility is naturally that the dissatisfied party requests the tribunal to reconsider its decision. In practise this would require good cause. Tribunals, having considered the arguments of the parties and having rendered a decision thereon, would typically not be open to a continued discussion on issues already decided. Another thing is that a second round of DP may be necessary because of new evidentiary needs in the light of subsequent pleadings.

Dissenting opinions in DP decisions are very rare (to the point of being virtually unheard of). However, if one of the arbitrators feels strongly that the majority is misguided in its decision there is nothing to prevent dissent. It is suggested, however, that a dissenting opinion is very likely to be pointless. A downside is that it would signal discord within the tribunal – an element which the parties may seek to exploit in the course of the continued process.

[21] In the much-discussed U.S. case *Publicis v True North Communications* the Court held that a procedurally based DP order, in view of the contents of the decision, did have the required finality under the New York Convention. In *Resorts International*, an Australian enforcement case in respect of a DP order by a U.S. seated tribunal, the Court arrived at the opposite result. It is submitted that *Publicis* goes against the commonly held view.

It is sometimes argued that a negative DP decision by the tribunal may constitute a procedural error such that the award may be challenged on that basis. This view is hardly sustainable. First, if a party does not like the decision it can often, as above indicated, bring the DP issue before the courts. Second, a DP decision would be a procedural decision. A challenge of the subsequent award on that basis would usually require that the applicant party to show that the outcome of the case was materially influenced by the DP decision. It is suggested that, given a possibility to bring the Request to Produce before the courts, this would only to be viable in most special circumstances. Another thing is that, where permission by the tribunal is required to bring an application to the court and such permission is denied without reasonable cause, this may in special cases constitute a procedural error which, if the effect of the refusal can be demonstrated to have materially influenced the award, may be used to attack the award[22].

## Disloyal Production

Having been subjected to a DP order the DP Respondent can take different attitudes. Some comply loyally. Others do not and instead prefer to obstruct production. The obstructive methods are many. An old trick is to flood the case, viz. to produce vast numbers of documents, some covered by the actual request, some not. In case of applications containing several requests, the producing party may hand over a mass of documents without specifying which document is responsive to which request. In such situations the DP Applicant may need to ask the tribunal to assist by expanding its earlier decision by supplementary directions.

## Cost Aspects

In a substantial international arbitration, the DP process may draw very substantial costs. The pleadings may be extensive, and the volume of documents involved very substantial. It may even be that the DP process requires a special evidentiary hearing. A question may then arise as to the financing of the DP process and, most certainly, which party should ultimately carry that cost.

As to financing in the course of the arbitral proceedings the general rule applies meaning that each party will have to finance its own cost until the tribunal ultimately decides on the final distribution thereof. However, it

[22] For a Swedish comment see the seminal Commentary on the Swedish Arbitration Act 1999 by Stefan Lindskog 2 ed. p. 700.

can also be argued that the DP process is in essence a cost of evidence that should be financed by the parties equally or, even more demanding, wholly, or partly by the DP Respondent. Tribunals may view this in different ways. An important aspect is obviously that where the DP process is costly an impecunious party may be unable to comply with a Request to Produce for lack of funds. Applying the IBA Rules such a situation may be invoked as a defence under Article 9(c) (unreasonable burden) or, possibly, under Article 9(g) (procedural fairness or equality). Where the situation is the opposite, viz. that the DP Applicant is the party with insufficient resources a tribunal, in special circumstances, could conceivably put some of the financing burden on the DP Respondent.

As to the final distribution of costs a widely shared view is that the cost should follow the event (measuring primarily the outcome of the principal dispute). This may often be too simplistic a formula. Disregarding the fact that the model is often difficult to apply already because of the problem in determining who the winner is, the formula arguably is too focused on over all outcomes rather than on what resources were required to deal with the case presented by the parties, on substantive and on procedural issues. A party that ultimately prevails in the main dispute but who lost on a number of procedural issues should not necessarily be as generously treated as the simple model suggests. For example, if the ultimately successful party submitted an extensive DP Request but lost on that such party should perhaps not be compensated for its DP costs.

## Concluding Observations

It is apparent that international arbitration over the last decades has developed towards gradual absorption of Anglo-American procedural models. DP is one such element. It often contributes to soaring costs. It is suggested that the practise in DP matters, whilst greatly assisted by rules such as the IBA Rules, is in need of further development, not least in order to reduce costs. Whether this should be best cared for by supplementing existing soft law rules or by development of unregulated best practise models is debatable. In addition, more harmonization of good DP practise would be beneficial to arbitration as the most useful model for commercial dispute resolution also in the future. It may be that the price to be paid for greater efficiency and lower costs is a system with more robust and cheaper models for search, production, and presentation of evidence. Such reform perhaps requires some sacrifice perceived to encroach upon that often resource demanding concept called "due process". But that, as Kipling said, is another story.