# CHAPTER 10
# Document Production in Scandinavia

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## §10.01 INTRODUCTION

Documents are the most important source of evidence the parties to an arbitration may have available to them.[1] However, it is not always the case that the parties to an arbitration have all the documents required to plead the case as they would like. For this reason, a party may have to request the production of documents from the opposing party or parties[2] in order to illuminate its case.[3]

A proper document production phase may substantively affect the outcome of the dispute.[4] However, document production procedures may also be abused, e.g., as a procedural tactic to impose costs, delay, and undue burdens or in an attempt to substantiate a case which, from the outset, was not supported by documentary

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1. Nigel Blackaby, Constantine Partasides & Alan Redfern, *Redfern and Hunter on International Arbitration*, N 6.88 (7th ed. Oxford University Press 2022); Gary Born, *International Commercial Arbitration*, p. 2421 (3rd ed. Kluwer International, 2021); Jean-Francois Poudret & Sébastien Besson. *Comparative Law of International Arbitration*, p. 554 (Sweet and Maxwell 2006).
2. This chapter only deals with requests from parties to the Tribunal, not requests directed towards third parties or the tribunal's competence to request the parties to produce evidence.
3. In the *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, by the Queen Mary University of London https://arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf (accessed 3 Mar. 2024), 62% of the respondents said that more than half of their arbitrations involved requests for document disclosure, while only 22% said that less than one-quarter of their arbitrations involved such requests (p. 24).
4. In the *2012 International Arbitration Survey*, 59% stated that documents obtained through document production materially affected the outcome of at least one-quarter of their arbitrations (p. 24), while 29% believe this happened in at least half of their arbitrations (p. 27).

evidence available to the requesting party. A common understanding of the correct application of the document production rules is, therefore, important.

We observe an increased focus on document production in arbitral proceedings seated in Scandinavia. This development may in particular be attributed to digitalisation and the availability of an ever-increasing amount of exchanged e-mail correspondence and compilation of data. The availability of, and relatively easy access to, extensive documentation may also lead to requests being formulated too broadly and/or concerning issues of little or no relevance.

This chapter explores the features of document production commonly found in Scandinavian arbitral proceedings and whether there may be differences between 'national' and 'international' arbitrations seated in Scandinavia.

We focus in particular on the respective countries' arbitration acts[5] and principles from domestic civil procedure established in jurisprudence and legal works and compare the result of our analyses of national principles with the IBA Rules on the Taking of Evidence (the 'IBA Rules'), as an expression of best practice in international arbitration.

In the next sections, we first perform a comparative study of the regulation of document production in arbitral proceedings in the three Scandinavian countries.[6] We then proceed with a presentation of how three main principles of particular practical significance, namely *specificity*, *relevance* and *proportionality*, are understood in the respective Scandinavian jurisdictions while also comparing them to the requirements in the IBA Rules.[7] Finally, we set out our conclusions.[8]

## §10.02 GENERALLY ON DOCUMENT PRODUCTION IN ARBITRATIONS IN SCANDINAVIA

### [A] Introduction and Some Starting Points

The relevant starting point under the Norwegian Arbitration Act of 2004 (NAA), the Danish Arbitration Act of 2005 (DAA), and the Swedish Arbitration Act of 1999 (SAA) is that it is for the parties to submit the evidence on which they intend to rely.[9] The parties are otherwise free to agree on the procedure, including for document production.[10] Notably, neither the NAA, the DAA, nor the SAA regulate the procedure of

5. The Norwegian Arbitration Act of 2004 (N. '*Lov om Voldgift*') (the 'NAA'), The Swedish Arbitration Act of 1999 (SW. *Lag (1999:116) om skiljeförfarande*) (the 'SAA'), and the Danish Arbitration Act of 2005 (D. Voldgiftsloven: Lov nr. 553 af 24. juni 2005) (the 'DAA').
6. *See* §10.02 below.
7. *See* §10.03 below.
8. *See* §10.04 below.
9. SAA § 25; NAA § 28. Jakob Juul & Peter Fauerholdt Thommesen, *Voldgiftsret* (3rd ed. Karnov, 2017), p. 237.
10. NAA §§ 43(1) litra e and 46(1) litra e, stating that an award may be set aside or refused recognition and enforcement if the procedure is contrary to the parties' agreement. *See* similarly, DAA § 37(2) no. 1, litra d, and § 39(1), no. 1, litra d, and SAA §§ 34(1)(3) and 54(4).

document production in the arbitration.[11] Rather, all three acts only regulate the situation in which the tribunal, or a party with the consent of the tribunal, requests the regular courts to assist in document production.[12] In this latter context, it has been established in Swedish jurisprudence that the regular courts shall rely on the tribunal's assessment of whether the request for the production of documents should be granted.[13]

In addition, the arbitration rules of both the Danish Institute for Arbitration (the 'DIA Rules') and the SCC Arbitration Institute (the 'SCC Rules') entitle the tribunal to order document production in the arbitral proceedings.[14]

As regards the relevance of national civil procedure acts, we recall that an agreement to arbitrate is an agreement to divert the dispute away from the regular courts and their procedural rules. Thus, unless specifically agreed between the parties, the national civil procedural act is not applicable to the arbitration procedure. This overall principle applies in all three Scandinavian countries.[15] However, to the extent that the arbitration act of the respective jurisdiction and the institutional rules, insofar as these are applicable, do not regulate the matter, we often see that principles of civil procedure are used as guidance.[16]

In §10.02[B] below, we first establish the tribunal's mandate to govern the document production procedure in the arbitral proceedings. In §10.02[C] we establish the principles commonly applicable in arbitral proceedings seated in Scandinavia.

### [B] The Tribunal's Mandate to Govern the Document Production Procedure

Where the parties have not agreed on the procedure, and within the framework of the arbitral acts, the tribunal is entitled to conduct the arbitration 'in such manner as it considers appropriate'.[17] This follows from the NAA § 21 first sentence and the DAA § 19(1) and (2) first sentence. The provisions are equivalent to Article 19(2) first sentence of the UNCITRAL Model Law. Although not as clearly expressed, the same applies in Sweden, where § 21 of the SAA requires and empowers the tribunal to conduct the procedure in an appropriate manner.[18]

The DAA and the Model Law go a step further than the NAA and SAA by also stating that 'the power conferred upon the arbitral tribunal includes the power to

11. NAA § 28 contains a distinctive provision on evidence, but is not meant to encompass requests for document production although it may be analogously applicable in certain cases.
12. NAA § 30, SAA § 26, DAA § 27.
13. NJA 2012 p. 289.
14. *See* Art. 33 of the DIA Rules and Art. 31(3) of the SCC Rules.
15. Denmark: Bernhard Gomard & Michael Kistrup, *Civilprocessen* (8th ed. Karnov, 2020), p. 880.
16. Generally in Luca Radicati di Brozolo, 'International arbitration and domestic law' in Giuditta Cordero-Moss, *International commercial arbitration* (2013, Cambridge).
17. '*På den måte den finner hensiktsmessig*' in Norwegian, *see* § 21 of the NAA and DAA § 19(2).
18. Sw.: Ändemålsenligt, *see* generally Stefan Lindskog, *Skiljeförfarande – En kommentar* (3rd ed. Norstedts Juridik, 2020), 636 et seq. *See also* the SCC Rules, Art. 23(1).

determine admissibility, relevance, materiality and weight of any evidence'.[19] This is also the position under Norwegian law despite it not being expressly set out.

Thus, the starting point under all three arbitration acts is that the tribunal is provided with a mandate to govern the document production procedure in the arbitral proceedings and apply the principles it sees fit. In practice, a tribunal seated in Scandinavia will regularly apply the principles established in the respective countries, and international principles like the IBA Rules. There are also instances where the parties agree that document production shall be regulated by the *lex arbitri*. Finally, there are instances where the tribunal or a party, with the consent of the tribunal, will request assistance with document production from the regular courts. In all three instances, national principles will be relevant.

### [C] The National Principles That May Be Applied in Considering a Request for Document Production

It has been argued that the tribunal's assessment, *in lieu* of guidance in the applicable procedural law, the parties' agreements or institutional rules, may be made pursuant to the same principles as applied in the courts under both Norwegian[20] and Danish[21] civil procedural law, at least in '*national*' arbitral proceedings. Under Norwegian law, it is held that the tribunal should be guided by general principles of dispute resolution.[22]

In Sweden, the Supreme Court has concluded that pursuant to § 26 of the SAA, the arbitrators shall perform the same overall legal review of a request as is done by the Swedish courts pursuant to the Swedish Procedural Code before granting an appeal to seek assistance from the courts.[23]

Thus, in respect of which rules the arbitral procedure may be guided by, the commonly held view seems to be that, particularly in 'national' arbitration matters, also the respective principles of the civil procedure act provide guidance with respect to requirements for document production.[24]

However, foreign parties choosing to arbitrate in a Scandinavian country may not have considered whether the domestic civil procedure and its peculiarities may have a bearing on the procedure as such. This could give a locally domiciled party an unfair advantage which the foreign party was not aware of. In respect of document production, it is therefore reasonable that the guidance provided by principles from domestic civil procedural law are restrictively applied. In these cases, it may be more appropriate to make a broader consideration of the parties' reasonable expectations and that the

19. Cf. § 19(2) second sentence of the DAA and the Art. 19(2) second sentence of the Model Law.
20. Per Magne Ristvedt & Sven Eriksrud, *Bevistilgang i voldgift*, Vol. 4. TfF, pp. 275 et seq. (2015).
21. Steffen Pihlblad & Julie Arnth Jørgensen *Bevisoptagelse i voldgiftssager* (ET.2013.177).
22. NOU 2001:33, p. 57.
23. NJA 2012 p. 289; Kaj Hobér, *International Commercial Arbitration in Sweden* (2nd. ed., Oxford University Press, 2021), p. 210; Finn Madsen, *Commercial Arbitration in Sweden* (5th ed., Jure Förlag, 2020), pp. 298-296, fn. 917.
24. Denmark: Pihlblad & Jørgensen, *supra* n. 21, p. 2; Sweden: NJA 2012 p. 289, Norway: Ristvedt & Eriksrud, *supra* n. 20, pp. 285-290.

tribunal seeks guidance from international best practice instruments, such as the IBA Rules, rather than from national law.[25]

In respect of Norway and Denmark, a more international approach would be supported by the preparatory works of the Model Law. The preparatory works first establish that the tribunal's competence to determine evidentiary rules is encompassed by the tribunal's competence to conduct the arbitration as it considers appropriate.[26] As established, the discretionary powers of the tribunal are considerable in evidentiary matters, as the Model Law provides a liberal framework.[27] The preparatory works indicate that the tribunal, where the parties are from similar legal systems, may adopt features similar to the parties.[28] Where the parties are from *different* legal systems, the preparatory works of the Model Law advocate that the tribunal may adopt '*suitable features from different legal systems and relying on techniques proven in international practice*'.[29]

The Norwegian Supreme Court applied a similar reasoning in its judgment HR-2017-1932-A, albeit in another context. In assessing the question of whether an arbitration agreement may be binding on others than the parties, the Supreme Court held that where there is no fixed position under Norwegian law and where Norwegian rules are largely adjusted to international rules, foreign sources of law may be relevant by virtue of their argumentative value.[30] The Norwegian Supreme Court stated that this:

> seems to be in line with an international arbitration trend that these issues are resolved based on what one may refer to as a 'denationalised approach' and more liberal deliberations regarding the parties' common qualifications and fair expectations.

Thus, the Norwegian Supreme Court appears to confirm that where there are international best practices applicable to a legal issue, and Norwegian law does not provide a fixed solution, the courts (and tribunals) may be guided by such international practice. However, as stated by the Supreme Court, '*Norwegian judges' view on which conclusions can be drawn from such a "denationalised approach", will to some extent be coloured by the habitual Norwegian legal approach*'.[31] This approach seems to be

25. *See*, *e.g.*, Robin Oldenstam & Kristofer Löf, 'Best Practices in International Arbitration' in Borgar Høgetveit Berg & Ola Ø. Nisja, *Avtalt Prosess* (Universitetsforlaget, 2015), pp. 295-297; Amund B. Tørum, 'Best Practice i Norsk og Nordisk Voldgift og NOMAs Guidelines', in Torsten Iversen et al. (eds) *Festskrift til Mads Bryde Andersen* (DJØF Forlag, 2018) expressing some of the same considerations.
26. UNCITRAL, *Report of the Secretary-General on the Analytical Commentary on Draft Text of A model Law on International Commercial Arbitration*, A/CN.9/264, pp. 44-46. On the relationship between the Model Law, its *travaux préparatoires* and the NAA, *see* Borgar Høgetveit Berg (red.)., *Voldgiftsloven: Med Kommentarer* (Gyldendal Akademisk, 2006), pp. 34-36.
27. A/CN.9/264, p. 45.
28. A/CN.9/264, p. 45. The principle is also referred to in the preparatory works to the DAA (LFF 2005-03-16, nr. 127).
29. A/CN.9/264, p. 46.
30. HR-2017-1932-A § 113 (quote from the formal English translation made by the Supreme Court).
31. HR-2017-1932-A § 114 (quote from the formal English translation made by the Supreme Court).

consistent with the position adopted in the preparatory works of the Model Law described above.

When the requesting party in an international arbitration in Sweden does not seek a court-ordered document production pursuant to §26 of the SAA but rather a non-enforceable order by the tribunal, the tribunal has considerable freedom to apply rules and principles for document production that it finds appropriate unless otherwise agreed by the parties. In that context, guidance is regularly found in Article 3 of the IBA Rules.[32] The Swedish Supreme Court's reference to the IBA Rules in the context of §25 SAA[33] and in domestic court proceedings regarding the possession criterion[34] seems to confirm, *a fortiori*, that tribunals seated in Sweden may also look to the IBA Rules when assessing requests for document production orders by the tribunal itself.

More broadly, it seems that also under Swedish law, it is accepted that tribunals may look to international best practice instruments in arbitration in the absence of an agreement to the contrary between the parties. This seems particularly true with regard to international matters and document production.[35]

An analysis of the principles of document production in all three countries reveals that in order for a request for document production to be successful, the request should typically meet the following criteria:

(1) the party who submits a request must state the facts that are intended to be proven by the documents;[36]
(2) the request must concern a physical or electronic *document* that exists (including that it can be printed or easily compiled from a computerised system);[37]
(3) the requested documents must be *properly identified* (the identification requirement; Sw. *identifikationskravet*);[38]

32. Fredrik Andersson et al., *Arbitration in Sweden* (Jure Förlag, 2011), pp. 124-126.
33. NJA 2012 p. 289.
34. NJA 2022 p. 249.
35. *See* Lindskog, *supra* n. 18, p. 270, fn. 2818, with further references to Claes Zettermarck & Rikard Wikström, 'The Impact of Document Production on the Efficiency of Arbitration' in Kaj Hobér, A. Magnusson & Marie Öhrström (eds) *Between East and West: Essays in Hobour of Ulf Francke* (Juris, 2010) pp. 590 et seq. and Lars Perhard, *Något om elektronisk edition i tvistemål och skiljeförfarande*, in JT 2007/08 p. 395, on p. 410.
36. Sweden: Per Olof Ekelöf, Henrik Edelstam & Lars Heuman, *Rättegång. Fjärde häftet* (JUNO Version 7, 2016), p. 264 Denmark: Erik Werlauff i U 2016 B 205 208 f; U 1968 608 H. Norway: Maria Astrup Hjort, *Tilgang til bevis i sivile saker* (Universitetsforlaget, 2016), pp. 265-271; Jens Edvin Skoghøy, *Tvisteløsning* (4th ed., Universitetsforlaget 2022), p. 337.
37. According to Swedish case law, a document is considered to be any document that can be printed, even though it is not saved anywhere in that particular form. E.g., NJA 2020 p. 664, NJA 2020 p. 373 and NJA 2022 p. 249. Denmark: U.2020.3872 H; Sø- og Handelsrettens dom af 3. Nov. 2023, p. 21; U.2024.1618. Norway: Tvisteloven §§ 26–5 and 26–6, HR-2019-997-A § 28.
38. Sweden: Lars Heuman, *Skiljemannarätt* (1999, Norstedts Juridik), p. 462; Lars Heuman, 'Editionsförlägganden i civilprocesser och skiljetvister. Del II', in *Juridisk Tidsskrift* (1989-1990), pp. 241 et seq.; Madsen, *supra* n. 23, pp. 286-287; Lindskog, *supra* n. 18, p. 719; Hobér, *supra* n. 23, pp. 210-211; Zettermarck & Wikström, *supra* n. 35, p. 594; Ekelöf, Edelstam & Heuman, *supra* n. 36, p. 264; P. Fitger et al. *Rättegangsbalken* (Juno Version 95, 2023), 38:2.
Norway: G. Woxholth, *Voldgift* (Gyldendal, 2013), pp. 639-640 and 669-670; Hjort, *supra* n. 36, pp. 335-337; Jens Edvin Skoghøy, *Tvisteløsning* (4th ed., Universitetsforlaget 2022), pp.

(4) each requested document or most documents in the eligible category must be *assumed to be relevant* to a *specified*, *invoked* and *disputed factual circumstance*, and the requested document must be *material to the outcome of the case* (the evidentiary requirement; Sw. *bevisrelevanskravet*).[39] It is not possible to request documents for the purpose of seeking to understand the facts better, for the purpose of analysing whether additional arguments can be made or new facts can be invoked, or to prove facts that are not relevant to the outcome of the case;

(5) the requested documents must not be possible for the requesting party to obtain elsewhere, e.g., if they are already in the requesting party's direct or indirect possession or in the public domain;[40]

(6) the party or person who is requested to produce a document must be *in possession of the document* (the possession requirement; Sw. *innehavskravet*);[41]

(7) the document production must be *proportional*, i.e., it shall not be more intrusive and burdensome than is justified by the importance of the evidence (the proportionality requirement; (Sw. *proportionalitetskrav*et);[42] and

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265-271; Amund Bjøranger Tørum & Per Magne Ristvedt, *Provokasjoner, begjæringer om bevistilgang og edisjonsplikt; tvistelovens modifiserte 'discovery'*, Vol. 2 TfF, pp. 103 et seq. (2015) at, pp. 138-149.

Denmark: Steffen Pihlblad et al. *Praktisk Voldgift* (Jurist- og Økonomforbundets Forlag, 2011), p. 147; Pihlblad & Jørgensen, *supra* n. 21; Gomard & Kistrup, *supra* n. 15, p. 611; Lars Lindencrone Petersen & Erik Werlauff *Dansk retspleje* (8th ed., Karnov, 2020), pp. 308-309; Werlauff, *supra* n. 36; J. Møller et al. (eds) *Kommenteret Retsplejelov* (Jurist- og Økonomforbundets Forlag, 2018), pp. 790-792.

Internationally: IBA Rules Art. 3(3)(a)(i) and Born, *supra* n. 1, pp. 2535-2537; Virginia Hamilton, *Document Production in ICC Arbitration*, in ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin, (ICC, 2006), pp. 71-72; Tobias Zuberbühler et al. *IBA Rules of Evidence. Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (2nd ed., Schulthess, 2022) p. 66; Hilmar Raeschke-Kessler, 'The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence', in *Arbitration International* Vol. 18, no. 4 (2002), p. 419; Roman Khodykin, Carol Mulchay & Nicholas Fletcher, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (2019), p. 136; Commentary on the IBA Rules 2020, p. 11.

39. Sweden: Lindskog, *supra* n. 18, p. 697, Fitger et al., *supra* n. 38, 38:6-7. Denmark: Retsplejeloven § 341; Retsplejeloven § 300(1)Sø- og Handelsrettens dom af 3. november 2023, p. 21; Østre Landsrets kendelse av 23. november 2022, p. 266; U 2021.1273 V: Højesterets kendelse af 24. november 2020. Norway: Tvisteloven § 21–7, HR-2019-997-A and Rt. 2013 p. 817.
40. Sweden: NJA 2012 p. 289, Denmark: Retsplejeloven § 341; Sø- og Handelsrettens dom af 3. november 2023, p. 21; Østre Landsrets kendelse av 23. november 2022, p. 258; Petersen & Werlauff, *supra* n. 38, p. 311, U 2021.1273 V. Norway: [XX].
41. Sweden: Heuman (1989/90), *supra* n. 38, pp. 22 et seq. and pp. 247 et seq. *See also* NJA 2020 p. 664 in which the fact that the use of the documents had been restricted by agreement with a third party did not prevent production of the documents and NJA 2022 p. 249, in which '*possession*' was considered intact also when the documents were in another country, Denmark, since the documents could be accessed electronically. Denmark: Sø- og Handelsrettens dom af 3. november 2023, p. 21; U.2020.3872. Norway: Tvisteloven §26–5; HR-2019-997-A.
42. Sweden: NJA 1998 p. 829. Denmark: Retsplejeloven § 298; U.2023.268 V; Petersen & Werlauff, *supra* n. 38, p. 311; Gomard & Kistrup, *supra* n. 15. Norway: HR-2019-997-A paras 79 et seq.; Hjort, *supra* n. 36, pp. 166 et seq.

(8) the documents must not be subject to a legal impediment, e.g., privileges or other confidentiality restrictions.[43] However, in Denmark, internal or confidential documents may only be ordered and produced under exceptional circumstances.[44] In Sweden, memorial notes are not available for document production and business secrets are available only exceptionally.[45]

Of these common requirements, items 3, 4 and 7 are the ones which in our practice are most disputed and which will be further discussed in §10.03 below.

Finally, a decision ordering a party to produce documents takes the form of an '*order*'. In neither of the three jurisdictions is the tribunal mandated to render decisions enforceable by the enforcement agencies.[46] However, the parties' refusal to adhere to the tribunal's order to produce certain documents may have an evidentiary value in and of itself, and the tribunal should, in such circumstances, be permitted to draw adverse inferences as part of its assessment of the evidence.[47] As explained, the alternative in all three jurisdictions would be for the tribunal, or a party with the approval of the tribunal, to request the regular courts to assist in ordering the procurement of the documents that the tribunal has ordered to be produced.[48]

## §10.03 KEY PRINCIPLES OF DOCUMENT PRODUCTION

### [A] Introduction

The common principles for a request for document production to be successful were set out in §10.02[C] above. Here, we discuss the criteria which, in our experience in practice, give rise to most discussions: that the request should be sufficiently specific,[49] that the requested documents must be relevant to the case,[50] and that the request must be proportional.[51] From a macro-perspective, the principles in the Scandinavian countries broadly set out the same requirements for requesting documents from the opposing party. In the following, we have therefore chosen to focus on the similarities, highlighting where the legal systems deviate from each other and comparing the national principles with international best practices represented by the IBA Rules.

43. Sweden: Chapter 38 § 2 of the Code of Judicial Procedure. Denmark: Retsplejelovens § 298, Gomard & Kistrup, *supra* n. 15, p. 614. Norway: Hjort, *supra* n. 36, pp. 175 et seq.
44. Sø- og Handelsrettens dom af 3. november 2023, p. 21; Østre Landsrets kendelse av 23. november 2022, pp. 257 and 260; U 2023.268 V; Højesterets kendelse af 24. november 2020; U.2002.1734H; U.2010.2808H,.
45. NJA 2012 p. 289 point 11.
46. Sweden: Lindskog, *supra* n. 18, p. 720. Norway: Woxholth, *supra* n. 38, p. 669, Denmark: Niels Schiersing, *Voldgiftsloven med kommentarer* (Jurist- og Økonomforbundets Forlag, 2016), p. 358.
47. Hobér, *supra* n. 23, p. 210, Woxholth, *supra* n. 38, p. 669.
48. *See* § 30 of NAA, § 27 DAA, and § 26 SAA.
49. *See* §10.02[C] above.
50. *See* §10.02[C] above.
51. *See* §10.02[C] above.

We recall that both in the Scandinavian countries and under the IBA Rules, document production is based on the following main principles. First, it is commonly accepted that a far-reaching 'discovery' system is undesirable.[52] Second, while the parties are free to submit requests for production, it is for the tribunal to decide whether the requested party should be ordered to produce such documents.[53] Thirdly, the scope of any possible production must be limited by specific conditions and a possibility for the party against whom the request is made to object to production in certain cases. Finally, it is broadly accepted that arbitral proceedings shall be efficient, economic and fair, considerations which are also applicable to issues of document production.

Beneath these principles lie two conflicting interests that must be balanced against each other: on the one hand, the parties must have full and equal opportunity to present their case. On the other hand, the parties do not have the right to do so at any cost, as this imposes burdens on the opposing party. For reasons of procedural economy, the right to request that documents be produced must therefore be limited.

## [B] The Specification Requirement

### *[1] Introduction*

The requesting party does not generally know whether the requested party indeed has relevant documents under its control. Nevertheless, it seems commonly accepted across the Scandinavian countries that a request for document production must be sufficiently specific.[54]

The specification requirement is, alongside requirements of relevance and materiality, a key restriction on the scope of document production in arbitration. The purpose of the specification requirement is to give the requested party the opportunity to locate the relevant document(s)[55] and assist the tribunal in deciding whether to order the production of the requested document(s),[56] making the requirement also practically significant. The requested documents or category of documents have to be

52. Sweden: NJA 1959 p. 230; *see also* dissenting opinion in NJA 2019 p. 289. Denmark: UfR 2015.339 and UfR 2011.413 H. Norway: HR-2019-997-A, paras 30-32, Internationally: Zuberbühler et al., *supra* n. 38, p. 41.
53. *See* §10.02[B] above.
54. Sweden: NJA 1998 p. 590 I and II; Heuman (1999), *supra* n. 38, p. 461; Heuman (1989-1990), *supra* n. 38, pp. 238 et seq.; Madsen, *supra* n. 23, pp. 287-288; Brozolo, *supra* n. 16, p. 23; Lindskog, *supra* n. 18, pp. 719-720; Hobér, *supra* n. 23, pp. 210-211; Zettermarck & Wikström, *supra* n. 35, p. 594; Ekelöf, Edelstam & Heuman, *supra* n. 36, p. 263-264; Fitger et al., *supra* n. 38 p. 38:2.
    Norway: Woxholth, *supra* n. 38, pp. 669-670; Hjort, *supra* n. 36, pp. 335-337; Skoghøy, *supra* n. 38, pp. 265-271; Tørum & Ristvedt, *supra* n. 38, pp. 138-149.
    Denmark: Pihlblad et al., *supra* n. 38, p. 147; Pihlblad & Jørgensen, *supra* n. 21, pp. 1-3. Gomard & Kistrup, *supra* n. 15, p. 611; Petersen & Werlauff, *supra* n. 38, pp. 307-313; Werlauff, *supra* n. 36; U 1968 608 H.
    Internationally: IBA Rules Art. 3(3)(a)(i) and Born, *supra* n. 1, pp. 2535-2537; Hamilton, *supra* n. 38, pp. 71-72.
55. *See*, *e.g.*, Ekelöf, Edelstam & Heuman, *supra* n. 36, p. 264.
56. Madsen, *supra* n. 23, p. 287.

identified to such an extent that it is possible for public authorities to enforce an order to produce the documents,[57] should the tribunal, or a party with the tribunal's consent, seek assistance from the regular courts.[58]

By providing that a request must be specific, the requirement also limits the opportunity to request excessive amounts of documents, and correspondingly that the requested party produces a disproportionately large volume of documents.[59] As will be set out below, allowing requests for production also of categories of documents may be abused, as one party may make requests that are excessively broad and vague.[60] The specification requirement should therefore be viewed in connection with the requirements for relevance and materiality as a way to prevent '*fishing expeditions*'.[61]

Key issues following this is how specification should be understood. When is a request sufficiently specific? And how specific should a request for categories of documents be, also compared to the 'narrow and specific' test under the IBA Rules?

### *[2] When Is a Request Sufficiently Specific?*

In a Scandinavian context, an *individual* document may be specified by the following information: (i) the author or recipient of the document; (ii) the date or period when the document was prepared, sent, and/or received; and (iii) the presumed subject matter or contents of the document.[62] The same applies under the IBA Rules.[63] The list is not exhaustive; for example, the document's numbering or title may also identify the

57. (SW. *verkställighetsprecision)*.
58. *See* §10.02 above.
59. Madsen, *supra* n. 23, p. 288; Daria Kozlowska-Rautiainen, *Obtaining Documents from the Opponent in International Commercial Arbitration* (2016), pp. 84-85; Bernard Hanotiau, 'Document Production in International Arbitration: A Tentative Definition of 'Best Practices' in *ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin*, (ICC, 2006), p. 117; Commentary on the IBA Rules 2020, p. 10.
60. *See* §10.03[C][1] et seq.
61. Sweden: NJA 1959, p. 230, *see also* the dissenting opinion in NJA 2012 p. 289; Ekelöf, Edelstam & Heuman, *supra* n. 36, pp. 264 et seq.; Lars Heuman, 'Editionsförlägganden i civilprocesser och skiljetvister. Del I', in *Juridisk Tidsskrift* (1989-1990), pp. 25 et seq. and Peter Westberg, *Anskaffning av bevis i tvistemål* (Norstedts Juridik, 2010), pp. 488 et seq.
    Norway: HR-2019-997-A paras 30-32.
    Denmark: U.2011.431 H; U.2015.3319 H; Gomard & Kistrup, *supra* n. 15, pp. 611-612; Petersen & Werlauff, *supra* n. 38, pp. 308 and 312.
    Internationally, *see*, *e.g.*, Hanotiau, *supra* n. 59, p. 117.
62. Some of the same elements are considered in, e.g., NJA 1998 p. 510, I and II, as well as in HR-2019-977-A.
63. Gabrielle Kaufmann-Kohler & Philippe Bärtsch, 'Discovery in international arbitration: How much is too much?' Zeitschrift für Schiedsverfahren (2004), p. 18; Raeschke-Kessler, 'The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence', in *Arbitration International* Vol. 18, no. 4 (2002), p. 418; Zuberbühler et al., *supra* n. 38, p. 60.
    In a Scandinavian context, *see also* HR-2019-997-A para. 69, mentioning the same considerations; & Heuman (1989-1990), *supra* n. 38, p. 240, mentioning, *inter alia*, author.

document.[64] Not all conceivable information needs to be specified for a document to be located, and a document may even then not be adequately identifiable. This depends on a closer assessment of the request and the documents seemingly covered by this.[65]

When assessing what a sufficiently specific request for a *category* of documents looks like, the same elements as described directly above may be of use. A '*category of documents*' is typically understood as several documents which share common features.[66] These are documents that may be difficult to identify individually but that have a natural internal coherence which may make the category itself sufficiently specific, e.g., minutes of meetings, memoranda or reports within a specific period of time. Such documents are often internal by nature, and the requesting party may not be certain that they exist, but it can often be assumed.[67]

All Scandinavian supreme courts have rendered a number of decisions concerning the specification requirement as interpreted in national law, which may provide some guidance in the tribunal's assessment. The following selected cases are illustrative of the specification requirement in a Scandinavian context:

(i) As set out in NJA 1998 section 590(I), it is sufficient for the requesting party to state that the application for an order for production relates to all documents relevant to a carefully described *evidentiary theme* or a certain category of documents, here the credit file held by the bank concerning a specific loan. Crucially, the Swedish Supreme Court held that it would not be difficult to determine which documents were in the requested file and thus covered by the request. In NJA 1998 p. 590 (II), the request concerned all written documentation relating to certain loans relevant to the case. The Swedish Supreme Court found that the documents referred to in the application for a production order were neither sufficiently specified nor sufficiently identified by evidentiary themes.[68]

(ii) In HR-2019-997-A, the Norwegian Supreme Court considered access to evidence pursuant to §§ 26-5 and 26-6 of the Civil Procedure Act, including the requirements of specification, relevance,[69] and proportionality.[70] In respect of the specification requirement pursuant to § 26-6(1) of the Civil Procedure Act, the Supreme Court recalled the strict starting point under the provision that each document has to be individualised, albeit having

64. Reto Marghitola, *Document Production in International Arbitration* (Kluwer Law International, 2015), pp. 37-38.
65. Kozlowska-Rautiainen, *supra* n. 59, pp. 86-87.
66. The IBA Rules Art. 3(3)(ii) lists several in the context of electronic documents.
67. At this point Danish law seemingly departs from Norwegian and Swedish law, and the IBA Rules. Under Danish law, internal documents are as a starting point exempted from production, *see, e.g.*, U.2002.1734 U; Petersen & Werlauff, *supra* n. 38, p. 309; and Peter Bang *Partsedition* in UfR 1997 B pp. 268 et seq.

    In contrast, the IBA Rules additionally require that it is reasonable to assume that the documents exist, as parties cannot request production of documents they merely hope exists.
68. *See also* NJA 1998 590.
69. *See* §10.03[C][1] below.
70. *See* §10.03[D] below.

due regard to the somewhat softer approach in recent case law.[71] With reference to previous case law, the Supreme Court proceeded to highlight that the requirement could not be understood so narrowly as to prevent production of documents which may affect the case. The Supreme Court recalled that requests specifying the sender, recipient, topic and time period have previously been considered to satisfy the specification requirement,[72] that the purpose of the specification requirement is, first and foremost, that the opposing party should know which documents are requested, and that it should be possible for the court (or tribunal) to assess the relevance of the requested documents. Sweeping requests bearing similarities to disclosure would have to be rejected. The Supreme Court also emphasised the opportunity in the specific case to significantly restrict the document requests by focusing on specific persons in the organisation and specific hard drives.

(iii) In U.2015.3319 H, the Danish Supreme Court assessed the specification requirement. The request related to virtually all of the requested party's working material concerning the audit of Roskilde Bank for the financial years 2006 and 2007, including all working papers, draft audit protocols as well as reports received and other documentation. The Supreme Court noted that the request did not specify which facts were to be proven by production of the documents, and the Supreme Court found no basis for ordering the requested party to hand over the documents for the purpose of an investigative review. While we otherwise would consider this as a matter of 'relevance',[73] the Danish Supreme Court considered this as a matter of 'specificity'. This may have been based on a reasoning along the same lines as in HR 2019-997 A, i.e., that the documents must be sufficiently specified to enable the court (or tribunal) to assess the relevance of the requested documents.

In conclusion, requesting production of documents, even if the parties are not able to identify individual documents, is accepted in all three Scandinavian countries. However, the threshold is fairly high, in particular in Sweden, and such requests have to be carefully tailored, focusing on relevant and material documents.[74]

The IBA Rules explicitly require that a request for a category of documents is both sufficiently '*narrow and specific*'. It has been held that this formulation is a key consideration in arbitration which distinguishes international arbitration from the

71. *See* NOU 2001:32B p. 980.
72. Rt-2007-920.
73. *See* §10.03[C][2] below.
74. Sweden: NJA 1998 p. 590 I and II; Heuman (1989-1990), *supra* n. 38, p. 241; Madsen, *supra* n. 23, p. 287; Ekelöf, Edelstam & Heuman, *supra* n. 36, p. 264.
Norway: Tørum & Ristvedt, *supra* n. 38, pp. 138-149.
Denmark: Pihlblad & Jørgensen, *supra* n. 21, section 3.3; U.2022.1661V.

'common law' system and 'discovery'.[75] The commentary on the IBA Rules does not distinguish between the two adjectives.[76] It should be noted that the 'narrow' requirement is not explicitly referred to as a separate principle in Scandinavian practice. However, our impression is that it often is part of the consideration of specificity.[77]

Also, under the IBA Rules, there does not seem to be a clear distinction between the two concepts, and the exact meaning is a matter of interpretation. A possible interpretation of '*specific*' is that it denotes how the category is described as set out above,[78] while '*narrow*' may require the category to be 'reasonably limited in time and subject matter in view of the nature of the claims and defences advanced in the case'.[79] This would presumably also mean that the request should be limited in other senses, e.g., by not having too many authors or consisting of too many different types of documents.

Whether a category is sufficiently narrow does not necessarily say anything about the amount of documents that may be produced. This is particularly true in cases where one request, in reality, is a request for several categories of documents.[80] It is challenging for the party to know the volume of documents within a category, and the tribunal will not be able to determine this either when the request is made. A narrow request can result in the production of large volumes of documents, while expansive requests can result in few documents.[81]

In the context of the IBA Rules, it has been widely discussed what characterises a sufficiently narrow and specific request.[82] The discussion has concerned three main themes. First is the subject matter of the documents.[83] Second is that the request should be narrowly tailored, reasonably limited in time and subject, in light of the claims each party has made in the case.[84] Third is that the request should seek to obtain documents related to a specific requirement or a specific claim in the case and not be loosely connected to a requirement or general point of disagreement.[85] For example, a reference to longer time periods and/or documents 'related to' a broadly described

75. Peter Ashford, *IBA Rules on the Taking of Evidence in International Arbitration* (Cambridge University Press, 2013), p. 70; O'Malley, Nathan D. *Rules of Evidence in International Arbitration: An Annotated Guide* (2nd ed. Routledge, 2021), p. 187; Zuberbühler et al., *supra* n. 38, p. 62.
76. Commentary on the IBA Rules 2020, p. 10.
77. Indications of this may be found in HR-2019-997-A para. 75 in which the Norwegian Supreme Court relies on the opportunity to narrow the scope of the request to certain persons and hard drives, as well as in NJA 1998 p. 590 in which the Swedish Supreme Court did not say that it *suffices* to state a category of documents. It said that it '*may*' suffice. That leaves open the question of how the category needs to be defined.
78. *See* §10.03[B][2].
79. O'Malley, *supra* n. 75, p. 187.
80. Reto Marghitola, *supra* n. 64, p. 41.
81. Kozlowska-Rautiainen, *supra* n. 59, pp. 88-89.
82. Commentary on the IBA Rules 2020, p. 10; Raeschke-Kessler, *supra* n. 38, p. 418; Ashford, *supra* n. 75, p. 69; Zuberbühler et al., *supra* n. 38, p. 61; Kozlowska-Rautiainen, *supra* n. 59, pp. 84-97; Khodykin, Mulkin & Fletcher., *supra* n. 38, N. 6.57; Born, *supra* n. 1, pp. 2535-2536.
83. HR-2019-997-A paras 71-73; *See also* IBA Rules Art. 3(3)(a)(ii).
84. O'Malley, *supra* n. 75, p. 187. *See* to this effect also; Ekelöf, Edelstam & Heuman, *supra* n. 36, p. 264.
85. O'Malley, *supra* n. 75, p. 187; Ashford, *supra* n. 75, p. 70.

subject or point of disagreement will likely be deemed insufficiently narrow and specific.[86]

In principle, it is probably true that most things can be searched only if a search is lengthy enough. However, as previously emphasised, a 'discovery'-like process is not desired, and accepting arrangements that strongly resemble 'discovery' is difficult. This starting point should also apply in complex cases with a significant amount in dispute.

The question is then what a sufficiently narrow and specific request looks like. As pointed out by Ashford, '[t]here is a fine but important distinction between an incoherent and non-specific categorization and a detailed narrow and specific description'.[87] For example, a formulation such as 'all documents being, evidencing, relating to, touching upon or concerning an issue' will likely not be evaluated to meet the criteria of specificity and scope. Meanwhile, a request for 'all emails and letters between A (acting by its employees C, D or E) to B (acting by its employees F, G or H) in the period from J to K relating to L together with any documents attached or enclosed, located in the paper files in the offices at M or on the computer servers at M and containing one or more of the following words N, P or Q', will likely meet the requirements.

## [C] Relevance

### *[1] The Content of the Relevance Requirement, Including Materiality*

For the tribunal to order the production of documents, it needs to find that the requested documents are relevant to the dispute.[88] Together with the requirement of specification, this is the most significant restriction on the extent of document production.[89]

The relevance requirement is inseparably linked to the principle that the requested evidence should be able to inform the case, i.e., support the requesting party's claims or

86. HR-2019-997-A para. 71. *See also* Heuman (1989-1990), *supra* n. 38, p. 247, in this regard. As a digression, the Swiss Supreme Court judgment DFT 4A_438/2020 of 15 Mar. 2021, cons 4.2, is also interesting in this regard.
87. Ashford, *supra* n. 75, p. 68.
88. Sweden: Heuman (1999), *supra* n. 38, p. 462; Heuman (1989-1990), *supra* n. 38, pp. 241 et seq.; Madsen, *supra* n. 23, pp. 286-287; Lindskog, *supra* n. 18, p. 719; Hobér, *supra* n. 23, pp. 210-211; Zettermarck & Wikström, *supra* n. 35, p. 594; Ekelöf, Edelstam & Heuman, *supra* n. 36, p. 264; Fitger et al., *supra* n. 38, p. 38:2.

Norway: Woxholth, *supra* n. 38, pp. 639-640 and 669-670; Hjort, *supra* n. 36, pp. 161 et seq.; Skoghøy, *supra* n. 38, pp. 265-271; Tørum & Ristvedt, *supra* n. 38, pp. 138-149.

Denmark: Pihlblad et al., *supra* n. 38, p. 147; Pihlblad & Jørgensen, *supra* n. 21; Gomard & Kistrup, *supra* n. 15, p. 611; Petersen & Werlauff, *supra* n. 38, pp. 308-309; Werlauff, *supra* n. 36; Møller et al., *supra* n. 38, pp. 790-792.

Internationally: IBA Rules Art. 3(3)(a)(i) and Born, *supra* n. 1, pp. 2535-2537; Hamilton, *supra* n. 38, pp. 71-72; Zuberbühler et al., *supra* n. 38, p. 66; Raeschke-Kessler, *supra* n. 38, p. 419; Khodykin, Mulkin & Fletcher., *supra* n. 38, p. 136; Commentary on the IBA Rules 2020, p. 11.
89. Blackaby et al, *supra* n. 1, N 6.95; Born, *supra* n. 1, pp. 2537-2538.

dispute the requested party's claims. In a Scandinavian context, a document is relevant to the dispute when it may substantiate an invoked fact. Typically, a relevant document can illuminate the factual circumstances related to a claim or objection in the case, either by proving facts invoked by the party itself or disproving facts invoked by the opponent. The relevance requirement is interpreted strictly. The parties must be able to justify why they are requesting the particular document. To do this, parties should explain the relationship between the document and the disputed invoked fact.[90]

In Denmark, the requirement that the evidence is relevant implies that the party requesting production must also bear the burden of proof for the invoked fact.[91] Under Swedish law, the position is the opposite.[92] The question is not settled under Norwegian law.[93]

Furthermore, both in Sweden and Norway, it is not only required that the requested document(s) should broadly be able to shed light on a disputed issue. It is also required that it may have some evidentiary value. Under Swedish and Norwegian arbitration law, this results from the tribunal's competence to reject the evidence of its own initiative if the evidence '*is* manifestly irrelevant to the dispute' (Sw. *'uppenbart saknar betydelse i tvisten'*).[94] The DAA does not contain a similar provision. Thus, at least in a Norwegian and Swedish context, the relevance consideration in practice also includes an element of 'materiality'.[95] In this regard, we note that in Denmark (and internationally), it is accepted that if other evidence is available and can prove the disputed claim, the requested documents are not material to the outcome of the case and need not be produced.[96] In Swedish jurisprudence, it is established that a request for documents for the purpose of supporting a claim which cannot be granted on the merits shall be rejected.[97]

90. Sweden: Lindskog, *supra* n. 18, pp. 720-721; Heuman (1989-1990), *supra* n. 38, p. 247.
Norway: HR-2019-997-A, para. 61.
Denmark: Pihlblad et al., *supra* n. 38, p. 147; Gomard & Kistrup, *supra* n. 15, p. 611.
91. Sø- og Handelsrettens dom af 3. november 2023, p. 21.
92. *See* NJA 2015 p. 651 para. 10.
93. Hjort, *supra* n. 36, p. 107, seems to indicate that Norwegian law is similar to Swedish law at this point.
94. Sweden: SAA § 25 second paragraph; Lindskog, *supra* n. 18, pp. 723-726; Heuman (1999), *supra* n. 38, pp. 439-440. NJA 1988 p. 652; Ekelöf, Edelstam & Heuman, *supra* n. 36, p. 265. Norway: NAA § 28 second paragraph, first sentence; Berg, *supra* n. 26, pp. 241-243; Woxholth, *supra* n. 38, pp. 639-642.
95. HR-2019-997-A para. 56.
96. Denmark: Gomard & Kistrup, *supra* n. 15, p. 612; Petersen & Werlauff, *supra* n. 38, p. 310.
Internationally: Philipp Habegger, 'Document Production – An Overview of Swiss Court and Arbitration Practice', in ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin (ICC, 2006), p. 33.
97. NJA 2014 p. 651 para. 9.

In the IBA Rules,[98] relevance and materiality are typically understood as cumulative requirements, a two-pronged test.[99] Thus, at first glance, the IBA Rules appear to set out an additional requirement compared to what is established in Scandinavian principles. However, as explained, the relevance requirement established in Scandinavian principles also includes a materiality requirement. In respect of whether the parties may request production of documents concerning factual issues for which they do not bear the burden of proof, the focus under the IBA Rules is on whether the requested document(s) are relevant and material to the outcome of the case, not who bears the burden of proof for the individual factual contention.[100] The parties should arguably also have the opportunity to respond to the opposing party's arguments and evidence presented.[101]

Distinguishing between relevance and materiality may be difficult. Guidance may be found in the IBA Rules' formulation 'relevant *to the case* and material *to its outcome*'. Relevant would then be any document which may inform the case, while a document that is material to its outcome would be necessary to facilitate a 'complete consideration of the invoked fact from which legal conclusions are drawn'.[102] It is, however, difficult to imagine a document which would be material to the outcome of the case but not relevant to it, at least from a Scandinavian perspective. The materiality requirement may therefore be referred to as a 'strict relevance requirement', as that is the tougher test.[103]

### *[2] The Tribunal's Assessment of Relevance (and Materiality)*

In its assessment of whether the evidence is relevant, the tribunal must necessarily base its assessment on the requesting party's assertions as to the factual issues of the

98. *See also* the SCC Rules Art. 31(3), stating that he Arbitral Tribunal, at the request of a party, may order a party to produce any documents or other evidence that may be *relevant to the case and material to its outcome*; and the DIA Rules Art. 33 stating that at the request of a party, the Arbitral Tribunal may order another party to produce documents […] that the Arbitral Tribunal considers may be relevant to the case. Relevance should be interpreted more similar to 'material' pursuant to Danish law, *see infra* n. 105.
99. Born, *supra* n. 1, pp. 2357-2359; Blackaby et al., *supra* n. 1, N 6.95.
100. *See* on this: Born, *supra* n. 1, p. 2539; Marghitola, *supra* n. 64, pp. 55-56; Kozlowska-Rautiainen, *supra* n. 59, p. 101; Khodykin, Mulkin & Fletcher., *supra* n. 38, N 6.134; Zuberbühler et al., *supra* n. 38, p. 70.
101. Some authors have taken the opposite position, *see* Zettermarck & Wikström, *supra* n. 35, p. 595; Ashford, *supra* n. 75, p. 71; Yves Derains, 'Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint', in *ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin* (ICC, 2006), p. 87; Hanotiau, *supra* n. 59, p. 117; B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* (Stämpfli, 2021), pp. 488-489. *See also* Khodykin, Mulkin & Fletcher, *supra* n. 38, pp. 148 et seq., who gives several examples from practice.
102. Marghitola, *supra* n. 64, p. 52; Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), p. 859.
103. Zuberbühler et al., *supra* n. 38, p. 68.

case.[104] The crux of the assessment is whether the requested documents are relevant to the requesting party's factual assertions. Whether something is ultimately of evidentiary value is for the tribunal to decide,[105] and the tribunal is not bound by the requesting party's assertions in this regard.[106]

Thus, the tribunal *can* accept a request if it finds it prima facie likely that the documents *can* be relevant (and material).

Ordering a party to produce documents that are only prima facie relevant is, in many ways, less risky for the tribunal than potentially refusing to order a party to produce documents that will contribute to the resolution of the dispute.[107] However, the threshold must not be set so high that it prevents the clarification of facts of importance to the case. The requesting party, whose request has been dismissed, can potentially challenge the validity of the tribunal's decision if it has not been given the opportunity to present its case in full.[108] It should be noted that the threshold for invalidating an arbitral award due to a refused request is high,[109] if at all possible.[110]

How the tribunal assesses relevance and materiality may depend on when the request is submitted. Although the threshold, in theory, is not more lenient later in the process, the tribunal will be better positioned to determine which documents may be relevant and material. The parties' claims and legal arguments will be sufficiently developed to enable the tribunal to decide whether the requests are adequately addressed and whether the documents are relevant and material. At an early stage, typically before the defence has been filed, the tribunal will usually not be able to assess the relevance and importance of the request in the same way.

It is incumbent on the requesting party to account for the relevance and materiality of the documents and to do this in as great a level of detail as possible to assist the tribunal in its prima facie assessment of the requested documents' relevance and materiality.[111] Relevance is not established solely by explaining why the requested document, in a general sense, is relevant to the dispute but also how it is relevant to a currently disputed issue, e.g., because it was authored by a specific person within a specific timeframe.[112]

The fact that the request must be tied to a current dispute issue also gives rise to another consideration, namely that the parties' factual and legal claims must be formulated in a sufficiently precise manner for a request to be considered at all. The claims must be contested, and a party may not request documents relevant to a factual

104. Sweden: Ekelöf, Edelstam & Heuman, *supra* n. 36, p. 264. Norway: HR-2019-997-A para. 57-58 and Hjort, *supra* n. 36, p. 361. Denmark: Gomard & Kistrup, *supra* n. 15, pp. 611-612.
105. NJA 2014 p. 651 para. 9.
106. *See* to this effect, e.g., HR-2019-997-A, para. 57.
107. Heuman (1989-1990), *supra* n. 38, pp. 245 et seq.; Habegger, *supra* n. 96, p. 32.
108. Marghitola, *supra* n. 64, pp. 196-202.
109. *Hochtief Airport GmbH v. ABB AG and Athens International Airport SA* Judgment of the High Court of Justice of England and Wales [2006] EWHC 388, paras 75 et seq.
110. Lindskog, *supra* n. 18, p. 719; Ramberg, *Sverige som skiljedomsland – några synspunkter med anledning av en nutkomen bok,* in JT 1990/91 p. 610; Heuman (1989-1990), *supra* n. 38, pp. 242 et seq.
111. Commentary on the IBA Rules 2020 p. 11.
112. Kozlowska-Rautiainen, *supra* n. 59, pp. 107-108.

assertion which has not been properly made or which shall be dismissed.[113] If a sufficiently detailed factual assertion has not been made, it is difficult to argue that the document is relevant to a properly invoked, disputed fact. For the same reason, a request made later in the proceedings may be easier for the tribunal to rule on, as the parties' factual and legal positions may be sufficiently developed at this point so that it is easier for the tribunal to determine whether the requested documents may be relevant and material to the dispute.

### [D] Proportionality

In all Scandinavian countries, it is generally held that a request must be proportional.[114] The IBA Rules have adopted a slightly different approach when considerations of proportionality are set out as an objection rather than as a requirement to the request itself.[115] It is fair to say that the requirement of proportionality is significantly less pronounced under the IBA Rules than under the more traditional Scandinavian approach.[116]

In the Scandinavian legal systems, proportionality is typically understood to mean that ordering the production of documents should not impose burdens on the requested party which are not reasonable in light of the dispute, the possible evidentiary value of the documents, and the burdens imposed on the party. The tribunal must consider the likelihood that the requesting party is able to prove what it is seeking by the requested documents and whether the documents produced may be material to the outcome of the case against the interests of the requesting party in not disclosing the documents. As part of this assessment, the tribunal must consider the practical burdens and costs imposed on the requested party.

## §10.04 CONCLUSIONS

In all three jurisdictions, it is generally accepted that the tribunal may conduct the arbitration as it deems appropriate, including regulating issues of document production. While there are significant similarities between the three Scandinavian countries in respect of the principles applied to document production in arbitral proceedings, there are also some differences which are important to keep in mind.

The largest difference concerns how there appears to be a weaker basis for invoking international sources in document production procedures in Sweden than in Norway and Denmark which are both Model Law Countries. However, it seems

113. Sweden: Ekelöf, Edelstam & Heuman, *supra* n. 36, pp. 264-265.
114. Sweden: NJA 1977 p. 254, NJA 1998 p. 829, NJA 2012 p. 289 and NJA 2014 p. 651; Fitger, *supra* n. 38, 38:8a; Westberg, *supra* n. 61, pp. 639 et seq.
Norway: HR-2019-997-A paras 79 et seq.; Hjort, *supra* n. 36, pp. 166 et seq.
Denmark: U.1950.761 H; U.1995.670 H; Gomard & Kistrup, *supra* n. 15, p. 613.
115. IBA Rules Art. 9(2)(g).
116. *See* more generally on considerations of proportionality internationally in Born, *supra* n. 1, p. 2538.

generally accepted that the tribunal may give due regard to international best practices, especially in international matters, in all three countries.

In respect of the requirements of specification, relevance, and proportionality, we note that the specification requirement as a starting point is stricter in Scandinavia than pursuant to the IBA Rules. However, in respect of relevance, the Scandinavian threshold appears lower than pursuant to the IBA Rules. However, that difference may, in the end, be minor since the tribunal in the document production phase of the proceedings shall consider the requirement on the basis of the requesting party's assertions. The weight the proportionality requirement has in Scandinavia appears to be an outlier in international arbitration and is a principle international parties should be aware of when participating in arbitral proceedings seated in Scandinavia.