Handbook of Evidence in International Commercial Arbitration

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Key Issues and Concepts

Edited by

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Preface

Evidence plays a key role in international arbitration. In the vast majority of disputes, the parties' factual allegations inevitably differ, and tribunals have to establish the relevant facts based on the evidence on record.

If one compares the approaches toward fact-finding across various legal systems and societies, one can observe striking differences.[1] In his book *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context*, Oscar Chase illustrates these differences by comparing how a Central African tribe, common law jurisdictions and civil law jurisdictions deal with questions of fact. Chase writes:

> Among the Central African Azande, the benge oracle would be consulted. A small portion of poison would be fed to a baby chick as the question was put to the oracle: "if the plaintiff tells the truth, let the chicken die, let the chicken die, let the chicken die […]." The chick lived (or died). The oracle had spoken. In another time and place (the United States) a judge orders a jury to be consulted. A group of strangers is summoned to a special hall, using only for airing disputes. They hear from the plaintiff, the defendant and the conflicting witnesses. The strangers retire to a private room and caucus. They return with a verdict. In yet another place (most of Continental Europe and Latin America), the facts are determined by a specially trained judge whose decision is based primarily on documents and who may not even allot contesting parties to testify. Every one of these methods is defended in the place it is (or was) used as the best way of getting that truth of an ultimately unknowable past.[2]

Chase's example is a testament to the cultural differences in approaches toward fact-finding across various societies.[3]

In international arbitration, the cultural differences are not as stark as Chase's example may suggest. This holds true even if one disregards the tribal approach of consulting an oracle, which clearly has no place in developed legal systems. No

1. Parts of this foreword draw on our book: Franco Ferrari and Friedrich Rosenfeld, *International Commercial Arbitration: A Comparative Introduction* (Elgar 2021) 106 et seq.
2. Oscar Chase, *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context* (NYU Press 2007) 2.
3. *See also* Mirjan Damaska, *Evidence Law Adrift* (Yale University Press 1997).

experienced user of arbitration would expect a jury in an arbitration, or an overly investigative tribunal that bases its decisions solely on documents. Instead, there is a significant trend toward an adversarial system in which the primary responsibility for gathering, presenting, and testing the evidence rests with the parties and not the tribunal. This is very much in line with arbitration's promise to respect party autonomy.

Notwithstanding the aforesaid, there remain areas of divergence in the approaches toward the taking of evidence. Users from different legal traditions may not share the same understanding as to how an arbitral tribunal ought to proceed in this regard. Expectations regarding key issues, such as the use of documentary evidence, witnesses or experts, may well differ. This harbors the risk of what Samuel Huntington described in a different context as "clash of civilizations."[4]

It is against this backdrop that the editors have invited a diverse group of distinguished arbitration practitioners and academics to contribute to this *Handbook of Evidence in International Commercial Arbitration*. Unlike many existing publications, this handbook does not examine the law on evidence through the prism of a given set of rules, such as the IBA Rules on the Taking of Evidence in International Arbitration. Instead, it adopts a holistic approach based on case law and best practices from major arbitration hubs.

This handbook is organized around six parts.

Part I sets out the foundations regarding the taking of evidence in arbitration proceedings. Julian Lew QC and Simona Valkova introduce the reader to the topic with a chapter on the different legal cultures in relation to the taking of evidence. Stefan Kröll then establishes the normative framework on the taking of evidence. A chapter by the editors examines the interplay between the pre-award regime and the post-award regime with regard to the taking of evidence.

Part II addresses issues pertaining to how the responsibilities in the fact-finding process are allocated among the various actors in an arbitration proceeding. Part II starts with a chapter by Richard Garnett on the burden of proof, i.e., the question of which party bears the burden of producing evidence at the risk of having the case decided against it if it fails to discharge this burden. Ina Popova and Lisa Wang Lachowicz address the related question of the required standard of proof, i.e., the degree of conviction that must be met for the tribunal to find that a proposition has been proven. Giuditta Cordero-Moss complements the analysis with a chapter on the principle of *iura novit curia*.

Part III focuses on the various means of evidence through which parties can discharge their burden of proof. It begins with a chapter on documentary evidence by Roman Khodykin. Mohamed S. Abdel Wahab and Jonathan Lim cover the role of party-appointed experts and tribunal-appointed experts, respectively. Ragnar Harbst addresses witness testimony. A chapter by Darius Chan and Gerome Goh focuses on the role of hearings.

4. Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simone & Schuster 1996).

Part IV addresses admissibility issues, i.e., issues pertaining to the question of whether certain evidence may be allowed into the evidentiary record. The part starts with a chapter by Timothy Nelson on admissibility issues relating to the origin of the evidence. This is followed by chapters authored by Klaus Peter Berger on the issue of privileges and Leon Trakman on issues of confidentiality and data protection.

Part V relates to the assessment of evidence by tribunals. It comprises a chapter by James Hosking on the assessment of the probative value of evidence and one by Jeremy Sharpe on adverse inferences.

Part VI concludes with two chapters on legal enforcement and sanctions relating to the taking of evidence for arbitration proceedings. Elliot Friedman, David Livshiz and Olivia Greene address how national courts may assist parties in an arbitration proceeding with regard to the taking of evidence. Hattie Middleditch, in turn, focuses on enforcement through arbitral tribunals by means of costs and other sanctions.

The editors would like to thank all contributors for their contribution to this handbook. Special thanks go to our research assistants Benjamin Tham and Kay Han Lee, who provided invaluable support during the editing process. Finally, we thank NYU's Center for Transnational Litigation, Arbitration, and Commercial Law and SciencesPo Law School for cohosting a conference where various chapters of this handbook were presented.

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CHAPTER 7
Documentary Evidence

Roman Khodykin

§7.01 INTRODUCTION

Documents play a very important role in the arbitration process. Tribunals attach significant weight to documentary evidence which (save in the case of fraud) is often regarded as a more reliable source of fact evidence than that provided by a witness whose memory may be unreliable and/or whose recollection of events may have been influenced by their employer or legal team.

It is well known that the common law system of England and Wales and the civil systems of Continental Europe have historically diverged in respect of the basis on which their courts make determinations at trial. English courts and other common law systems have historically placed greater reliance on witness evidence, whereas civil law systems have tended to prioritise the assessment of contemporaneous documentary evidence.

In the mid-twelfth century, King Henry II enacted a number of reforms under the Constitutions of Clarendon, in which he expanded the jurisdiction of the secular courts in England and Wales.[1] Ecclesiastical courts retained their inquisitorial approach, but the secular courts began to move towards jury-led trials. These juries were selected from local people as 'witness-like persons'[2] who were likely to know the facts of a matter, but it has been said that these jury trials 'hardly had any place for a law of

1. Constitutions of Clarendon, 1164 as cited in Ernest F. Henderson, *Select Historical Documents of the Middle Ages, London* (George Bell and Sons 1896) https://avalon.law.yale.edu/medieval/constcla.asp accessed 6 August 2021.
2. John Langbein, 'Historical Foundations of the Law of Evidence: A View from the Ryder Sources' (1996) 96 Columbia Law Review 1170.

evidence'.[3] Jurors were often chosen because of their expertise or local knowledge of the facts, as opposed to their independence.[4]

The modern jury is a far cry from this position, but the English legal system retained its interest in evidence from persons with direct knowledge of a case.

Modern arbitral tribunals often consist of a mixture of civil and common lawyers. This synthesised approach can result in a divergence of views on the credibility of a witness or the value of their testimony, ranging from the notion that witnesses can be partisan and unreliable, to the notion that witnesses can be elucidatory and helpful when their evidence is properly tested under cross-examination. However, most practitioners broadly concur that contemporaneous documentation will be of the strongest probative value.[5] A possible exception are some Islamic legal systems, where 'the words of an upright citizen were worthier than an abstract piece of paper or a piece of information subject to doubt and falsification'.[6]

§7.02 LEGAL FRAMEWORK

The various issues relating to documentary evidence in arbitration are governed by different instruments, in particular:

- national laws;
- institutional arbitration rules; and
- soft law instruments.

National laws normally contain general provisions on evidence (burden of proof, default by a party to produce evidence, etc.). These provisions generally grant arbitrators broad powers to order disclosure by the parties to an arbitration, but impose no specific restrictions on the manner by which the tribunal arrives at a decision on this issue, subject always to the tribunal's underlying duties of fairness and impartiality.

Most arbitration laws provide that, subject to party agreement on the extent of document production, the arbitral tribunal has a broad discretion to order document production but do not set out any procedural requirements for document production.[7]

3. Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, Cambridge 1898) 660.
4. Christopher Milroy, 'A Brief History of the Expert Witness' (2017) 7(4) Academic Forensic Pathology https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6474433/#bibr1-2017.044 accessed 6 August 2021.
5. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 827.
6. Nudrat Najeed, 'Good Faith and Due Process: Lessons from the Shari'ah' (2004) 20(1) Arbitration International 97.
7. *See*, e.g., English Arbitration Act 1996, ss 34(2)(d) and 41(5); Hong Kong Arbitration Ordinance, s. 56(1)(b); German Code of Civil Procedure, s. 1042(4); and Austrian Code of Civil Procedure, s. 594(1), which are modelled on Art. 19(2) of the United Nations Commission on International Trade Law ('UNCITRAL') Model Law ('Model Law'), and include the power to order document production. Although there is no specific reference to disclosure or document production, the Model Law's drafting history makes it clear that the arbitral tribunal's general procedural powers include an inherent authority to order disclosure by the parties. *See* the UNCITRAL Analytical

Some arbitration laws go one step further and allow courts to summon a witness to produce documents in aid of arbitration.[8] Beyond that, national laws contain few specific provisions regarding documentary evidence.

In the same way, most institutional arbitration rules include general provisions confirming that the arbitral tribunal has the power to order document production but few include any procedural requirements for document production,[9] other than some provisions about translations.[10] By and large, the detailed provisions concerning documentary evidence are to be found in soft law instruments and/or the procedural orders issued by arbitrators.

When it comes to the documentary evidence, the chief soft law instrument is the International Bar Association ('IBA') Rules on the Taking of Evidence in International Arbitration ('the IBA Rules'). The IBA Rules have their genesis in the 1983 IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration. This was revised and updated in 1999 and 2010 and the most recent version of the IBA Rules was adopted in 2020.

It is also necessary to mention another soft law instrument. The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules') were published on 14 December 2018. The promoters of the Prague Rules believe that these rules, which are said to be based on the inquisitorial model of procedure, will encourage a more active role by arbitral tribunals and will contribute to increasing efficiency in international arbitration. Strictly speaking, the role of the Prague Rules is quite limited for two reasons: (i) they do not contain any provisions on the documentary evidence which achieve an outcome that could not be achieved by applying the IBA Rules; and (ii) to date, there has been a limited adoption of the Prague Rules by practitioners. It will be interesting to see whether this will change in the future. However, for the time being, their relevance is limited. Accordingly, this chapter will not offer a detailed analysis of the Prague Rules.

Commentary on Draft Text of a Model Law on International Commercial Arbitration (UN Doc A/CN.9/264) (25 March 1985) Art. 19, para. 6.

8. *See,* e.g., English Arbitration Act 1996, s. 43; United States Federal Arbitration Act, s. 7; Singapore International Arbitration Act, s. 13.
9. London Court of International Arbitration ('LCIA') Rules, Art. 22.1(v); Swiss Rules 2021, Art. 24(3); Stockholm Chamber of Commerce ('SCC') Rules 2017, Art. 31(3); Singapore International Arbitration Centre ('SIAC') Rules 2016, Rule 27(f); Hong Kong International Arbitration Centre ('HKIAC') Rules 2018, Art. 22(3); International Centre for Dispute Resolution ('ICDR') Rules 2014, Art. 20(4); American Arbitration Association ('AAA') Rules 2013, Rule 34; UNCITRAL Arbitration Rules 2013, Art. 27.3. Although the International Chamber of Commerce ('ICC') Arbitration Rules 2021 ('ICC Rules') do not expressly empower arbitrators to order disclosure or discovery, ICC tribunals and other authorities have almost uniformly held that such authority is implied. *See,* e.g.: '[W]hile the ICC Rules do not contain any provision dealing with "discovery" properly speaking … [that the ICC Rules' mandate that] "the arbitrator shall proceed within as short a time as possible" to "establish the facts of the case" by all appropriate measures … allows the arbitrators to ask the parties to produce the documents in their possession or control, which in their view are relevant to the case.' Order in ICC Case No. 5542 in Dominique Hascher (ed.), *Collection of Procedural Decisions in ICC Arbitration 1993-1996* (Kluwer Law International 1997) 62.
10. *See,* e.g., LCIA Rules, Art. 17.5.

§7.03 DEFINITION OF A 'DOCUMENT'

National laws and institutional arbitration rules do not contain a definition of a 'document', even though the term is used one way or another in these instruments.

The most comprehensive definition of the term 'Document' can be found in the IBA Rules:

> '*Document*' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means.[11]

The breadth of this definition is unsurprising. The IBA Rules are concerned with the taking of evidence. It is important that the provisions relating to documents pick up all forms of evidence that are not witness evidence or expert opinion evidence.

In addition to reflecting an evolving compromise around the right and nature of the documents that a party may request from its opponent, the IBA Rules also contain some adjustments reflecting the ever-increasing volume of document production resulting from electronic communications. The definition of the term 'Document' was revisited during the drafting stage of the 2010 IBA Rules to ensure that it was adequate, and changes in this regard were made. The possible use of search terms to capture electronic documents was also introduced.[12] However, there was no fundamental rethinking of how document production of electronic documents should be managed. The draftsmen took a largely 'hands-off' approach towards issues such as data preservation measures, or possible limitations on the types of sources of electronic information that might be requested.[13] For the most part, electronic documents are treated in the same manner as paper documents.

§7.04 CATEGORIES OF DOCUMENTS IN INTERNATIONAL ARBITRATION

Article 3 of the IBA Rules helpfully divides documents into three categories and contains discrete procedural mechanisms dealing with each of these three categories:[14]

(a) first category: documents accessible to a party and upon which it wishes to rely – covered by Article 3.1 and 3.11 of the IBA Rules;

11. *See* IBA Rules, 7.
12. *Id.*, Art. 3.3(a)(ii). *See also* Roman Khodykin and Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press 2019) paras 6.24-6.25 and 6.72-6.75.
13. *See* Richard Kreindler, 'The 2010 Revision to the IBA Rules on the Taking of Evidence in International Commercial Arbitration: A Study in Both Consistency and Progress' (2010) International Arbitration Law Review 157, 158.
14. *See* further Hilmar Raeschke-Kessler, 'The Production of Documents in International Arbitration: A Commentary on Article 3 of the New IBA Rules of Evidence' (2002) 18(4) Arbitration International 411.

(b) second category: documents that a party believes to be relevant and material to the case but which it cannot produce/access because they are in the possession, custody or control of another party to the arbitration, or a third party – covered by Article 3.2-3.9 of the IBA Rules; and
(c) third category: documents which neither party has introduced or wants to introduce as evidence, but which are regarded as relevant and material by the tribunal – covered by Article 3.10 of the IBA Rules.

This chapter focuses on the first two categories, as well as on some other issues, relevant for all categories of documentary evidence.[15]

§7.05 DOCUMENTS RELIED ON BY THE PARTIES

The requirement that a party produces those documents on which it wishes to rely is, generally speaking, uncontroversial. Leaving aside the question of timing, it is usually in that party's interests to produce such documents. Most institutional arbitration rules,[16] and soft law instruments,[17] impose an obligation on each party to produce the documents upon which it relies.

Article 3.1 of the IBA Rules requires production of all documents available to a party upon which it relies. The only exception is that a party need not produce a document that has already been submitted by another party. It is not enough that the producing party believes that the other party already has a copy of the document. If it has not already been introduced into the arbitration, then it must be produced under Article 3.1. There is no exception for documents that are in the public domain. Article 3.1 states expressly that these must be produced. This makes sense. Although theoretically available to the other parties, it would be unfair not to produce the documents because the other party may not otherwise be able to understand fully the producing party's case on the matter to which the documents relate.

Article 3.1 of the IBA Rules also requires production of documents relied on to take place 'within the time ordered by the Arbitral Tribunal'. The relevant deadlines will normally be set out in the procedural timetable.

The parties may be required to produce the supporting documents that they rely on with their written submissions. They may be given an additional longstop date by which any other documents upon which they wish to rely must have been produced. That date may be the one contemplated by Article 3.11 of the IBA Rules (i.e., following document production, witness statements and expert evidence) or an earlier one.

For the purposes of Article 3.1 of the IBA Rules, a date prior to delivery of witness/expert evidence is desirable since the witnesses/experts may not otherwise have an opportunity to address something important to which they can speak arising

15. For more detail, *see* Roman Khodykin and Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press 2019) Chapter 6.
16. LCIA Rules, Art. 15.2 and 15.3; UNCITRAL Arbitration Rules, Art. 27(1) and (3); HKIAC Rules, Arts 16.3, 17.4 and 22.1; SIAC Rules, Rule 20.7.
17. IBA Rules, Art. 3.1; Prague Rules, Art. 4.1.

out of the documents. The further deadline referred to in Article 3.11 of the IBA Rules will provide a final opportunity to produce additional documents that have become relevant as a result of what is said in witness statements, expert evidence or other documents that have been produced.

The purpose behind these various deadlines is to ensure that the other parties have sight of the documents at the earliest possible opportunity. This limits the possibility of any party gaining a tactical advantage by submitting documents late or so close to the hearing that the other party is not able to deal with them properly and, as a result, may suffer prejudice in the presentation of its case. Of course, it is always open to the tribunal to adjust the timetable to give the receiving party more time but this can then lead to procedural efficiency. As O'Malley puts it:

> [A]s the IBA Rules themselves make clear, a tribunal is under a duty to administer an efficient and economic procedure, which may be understood generally to include holding the parties to filing deadlines … Failure to maintain timetables may cause substantial delay, as the tribunal that allows for the filing of evidence late may be required to grant the opposing party time to comment on the new evidence and perhaps introduce counter-evidence into the record.[18]

In practice, it is not uncommon to see a request from one or more parties to introduce new documentary evidence after the relevant deadline has passed. How the tribunal responds will depend on the facts of the case and the attitude of the individual tribunal members.

For example, some tribunals may expect the producing party to provide a compelling reason why the tribunal should admit the documents late. The tribunal may be willing to admit them if the producing party can demonstrate to the tribunal's satisfaction that it did not have, and could not have obtained, the documents any earlier. The tribunal will also generally admit new documents into the record where all parties agree to this.[19]

Other tribunals may take a pragmatic approach and admit documents even where there is no satisfactory explanation for the delay and the other party does not agree to its admission. If the tribunal has seen the documents, it may conclude that they are not material to the tribunal's determination and so they can be safely admitted and then discounted in the award without prejudice to either party. Some tribunals may admit the documents without any such analysis and simply because they are concerned that if they do not, the award will be vulnerable to challenge on the basis that the producing party was denied the opportunity to present its case.[20]

More robust tribunals may refuse to admit documents after the deadline has passed, particularly in circumstances where the evidence suggests that the producing party could have submitted them earlier but chose not to in order to gain a tactical advantage. Decisions by tribunals not to admit documents filed after a procedural

18. Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa Law from Routledge 2012) para. 3.06.
19. For discussion, *see id.*, para. 3.08.
20. Of course, if the documents are material, and the other party is prejudiced by its late admission, the award could be subject to a challenge from the other side.

deadline has passed have been upheld by courts.[21] In one ICC case, where the tribunal took a robust approach, the tribunal made the following comments:

> The arbitrators have a duty to take into account the fundamental right of each party to present its case properly, but they also have a duty to ensure that the arbitration progresses at a reasonable pace and to avoid unwarranted or deliberate delays. If a party which has had ample opportunity to prepare its case or to submit requests to the arbitral tribunal at an earlier stage of the proceedings, applies to the tribunal, belatedly and without giving legitimate reasons for tardiness, with requests which are liable to cause substantial delays, it may well be the duty of the arbitrators to continue the arbitration without accepting the request of the tardy party.[22]

Where it is clear that a party could have produced documents earlier and chose not to do so as a part of its tactical strategy, even if the documents are admitted, a tribunal may consider it appropriate to sanction the producing party in costs pursuant to Article 9.8 of the IBA Rules.

§7.06 DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION

The second category is the documents which a party seeks another party to produce. In different parts of the world, this process has different names such as 'disclosure' or 'discovery'. However, both terms are more prevalent in the court litigation environment, which is why the term most often used in international arbitration is 'document production'.

The approach to document production in civil law and common law jurisdictions is very different. While the precise rules for obtaining documents may vary between common law jurisdictions, most common law lawyers will generally regard document production – in particular, the right to access all relevant documents held by an opponent – as an essential tool in the fact-finding exercise necessary to the preparation of a client's case. The underlying principle is that all documents relevant to the disputes must be disclosed to the other party.

In contrast, the approach to document production adopted in civil law jurisdictions is much more restricted and the right to request documents of an opponent may be limited to those documents that prove an already pleaded fact.[23]

Article 3 of the IBA Rules represents a compromise between the two legal traditions and, as such, it is invaluable for use by parties to international arbitration. Given the importance of documentary evidence, it is logical that Article 3 should be a fundamental provision of the IBA Rules. It may also explain why Article 3 is the longest and most detailed provision.

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21. For discussion and examples of cases in the Netherlands, United States and Switzerland, *see* O'Malley (n. 18) para. 3.06 and n 9.
22. Letter from the President of the Arbitral Tribunal in ICC Case No. 6465 in Dominique Hascher (ed.), *Collection of Procedural Decisions in ICC Arbitration 1993-1996* (Kluwer 1997) 82.
23. Reto Marghitola, *Document Production in International Arbitration* (Kluwer 2015) 11.

The results of an IBA survey show that Article 3 is by far the most frequently referred to provision of the IBA Rules. Approximately 21% of references to the IBA Rules were references to Article 3.[24]

[A] The IBA Regime for Production of Documents

The IBA Rules make no provision for a general obligation of discovery of documents under which a party has an automatic obligation to disclose to its opponent all documents that are germane to the dispute.[25]

Accordingly, save for specific documents that may have been requested by a tribunal pursuant to Article 3.11 of the IBA Rules, documents on the record in the arbitration will comprise only those that each party has volunteered in support of its case, or that have been disclosed following a request for production made by one party to another. The latter process is regulated by Article 3.2-3.8 of the IBA Rules. The core provision is Article 3.3, which sets out the requirements that must be met in relation to the substance and content of a Request to Produce. Article 3.2 grants the parties the right to deliver a Request to Produce, and Articles 3.4-3.8 deal with the voluntary production of the requested documents by the party in possession, as well as with the raising and resolution of objections to production by that party. Article 9.2 and 9.3 of the IBA Rules set out the grounds upon which objection to a request for production may be made.

Within the committee charged with drafting the 1999 IBA Rules, the issue of non-voluntary document production was the subject of heated debate between participants from different legal traditions. As noted in the commentary to the IBA Rules:

> The issue of whether and under what conditions one party should be able to request production of documents from another party occupied much of the Working Party's discussions in 1999. The vigour with which this issue was debated demonstrated that the question of document production was the key area in which practitioners from common law countries and civil law countries differ.[26]

The requirements of Article 3 of the IBA Rules were drafted in accordance with a number of principles articulated in the commentary to the 1999 IBA Rules and expanded upon in the commentary to the current (2020) IBA Rules. Those principles include the following:[27]

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24. *See*: The IBA Arbitration Guidelines and Rules Subcommittee, 'Report on the Reception of the IBA Arbitration Soft Law Products' (International Bar Association 2016) (hereinafter '2016 IBA Report').
25. *See,* for more detail: Franco Ferrari and Friedrich Rosenfeld, *International Commercial Arbitration: A Comparative Introduction* (Edward Elgar Publishing 2021) 109.
26. 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, 'Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (International Bar Association 2010) 7 https://www.ibanet.org/MediaHandler?id = DD240932-0E08-40D4-9866-309A635487C0 accessed 6 August 2021 (hereinafter 'Commentary on the 2010 IBA Rules').
27. *Id.*, 8.

- expansive American or English-style discovery is generally inappropriate in international arbitration;
- there is a general consensus, even among practitioners from civil law countries, that some level of document production is appropriate in international arbitration; and
- the scope of the permissible document production request is to be limited by certain objections set out in Article 9.2 and 9.3 of the IBA Rules.

In broad terms, the regime arrived at in the IBA Rules has at its heart the requirement in Article 3.3 that, if a request for production of documents by another party is to be advanced, the document requested must be 'relevant to the case and material to its outcome'. The grounds for objection set out at Article 9.2 and 9.3 of the IBA Rules add further protections designed to contain the scope of document production under the rules to that representing a reasonable compromise between legal traditions, and in which the rights of the requesting and producing parties are properly balanced.

At a practical level, and subject to inevitable tensions, the IBA Rules are widely recognised as accommodating procedures by which the concerns of both common law and civil law practitioners may be alleviated. As one commentator puts it:

> A civil lawyer may find the Rules helpful when seeking to limit an extensive request for document production by a common law party; and a common law party may be able to use the Rules to obtain at least some internal documents from a civil law party which this party would otherwise not provide.[28]

[B] Party Right to Deliver a Request to Produce Documents

Article 3.2 of the IBA Rules expressly states that any party may deliver a request for documents to any other party to the arbitration. It is the doorway by which a party may obtain access to documents not in its possession but which another party holds.

It is, of course, open to parties to an international arbitration to agree to limit the scope of document production, or to exclude it altogether. The ICC Commission Report on Controlling Time and Costs in Arbitration identifies an agreement to limit the number of permitted document production requests as a technique for managing document production efficiently.[29] There have been some cases in which parties have agreed that they will each make no more than five document production requests. The ICC Guide for Effective Management of Arbitration[30] ('ICC Guide') highlights that the ICC Rules contain no specific provisions governing document production and that the

28. Tobias Zuberbühler et al., *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (Sellier European Law Publishers 2012) 40.
29. ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration (International Chamber of Commerce 2018) paras 49-57 (hereinafter 'ICC Report on Controlling Time and Costs').
30. Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives (International Chamber of Commerce 2014) 33. Topic Sheet 6 goes on to describe some

parties may agree on the procedures to be applied. Suggested options mentioned in the ICC Guide include no document production at all.

In practice, parties rarely consider document production procedures when drafting their arbitration agreement. In one survey on document production in international arbitration, 73% of respondents said that they rarely or never included a procedure for document production in their arbitration clauses. Fifteen per cent said that they sometimes included such provisions and only 6% said that they frequently did so.[31] Even when parties do consider the issue, they may be reluctant to agree to limit or exclude the right to request documents from an adverse party.[32] Until a dispute arises, it is difficult to anticipate what categories of document will be relevant and, therefore, which party will hold them. Once a dispute has arisen, the potential for agreement is much diminished.

[C] Timing of a Request to Produce

As to the timing of the Request to Produce, Article 3.2 of the IBA Rules simply says that the Request to Produce should be delivered within the time ordered by the tribunal. A deadline for delivery of requests to produce is often contained in the first procedural order following discussion with the parties on the procedural timetable. In cases where such consultation takes place pursuant to Article 2 of the IBA Rules, one of the suggested agenda items for discussion set out in that provision is 'the requirements, procedure and format applicable to production of documents'. Discussion around this is likely to include debate on appropriate dates for delivery of requests to produce and how this step fits into the overall procedural timetable. The relevant timelines will depend on the individual circumstances of the case.

In general, the procedural framework into which a Request to Produce will fit is relatively straightforward. Each party will disclose in advance of the document production phase all of the documents on which it intends to rely (as prescribed by Article 3.1 of the IBA Rules), sometimes with its written submissions. Under Article 3.2 of the IBA Rules, by a date fixed by the tribunal, the parties will then deliver their document production requests containing the information set out in Article 3.3 of the IBA Rules, including a statement explaining the relevance and materiality of the requested documents. The parties will then usually be given a reasonable time in which to either produce the requested documents or to provide details of any applicable grounds of objection under Articles 3.3, 9.2 and/or 9.3 of the IBA Rules.

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of the factors that parties should take into account in deciding what approach to document production is sensible in an individual case, and advocates the use of a cost/benefit analysis.

31. Berwin Leighton Paisner, *International Arbitration Survey on Document Production in International Arbitration* (2013).

32. *See* further, Marghitola (n. 23) 160. Marghitola concludes that the practice of limiting or excluding document production is unlikely to gain broad acceptance in practice. *See also* Jarred Pinkston, 'The Case for a Continental European Arbitral Institution to Limit Document Production' in Nikolaus Pitkowitz et al., *Austrian Yearbook on International Arbitration 2011* (Manz'sche Verlags- und Universitätsbuchhandlung 2011) 87, which considers the potential for arbitral institutions to set limits to document production.

There may be an opportunity for the requesting party to respond to the objections. In the event that the objection to production cannot be resolved between the parties, the requesting party may ask the tribunal to make an order for production under Article 3.7 of the IBA Rules.

The Article 3.1 of the IBA Rules provision for voluntary production of documents relied on, the requirements of the IBA Rules as to the content of a Request to Produce, as well as other factors of more general application may all have some influence on the precise date for delivery of document production requests. It has been suggested that the best practice is for document production to take place between the first and second rounds of written submissions. It is said that:

> The general view is that disputed document production should take place between the first and the second exchange of (full) written briefs (i.e. after the submission of both the statement of claim and the statement of defence). This timing is seen as best practice, although it is clear that the specific circumstances of a case may require a different approach.[33]

This is likely to be the approach adopted in many arbitrations, although it may require some adaptation according to the circumstances of the case, particularly where English-style pleadings are utilised and the range of issues that can be identified from first-round pleadings are more limited.

The drafters of the current version of the IBA Rules also clarified that document requests may take place at multiple points throughout the proceedings as the case evolves.[34]

[D] The Content of a Request to Produce

[1] Introduction and Overview

Article 3.3 of the IBA Rules lays down requirements relating to the substantive content of a Request to Produce Documents.

These requirements are an important part of the checks and balances that exist within the IBA Rules, and which are designed to maintain an appropriate balance between 'too much' and 'too little' document production, as viewed from the perspectives of parties from different legal traditions, and in the interests of efficiency of process.[35]

33. Zuberbühler et al. (n. 28) 46.
34. IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration/Consolidated Amendments, 'Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration' (International Bar Association 2021) 9 https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D accessed 6 August 2021 (hereinafter 'Commentary on the IBA Rules').
35. *See ibid*. Despite the wide acceptance of the IBA regime, the mechanisms for controlling documents production contained in the IBA Rules remain the subject of ongoing debate. For example, Jaffe, Dulani and Stute say that 'the scope of production continues to divide scholars and practitioners alike'. Lotfi notes that 'Given the diverging domestic standards regarding

In general terms, even when contested, a Request to Produce documents should succeed under the IBA Rules where:

- the requirements of Article 3.3 of the IBA Rules have been met;
- the tribunal considers that the issues that the requesting party wishes to prove by means of the documents are relevant to the case and material to its outcome;[36] and
- none of the grounds for objection raised under Article 9.2 or 9.3 of the IBA Rules applies.[37]

In summary, under Article 3.3 of the IBA Rules, the Request to Produce must contain:

(a) a narrow and specific description of the document/s requested;[38]
(b) a statement as to why the requested documents are relevant to the case and material to its outcome;[39]
(c) a statement that the requested documents are not in the possession, custody or control of the requesting party, or a statement that it would be unreasonably burdensome for that party to have to produce them;[40] and
(d) the reasons why the requesting party assumes that the documents requested are in the possession, custody or control of the party to whom the request is addressed.[41]

Some commentators have expressed the view that a number of the requirements to be applied under Article 3.3 of the IBA Rules remain uncertain and subject to conflicting views, with the result that the document production phase of an arbitration remains highly contentious, and often costly and time-consuming.[42] It is true that document production is often very contentious and extremely expensive. Whether that outcome can be laid at the door of the IBA Rules, rather than the parties themselves, is a different question.

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document production, international arbitration is a prime battleground for conflicting approaches.' *See* Michael Jaffe, Jeetander Dulani and David Stute, 'Burden of Proof as a Prerequisite to Document Production Under the 2010 IBA Rules: An Obituary' (2017) 1 Transnational Dispute Management www.transnational-dispute-management.com/article.asp?key=2440 accessed on 29 November 2018; Courtney Lotfi, 'Documentary Evidence and Document Production in International Arbitration' (2014) 4 Transnational Dispute Management www.transnational-dispute-management.com/article.asp?key=2136 accessed on 29 November 2018.

36. IBA Rules, Art. 3.7.
37. *See*, Khodykin and Mulcahy (n. 15) Chapter 12, paras 12.59-12.342.
38. IBA Rules, Art. 3.3(a).
39. *Id.*, Art. 3.3(b).
40. *Id.*, Art. 3.3(c)(i).
41. *Id.*, Art. 3.3(c)(ii).
42. Mark McNeil and Margaret Clare Ryan, 'Meeting the Requirements of Article 3(3) of the IBA Rules: Recommendations for Successful Requests for Document Production' in Julio César Betancourt (ed.), *Defining issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (Oxford University Press 2016) para. 17.02.

[2] Description of the Document

Article 3.3(a) of the IBA Rules requires the requesting party to provide a description of the document it wants.

A party may request either an individual document or a narrow and specific category of documents.[43] In general terms, whatever document is sought, the description should be such that the producing party can easily understand whether a document it holds falls within the terms of the request.

Where an individual document is sought, the description provided in the Request to Produce must be 'sufficient to identify it'.[44]

In many ways, it is more straightforward to seek production of an individual document than a category of documents. When a party seeks production of an individual document, that party will generally have a very clear idea of what that document is. In some instances, the requesting party may have found a reference to, or description of the document, in another piece of evidence or in a public register. For example, a document already on the record in the arbitration may refer to a specific email or letter from the other party to a third party, or it may be clear from the first document that it addresses matters that have been raised in another document. In such circumstances, it is often relatively easy for the requesting party to identify the letter by date and sender/recipient, or by a description, perhaps cross-referenced to the document in which mention is made of it. In other cases, the requesting party may not know a precise date or author but it is nonetheless able to describe the document in a way that will still permit the producing party to identify it. For example, in relation to payment of a certain amount made to company X in August of a given year, it may be possible to request production of the payment order by means of a description referencing those matters. The requirements of Article 3.3(a)(i) of the IBA Rules will be met because the description is sufficient for the respondent to identify the document – all the respondent needs to do is to search for all payment orders made in August of that year to company X.

Article 3.3(a) of the IBA Rules also allows parties to request a category of documents as long as the category of documents requested is 'narrow and specific' and the category of documents is 'reasonably believed to exist'.[45]

In many cases, a requesting party may not know the details of a specific document and will have to frame its request by reference to a category of documents. The requirements mentioned are designed to ensure that the right to request a category of documents is not used as a basis for a 'fishing expedition' while at the same time, not shutting out reasonable requests for documents that are germane to issues in the case. The commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence

43. The Commentary on the IBA Rules notes that the facility to make a request by reference to an individual document or by 'describing "in sufficient detail (including subject matter) … a narrow and specific requested category of Documents that are reasonably believed to exist" was a compromise between the common law and civil law systems'. Commentary on the IBA Rules (n. 34) 10.
44. IBA Rules, Art. 3.3(a)(i).
45. *Id.*, Art. 3.3(a)(ii).

in International Arbitration ('Commentary on the IBA Rules') describes the discussions on this topic that took place between those responsible for drafting the IBA provisions:

> Permitting parties to ask for documents by category, however, prompted more discussion. The 1999 Working Party and the 2010 Subcommittee did not want to open the door to 'fishing expeditions'. However, it was understood that some documents would be relevant and material and properly produced to the other side, but that they may not be capable of specific identification. Indeed, all members of the 1999 Working Party and of the 2010 Subcommittee, from common law and civil law countries alike, recognised that arbitrators would generally accept such requests if they were carefully tailored to produce relevant and material documents. For example, if an arbitration involves the termination by one party of a joint venture agreement, the other party may know that the notice of the termination was given on a certain date, that the Board of the other party must have made the decision to terminate at a meeting shortly before that notice, that certain documents must have been prepared for the Board's consideration of that decision and that minutes must have been taken concerning the decision. The requesting party cannot identify the dates or the authors of such documents, but nevertheless can identify with some particularity the nature of the documents sought and the general time frame in which they would have been prepared. Such a request may qualify as a 'narrow and specific category of Documents', as permitted under Article 3.3(a)(ii).[46]

Although the term 'narrow and specific' may sometimes be construed differently by arbitrators with civil or common law backgrounds (or even by arbitrators with the same legal background), it seems to be common ground that a request for a category of documents should not be couched in nebulous terms. For example, a request for 'any and all documents', references to lengthy time frames and/or 'relating' to a broad description of subject matter are in most cases judged by tribunals to be too broad and failing to meet the 'narrow and specific' standard.[47]

Where the inadequacy of a request is less obvious, a more considered approach to assessing its legitimacy may be required but the approach taken by different tribunals may vary.

O'Malley contends that the 'narrow and specific' standard has generally been understood to apply to both the time frame for a Request to Produce and its subject matter.[48] Some tribunals have gone further. In one ICC case, in which the need for a high degree of specificity was acknowledged, it was suggested that a request for a category of documents should, for example, describe the kind of the document, the identity of the authors and the addressees; cover a narrow time period; describe the contents and the other characteristics of the documents sought; and, in general, allow the other party to identify precisely what documents were responsive to the request.[49]

46. Commentary on the IBA Rules (n. 34).
47. O'Malley (n. 18) para. 3.35 (internal references are omitted).
48. *Id.*, para. 3.34.
49. Virginia Hamilton, 'Document Production in ICC Arbitration' in *Special Supplement 2006: Document Production in International Arbitration* (International Chamber of Commerce 2006) 63, 71.

It appears that the correct approach is to consider whether the description provided in the request is adequate to enable the party on whom the request is served to judge, without too much difficulty, whether a particular document it has in its possession falls within the category of documents requested or outside of it.

Where a request for a category of documents is too broad, and is thus contested, many tribunals will deny the request. There is therefore an element of risk in drafting requests too widely. However, some tribunals may instead invite the requesting party to refine the request. A certain amount of negotiation on the scope of a particular request may also take place between the parties.[50]

An interesting question arises in relation to the volume of documents potentially caught by a document production request. If such volume is extremely large, does this suggest that the request is too broad? While the sheer volume of documents requested to be produced may give rise to other objections to production,[51] we do not think that volume can be relevant to the adequacy of the description of the category of document requested. A request may describe that category very precisely and it may simply be the case that a large number of documents meeting that description exist. As O'Malley explains:

> [I]t should also be said that the volume of documents captured by a request is not necessarily an indication of whether a request does, or does not, meet the 'narrow and specific' criteria. It is entirely possible that given the context of the dispute, a well-crafted request for the production of documents will encompass a large mass of documents. Document production of more than 18,000 pages was ordered by Swiss arbitrators in the past, as was over 150,000 pages by ICDR arbitrators sitting in New York. In the setting of high value dispute, such procedures may be necessary.[52]

In addition to the requirement that the category of documents requested be a narrow and specific category, Article 3.3(a) of the IBA Rules requires that the documents requested are 'reasonably believed to exist'. If the request is contested by the other party and the requesting party has to seek an order for production from the tribunal, the tribunal will have to be satisfied that there is a reasonable basis for belief in the existence of the documents requested. Accordingly, it has been suggested that it is an implied requirement, and that it would be prudent for the requesting party to mention the grounds for belief in the request, particularly where this is not obvious from the nature of the documents requested.[53]

Individual documents can be sought without such qualification,[54] probably because when requesting specific documents, the description of the document will contain details, such as a date and sender/recipient that will tend to confirm its existence. When it comes to a category instead, the request is necessarily broader and,

50. For some specific examples, *see*: Khodykin and Mulcahy (n. 15) paras 6.69-6.70.
51. For example, that it would be unreasonably burdensome to have to produce them (*see* IBA Rules, Art. 9.2(c)).
52. O'Malley (n. 18) para. 3.38 (internal references are omitted).
53. Khodykin and Mulcahy (n. 15) para. 6.65.
54. The requirement that the documents are believed to exist is not mentioned in IBA Rules, Art. 3.3(a)(i).

to prevent a fishing expedition, the requesting party must be able to point to circumstances that suggest the existence of the documents.

For example, in a construction dispute, between an employer and main contractor, relating to particular aspects of the project for which the main contractor seeks an extension of time, the employer may be arguing that the delay was caused by problems with the main contractor's design. The employer may wish to see correspondence between the main contractor and subcontractors relating to any problems with a particular component over the period when the alleged delay occurred. Where it is clear from the contract, documents or other correspondence, that the main contractor had used subcontractors on the relevant part of the project, the employer will have reasonable grounds for believing that correspondence between the main contractors and the subcontractor will exist.

[E] Documents Maintained in Electronic Form

Article 3.3(a)(ii) of the IBA Rules also specifically deals with the situation where a party requests production of documents held in electronic form and highlights ways in which the search for such documents falling within document production requests may be made more efficient and economical.

A number of revisions introduced into the IBA Rules in 2010 were directed at the growing use of e-discovery. These included changes to the definition of 'Document', and the introduction into Article 3.3(a) of the IBA Rules of the possibility that the requesting party may offer, or be ordered to provide, suggested search parameters, by reference to which documents within a requested category of documents held in electronic form could be searched for across the relevant platforms where they might exist.[55] However, aside from these changes, there was no fundamental rethinking of how document production of electronic documents should be managed.[56] In substance, under the IBA Rules, electronic documents are treated in the same way as paper documents. There is no additional express provision dealing with particular issues generated by the nature and volume of electronic documents – for example, data preservation measures, or a limitation on the types of sources of electronic information that may be requested – or a separate regime for production of electronic documents.

The absence of the latter has been seen as a positive feature of the IBA Rules in some quarters. For example, it has been said that:

> Issuing an entire set of new rules for production of electronic documents as part of the 2010 Rules would have been likely to lead to unwanted and unfortunate

55. Another change influenced by the volume of e-documents introduced into arbitration, and the desire to cater for greater economy in the document production process, was the introduction of 'considerations of procedural economy' as a ground for excluding documents or oral testimony from production or evidence. *See* Khodykin and Mulcahy (n. 15) paras 6.25, 12.308-12.316.
56. The Commentary on the IBA Rules notes that the rules are 'neutral regarding whether electronic documents should be produced in any given arbitration; they simply provide a framework for doing so where the parties agree or the tribunal orders production of such documents'. Commentary on the IBA Rules (n. 34) 10.

> results. In particular, new detailed rules may well have led to an increase of the production of electronic documents and hence document production in general. … [I]t is thought that the 1999 Rules contributed to an overall increase of document production in international arbitration practice, and the same might have happened if the 2010 Rules had been amended by detailed rules on e-disclosure. Accordingly, a well-intended 'cure' may have eventually become a part of the 'disease' itself. Moreover, a new set of rules as to production of electronic documents might, in effect, jeopardise the flexibility of the parties and the arbitrators to address such issues in view of the particular circumstances of the case.[57]

However, it clearly lies within the discretionary powers of a tribunal operating under the IBA Rules to take an active role in management of e-disclosure or related issues should it wish to do so.[58]

Article 3.3(a)(ii) of the IBA Rules expressly states that:

> [I]n the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner.

As mentioned, the proposed use of search terms and other search parameters is intended to assist in making the search for electronic documents, that are the subject of a Request to Produce, as efficient as possible, bearing in mind that the volume of electronic documents that a party may possess may often run into tens of thousands of documents, if not more. The availability of this mechanism applies to a request for a category of documents.[59]

Given the volume of documents held electronically by most commercial parties, it is simply not feasible or cost-efficient for a manual search/review of all of those documents to take place in all cases. Even where a party has the necessary resources, the costs associated with it may well be disproportionate. Out of necessity, the parties must therefore employ search parameters as a filter to catch documents that may fall within the category of documents that have been requested. A manual review of that set of captured documents (sometimes referred to as the review set) will then generally be done to identify those documents from the review set that do fall within the request, and those documents within that group that may be privileged or sensitive. The skill in this exercise is to formulate initial search parameters that are not too narrow so that the risk of missing important documents is high, and not too broad so that the set of documents to be reviewed is too large. Although the advent of predictive coding[60] has

57. Zuberbühler et al. (n. 28) 38.
58. For example, pursuant to IBA Rules, Preamble 3 and Art. 2. *See* further Kreindler (n. 13) 157.
59. Formulation of appropriate search parameters to find an individual document required by IBA Rules, Art. 3.3(a)(i), should be relatively straightforward.
60. Predictive coding is machine learning technology driven by human tuition. A senior lawyer reviews a small 'seed set' of documents, which are then analysed by the software programme and used to generate a further sample of documents for review. Through a process of iterative refinement, an algorithm in the software used to harvest relevant documents can reach a level of review accuracy that can be applied across the entire dataset, identifying relevant documents in a manner that is far more efficient and scalable than a traditional document review. A series

the potential to improve and possibly supersede this approach to finding electronic documents, for the moment at least, the use of appropriate search criteria remains an important element in trying to manage and contain the burden of electronic document production, while at the same time, ensuring so far as possible that relevant and material documents are made accessible to the requesting party.

This express reference to the power of a tribunal to require formulation of appropriate search terms is consistent with guidelines on production of electronic documents found elsewhere. For example, the International Centre for Dispute Resolution ('ICDR') guidelines provide that:

> [R]equests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search.[61]

A request for documents in electronic form should use suggested search criteria formulated by referencing to as many of the following parameters as possible.

Date range: This should be as narrow as possible and linked to the likely time period within which documents in a particular category of documents described are likely to have been created, with perhaps a small degree of leeway on either side of those dates. For example, a request for correspondence relating to what was agreed at a meeting between named individuals on a particular date is likely to have been generated in a relatively short period after the date of the meeting.

Custodians (identified by name or email address): Identification of individuals, who are likely to be the sender, recipient or author of the documents requested, or simply holding relevant documents by reason of their role or function, is extremely useful. Searches can be made by referencing these details. Depending on how conscientious the requesting party is, there are various refinements that may be made to limit custodian related searches. For example, a request for emails between Mr A and Mr B will produce two copies of each email (the one sent and the one received). In contrast, if the request limits the search to email folders of Mr A and asks for emails to or from Mr B, only one copy should be produced. In practice, the wider search may not impose a significant additional burden because of the availability of software that can deduplicate a data set to remove identical copies. All such methods of limiting searches for documents in electronic form should be carefully considered.

Search terms: Date range and custodian criteria can impose useful limits on a search for electronic documents. However, depending on the nature of the business being conducted by the party in possession of the documents, application of these filters alone may still produce a large volume of irrelevant documents. It is therefore useful to identify particular words or phrases that are likely to occur in the particular documents being sought, either on their own or in combination with other words or

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of sample reviews, privilege sweeps, and other human interventions can then be used to verify the results and finalise the documents prior to production. *See* further Khodykin and Mulcahy (n. 15) paras 5.89-5.90.

61. International Centre for Dispute Resolution ('ICDR'), *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* (International Centre for Dispute Resolution 2008) Art. 4 (hereinafter 'ICDR Guidelines').

phrases. Clearly, to be useful, these must be specific to the particular subject matter of the documents being sought. For example, in a dispute between a hotel owner and a large management company with responsibility for a number of hotels, where the owner claimed that the management company is in breach of contract for letting customer service standards slip at the owner's hotel, a search for 'complaint' in the management company's records has the potential to pull up a large number of documents unrelated to the owner's hotel. If that search were to be run, however, in combination with the name of the owner's hotel, a more targeted set of documents might be produced.

File types: To avoid unnecessary misunderstanding, it is prudent to indicate the standard file types that the requesting party expects to receive (e.g.,.pst files (emails), Microsoft Word files, pdf files,.msg,.xls/xlsx,.ppt/.pptx and jpg files), although some parties will wish to make clear that this is a non-exhaustive list.

[F] Statement of Relevance and Materiality

[1] Introduction

Article 3.3(b) of the IBA Rules provides for a requirement that a Request to Produce contains a statement as to why the documents requested from the other party are 'relevant to the case and material to its outcome'. The requirement of relevance and materiality as well as the specificity requirement set out in Article 3.3(a) are critical elements of a document production request made under the IBA Rules.[62]

The benchmark of relevance and materiality is one of the tools given to a tribunal to help it ensure that document production assists rather than frustrates an efficient determination of the dispute. Importantly, the benchmark also provides parameters for document production that – for the most part – are acceptable to parties and practitioners from different legal traditions. As mentioned, if applied robustly, it can prevent 'fishing expeditions' by which parties seek disclosure of documents that may help them to construct a case rather than support an existing case, but it will also facilitate introduction into evidence of documents that are germane to the dispute.

At a practical level, confining document production within reasonable parameters assists in reducing the number of documents introduced onto the record in an arbitration. The large and growing volume of documentary evidence used in international arbitration raises a number of challenges. It often involves delay, as documents are searched for, reviewed, delivered and digested. It can also involve significant additional costs that, in addition to being generally undesirable, can exacerbate inequalities of resources between parties. Moreover, while the parties may very often have teams of lawyers and experts available to review these documents, the same is not

62. Although these two requirements are contained in two separate provisions, the point has been made that, where a category of documents (rather than an individual document) is being requested under Art. 3.3(a)(ii) of the IBA Rules, the requirement that the request contains 'a description in sufficient detail (including subject matter) …' creates a direct link to the relevance requirement under Art. 3.3(b) of the IBA Rules: *see* Marghitola (n. 23) 37-39.

true of arbitrators, who are very often expected to wade through a vast amount of material that later turns out to be of little significance.[63] A review of the transcripts of evidentiary hearings, and of the final award/s in many arbitrations, will show that the number of key documents referred to by the parties, and relied on by the tribunal, is usually limited.

Whether the benchmark of relevance and materiality introduced under the 1999 IBA Rules[64] led the way or followed an emerging approach, it is clear that the current IBA formulation represents accepted best practice in international arbitration. In some cases, the benchmark may be stated expressly in the applicable arbitration rules. In other cases, it is not mentioned but the test of relevance and materiality is nonetheless applied by the tribunal.

[2] Relevance and Materiality under the IBA Rules: What Does It Mean?

[a] Relevance Versus Materiality

The concepts of 'relevance' and 'materiality' find their origins in different legal traditions. Relevance to the case is a requirement for document disclosure that is typically used in common law jurisdictions, where there is a broad understanding of what this description means. In these jurisdictions, provided a document is 'relevant', there is generally no enquiry as to whether the document is ultimately necessary in order to enable the court to decide the case. In contrast, civil law concepts strongly influence the requirement under the IBA Rules that a document requested must be material to the outcome of the case. In civil law jurisdictions, the judge will examine and enquire the disputed allegations and may order production of any document necessary to establish those allegations.[65]

Under the 1999 IBA Rules, the benchmark adopted was 'relevant and material to the outcome of the case'. This is in contrast to the formulation used in the current IBA Rules: 'relevant *to the case* and material to its outcome' (emphasis added).[66] The formulation in the 1999 IBA Rules was often interpreted to mean that 'relevance' and 'materiality' were part of a single requirement that carried a degree of redundancy between the two concepts.[67] It is widely accepted that the revised formula in the current IBA Rules contains two limbs ('relevant to the case' and 'material to its

63. Depending on the tribunal's appetite for reviewing voluminous files of documents and/or the time available for them to do so, the need to deal with a large volume of documents may have adverse consequences for the arbitration process. *See* Michael E Schneider, 'Chapter 9. The Paper Tsunami in International Arbitration: Problems, Risks for the Arbitrators' Decision Making and Possible Solutions' in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Dossiers of the ICC Institute of World Business Law Vol. 6, Kluwer 2009) 366.
64. The formulation under the 1999 IBA Rules was slightly different. Article 3.3(b) of the 1999 IBA Rules required a statement as to how the documents requested are 'relevant and material to the outcome of the case'.
65. *See* further, Marghitola (n. 23) 47.
66. IBA Rules, Art. 3.3(b).
67. *See* further, O'Malley (n. 18) para. 3.68.

outcome') and that both limbs must be satisfied.[68] The IBA Rules, however, do not contain a definition of either term.

In addition to the mentioned distinction between legal traditions, there is some suggestion that the two limbs reflect two differing perspectives – the first perspective being that of the parties, and the second being that of the tribunal. This makes sense. 'Relevant to the case' may be seen as meaning that a document or content of a document will reasonably assist a party in establishing its case, whereas 'material to its outcome' is to be seen as relating to the tribunal's right to evaluate a requested document in light of whether it will have a bearing upon the final award.[69]

Some commentators suggest that the requirement of 'relevancy' continues to be wrapped up in the second limb of materiality; i.e., a document that is material to the outcome is always relevant to the case.[70] While in some cases this may be true, it is a simplistic analysis that ignores the dual perspectives highlighted above.

A more general point to bear in mind, in relation to both relevance and materiality, is that the IBA Rules are not intended to limit a substantive right to documents that may exist independently of the document production process.[71] The benchmarks of relevance and materiality cannot be used by a party to resist operation of a substantive right – for example, a contractual or statutory obligation.[72] Both the form and substance of production requests based on a substantive right have to be examined by reference to rights and obligations existing under the applicable substantive laws, and not against the benchmark of relevance and materiality.[73]

[b] Relevant to the Case

The IBA Rules contain no definition of 'relevance to the case'.

68. *See* further Nathan O'Malley, 'Document production under Art.3 of the 2010 IBA Rules of Evidence' (2010) International Arbitration Law Review 186; Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014) 2360.
69. *See* further Marghitola (n. 23) 49. Marghitola notes this dual perspective. She puts it in this way when describing the relevancy requirement: 'The amendment to the wording involved a change of perspective. Contrary to the term "relevant to the outcome of the case" [the benchmark contained in the 1999 IBA Rules], the term "relevant to the case" considers the relevance from the parties' perspectives. "Relevant to the case" does not imply an analysis by the arbitral tribunal regarding whether the requested documents will be needed to resolve the case. Rather, the issue is whether the requesting party can use the requested document to present its case.'
70. Born (n. 68) 2360.
71. *See* further Matthias Scherer, 'The limits of the IBA Rules on the Taking of Evidence in International Arbitration: Document Production Based on Contractual or Statutory Rights' (2010) International Arbitration Law Review 195; Reto Marghitola, 'Document Production: New Findings on an Old Issue' (2016) 34(1) ASA Bulletin 78.
72. A term, providing for a right to provision of documents held or generated by the other party, is not uncommon in certain types of contracts, such as distributorship agreements or joint venture agreements, or in respect of audit rights in a production sharing agreement. As to statutory rights, one example cited elsewhere is the obligation of an agent to return, at the request of his/her principal, everything that he has received as a result of his/her agency activities.
73. Matthias Scherer, 'The Limits of the IBA Rules on the Taking of Evidence in International Arbitration: Document Production Based on Contractual or Statutory Rights' (2010) International Arbitration Law Review 195.

Various descriptions of what must be demonstrated by a statement of relevance delivered under Article 3.3(b) of the IBA Rules have been put forward. An appropriate base test for relevance is whether the document will assist the requesting party, either to establish the truth of the allegations of fact relied on to support its legal case or because it is inconsistent with the facts relied on by its opponent(s). Documents meeting this formulation will not be limited to documents relevant to witness evidence, and may include documents that establish or discredit facts on which expert evidence is based.

This approach is supported by other commentators. For example, it is said that, to demonstrate relevance, the requested document must be useful for a line of evidence followed by the requesting party in order to establish the truth of factual allegations on which legal conclusions are based.[74] In similar terms, a document is said to be relevant if it is likely to prove a fact from which legal conclusions are drawn.[75] Another view notes that the requested document may serve to support the requesting party's allegations in the case or, on the contrary, may be necessary to repudiate allegations made by the other party.[76]

Documents that contradict a written witness statement are relevant to the case. A party can typically use such documents to present them to an opponent's witness during cross-examination. A more interesting question, however, concerns documents that are unrelated to the case but which touch on the credibility of the witness. On one view, such documents are irrelevant to the issues in the case and therefore fall outside of the parameters laid down by Article 3.3(b) of the IBA Rules.[77] However, if the documents are of a nature that are likely to substantially undermine the credibility of a key witness for the producing party, it is hard to see why they would not be material to the outcome of the case, and therefore also relevant within the context mentioned.

In order to demonstrate relevance in the terms described above, it is good practice for parties to explain in their document production requests the relationship between a document requested and the issue in the written submissions to which it relates. One experienced arbitrator has put it in these terms:

> [T]he requesting party should be invited to make clear with reasonable particularity what facts or allegations(s) each document or category of documents sought is intended to establish.[78]

A ruling in an unpublished ICC award makes the point that:

> The request for production must establish the relevance of each document or each specific category of documents sought in such a way that the other party and the

74. Raeschke-Kessler (n. 14) 427.
75. Gabrielle Kaufmann-Kohler and Philippe Bartsch, 'Discovery in International Arbitration: How Much Is Too Much?' (2004) 1 SchiedsVZ 13.
76. Raeschke-Kessler (n. 14) para. 3.2.3.
77. *See* further Marghitola (n. 23) 50.
78. Bernard Hanotiau, 'Document Production in International Arbitration: A Tentative Definition of "Best Practices"' in *Special Supplement 2006: Document Production in International Arbitration* (International Chamber of Commerce 2006) 113, para. 14.

> arbitral tribunal are able to refer to factual allegations in the submissions filed by the parties to date.[79]

Where production requests are to be made in the form of a Redfern Schedule, the explanation should be included within the schedule.[80]

[c] Material to Outcome of the Case

As noted above, under the current version of the IBA Rules, the requirement of materiality to the outcome of the case is a separate and more onerous requirement than that of 'relevance to the case'. It is a requirement formulated from the perspective of the tribunal. The key question to be answered is whether the requested document will have a material effect on the tribunal's award. The document(s) must add something to the evidence on a factual issue that is on the critical path to a determination of the dispute. If it is clear that the document will have no bearing on the matters to be decided, then the requirement is not met. The more difficult ground is where a document is likely to fall within the scope of the evidence to be considered by a tribunal in relation to an important issue between the parties, but the significance of the document is not readily apparent. Whether a tribunal applying the IBA Rules will be satisfied that the requirement of materiality is met is likely to turn, in practice, on the individual predilections of the tribunal members, the quality of the analysis put forward by the party in support of its request, and (if the request is opposed) the quality of the argument made by the other party. That said, if a very large number of requests are made, it is only the most diligent of tribunals that may give such opposing arguments the consideration they merit.

It is nonetheless useful to consider some of the different ways in which the 'material to outcome' test has been paraphrased. These include: '[the documents are] material to the tribunal's decision';[81] '[the document] is needed to allow complete consideration of the factual issues from which legal considerations are drawn';[82] '[a document which] would have a tendency to influence the tribunal's determination of issues in dispute'[83] or that will have a bearing upon 'the … likely merit of the point the requesting party seeks to support'.[84]

79. McNeil and Ryan (n. 42) para. 17.19.
80. *See* below section I for a description and explanation of the use of Redfern Schedules.
81. McNeil and Ryan (n. 42) para. 17.24.
82. Marghitola (n. 23) 79. The author contends that this definition clarifies that, factual rather than legal issues are intended to be the focus of this benchmark. A similar formulation is provided by Professor Raeschke-Kessler: 'the arbitral tribunal must deem it necessary that the document is needed as an element to allow complete consideration whether a factual allegation is true or not' (Raeschke-Kessler (n. 14) para. 11.1). Although similar to the description offered by those commentators in relation to the requirement of relevance, the phrase 'complete consideration' is a distinguishing feature. This author contends that this definition clarifies that factual rather than legal issues are intended as the focus of this benchmark.
83. Byung Chol Yoon and Joel Richardson, 'Discovery in Investment Arbitration Involving Republic of Korea' (2008) 4(2) Asian International Arbitration Journal, 137, 139.
84. O'Malley (n. 18) para. 3.73, citing *Aguas del Tunari, S.A. v. Republic of Bolivia* (Procedural Order No. 1) International Centre for Settlement of Investment Disputes ('ICSID') Case No. ARB/02/3.

Examples of documents likely to be material to the outcome include: the test results of an allegedly defective product; sales statistics in relation to a claim for royalties; the metadata of a document where the issue concerns the timing or authenticity of the document; internal schedule analysis where there are claims of construction delay; or distributor sales figures in a claim for unpaid commission.

Examples of circumstances where a document may be found not to be material include where an issue has already been conceded by one side and the document is not therefore material to the tribunal's determination, where the matter to which the document relates is connected with the events underlying the dispute but is not on the critical path to a determination by the tribunal, or where the tribunal already has sufficient evidence on the particular issue.

The decision of the English Court in *ABB v. Hochtief Airport GmbH* is a good illustration of this point.[85] In that case, the complaining party argued before the court that it had been unfairly discriminated against when a number of its document requests were denied by the tribunal during the arbitration. It argued that it had clearly shown that the documents in question were relevant to one of its arguments. In reviewing the conduct of the tribunal in light of the standards found under the IBA Rules (which, by order of the tribunal, were to apply) the court noted that, even though there did appear to be a connection between the document requests and the complaining party's arguments in the case, the tribunal had not acted unfairly in denying document production. It was plain that the tribunal did not consider that the requested documents would assist with its determination. The argument to which the requested documents related was immaterial to outcome.[86] In practice, a tribunal will have to be very careful not to prejudge the issue, or to be perceived as doing so.

One reported ICC decision referred to a requesting party seeking the production of notes of witness interviews referred to in a report, in order to check the accuracy and veracity of the statements made in the report. The tribunal pointed out that the requesting party would have the opportunity to question the witnesses at the hearing and that there was other material already on the record that could be used to prove the truth or otherwise of the statements made in the report. The request for production was thus denied.[87]

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85. *ABB AG v. Hochtief Airport GmbH* [2006] EWHC 388 (Comm).
86. *See* further O'Malley (n. 68) 5. *See also ABB AG v. Hochtief Airport GmbH* [2006] EWHC 388 (Comm) paras 84-85. The court also noted that '[w]hether the arbitrators were wise to reject … [the] request for disclosure was not something it had to decide', suggesting that the court may have considered that admitting the documents would perhaps have avoided a possible basis of complaint by the requesting party.
87. Hamilton (n. 49). Although this article involved a review of ICC Decisions prior to the implementation of the current 2010 IBA Rules, the example cited concerned the issue of materiality. Another example quoted is the decision of an ICSID tribunal to reject document production requests filed after a jurisdictional hearing, on grounds that the evidence before the tribunal was 'sufficient to decide the jurisdictional issues raised by the respondent'. *See El Paso Energy International Company v. The Argentine Republic* (Procedural Order No. 1) ICSID Case No. ARB/03/15 (28 July 2005), quoted in *El Paso Energy International Company v. The Argentine Republic* (Decision on Jurisdiction) ICSID Case No. ARB/03/15 (27 April 2006) para. 9. *See* further McNeil and Ryan (n. 42) para. 17.24.

[G] Statement That Documents Are Not in Possession, Custody or Control of the Requesting Party

Article 3.3(c)(i) of the IBA Rules provides that the Request to Produce must contain: (i) a statement that the requested documents are not in the 'possession, custody or control' of the requesting party; or (ii) a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce them.

In other words, if the requesting party already has the documents, it should not ask another party to produce them, unless there are good reasons why it would be unduly onerous for the requesting party to have to retrieve the documents itself. The Commentary on the IBA Rules explains the importance of this requirement in these terms:

> By requiring the requesting party to state that the documents sought are not in its own possession, the IBA Rules of Evidence seek to prevent unnecessary harassment of the opposing party by the requesting party.

Articles 3.3(c)(i) and (ii) of the IBA Rules each use the same phrase – 'possession, custody or control'. In the majority of cases, a party will not request production of documents that it already has. As a result, it is generally not necessary to consider the application of that phrase to the requesting party. Much more often, however, arbitrators are asked to conclude, pursuant to Article 3.3(c)(ii), that the requested documents are in the possession, custody or control of the party who has been asked to produce the documents.

It may be self-evident that certain categories of documents that the requesting party wants to see will never have been in its possession, custody or control. An example would be correspondence between two individuals employed by another party. In such circumstances, the requesting party may feel very comfortable making a statement that those documents are not in its possession, custody or control. In other cases, the requesting party may not be entirely sure if it has some or all of the documents. In these cases, in order that it may make a statement in good faith that the documents are not in its possession, custody or control, the requesting party may wish to undertake the following steps prior to making the request:

- Formulate appropriate search terms and undertake a search of its electronic files and archives.
- Request that all individuals involved in any events to which the request relates make their paper and electronic files available for review.
- Consider whether there are any third parties (e.g., subcontractors, advisors, auditors) who have been involved in the events to which the request relates, and from whom the requesting party has the right to request documents.

In an unreported ICC case, a party requesting production of documents was criticised in these terms for failing to make adequate searches for the documents it wanted:

> Claimants have not even made a basic representation that they have undertaken a search for the requested documents, but failed to locate them. But, even more importantly, in addition to not having demonstrated any reason to believe that the documents they request exist, Claimants also have failed to provide a convincing (or, indeed, any) reason to believe that, were they to exist, they would be exclusively in [Respondent]'s possession. For example, Claimants have not alleged any circumstances indicating that the documents sought were submitted directly, and solely, to [Respondent].[88]

A question that sometimes arises is whether a party can request production of documents that are in the public domain. Although at the time of the request these documents may, strictly speaking, not be in the '*possession, custody or control*' of the requesting party, it may be perfectly possible for the requesting party to obtain them. As a general principle, documents in the public domain should be treated as documents to which the requesting party has access to and therefore such documents should not be the subject of a document production request. However, there may be legitimate exceptions to this approach. For example, a technical manual may be referred to in documents on the record and a copy held by one of the parties. The manual may be publicly available but only at significant cost. In those circumstances, it may be reasonable for the party without a copy of the manual to ask for copies of the relevant parts of it so that it may understand the references in the documents on the record.[89]

As mentioned, Article 3.3(c)(ii) of the IBA Rules provides one exception to the general rule; i.e., a party in possession of particular documents cannot ask another party to produce them. The exception is where it would be 'unreasonably burdensome' for the requesting party to produce the documents requested.

The grounds on which a party may argue that it would be onerous to produce documents in its possession will vary according to the circumstances of the case. However, possible examples include where the documents have been archived[90] and can only be retrieved at significant expense, or perhaps where a party has only retained hard copy documents and in order to find the items requested by its opponent, it would have to undertake a manual review of a significant volume of documents. In addition, backup tapes may not be easily recoverable and it is not possible to interrogate them by reference to search terms.[91] It has been suggested that the alleged burden on the

88. Hamilton (n. 49) 75.
89. The position was rather well summarised by the tribunal in *ADF Group Inc. v. United States of America* (Procedural Order No. 3) ICSID Case No. ARB (AF)/00/1 (4 October 2001) para. 4.
90. The Commentary on the IBA Rules indicates that Art. 3.3(c)(i) of the IBA Rules may be directed at such a situation. It states: 'Article 3.3(c)(i) of the revised IBA Rules recognises one exception [to the principle that a party should not request documents in its own possession]. In the age of electronic documents it will become increasingly less likely that a particular document has been entirely deleted from a party's records, as it may continue to exist electronically such as on back-up tapes or in electronic archives. Where a document is no longer accessible, for example, because it is not on a server's active data, it may be less burdensome and costly for another party to produce it.' *See* Commentary on the IBA Rules (n. 34).
91. Irene Warshauser, 'Electronic Discovery and Arbitration: A Shortcut Through e-Discovery' in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation. Fordham Papers 2008* (Martinus Nijhoff Publishers 2009) 255; Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration* (CUP 2013) 73.

requesting party should be assessed against the evidential value of the documents and the comparative ease with which the other party can produce them – essentially a matter of proportionality or 'balance of convenience'.[92]

[H] Statement of Reasons Why the Requesting Party Assumes That the Documents Are in the Possession, Custody or Control of Another Party

Article 3.3(c)(ii) of the IBA Rules provides that the Request to Produce should contain a statement setting out the reasons why the requesting party believes that the documents it wants are in the 'possession, custody or control' of another party.

Although each of these terms may have a separate meaning, generally, a party requesting production will simply use the phrase 'possession, custody or control' with supporting explanation as to why the opponent party either has the document or can obtain access to it. If the request is resisted and the tribunal is asked to make an order for production, the tribunal may also look at the requirement without too much analysis as to which of the three terms are satisfied.

Article 3.3(c)(ii) of the IBA Rules does not require the requesting party to provide proof that the documents are held by another party. However, in practice, if the request is objected to by the opponent, the requesting party will need to be able to persuade the tribunal that its assumption about the whereabouts/availability of the documents is a reasonable one. The circumstances giving rise to a belief that another party holds particular documents will be case specific. However, if a requesting party is able to meet the requirement under Article 3.3(a) of the IBA Rules by demonstrating a reasonable basis for belief that such documents exist, and by being able to describe the documents sought in adequate detail, in many cases that same reasoning and detail will point to it being likely that those documents are in the possession of party A or party B, etc.

The phrase 'possession, custody or control' is used in both Articles 3.3(c)(i) and (ii) of the IBA Rules. It is also used in Article 3.4, which makes clear that the obligation to produce a document (whether on a voluntary basis or pursuant to an order for production made by the tribunal) is limited to documents that a party has in its 'possession, custody or control'. The meaning of this phrase is likely to become relevant where a requesting party has stated in a Request to Produce its belief that the documents in question are held by the party to whom the request is addressed, and the party alleged to have the documents contends that they are not in that party's 'possession custody or control' and it cannot therefore produce them. Although the intention behind the phrase is reasonably clear – in essence, that by some legal means the party to whom the Request to Produce is addressed has a right of access to the documents in question – in a contentious environment such as international arbitration, there may be considerable debate between the parties, and with the tribunal, as to what constitutes 'possession, custody or control'.

92. O'Malley (n. 18) para. 3.46.

The Commentary on the IBA Rules does not mention the origin of the phrase 'possession, custody or control',[93] but it is suggested by Marghitola that it is derived from common law rules – in particular, the United States Federal Rules of Civil Procedure which contain the identical formula of 'possession, custody and control'.[94] Although adoption of English/US-style discovery was regarded by the drafting committee as being inappropriate in international arbitration, it may be that the adoption of the concept of 'possession, custody or control' was considered useful as part of the package of measures by which a compromise between common law and civil law approaches could be found.

The terms 'possession, custody and control' are not defined terms within the IBA Rules. It is suggested that this poses a problem because lawyers from different jurisdictions may understand these terms to mean different things. By way of example, in some civil law jurisdictions, 'possession' includes 'indirect possession' or actual control over a document, whereas in many common law countries, the term 'possession' does not extend to documents that can be obtained on demand, that situation instead falling within the description of 'control'.[95]

Given the lack of a definition in the IBA Rules, the scope for disagreement on what each of the terms 'possession', 'custody' and 'control' means is significant. However, that is not to say that the inclusion of a definition of those terms in the IBA Rules would remove argument on whether a particular situation falls within one or more of those definitions or outside all of them entirely. The inclusion of a definition might also hinder a tribunal's flexibility when interpreting these terms in an individual case.

As things stand, it is left to an individual tribunal to decide how the terms are to be interpreted and how they apply to the facts of an individual case. The precise meaning of each individual term, however, may not matter very much in practice. The idea behind the formula adopted in the IBA Rules was to capture all situations where the party to whom the Request to Produce is addressed can, in practice, obtain a requested document. Even if a different interpretation is applied to individual terms, the outcome reached may still be the same. For example, a civil law arbitrator may take the view that a document is in the 'possession' of the party, whereas an arbitrator with a common law background may treat the same document as being in that same party's 'control'. It therefore does not really matter eventually because in both instances, the tribunal is entitled to order production. The adoption of three alternative criteria for production simply suggests that a relatively liberal approach to establishing an ability

93. IBA Working Party, 'Commentary on the New IBA Rules of Evidence in International Commercial Arbitration' (2000) 2 Business Law International 16 (hereinafter 'Commentary on the 1999 IBA Rules') refers only to documents being in the 'possession' of another party, although those rules contain the same description 'possession, custody or power' as provided in the 2010 IBA Rules.
94. United States Federal Rules of Civil Procedure, Rules 26(a)(1)(A)(ii), 34(a)(1) and 45(a)(1)(iii). *See* further: Marghitola (n. 23) 64.
95. *See* for more detail: Marghitola (n. 23) 64-65.

to produce requested documents on the part of the non-requesting party was intended by those drafting the IBA Rules.[96]

[I] The Use of Redfern Schedules for Requests to Produce

It is common practice in international arbitration for a Request to Produce to be made in the form of a Redfern Schedule. This is a table containing a number of columns in which the party requesting production will set out the categories of documents that it wishes to see, usually supported in a second column by the information required by Articles 3.3(a), (b) and (c) of the IBA Rules. The party to whom the request is addressed will then complete the next empty column in the table, indicating whether it intends to produce the requested documents on a voluntary basis pursuant to Article 3.4 of the IBA Rules, or whether it objects to production on one of the grounds for objection set out in Article 9.2 or 9.3 of the IBA Rules. If it objects, it is required to provide details of the grounds of objection relied upon in relation to each category of document to which objection is taken. If the objection cannot be resolved, the tribunal will decide on the matter under Article 3.7 of the IBA Rules, and will often enter its ruling on the objection under the final column of the table. There will generally be a separate Redfern Schedule for each party's Request to Produce.

The Redfern Schedule is named after Alan Redfern,[97] who is credited for its introduction as standard practice in international arbitration. Alan Redfern describes the provenance of the Redfern Schedule in these terms:

> The Redfern Schedule was devised in order to crystallise the precise issues of document production which were in dispute between the parties. The arbitral tribunal would then know what position the parties had reached in the course of their exchanges, which may well have been going on for several months. The Redfern Schedule makes it possible for both the parties' lawyers and the arbitral tribunal to know where the parties finally stand in relation to detailed requests for document production and the reasons for objection to them. The tribunal can then go through the requests, one by one, and decide how each is to be dealt with.[98]

The Redfern Schedule was later picked up by other arbitrators, and in 2012, the ICC first published its report on Techniques for Controlling Time and Costs in Arbitration, in which it recommended use of Redfern Schedules.[99] Thereafter, the Redfern Schedule has become the prevalent form of written vehicle for document production requests.

The original form of the Redfern Schedule had only four columns, i.e., requested documents, reason for request, reply and the tribunal's decision. Under current

96. For more detailed analysis of the terms 'possession', 'custody' and 'control', *see* Khodykin and Mulcahy (n. 15) paras 6.165-6.198.
97. At the time, Alan Redfern was a partner in an international law firm in the City of London, and he is now a member of the English bar and a well-known arbitrator.
98. Alan Redfern, 'Documentary Disclosure in International Arbitration: The IBA Rules and the Redfern Schedule' in Andrea Carlevaris et al. (eds), *International Arbitration under Review: Essays in Honour of John Beechey* (ICC Publication No. 772E, ICC 2015) 343, 351.
99. ICC Report on Controlling Time and Costs (n. 29) para. 52.

practice, counsel will often make modifications to this format. For example, there may be a first column that identifies requests by number. Where there are a significant number of requests, this provides an easy reference point. Another more substantive modification is an additional column, in which the requesting party is given an opportunity to respond to objections raised by its opponent, either by taking issue with the grounds of objection or perhaps taking them into account and proposing a modification to the original request. This addition appears to be particularly prevalent among counsel from common law jurisdictions, where an applicant is used to having the last word. If used, this last round of comments will need to be factored into the procedural timetable. There are no strict rules regarding the format of a Redfern Schedule. It is a useful tool for the parties to adopt and may be adapted as circumstances dictate.

The precise format of a Redfern Schedule may vary. For example, there may not be a discrete column or line reference in which the requesting party confirms (as required by Article 3.3(c)(i) of the IBA Rules) that it does not have the requested documents. Since this is a requirement applicable to all requests, it is sometimes addressed by way of a general statement to this effect in the introductory part of the Redfern Schedule. However, any exceptions to that position are generally best dealt with against the individual item requested, as the explanation given will have to be tailored to those documents. For example, where the requesting party has a particular document or category of documents in its possession, but claims (pursuant to Article 3.3(c)(i)) that it would be unreasonably burdensome to have to produce them itself.

It is also generally prudent not to make such a general statement, in relation to the requirement under Article 3.3(c)(ii) of the IBA Rules, that the requesting party provides a statement of the reasons why it assumes that the requested documents are in the possession, custody or control of the responding party. Those reasons will generally be specific to the particular document or category of documents being requested. It is more appropriate to include these reasons in the appropriate column against the relevant category of document.

A regrettable development in relation to the use of the Redfern Schedule is the practice by some counsel to use it as a vehicle for making submissions on the merits of the case – in particular, unnecessarily stating repeatedly what their case is and referencing arguments relied upon, that have no relevance to the critical path by which a requested document may be said to be relevant to the case and material to its outcome.

Another inevitable consequence of the voluminous amount of documents requested in international arbitration is that some Redfern Schedules have become unduly excessive and complex. As Laurence Shore puts it:

> [W]e all now have the Redfern Schedule which, in its origins, reflected the developments of the newer editions of the IBA Rules of Evidence. What the Redfern Schedule meant to do was organize and discipline the parties in order to make sure that narrow, material, specific and relevant documents were the only

> ones – even though internal – that would be produced. But, as we all know, the Redfern Schedule has become a trial within a trial.[100]

Nonetheless, the utility of using Redfern Schedules as a vehicle for distilling requests, objections and outstanding issues should not be underestimated.

By way of illustration, the below is an extract from a Redfern Schedule published elsewhere, concerning an objection to a request for production made on grounds that the requested documents were not relevant to the case or material to its outcome:[101]

No.	*Document Description*	*Relevance and Materiality/Possession of Documents*	*Claimant's/Respondent's Response*
3	An extract of the due diligence report in connection with X's acquisition of Y in 2012 and contained in the transaction files for the acquisition referred to in para. 20 of Mr Jones' witness statement, including all sections of that report which relate to the Contract.	The report will show what X and its advisers understood the Contract to mean in 2012 before the context of this arbitration. The interpretation of the Contract is at the core of the case and this document will be material to outcome in that it will show how the Contract might be interpreted absent pressure of this arbitration.	The documents are neither relevant to the case nor material to its outcome. The understanding of the contracting parties (Y and Z at the time they negotiated and concluded the contract) are relevant, not X's understanding when it acquired Y.

A variation on the traditional form of Redfern Schedules is to present the information, which would normally appear in the various columns of one row, in the form of an individual table for each request.

100. Laurence Shore, 'Chapter 3: Document Production, Witness Statements, and Cross-Examination: The Enduring Tensions in International Arbitration' in Stavros Brekoulakis et al. (eds), *The Evolution and Future of International Arbitration* (International Arbitration Law Library Vol. 37, Kluwer 2016).

101. Courtney Lotfi, 'Documentary Evidence and Document Production in International Arbitration' (2014) 4 Transnational Dispute Management www.transnational-dispute-management.com/article.asp?key=2136 accessed 20 November 2021.

§7.07 OBJECTIONS TO PRODUCTION

Under the IBA Rules, when a Request for Production is made, the party to whom it is addressed must produce the requested document or make an objection. If that party does not have a valid objection, it cannot withhold production. The documents must be produced pursuant to Article 3.4 of the IBA Rules.

If the party receiving the request has an objection, it must state that objection in accordance with the requirements under Article 3.5 of the IBA Rules. Under Article 3.6 of the IBA Rules, the tribunal may then invite the parties to discuss the objection to see if it can be resolved.

Article 3.5 of the IBA Rules provides that any objection must be stated in writing. If the parties are using Redfern Schedules, the objections may be incorporated under the appropriate column.

Under Article 3.5 of the IBA Rules, the objections which may be raised fall into two categories. The first category of permitted objections concerns a failure of the requesting party to meet the requirements under Article 3.3 of the IBA Rules relating to the content of the Request to Produce. The second category comprises the various grounds for excluding evidence set out in Article 9.2 and 9.3 of the IBA Rules.

[A] Formal Objections Citing Non-compliance with Article 3.3 of the IBA Rules

As mentioned, Article 3.3 of the IBA Rules requires a description of an individual document, or a description 'in sufficient detail' of a narrow and specific category of documents sought; a statement that the documents are not in the possession, custody or control of the requesting party (or that it would be unreasonably burdensome for that party to produce them); a statement as to why the requested documents are assumed to be in the possession, custody or control of the opponent party; and a statement as to how the documents are relevant to the case and material to its outcome.

Provided the Request to Produce has been drafted with care by reference to the provisions of Article 3.3 of the IBA Rules, it is unusual to see an objection based on a failure to include any of the information required by that provision.

More often, the objection founded on Article 3.3 of the IBA Rules is based on an alleged inadequacy or error in the information that has been provided. For example, that the description of the document requested is too vague and therefore non-compliant with the requirement for specificity in description; or that, on proper analysis, the documents requested are not relevant to the case or material to its outcome. The latter ground for objection is separately provided for under Article 9.2(a) of the IBA Rules. If this ground can be made out on the facts, the party will often rely on both Article 9.2 and 9.3 of the IBA Rules, in addition to the failure to satisfy the requirements under Article 3.3 of the IBA Rules.

[B] Objections under Article 9.2 and 9.3 of the IBA Rules

Article 9.2 of the IBA Rules sets out a number of grounds on which the documents requested may be excluded from production. It should be noted that, under Article 9.2, these grounds are available to be raised by a party in relation to any evidence at issue in the arbitration, and not just documents that it has been asked to produce.

The available grounds set out in Article 9.2 of the IBA Rules are reproduced in full below:

> (a) lack of sufficient relevance to the case or materiality to its outcome;
> (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
> (c) unreasonable burden to produce the requested evidence;
> (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
> (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
> (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
> (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

In addition, the current version of the IBA Rules introduced a new ground for objection under Article 9.3, namely, that the tribunal may, at the request of a party or on its own motion, exclude evidence obtained illegally.

Under Article 3.5 of the IBA Rules, a party may rely on any of the grounds set out in Article 9.2 and 9.3 of the IBA Rules. It may rely on more than one ground in relation to an individual request to produce, and it is common practice to do so where more than one ground is applicable. A party may also rely on a ground provided for under Article 9.2 in combination with an objection that an Article 3.3 of the IBA Rules requirement has not been met. For example, if the request is broad and unfocused such that it will catch a large volume of irrelevant documents, it may be objected on the basis that: (i) the documents lack sufficient relevance to the case and materiality to its outcome (under both Articles 3.3 and 9.2(a) of the IBA Rules); (ii) the request places an unreasonable burden on the party requested to produce the documents (Article 9.2(c) of the IBA Rules); and (iii) the request runs against considerations of procedural economy and proportionality (Article 9.2(g) of the IBA Rules).

In order to simplify dealing with objections referencing the various grounds under Article 9.2 of the IBA Rules (often necessitating counsel and the tribunal to repeatedly refer to the IBA Rules in order to check the particular basis of objection), one eminent arbitrator, the late V.V. Veeder QC, designed what has become known as the 'Veeder Code' or 'Veeder Protocol'. Each ground of objection is given a code to simplify cross-referencing to a particular ground of objection under Article 9.2 of the IBA Rules.

For example, 'M' stands for materiality. The Veeder Code can also be used in arbitrations not subjected to the application of the IBA Rules.[102]

When a request for a ruling under Article 3.7 of the IBA Rules is made by one of the parties, the tribunal must 'in consultation with the parties' and 'in timely fashion' consider the Request to Produce and the objections.

Under Article 3.7 of the IBA Rules, the tribunal may (but is not obliged to) order production of the requested documents where it is satisfied that:

(a) the issues that the requesting party wishes to prove are relevant to the case and material to its outcome;[103]
(b) none of the reasons for objection set forth in Article 9.2 of the IBA Rules applies;[104] and
(c) the requirements under Article 3.3 of the IBA Rules have been met.[105]

In practice, a tribunal may also take into account a number of factors relevant to the arbitration. It will, generally, to the extent possible, wish to leave the parties feeling that they have been treated fairly and that the amount of document production obtained or given is relatively balanced. Of course, in some cases (e.g., in a breach of warranty dispute following the sale of a company), the documents may be entirely or mostly one-sided, and such obvious even-handedness may not be possible. However, in every case, the tribunal will wish to pay close attention to the precise circumstances of the dispute. Although writing in respect of the 1999 IBA Rules rather than the current version, Professor Bernard Hanotiau refers to the (then) current best practice that had developed in the several years following the introduction of the 1999 IBA Rules, and summarises such practice in relation to these more nebulous factors as follows:

> As rightly pointed out by Mr Veeder, the best procedures for document production will differ from case to case depending upon the dispute, the parties and their legal representatives. In a similar vein, Mr Hwang and Mr Chin emphasized that in dealing with applications for document production arbitral tribunals should take into consideration the expectations of the parties and their lawyers, the amount in dispute, the nature of the issues in dispute, and various other factors such as whether or not there are other means on obtaining the requisite information without resorting to discovery. It is paramount that in each case the arbitral tribunal strike a balance between a number of fundamental requirements: the integrity of the arbitral process, its efficiency in terms of time and costs, fairness to the parties and, to the best extent possible, satisfaction of their legitimate expectations and, above all, compliance with due process.[106]

102. A copy of the Veeder Code can be found at Appendix 6 to Khodykin and Mulcahy (n. 15).
103. IBA Rules, Art. 3.7(i).
104. *Id.*, Art. 3.7(ii).
105. *Id.*, Art. 3.7(iii). This third requirement was added in the 2010 revisions to the IBA Rules. *See* Commentary on the IBA Rules (n. 34).
106. Hanotiau (n. 78) para. 8. Other commentators make the same point. *See*, for example, Pierre Tercier and Tetiana Bersheda, 'Chapter 7 Document Production in Arbitration: A Civil Law Viewpoint' in Markus Wirth, Christina Rouvinez and Joachim Knoll (eds), *The Search for 'Truth' in Arbitration: Is Finding the Truth What Dispute Resolution Is About?* (ASA Special Series No. 35, JurisNet 2011) 90-92; Kaufmann-Kohler and Bartsch (n. 75); Hamilton (n. 49) 73.

§7.08 SOME GENERAL ISSUES REGARDING DOCUMENTS

Article 3.12 of the IBA Rules addresses a number of general issues relating to documents.

[A] Conformity of Copy with the Original and Obligation to Present Original for Inspection

Article 3.12(a) of the IBA Rules is concerned with the use of copies of original documents.

Article 3.12(a) of the IBA Rules permits the production and submission into evidence of copies of documents rather than originals.[107]

Historically, many arbitral tribunals required the production of original documents, or duly certified copies, as evidence for the proceedings. Although this is still the case in certain jurisdictions (e.g., in some countries of the former USSR), it is general practice in international arbitration for tribunals to accept copies of documents unless the authenticity of the document, or conformity of the copy with its original, is disputed by a party or witness.

Despite permitting the use of copies, the IBA Rules require that the copy should conform to the original.[108] Under the previous 1999 IBA Rules, it was a requirement that a copy should 'fully conform' to the original. Under the present version of the IBA Rules, the word 'fully' was omitted. Noting the change, O'Malley suggests that a distinction is to be drawn between minor or irrelevant discrepancies, and those that are material in nature:

> Such a rule would appear to be consistent with the approach that … evidence produced in an arbitration should have material conformity to an original, but minor and/or irrelevant discrepancies (such as irrelevant notes in the margins which do not feature on the original) should not bar a copy from being introduced into evidence.[109]

Nevertheless, the Commentary on the 2010 IBA Rules (like the commentary to the 1999 Rules) still expressly states that the copy 'must fully conform' to the original.[110] This is either an oversight in the Commentary on the 2010 IBA Rules or an indication that there is no real change in the substance of the requirement that a document conforms to the original. However, it is hard to see how the deletion of an additional qualifying word could not have been intended to change the meaning of the requirement in some way.

The point made by O'Malley concerning the difference between minor/irrelevant differences and those that are more significant could be made in relation to the earlier

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Hamilton refers to the desirability of the burden imposed on the producing party being proportionate to the evidentiary value of the documents.

107. Commentary on the IBA Rules (n. 34) 12.
108. IBA Rules, Art. 3.12(a).
109. O'Malley (n. 18) para. 3.131.
110. Commentary on the IBA Rules (n. 34) 12.

('fully conform') description, even if it was intended that this should mean something different and more onerous. The real question is whether the copy conforms in substance with the original. For example, in relation to the 1999 IBA Rules, Professor Raeschke-Kessler went so far as to argue that irrelevant material, that would not mislead or distort the evidence, could be removed from the copy:

> The copy of the original must only conform to the document as it was initially established by the author. The recipient of the letter, for example, may later add handwritten notes on the letter. These notes do not belong to the original document of the sender. If the recipient wants to introduce the latter into the arbitral proceedings as a document written by the sender, the recipient may remove from the copy his or her own handwritten notes on the original because they do not belong to the original document.
>
> This is of course different if the recipient has written his or her own manifestations of legal importance on the document. If, for example the person received an offer to conclude a contract from the sender and signed the document, a contract between sender and recipient will have been concluded by that signature. When introducing this document into the arbitral proceedings, the signature of the document must remain visible on the copy. Should the recipient present a copy – with his or her signature covered up – as evidence for the fact that no contract was concluded, this will constitute an attempted forgery.[111]

For example, a party to the arbitration may have taken a telephone call and, during that call, jotted down on an original piece of correspondence the telephone number of the person calling. The call and the person calling have no connection to the dispute. This is clearly a different situation from one in which that same party writes 'correct' at the bottom of a draft minutes of meeting relating to the dispute.

Article 3.12(c) of the IBA Rules – which relieves a party from an obligation to produce multiple copies of a document that is 'essentially identical' – may also be relevant in this context, by providing guidance on what might be regarded as a nonconformity for the purposes of Article 3.12(a).

Although the use of copies is permitted, Article 3.12(a) of the IBA Rules provides that 'at the request of the Arbitral Tribunal, any original shall be presented for inspection'.

Article 3.12(a) of the IBA Rules does not provide any guidance on the circumstances that may prompt the tribunal to order a party to produce the original document. Such circumstances will be case specific. Generally, a request for inspection of the original is most likely to be prompted by an issue raised by one of the other parties to the arbitration. It may be sensible for a tribunal to set a deadline for the parties to indicate if the authenticity of a document is disputed. Such disputes raise difficult issues and may call for further factual or expert evidence (including those of a forensic nature). This cannot be left unresolved until late in the proceedings. Some tribunals may stipulate that copies are deemed authentic unless disputed by one of the parties. For example, one ICC procedural order contained the following statement:

111. Raeschke-Kessler (n. 14) 413.

> [A]ll documentary evidence submitted to the arbitral tribunal shall be deemed authentic and complete, including evidence submitted in the form of copies, unless a party disputes its authenticity or completeness.[112]

Circumstances that may justify a request by the tribunal for review of the original documents include where another party has made allegations that the copy produced is materially different from the original, or that the document is a forgery.[113]

If a copy does not conform with the original when inspected, or if doubts exist about the authenticity of the original document, the tribunal may be faced with the question of what to do about it, either on its own initiative or following an application by one of the parties. Much may depend on the facts of the case, but available options include:

(a) excluding the document from evidence; or
(b) admitting it into evidence but attaching no/less weight to the document if its authenticity is in question. In particular, a tribunal may decide that it attaches no weight to the document unless it is corroborated by other reliable evidence.

In nearly all cases, it is desirable for the tribunal to give the parties an opportunity to make submissions on the implications of the lack of conformity and the consequences that should flow from that position.

In relation to allegations of forgery, it must be borne in mind that most tribunals will be very slow to make a finding to that effect without compelling evidence of the forgery. As one commentator puts it:

> When confronted with challenges to evidence based on the allegation of forgery, customarily arbitrators begin with the presumption that the evidence is authentic, and require a high or enhanced standard of proof be met by the party alleging the forgery before disqualifying the evidence from the record.[114]

In practice, in many cases, the tribunal may not need to make a finding that a document has been forged, but may simply address the problem as a question of weight of evidence. This was the approach taken in the case of *Reza Said Malek v. The Government of the Islamic Republic of Iran*.[115] The tribunal was faced with inconsistent evidence in relation to the authenticity of a document. The tribunal decided that the document should be afforded no evidential weight and, on that basis, the tribunal held that it was unnecessary to decide whether the document was a forgery.

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112. 'Procedural Order of 19 May 2004 in ICC Case 13046 (Extract)' in *Special Supplement 2010: Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration (2003-2004)* (International Chamber of Commerce 2010).
113. For further discussion on the issues raised in relation to circumstances justifying a Request to Produce an original, and doubts as to the authenticity of a document, *see* Simon Gabriel, 'Dealing with "Challenged Documents"' (2011) 29(4) ASA Bulletin, 823.
114. O'Malley (n. 18) para. 3.135.
115. *Reza Said Malek v. The Government of the Islamic Republic of Iran* (Final Award No. 534-193-3) Iran-US Claims Tribunal Case No. 193 (11 August 1992) 9.

If, of course, the forgery is proven to the satisfaction of the tribunal, then, in addition to any other consequences that may flow from the act of forgery, the act of forgery (and therefore the document) may, depending on the issues in the case, be very important evidence, just not pertaining to the fact for which it was originally offered as support.

[B] Multiple Identical Copies

Article 3.12(c) of the IBA Rules contains the very sensible provision that, during the document production process, a party is not required to produce more than one copy of the same document where the documents are 'essentially identical'. As mentioned elsewhere, the volume of documents – particularly electronic documents – introduced in international arbitration is often very significant. The more that can be done to restrict the introduction of documents that have no additional evidential value, and merely serve to increase costs, the better for all concerned. Article 3.12(c) is therefore consistent with the objective set out in Preamble 1 of the IBA Rules for an 'efficient' and 'economical' process.

The practical implications of Article 3.12(c) of the IBA Rules are self-explanatory. If, during the document production process, a party locates more than one copy of the same document, it needs to produce only a single copy provided that the two copies are 'essentially identical'.

The meaning of 'essentially identical' requires careful consideration. If a search for documents results in two copies of the same document, but one of them contains manuscript annotations or has an additional stamp of some significance to the dispute, Article 3.12(c) of the IBA Rules is not triggered because these documents are not essentially identical. They are to be treated as separate documents for the purposes of Article 3.12(c). In such a case, and provided they fall within the scope of a legitimate request for production, the party in possession should produce both documents.

A practical difficulty can sometimes arise in relation to electronic documents. Historically, documents (principally hard copies) were reviewed manually and counsel would make a decision as to whether the copies in front of him or her were essentially the same. More recently, with the bulk of document production involving e-documents, the volume of documents to be searched has grown exponentially. It is not unheard of to have document production involving hundreds of thousands of documents. In addition, the very nature of electronic documents lends itself to multiple copies. For example, one email sent to two recipients will be found in the email folders of the sender and two recipients. If a search is made of all three custodians, three copies will be found. Where, as is very often the case, an email has been copied to numerous recipients, the volume of copies may be significant. Fortunately, forensic document management software is often able to carry out a process of 'de-duplication' by which it can identify multiple copies of the same document by reference to certain parameters that are applied. For example, all emails having the same sender, recipients, subject and sent/received at the same time will be identified as duplicates.

The search for documents to produce may also be approached using 'threading', by which the software will retrieve only those parts of the communication 'tree' that contain unique material. For example, a reply, that includes the email to which it responded to, will be retrieved but not the original email. Such software is also capable of identifying copies that have minor variations. For example, if one of the recipients forwarded the email to someone else with only 'FYI' added on top of the email. It is for counsel to determine the parameters to be applied to identify duplicates, and whether any category of duplicate needs to be manually reviewed to determine whether it is 'essentially identical' or should be produced. For instance, in the example given of the forwarded email simply marked 'FYI', if the knowledge (or lack of knowledge) of the subject matter of the email by the person to whom it was forwarded is an issue in the arbitration, then the email may be material.