

Chapter 2

A CIVIL LAW PERSPECTIVE: "FORGET E-DISCOVERY"

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The common law world, and especially the U.S., faces serious problems in the document production process in litigation when dealing with electronically stored information (ESI). The vast amount of material that is subject to discovery, and its diversity, have required new litigation rules concerning e-discovery in the U.S. and the disclosure of electronic documents in England. The rules concern, in particular, the search for electronically stored information, including deleted information, and the obligations in these jurisdictions to preserve relevant documents.

It has been suggested that these issues should also be considered in international arbitration, and that rules and practices concerning the production of ESI in international arbitration should be adapted to take account of these developments.

The present author does not share this concern. The problems with ESI in the common law world are linked to a particular paradigm in the conduct of civil litigation, in particular, the joint responsibility of the parties for the assembly of the documents related to the dispute at a time before the parties have fully developed their respective cases. This paradigm does not prevail in international arbitration where the parties first present in detail their full case in writing, accompanied by the available evidence, and may then request the production of specific documents.

In international arbitration, the preoccupation with e-discovery and the proposals inspired by new rules on e-discovery constitute a danger which risks eroding the progress made in the past towards a model inspired by civil law procedure, with restrictive and focused document production. This erosion must be resisted.

The preoccupation with the discovery aspects of ESI in international arbitration is also misguided because it distracts from the great advantages which information technologies offer for the efficient conduct of arbitration proceedings and from certain difficult questions and risks which these technologies raise. These aspects should be given increased attention.

TERMINOLOGY

Before considering these matters in further detail a reference to terminology is helpful. The term “document” must be understood in a very wide sense. In English civil procedure the term electronic document has been defined as extending

... to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media. The definition covers those documents that are stored on servers and back-up systems and electronic documents that have been ‘deleted’. It also extends to information stored and associated with electronic documents known as metadata.¹

The term “discovery” is used in U.S. civil litigation to describe the process by which the parties provide each other access to their respective evidence, including documents but also witness depositions and other forms of evidence.² The term “disclosure” is used for information and evidence which a party must produce on its own initiative. Its scope is far more limited than discovery. In England, disclosure is the principal method by which the parties inform each other of the relevant documentary evidence.³ A distinction is made between standard disclosure and specific disclosure. The procedures for both differ in a number of important respects from U.S.-style discovery.

In international arbitration, the term “discovery” is generally avoided. The term “disclosure” sometimes is proposed, to avoid associations with U.S. style of discovery.⁴ However, since the term “disclosure” is employed as a technical term in English civil procedure in a sense which is different from the practice in international arbitration, it does not appear suitable for describing the process in international arbitration. Frequently, the expression “document production” is used. This is the case, in particular, in the IBA Rules on the Taking of Evidence in International Commercial Arbitration, adopted in their second edition in 1999 (the “IBA Rules”) and is frequently referred to in the context of

¹ See Appendix 5, Practice Direction supplementing the English Civil Procedure Rules, Part 31, Paragraph 2A.1.

² In proceedings before Federal Courts, the process is regulated in Rule 26 of the Federal Rules of Civil Procedure.

³ The matter is now regulated in Part 31 of the Civil Procedure Rules and the corresponding Practice Direction, applicable in England and Wales, http://www.justice.gov.uk/civil/procrules_fin, accessed June 2008.

⁴ See, e.g., Smit & Robinson, *E-Disclosure in International Arbitration*, 24-1 ARB. INT’L, 105, 122 (2008).

documentary evidence. The present commentary uses the term "document production" for the process by which a party makes available to another party in an arbitration documents for presentation as evidence.

When documents produced to one of the parties are introduced into the arbitral proceedings, the term "production" also is used occasionally. In order to avoid confusion, it is preferable to use a different term. The UNCITRAL Arbitration Rules⁵ and IBA Rules use the term "submit".⁶ Therefore, we shall use the term "submit" for the introduction of documentary evidence into the arbitration and its presentation to the arbitral tribunal.

PARADIGMS IN CIVIL PROCEDURE: THE SCOPE OF THE COMMON LAW/CIVIL LAW DIVIDE

The recent discussions about electronic evidence, and the issues which it raises in the context of production in international arbitration, show the extent to which concepts and practices often remain influenced by the litigation practice of the protagonists. There is a clearly prevailing trend, or "good practice", in international arbitration, as will be shown below; but the extent to which this trend prevails depends to some degree on the background of the user.

In a recent article on the subject of e-disclosure in international arbitration SMIT and ROBINSON make the daring affirmation that

... the primary *purposes* of disclosure⁷ are the same in international arbitration as they are in litigation: to avoid unfair surprise at trial or hearing and to discover the facts and get to the truth in order to create the record necessary for a just result.⁸

This statement and the guidelines proposed by the authors of that article clearly show the influence of U.S.-style discovery rules and practices; as do arbitration practices which one occasionally and, perhaps, increasingly finds in cases in which counsel and tribunal are from a U.S. background. Before considering the impact which electronic evidence may have on international arbitration, the treatment of documentary evidence in domestic civil procedure must be understood and the influence of this procedure in international arbitration must be considered.

⁵ Article 18 (2) for instance speaks of "documents and other evidence [the claimant] will submit".

⁶ Article 3 (1) provides that « each Party shall submit to the Arbitral Tribunal ... all documents available to it on which it relies ... ».

⁷ The term is used in a sense which resembles US discovery, mitigated by the Sedona principles (see below).

⁸ Op.cit, 121.

The distinction between the civil law and common law families of legal systems in many respects can be misleading; there are great differences within each of these families. This is also true in the field of civil procedure. Much has been written about the differences between the legal systems in the field of document production.⁹ In this essay only the basic approaches can be highlighted. Most of the variations in the rules of civil procedure in different common law and civil law countries will have to be disregarded. HANOTIAU describes the differences as follows:

In practice this means that in the common law world, and especially in the United States, '[r]equests for documents typically are far-reaching in scope and require parties and non-parties to expend considerable time and expense in responding to such requests', whereas in Continental Europe, Latin America and Arab States it is generally for the parties to submit with their briefs the documents on which they rely; and although national courts may have a residual power to order the production of documents, they rarely seem to use it.¹⁰

This summary description shows that the difference is often conceived in terms of extent and scope of the required document production. It also points, however, to some more fundamental differences, not just with respect to document production but with respect to the organisation of the procedure as a whole and the roles of the parties in it. One might even speak of a different paradigm which concerns the approach to evidence, especially documentary evidence and, more generally, to truth. Perhaps the difference in paradigms may be described as follows: joint responsibility of the parties for the evidence in the interest of some objective truth in the common law world, differing from the civil law world, in which each party not only has the burden of proof for its case but also has the responsibility for obtaining and producing the supporting evidence and in which the search for truth is less ambitious, limited as it is to the "relative truth" between the parties and their allegations. This difference can also be seen in the manner in which the proceedings progress and how evidentiary questions are treated.

In civil law systems, a party, as a matter of principle, is expected to build its case with the evidence it has available. Before exposing another party to the burden of contentious proceedings, a party is expected to have

⁹ See, e.g., *Document Production in International Arbitration*, 2006 Special Supplement to the ICC International Court of Arbitration Bulletin (referred to as ICC Court Bulletin, 2006 Supplement), with reports from different jurisdictions and a "tentative definition of 'Best Practices'" by HANOTIAU.

¹⁰ *Id.* at 113, 114; the quotation is from KIMMELMAN & MACGRAWTH, "Document Production in the United States", ICC Court Bulletin, 2006 Supplement, 43.

determined that it has solid grounds for doing so and to have made serious efforts to establish its case. As a matter of principle, each party is defending its own case. There is no duty on a party to assist its opponent in the construction of its defence. There are, of course, exceptions to this principle and means and methods to reduce the inequitable effects that would result from a strict application of this approach; but they are exceptions to a principle that determines litigation practice. In this respect, as in some others, it may well be said that the civil law procedures are more "adversary" and less "inquisitorial" than the common law procedures.¹¹

The organisation of proceedings in civil and commercial matters before courts in civil law countries may be summarised as follows: the claimant, and then the respondent, set out their case in writing. These written submissions contain the factual allegations of each party and identify the evidence on which each party relies. Documentary evidence may be produced with the submissions or at a later date. Some rules of procedure require each party to contradict specifically the allegations of its opponent; evidence then is required only with respect to allegations which are contested and relevant in the eyes of the court. It is only when both parties have produced their respective submissions and evidence, and the court may have formed a view about the contested allegations and their relevance for the outcome of the dispute, that specific requests for document production are normally made and determined.

In the U.S., the organisation of the procedure follows a different track. Under the Federal Rules of Civil Procedure, a party must file with its first appearance or other procedural act a "Disclosure Statement", identifying "each individual likely to have discoverable information ... that the disclosing party may use to support its claims or defenses", providing documents which it "may use to support its claims or defenses" and a computation of the damages claimed.¹² Parties may also obtain from other parties to the litigation, voluntarily or by court order, "discovery of any matter relevant to the subject matter involved in the action". From a civil law perspective, it is important to note that the relevance of the information that is discoverable is not determined by reference to a particular allegation of fact but very generally by its relation to the "subject matter" of the case. In other words, discovery is not limited to evidence, but goes further. The Federal Rules of Civil Procedure state clearly:

Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.¹³

¹¹ See Reymond, *Common Law and Civil Law Procedure: Which is the More Inquisitorial?*, 5-4 ARB. INT'L (1989).

¹² FEDERAL RULES OF CIVIL PROCEDURE, Rules 7.1 (b) and 26 (a),

¹³ Rules 26 (b) (1).

A particularly significant feature of this joint responsibility for the evidentiary basis is the “duty to preserve” which rests upon the parties even before litigation has commenced:

In the American judicial system, every litigant know that once a complaint is filed, there is a duty to preserve relevant documents. But that duty usually arises earlier: a claimant or plaintiff must preserve relevant information once it is going to pursue a claim and a respondent or defendant must preserve relevant information once it knows or reasonably anticipates that litigation is coming.¹⁴

It is in this context and through these pre-trial procedures that the factual basis is established for the case which is then presented at trial. In other words, the parties have an obligation jointly to cooperate in the establishment of this factual basis. Its relevance for the case, i.e. its evidentiary nature, is fully revealed only at the trial.

The rules in England have evolved away from the rules still practiced in the U.S. and, especially since the Woolf reform, have come closer to the civil law paradigm. Each of the parties discloses its documentary evidence in what is called “standard disclosure”¹⁵ shortly after the commencement of the proceedings or, exceptionally, before their start.¹⁶ It is only when a party considers this disclosure is “inadequate” that it may apply for an order of “specific disclosure”, which requires the addressee to carry out a search for specific documents or classes of documents and to disclose them.¹⁷ Standard disclosure requires a party to identify not only the documents upon which it relies for its case but also those which adversely affect its case and which support or adversely affect the other party’s case. In the pre-trial period, litigants in England are now, as a result of the Woolf reform, better informed about their opponents case, since the CPR require the submission not only of particulars of claim at the commencement of the litigation but also of a statement of claim and a statement of defence. However, these statements are rarely as developed as what is required in submissions under the civil procedure in most civil law countries.

LEADING PARADIGM IN INTERNATIONAL ARBITRATION

Arbitration practitioners often continue to approach international arbitration procedures with the experience of the rules and practices developed in litigation before their domestic courts. Even where these

¹⁴ Barkett, *E-Discovery For Arbitrators*, 1-2 DISP. RES. INT’L, 129, 148 (2007). See also Chapter 4 below.

¹⁵ Civil Procedure Rules (CPR) 31.6.

¹⁶ CPR 31.16.

¹⁷ CPR 31.12 and Practice Direction – Disclosure and Inspection, para. 5.1.

practitioners are frequently engaged in international arbitration, the influence of domestic litigation practices is often apparent. The discussion of e-discovery in international arbitration is a good example of the extent to which the approach to arbitration issues remains under the influence of domestic litigation experience.¹⁸

However, despite the prevailing cultural differences the specificity of arbitration, and international arbitration in particular, is generally recognised. In many respects international arbitration differs clearly from the civil procedure of any particular jurisdiction. With respect to the organisation of the procedure and the collection and presentation of evidence a leading paradigm has evolved. The UNCITRAL Arbitration Rules are a good expression of this paradigm. Their application in the proceedings before the Iran-US Claims Tribunal has further developed this paradigm and, through the formation of a new generation of international arbitration lawyers, mainly from a US background, have further advanced this arbitration practice. The following explanations on international arbitration practice are illustrated primarily by the UNCITRAL Arbitration Rules, in their original version of 1976 and the now ongoing revision of these rules, which may be taken as an expression of the prevailing practice in international arbitration, and by some reference to their application in The Hague.

Organisation of the procedure

In international arbitral proceedings the notice or request for arbitration which initiates the proceedings, and a possible response to this notice,¹⁹ is followed in the vast majority of cases by an exchange of detailed written submissions and the production by each party of the evidence which it can muster in the form of documents, witness statements and expert opinions. The 1976 UNCITRAL Arbitration Rules describe the initial round of submissions as "Statement of Claim" and "Statement of Defence". In the former, the claimant must provide a "statement of the facts supporting the claim"; it may join all documents deemed relevant, or make a reference to the evidence which it intends to submit.²⁰ The respondent then

¹⁸ See, e.g., the observation of TSE and PETER, "Confronting the Matrix: Do the IBA Rules Require Amendment to Deal with the Challenges Posed by Electronically Stored Information?" *Arbitration*, vol. 74, N° 1 (February 2008), 28, at 33 wherein they write: "The fact that the two pre-eminent common law jurisdictions have seen the need to amend their procedural rules to deal with the questions surrounding electronically stored information is a measure of the importance of the issue." They conclude that the reforms in these countries justify a reconsideration of the IBA Evidence Rules.

¹⁹ The absence of a rule on such an answer was one of the principal deficiencies in the 1976 UNCITRAL Rules which lead to the now ongoing revision. In the work concerning this revision it is undisputed that a new article dealing with the response to the notice of arbitration will be introduced.

²⁰ Article 18 (2).

replies to the statement of facts which the claimant has presented and may annex "the documents on which he relies for his defence", or may make reference to the evidence which it intends to produce.²¹

In the ongoing revision of these rules the importance of these two statements is further emphasised. The PAULSSON/PETROCHILOS Report, which was the principal study addressing the revisions, proposed two significant changes. The requirement for the statement of claim to contain a "statement of facts supporting the case" was expanded to include also the legal principles invoked by the claimant. Further, the report proposed that joining the relevant documents to the statement of claim should no longer be optional. Instead, an amendment to the second paragraph of Article 18 (2) was proposed as follows:

The Statement of Claim shall as far as possible be accompanied by all documents and other evidentiary materials relied upon by the Claimant, or by references to them²²

Corresponding changes were proposed with respect to the statement of defence. In support of their proposals, the authors referred to other arbitration rules which had adopted similarly compelling provisions and which the authors of the report considered to be good practice. UNCITRAL Working Group II, which is in the course of preparing the revised version of the Arbitration Rules, followed in substance these proposals, even though the final version of the new Articles 18 and 19 has not yet been adopted.²³

It is indeed now good practice in international arbitration that the first detailed written submission of the claimant and the respondent, respectively, present the full case of each party and identify the evidence on which each party relies. Normally the evidence so identified is submitted at the same time.

Scope and timing of requests for production

In the UNCITRAL Rules, this is the principal provision dealing with the submission of documentary evidence. Each party submits its own evidence. As the Iran-US Claims Tribunal expressly pointed out

²¹ Article 19 (2).

²² PAULSSON/PETROCHILOS, "Revision of the UNCITRAL Arbitration Rules", a report commissioned by the UNCITRAL Secretariat, September 2006, p. 90.

²³ In A/CN.9.WG.II/WP.147/Add.1 of 3 August 2007, containing the second draft for consideration by the Working Group, a new letter (e) is added to Article 18 (2) requiring that the statement of claim shall include "the legal [argument] [grounds] supporting the claim"; it also contains a provision identical to the second paragraph that had been proposed in the PAULSSON/PETROCHILOS Report.

... the Party who carries the burden of proof determines at its discretion what evidence it wishes to submit in support of its Claim.²⁴

The production of documents and other evidence which neither party has produced is regulated in Article 24 (3) of the UNCITRAL Rules.

At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

While the tribunal, under this rule, may require the production of evidence on its own initiative, the provision applies primarily in the case of requests by one party for the production of evidence in the possession of another party. Powers to grant such requests are generally recognised in modern international arbitration, either through a specific clause (such as that quoted above) or impliedly, in particular through powers to grant interim measures. Detailed rules in this respect are set out in Article 3 of the IBA Rules.

The UNCITRAL Rules provide that the order to produce documents may be made at "any time during the arbitral proceedings". A similar expression is contained in Article 3 (9) of the IBA Rules. These words do not exclude the possibility that a broad discovery request is made at an early stage of the proceedings. However, such an early request, irrespective of its scope, would not conform with standard practice. Requests are normally made, if at all, only after the exchange of the statements of claim and defence.

This practice is exemplified by the procedural calendar agreed by the parties in an ongoing ICSID case: in its detailed statement of claim the claimant sets out its case fully in law and in fact and produces all evidence on which it wishes to rely. At this stage, the claimant specifies any documents that it wishes the respondent to produce. The respondent then produces these documents with its statement of defence or explains why it does not consider itself obliged to produce some or all of the requested documents; the respondent may make production requests at the same occasion. The parties then may address the tribunal for a decision on the unsatisfied production requests. The tribunal is then in a position to decide the request(s), taking into consideration all relevant circumstances, in particular the relevance of the requested evidence.

²⁴ Offshore Company and National Iranian Oil Company, Case N° 133, Chamber Two, Order of 26 June 1986, quoted from Caron, Caplan & Pellonpää, *The UNCITRAL Arbitration Rules, A Commentary*, 2006, 595.

This sequence and timing of production requests are in line with good practice in international arbitration. As explained by HANOTIAU:

It is suggested that the best practice is to give the parties this opportunity [of making production requests] after the first exchange of submissions (statement of claim and statement of defence). The reasoning for this is as follows: the claimant considers it has a case and presents it to the arbitral tribunal in its statement of claim; at this point the defendant's role is simply to present its defence in its answer; if after this first exchange it appears that documents are necessary for one or the other of the parties to successfully argue its position or satisfy the burden of proof lying upon it, request for those documents to be produced should be filed with the arbitral tribunal ...²⁵

This approach is necessary also because of the particular circumstances in arbitration compared to those in litigation. English and American courts have judicial sanctions at their disposal in case a party does not comply with an order for discovery or disclosure. Apart from the exceptional cases in which an arbitral tribunal may order that the defaulting party pay a penalty, in the sense of the French expression "astreinte", arbitral tribunals do not have such sanctions at their disposal. The only sanction they have is that of "adverse inferences". This implies that, if a party fails to comply with an order to produce, the tribunal may draw the following conclusions: it may (a) not fault the requesting party when its evidence for a certain allegation otherwise would appear insufficient and (b) infer that the withheld documents would have supported the requesting party's allegation.²⁶

An adverse inference, therefore, requires that the requesting party has made an allegation which is relevant for the tribunal's decision; for which the requesting party has the burden of proof and which the requested document is capable of proving.²⁷ It is obvious that these conditions can be met and the tribunal can make such an inference only at a time when each of the parties has presented its case in some detail and the tribunal is in a position to form at least a preliminary view on the case and facts which are relevant for its decision.

²⁵ *Op.cit.* 115.

²⁶ Concurring and Dissenting Opinion of Judge Charles N. Brower in Frederica Lincoln Riahi and the government of the Islamic Republic of Iran, Award N° 600-485-1 (27 February 2003), para. 21.

²⁷ For a summary of the requirements applied by the Iran-US Claims Tribunal, see Concurring and Dissenting Opinion of Judge Charles N. Brower in Frederica Lincoln Riahi and the government of the Islamic Republic of Iran, Award N° 600-485-1 (27 February 2003), para. 30.

The Iran-US Claims Tribunal, frequently confronted with requests for document production, stated in clear terms that, in international proceedings, a considered decision on such a request can be made only at a stage when the tribunal has a reasonably good understanding of the case and the relevance of the requested document for its decision. In *Brown & Root, Inc. v. The Islamic Republic of Iran*, the Tribunal had to consider a request by the respondent for the production of documents in the possession of the claimant which, in the respondent's contention, were necessary for an audit which it wished to have performed. The claimant objected that the production of the documents would be possible only at great expense of time and money, and that it was "unreasonable, unnecessary and too late." The Tribunal did not deem it "appropriate to require the Claimants to produce the documents requested by the Respondents." However, it added the following reservation:

...the Tribunal points out that this decision is without prejudice to the Tribunal, if and when it eventually considers the merits of the Case, weighing the evidentiary significance, if any, that flows from the above-mentioned Respondents' request for production of documents and the Claimants position taken in their respective submissions.²⁸

The Iran-US Claims Tribunal also insisted, on repeated occasions, that it considered requests for orders to produce as admissible only if the requesting party demonstrated that it had made specific efforts to obtain the document through other sources.²⁹ CARON/CAPLAN/ PELLONPÄÄ explain that this rule must be understood "in light of the principle that it is primarily the responsibility of each party to submit the evidence upon which it wishes to rely."³⁰

Production of internal information

The question whether a party may be required to produce internal documents and information is a particularly controversial issue in international arbitration. As an author from a civil law background stated, such production "...is rejected as totally unacceptable by many companies

²⁸ Case N° 50, Chamber one, Order of 4 January 1993, quoted in Caron, Caplan & Pellonpää, *The UNCITRAL Arbitration Rules, A Commentary*, 2006, 597 et seq.

²⁹ Vera-Jo Miller on her own behalf, on behalf of Laura Aryeh, on behalf of JM Aryeh and The Islamic Republic of Iran, Case Nos. 842, 843 and 844, Chamber One, Order of 6 March 1992; quoted in CARON et al. op. cit. p. 597; and MCA Incorporated and The Islamic Republic of Iran, Case N° 768, Chamber Two, Order of 6 October 1983, op.cit. p. 593.

³⁰ *Op. cit.* 576.

in the civil law world".³¹ In contrast, access to such internal information is one of the principal objectives of US-style discovery and plays an important role in other forms of production requests.

The principal justification for ordering any form of document production is to provide a party with evidence that it does not have in its possession. In contractual disputes, the primary evidence is the contract and the exchanges between the parties. Normally, both parties to the contract will have this evidence in their possession and will not need discovery orders by a court or arbitral tribunal. Discovery, and especially discovery of documents internal to one of the parties, thus rests on the assumption that there is or may be a difference or even a contradiction between, on the one hand, the conduct and communications of a party toward the other party and, on the other hand, that party's undisclosed intentions.

Discovery of internal information also presumes that such undisclosed intentions are relevant to the case. In most legal systems, the failure of a party to comply with its obligations is sufficient to establish its liability. It is the objective facts that count. Good or bad intentions normally make no difference. There are exceptions; for instance, in some cases the degree of negligence may depend on a party's good faith; in the calculation of damages even in legal systems that do not provide for punitive damages, the knowledge of a party or its intentions may have an impact. Information on a party's state of mind, its intentions, and good faith are, however, relevant only in exceptional cases.

Systematic discovery of information internal to one or the other of the parties implies distrust in the good faith of the party concerned and, as HAFTER has pointed out, tends to provoke it. Production requests often seek the disclosure of internal documents containing internal information with the objective

...to learn what occurred within the requested party and what communications were exchanged between its officers and agents. Quite often such requests involve the implicit accusation that the requested party is not acting in good faith.³²

Arbitration is based upon agreement, normally in a business relationship of confidence. One of the principal purposes of arbitration is to restore confidence and enable the continuation of a disturbed business

³¹ LIONNET, *HANDBUCH DER INTERNATIONALEN UND NATIONALEN SCHIEDSGERICHTSBARKEIT* (3rd ed. 2005), 499; English translation quoted from PLOUDRET & BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION*, (2nd ed. 2007), footnote 459(b).

³² HAFTER, *The provision on the Discovery of Internal Documents in the IBA Rules of 1999*, in *GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION*, Liber Amicorum in honour of Robert Briner, 2005, 347, 350.

relationship. Accusations or insinuations of bad faith are unlikely to promote such objectives. They should be avoided in international arbitration and, in the present author's experience, arbitrators are rarely impressed by such accusations and even more rarely base their decisions on findings of that nature. Procedural devices which are based upon assumptions of this nature should be applied only when really necessary. As HAFTER noted, the failure of the IBA Rules to restrict orders for the production of internal information has encouraged the filing of discovery requests. The observation of POUURET and BESSON that such requests are in the increase is unfortunately confirmed by the present author's experience.³³

Moreover, in a corporation or any other group of people, the content of the communications between the members of the group may be determined by many considerations. Often they express their personal opinions and it is far from clear that this is also the position of the organisation as a whole, i.e. the party to the dispute.

This is not to say that bad faith does not occur in business relations and that there are no cases in which a party has a justified interest in relying upon it and seeking to prove it. The considerations set out above do, however, justify restraint in ordering production of internal information by international arbitrators. Such orders should be made only if such internal information and the requested party's intentions are relevant for the case made by its opponent and if there are clear indications of bad faith on the side of the requested party.

Conclusions on document production in international arbitration

In the leading paradigm of international arbitration production requests are the exception. To the extent to which they are admissible, they are decided only at a stage of the proceedings when the parties have presented their case and have submitted the available evidence. They must show that the requested documents concern the contested factual allegations relevant for the outcome of the dispute and are capable of proving these allegations and that the requesting party has made reasonable efforts to obtain the document by other means. The production of internal documents should be required only in exceptional cases.

This paradigm and the resulting rules on document production, largely inspired by civil law principles of procedure, have gained considerable acceptance among American practitioners of international arbitration through the practice by and before the Iran-US Claims Tribunal. They find partial support in Article 3 of the IBA Rules.

³³ POUURET & BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION*, (2d ed. 2007), para. 653.

However, in some respects the IBA Rules undermine the progress achieved, especially by failing to clearly require that production requests, as a matter of principle, should be admitted only after the parties have set out their full case and by failing to adequately restrict requests for the production of documents and information internal to a party.

The discussion of discovery and production of electronically stored information, inspired as it is by common law concerns and practices, risks further erosion of the leading paradigm described above and the resulting rules and practices of document production. Reference to rules and practices developed with respect to e-discovery in common law countries address a problem which, as shall now be shown, remains of marginal importance in international arbitration. There is no need to pursue their translation into international arbitration practice.

IMPACT OF ELECTRONICALLY STORED INFORMATION ON THE RULES AND PRACTICES OF DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION

There is no need in the present publication to emphasise the enormous increase of data that is generated in all forms of human communication in general and in business relations in particular. Much of this data is stored electronically and remains available. Some may be relevant for disputes in which the organisation which stored the information may be engaged.

Does this development require new rules or guidelines? Common law jurisdictions in the US and England have responded in the affirmative. So have some authors dealing with international arbitration. The following examination describes, first, the adopted and proposed regulations and then examines whether, in international arbitration, there is a need for similar regulations.

Domestic attempts to regulate e-disclosure and corresponding recommendations for international arbitration

In the jurisdictions in which court proceedings provide for extensive discovery or disclosure of evidence, the vast increase of electronically stored data has further complicated the discovery process, both by increasing the complexity and costliness of the search process and by the impact of the preservation obligation on the manner in which business entities deal with their own information, its storage and with the balance between preservation and deletion of information. In court proceedings this development has led to an additional layer of guidelines, rules and regulations which have been promulgated to deal with the preservation of electronic evidence and its discovery.

In North America, a leading role has been played by the Sedona Conference, a non-profit research and educational institute based in

Sedona, Arizona.³⁴ One of its principal areas of activity concerns Electronically Stored Information (ESI) and its use in litigation. The Conference published the Sedona Principles for Electronic Document Production in 2004 and prepared a second edition in 2007. These principles are frequently referred to and are said to have influenced the 2006 amendments in the US Federal Rules of Civil Procedure³⁵ dealing with matters of electronic discovery.³⁶ A separate set of these Sedona Principles has been issued for Canada.³⁷

In England Part 31 of the Civil Procedure Rules (CPR), dealing with Disclosure and Inspection of Documents and the corresponding Practice Direction have been amended in October 2005, in particular by the inclusion in the latter of a paragraph 2A on Electronic Disclosure.

Arbitration specialists on both sides of the Atlantic have focused on this development and have identified new needs for guidance and regulations. The American Arbitration Association (AAA) established a Task Force on Exchange of Documentary and Electronic Materials in 2007. The Guidelines which were eventually produced by the AAA's international arm, the International Centre for Dispute Resolution (ICDR), deal with "exchanges of information" in general and contain a short section on "Electronic Documents". The section is modest in scope. It recommends that, when documents are maintained in electronic form, the producing party should, as a matter of principle, have the choice of the form of production and that requests for electronic documents "should be narrowly focused and structured to make searching for them as economical as possible".³⁸

Some writers have been more ambitious in their proposals. SMIT and ROBINSON, for example, conclude that "Disclosure of electronic information will inevitably play an increasingly determinative role in international business disputes that are submitted to arbitration". They refer to the IBA Rules on the taking of evidence which they consider "broad enough to embrace electronic information generally", but, in their opinion, they are not enough:

... like the recently amended Federal Rules of Civil Procedure in the United States, e-disclosure guidelines are necessary to supplement the IBA Rules to promote predictability, uniformity

³⁴ www.thesedonaconference.org

³⁵ Accessible on the US Courts website at <http://www.uscourts.gov/rules>.

³⁶ For a summary of these provisions, see, e.g., Frank & Bédard, *Electronic Discovery in International Arbitration: Where Neither the IBA Rules Nor U.S. Litigation Principles Are Enough*, 62-4 DISP. RES. J., 66 (Nov. 2007- January 2008).

³⁷ The Sedona Canada Principles, Addressing Electronic Discovery, January 2008; available at the Sedona website.

³⁸ ICDR Guidelines for Arbitrators Concerning Exchanges of Information, accessible on the AAA website <http://www.adr.org/si.asp?id=5288>.

and hence fairness in the e-disclosure process in international arbitration.³⁹

The authors themselves respond to this perceived need and add to their article a set of "Guidelines for Disclosure of Electronically Stored Information in International Arbitration. Apart from provisions which apply to document production in general, the guidelines are concerned primarily with the preservation of electronically stored information and its search in response to production requests.

The guidelines seek to strike a balance between the perceived need for having requested parties conduct searches in their electronically stored information and the efforts and costs caused by such searches. They refer to the requirement of "reasonable and good faith efforts to retain information that may be necessary for pending or threatened arbitration", but accept that, in the absence of special circumstances, metadata and "deleted electronically stored information that exists only in fragmented, shadowed or residual form" need not be preserved or produced. There is no explanation concerning the legal basis for a requirement in international arbitration for preserving information "necessary for pending or threatened arbitration". The guidelines also discuss methods of searching and for establishing when a search is too costly or burdensome.

Other authors, as for instance BARKETT, are less ambitious and recommend merely that further research be conducted into arbitration practice.⁴⁰ FRANK and BÉDARD also suggest that further analysis of e-discovery issues be undertaken in order to "uncover useful principles that arbitrators could apply". They present a list of Proposed Suggestions for Future Discussion which are visibly inspired by the rules and guidelines in the US and, in a number of aspects, come close to the guidelines recommended by SMIT and ROBINSON.⁴¹

TSE and PETER refer to the above-mentioned changes made in the civil procedure rules in England and the U.S. and conclude from them that the subject should also be considered in the context of international arbitration. They conclude:

The English and U.S. reforms highlight the need for a debate as to how, why and to what extent changes might be made to guidelines provided by the IBA Rules.⁴²

³⁹ Op. cit. vol. 24/1, 105, 129.

⁴⁰ Op. cit. 168.

⁴¹ Op. cit. 34.

⁴² Tse & Peter, *Confronting the Matrix: Do the IBA Rules Require Amendment to Deal with the Challenges Posed by Electronically Stored Information?* 74-1 ARB., 28, 34 (February 2008).

