Swiss Arbitration Association

ASA User Council

"Taming the Beast"
A Whitepaper on Document Production

Executive Summary

Users of international arbitration experience document production as a burdensome, costly, and all too often ineffective exercise. Drawing on an analysis of various legal traditions and existing instruments, a working group of the ASA User Council now takes the initiative to call for a robust readjustment of current procedures and to make concrete recommendations aimed at keeping arbitration efficient and attractive. In this whitepaper, guidance on the key standards defining current practice – relevance and materiality – is thus combined with proposed measures that can be applied before a dispute arises or once an arbitration is underway, by parties, counsel, arbitral tribunals, and institutions alike.

This whitepaper does not advocate for a blanket abolition of document production, although such proposals have been made and some companies make a deliberate choice to that effect. It rather seeks to recommend a variety of options, with possible measures ranging from numerical and other hard-and-fast limitations to substantive standards as well as procedural means such as integrating document production into the exchange of submissions or techniques aimed at countering parties' and counsel's propensity to "leave no stone unturned." While artificial intelligence is sure to play an important role also in arbitration, it seems doubtful that it will by itself reduce the time and cost of document production.

Arbitral institutions and other organizations will be well-advised to support parties, counsel, and arbitral tribunals in keeping arbitration as efficient as possible. Only if these efforts succeed will arbitration maintain its position as the preferred choice for resolving international disputes. The current tendency to favor expedited procedures, which seem to be received well by the market and which avoid document production to a large extent, demonstrates that it can be successfully achieved.

I. Introduction

Over the last 25 years, parties to international arbitration (often referred to as "arbitration users") have become increasingly frustrated with the seemingly inexorable rise of document production in international arbitration.

This has prompted a working group of experienced in-house counsel from frequent arbitration users represented on the User Council of the Swiss Arbitration Association (ASA)[1] to voice their

1 See www.swissarbitration.org/user-council, with a working group comprising of Jan-Michael Ahrens (Siemens AG), Lara Hammoud (ADNOC), Jeremy Hannah (Arabelle Solutions), Wolfgang Junge (Mediterranean Shipping Co.), Andrea Meier (Walder Wyss), James Menz (rothorn legal), Faris Nasrallah (Crescent Petroleum), Alison Pearsall (Atos), Noradèle Radjai (Lalive), Francesca Salerno (ENEL), Tom J. Sikora (ExxonMobil Corp.), and Nicholas Spichtin (Schindler). Views expressed here will not necessarily be those of individual members of the working group and do not engage their respective companies.

concerns and put forward concrete proposals for how best to rein in and adjust this practice. Doing so should be in the best interests of international arbitration, as we know and appreciate it, and will enhance its legitimacy in resolving commercial disputes.

The present whitepaper is the result of these efforts. It first takes stock of where we are (*II.*) and then attempts to provide guidance on the key requirement for document requests, i.e., relevance and materiality (*III.*), before offering specific recommendations to parties, counsel, arbitral tribunals, and institutions (*IV.*).

II. Background

1. User experience

As many users see it, arbitral tribunals, outside counsel, and parties themselves are often too quick to arrange for document production in the first place, too zealous in submitting numerous, broad requests for production, and too generous in granting them. Parties have come to understand that document production imposes a significant burden on them without necessarily improving the quality of decision-making.

Recent surveys attest to these concerns: The Queen Mary / White & Case International Arbitration Survey of 2021 found that arbitration users would be most willing to give up, *inter alia*, document production to make arbitration more efficient. Many interviewees stressed that the time and cost required for document production are often disproportionate to its benefits, and that it can also be abused. Interestingly, many interviewees from common law backgrounds were similarly disposed to limit document production as their civil law peers. As per the 2025 edition of the survey, parties often favour expedited arbitration specifically because it does not include extensive, or any, document production.

For civil law parties, it remains surprising that document production has become almost standard practice even in arbitrations between parties from civil law countries. This will often put parties in a different (*i.e.*, better or worse) position than they would be in the state courts of their respective home states, or in the system of law governing the merits of the dispute. Civil law parties may be particularly surprised by the scope of permitted requests, by practices originating from common law domestic procedures (such as litigation holds or privilege logs), and by the cost involved. Because of new means and greater volumes of communication, costs have not only increased but have also become more difficult to predict, making cost-benefit-analyses more difficult at least for small- and medium-sized disputes. Document production also has a significant impact on the duration of an arbitration as it is frequently dealt with in a separate phase lasting three months or more. The greater the number and breadth of production requests, the more time it will take for parties and counsel to search for, review, and produce responsive documents, to respond to requests or objections, and to review documents received from the other side. Complications are compounded for parties that are exposed to document production only occasionally, that do not have predetermined procedures in place, including for e-discovery, and that are subject to more stringent data privacy laws.

Parties to international arbitration recognise that legal systems differ, that cases are not the same, and that stakeholders may hold different views on these matters:

- Not all laws applicable to the merits will operate in the same way, interlinked as they normally are with the procedural tools available in that system, including full, some, or no document production.

- Some cases will not require any document production at all, whereas others may call for it under the applicable law, *e.g.*, in view of a possible lack of information of one party or other such asymmetries (as for certain types of claims).

- Parties' expectations will often be informed by their or their counsel's legal and cultural backgrounds, or by practices at the place of arbitration, whereas arbitrators will typically be keen to decide cases not just efficiently, but also justly, based on an accurate record of (relevant) facts.

These aspects notwithstanding, the working group of in-house counsel presenting this whitepaper maintains that something must be done to remedy the unsatisfactory situation we are experiencing today. The recommendations set out below are meant to do just that, *i.e.*, to help improve the practice by limiting document production to what is genuinely necessary. All parties involved, and in particular the parties themselves must consider whether document production is needed at all, and if so, to what extent.

2. The existing procedural tools

Parties wishing to address document production before or at the outset of an arbitration already have a number of tools to use or from which to draw inspiration.

The most common such instrument is the IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules of Evidence), which were first issued in 1999 and revised in 2010 and 2020. Designed as a compromise between civil law and common law traditions, the IBA Rules of Evidence reflected the view that expansive US- or English-style disclosure is generally inappropriate in international arbitration and that production of documents should instead be limited to issues relevant and material to resolving the case at hand. Civil law practitioners have generally agreed that at least some level of document production may often be appropriate.

This working group considers the IBA Rules of Evidence to be a useful instrument if used appropriately, *i.e.*, restrictively as originally intended. Regrettably, the practice of international arbitration appears to have evolved away from the balance struck in 1999, allowing much more expansive domestic disclosure practices to seep in. Crucially, the requirement of "relevance and materiality" is not always applied with the necessary rigor – all too often, arbitrators do not apply the two prongs of the test cumulatively or do not apply an adequately high standard of materiality. Similarly, the possibility under the IBA Rules of Evidence to request a "narrow and specific category" of documents is often misapplied to seek or order the production of documents that cover long periods of time and broadly defined subject matters. The original intention of the IBA Rules of Evidence – to limit disclosure – has thus given way to a more expansive practice, and users see a need to re-adjust this development. Parties, arbitrators and other stakeholders should accordingly consider additional or alternative measures, including bespoke restrictions on document production in their contracts, procedural orders, and rules.

The Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules, 2018) advocate a more proactive and possibly inquisitorial approach to the taking of evidence. Under these rules, the arbitral tribunal is expected to be more proactive early on, *e.g.*, by giving preliminary views on the evidence that the tribunal would consider relevant and on the burden of proof. While the Prague Rules encourage tribunals to avoid extensive disclosure, including any form of e-discovery, they actually do allow parties to seek production of specific documents that are shown to be "relevant and material to the outcome of the case" – a standard strikingly similar to that of the IBA Rules of Evidence. Indeed, the real difference between the

two sets of rules arises as to requests for categories of documents, which cannot be sought under the Prague Rules.

Further guidelines such as the ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration (2007), its Report on Managing E-Document Production (2016), or the New York State Bar Association Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations (2010) offer useful guidance on how to deal with document production in arbitration. Also, parties in practice often use so-called Redfern, Armesto or Stern Schedules, *i.e.*, tables recording each party's requests, objections to those requests, the requesting party's comments and the arbitral tribunal's decisions on each request. While such guidelines and tables can be helpful in managing the process, they do not by themselves guide or limit the scope of document production – indeed, by facilitating the practice, these tools might rather perpetuate or even expand it.

3. Taking a comparative approach: how different jurisdictions approach document production

Document production is not an instrument unique to international arbitration. It has been used by courts in different legal cultures for many decades or even centuries. As we consider how to limit document production, it is worth assessing how state courts in major jurisdictions approach the taking of evidence and document production, contemplating new developments, and exploring possible lessons to be drawn.

By and large, civil law jurisdictions take a more restrictive approach to document production. Claimants are expected to know their case and (most of) the facts underlying their claims, and to be able to prove them already when bringing a lawsuit. In court proceedings, there is often no disclosure at all. Exceptions apply where a lack of, or an asymmetry of information typically exists (*e.g.*, for accounting records available to only one side). Here, a party may have a substantive right – contractual or statutory – to obtain information (to be claimed in a first step, before pursuing monetary claims in a second step), or the asymmetry is overcome by procedural shifts in the burden of proof. Such tools available under applicable laws should normally be used first and foremost. Indeed, where such mechanisms apply, it could be argued that documents sought are not relevant and material under the applicable law and that procedural document production must therefore not be granted. Where document production is then available, a party seeking to obtain documents must describe the document(s) sought with precision and demonstrate a legitimate interest in the production, *e.g.*, that the requested document is needed to prove a particular fact for which it bears the burden of proof. To this end, a party must provide some detail as regards the (alleged) content of the document. There is usually no separate phase for production in the proceedings and the parties submit requests, if any, with their written submissions.

In common law jurisdictions, discovery or disclosure tends to be seen as essential to achieving a level playing field and transparency, in line with a more pronounced desire to find the objective "truth." Discovery typically occurs early in the litigation and before the actual start of proceedings ("trial" in US terminology). It is primarily conducted inter partes, with the court intervening only when directions or rulings are required. Fairly uniform ethical standards, rules of evidence, and protocols for managing discovery, together with well-developed precedent for sanctioning breaches of those rules contribute to ensuring that parties approach the process with a shared understanding. As a rule, the bar to demonstrating the relevance of the requested evidence tends to be fairly low. On the other hand, rules on legal privilege offer a significant level of protection against having to produce sensitive documents – rules that have not developed in

similar form outside the common law countries, largely because there was no need for them.

In the USA, discovery was introduced in the Federal Rules of Civil Procedure in 1938, with an aim to avoid surprises, enable a level playing field and encourage early settlement. Supreme Court judgments and amendments to the rules in 1946 and 1970, respectively, led to a significantly expanded use (and abuse) of discovery, with electronic discovery later exacerbating the time and expense involved.

Over the past 25 years, however, various common law jurisdictions have reacted and adopted reforms to rein in and nuance the practice of discovery and disclosure. Since 1998, English civil procedure has thus established an "overriding objective" requiring courts to deal with cases justly and in ways that are proportionate to the amount in dispute, the importance of the case, and the complexity of the issues, among other considerations. This overriding objective applies as much to disclosure as it does to all other areas of civil procedure, and it has now found its way into the civil procedure rules of several other common law jurisdictions, including Australia and Singapore. In the USA, a variety of reforms have been attempted, most significantly in 2015, when various provisions in the Federal Rules of Civil Procedure were amended to implement a newly introduced objective to "secure a just, speedy, and inexpensive determination of every action" and to limit discovery to materials that are "proportional to the needs of the case."

Beyond the actual or perceived civil and common law divides, and looking at other legal traditions, it is important to understand that attitudes to document production also depend on an intersection of business cultures, industry cultures, and national legal cultures. Expectations and practices regarding document production are therefore to be adjusted in view of these cultural factors. While there is often a tendency to think about law in terms of citadels of isolated jurisdictions or legal traditions, document production reminds us that business cultures and elements of soft law can also impact practices.

The above comparative approach helps to identify procedural tools that may be used to restrain document production. These tools include the early identification of issues by arbitral tribunals, giving weight to burden of proof, strict requirements for a specific and narrow description of documents sought, and integrating production requests into the proceedings, thus doing away with a separate document production phase – all of which may contribute to adjudicating cases both justly and efficiently.

The working group acknowledges that technological advances and artificial intelligence may have a profound impact on document production, as on legal proceedings generally. Many of these changes will only emerge in the years to come. Although certain aspects of these developments are addressed below, the working group considers that the practice of document production calls for conceptual change rather than merely improvements in process.

III. Standard of Relevance and Materiality pursuant to the IBA Rules of Evidence

The instrument most commonly used to address document production are the IBA Rules of Evidence. These provide procedures for requesting documents from other parties and define a standard for determining whether a request should be granted.

In terms of procedure, Article 3.3(b) of the IBA Rules of Evidence requires from the requesting party "a statement as to how the documents requested are relevant to the case and material to its outcome." This wording was adopted in 2010 to replace the original "[...] relevant and material to the outcome of the case", aiming for greater clarity and indeed a stricter application of the materiality threshold.

If the request is objected to, the arbitral tribunal may in accordance with Article 3.7 order the production of any requested document as to which it determines that:

i. "the issues that the requesting party wishes to prove are relevant to the case and material to its outcome;

ii. none of the reasons for objection set forth in Articles 9.2 or 9.3 applies; and

iii. the requirements of Article 3.3 have been satisfied."

While Article 3.7(i) on the one hand and Articles 3.7(iii) and 3.3(b) on the other both require relevance to the case and materiality to its outcome, one may note that they tie this requirement in the first case to "the *issues* that the requesting party wishes to prove" and in the second case to "the *documents* requested."

The distinction is not accidental, and a proper interpretation of the standard must indeed consider all the dimensions engaged here: Relevance to the case and materiality to its outcome must be shown for each document sought and with a view to the issues that the requesting party wishes to prove or disprove. That said, a statement pursuant to Article 3.3(b) will always have to link the document sought to issues that the requesting party wishes to prove (facts and legal conclusions, as explained below), failing which such document will stand little chance of being considered material to the outcome of the case.

The standard of "relevant to the case and material to its outcome" gives rise to a two-pronged test. The working group considers it worthwhile to offer some clarifications on these prongs and on their relationship, which could also be expressly included in the arbitration agreement or the procedural rules applicable in an arbitration.

The issue of document production will typically arise in the written phase of the proceedings, well before the arbitrators deliberate on any award. Determinations on relevance and materiality will thus be predictive in nature. While it may be impossible to define a percentage of probability required, it is clear that this prediction is key to limiting document production: A production order must therefore not be granted unless there is a reasonable expectation that the document will be relevant to the case and material to its outcome. To encourage arbitrators to take a restrictive approach early on, it might be helpful to envisage a mechanism allowing the parties to (re-) present requests at a later stage (potentially doing away with a separate, conclusive phase of production).

Relevance to the Case

The first test is that the requested document must be "relevant to the case." Relevance requires no more than that the document bear on the case; the test primarily serves to exclude documents that have no relevance to the facts of the case.

The "case" must be understood as the factual and legal representation made by the requesting party; note that a party's case may be put forth in support of a claim or in defense and will comprise allegations denying those of the other side. It will comprise factual allegations, *i.e.*, "issues that the requesting party wishes to prove" by the document requested (cf. Art. 3.7(i)), as well as legal conclusions drawn on the basis thereof. Relevance is irrespective of whether the allegation and legal conclusion may ultimately be material to the outcome of the dispute. While views differ as to whether documents may be requested only with regard to the *requesting party's own case*, or e*ither party's case*, or just *the case made up of all the parties' allegations*, we note that Art. 3.7(i) requires reference to issues that the requesting party wishes to prove and consider that the above definition of the requesting party's case is wide enough not to exclude

genuine requests. What it might perhaps do, however, is to avoid wasteful skirmishes on issues not in dispute so far.

Based on these considerations, we propose that the standard of relevance should be understood to mean:

> *The requested document relates to a factual allegation on which legal conclusions are drawn in support of the requesting party's case.*

The following example may serve to illustrate the point:

> Party A alleges that it attended a meeting with Party B and reached an agreement which Party A now seeks to enforce. Party B denies meeting with Party A and denies the agreement. The calendar or expense report for the day of either Party would thus be relevant to the case – irrespective of whether or not the existence of the meeting is in fact decisive to the tribunal's determination that the Parties reached the agreement.
>
> By contrast, there could be an allegation that a person attended a meeting from which no legal conclusion is drawn. The person's diary would thus not meet the relevancy test: While the diary would be relevant to the person's attendance at the meeting, it would not relate to a case presented.

Materiality

The second prong of the test is that the requested document must be "material to its outcome", *i.e.*, the outcome of the case as presented by the requesting party. All too often, and regrettably so, parties and tribunals treat materiality as merely a heightened relevancy standard or they rely simply on relevancy. An appropriate specification of the materiality standard thus seems imperative to guide parties and tribunals to stay more faithful to the intent of the IBA Rules, which it is submitted was to limit discovery, not to expand it.

We firmly believe that the element of "materiality to its outcome" must set a higher standard than the relevancy element. This is not just because the IBA drafters consciously maintained both elements as separate – and emphasized the separation in the 2010 re-wording –, but also because the terms used establish a qualitative difference: Not every document somehow related to factual allegations and legal conclusions drawn thereupon will necessarily have a bearing on the outcome of the case. Clearly, something more is required.

In view of the various elements forming part of the test, we propose to consider the following: In order for a document to be material to the outcome of the case, it must impact the tribunal's determination on a fact that is being alleged and which that document is allegedly relevant to. It is not necessary for the document to be critical to prove or disprove the fact, but it must be necessary to allow the tribunal's complete consideration of whether that fact is proven or not.

This alone does not however suffice, since a document may impact the tribunal's determination on a factual allegation, yet that allegation may in fact be irrelevant to the outcome of the case. Therefore, in addition to impacting the tribunal's consideration of whether that fact is proven or not, the factual allegation in question must in turn confirm (or refute) a legal conclusion that is necessary for a determination of the case. Where an alleged fact need not be proven (*e.g.*, because it is undisputed) or where it can be proven by other means (to the extent available and equally probative), the request for production should be denied.

Accordingly, we propose that, in further development of the relevancy standard, the materiality standard be understood to mean:

The requested document is necessary to allow a complete consideration of whether a factual allegation is proven or not, which allegation must be necessary for the determination of a legal conclusion drawn, which must in turn be necessary for a determination of the case.

Developing further the example given above, this can be illustrated as follows:

Party A alleges that it attended a meeting with Party B and reached an agreement which Party A now seeks to enforce. Party B denies meeting with Party A and denies the agreement. Party B's calendar or expense report alone might not suffice to prove the alleged meeting, but each of those documents may impact the tribunal's consideration of that factual allegation, and each may therefore be material.

Further, the factual allegation must be necessary for the determination of the legal conclusion sought to be drawn. For example, if the alleged agreement was required to be in writing, the allegation of an oral agreement reached at the meeting – whether proven or not – is unlikely to be material to the question of whether or not an agreement was validly made; this will then also apply to the Parties' calendars and expense reports.

Finally, the legal conclusion sought to be drawn must also be necessary for the determination of the dispute. In our example, if neither party's case requires the tribunal to make any finding based on the alleged agreement, determining whether an agreement was concluded at that meeting may not be necessary for the determination of the dispute and thus not material to its outcome. This could be because the claim under the agreement was already barred by a subsequent settlement and release.

In conclusion, a document that is – from an ex ante perspective – relevant to the case and material to its outcome must meet the following criteria:

Criteria	Application to our hypothetical
• Does the document relate to a factual allegation on which legal conclusions are drawn in support of the requesting party's case?	Does the document tend to prove or disprove the meeting?
• Is the document necessary to allow a complete consideration of whether a factual allegation is proven or not?	Is the document necessary for the complete consideration of whether the Parties indeed met as alleged?
• Is the factual allegation to which the document relates necessary for a determination of the legal conclusion drawn?	Is the allegation of the meeting necessary for the legal conclusion that an agreement has been reached?
• Is that legal conclusion necessary for the determination of the case?	Is the conclusion that an agreement has been reached, or not, necessary for the determination of the case?

Our working group recognizes that the clarification of the standard as proposed above does not address the question of burden of proof, and indeed the test in the IBA Rules of Evidence itself is agnostic in this respect. Yet the applicable law may allocate the burden of proof in a certain way and thus impact the assessment of whether a document or issue is material to the outcome of the dispute.

In our example given above, Party A seeking to enforce the agreement would thus not be

allowed to request diaries and expense reports of Party B if no defense has been raised relying on the alleged meeting.

The parties may also separately agree, or the tribunal may order, that the production of documents shall be limited to those documents that are necessary for the requesting party to discharge its burden of proof.

IV. Discrete Recommendations

The perception of document production as a time-consuming, costly, and sometimes unnecessary exercise has spurred various proposals to address these concerns. This whitepaper will thus offer practical considerations and a number of discrete recommendations for how best to avoid document production or limit it in a sensible way.

We first focus on measures that can be taken "upfront", before a dispute arises, and thus primarily by the parties when drafting dispute resolution clauses (*IV.1*). We then discuss measures that can be implemented in an arbitration, in particular by arbitral tribunals, to limit document production and ensure efficiency of the process (*IV.2*). Finally, we propose some considerations for arbitral institutions and other stakeholder organizations to improve on document production (*IV.3*).

1. Recommended measures to be taken upfront

When parties negotiate a contract, their considerations regarding document production will usually be generic and vague. Companies do not generally invest resources in envisioning hypothetical disputes when contracting, and many strategy considerations become apparent only when a dispute arises. At that point, however, the parties' interests often diverge, including on document production, and it is therefore recommended to agree on appropriate measures upfront.

Experienced in-house counsel understand their company's exposure and portfolio of disputes, and they are best placed to devise appropriate policies and clauses regarding document production. They will inter alia consider the following questions to balance efficiency, cost, confidentiality, and the ability to present their case effectively:

- Is the company more often the claimant or the defendant in its disputes?
- What types of documents are essential for proving claims, or in defense, and who currently possesses, or will possess, these documents?
- Do the company's most common disputes hinge on factual issues that can only be proven by documents held by the prospective opponent? Would a lack of access to these documents significantly impact the company's chances of success in an arbitration?
- What are the company's requirements for confidentiality as to its own internal documents, and what is the sensitivity of documents that might have to be disclosed? What measures are there to protect confidential and privileged information?
- What is the expected volume and complexity of documents to be disclosed? Do they warrant an upfront agreement on a structured, phased approach whereby the tribunal will address certain legal issues before ordering document production? Or can this be left to the tribunal's discretion?
- What are the company's technological capabilities for document retention, search and production and what is the estimated burden in terms of time and cost?

- To what extent can "blind spots" and uncertainties be anticipated at the time of drafting a dispute resolution clause? Are powers granted to the arbitrators flexible enough to adapt to unforeseen issues and scenarios?

These and other considerations may guide contracting parties in agreeing on specific measures for limiting document production upfront. In the following, we will present and discuss some key recommendations, together with draft clauses.

As will be clear from the preceding sections, the implementation and experience of document production in arbitration will vary depending on choices that companies make in respect of the governing law, place of arbitration, arbitral institution / rules of arbitration, agreement on or exclusion of the IBA Rules on Evidence or the Prague Rules, selection of arbitrators as well as outside counsel. While document production may be a key factor for parties to consider in making these choices, this whitepaper will refrain from taking any views in this respect and instead focus on practical recommendations that will be useful regardless of the particular circumstances.

i. Full exclusion of document production

First, parties may of course choose to exclude document production altogether, agreeing thereby to rely, in a possible arbitration, solely on the documents and information then available to them. This option simplifies and shortens the arbitral process considerably and it avoids expensive fishing expeditions.[2] It will however require consideration of the risks involved, including whether the parties expect being able to prove their case without document production (*e.g.*, under applicable law, considering burden of proof) and whether the expected gains in time and cost outweigh the risks of losing a particular, or a few cases. In choosing exclusion, parties may also wish to clarify that it does not limit any contractual / substantive rights to information.

> *"The parties shall not be entitled to any production of documents, and the arbitral tribunal shall have no power to order such production. This exclusion does not apply to any contractual / substantive rights to information."*[3]

Alternatively:

> *"Should a dispute arise between the parties and be referred to arbitration, the parties agree to exclude any production of documents and instead to rely only on the documents they have in their possession. This exclusion does not apply to any contractual / substantive rights to information."*

Where parties resolve to exclude document production, they may wish still to allow for a safety valve, *i.e.*, authorize the arbitral tribunal to decide otherwise in exceptional circumstances:

> *"... unless the tribunal, in exceptional cases, decides otherwise after consultation of the parties and considering all the circumstances of the dispute."*

The working group understands that certain key users of international arbitration have now indeed resolved to exclude document production in their standard clauses; where no such exclusion is agreed, they require business units to set up (considerable) cost contingencies to cover the resulting cost.

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2 See recommendations by Joerg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, Arbitration International 29/3 (2013), p. 453 (459) and Peter Rees, *Is It Time for Users to Take More Risks in Arbitration?*, SchiedsVZ 2016, p. 57 (58).

3 Cf. Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 6 ed., 2021, p. 100: "*The parties shall not be entitled to discovery, and the arbitrators shall have no power to order discovery or disclosure of documents, oral testimony or other materials*."

Another way of excluding document production would be to expand, or specifically agree on the use of expedited procedures, where document production is infrequent (*e.g.*, not taking place in ca. 80% of ICC expedited arbitrations).[4] Most institutions' rules for expedited procedures either exclude document production entirely (as under Art. 11(b) of the SIAC Streamlined Procedure) or specifically grant discretion to the arbitral tribunal to disallow such requests (as under Art. 3(4) of the ICC and Art. 3(d) of the SIAC Expedited Procedure Rules).

ii. Limiting the scope of document production

a) Limitation to material documents only, with interpretation guidance

Choosing a less sweeping approach, parties may choose to limit production to documents that are material to the determination of the relief(s) sought:

> *"Requests to produce documents shall be limited to documents which are material to the determination of any relief requested by the parties."*

and bind the arbitral tribunal to a strict interpretation of the "materiality" criterion (e.g., by reference to the clarification offered above):

> *"A document is material if it is necessary to allow a complete consideration of whether a factual allegation is proven or not, which allegation must in turn be necessary for the determination of a legal conclusion drawn, which must in turn be necessary for a determination of the case."*

b) Limiting the number of document production requests a party may submit

In a practical, clear-cut approach, parties may also consider limiting upfront the number of document production requests that can be submitted by each party. How many requests the parties should agree on will depend on the nature of the parties' business transaction and disputes potential (for example whether the parties engage in a construction project as opposed to a licensing transaction).[5] To prevent abuse, the arbitral tribunal should be empowered to reject additional requests disguised as sub-requests, compounded requests or requests for categories of documents.

> *"The number of document production requests per party shall not exceed [x], including any sub-requests."*

Also in this case, the parties may wish to provide a safety valve and allow the limit of requests to be exceeded in exceptional circumstances:

> *"Exceptionally, at the request of a party setting out in detail the need and reasons for a greater number of requests, the arbitral tribunal may, in its discretion and in exceptional circumstances only, grant additional requests. However, the number of any such additional requests shall not exceed [x]."*

c) Limitation to specific documents only and/or to external documents

Parties may further allow only requests for specific, identifiable documents, rather than categories of documents, or for specific documents and categories of documents, but not for sub-categories. The onus will then be on the requesting party specifically to identify and justify

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4 See also Queen Mary / White & Case International Arbitration Survey of 2025, p. 19.

5 Marco Eliens proposes a limit of 10 requests in his blog post "*Document Production: Quality over Quantity*" on Kluwer Arbitration Blog (2020), while Aníbal Sabater proposes 30 requests, including any sub-requests. See Aníbal Sabater, *Optional Provisions for the Terms of Reference and Procedural Order No. 1*, ICC Dispute Resolution Bulletin 2023 No. 3, p. 62-72.

each document requested, and parties may object to (overbroad) requests for categories of documents.

> *"At the request of a party, the arbitral tribunal shall have the power to order the production of specified documents by the other party/ies. Any such request shall identify the document(s) sought with a reasonable degree of specificity and explain its relevance to the case and materiality to its outcome. Requests for categories of documents, including requests for 'all documents directly or indirectly related to [...]', shall be excluded."* [6]

A further limitation can be achieved by excluding the production of internal documents. These are often deemed to be of limited evidentiary value anyway, although they might of course be material for matters of intent and internal knowledge.

> *"At the request of a party, the arbitral tribunal shall have the power to order the production of specified documents by the other party/ies. Any such request shall identify the document(s) with a reasonable degree of specificity and explain its relevance to the case and materiality to its outcome. Requests for categories of documents and internal documents shall be excluded."*

Parties based in countries where the communications or work product of in-house counsel are not protected by strong rules on legal privilege may want to add express language to the effect that legal privilege in arbitration will indeed also apply for in-house counsel (although arbitral tribunals often seem inclined to grant it anyhow so as to match available mechanisms of disclosure and protection, and to ensure a level playing field).

> *"The work product of counsel (external or in-house) and communications between counsel (external or in-house) and clients shall be protected and excluded from production [as provided for in Articles 9.2(b) and 9.4 of the IBA Rules]."*

d) Limitation to documents shown by requesting party to be required to discharge its burden of proof

Parties may agree that the production of documents shall be limited to those documents that are necessary for the requesting party to discharge its burden of proof. This standard is related to the requirement that a document needs to be material and is applied by many arbitral tribunals anyhow, under the applicable law. Parties may still, depending on the applicable law, benefit from agreeing that production requests should be refused unless they specify the issues that the requesting party wishes to prove and explain why the burden of proof cannot otherwise be met.[7] This approach reinforces the need for arbitrators to be familiar with the parties' respective cases and with the burden of proof for relevant allegations.

> *"The production of documents shall be limited to those specific documents necessary for the requesting party to meet its burden of proof with respect to a particular fact, allegation or claim."*

e) Limitation to documents which parties have invoked in their submissions

Parties may also limit document production to those documents which the requesting party has expressly referred to, and relied upon, in its (prior) submissions. Such a requirement will reinforce the necessary link to factual allegations and legal conclusions advanced in support of a claim or defense. If a party believes that a specific document confirming an issue that it

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6 See also Reto Marghitola, *Document Production in International Arbitration*, Kluwer, 2015, § 8.05[C] Exclusion of Requests for Categories of Documents, p. 159.

7 Yves Derains, *Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint*, in Special Supplement 2006: Document Production in International Arbitration (International Chamber of Commerce (ICC), 2006, p. 87.

wishes to prove exists but is available only to the other side, it will thus request it in the context of stating its case or in a subsequent request. While the natural way of doing this may be to request production within the submission itself – as is customary in a number of jurisdictions –, nothing prevents applying the criterion in a later, separate production phase either.

> *"Any production of documents shall be limited to documents which the requesting party has invoked in its submissions in support of a particular allegation."*

f) No separate document production phase and inclusion of production requests in submissions

Document production often takes place in a separate phase, *e.g.,* after the first exchange of full written submissions. This not only takes considerable time, but it also seems to encourage parties to file more requests than would otherwise be the case. Parties should therefore consider whether to forego a separate document production phase and instead integrate document production into their written submissions. This will not only tighten the necessary link to specific allegations made by the requesting party in its submissions, but it would also allow parties (i) to raise (additional) requests at a later stage, as needs for (further) production may arise, or (ii) to re-file requests previously rejected based on strict materiality considerations. Conversely, and significantly, it would allow arbitral tribunals, in an *ex ante* view, to adopt a stricter interpretation of materiality and reject requests at an early stage, with a view possibly to re-consider the issue at a later point in time.

> *"Each party may in its submissions make related requests for the production of documents by the opposing party/ies, with any applications to be made to the tribunal at the latest [xx] weeks prior to the cut-off date."*

Alternatively:

> *"The claimant shall submit any document production requests with the statement of claim and the respondent with the statement of defense. In addition, the claimant may be granted an additional time limit of [xx] days after receipt of the statement of defense to raise any additional requests prompted by the statement of defense. Each party shall then have a period of [xx] weeks from the other party's response to its requests to submit an application to the tribunal in relation to any outstanding requests."*

g) Cost consequences, subject to a possible re-allocation in the final award

Aiming to provide incentives for a more restrictive approach, parties could finally agree on cost implications related to document production. They could for example agree that they shall each bear their own costs for preparing their production requests and, in addition, pay the other party's reasonable costs for responding to requests and for searching and producing the documents requested, subject to possible reallocation in the final award.

> *"Costs associated with the production of documents: Each party shall bear its own costs (including counsel costs) for preparing production requests to the other party as well as the other party's costs (including counsel costs) for responding to requests and for searching and producing the documents requested. Payment of the other party's costs shall be made within [xx days] of receiving an invoice from that party, and in case of dispute, the matter may be referred to the arbitral tribunal for decision. The costs of producing documents may ultimately be reallocated in the award based on the outcome of the dispute, the conduct of the parties*

during the arbitration, and any other relevant factors as determined by the arbitral tribunal." [8]

Alternatively:

"The parties shall submit cost submissions regarding document production to the arbitral tribunal shortly after the document production phase and the arbitral tribunal will immediately assess these costs and make a determination as to their allocation among the parties, taking into account which party had more document production requests rejected. The costs of producing documents may ultimately be reallocated in the award based on the outcome of the dispute, the conduct of the parties during the arbitration, and any other relevant factors as determined by the arbitral tribunal." [9]

2. Recommended measures to be taken by arbitral tribunals

Once an arbitration is underway, it is the responsibility of arbitral tribunals to ensure that document production remains as narrow and is conducted as efficiently as possible. Subject to any agreement between the parties, tribunals will thus give directions for document production taking into account the parties' expectations and the particularities of the case. In doing so, they may want to consider adopting any of the measures discussed above (*IV.2(i)*), using certain procedural techniques restraining and streamlining the exercise (*IV.2(ii)*), or employing technological solutions (*IV.2(iii)*).

i. Reflecting recommendations in section IV.1. in the procedural rules

Where the parties have not addressed document production in their dispute resolution clause, arbitral tribunals should evaluate whether measures as recommended in section IV.1 merit discussion with the parties and implementation in the procedural rules – possibly using the language proposed above for the various scenarios. The tribunal could thus envisage limiting production to (cf. above *IV.1(ii)*):

- specific, identifiable documents,
- documents meeting a specified threshold of materiality,
- documents which the parties have invoked in support of specific allegations in their pleadings.

The tribunal may also consider whether to:

- implement a production phase at all,
- limit the number of production requests,
- allocate separately the costs of document production.

ii. Procedural techniques restraining and streamlining document production

Beyond such specific measures, arbitral tribunals looking how best to address and structure document production in a particular case may want to consider a number of further procedural approaches.

a) Addressing document production proactively?

Whether and when an arbitral tribunal should raise the issue of document production during

8 Based on the suggestions in the ICC Commission Report on Managing e-document production, 2016, p. 12.
9 Based on the suggestions made by Peter J. Rees, *We Can Have It All: Some Thoughts on the Future of Document Disclosure*, in Michael O'Reilly (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Sweet & Maxwell 2015, Volume 81 Issue 2, pp. 187 – 191.

the initial case management conference can be a delicate matter. Before doing so, the tribunal should seek to understand the parties' expectations and the specific features of the case.

Where the arbitration is seated in a civil law jurisdiction, applies civil law on the merits, and involves only parties with a civil law background, proactively raising document production may inadvertently prompt the parties to consider requests they would not otherwise have made. In such cases, parties and counsel will often share similar expectations and will either raise the issue themselves, or they will not. Introducing it prematurely may not be in line with the parties' expectations and unnecessarily complicate the proceedings.

Conversely, early discussion of document production may be helpful in other cases – for example, where parties and counsel are accustomed to broader disclosure, where the issue has already been raised, or where the nature of the dispute suggests that access to documents held by the other side will be required. In such cases, addressing expectations at the outset can help define the scope of production, establish procedural guardrails, and minimize the risk of later disagreement.

b) Setting timetable for document production early and providing guidance

Where the issue of document production is raised early on, the procedural timetable established by the arbitral tribunal should, subject to the parties' agreement and with a view to their expectations, provide appropriate limitations on the phases and timelines of production. By setting dates, the tribunal can convey its intention to limit the process to the extent possible; a suggestion to integrate production into the exchange of submissions can have a similar effect.

c) Encouraging restraint

In the case management conference, the arbitral tribunal may expressly emphasize that it expects the parties to show restraint in seeking documents and highlight possible cost consequences. It can also encourage the parties to resolve disputes about requests for production between themselves, prohibit the use of Redfern or other schedules and consider only those requests that remain contentious after discussions between the parties.

d) Holding a separate case management conference on requests and objections filed

In cases where document production is expected to be extensive, a dedicated case management conference may assist the tribunal in addressing and narrowing the parties' respective requests and objections. Such a conference would not only require the arbitrators to engage with the factual allegations at an early stage, identify and prioritize key issues, and form preliminary views on relevance and materiality. The prospect of such a discussion may also discourage excessive requests, and preliminary guidance from the tribunal can help the parties focus their subsequent submissions more effectively.

e) Requesting the parties to integrate requests in their submissions

Where document production occurs, the tribunal should consider implementing measures to ensure its effectiveness and focus it on the core purpose: revealing information that proves or disproves facts material to the outcome of the case presented, as per the tribunal's preliminary legal analysis.

For example, if not yet agreed by the parties, the tribunal may require the parties to integrate requests for production into their submissions, ensuring that each of them is invoked in support of a specific allegation. The requesting party will thus be forced to establish a clear connection between a factual allegation, its materiality, and the document sought. While this approach might

lead to an iterative process of sorts and require a final cut-off date, it will also narrow production to material issues only.

f) Setting limits on scope and volume

To prevent excessive or unfocused requests, the tribunal may impose limits on the number of production requests or set word or page limits on requests and on corresponding objections.

g) Requiring separate reasoning for each request and limiting replies to objections

Parties should further be discouraged from cross-referencing or replicating reasons for their document production requests, ensuring that each request is justified by distinct reasoning and limiting their number.

To streamline the process, the tribunal might also limit the scope of replies to objections only, encouraging requesting parties to argue the general requirements (*e.g.*, of relevance and materiality) fully in their original application.

iii. Technological solutions

Although technological progress, particularly the rapid development of artificial intelligence (AI), might not allow us simply to abandon document production, it may well assist in making it more efficient – be it in narrowing down and assessing production requests or in dealing with documents upon production. While the earlier shift to electronic communications and data storage led to a sharp rise in the volume of data, the AI revolution now under way is expected not to increase data volumes as such, but rather to offer improved organizational capabilities. It is against this backdrop that the following will attempt to describe current or foreseeable use cases for AI in document production, noting that much of this is gazing into the crystal-ball still.

a) Narrowing down and analyzing requests for document production

AI can already be programmed to analyze document requests for overbreadth and lack of specificity. It can be trained on anonymized or fictitious arbitration cases, learn the pattern of requests that were granted, and then compare them against current requests. Overly broad requests can thus be flagged based on factors such as volume, lack of specificity, or over-inclusiveness.

AI could presumably also be trained to assess the relevance and materiality of documents requested. Taking into account the factual allegations made by the parties and applicable legal standards, as provided by the user, AI would thus generate a relevance score for each request. This could be used at least as a first indication by parties and tribunals and could also facilitate prioritizing requests.

Integrating such analyses, AI-powered drafting tools could then help parties craft narrower, more precise document requests, and they could similarly assist arbitral tribunals to determine whether requests are specific enough as well as relevant and material to the case.

b) Assisting in document production

Finally, the process of document production can benefit from technology keeping it efficient. In granting document production requests, tribunals often give specific directions for e-discovery, including the use of keywords, date ranges, and data sources. This ensures that searches are precise and helps in managing large amounts of electronic documents.

AI tools can assist in identifying and filtering out privileged, confidential, and private data by

recognizing patterns in language and metadata, minimizing the need for manual review. Similarly, duplicates can be eliminated from the production set, documents clustered by topics, etc.

Parties and tribunals may further use Technology-Assisted Review (TAR), *e.g.*, in the form of "predictive coding", which allows AI to learn from the review patterns of legal teams. After being trained on a sample set of documents, AI can then apply the same criteria to the entire dataset, reducing the time and resources spent on document review while ensuring that only the most relevant documents are produced. To ensure transparency, the tribunal will want to set up rules for and supervise the implementation of TAR.

3. Considerations for arbitral institutions and stakeholder organizations

Although this whitepaper focuses on practical recommendations for limiting document production in individual cases, the working group also wishes to offer a few broader policy considerations that arbitral institutions or other organizations active in the field may find useful.

The system of international arbitration as we know and value it, must continue to defend its legitimacy and remain relevant in an increasingly competitive environment of dispute resolution options. To do so, it must be both effective and efficient, and recognize that, for many users, more is not always better – oftentimes, less is more (and better). On our topic of document production, technological advances including AI may provide some relief, i.e., allow for efficiency gains, but they are unlikely to provide a solution.

Institutions and policymakers should therefore consider promoting or at least facilitating a "less is more" approach, consistent with the reforms to civil procedure adopted in several common law jurisdictions. They should encourage parties to prioritize their objectives (or to make conscious trade-offs) and support arbitrators to be more courageous both in streamlining the arbitral process and in determining individual points of procedure.[10] In expedited procedures, the need to accelerate the process seems to provide sufficient grounds for arbitrators, parties and counsel to step back from a "turn every stone" approach – and these procedures are now valued precisely for such qualities. Also for standard procedures, institutions should accordingly prioritize proactive case management and disincentivize parties and counsel from over-lawyering each and every procedural skirmish; otherwise, parties and counsel will often just shy away from taking any "risk" and continue turning all the stones, however pointless it may be.

With regard to document production, this may call for:

- incorporating limitations such as those recommended above into model clauses, guidelines on efficiency, model procedural orders, or case management checklists; depending on institutional policy, this could include disallowing document production altogether, save for exceptional cases (i.e., leaving only a safety valve),
- expanding expedited procedures, where document production is frequently disallowed or simply not pursued by the parties (going to show that document production is not always required for resolving cases, as expedited procedures apply across the board to all cases not meeting a certain monetary threshold),
- empowering arbitral tribunals, in expedited procedures and beyond, either (i) to allow document production only where it is specifically called for in the circumstances of the case, or (ii) to disallow it in their discretion (as is the case under the ICC and SIAC Expedited Procedure Rules),

10 On the need for "less is more" and the courage required from arbitrators and counsel see also the Queen Mary / White & Case International Arbitration Survey of 2025, p. 16.

- rules providing not for a separate production phase but recommending a frontloaded yet flexible system of ongoing document production to be integrated into the exchange of submissions, with a defined cut-off date before the hearing. This would not only strengthen the necessary link between requested documents and alleged facts, but it could give also arbitral tribunals greater confidence to reject requests for lack of materiality, as assessed from an ex ante perspective, knowing that they may revisit the issue later if justified by the evolving record.

Arbitral tribunals are responsible for ensuring the effectiveness and the efficiency of the arbitration (and sometimes, for protecting the parties from themselves). We should give them all the support and the tools they need, and then, finally, may we hope to return to a restrictive approach to document production, consistent with what was originally envisaged in the IBA Rules of Evidence.