Global Arbitration Review

The Guide to M&A Arbitration

Editor
Amy C Kläsener

Second Edition

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Editorial Coordinator
Tommy Lawson

Production and Operations Director
Adam Myers

Head of Content Production
Simon Busby

Copy-editors
Tessa Brummitt, Caroline Fewkes

Proofreader
Katrina McKenzie

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to M&A Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. We are therefore delighted to be publishing the second edition of this guide on mergers and acquisitions within the world of arbitration. It is a practical know-how text in two parts. Part I identifies the most salient issues in M&A arbitration, while Part II surveys substantive principles from select regional perspectives.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to M&A Arbitration*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, mining, and challenging and enforcing awards in the same practical way. We also have books on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*). Our thanks to the Editor, Amy C Kläsener, for her vision and energy in pursuing this project and to our colleagues in production for achieving such a polished work.

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Part I

Key Issues in M&A Arbitration

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The Taking of Evidence

Andrea Gritsch, Stefan Riegler and Alexander Zollner[1]

Introduction

The chances of success for a party in most legal disputes significantly depend on whether the party can present and prove the facts justifying its case. This is no different in arbitrations related to M&A transactions.[2] Yet, it is the taking of evidence in international arbitration that is – like no other stage of the proceedings – a contentious topic depending on the different legal and cultural backgrounds of the parties, counsel, arbitrators, witnesses and experts. This is due to various reasons. In particular, different legal jurisdictions may qualify certain issues as substantive issues while others consider them to be procedural. Also, nowhere can the divide between common law and civil law be better illustrated than in the conduct of proceedings by arbitrators (adversarial versus inquisitorial approach), the weighing of different kinds of evidence (witness testimony versus documentary evidence) and the volume of rules regulating the evidentiary procedure.

In particular, common law jurisdictions tend to have a more open approach when it comes to the disclosure of evidence by the opponent (even at the pre-litigation stage); civil law jurisdictions usually only provide for rather limited possibilities to do so. For example, when it comes to document production[3] the difference between the common law and civil law system becomes especially evident.[4] In arbitral proceedings, which often involve

1 Andrea Gritsch and Stefan Riegler are partners, and Alexander Zollner is a senior associate, at Wolf Theiss.

2 Broichmann/Schumacher, 'Evidence and Quantification of Damages in M&A Contracts', *FYB Financial Yearbook 2014*, p. 65 et seq.

3 For a definition of document production and its distinction to other terms used in this respect, see Marghitola, *Document Production in International Arbitration* (2015), Chapter 2.

4 Drymer/Gobeil, 'Document Production in International Arbitration: Communication Between Ships in the Night', in van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series Volume 18 (2015), p. 207 et seq.

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parties from different jurisdictions and legal cultures, those two concepts may easily clash.[5] However, it is an essential feature of international arbitration that different legal approaches and cultural backgrounds may be reconciled in the same forum.

To balance those two approaches in international arbitrations and to shape an international standard against which the various players may measure their expectations, the arbitration community developed several sets of rules,[6] of which arguably the IBA Rules on the Taking of Evidence in International Arbitration[7] (the IBA Rules) – containing rules on evidence by documents, witnesses, experts and inspection and on the evidentiary hearing and issues of admissibility and assessment of evidence – are the most widespread and successful initiative.[8,9] Their aim is described in the Preamble as follows: 'These IBA Rules . . . are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules to the conduct of the arbitration.' Although the applicability of the IBA Rules depends on an agreement by the parties or maybe even a tribunal ordering their application, they gained significant importance in arbitrations. In practice, parties usually do not agree upfront on the application of the IBA Rules, nor do tribunals unilaterally determine their application.[10] Instead, tribunals usually consult with the parties as to whether the IBA Rules shall apply to the proceedings directly (either wholly or partly) or, increasingly, as mere guidelines.[11]

In the Sections below, topics frequently arising in M&A arbitrations, such as burden and standard of proof issues, access to documentary evidence (in particular, document production and related issues such as privilege, confidentiality and adverse inference), fact witnesses and expert evidence will be discussed. Of course, this chapter does not and cannot claim to elaborate on those issues in a detailed – let alone exhaustive – manner; also,

5 Blackaby/Partasides et al., *Redfern and Hunter on International Arbitration* (6th ed., 2015), mns 6.93 et seq.; Marghitola, *Document Production in International Arbitration* (2015), p. 11 et seq.

6 e.g., ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration; ICC 2006 Special Supplement on Document Production; ICC Arbitration Commission Report on Techniques for Managing Electronic Document Production; ICDR Guidelines for Arbitrators on Exchange of Information; CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration; Chartered Institute of Arbitrators' Protocol for E-Disclosure in International Arbitration; Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), which are sometimes viewed as a civil law counterpart to the IBA Rules.

7 IBA Rules on the Taking of Evidence in International Arbitration 2010.

8 Drymer/Gobeil, 'Document Production in International Arbitration: Communication Between Ships in the Night', in van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series Volume 18 (2015), p. 209.

9 As to the recently launched Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), which may arguably be understood as a certain civil law counterpart to the IBA Rules, it remains to be seen whether they will reach an importance comparable to other sets of rules regarding the taking of evidence, in particular the IBA Rules.

10 As to the question of whether tribunals have the power to adopt the IBA Rules and direct that the parties proceed in accordance with them, see Born, *International Commercial Arbitration* (2nd ed., 2014), p. 2211.

11 The '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' by Queen Mary, University of London, found that the IBA Rules are used as guidelines in 53 per cent and as binding rules in 7 per cent of surveyed cases.

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it cannot present the one and only 'correct' answer to the various open questions. This chapter should, however, give the reader a comprehensive overview on frequent topics and – through references to other literature – further guidance on the taking of evidence in M&A arbitrations.

The burden of proof

When it comes to questions on the burden and standard of proof, a tribunal must first determine which law applies, including whether these issues are considered to be part of the applicable substantive law or the procedural rules. In civil law jurisdictions, questions on the burden of proof are traditionally viewed as substantive issues, while common law jurisdictions tend to adopt the procedural approach. By way of example – and leaving aside whether this provision may be directly applicable in international arbitration – Article 18(1) of the Rome I Regulation[12] recognises that the law governing a contractual obligation 'shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof'. However, even according to the civil law approach, other issues regarding the taking of evidence, such as the choice of means of evidence or the admissibility of evidence might be governed by procedural rules.[13] Finally, even among civil law jurisdictions and among common law jurisdictions the question of standard of proof might be treated differently.

This distinction is relevant because in most circumstances, the designation of the substantive law to be applied by the tribunal is relatively clear: either the parties have chosen the law or the applicable *lex arbitri* or have chosen arbitration rules containing a (conflict) rule as to how the applicable *lex causae* should be determined by a tribunal. If the tribunal considers questions on the burden of proof to be part of the substantive law, it will follow the substantive provisions (once it has determined the applicable *lex causae*). By contrast, if the question of burden of proof is qualified as a procedural issue, the tribunal will usually enjoy wider discretion in determining the evidentiary procedure and its rules. While the procedural rules applicable in court litigation at the place of arbitration will usually not be relevant, the *lex arbitri* will rarely contain strict rules as to how the tribunal should proceed. For instance, Article 19(2) of the UNCITRAL Model Law[14] provides that 'The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.' Similarly, Article 27(4) of the UNCITRAL Arbitration Rules (2013)[15] states, 'The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.' Consequently, if the tribunal treats the burden of proof as a procedural question, it will usually enjoy considerable discretion in the absence of any agreement by the parties to the contrary. Owing to the relevance of determining this issue, it is unsurprising that in international arbitration tribunals are encouraged to look into both the rules of the applicable substantive law and

12 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

13 Poudret/Besson, *Comparative Law of International Arbitration* (2nd ed., 2007), mn 643.

14 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

15 UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013).

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the procedural rules.[16] However, it is advisable that the tribunal lay out this framework at an early stage of the proceedings so the parties can present the facts and produce the evidence according to these expectations.

The issue whether evidentiary rules qualify as substantive or procedural leads to the question to what extent an arbitral award and the related proceedings are subject to court review. While arbitration laws may contain different grounds for set-aside, the New York Convention[17] is almost universally applicable. The disregard of rules on the burden of proof can have different sanctions depending on how the tribunal made such qualification. While a 'simple' erroneous application of the substantive law will usually not constitute a ground for refusal as long as the public policy of the enforcing state is not violated,[18] enforcement of the award may be refused if the arbitral procedure was not in accordance with the agreement of the parties.[19] This might occur if, for instance, the application of the IBA Rules or another set of procedural rules was not merely adopted as 'guiding principles' by the tribunal, but explicitly agreed by the parties and the tribunal has disregarded them.[20]

The purpose of taking evidence (on facts) is to adduce the evidence to support one's case and convince the tribunal to uphold it. The question as to which party shall prove what fact is often generally referred to as 'the' burden of proof. However, it is important to distinguish between two different burdens of proof: the legal burden of proof, also referred to as 'onus of proof', specifies which party must prove a particular issue; that party consequently bears the risk whether the tribunal considers certain facts to be true or not. The legal burden of proof is based on the principle *onus probandi incumbit actori*: the party that asserts certain facts must establish their existence. In other words, the claimant must prove all elements of its claims, and the respondent must prove all elements of its defence. This principle is, for instance, explicitly laid down in Article 27 of the UNCITRAL Arbitration Rules (2013): 'Each party shall have the burden of proving the facts relied on to support its claim or defence.' By contrast, the evidential burden of proof determines which party must produce evidence on a particular issue (*onus proponendi*). The evidential burden may shift in some circumstances.[21] Specific statutory or contractual provisions might govern issues, such as presumptions, shifting the (evidential) burden of proof and *prima facie* evidence. For instance, with regard to warranty issues, statutory or contractual provisions might provide that if a defect is revealed within a certain time after delivery, the defect is presumed and the seller or contractor must prove that the defect was not existent at the time of delivery. Such statutory rights are typically excluded in sale and purchase agreements. Rather, in an M&A context sellers often try to establish that certain information provided by them in the

16 Born, *International Commercial Arbitration* (2nd ed., 2014), p. 2315.

17 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

18 Article V(2)(b) New York Convention.

19 Article V(1)(d) New York Convention.

20 Poudret/Besson, *Comparative Law of International Arbitration* (2nd ed., 2007), mn 647.

21 Born, 'On Burden and Standard of Proof', in Kinnear, Fischer, Mínguez Almeida, et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (2015), p. 46; Menaker/Greenwald, 'Proving Corruption in International Arbitration', in Baizeau, Kreindler (eds.), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law (2015), p. 81 with further references to investment tribunals; Sharpe, 'Drawing Adverse Inferences from the Non-production of Evidence', *Arbitration International*, Volume 22, No. 4, p. 552.

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course of due diligence or contract information or otherwise available in public registers shall be deemed disclosed with the effect that buyers would have to prove the opposite. The tribunal should apply the specific statutory or contractual provisions if and to the extent it determines that they are part of the (substantive or procedural) applicable law.

Since M&A arbitrations are heavily determined by contractual provisions, in particular by the share- or asset purchase agreement and corresponding deal documents, the tribunal should pay particular attention to the wording of those provisions. The parties may have (explicitly or by underlying intention) agreed to shift the burden of proof. Another example where the tribunal might not apply the common rules of burden of proof is when a party needs to establish an omission. For instance, it might be difficult for a purchaser to demonstrate that it has not received certain relevant information on the target company. In such circumstances it will likely fall on the seller to demonstrate that it provided or made available the relevant information.

The standard of proof

As indicated above, the standard of proof may be governed by the substantive law or by the procedural rules. The standard of proof is the level of proof required to convince the tribunal. While civil law jurisdictions often describe it as 'full conviction', common law jurisdictions often refer to the 'balance of probabilities'. It has therefore been argued that the civil law system requires a higher standard of proof; as the common law understanding merely requires that something was 'more likely than not'.[22] However, in international arbitration, the distinction is more theoretical than practical. As a result, it has been argued that the party that can establish a 'preponderance of the evidence'[23] will convince the tribunal.

Commentators have expressed different views as to whether the standard of proof should be heightened or even lowered in particular circumstances, for example if corruption, fraud or other criminal behaviour is alleged.[24] Similar questions might arise in M&A disputes. For instance, certain claims for contractual liability are usually excluded or at least limited unless the purchaser can prove that the seller wilfully deceived the purchaser by, for example, withholding crucial information or giving misleading or incorrect information. Although the evidential burden might rest on the purchaser, the task of establishing such facts might be alleviated if the standard of proof is lower than usually required under the substantive law. Another example relates to the quantification of damages. Some commentators are satisfied with a lower standard of proof if the exact amount cannot be ascertained by the tribunal; others might consider this to be a question of the applicable law. There might be specific provisions under the applicable law that allow tribunals to determine an amount in instances where an exact determination would require disproportionate resources.

22 See, e.g. Blackaby/Partasides et al., *Redfern and Hunter on International Arbitration* (6th ed., 2015), mn 6.87.

23 Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 766 with further references.

24 Menaker/Greenwald, 'Proving Corruption in International Arbitration', in Baizeau, Kreindler (eds.), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law (2015), p. 82 et seq. with further references.

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Access to documentary evidence

In M&A arbitrations, documentary evidence (e.g., the various documents contained in data rooms) plays a significant role. Generally, parties are advised to preserve the data room so that they have the information that was provided when signing the SPA and parties might keep information as to how they valued the target company or companies and relevant documents as to the basis of the agreement on the price. Further, and depending on the parties' relative negotiating power, sellers sometimes contractually 'secure' post-closing access to evidence by having the right to meet with the target group companies' management, employees or inspect the target company's books and records, etc. Yet, there are frequently situations in which a party cannot rely on such clauses and does not have access to the relevant evidence needed to present and prove the facts justifying its case. For example, this could be the case for documents that are in possession of the opposing party or the target company (e.g., documents useful for the buyer containing information on false statements made by the seller about the target company could be in the seller's possession).[25] In the case of documents in the possession of the opposing party or the target company, the procedural mechanism of document production may be of particular importance.

Before going into the details of document production, a clear distinction should be made: a procedural obligation to produce documents must be distinguished from an obligation to produce documents under substantive law, which may be derived from statutes, case law or – as described above – contract.[26] The contract may enable the entitled party to independently claim for the handing over of the respective documents (or granting of access to the relevant people). In such case, at least for the documents covered by the contractual provisions, one does not necessarily have to resort to document production.[27] Further, the role document production plays in a particular arbitration, to some extent, also depends on the rules of the chosen arbitral institution,[28] the procedural rules of the place of arbitration[29] and the parties' agreement.[30]

Although it might be advisable to preserve relevant documents to be prepared for a future dispute, being in possession of these documents might also be disadvantageous as in document production they might have to be handed over to the counterparty. This tension can likely only be resolved case by case.

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25 Broichmann/Schumacher, 'Evidence and Quantification of Damages in M&A Contracts', *FYB Financial Yearbook 2014*, p. 70 et seq.

26 Marghitola, Document Production in International Arbitration (2015), p. 7.

27 Notably, although a document production phase may also be conducted without reference to the IBA Rules, they will, owing to their importance, also frequently be referred to in the following Sections, which describe how document production phases are usually conducted and which legal questions frequently arise.

28 For an assessment of the tribunal's powers as to document production based on arbitration rules, see Marghitola, *Document Production in International Arbitration* (2015), p. 25 et seq.

29 For an assessment of the tribunal's powers as to document production based on legislation, see Marghitola, *Document Production in International Arbitration* (2015), p. 22 et seq.

30 Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions', in Campbell (ed.), *The Comparative Law Yearbook of International Business* (2005), p. 307; for model clauses regulating document production, see Marghitola, *Document Production in International Arbitration* (2015), Chapter 8.

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The timing of document production

It is crucial to find the right time to schedule document production. Scheduled too early, the parties might be unable to fully assess which documents are needed to present or defend their case (as there might also be the need for documents to respond to certain allegations made by the counterparty); also, the tribunal might not sufficiently understand the case at this stage. Scheduled too late, a party might use a document production request to significantly delay the proceedings. The 'best' timing of a document production phase depends on the particular case and there is therefore no one-size-fits-all solution. As a rule of thumb, it is often argued that document production should be scheduled once the parties have submitted their main submissions, so that the tribunal is in a position to assess whether the documents requested by the parties are indeed relevant and material.[31]

The usual course of a document production phase

Usually, tribunals at an early stage of the proceedings discuss with the parties whether there is a need for a document production phase and how it should be structured (e.g., form of a document production request, timing of the request, the need for protective orders).[32] Frequently, the rules on document production agreed by the tribunal and the parties are then included in a procedural order or specific procedural rules. As mentioned, the IBA Rules are not usually agreed to be directly applicable, but are frequently referred to as guiding principles.

In terms of format, the Redfern Schedule has developed into a commonly accepted tool for organising and presenting the process of document requests, objections and decisions.[33] It usually has (at least) four columns[34] and guides the tribunal and the parties through the usual course of a document production phase:

The first and second column (Step I) is filled out by the requesting party. While the first column is reserved for setting out a description of specific requested documents sufficient to identify them or a description in sufficient detail of a narrow and specific requested category of documents (to prevent an impermissible 'fishing expedition'), the second column should contain (1) a statement as to how the documents requested are relevant to the case and material to its outcome and (2) a statement that the documents requested are not in the possession, custody or control of the requesting party and a statement of the reasons why the requesting party assumes the documents are in the possession, custody or control of another party.

In this respect, it is debatable whether a party may only request documents material to issues for which it bears the burden of proof. While, according to some authors, a tribunal must determine 'whether the requesting party actually needs the documents to discharge

31 Article 3.3 (b) IBA Rules. See Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 842 et seq.; see also ICC 2006 Special Supplement on Document Production, p. 88.

32 See ICC Arbitration Commission Report on Techniques for Managing Electronic Document Production, para. 5.5 (b); Marghitola, *Document Production in International Arbitration* (2015), p. 117 et seq.

33 Blackaby/Partasides et al., *Redfern and Hunter on International Arbitration* (6th ed., 2015), mn 1.238 and Figure 1.1.

34 Blackaby/Partasides et al., *Redfern and Hunter on International Arbitration* (6th ed., 2015), mn 6.104.

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the burden of proof. If not, the request should be denied,'[35] other authors oppose this view.[36] Yet another view is, that the rule that a party may only request production of documents material to an issue for which it bears the burden of proof should not be adopted 'as a blanket rule'.[37]

Particularly in M&A arbitrations, the concept of control may be debatable, for example when documents are located at the target company. Indeed, it will depend on the particular case whether the 'group concept', under which a tribunal may order the production of documents that are not in the direct possession of the requested party, but are in the possession of a company that is also a member of the group to which the party belongs, can be applied.[38] While this concept might be justified in cases where the requested party controls the entity in possession of the document, the justification is less clear when the requested party is a subsidiary.[39] Alternatively, reference could be made to Article 9.3 of the IBA Rules, which provides for a basis for production of documents by third parties under certain circumstances.[40]

In the third column (Step II), the requested party states the extent to which it is prepared to accede to the request (leading to a voluntary production), or if it objects, the grounds on which it does so (in essence triggering the need for a decision by the tribunal). Objections may be based on formal or substantive arguments. With respect to formal objections, a party may, for example, argue that the request for document production is too broad or that requested documents are not in its possession, custody or control. As to substantive objections, a party must make an assessment of the case and could for instance argue that the documents are not relevant to the case or material to its outcome.

The fourth column is left blank for the tribunal's decision (Step III). In this decision, the tribunal may also decide on protective measures (e.g., in cases of sensitive or confidential information). Depending on the outcome of the request, documents must be produced within a deadline set by the tribunal (Step IV). The produced documents are usually not automatically on the record,[41] but have to be introduced by the respective parties with their submissions under the regular rules of the case.

Occasionally, the requesting party may reply to the objections of the requested party so that the Redfern Schedule has five columns (the fourth column reserved for the reply and the fifth column for the tribunal's decision). Although one could argue that a reply is not necessary and might be problematic with regard to the requested party's right to be heard,[42]

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35 Derains, 'Towards Greater Efficiency in Document Production Before Arbitral Tribunals – A Continental Viewpoint', in ICC, Document Production in International Arbitration, p. 87; see also Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 3 mn 138 et seq.

36 Born, *International Commercial Arbitration* (2nd ed., 2014), p. 2364.

37 Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 860.

38 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 3 mn 150 with further references.

39 Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 864.

40 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 3 mns 206 et seq.; Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 854 et seq.

41 IBA Rules, Art 3.4 and 3.7; See Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 842.

42 As the requesting party could have the first and last word on its own request.

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there may be occasions in which this is justified. Such reply may be limited to objections that the requesting party did not have to, and did not, address when presenting the reasons underlying its request.[43]

Requesting electronic files (e-document production)

The vast majority of documents used in today's business transactions are stored electronically (one must only think of the general use of electronic data rooms in M&A transactions and the fact that communication between counsel, advisors and transaction parties is basically done by email).[44] The IBA Rules take a neutral approach[45] as to the nature of documents and define a document to be 'a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means'. Therefore, electronic evidence (including metadata[46]) is generally considered to be covered by the IBA Rules. The IBA Rules, however, do not prescribe the production of electronic documents as such in a particular case, but rather they provide a framework in case the parties agree to, or the tribunal orders, the production of electronic documents.[47] In any case, certain differences with regard to the production of hard-copy documents should be kept in mind.

Firstly, tribunals (at an early stage) might wish to consult with the parties whether e-document production would be possible and, if so, how it should be conducted.[48] The outcome of such discussion or the decision of the tribunal will usually be addressed in procedural orders covering the document production phase.[49] In this respect, there is also a variety of further guidelines and checklists.[50]

Secondly, the phrasing of the document production request raises particularities, as it should be sufficiently narrow and specific. In this respect, the IBA Rules in Article 3(3)(a)(ii) suggest that the requesting party may, or the tribunal may require it to, additionally identify specific files, search terms, individuals or other means of searching for such documents efficiently and economically.

43 Habegger, Chapter 13, Part V: 'Saving Time and Costs in Arbitration', in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, p. 1403.

44 Blackaby/Partasides et al., *Redfern and Hunter on International Arbitration* (6th ed., 2015), mns 6.104 with further references.

45 1999 IBA Working Party & 2010 IBA Rules of Evidence Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010), p. 9; Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 3 mn 122.

46 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 3 mns 12 and 123.

47 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012),, Article 3 mns 56 and 122.

48 Born, *International Commercial Arbitration* (2nd ed., 2014), p. 2373.

49 See ICC Arbitration Commission Report on Techniques for Managing Electronic Document Production, para. 5.5 (a).

50 Chartered Institute of Arbitrators' Protocol for E-Disclosure in International Arbitration; ICC Arbitration Commission Report on Techniques for Managing Electronic Document Production; The Sedona Conference Working Group on Electronic Document Retention & Production, The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production.

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Thirdly, when it comes to the tribunal's discretion to reject requests, the refusal ground of an unreasonable burden to produce plays an important role.[51] In particular, this burden may vary depending on the different software currently available to the requested party (and if the question arises as to whether a party should be obliged to acquire the software). In this respect, a tribunal should not only assess the burden on the requested party but should also consider its cost-shifting powers (e.g., making e-document production conditional on paying all or parts of the respective costs of the requested party).[52]

Fourthly, another question is whether electronic documents should be provided in electronic format or produced in paper form. Article 3.12 of the IBA Rules indicates that electronic documents are to be submitted or produced in the form most convenient or economical to the provider and which is reasonably usable by the recipients, unless otherwise agreed, or the tribunal otherwise directs.[53] Yet, it is crucial that the documents are accessible to the other parties and the tribunal without undue delay and costs.

Finally, there is the question as to the consequences of inadvertently produced documents (in particular, documents that might be subject to privilege or otherwise protected from production); inadvertent production might occur in e-document production, when adequate human review was not possible within the prescribed time frame. In such cases, parties may conclude claw-back agreements preventing either party from making use of inadvertently produced documents, unless a counterparty can show that the document was properly produced.[54]

Grounds for refusing requests for document production

Article 9.1 of the IBA Rules vests tribunals with broad discretion as to the admissibility (and relevance, materiality and weight) of evidence. As the issue of admissibility may vary from one jurisdiction to another,[55] the IBA Rules try to strike a balance in this respect. Pursuant to Article 9.2 the tribunal 'shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection' based on[56] (1) lack of sufficient relevance or materiality, (2) legal impediment or privilege, (3) unreasonable burden to produce, (4) loss or destruction of the document, (5) commercial or technical confidentiality, (6) political or institutional sensitivity or (7) considerations of procedural economy, proportionality, fairness or equality of the parties.[57]

In disputes related to M&A transactions, a requested party will likely invoke issues of privilege (as parties are usually advised by counsel, be it outside or in-house counsel, during the negotiation of a transaction) and confidentiality (as relevant information is now with the buyer or seller of the target company, which is often a competitor of the contractual

51 Article 9.3(c) IBA Rules. See Marghitola, *Document Production in International Arbitration* (2015), p. 98 et seq.

52 Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 850.

53 Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 847.

54 Born, *International Commercial Arbitration* (2nd ed., 2014), p. 2374.

55 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 4.

56 This list should not be considered as exhaustive, see Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 18.

57 For a detailed analysis of those grounds see Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mns 18 et seq.; Waincymer, *Procedure and Evidence in International Arbitration* (2012), Chapter 11.7; Marghitola, *Document Production in International Arbitration* (2015), Chapter 5.

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partner).[58] While the issue of privilege could – because of many unresolved or highly debated questions – be discussed in length (and would likely fill its own book), this chapter will only mention some important questions in this respect and direct the reader to relevant literature for further information.

The complexity of privilege in the context of arbitration stems from the fact that the nature and concept of privilege varies from jurisdiction to jurisdiction and in civil and common law (in particular as there are differences in the qualification of privilege as a substantive or procedural matter in common and civil law). Further, there are no established, uniform conflict-of-law rules for the determination of the applicable law to privilege in international arbitration.[59] Also the IBA Rules do not provide a solution on this issue; although Article 9.3 does contain a checklist for the tribunal when considering issues of privilege.[60]

From a conceptual point of view, it is submitted that the main difference is that the common law attorney–client privilege usually covers any communications (excluding facts) between client and attorney (or – in most jurisdictions – in-house counsel[61]) which have the main purpose of providing legal services and may be invoked by clients and attorneys; the civil law concept of professional secrecy usually covers everything the attorney knows about the client's affairs and may be invoked by attorneys (or – in a limited number of jurisdictions – in-house counsel).[62] The situation is further complicated by the European Court of Justice's case law.[63]

In the absence of established conflict-of-law rules regarding privilege,[64] legal doctrine provides for several connecting factors (e.g., the applicable procedural or substantive law, the law where the party or lawyer claiming protection resides) for the determination of the law applicable to the issue of privilege.[65] However, as those connecting factors may not fully satisfy the premise that tribunals should do justice to the legitimate expectations of the parties when rendering decisions on choice of law, tribunals frequently resort to the 'closest connection' or 'centre of gravity' test, which often leads to the application of the law of the place where the entire attorney–client relationship has its predominant effects.[66]

58 As to possible confidentially reasons see Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 43; Ehle, 'Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions', in Campbell (ed.), *The Comparative Law Yearbook of International Business* (2005), p. 306.

59 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 19 with further references.

60 1999 IBA Working Party & 2010 IBA Rules of Evidence Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010), p. 25.

61 Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 812.

62 Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 812; Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 23 and 24.

63 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 25 with references to *AM&S Europe Ltd v. Commission*, C-155/79 and *Akzo Nobel Chemicals v. Commission*, C-550/07; Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 812.

64 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 28; Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 802 et seq.

65 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 28.

66 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 29 with further references; Born, *International Commercial Arbitration* (2nd ed., 2014), p. 2385 with further references.

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Another doctrine endorsed by some authors[67] and arguably by the IBA Rules[68] is the 'most favourable privilege' rule, which authorises a tribunal to apply the law of the party that accords the broadest protection to any given privilege issue (and by that, aims to ensure fair and equal treatment of the parties).

The IBA Rules in Article 9.3 only contain non-binding guidance with respect to the determination of applicable privileges,[69] in which a tribunal may basically take into account (1) any need to protect confidentiality in connection with providing or obtaining legal advice, (2) any need to protect confidentiality in connection with settlement negotiations, (3) the expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen, (4) any possible waiver of any applicable legal impediment or privilege and (5) the need to maintain fairness and equality between the parties, particularly if they are subject to different legal or ethical rules. In particular the fifth consideration appears to be of particular importance in cross-border situations (so that parties from common and civil law countries are treated equally) and can be managed by employing the 'most favourable privilege' rule.[70]

Adverse inference

When parties do not comply with tribunals' document production orders, (in the context of M&A arbitrations, one might think of documents that show that certain information (such as notes in negotiation protocols) has or has not been disclosed to the counterparty) the question arises which consequences such behaviour might have, in particular as tribunals lack the power to compel production[71] and judicial assistance is often cumbersome and time-consuming.[72] A technique also supported by Article 9.5 and 9.6 of the IBA Rules is to draw an 'adverse inference' from the silence of a party, or failure to comply with an order of the tribunal for the production of documentary evidence.[73] Therefore, to apply this principle, there must have been a document production order and the requested party must have failed to provide a 'satisfactory explanation' for not having produced the documents in question.[74]

67 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 30 with further references; Marghitola, *Document Production in International Arbitration* (2015), p. 78 et seq.

68 1999 IBA Working Party & 2010 IBA Rules of Evidence Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010), p. 25.

69 1999 IBA Working Party & 2010 IBA Rules of Evidence Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010), p. 25; Marghitola, *Document Production in International Arbitration* (2015), p. 76.

70 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 34.

71 Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration* (2003), mn 22-58.

72 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 54.

73 Blackaby/Partasides et al., *Redfern and Hunter on International Arbitration* (6th ed., 2015), mn 6.113; for further consequences of a failure to comply with a tribunal's order see Born, International Commercial Arbitration (2nd ed., 2014), p. 2388 et seq. and Marghitola, *Document Production in International Arbitration* (2015), Chapter 9.

74 Blackaby/Partasides et al., *Redfern and Hunter on International Arbitration* (6th ed., 2015), mn 6.114.

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Further to the principles enshrined in Article 9.5 and 9.6 of the IBA Rules, according to some authors,[75] further requirements must be met for a drawing adverse inference: (1) the party seeking adverse inference must produce all available evidence corroborating the inference sought; (2) the requested evidence must be accessible to the requested party; (3) the inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld; (4) the party seeking the adverse inference must produce *prima facie* evidence; and (5) the requested party must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought. Notably, other authors raise concerns that these criteria would limit the application of adverse inference too much.[76]

Fact witnesses

Another, often one of the most important, sources of evidence is the testimony of fact witnesses. In international arbitration, it has become standard practice that a party which intends to present a witness first submits a written witness statement, which is then followed by the examination of the witness at the subsequent oral hearing.

Generally, the purpose of a written witness statement is to set out the topics of the testimony to facilitate the preparation of the witness's examination in the oral hearing. This generally recognised understanding is reflected, *inter alia*, in Article 4 of the IBA Rules, which also sets out what formal content a written witness statement should have.

In many instances, the written witness statement stands for the examination in chief,[77] namely the questioning by counsel of the party that nominated the witness. However, this is not a strict rule, and the advantage of starting with the examination in chief by the party's 'own' counsel could be to accustom the witness to testifying before a tribunal and to avoid the immediate exposure to opposing counsel.

Cross-examination is usually the core part of an oral hearing. It may also become the most contentious part, depending on the style and cultural background of the counsel and arbitrators. While common law counsel consider it to be state-of-the-art to ask closed questions to 'put the case before the witness' and to raise doubts on his or her credibility, lawyers with a civil law background might be used to adhere to the guiding principle that witnesses should be asked open questions to serve the purpose of fact-finding. Moreover, arbitrators from a civil law jurisdiction might apply a more inquisitorial approach than their common law counterparts. In any event, Article 8(2) of the IBA Rules stipulates that the tribunal shall at all times have complete control over the evidentiary hearing.

To balance contrary understandings of counsel (e.g., because of different ethical rules) of the method and purpose of written witness statements or cross-examination, tribunals should at a very early stage of the proceedings address issues such as counsel's role in the drafting of written witness statements based on information or testimony of the respective witness, whether meetings with witnesses for preparing them for examinations are

75 Zuberbühler/Hofmann/Oetiker/Rohner, IBA Rules of Evidence (2012), Article 9 mn 58 et seq. with further references.

76 Born, *International Commercial Arbitration* (2nd ed., 2014), p. 2393; Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 776; Marghitola, *Document Production in International Arbitration* (2015), p. 177.

77 See, e.g., Article 8(4) IBA Rules.

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permitted or whether cross-examination is limited by the scope of the written witness statement. This is a matter of fairness and ultimately may be a matter of whether the parties were granted the equal right to present their case.[78]

In M&A arbitrations, the accessibility to and availability of witnesses may constitute a particular problem that could already be addressed by drafting respective contractual provisions. Managers and other employees of the target company might serve as key witnesses. If personnel have left the company, it might be – as in any other case – difficult for either side to convince them to provide witness testimony, in particular in light of tribunals lacking the *imperium* to force witnesses to appear, so that parties must rely on the witnesses' voluntary cooperation. If the key personnel have remained with the company, they will often feel more loyal to the new owners than to the previous ones or even feel under some pressure to appear as witnesses for the new owner, in which case the seller's access could be safeguarded by including provisions that allow the seller to approach the relevant staff.

The lack of *imperium* of the tribunal could, in some instances, be compensated by involving state courts where the *lex arbitri* so allows. Under certain arbitration or civil procedural laws, tribunals or parties to arbitral proceedings may ask the state courts at the place of arbitration to provide judicial assistance. This could, for instance, include the summoning of witnesses before a state court. However, the involvement of state courts during arbitral proceedings is – except where interim measures are concerned – usually rather rare.

Finally, various questions might arise if lawyers (in particular the lawyers that were advising in the transaction) are called to appear as witnesses. While those lawyers might be of particular value for a party as they – apart from being in possession of the relevant documents – usually have knowledge of aspects that might not be written down, such as the intention of the parties when agreeing on certain clauses in an SPA, issues such as privilege or other confidentiality obligations or professional duties might arise. Those issues might even be intensified if the lawyers advising in the transaction act as counsel in the arbitration.

Expert evidence

Expert evidence is of particular importance in M&A related arbitration. Again, common law jurisdictions and civil law jurisdictions have traditionally taken different approaches. While the former regularly rely on party-appointed experts, the latter prefer tribunal-appointed experts. These traditions simply reflect the different conduct of proceedings in the two systems, namely adversarial as opposed to inquisitorial. The pros and cons for either approach are numerous[79] and must be assessed case by case. Whether the tribunal appoints 'its' expert to assist in deciding the matter or the parties retain and instruct their 'own' experts does not so much depend on the legal background of the persons involved, as on pragmatic aspects such as time and costs.

Even if the *lex arbitri* or the applicable arbitration rules do not explicitly refer to the parties' right to appoint an expert, this right is based on the overall and fundamental right of each party to present one's case. Similarly, a tribunal's power to appoint an expert will be

78 For practical guidance with a helpful checklist on conducting an oral hearing, see e.g. Lévy/Reed, 'Managing Fact Evidence in International Arbitration', in van den Berg (ed.), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series Volume 13 (2007), pp. 633–644.

79 See, for instance, Waincymer, *Procedure and Evidence in International Arbitration* (2012), p. 932 et seq.

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covered, in most circumstances and in the absence of the parties' agreement to the contrary, by the discretionary power to conduct the proceedings and to determine issues of evidence taking. The IBA Rules suggest in Article 6(1) that the tribunal should first consult with the parties before it appoints its 'own' expert.

In practice, tribunals will usually strive to obtain the parties' agreement (not necessarily a formal procedural agreement, but at least a common understanding) as to whether to have a tribunal-appointed expert or experts instructed by the parties. If the parties cannot agree, most arbitration laws and arbitration rules grant the tribunal the power to determine this. Despite this procedural discretion, the tribunal must consider whether its decision to have a tribunal-appointed expert or not to hear an expert at all could violate one party's right to properly present its case. Another question as to the appointment of experts is not just whether to have party-appointed experts or a tribunal-appointed expert, but often whether to have both. The IBA Rules are a helpful source for the procedure on appointing experts and presenting written and oral expert evidence.

In M&A disputes, different kinds of experts may be retained. One aspect relates to the question as to how to qualify and assess an expert determination that was obtained prior to the initiation of the arbitration as a pre-arbitral step (see Chapter 3 on conflicts between expert determination and arbitration clauses). In most M&A disputes, the claimant claims compensation for certain damages or a price adjustment for which quantum experts will be needed (see Chapter 6 on the role of the quantum expert in M&A disputes). Apart from these kinds of experts, one might also need the assistance of experts on accounting or certain legal fields such as corporate, capital markets, competition, etc., in particular where foreign law is concerned.

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Appendix 1

The Contributing Authors

Andrea Gritsch
Wolf Theiss

Andrea Gritsch is a Vienna-based partner and member of the Wolf Theiss management team. She handles large-scale mandates spanning multiple jurisdictions and provides full coverage in key legal areas, including M&A, banking and financial services, finance, regulatory compliance, corporate and financial restructuring. Her clients include credit and financial institutions, insurance undertakings, corporates, corporate and financial investors, private equity and venture capital. In the context of her M&A practice, Andrea regularly advises in contentious M&A disputes, with a particular focus on financial arbitration. Andrea studied Austrian law and international economics at the University of Innsbruck, Austria, and Aston University, United Kingdom. Prior to becoming a lawyer, she was a candidate of the Austrian judiciary.

Stefan Riegler
Wolf Theiss

Stefan Riegler is a member of the dispute resolution team and heads the arbitration practice. Stefan specialises in advising companies on commercial disputes, especially in the energy, construction and infrastructure sectors; he is also experienced in handling corporate, post-M&A and banking disputes. Stefan has acted as counsel and arbitrator under major arbitration rules, such as the ICC, DIS and Vienna Rules, as well as in ad hoc arbitration proceedings. In addition, he advises on private enforcement issues. Stefan is a member of the board of the Austrian Arbitration Association, the ICC Commission on Arbitration and various other international arbitration organisations, and is the author of numerous articles and publications on arbitration.

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Alexander Zollner
Wolf Theiss

Alexander Zollner is a member of the dispute resolution team in Vienna. He focuses on commercial disputes and is particularly experienced in advising clients in corporate, post-M&A and banking disputes. Alexander has handled disputes under the ICC, VIAC, DIS and Swiss Rules, and represented clients before ad hoc tribunals. He also assists in disputes regarding arbitration-related matters before Austrian courts. Prior to joining Wolf Theiss, Alexander worked at the Vienna office of a global law firm. Alexander obtained his law degree from the University of Vienna and gained international experience during his studies in Denmark (University of Copenhagen), focusing on international and European law. He is a member of the Young Austrian Arbitration Practitioners, CEPANI40, DIS40 and ICC YAF, and is the author of several articles on arbitration.

Wolf Theiss

Schubertring 6
1010 Vienna
Austria
Tel: +43 1 51510
Fax: +43 1 51510 25
andrea.gritsch@wolftheiss.com
stefan.riegler@wolftheiss.com
alexander.zollner@wolftheiss.com
www.wolftheiss.com

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M&A disputes can be unique in their hostility and complexity. *The Guide to M&A Arbitration* – published by Global Arbitration Review – is a practical guide intended to provide guidance on what merger parties should think about, when. It pools the wisdom of specialists who describe how to prevent these disputes arising and how best to resolve them when they do. The guide is structured in two sections. Part I consists of eight chapters on planning and procedural issues, covering everything from drafting clauses to how to structure contracts to minimise the potential for disputes. Part II offers a geographical survey of important differences in national laws that may affect the outcome of a dispute. The second edition of this guide is written by 36 specialists from a variety of backgrounds.

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