

## PRESERVING DUE PROCESS: DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION"

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**Abstract:** Arbitration, a preferred alternative to court proceedings, hinges on the autonomy and flexibility granted to disputing parties. This autonomy is reflected in the arbitration agreement where parties can stipulate the governing law and the seat of arbitration. In the absence of specific clauses, the law of the arbitration's seat typically governs the proceedings.

In international commercial arbitration, the primary source of resolution lies in the documentary evidence submitted by the parties. They have the prerogative to present oral or documentary evidence to support their claims or request the production of relevant documents from the other party. This right is integral to due process of law, and many international institutional arbitration rules empower the arbitral tribunal to order the production or disclosure of documents, either at the tribunal's discretion or upon party request.

The extent of document disclosure in arbitration hinges on various factors, including party agreement, applicable arbitration rules, and the document's relevance to the case's outcome. Parties may employ discovery or disclosure procedures to request documents from one another. This power of arbitral tribunals to order document production is fundamental to preserving due process of law.

This paper delves into the provisions granting arbitral tribunals the authority to order document production, ensuring due process of law in arbitration. It references international, institutional, and select national arbitration rules related to document production.

**Keywords:** arbitration, due process, document production, international commercial arbitration, arbitral tribunal.

### Introduction

Arbitration of a dispute requires an arbitration agreement between the parties. Arbitration is largely what is agreed to by the parties.<sup>i</sup> The reason for preferring arbitration over court proceedings is autonomy of parties and flexibility in procedure. The international arbitration rules provide the opportunity to the parties to choose arbitrators and arbitration procedure. At the time of signing arbitration agreement, it is for the parties to stipulate the law governing the arbitration procedure and seat of their arbitration. The tribunal follows the arbitration rules opted by the parties. If nothing is said, the law of the seat of the arbitration will generally govern the arbitration proceedings.<sup>ii</sup>

In arbitration, the primary source of information for resolution of international commercial arbitration disputes is the documentary evidence submitted by the parties.<sup>iii</sup> It is for the parties to submit oral or documentary evidence in support of their claim. Similarly, a party may request the other party to produce a document relevant to the case. The right to present a case is a part of due process of law. In order to ensure due process of law and resolve the dispute, many international institutional arbitration rules confer the powers on the arbitral tribunal to order production or disclosure of documents, upon its own or on the request of a party.

Accordingly, the party to the arbitration may make a request to the tribunal or the tribunal upon its own order a party to produce the document, which is relevant to the case. How much disclosure is allowed in arbitration depends upon the agreement between the parties, applicable arbitration rules, and relevance of the document to the outcome of the case. The parties to the arbitration sometimes use discovery or disclosure procedures to seek the production of documents from other party. The power of the arbitral tribunals to order for production of relevant documents from a party to the arbitration is a part of due process of law.

Therefore, the paper attempts to identify the provisions that give power to the arbitral tribunal to order the production of documents, in order to ensure due process of law in arbitration. In this context, reference is made to international, institutional and some national arbitration rules relating to production of documents.

The difference between discovery and a request for production of documents is that discovery is based on an obligation on the parties to disclose any document whether its existence is known to the other party or not, to the extent that it is relevant to the claim or defense. A document production request is made by a party and covers specific documents that are sufficiently described to be material and relevant to the outcome of the case.<sup>iv</sup> Documentary discovery is part of the process of presenting evidence. The principle purpose of documentary discovery is to assist the parties in ascertaining the existence of documents, the whereabouts of those documents and hence details and facts relevant to the claims and defenses in issues in the reference.<sup>v</sup>

## **2. Production of documents in international commercial arbitration:**

The production of documents by a party in arbitration may require an order by the tribunal. According to the common law system that each party must disclose to the other all documents in its possession that are relevant to its claims or defenses, unless those documents are privileged.<sup>vi</sup> In Civil law countries also the practice is each party to produce documents upon which it relies and a party may ask for the production of specific document which it believes to be (a) in a possession of the opposing party and (b) likely to assist its case. The practice in international arbitration that it is for the tribunal to blend common law and civil law procedure.<sup>vii</sup>

Indeed, both the common-law and civil-law rules of procedure governing the settlement of disputes are based on the axiom of “fair-trial” or “due process” which comprises the following fundamental elements: equal treatment of the parties and opportunity to be heard before the court.<sup>viii</sup>

According to the Universal Declaration of Human Rights, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligation.<sup>ix</sup> All persons shall be equal before the courts and tribunals.<sup>x</sup>

The elements of due process of law or principles of natural justice include, fair hearing, equal treatment of the parties and opportunity to present the case. The general principles of due process, and the specific right to equal opportunity in presenting the case, are common principles in national arbitration laws as well as institutional rules.<sup>xi</sup>

If a party's requests are not voluntarily complied with by the adverse party, an application ordering disclosure of requested documents can be made to the tribunal. The tribunal will typically encourage the parties to comply voluntarily with another's request; thereafter, if its encouragement is not heeded, the tribunal will make an order either granting or denying the parties' request.<sup>xii</sup>

According to the leading arbitration, statutes and institutional rules almost universally permit international arbitral tribunals to order the parties to the arbitration to make disclosure of documents and other materials as part of the evidence-taking process.<sup>xiii</sup> Even in the absence of statutory grants of disclosure powers, most national arbitration regimes afford tribunal's broad inherent authority over the fact-finding process, which includes authority to order parties to the arbitration to make disclosure.<sup>xiv</sup>

Rules of various institutions such as ICC, LCIA, DIS, AAA as well as UNCITRAL Arbitration rules grant explicitly or implicitly the power to the tribunal to require production of documents at its discretion.<sup>xv</sup>

In *Chevron Transport Corporate v. Astro Vencedorcompania Naviera, S.A.*,<sup>xvi</sup> the District Court held that arbitrators may have "affirmative duty" to ensure that relevant evidence in the hands of one party is made available to the other side. In *Oriental commercial & Shipping Co. v. Rosseel, N.V.*,<sup>xvii</sup> held that courts will permit discovery when a movant demonstrates "exceptional circumstances" and the discovery will "aid" arbitration. In *Ferro Union Corp. v. SS. Ionic Coast Ferro Union Corp v. SS. Ionic Coast*,<sup>xviii</sup> the court granted the plaintiff's discovery request upon satisfaction of the exceptional circumstances test.

Hence, in international arbitration under certain circumstances, a party may invoke the applicable arbitration rules and request the tribunal to order the other party to produce the documents in its possession. The most of the arbitration rules empowered the arbitral tribunal to take appropriate decision, if a document is relevant for the outcome of the dispute. The following paragraphs deal with the provisions of fair hearing, opportunity to present case and production of documents under different international arbitration rules.

### 3. International Arbitration Rules:

#### 3.1. The UNCITRAL Model Law with 2006 Amendments:

The United Nations Commission on International Trade Law (UNCITRAL) Model Law provides that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.<sup>xix</sup> If the parties have not provided otherwise, "the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence."<sup>xx</sup>

In respect of production of documents, unless otherwise agreed by the parties, the arbitral tribunal may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.<sup>xxi</sup>

### **3.2. The UNCITRAL Arbitration Rules, 2013:**

The arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.<sup>xxii</sup> The Arbitral Tribunal at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.<sup>xxiii</sup>

### **3.3. The International Chamber of Commerce (ICC) Arbitration Rules, 2012:**

The arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.<sup>xxiv</sup> In order to ensure effective case management, the arbitral tribunal may adopt procedural measures.<sup>xxv</sup> The tribunal may require the parties, to produce with their submissions the documents on which they rely; in those cases where requests for document production are considered appropriate, limit such requests to documents or categories of documents that are relevant and material to the outcome of the case and it may establish reasonable time limit for the production of documents.<sup>xxvi</sup>

### **3.4. IBA Rules on taking of Evidence in International Arbitration, 2010:**

According to International Bar Association (IBA) Rules on the taking of evidence in International arbitration, the arbitral tribunal considers the need to maintain fairness and equality as between the parties, particularly if they are subject to different legal or ethical rules.<sup>xxvii</sup>

A party may submit a request to the arbitral tribunal to order the other party to produce documents in possession of the other party along with a statement as to how the documents requested are relevant to the case and material to its outcome.<sup>xxviii</sup> At any time before the arbitration is concluded, the arbitral tribunal may (i) request any party to produce documents or (ii) use its best efforts to take or (iii) itself take, any steps to obtain documents from any person or organization.<sup>xxix</sup>

Within the time ordered by the arbitral tribunal each party shall submit to the arbitral tribunal and to the other parties all documents available to it on which it relies, including public documents.<sup>xxx</sup>

### **3.5. World Intellectual Property Organization (WIPO) Arbitration Rules, 2014:**

In all cases, the tribunal shall ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case.<sup>xxxi</sup> The tribunal shall at any time during the arbitration, may at the request of a party or on its own motion, order a party to produce such documents or other evidence as it considers necessary or appropriate.<sup>xxxii</sup>

### **3.6. The ICDR Arbitration Rules, 2014:**

According to International Centre for Dispute Resolution (ICDR), the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.<sup>xxxiii</sup>

The arbitrators are empowered “to order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.”<sup>xxxiv</sup>

### **3.7. The ICSID Arbitration Rules:**

The International Centre for Settlement of Investment Disputes (ICSID) Arbitration rules authorize the tribunal to request documents from any party. If the tribunal deems it necessary at any stage of the proceedings it may call upon the parties to produce documents or other evidence, witnesses and experts.<sup>xxxv</sup>

### **3.8. Australian Centre for International Commercial Expedited Arbitration (ACICA) Rules, 2016:**

The Arbitrator may conduct the arbitration in such manner as he or she considers appropriate, provided that the parties are treated equally and that each party is given a reasonable opportunity of presenting its case.<sup>xxxvi</sup> The Arbitrator may order a party to produce such particular documents as he or she may believe to be relevant.<sup>xxxvii</sup>

### **3.9. The VIAC Arbitration Rules, 2013:**

According to the Vienna International Arbitration Centre (VIAC) rules, the arbitral tribunal shall treat the parties fairly and shall grant the parties the right to be heard at every stage of the proceedings.<sup>xxxviii</sup> In order to establish the facts of the case, if the arbitral tribunal considers it necessary, it may on its own collect evidence or requests the parties to submit evidence.<sup>xxxix</sup>

### **3.10. The Singapore International Arbitration Centre (SIAC) Rules, 2013:**

The Tribunal shall ensure the fair, expeditious, economical, and final determination of the dispute. It shall determine the relevance, materiality, and final determination of all evidence.<sup>xl</sup>

The tribunal shall have the power to order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome.<sup>xli</sup>

### **3.11. London Court of International Arbitration (LCIA), 2014:**

The Arbitral Tribunal's general duties at all times during the arbitration shall include, a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s).<sup>xlii</sup>

The Arbitration Tribunal shall have the power, upon the application of any party or upon its own initiative, after giving reasonable opportunity, may decide to order any party to produce to the Arbitral Tribunal or other parties documents in their possession, custody or power which the tribunal decides to be relevant.<sup>xliii</sup>

### **3.12. American Arbitration Association (AAA) Rules, 2013:**

The arbitrator has the discretion to vary this procedure; provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.<sup>xliv</sup> The arbitrator shall have the authority to require the parties, in response to reasonable documents request, to make available to the other party documents in the responding party's possession or custody.<sup>xliv</sup>

### **3.13. China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, 2015:**

Under all circumstances, the arbitral tribunal shall act impartially and fairly and shall afford a reasonable opportunity to both parties to present their case. Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.<sup>xlvi</sup>

The arbitral tribunal may specify time for producing evidence. It has the power to request the parties to deliver any relevant material or documents.<sup>xlvi</sup> The arbitral tribunal may undertake investigation and collect evidence as it considers necessary.<sup>xlvi</sup>

### **3.14. The Swiss Rules of International Arbitration, 2012:**

The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard.<sup>xlvi</sup>

At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within a period of time determined by the arbitral tribunal.<sup>1</sup>

### **3.15. Japan Commercial Arbitration Association Rules, 2015:**

The arbitral tribunal shall treat the parties equally. The arbitral tribunal shall give each party a sufficient opportunity to state and prove its case and to present a defense against the other party's case.<sup>li</sup> The arbitral tribunal, at the written request of a party or on its own motion, may order any party to produce documents in its possession that the arbitral tribunal considers necessary to examine after giving the party in possession an opportunity to comment, unless the arbitral tribunal finds reasonable grounds for the party in possession to refuse the production.<sup>lii</sup>

### **3.16. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2010:**

In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case.<sup>liii</sup> At the request of a party, the Arbitral Tribunal may order a party to produce any documents or other evidence which may be relevant to the outcome of the case.<sup>liv</sup>

### **3.17. The German Institute of Arbitration (DIS) Rules, 1998:**

The parties shall be treated with equality. Each party shall be given a full opportunity to present his case at all stages of the proceedings.<sup>lv</sup> The arbitration tribunal in order to establish the facts has the discretion to order the production of documents.<sup>lvi</sup>

### **3.18. The Indian Arbitration and Conciliation Act, 1996:**

The parties shall be treated with equality and each party shall be given a full opportunity to present his case.<sup>lvii</sup> The arbitral tribunal may require a party to give the expert any relevant information, to produce, or to provide access to, any relevant documents, goods or other property for his inspection.<sup>lviii</sup>

## **4. Limits on production or discovery of documents:**

The extent of the power of the tribunal will be determined by the arbitration agreement, the rules chosen by the parties as well as the applicable national law.<sup>lix</sup> The arbitral tribunals have to strike a balance between the object of arbitration, i.e. speedy disposal of the dispute and opportunity to present the case. If necessary, the arbitration tribunal must limit the scope of document production to an extent that is reasonable in the context of the amount in dispute and the relative significations of the issues in respect of which document production has been requested.<sup>lx</sup> The due process interests also give defendants the right to be free from needlessly burdensome

discovery.<sup>lxi</sup> Therefore, the tribunals have the power to limit the scope of discovery in cases where the request is only to delay the process of arbitration.

In determining whether extensive discovery and disclosure should be allowed, a party will have to assess whether; (a) it is likely to have in its possession more or fewer documents because of that particular contractual relationship; (b). The parties are located in a civil law or common-law jurisdiction; and (c). The seat of the arbitration.<sup>lxii</sup>

The disclosure and discovery powers of the arbitral tribunal in international are ordinarily limited to the parties to the arbitration and do not extend to non-parties. Accordingly, the tribunal will generally lack the authority to order third parties to produce documents or otherwise provide disclosure in the arbitration.<sup>lxiii</sup>

#### **5. Drawing adverse inference by the tribunal:**

If the party failed to give any proper explanation or reasons for not producing the ordered documents, the tribunal has the discretion to infer that the document is adverse to the party. However, if a party provides the explanation and the tribunal is satisfied with the explanation, there may not be any adverse inference. It is only when a party refuses to comply with a disclosure request ordered by the tribunal; a number of consequences can follow.

The tribunal may draw adverse inferences from the default of the party.<sup>lxiv</sup> The arbitral tribunals are very cautious in drawing the adverse inference. Following are the few arbitration rules, which contain adverse inference provision:

According to IBA Rules on the Taking of Evidence, if a party fails without satisfactory explanation to make available any other relevant evidence ...ordered by the arbitral tribunal to be produced, the arbitral tribunal may infer that such evidence would be adverse to the interests of that party.<sup>lxv</sup>

According to ACICA Rules, the Arbitrator may order a party to produce such particular documents as he or she may believe to be relevant. If the Arbitrator believes that a party has failed to produce any relevant document without good reason, he or she may draw an adverse inference from that party's failure to produce.<sup>lxvi</sup>

#### **6. Taking Assistance from Court:**

In some arbitration rules, the tribunal or parties may take assistance from the national courts in obtaining disclosure of materials for use in the arbitration. This is particularly likely where disclosure is sought from non-parties to the arbitration, but also available against parties.<sup>lxvii</sup> National courts of the seat of the arbitration often act in aid of arbitrations.

The Arbitration Act 1996<sup>lxviii</sup> permits the English court to make an order requiring a party to comply with a peremptory order of the arbitral tribunal.<sup>lxix</sup> According to Indian Arbitration and Conciliation Act, 1996, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence.<sup>lxx</sup>

The US Federal Arbitration Act gives the tribunals the right to summon third parties to produce documents or other records, which are deemed material to the tribunal at a hearing.<sup>lxxi</sup>

According to UNCITRAL Arbitration Rules, 2013 the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court for assistance in taking evidence.<sup>lxxii</sup> The Convention on the Taking

of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention)<sup>lxxiii</sup> is also helpful in international arbitration proceedings for taking evidence from other party situated in other countries.

## **7. Recognition and Enforcement of arbitral Award:**

Recognition of arbitral awards is frequently opposed on the basis of a tribunal's evidentiary rulings, i.e., the admission or exclusion of documentary or witness evidence.<sup>lxxiv</sup> The award of a tribunal that denied a party the opportunity to present the case is not enforceable under national laws. For example, Swiss Law on Private International Law provides that if the principle of equal treatment of the parties or the right of the parties to be heard was violated, the award may not be enforced.<sup>lxxv</sup>

According to the various arbitration rules, unless otherwise agreed by the parties, a party may request the tribunal to order the other party for production of documents relevant to the case. The object of this provision is to giving opportunity to the parties to present their case before the tribunal, otherwise it may be a case of denial of fair hearing.

The New York Convention allows a party to challenge the award of the tribunal under certain circumstance. The recognition and enforcement of the award may be refused under the New York Convention at the request of the party against whom it is invoked, on the grounds that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case<sup>lxxvi</sup> or the recognition or enforcement of the award would be contrary to the public policy of that country<sup>lxxvii</sup>. These provisions permit the national courts to deny recognition to awards that are based on unfair, arbitrary or unbalanced procedures, applying either a uniform international standard of procedural fairness under Article V(1)(b) or procedural protections guaranteed by mandatory national law under Article V(2)(b).<sup>lxxviii</sup>

## **8. Conclusion:**

The research concludes that many international and institutional commercial arbitration rules recognized the power of the arbitral tribunal that on the request of a party or on its own, order for production of documents. The party seeking the production of documents from other party must prove that the requested documents are in possession of the party from whom production is demanded and they are relevant to the case.

After hearing the parties, it is for the arbitration tribunal to decide whether an order should be made and parties' request be granted in respect of production or disclosure of documents from the parties to the arbitration. The power of the arbitral tribunal to order the production of documents depends upon the applicable arbitration rules, the agreement between the parties and the procedural law of the arbitration seat. However, arbitrators have the power to safeguard fair procedure in an arbitration hearing.<sup>lxxix</sup> In some arbitration rules, the tribunal or parties may take assistance from the national courts for obtaining disclosure of documents relevant to the case.<sup>lxxx</sup>

The study suggests that in order to ensure due process of law, it is necessary for the tribunal to treat the parties equally and give them fair opportunity to present the case. The right of fair hearing or opportunity to present the case may include request to produce the documents relevant to the case. The power of the tribunal to order a party for production of documents relevant to the case is an implied right of due process of law. Therefore, the international and institutional commercial arbitration rules empowered the arbitral tribunals to pass such orders,

which are necessary to achieve the goal of full and fair hearing, failing which a party may challenge the enforcement of the award. Article V (b) of New York Convention, 1958 allows an arbitral award to be set aside where parties have been unable to present their case

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Article 3 of IBA Rules. <sup>xxxi</sup>

Article 37. <sup>xxxii</sup>

Article 50.

<sup>xxxiii</sup>Article 20 (1)

<sup>xxxiv</sup>Article 20.4.

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For example, Article 27 of UNCITRAL Model Law; Article 184 (2) of the Swiss Law on Private International Law; Section 43 of English Arbitration Act, 1996; Article 1696 (2) of Belgian Judicial Code; Article 1041 (2) of Netherlands Code of Civil Procedure.