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force at the seat of the Chamber of Commerce, in the event parties have failed to provide differently[42].

IV. Pleading – Case Management and Advocacy

1. What strategy should be adopted?

Until now, there has been no uniform practice prevailing in international commercial arbitration as regards the pleading and proving of foreign law. As aforesaid, due to inconsistent practice and lack of predictability, parties may be well advised to agree upon the law applicable on the merits beforehand. At best they may be advocated to draft a *choice of law clause*, in addition to their arbitration agreement.

If the parties have failed to designate the applicable substantive law at the contract drafting stage, it is advisable to raise this issue at an early stage in the arbitration proceedings.

Where it is possible to negotiate a framework for the arbitration (arbitration agreement or Terms of Reference in an ICC arbitration) obviously these issues can be clarified there.

Parties are sometimes disappointed if, as a result of failing to select the law, the tribunal directly applies the lex mercatoria. Consequently, the Austrian Supreme Court has acknowledged the application of the lex mercatoria by the arbitral tribunal, in case the parties had failed to choose the law themselves and therefore the court found no reason to vacate the award[43].

2. Whom to appoint as arbitrator?

It may definitely be a criterion to appoint an arbitrator who knows the applicable law. Normally however, parties prefer to select someone who meets other requirements such as special skills, experience and knowledge in a particular trade or industry, language, etc. Naturally knowledge of the applicable law has an impact if the dispute or rather the arbitration centres on a complex legal issue, e.g. interpretation of contract clauses. Where the tribunal consists of three arbitrators, it is common to have two experts and at least (preferably as presiding arbitrator) one lawyer or a person who has been legally trained.

3. What aspects are to be taken into account?

It is advisable to consider factors such as the law at the seat of arbitration and the nationality of the arbitrators: as mentioned above, arbitrators from a common law country will tend or expect the parties to put forward proof; in contrast, arbitrators trained in civil law will take a more active role and will tend to act according to *Iura Novit Curia*.

4. How to prove – what means are available?

As regards the strategy and means to apply or evidence to offer to the tribunal, it is commendable to take into account the aforementioned cultural background of the arbitrators and the other party. Arbitrators from civil law countries may prefer firstly to examine the content of the foreign law themselves. In parallel or after they have not found a solution readily available, they may ask the parties. Written expert opinions by academics and the latters' subsequent oral testimony are generally highly appreciated and the preferred method[44].

V. Conclusion

By way of this presentation it was intended to give a summary of the different approaches arbitrators may take, in order to determine the foreign law, applicable in the case to arbitrate before them.

Parties to an arbitration are generally granted the freedom to determine which law applies to their relationship, including a choice of foreign law, except if their choice of law would be contrary to principles of public policy. In order to prove the contents of the chosen law, parties may generally rely on professional opinions, foreign court rulings, the internet and/or the official text of the foreign law.

42) *Gaillard*, "The Role of the Arbitrator in Determining the Applicable Law", *Newman/Hill* (ed., 2004), The Leading Arbitrators' Guide to International Arbitration, p. 200.

43) *Austrian Supreme Court* (OGH), 18. 11. 1982, *Pabalk/Norsolor*, cf Karollus, "Vorsorge gegen freie Rechtsfindung durch Schiedsgerichte", RdW 1992/10, p. 332, suggests to expressly exclude the application of the lex mercatoria.

44) *Kaufmann-Kohler*, The Arbitrator and the Law: Does He/She know it? Apply it? How? And a few more Questions, in: *Wirth* (ed.), ASA Special Series No. 26, Best Practices in International Arbitration (2006), p. 94.

By Dr. Anke Meier, LL.M., Munich *

The Production of Electronically Stored Information in International Commercial Arbitration

In den letzten Jahrzehnten hat sich die Kommunikationstechnik stark weiterentwickelt. Der Umfang elektronischer Daten übersteigt heute bei weitem den Umfang von Papierdokumenten. Gleichzeitig wird mit elektronischer Korrespondenz häufig weniger überlegt und formal umgegangen. Elektronische Daten erweisen sich als sehr wertvolle Quelle von Beweismitteln, allerdings sind verschiedene Besonderheiten zu beachten. Wenngleich der Dokumentenaustausch in Schiedsverfahren im Allgemeinen begrenzter ist, hat sich E-Discovery bereits zu einem festen Bestandteil von Schiedsverfahren in den USA entwickelt. Dieser Beitrag wirft die Frage auf, ob die Bedeutung von E-Discovery in der internationalen Handesschiedsgerichtsbarkeit zunehmen wird und stellt verschiedene mögliche Rechtsgrundlagen vor. Die Autorin stellt dar, welche Herausforderungen der Austausch elektronischer Dokumente mit sich bringen kann und zeigt auf, wie Schiedsrichter und Parteien den Austausch elektonischer Dokumente angehen sollten.

Through the last decades, communication technologies have significantly advanced. Today, the volume of electronic data largely exceeds the volume of paper documents. At the same time, people often seem to be less careful and less formal in exchanging electronic data than in hard copy correspondence. Electronic

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data appears to be an extremely valuable source of evidence but when it comes to discovery various particularities have to be taken into account. Although the scope of discovery is generally more limited in arbitrations, e-discovery has already become a usual component in arbitration in the U.S. This article raises the question whether e-discovery will become increasingly relevant for international commercial arbitration and identifies several potential sources of e-discovery. The author outlines why the production of electronic data can be challenging and suggests how arbitrators and parties shall approach the exchange of electronically stored documents.

I. Introduction

During the last few decades, communication technologies have advanced significantly and the way private individuals as well as businesses communicate with each other has changed tremendously. Instead of mailing typewritten letters or sending faxes, we "shoot" e-mails to one or multiple recipients easily attaching various text documents, photos or other files. The recipients themselves reply to, or forward, the message with only a few mouse clicks, carbon copying or blind carbon copying even more receivers. At the same time, people often seem to be less careful and less formal in exchanging electronic data than in hard copy correspondence.

Today, the volume of electronic data largely exceeds the volume of paper documents. It is reported that approx. 2.7 trillion e-mails are sent annually[1]. Approximately 90% of new stored information is electronic[2] while 70% of this electronic data is never printed[3]. Electronic data differs in many ways from hard copies and involves certain characteristics[4] that affect their potential use as evidence. Some major issues associated with electronically stored data – other than the sheer volume – are:

- **Multiple communicants and multiple places of data** – In contrast to a centrally kept paper file, electronic data is likely to be stored concurrently by several persons. Also, it may be stored in various places, such as desktops, laptops, backup files, CDs, DVDs, flash drives, external hard drives, Blackberries, cell phones, web-based storage etc.[5].
- **Metadata**[6] – Beyond the content of the directly visible electronic data, further information may be available on how, when and by whom data was created, modified etc. This so-called metadata may not be accessible for the average computer user[7].
- **Backups**[8] – Frequently, data is saved for a specific time period in not easily accessible backup tapes. Entities often back up their data sequentially (on a daily or weekly basis) and thereby duplicate information which is stored as of the time of the backup.
- **Recovery of deleted data** – Electronic data is extremely difficult to destroy. Frequently, deleted files can be tracked and undeleted[9]. Thus, often it would be necessary to physically destroy a hard drive to ensure that data is actually deleted.

Electronic data appears to be an extremely valuable source of evidence but when it comes to discovery the aforesaid particularities have to be taken into account. Gathering electronic data requires special techniques, can involve immense costs and raises the question when the production of not easily accessible data imposes an undue burden on the responding party[10]. Reviewing the great volume of electronic data for the purpose of protecting privileged information is also particularly costly and time-consuming[11]. Additionally, e-discovery raises the question in what form electronic data has to be produced – in the same form as it exists on the native storage media, in another electronic form such as PDF files, or printed?

The new age of electronic documents has put traditional discovery to test. After years of preparation, amendments to the Federal Rules of Civil Procedure ("FRCP") entered into force on December 1st, 2006, introducing new rules on e-discovery for the federal courts. While the United States have always been notorious for the broad discovery available in civil litigation, now, a new era of discovery has begun[12]. The first experiences suggest that e-discovery will increase the burden of discovery in significant ways. Recent court decisions have placed heavy responsibilities on companies regarding document management, document storage and document production and courts did not hesitate to impose sanctions for not properly preserving and producing e-mails and other electronic data[13]. Given our modern communication means and technologies the new e-discovery rules set forth in the FRCP certainly reflect the zeitgeist and have their legitimacy. At the same time, however, they raise concerns with parties how they can actually succeed in e-discovery.

Although the FRCP does not govern arbitration proceedings and the scope of discovery is generally more

1) Inside Counsel, Foley & Lardner LLP, Practical Legal Strategies for Dealing with E-Discovery, 2006, available at http://www.foley.com/files/tbl_s88EventMaterials/FileUpload587/638/EDiscovery%20Presenation.pdf with reference to the ABA Digital Evidence Project and National Law Journal.

2) *Lyman/Varian et al.*, How much information 2003?, available at http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/ suggesting that in 2003, 92% of new stored information was on magnetic media while 7% was stored on film, 0.002% on optical medial and only 0.01% on paper.

3) See supra, note 1.

4) For a detailed description of differences between electronic and paper data, see *Barkett*, E-Discovery for Arbitrators under the IBA Rules for Taking Evidence, 2007, available at http://www.lcia.org/CONF_folder/documents/JBarkettE-Discovery_for_Arbitrators.pdf.

5) *Witte/Portinga*, E-Discovery and the New Federal Rules of Civil Procedure: They apply to You, 86 MI Bar J 36, 37 (2007).

6) See the Sedona Conference Glossary, E-Discovery & Digital Information Management, 2005, available at http://www.thesedonaconference.org/content/miscFiles/tsglossarymay05.pdf.. Case law in the U.S. is mixed with regard to whether metadata has to be produced. Compare *Williams v. Sprint/United Management Company*, 230 F.R.D. 640, 646 (D. Kan. 2005) and Wyeth v. Impax Labs, 2006 U.S. Dist. LEXIS 79761 (D. Del. Oct. 26, 2006) with *Kentucky Speedway, LLC v. Nat'l Assoc. of Stock Car Auto Racing, Inc.* 2006 U.S. Dist. LEXIS 92028 (E.D. Ky. Dec. 18, 2006).

7) *Witte/Portinga*, supra, note 5, id.

8) See supra, note 1.

9) *Shields*, Discovery of Deleted E-mail and Other Deleted Electronic Records, 27 A.L.R. 6th 565 (2007), § 2.

10) *Warshauer*, Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence, Dispute Resolution Journal 11/2006-1/2007, 10; *Shields*, supra, note 9, id.

11) *Warshauer*, supra, note 10, id.

12) *Bergin*, New Federal Rules on E-Discovery Help or Hindrance? 43 AZ Attorney 22 (2006), 22.

13) *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. Lexis 911 (S. D. Cal. Jan. 7, 2008), ordering Qualcomm to pay more than $ 8.5 million in sanctions for not producing emails. See also *Witte/Portinga*, supra, note 5, id.

limited in arbitrations, e-discovery has already become a commonly occurring component in U. S. arbitration. Will e-discovery become relevant for parties outside the U. S. as well? Will it eventually enter into international commercial arbitration where the parties frequently are from different legal traditions and bring fundamentally different assumptions and expectations regarding the taking of evidence[14]? This article identifies some potential sources of the production of electronic documents in international commercial arbitration and addresses possible consequences for arbitrators and parties.

II. The December 1st, 2006 Amendments to the FRCP regarding e-discovery and its impact on domestic U.S. arbitration

1. Discoverability of electronically stored information

On December 1st, 2006, amendments to FRCP Rules 16, 26, 33, 34, 37, 45, and Form 35 came into effect[15]. As outlined above, the amendments respond to fundamental changes in technology and communication, specifically the vast increase of digital documents. The Judicial Conference Committee on Rules of Practice and Procedure, in its September 2005 report on the proposed e-discovery amendments, specifically referred to the enormous expansion of computer networks' storage capacity, the volume of e-mail correspondence of all types of companies and even individual litigants and the dynamic of changes to electronic data[16].

According to the amended Rules 26, 33, and 34, any type of "electronically stored information" is discoverable. The term "electronically stored information", also referred to as "ESI", is intended to have a broad meaning covering all current types of computer-based information. The term "ESI" is also intended to include information created utilizing future changes and further developments in technology[17].

In order to handle the bulk of electronically stored information, parties to civil cases before the federal courts have to focus on the discovery of electronically stored information early in the discovery process, and address it, amongst others, in the list of items of a party's initial disclosure[18]. The parties are required to meet and confer about e-discovery and establish a discovery plan which also considers in what form electronically stored information will be produced[19]. The early consideration of electronically stored information in the discovery process requires the parties at the same early stage to deal with privileges and trade secrets as reflected in FRCP 16 and 26.

FRCP 26 (b)(2) establishes a two-tier approach in order to limit the undue production of electronically stored information that is not "reasonably accessible". If a requesting party moves to compel the production of electronically stored information the responding party may show that such information is not reasonably accessible because the production involves an undue burden of costs[20]. Subsequently, the court may order discovery only for good cause subject to the limitations of FRCP 26 (b)(2)(C). For instance, the court must limit e-discovery if the discovery sought is obtainable from some other source that is more convenient. Finally, the responding party is protected by Rule 37 (f) which contains a so-called "safe harbor provision" pursuant to which the court may not impose sanctions if electronically stored information was lost as a result of the routine, good-faith operation of an electronic information system. On the other hand, courts are likely to impose sanctions for the destruction or significant alteration of evidence, or the failure to preserve data for use as evidence in pending or reasonably foreseeable litigation[21].

Also, courts have responded to the vast costs of e-discovery and recognized particular circumstances under which a cost-shifting to the party seeking e-discovery may be appropriate[22]. The leading case, *Zubulake v. UBS Warburg*[23], addressed this issue and became the basis for general analysis on e-discovery[24]. In this decision, the federal district court for the Southern District of New York established seven factors which courts should consider when determining if the requesting rather than the responding party should pay the cost of producing electronic information during discovery. Regardless of a possible cost-shifting, court decisions show that, in general, civil litigants are facing high standards regarding e-discovery[25].

2. Use of e-discovery in domestic U.S. arbitration

Generally, discovery is limited in arbitration. The FRCP does not apply[26], nor do State statutes on civil procedure or evidence[27]. In light of the expedited nature of arbitration, the exchange of information is usually significantly more restrictive than in civil litigation, as it is expressed, for instance, in Rule 21 of the Commercial Arbitration Rules of the American Arbitration Association ("AAA")[28]: "At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (a) the production of documents and other information (...)". The restraints on discovery are held by courts to be "one important component" of arbitration[29]. According to the U. S. Supreme Court, a party which enters into an arbitration agreement "trades the

14) See *Frank/Bédard*, Electronic Discovery in International Arbitration, Dispute Resolution Journal, 11/2007-1/2008, 62, 68.

15) All amendments to the FRCP relating to e-discovery and the respective notes of the Advisory Committee are available at www.uscourts.gov/rules/congress0406.html.

16) Summary of the report of the Judicial Conference Committee on Rules of Practice and Procedure available at www.uscourts.gov/rules/Reports7ST09-2005.pdf.

17) Committee Notes on FRCP 26(a).

18) FRCP 26 (a)(1)(B).

19) FRCP 26 (f).

20) FRCP 26 (b)(2)(B).

21) *West v. Goodyear Tire & Rubber Co.*, 168 F.3 d 776, 779 (2 d Cir. 1999), *Zubulake v. UBS Warburg*, 220 F. R. D. 212, 218 (S.D. N. Y. 2004).

22) *Shields*, supra, note 9, § 3.

23) 217 F. R. D. 309 (S.D. N. Y. 2003).

24) Also the Sedona Principles for Electronic Document Production, published by the Sedona Group, 2005, and available at http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf offer comprehensive guidelines regarding e-discovery issues.

25) *Witte/Portinga*, supra, note5, id.

26) FRCP Rule 1, assuming that the parties have not incorporated a reference to the FRCP as a whole or in part in their arbitration agreement.

27) See for example Cal. Code Civ. Proc. § 1282.2(d) pursuant to which the rules of evidence and judicial procedure do not apply unless the parties otherwise agree.

28) Hereinafter referred to as "AAA Commercial Rules".

29) *Armendariz v. Foundation Health Psychcare Services*, 24 Cal.4th 83, at 106 (2000).

procedures (...) of the courtroom for the simplicity, informality, and expedition of arbitration"[30].

a) Availability of discovery in U. S. arbitration

The contractual nature of arbitration allows the parties to agree on the scope of discovery they wish to apply to their individual dispute. Parties are free to refer to a complete body of rules such as the FRCP in their arbitration agreement, or agree on particular rules in order to tailor discovery to their specific needs[31]. Often, however, the parties miss the opportunity to include detailed discovery rules in their arbitration agreements and instead use lean standard arbitration clauses[32].

Often, the parties refer in arbitration agreements to an arbitration institution and/or institutional arbitration rules which shall govern the proceedings. In such cases, the scope of discovery is hard to predict and will largely depend on the experiences and preferences of the arbitrators, the parties and counsel. Typically, the arbitrator has wide discretion with respect to discovery for the sake of procedural flexibility. Rule 21 of the AAA Commercial Rules provides that the arbitrator "may direct the production of discovery". Pursuant to subsection (c), the arbitrator is authorized "to resolve any disputes concerning the exchange of information". Absent any further specific guidance, the arbitrator has to consider general principles when ordering document production and deciding on discovery disputes. One example of such general concepts is set forth in Rule 30 (a) of the AAA Commercial Rules which stipulates that the arbitrator may vary the way the process is conducted "provided that each party has the right to be heard and is given a fair opportunity to present its case." The JAMS Comprehensive Arbitration Rules & Procedures[33] pursue a similar approach although Rule 17 imposes a higher burden of exchanging documents on the parties, unless modified by the arbitrator[34].

Another source of possibly wide-ranging discovery for arbitrations with a seat in the U. S. is Section 7 of the Federal Arbitration Act ("FAA") which grants the arbitrator the authority to subpoena witnesses to appear for testimony and to produce documents which may be deemed material as evidence in the case[35]. If the summoned person refuses to comply with the subpoena, the U. S. district court for the district in which the arbitrator is sitting, upon petition, may compel attendance[36]. While the scope of the arbitrator's subpoena power with regard to witnesses who are or are not under control of one of the parties is not sharply defined[37], courts have held that Section 7 authorizes the arbitrator to order third parties to produce documents[38]. However, the circuits are split over the question whether pre-hearing discovery is covered by Section 7 or whether the arbitrator may order a witness to produce documents only at the arbitration hearing[39].

It appears to be a common understanding that discovery in U. S. arbitration does not mirror U. S. civil litigation but pre-trial discovery is still available. Absent any party agreement on the scope of discovery, the arbitrator has to establish the ground rules exercising discretion.

b) E-discovery practice in domestic U. S. arbitration

Given the wide discretion the arbitrator has with respect to the scope of discovery in general, the rules are even less specific on e-discovery[40]. The wording of the arbitration rules cited above appears to be broad and flexible enough to cover the production not only of paper documents but also electronically stored documents.

One may argue that e-discovery by nature involves such complex searches and time- and cost-intensive document production that it can never be in accordance with the "simplicity, informality, and expedition of arbitration". This, however, would ignore the importance of electronic documents and conflict with the current practice.

In fact, e-discovery has already become part of domestic arbitration. Recently, several articles were published addressing e-discovery issues in arbitration or offering guidance for arbitrators[41]. Also arbitration institutions aim to establish guidelines for their arbitrators and best practices on e-discovery in order to enable their neutrals to actively engage in a reasonable scope of e-discovery[42]. The AAA has formed a "Task Force on the Exchange of Documentary and Electronic Materials" comprised of experienced practitioners to discuss whether current arbitration rules should be supplemented with regard to the exchange of electronic documents[43]. The AAA thereby aims to narrowly focus the search for electronic documents and structure the process as economically and limited as possible.

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30) *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc. 473 U. S. 614 [105 S. Ct. at 3354] (1985), *Gilmer v. Interstate Johnson Lane* Corp. 500 U. S. 20, p. 31 [111 S. Ct. at 1655] (1991).

31) *Rovine*, Developments in international litigation and arbitration: The scope of discovery in international arbitration proceedings, 5 Tul. J. Int'l & Comp. L. 401 (1997), 404.

32) According to *Rovine*, id., arbitration clauses that require discovery under the FRCP "are unusual but not unknown".

33) Hereinafter referred to as "JAMS Rules".

34) JAMS Rule 17 (a) provides: "The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information relevant to the dispute or claim immediately after commencement of arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control (...) The arbitrator may modify these obligations at the Preliminary conference."

35) *O'Malley/Conway*, Document Discovery in International Arbitration – Getting the Documents You Need, 18 Transnat'l Law. 371, 376; also under the Uniform Arbitration Act (revised 2000, section 171, arbitrators have the power to order the production of records and other evidence at adiscovery proceeding.

36) FAA Section 7.

37) *Redfern/Hunter/Blackaby/Partasides*, Law and Practice of International Commercial Arbitration, 2004, Chapter 7, 7-25; *O'Malley/Conway*, supra, note 35, 375.

38) *Meadows Indem. Co. Ltd. v. Nutmeg Ins. Co.*, 157 FRD 42, M. D. Tenn. (1994); *Stanton v. Paine Webber Jackson & Curtis Inc.*, 685 F.Supp. 1241, S. D. Fla. (1988).

39) American Law Institute, *McLaughlin et al.*, Recent Development in Domestic and International Arbitration Involving Issues of Arbitrabitily, Consolidation of Claims and Discovery of Non-Parties, 2007, 859 with references to the relevant court decisions; *O'Malley/Conway*, supra, note 35, 376.

40) As of today, neither the AAA Commercial Rules nor the JAMS Rules contain a reference to e-discovery.

41) *Warshauer*, supra, note 10, *Barkett*, supra, note 4.

42) For instance, the International Institute for Conflict Prevention & Resolution ("CPR") has formed a committee on e-discovery which is aimed to support neutrals in addressing e-discovery issues, see at http://www.cpradr.org/committees.asp?M=4.1.

43) *Slate*, New Standards for Information Exchange, Dispute Resolution Journal, 11/2007-1/2008, 1.

c) Impacts of e-discovery on parties to U. S. arbitration

Any party to arbitration proceedings in the U. S. should be aware that even if the particular agreement to arbitrate does not provide for discovery, or e-discovery, document production may be ordered. Given the modern technologies, document production is likely not to be limited to paper documents but rather to include electronically stored information. Although the scope of discovery is more limited in arbitration proceedings, the parties, counsel and arbitrator will face the same challenges as in a courtroom. Consequently, until a best practice for e-discovery in arbitration is established it is likely that arbitrators will refer to U. S. court cases for guidance. Since U. S. parties can be expected to be familiar with the new FRCP rules and related court decisions they should not face big surprises when conducting arbitration.

Non-U.S. persons and entities may become subject to e-discovery due to either their involvement as a party to U. S. arbitration or due to their connections or relationships to a U. S. party. For instance, a foreign subsidiary or parent company of a U. S. party may become subject to document requests by the opposing party. The foreign person or entity may decide to voluntarily comply with document requests in order to avoiding negative inferences for the U. S. party. If objections are raised, the route of FAA Section 7 may allow compelling document production. Given that e-discovery is a normal component of U. S. litigation today, a foreign entity or person should not expect that U. S. courts, arbitrators and counsel lower their standards and expectations only because a non-U.S. party is involved that may not be familiar with U. S.-style e-discovery. Consequently, they should be aware of the recent developments in the area of e-discovery in order to be prepared when being requested to produce electronic documents.

III. The impacts of e-discovery on international commercial arbitration

1. Document production in international commercial arbitration

In contrast to U. S. arbitration, international arbitration frequently involves the particularity that parties, counsel and arbitrators from different legal systems with differing backgrounds and expectations interact with each other. For example, continental European legal systems often do not use pre-trial discovery in their home country and professionals from such countries will bring fundamentally different expectations to the proceedings than professionals from the Anglo-American legal system[44]. There does not appear to be much published information available as to the current practices on e-discovery in international arbitration[45]. Nevertheless, practitioners report that e-discovery is an important issue, which is not surprising as the use of electronic data increased throughout the entire world. Also, during the last few years, trends have generally indicated "a growing acceptance of widespread discovery" in international arbitrations[46].

While a "U. S.-style" pre-trial discovery seems to be seldom used in international commercial arbitration, parties often exchange documents[47]. It can be assumed that, the higher the amount in dispute and the importance of a claim, parties are more willing to invest efforts and money in a comprehensive document production process in order to improve their chances. Even absent specific provisions in the arbitration agreement, arbitrators frequently do not interfere with an intense document production in order to avoid any challenges claiming that a party was not given a fair opportunity to present its case and to be heard[48]. Often, electronic data such as e-mail will be treated like paper documents without any awareness about the particularities of electronic information[49]. However, on what source could e-discovery be based? If there is the possibility of conducting e-discovery, what impact can parties to international commercial arbitration cases expect on their responsibilities and the management of the process?

2. Possible sources for the production of electronic documents in international commercial arbitration

Various sources may make the production of electronic documents available to parties in international commercial arbitration, such as the arbitration agreement or any subsequent stipulation on procedural issues, the applicable rules of the arbitration institution which govern the proceeding, or the IBA Rules on the Taking of Evidence in International Commercial Arbitration[50]. Additionally, U. S. C. Section 1782 may present a route to obtaining documents from the other party.

A further possible source of discovery which won't be addressed in more detail below is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[51]. Although arbitral tribunals may make use of the procedures under the Hague Evidence Convention[52], the inter-state processes frequently appear to be too lengthy to become an attractive tool for arbitration proceedings. Also, Article 23 of the Hague Evidence Convention allows Contracting States to make reservations as to the execution of letters of requests issued for the purpose of obtaining pre-trial discovery. As of today, several Contracting States have made use thereof[53]. Consequently, pre-trial discovery may not even obtainable through the Hague Evidence Convention in certain jurisdictions.

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44) *Griffin*, Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings, Journal of International Arbitration, Vol. 17, No. 2, 2000, 19; *O'Malley/Conway*, supra, note 35, id.

45) *Frank/Bédard*, supra, note 14, id.

46) *Rovine* supra, note 31, id.

47) *Böckstiegel*, Presenting, Taking and evaluating Evidence, in: International Arbitration, Handbook on International Arbitration & ADR, 2006, 137, 142.

48) Id.

49) *Frank/Bédard*, supra, note 14, id.

50) Hereinafter referred to as "IBA Rules".

51) Hereinafter referred to as "Hague Evidence Convention"

52) For example §§ 1050, 1025 of the German Code of Civil Procedure (Zivilprozessordnung) authorizes foreign and domestic arbitral tribunals to even directly obtain the aid of courts in the taking of evidence.

53) A summary of the status of reservations of Contracting States is available at http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=82.

a) Arbitration agreements or subsequent stipulations on procedural issues

The taking of evidence is one of the typical areas which call for party autonomy[54]. The parties are free to agree on the scope of discovery either in the initial arbitration agreement or in any subsequent procedural agreement[55]. Setting out the scope of discovery in an agreement is probably the easiest way for the parties to set forth their expectations and needs[56] in a binding way for the arbitrator[57].

An arbitration agreement in which discovery, or even more specifically e-discovery, is addressed is rare[58]. Even today, the parties frequently do not pay much attention to the dispute resolution clauses when entering into a contract and do not take the time to set out details for a potential future legal dispute. Sometimes e-discovery may not have been an issue at the time when the contract was entered into, possibly decades ago. But later agreement on procedural issues can be difficult to reach, especially once the dispute has arisen.

b) Rules of international arbitration institutions

The UNCITRAL Model Law on International Commercial Arbitration[59], on which various modern statutes and rules are based, contains a description of basic procedural principle but does not provide for specific guidance with respect to discovery in general, nor for document production in particular. Article 18 of the UNCITRAL Model Law provides: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". Under Article 19(1) of the UNCITRAL Model Law the parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings[60]. "Failing such agreement, the arbitral tribunal may (...) 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."[61].

Similar to the UNCITRAL Model Law, the rules of international arbitration institutions address the taking of evidence in a very general way. Absent any party agreement, the arbitrator has wide discretion[62]. Article 15(2) of the ICC Rules provides that the tribunal "shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case". Regarding establishing the facts, Article 20(1) of the ICC Rules sets forth "The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." Under Article 20(5) of the ICC Rules the tribunal "may summon any party to provide additional evidence" at any time during the proceedings.

The ICDR International Dispute Resolution Procedures[63] pursue a similar approach under Article 16(1)[64]. In contrast to the AAA Commercial Rules, which are designed for domestic use, document production is currently not mentioned explicitly under the ICDR International Rules.

More specific but still broad rules on document production are contained in the Rules of the London Court of International Arbitration ("LCIA"). Article 22 of the LCIA Rules gives the tribunal the power to "order any party to produce (...) any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant."

Although electronic data is not mentioned explicitly, the wide discretion of the arbitrator is likely to also allow the production of electronic data to the same extent as paper documents, provided that the general principles of the procedure are obeyed.

Today, the institutional arbitration rules in general do not offer any specific guidance as to what standards apply when a party refuses to produce documents and the opponent moves to compel[65]. The scope of e-discovery in a specific case will therefore largely depend on the personal approach, preferences, and experience of the arbitrator[66]. If a party from a continental European background and a party from an Anglo-American legal system are in dispute and the arbitrator is more familiar with U.S.-style discovery it is more likely that the preferences of the arbitrator will lead to a more U.S.-style discovery and vice-versa. In most cases, parties from different legal traditions will have to hope that the arbitrator finds a compromise to balance fundamentally different expectations[67]. A party should therefore address its expectations at an early stage of the proceedings.

The absence of specific binding provisions harbors the danger that neither the arbitrator nor the parties and their counsel, take into account the particularities of electronic data. As a consequence, the parties may miss the chance of gathering evidence contained in electronic documents or, the other extreme, e-discovery becomes overly broad and burdensome because the participants were not capable of handling the production of electronic data properly. Therefore, it has been suggested that the arbitration institutions incorporate new rules on the production of electronic documents with regard to which the parties may opt-in or opt-out[68]. The AAA is currently considering amendments

54) *Böckstiegel*, supra, note 47, 139. The U.S. Supreme Court repeatedly held that parties have "virtually unfettered control over the terms" of their arbitration agreement – see *Peterson*, U.S. Courts and International Arbitration Agreements, Handbook on International Arbitration & ADR, 2006, 341, id.

55) *Griffin*, supra, note 44, 20; *Frank/Bédard*, supra, note 14, id.

56) *Rovine*, supra, note 31, id.

57) For example under Rule 15(1) of the Rules of Arbitration of the International Chamber of Commerce (hereinafter referred to as "ICC Rules") "The proceedings shall (...) be governed by [the ICC] Rules, and, where these rules are silent, by any rules which the parties (...) may settle on ...".

58) *Rovine*, supra, note 31, id.

59) Hereinafter referred to as "UNCITRAL Model Law".

60) Article 19 of the UNCITRAL Model Law: "Subject to the provisions of the law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

61) Article 19(2) of the UNCITRAL Model Law.

62) *O'Malley/Conway*, supra, note 35, 372.

63) Hereinafter referred to as "ICDR International Rules".

64) Article 16(1) of the ICDR International Rules: "Subject to these rules, the 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".

65) *O'Malley/Conway*, supra, note 35, id., *Frank/Bédard*, supra, note 14, 69.

66) *Rovine*, supra, note 31, 402.

67) *O'Malley/Conway*, supra, note 35, id.

68) *Frank/Bédard*, supra, note 14, 72.

to the International Rules in order to structure, limit and narrow the exchange of electronic data[69].

c) IBA Rules on the Taking of Evidence in International Commercial Arbitration

Probably the most specific guidance on the production of electronic data can currently be found in the IBA Rules which are widely used in international commercial arbitration[70]. The IBA Rules were adopted in 1999. They are designed to facilitate the taking of evidence in international commercial arbitration in an "efficient and economical manner"[71]. The IBA Rules aim to balance the differences between the Anglo-American and continental European legal systems with regard to the taking of evidence[72]. Pre-hearing document discovery is explicitly permitted under the IBA Rules, however, the drafters of the IBA Rules "considered 'expansive American (...) style discovery' to be inappropriate in international arbitration"[73] so that it is very unlikely that an arbitrator would directly refer to the amended FRCP for guidance on e-discovery issues.

aa) The document production procedure under the IBA Rules

The IBA Rules apply to arbitrations either by agreement of the parties or determination of the arbitral tribunal[74]. Article 3 of the IBA Rules establishes a procedure for the exchange of documents: Each party shall not only share the documents on which it intends to rely and are in its possession but may also submit a "Request to Produce" with regard to documents under the control of the other side[75]. Such request shall contain (i) a description of the requested document or of a narrow and specific requested category of documents that are reasonably believed to exist; (ii) a description of how such documents are relevant and material to the outcome of the case; and (iii) a statement that the documents requested are not in the possession, custody or control of the requesting party but of the other party[76].

The responding party shall either produce the documents or file its objections for consideration by the tribunal[77]. The tribunal has the power to order the production of documents if it determines that (i) the issues that the requesting party wishes to prove are relevant and material to the outcome of the case and (ii) none of the general reasons for objections as set forth in Article 9(2) of the IBA Rules applies[78].

Under Article 9(2), the tribunal shall not order the production of documents in case of (i) lack of sufficient relevance or materiality; (ii) legal impediment or privilege; (iii) unreasonable burden to produce the requested evidence; (iv) loss or destruction of the document that has been reasonably shown to have occurred; (v) grounds of commercial or technical confidentiality; (vi) grounds of special political or institutional sensitivity; or (vii) considerations of fairness or equality.

In exceptional circumstances, if the propriety of an objection can only be determined by reviewing the document, the tribunal, upon consultation with the parties, is authorized to appoint an independent and impartial expert to review such document and report on the objection[79]. Such expert may not disclose the contents of the document reviewed if, and to the extent, the objection is upheld[80]. If a party fails without satisfactory explanation to produce any document requested in a Request to Produce to which it has not objected in due time or fails to produce any document ordered to be produced, the tribunal may infer that such documents would be adverse to the interests of that party[81].

bb) The IBA Rules are capable of handling electronic documents

Article 1 of the IBA Rules, defines the term "Document" as "A writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information". Consequently, the procedure of document production described above is not limited to paper documents and explicitly includes electronically stored information. Articles 3 and 9(2) of the IBA Rules, however, do not further distinguish between the different forms of documents and do not offer any specific guidelines as to the production of electronic data[82]. In light of the fundamental differences of electronic data, the question arises if the IBA Rules in their current form are precise enough to address the particularities of electronic data.

The IBA Rules establish general principles that are flexible enough for the tribunal to decide on e-discovery disputes[83]. Similar to the rules of international arbitration institutions, the arbitrators are given flexibility as long as the parties are treated fairly and the taking of evidence is governed "in an efficient and economical manner"[84]. Overbroad e-document requests can be avoided by requiring that the requesting party must describe the requested document or category specifically and demonstrate relevance and materiality[85]. Provided that the arbitrators are engaged and thoughtful they can always weigh the costs and length of excessive e-discovery against the amount in dispute and consider fairness[86].

If it is too difficult for the tribunal to assess the validity of one party's objection to the production of certain data without having itself seen the requested information, arbitrators may consider appointing an independent expert pursuant to Article 3(7) of the IBA Rules. An independent expert may not only ensure confidentiality of requested information until a decision on the objection has been made. An expert can

69) *Slate*, supra, note 43.
70) *Barkett*, supra, note 4, 4; *O'Malley/Conway*, supra, note 35, 375.
71) See IBA Rules, Preamble 1.
72) *Böckstiegel*, supra, note 47, 140.
73) *Frank/Bédard*, supra, note 14, id., *O'Malley/Conway*, supra, note 35, 373.
74) Article 2(1) of the IBA Rules.
75) Article 3(1) and (2) of the IBA Rules.
76) Article 3(3) of the IBA Rules.
77) Article 3(4) and (5) of the IBA Rules.
78) Article 3(6) of the IBA Rules.
79) Article 3(7) of the IBA Rules.
80) Id.
81) Article 9(4) of the IBA Rules.
82) *Barkett*, supra, note 4, 4.
83) *Frank/Bédard*, supra, note 14, 73.
84) Preamble 1 of the IBA Rules.
85) *Frank/Bédard*, supra, note 14, 70.
86) *Barkett*, supra, note 4, 18.

also contribute particular technical expertise, for instance, by analyzing the characteristics of the computer network of one party or assess what data is reasonably accessible. If expertise beyond the scope of Article 3(7) of the IBA Rules is required, the tribunal may consider appointing an independent expert under Article 6 of the IBA Rules which authorizes the tribunal to appoint an independent so-called tribunal-appointed expert who reports on specific issues designated by the tribunal.

However, besides those general guidelines, the IBA Rules remain silent on various issues arising out of the use of electronic data. Can a party request the production of metadata or backup tapes? In which form must a party produce electronic data? Article 3(11) of the IBA Rules provides that copies which are submitted "must conform fully to the originals". Do the IBA Rules suggest that a party has to produce electronic data only in native form rather than as PDF files or printouts[87]? Which party bears the often high costs of producing electronic data? Which party is responsible for reviewing the electronic data as to privileges?

The IBA Rules offer answers to those questions by setting out the basic principles of document production. If a party requests metadata and backup tapes it has to demonstrate relevance and materiality in its Request to Produce according to Article 3(3)(a) of the IBA Rules[88]. Failing such reasoning the tribunal has to deny the request upon any objection by the responding party. Additionally, the responding party can argue that the production of not easily accessible data is an unreasonable burden within the meaning of Article 9(2)(c) of the IBA Rules[89]. If the form of production is in dispute and the producing party can show that a production in native format would be more burdensome and expensive than a production in other formats, the tribunal again may apply the standard of "unreasonable burden" set out in Article 9(2)(c) and order the production in a less burdensome format.

In absence of any provisions of cost shifting under the IBA Rules, typically general rules apply with regard to the allocation of costs between the parties. Institutional arbitration rules will often provide that the tribunal allocates the costs of arbitration in its final award, including reasonable attorney fees and other costs incurred by the parties for the arbitration[90]. Consequently, the producing party is assumed to initially have the burden of bearing the costs for document production and reviewing documents regarding privileged information[91]. However, if these costs are very high the tribunal may find again an "unreasonable burden". Also if it is only one party that has electronic data or is requested to produce electronic data[92], the considerations of fairness or equality set out in Article 9(2)(g) of the IBA Rules provide a basis for restricting excessive one-sided e-discovery[93]. Given the tribunal's wide discretion regarding the taking of evidence the arbitrators may even consider ordering the production of certain electronic documents under the condition that the requesting party advances the costs.

Overall, arbitrators should be able to handle the production of documents by reverting to the general principles and flexible provisions of the IBA Rules. Consequently, the IBA Rules do not necessarily have to be amended. The arbitrators, however, have to be thoughtful and engaged and be aware of the particularities of electronically stored information in order to manage the arbitration efficiently and successfully[94]. Given the importance of electronic data, guidelines for arbitrators appear to be desirable in order to raise the arbitrator's awareness of the specific issues of document production and develop best practices. In light of the diversity of backgrounds of arbitrators in international commercial arbitration proceedings the training of arbitrators seems to be even more important than in U. S. arbitration with U. S. practitioners familiar with discovery serving as neutrals.

It may become desirable to provide more specific information regarding the standards and procedures parties can expect when the IBA Rules govern their arbitration. The process of the taking of evidence would be more predictable if the production of electronic data is set out in a separate new article of the IBA Rules. Eventually, this will further the reliability and attractiveness of arbitration. At the same time, it may be too early to currently include a new article because best practices have not yet been established and more experience is needed before standards and procedures for the production of electronic documents can be incorporated[95].

d) U. S. C. Section 1782

From a U. S. perspective, the IBA Rules may be perceived as being too narrow for the purpose of getting documents required to prove a party's case[96]. The IBA Rules deliberately intend to avoid what is referred to as "fishing expeditions"[97]. Recent U. S. court decisions may have opened the door for another possible avenue to obtain discovery in connection with international arbitration proceedings: 28 U. S. C. Section 1782.

Under Section 1782, a federal district court is authorized to order the production of documents and the deposition of witnesses if such discovery is sought for use "in a proceeding in a foreign or international tribunal"[98]. Either the "foreign or international tribunal" or any "interested person", referring to the parties to the respective proceeding[99], may file a request[100]. Unless the district court orders otherwise, the taking of evidence shall be conducted in accordance with the FRCP[101]. Thus, the new e-discovery rules would apply.

87) *Barkett*, supra, note 4, 19.
88) *Barkett*, supra, note 4, 22.
89) *Barkett*, supra, note 4, 23.
90) ICC Rule 31(1) provides: "The costs of the arbitration shall include the fees and expenses of the arbitrators (...) as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and reasonable legal and other costs incurred by the parties for the arbitration." ICC Rule 31(3): "The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."
91) *Barkett*, supra, note 4, 26, 28.
92) *Barkett*, supra, note 4, 19.
93) *Frank/Bédard*, supra, note 14, 71.
94) *Barkett*, supra, note 4, 30.
95) *Frank/Bédard*, supra, note 14, 73.
96) *O'Malley/Conway*, supra, note 35, 374 et seq.
97) *Frank/Bédard*, supra, note 14, 69.
98) 28 U. S. C. § 1782(a).
99) American Law Institute, *McLaughlin et al.*, supra, note 39, 864.
100) 28 U. S. C. § 1782(a) 2nd sentence.
101) 28 U. S. C. § 1782(a) 1st paragraph, last sentence.

In 1999, the 2nd and 5th Circuits held that private arbitral tribunals do not qualify as "foreign or international tribunals" within the meaning of Section 1782 and, therefore, U. S. courts may not aid parties to international arbitration in obtaining discovery[102]. Recently, however, the U. S. Supreme Court had the opportunity to address Section 1782 for the first time[103]. Effectively overruling the interpretation of the Second and Fifth Circuits, the Supreme Court held (albeit in dictum) that Section 1782 may in fact apply to private arbitral tribunals[104]. Subsequently, federal district courts have relied on the U. S. Supreme Court decision and granted discovery requests which were made for use in investment treaty arbitration[105] and a private commercial arbitration[106]. While the future development is hard to predict, at least at the moment, federal courts appear to be willing to grant discovery applications as a result of the interpretation of Section 1782 provided by the U. S. Supreme Court[107].

This recent development provides a new platform for parties to international commercial arbitration proceedings seeking U. S.-style discovery under the guidance of a U. S. federal court. However, it is questionable whether a party request under Section 1782 is eventually beneficial and well taken. If a party needs to use Section 1782 it can be assumed that such party seeks a scope of discovery which the tribunal has previously not allowed within the arbitration proceedings. Otherwise, the tribunal itself would have granted the requested discovery, or used Section 1782. Thus, by invoking Section 1782 the requesting party typically challenges a previous discovery ruling of the arbitrator.

3. Consequences for arbitrators and parties

It seems to be certain that the new era of electronic documents impacts on international commercial arbitrations. Absent any detailed guidance, the scope of e-discovery will largely depend on the personal preferences and experience of the arbitrator as well as the background and expectations of the parties and their counsel. Regardless of the different possible sources of e-document production, certain general approaches appear to be appropriate:

a) Parties should consider their interests and needs early

A party should asses at the very beginning of the arbitration whether the production of electronic data would be rather beneficial or detrimental to the own case. There might be good reasons for either alternative. In the rare situation that the disputing parties are in agreement on the scope and conduct of the production of electronic documents the issue is fairly easy. Probably, the main concern in this situation would be whether the arbitrator is capable of efficiently managing the process in accordance with the parties' expectations. If a party assumes that a great volume of electronic documents will be exchanged, already the selection of the arbitrator should focus on the potential arbitrator's experience in this field.

If a party intends to restrict the production of electronic documents, such party is well advised to incorporate this approach already in the arbitration agreement. Otherwise it is likely that the arbitral tribunal will exercise discretion and eventually allow at least a limited document production which, given the modern means of communication, will of course include electronically stored data. In light of the wide acceptance of the IBA Rules the arbitrators may adopt specific principles or provisions set forth in the IBA Rules even if they are not decided to be applied as a whole.

Particularly challenging situations are likely to occur when individuals from different legal traditions participate in the proceedings. Even parties from a continental European legal tradition which are not used to broad discovery and not exposed to the current developments of e-discovery in the U. S. should consider that a reasonable production of electronic documents may be beneficial to its case. As already mentioned in the introduction, electronic data is a very valuable source of evidence which should be taken advantage of, provided that such discovery does not endanger the effectiveness of arbitration.

b) The production of electronic documents as issue for preliminary hearings at the beginning of the arbitration proceedings

Regardless of what rules govern the arbitration, the arbitrator and the parties should address the issue of electronically stored documents as early as possible in the arbitration process, preferably in the first conference call or the preliminary hearing[108]. As suggested by the FRCP, the production of electronic data requires early attention in order to set out the basics of such discovery, remain in control of the process and consider the time and costs involved with e-discovery.

c) Protecting the efficiency of arbitration by high standards as to relevance

In order to ensure a fair process, conducting the arbitration within a reasonable time and as efficiently as possible the arbitrator has to manage the arbitration in an effective way. The reputation of arbitration in general is likely to suffer if bad cases give examples for overbroad discovery delaying the proceedings and creating outrageous costs. It is necessary that arbitrators are aware of the particularities and possible problems of electronic documents. The arbitrator has to

102) *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, 165 F.3 d 184 (2 d Cir. 1999), *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3 d 880 (5th Cir. 1999), both holding that a foreign private arbitration is not a proceeding in a foreign or international tribunal.

103) American Law Institute, *McLaughlin et al.*, supra, note 39, id.

104) *Intel Corporation v. Advanced Micro Devices, Inc,.* 542 U. S. 241, 124 S. Ct. 2466 (2004), citing with approval *Smit*, International Litigation 1026-1027, and nn. 71, 73 ("[t]he term 'tribunal' ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts"), as well as interpreting the term as affording assistance "in cases before the European Court of Justice, § 1782, as revised in 1964, permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers". 542 U. S. at 258.

105) In re Application of Oxus Gold plc. 2007 U. S. Dist. LEXIS 24 061 (D.N. J. April 2, 2007).

106) In re Application of Roz Trading Ltd., 469 F. Supp. 2 d 1221 (N.D. Ga. 2006), 2007 U. S. Dist. LEXIS 2112 (N.D. Ga. Jan. 11, 2007).

107) American Law Institute, *McLaughlin et al.*, supra, note 39, 866.

108) Rule 16 of the JAMS Rules provides with respect to the "Preliminary Conference": "(...) The Preliminary Conference may address any or all of the following subjects: (a) The exchange of information in accordance with Rule 17 or otherwise; (b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law; (...)".

be familiar with the basic technologies in order to judge what additional evidence may be obtained by a certain category of electronic data or whether the additional value may be outweighed by unreasonable costs. What additional value has metadata and why is it important to the specific case? Further, the arbitrator has to employ a thoughtful and common sense approach when weighing benefits and burdens of the production of electronic data.

If there is a reasonable doubt whether or not the requested document production is actually necessary and not overly burdensome, the arbitrator should apply rather high standards as to relevancy and materiality and invite the requesting party to demonstrate carefully why a particular electronic document is necessary and more beneficial than other more easily accessible data. If the arbitrator turns down inadequately reasoned document requests, the scope of discovery can be controlled effectively. The arbitrator should consider applying the principles set out in the IBA Rules to structure the process of requests for production of documents and implement general guidelines as to the requirements and limits of document production.

In particular circumstances the tribunal should consider appointing independent experts before ruling on objections of a party as set forth in Article 3(7) of the IBA Rules or in order to obtain certain technical expertise on specific issues. Especially in very complex cases it may be helpful to appoint an independent expert who oversees the document production process.

d) Anticipating benefits by permitting limited discovery

If a party requests a large amount of electronic data and costs, time requirements, benefits or relevance are largely unclear, the arbitrator may consider an approach applied by the district court in *Zubulake v. UBS Warburg*[109]. In this case, the plaintiff requested the production of 77 backup tapes which would have had to be restored. In a first step, the court ordered the production of 5 tapes in order to obtain an idea regarding the costs of production and the relevance of the information contained on the backup tapes. This approach does not only allow a comprehensive assessment of the document request but also discourages excessive discovery requests.

e) Cost-shifting

In cases in which a party, for example, insists on a broad production of electronic documents or a certain format in which documents are produced the arbitrator should consider a cost-shifting in order to reduce the burden upon the producing party as indicated in the case *Zubulake v. UBS Warburg*[110]. However, as of today[111], neither the IBA Rules nor institutional rules provide explicitly for such cost-shifting. Based on the wide discretionary powers regarding the taking of evidence, the arbitrator may order the gathering and production of electronic documents under the condition that the requesting party bears the costs. The requesting party then may weigh the expected additional value of the requested documents or the requested particular format of production against the burden of costs and decide whether or not it intends to further pursue its request. As long as the arbitrator bases the cost-shifting decision on sound reasons the basic procedural rights of the requesting party, particularly the right to a fair opportunity to present the own case, are still observed.

IV. Conclusions

Today's importance of electronically stored data cannot be ignored. The e-discovery amendments to the FRCP of December 6th, 2006 recognize the technological developments and provide guidelines how to reasonably approach e-discovery in U. S. litigation. Also in domestic U. S. arbitrations, e-discovery is already in use and arbitrators across the country aim to familiarize themselves with the particularities and specific requirements of e-discovery in order to establish guidelines and best practices.

In international commercial arbitration, production of electronically stored documents appears to be particularly challenging because frequently arbitrators, parties and counsel come from different legal systems which may have a different understanding of discovery in general and e-discovery in particular. Given that the era of electronic data can neither be ignored nor retracted, it is likely that e-discovery will enter international commercial arbitrations and create challenges for all participants. Already today there are several possible sources of production of electronic data. The parties are free to agree on specific provisions on e-discovery. The rules of international arbitration institutions give the arbitrator wide discretion to conduct the taking of evidence and establish the facts by any appropriate means provided that the parties enjoy all basic procedural rights.

The most specific source regarding production of electronic documents are the IBA Rules which mention specifically electronically stored information. The IBA Rules are capable of handling the particularities involved with electronically stored data by reverting to general principles such as consideration of "relevance/materiality", "unreasonable burden" or "fairness or equality". Thus, it is not necessary to amend the IBA Rules and it seems to be more preferable to first gain more experience until a best practice can be established before amendments are incorporated.

An alternative route outside of the core arbitration proceedings provides U. S. C. Section 1782 as the *Intel* decision of the U. S. Supreme Court has opened the door for granting discovery requests of parties in aid of international arbitration proceedings. It is, however, hard to predict whether Section 1782 will eventually be widely used in international commercial arbitration.

Having said this, it is clear that arbitrators as well as all other participants in international arbitration proceedings should aim at familiarizing themselves with the importance and particularities of electronically stored information. The parties and their counsel should assess early what scope of document production would be beneficial. As suggested by the FRCP the

109) 217 F. R. D. 309 (S.D. N. Y. 2003).

110) Id.

111) The AAA Committee on e-discovery is considering introducing a provision which allows the arbitrator to grant e-discovery under the condition that the party seeking production pays part or all of the costs of production., see sup*ra*, note 43.

parties and their counsel should address the issue of electronically stored documents as early as possible in the arbitration process. As early as possible, the parties and the arbitrator should establish basic consensus regarding the scope, form and costs of document production. At the same time, the arbitrator should strive to protect the efficiency of the arbitration process by strictly applying limitations on document production as they are set out in the IBA rules. Document requests whose actual value cannot be foreseen should be addressed by ordering only a limited production as a first step in order to sample and test the costs, time requirements and relevance of certain electronic data. Overall arbitrators need to deal with electronic documents in a very thoughtful manner in order to further the reputation and acceptance of arbitration.

Veranstaltungsbericht

*Von Pascal Schonard, M. A. P. (ENA) / maître en droit (Paris 1), Rosenheim**

Gesprächskreis „Investitionsrecht und -schiedsgerichtsbarkeit" – Jahrestreffen 2007

Das nunmehr bereits zur Tradition gewordene Frankfurter Jahrestreffen des vor drei Jahren auf Initiative von Rechtsanwalt Dr. Alfred Escher und Rechtsanwalt Jan K. Schäfer gegründeten Gesprächskreises „Investitionsrecht und -schiedsgerichtsbarkeit"[1] fand am 14. 11. 2007 in Zusammenarbeit mit der Industrie- und Handelskammer (IHK) Frankfurt am Main[2] und der Gesellschaft zur Förderung von Auslandsinvestitionen (GFA)[3] statt. Bei dem Jahrestreffen zeigte sich der Gesprächskreis thematisch frisch und bot wiederum Gelegenheit zur angeregten Diskussion. Dazu trugen auch die rund 65 geladenen Teilnehmer bei, die nicht nur aus den, wie Herr Schäfer in seiner Begrüßung formulierte, „*usual suspects*" aus Anwaltschaft, Verwaltung und Wissenschaft bestanden, sondern zu denen auch und gerade Vertreter von Rechtsabteilungen großer auslandsaktiver deutscher Unternehmen zählten. Neben dieser Besonderheit ist der Gesprächskreis das einzige informelle Gesprächsforum im deutschsprachigen Raum zu diesem praxisrelevanten Rechtsgebiet, das an der Schnittstelle von Wirtschaftsvölkerrecht, internationalem Prozess- und Zivilrecht liegt.

Die Veranstaltung unterteilte sich in zwei Themenblöcke, von denen schon der erste, von Herrn Schäfer moderierte Teil angesichts der Kreditkrise aktueller kaum sein konnte: Rechtsfragen der Finanzierung von Auslandsinvestitionen. Nach den Begrüßungsworten von Frau Tontsch im Namen des Gastgebers IHK sowie von Herrn Dr. Heiko Willems im Namen der vom Bundesverband der Deutschen Industrie geförderten GFA unterstrich Herr Schäfer in seinen Einführungsworten, dass eine Einbeziehung von Banken in investitionsschutzrechtliche Überlegungen bisher unzureichend erfolgt sei. Die drei Impulsreferate hierzu kamen von Vertretern eines Entwicklungsfinanzierers, der Anwaltschaft und eines Energieunternehmens.

Erster Referent zu dem Themenkomplex „Finanzierung" war Herr Ulrich W. Klemm, Chefsyndikus der Deutschen Investitions- und Entwicklungsgesellschaft mbH, Köln (DEG). Sein Impulsreferat trug den Titel „Die rechtliche Strukturierung der Finanzierung einer Auslandsinvestition – Nutzen bi- und multilaterale Investitionsförderungsabkommen dem Investor bei der Kreditvergabe?". Herr Klemm berichtete zunächst über die Projektstrukturierung bei den von seinem Institut in nicht-OECD Staaten geförderten Privatinvestitionen. Oftmals würden Auslandsinvestitionen über lokale Kapitalgesellschaften getätigt, an denen in vielen Fällen lokale Gesellschafter beteiligt seien („*joint-ventures*"). Es sei jedoch eine gewisse Skepsis und Abkehr von diesem Beteiligungsmodell zu erkennen, so dass etwa in China immer öfter Projektgesellschaften gegründet würden, die vollständig in ausländischer Hand seien. Herr Klemm beleuchtete ferner die vertraglichen Aspekte derartiger Finanzierungen. Das größte praktische Verhandlungsproblem zwischen Investitionsfinanzierern und Investoren sah er in den Auszahlungsvoraussetzungen, die insbesondere die vorherige Bestellung der Sicherheiten voraussetzten. Als Sicherheit käme allerdings oftmals lediglich eine Grundpfandabsicherung im Investitionsziellland in Betracht, obwohl das dortige Sachenrecht nicht immer dogmatisch so ausgefeilt sei wie das deutsche. Als weiteren wichtigen Aspekt nannte Herr Klemm die Kündigungsgründe für Finanzierungsverträge, deren Verschärfung zu Gunsten des Gläubigers aufgrund des Schuldrechtsmodernisierungsgesetzes schwieriger geworden sei. Schließlich wurde noch auf die Rechtswahl- und Gerichtsstandsklauseln hingewiesen, im Rahmen derer sein Institut deutschem Recht und Gerichten den Vorzug zu geben sucht, es sei denn, es fehle im Einzelfall an einem unkomplizierten *exequatur*-Verfahren. Unter Umständen sei unter Berücksichtigung des New Yorker Übereinkommens[4] auch die Vereinbarung einer Schiedsklausel möglich. Hinsichtlich der Finanzierungsformen kämen mezzanine Fazilitäten (eine Form der Risikobeteiligung) sowie subordinierte Darlehen und Anleihen in Betracht. Ferner seien auch Lokalwährungsdarlehen denkbar, die aber voraussetzten, dass die Währung vor Ort absicherbar sei. Investitionsförderungs- und -schutzverträge (*Bilateral Investment Treaties* – BITs) seien vor diesem Hintergrund keine *condicio sine qua non* für eine Darlehensvergabe. Im Fall Brasiliens etwa habe man sich beispielsweise nicht daran gestört, dass das deutsch-brasilianische Investitionsförderungs- und -schutzabkommen noch nicht in Kraft getreten sei. Wenn jedoch BITs vorlägen, sei die Kreditvergabe einfacher. Zudem lege man jedenfalls bei Investitionen in Staaten, die sich nach einem Bürgerkrieg noch in der Phase der Stabilisierung befänden, Wert auf das Vorliegen eines BIT. Interessanterweise sah Herr Klemm den Nutzen des BIT insoweit vor allem in der Absicherung der Eigenbeteiligung des Investitionsfinanzierers an der Projektgesellschaft, welche als eigenständige Kapitalanlage im Sinne der BITs zu werten sei.

Das nächste Impulsreferat mit dem Thema „Der völkerrechtliche Schutz einer Projektfinanzierung" hielt Frau

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1) Herr Dr. Escher ist Partner der Sozietät Escher Rechtsanwälte, Frankfurt am Main, Herr Schäfer ist im Bereich Schiedsgerichtsbarkeit bei Allen & Overy LLP, Frankfurt am Main, tätig. Veranstaltungsberichte zu den beiden vorherigen Treffen finden sich bei *Escher/Schäfer*, SchiedsVZ 2006, 95 ff., sowie *Reichert*, SchiedsVZ 2007, 213 ff.

2) Vgl. http://www.ihk-frankfurt.de; speziell zu dem Abkommen zwischen der Deutschen Institution für Schiedsgerichtsbarkeit (DIS) und der IHK Frankfurt am Main, das es ermöglicht, bei dem in der IHK angesiedelten *Frankfurt International Arbitration Center* (FIAC) ein ICSID-Schiedsverfahren durchzuführen siehe http://www.ihk-frankfurt.de/recht/streitbeilegung/schiedsgericht/icsid.

3) Vgl. http://www.investitionsschutz.de.

4) Übereinkommen vom 10. 6. 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche, in Kraft seit 7. 6. 1959, für die Bundesrepublik Deutschland in Kraft getreten am 30. 6. 1961, BGBl 1961 II S. 122; vgl. auch § 1061 ZPO.