

# The Requirement of Fair and Equal Treatment with Respect to Document Production in International Arbitration

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## I. Introduction

All of the major institutional and *ad hoc* rules applicable to international arbitration grant the arbitral tribunal the power to order a party to produce documents to the tribunal and the opposing party.<sup>1</sup> While the rules provide the tribunal with enormous discretion over the arbitral procedure, including the taking of evidence, they require the tribunal to treat the parties fairly and equally in the conduct of the proceedings.<sup>2</sup> Most modern arbitration laws also expressly require fair and equal treatment of the parties,<sup>3</sup> and the tribunal's violation of this principle may be a basis for non-enforcement (or annulment) of the award under a multilateral convention.<sup>4</sup> The question thus arises how tribunals should apply the fair and equal treatment principle with respect to the production of documents.

This paper discusses the application of the fair and equal treatment principle to three issues that may arise in relation to document production in international arbitration:

- legal impediments to document production (Part II);

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<sup>1</sup> See, e.g., ICC Arbitration Rules, Art. 20.5; AAA International Arbitration Rules, Art. 19.3; LCIA Arbitration Rules, Art. 22.1(e); ICSID Arbitration Rule 34(2)(a); DIFC LCIA Arbitration Rules, Art. 22.1(e); DIAC Arbitration Rules, Art. 27.3; UNCITRAL Arbitration Rules, Art. 24.3. See also IBA Rules on the Taking of Evidence in International Commercial Arbitration, Arts. 3.6, 3.9.

<sup>2</sup> See, e.g., ICC Arbitration Rules, Art. 15.2; AAA International Arbitration Rules, Art. 16.1; LCIA Arbitration Rules, Art. 14.1; DIFC LCIA Arbitration Rules, Art. 14.1; DIAC Arbitration Rules, Art. 17.2; UNCITRAL Arbitration Rules, Art. 15. The ICSID Arbitration Rules do not expressly require the tribunal to treat the parties fairly and equally in the conduct of the proceedings, but parties have argued that violation of this principle could subject the award to annulment under Article 52(1)(d) of the ICSID Convention. See Christoph H. Schreuer, *The ICSID Convention: A Commentary* 672-73, 970-71 (2001).

<sup>3</sup> See, e.g., UNCITRAL Model Law, Art. 18; English Arbitration Act 1996, § 33(1)(a); Swiss Private International Law, Art. 182; DIFC Arbitration Law, Art. 25.

<sup>4</sup> See, e.g., New York Convention, Arts. V.1(b) and V.2(b); ICSID Convention, Art. 52(1)(d).

- the availability and accessibility of electronic documents (Part III); and
- the availability of judicial assistance with respect to document production (Part IV).

In addition, this paper discusses a possible limitation on the requirement of equal treatment with respect to document production (Part V).

## **II. Legal Impediments to Document Production**

A party may seek to resist the production of documents in an international arbitration on the ground that production would violate the attorney-client privilege rules or the privacy law of the jurisdiction where that party is based. If the parties are based in jurisdictions with different attorney-client privilege or privacy rules, the tribunal could run afoul of the fair and equal treatment principle by applying each party's domestic rules to determine the discoverability of its documents.

### **A. Attorney-Client Privilege**

The attorney-client privilege rules in common law jurisdictions differ substantially from those in civil law jurisdictions, and even within each of these two systems there are important differences in the scope of the privilege from jurisdiction to jurisdiction. In common law jurisdictions, attorney-client communications are protected from disclosure by a legal privilege belonging to the client. In civil law jurisdictions, by contrast, the attorney is bound by ethical rules to protect the confidentiality of all information received from the client. One practical result of this civil law concept of privilege is that, at least under Swiss law, a document prepared by an attorney and containing confidential information is not entitled to any protection if it is in the client's possession.<sup>5</sup>

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<sup>5</sup> See Michelle Sindler & Tina Wüstemann, *Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup?*, 23/4 ASA Bulletin 610, 616 (2005).

Another difference in the scope of the privilege is that, unlike common law jurisdictions, many civil law jurisdictions afford no protection to communications between company representatives and their in-house counsel. The courts in these civil law jurisdictions, which include France, Switzerland, Sweden and Italy, have reasoned that in-house counsel are not sufficiently independent of their employers to be bound by the duty of confidentiality.<sup>6</sup> Another explanation for the narrow scope of the privilege in most civil law jurisdictions is the very limited availability of discovery in these jurisdictions.

A tribunal in an international arbitration could treat the attorney-client privilege as a procedural issue to be decided under the law of the seat of the arbitration.<sup>7</sup> Under this approach, the tribunal would apply the same privilege law to both parties' attorney-client communications, thereby avoiding any risk of a violation of the principle of equality. As Professor Klaus Peter Berger has observed, however, the seat of the arbitration often has no connection with the parties or the underlying dispute, and the application of its privilege law to communications that took place in other countries, years before the dispute arose, could frustrate the parties' legitimate expectations of confidentiality at the time of the relevant communications.<sup>8</sup>

Another alternative would be for the tribunal to treat the privilege as a substantive issue and to follow a traditional conflict-of-laws analysis, under which the privilege law applicable to each party's attorney-client communications would be the law of the jurisdiction that has the "closest connection" with the respective attorney-

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<sup>6</sup> See Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion*, 22/4 *Arbitration International* 501, 505 (2006). In September 2007, the European Court of First Instance reaffirmed that communications with in-house counsel are not protected from disclosure under European Community law. *Akzo Nobel Chemicals v. Commission*, Case T-125/03 (Sept. 17, 2007).

<sup>7</sup> At least one commentator has advocated this approach. See Robert Pietrowski, *Evidence in International Arbitration*, 22/3 *Arbitration International* 373, 404 (2006).

<sup>8</sup> Berger, *supra* note 6, at 508-09.

client relationship.<sup>9</sup> This would usually be the law of the jurisdiction where the party has its place of business, but it could also be the law of the jurisdiction where the attorney is admitted to the bar.<sup>10</sup> The application of this law would be consistent with the legitimate expectation of the party claiming the privilege, but it could also lead to precisely the risk of unequal treatment discussed above when there is a substantial difference between the parties' domestic privilege laws.

A third alternative would be for the tribunal to apply transnational privilege rules to both parties' attorney-client communications. Professor William Park has advocated this approach and called for professional associations and arbitral institutions to establish pre-set rules of privilege applicable in international arbitration.<sup>11</sup> Such transnational rules are likely to be difficult to develop, however, and in any event they do not exist today. A tribunal applying transnational privilege rules would therefore have to develop such rules on an *ad hoc* basis, which would cause substantial uncertainty regarding the scope of the privilege and could lead to the frustration of the parties' legitimate expectations of confidentiality.<sup>12</sup>

The challenges posed by the attorney-client privilege in international arbitration are also present in court litigation if the parties are based in jurisdictions with different privilege laws. The drafters of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention") addressed these challenges by providing in Article 11 that any person requested to give evidence in the execution of a Letter of Request may refuse to do so "in so far as he has a privilege or duty to refuse to give the evidence (a) under the law of State of

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<sup>9</sup> *Id.* at 509-11.

<sup>10</sup> *Id.* at 511-12. Regardless of the tribunal's determination of the applicable privilege law, a civil law attorney will be bound by the duty of confidentiality under the ethics rules of the jurisdiction where the attorney is admitted to the bar. See IBA International Code of Ethics, Rule 1.

<sup>11</sup> See William W. Park, *Procedural Evolution in Business Arbitration: Three Studies in Change* 58-61, 64 (2006).

<sup>12</sup> See Berger, *supra* note 6, at 513-14.

execution; or (b) under the law of the State of origin . . . .”<sup>13</sup> In other words, as between the privilege law of the state where the requested party is based and the privilege law of the forum state (where the opposing party is likely to be based), a court will apply the privilege law which affords the most protection to attorney-client communications. This “most protective” privilege rule ensures fair and equal treatment of the parties while also safeguarding each party’s legitimate expectation of confidentiality.

There is an emerging consensus in the international arbitration community that tribunals should likewise apply to both parties’ attorney-client communications the most protective privilege law applicable to either party’s communications under a traditional conflict-of-laws analysis.<sup>14</sup> The ICDR Guidelines for Arbitrators Concerning Exchanges of Information (the “ICDR Guidelines”), which became effective in international cases administered by the ICDR commenced after May 31, 2008, expressly adopt the “most protective” privilege rule.<sup>15</sup> The IBA Rules on the Taking of Evidence in International Commercial Arbitration (the “IBA Rules of Evidence”) also promote the application of the “most protective” privilege rule by providing in Article 9.2(g) that the tribunal may exclude from production any documents based on “considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.” The IBA Working Party’s Commentary on this rule explains that it permits the tribunal to exclude from production a party’s “technically non-privileged documents” that would be privileged

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<sup>13</sup> The EU adopted an almost identically worded provision in its 2001 regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. *See* Council Regulation (EC) No. 1201/2001, Art. 14.1.

<sup>14</sup> *See, e.g.*, Berger, *supra* note 6, at 518-20; Sindler & Wüstemann, *supra* note 5, at 637; Pierre Heitzmann, *Confidentiality and Privileges in Cross-Border Legal Practice: The Need for a Global Standard?*, 26/2 ASA Bulletin, 205, 220-23 (2008).

<sup>15</sup> ICDR Guidelines, ¶ 7 (“The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.”).

under the law applicable to the opposing party's documents so that the tribunal can "assure fairness and equality to all sides in the case."<sup>16</sup>

Finally, the robustness of the attorney's duty of confidentiality under the ethics rules of some civil law jurisdictions may make it desirable for the tribunal to take control of the discovery process early in the arbitration. By way of example, Article 16 of the Swiss Code of Ethics provides that an attorney cannot be required to reveal a client's confidential information, even if the client has released the attorney from the duty of confidentiality, if the attorney believes that maintaining the confidentiality of the information is necessary to protect the client's interest.<sup>17</sup> Swiss counsel to a party in an international arbitration could resist producing any documents in response to a document request from the opposing party's counsel on the ground that production would violate the attorney's duty of confidentiality under this rule.

Despite its broad wording, Article 16 of the Swiss Code of Ethics does leave room for an attorney to produce confidential documents in response to an order from the tribunal, because non-production under such circumstances would almost certainly harm (rather than protect) the client's interest. Accordingly, if one of the parties in an arbitration is represented by Swiss counsel, the tribunal should consider issuing a document production order early in the arbitration in order to avoid the delays and inefficiencies that this rule may otherwise engender. At a minimum, counsel for the other party should seek an order requiring production in order to ensure that documents are not withheld and it will obtain all relevant documents that it seeks.

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<sup>16</sup> *Commentary on the New IBA Rules of Evidence by the IBA Working Party*, at 20.

<sup>17</sup> *Code suisse de déontologie*, Art. 16.

## B. Privacy Law

Other legal impediments to document production in international arbitration may include data protection laws and taxpayer privacy protection laws.<sup>18</sup> For example, the EU Member States have all enacted robust data protection laws pursuant to the EU's 1995 data protection directive.<sup>19</sup> In 2007, the Dubai International Financial Centre (the "DIFC") enacted a substantially similar data protection law.<sup>20</sup> These laws regulate the processing of "personal data," which they define extremely broadly as "any information relating to an identified or identifiable natural person."<sup>21</sup> Subject to certain exceptions, they also prohibit the transfer of such data to countries which do not ensure an "adequate level of protection" (including the United States).<sup>22</sup>

Article 26(1)(d) of the EU's 1995 directive and Article 12(1)(e) of the DIFC law set forth a "legal claims" exception to the prohibition on the transfer of personal data to countries not ensuring an adequate level of protection. Both articles provide that such a transfer is permissible if "necessary or legally required . . . for the establishment, exercise or defence of legal claims." While the "legal claims" exception would appear to authorize a party's transfer of personal data pursuant to a document production order issued by an arbitral tribunal, an EU Working Party established pursuant to the 1995 directive stated in a 2005 Working Document that, insofar as the EU directive is concerned, the exception is "subject to strict

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<sup>18</sup> So-called "blocking statutes" generally do not prohibit the transfer of documents for use in foreign arbitrations. For example, the French blocking statute applies only to "foreign judicial or administrative proceedings." See Law No. 80-538 of July 16, 1980.

<sup>19</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>20</sup> See DIFC Data Protection Law 2007.

<sup>21</sup> See, e.g., Directive 95/46/EC, Arts. 2(a), 7-8; DIFC Data Protection Law 2007, Arts. 8-9, Schedule 3.

<sup>22</sup> See, e.g., Directive 95/46/EC, Arts. 25-26; DIFC Data Protection Law 2007, Arts. 11-12.

interpretation” and can only be applied in “civil proceedings” if the personal data has been requested pursuant to the Hague Convention.<sup>23</sup>

Notwithstanding the uncertain scope of the “legal claims” exception, the risk that a party’s production of documents in an international arbitration could be held to violate the applicable data protection law is low given the limited amount of discovery ordered by most tribunals. In order to minimize that risk even further, a tribunal may issue a confidentiality order at the beginning of the proceedings or permit the parties to redact the potentially protected information contained in their documents.

### **III. Availability and Accessibility of Electronic Documents**

E-discovery is a hot topic in the international arbitration community. In the past year alone, the ICDR addressed e-discovery in the new ICDR Guidelines, the Chartered Institute of Arbitrators issued a Protocol for E-disclosure in Arbitration (the “CIArb Protocol”), and the arbitration committee of the International Institute for Conflict Prevention and Resolution proposed a draft discovery protocol which addresses e-discovery.<sup>24</sup>

One of the many questions that arises in relation to e-discovery is the availability and accessibility of each party’s electronic documents. One party may have a document retention policy under which e-mails and other electronic documents are retained in an accessible medium over a period of many years, while the other party may not retain such documents at all or it may store them only on non-searchable back-up tapes containing huge volumes of data. Under pressure from

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<sup>23</sup> See Article 29 Working Party, Working Document WP 114, 2093/05/EN, at 15 (Nov. 25, 2005), available at [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/wpdocs/2005/wp114\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2005/wp114_en.pdf);

<sup>24</sup> See ICDR Guidelines, ¶ 4 (effective May 31, 2008); CIArb Protocol (issued on Oct. 2, 2008); Thomas L. Aldrich, *Arbitration’s E-Discovery Conundrum*, The National Law Journal, December 16, 2008 (discussing CPR’s draft protocol).

litigation and regulatory investigations, many US businesses are moving towards more efficient and centralized data management systems.

In circumstances in which there is a significant imbalance between the parties with respect to the availability and accessibility of electronic documents, the fair and equal treatment principle could require the tribunal to level the playing field in deciding whether to order any e-discovery, and if so, how much. For example, if the parties have dramatically different policies about the maintenance and accessibility of e-mails or if only one of the parties has retained its internal e-mails relevant to the key issue in the case, the tribunal could deny any e-discovery, lest it give an unfair advantage to the party that failed to retain its e-mails. Both the CIArb Protocol and the ICDR Guidelines emphasize the need for the tribunal to consider the fair and equal treatment principle in making any e-discovery order.<sup>25</sup> While the IBA Rules of Evidence do not specifically address e-discovery, Article 9.2(g) likewise permits the tribunal to limit or deny e-discovery based on “considerations of fairness and equality of the Parties that the Arbitral Tribunal determines to be compelling.”

#### **IV. Availability of Judicial Assistance with Respect to Document Production**

The arbitration laws of most countries authorize the courts to provide assistance in the taking of evidence for use in arbitration.<sup>26</sup> If a party refuses to comply with an arbitral tribunal’s order to produce documents, the tribunal can draw

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<sup>25</sup> See CIArb Protocol, ¶ 6 (“In making any order or direction for e-disclosure the Tribunal shall have regard to considerations of . . . fairness and equality of treatment of the parties[.]”); ICDR Guidelines, ¶ 1 (tribunal and parties should “promot[e] equality of treatment and safeguard[] each party’s opportunity to present its claims and defenses fairly”).

<sup>26</sup> See, e.g., UNCITRAL Model Law, Art. 27; English Arbitration Act 1996, § 43; US Federal Arbitration Act, § 7; Swiss Private International Law, Art. 184; German Civil Procedure Code, § 1050; DIFC Arbitration Law, Art. 34; UAE Civil Procedure Code, § 209(2)(b). While French law does not contain any provision expressly authorizing judicial assistance in the taking of evidence for use in arbitration, the general view is that the French courts can order a non-party to produce documents. See *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 728 (Emmanuel Gaillard & John Savage eds., 1999).

an adverse inference against that party.<sup>27</sup> If a *non-party* refuses voluntarily to produce documents that are necessary for a fair resolution of the dispute, the tribunal's only option is to have recourse to the courts for assistance in the taking of evidence. While most arbitration laws provide for such assistance under certain circumstances, important differences among the laws can potentially give one party to an arbitration an advantage over the other. In the interest of fair and equal treatment of the parties, the tribunal should minimize any such advantage.

One important difference among the judicial assistance provisions in arbitration laws relates to their territorial scope of application. Under the laws of Switzerland, the United Arab Emirates and the DIFC, a court can provide assistance in the taking of evidence only if the arbitration is seated in the jurisdiction where assistance is sought.<sup>28</sup> Under the laws of England, Germany and Austria, the courts can provide assistance in the taking of evidence even if the arbitration is seated in a foreign country.<sup>29</sup> US law with regard to this issue is uncertain. Section 7 of the Federal Arbitration Act authorizes judicial assistance in the taking of evidence only if the arbitration is seated in the judicial district where assistance is sought. Another statutory provision, Section 1782 of the US Judicial Code ("Section 1782"), authorizes judicial assistance in the taking of evidence for use in "a proceeding in a foreign or international tribunal,"<sup>30</sup> but for many years the courts held that this provision did not apply to arbitration.<sup>31</sup> In 2004, the US Supreme Court suggested in dicta in *Intel Corp. v. Advanced Micro Devices, Inc.* that Section 1782 does apply to

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<sup>27</sup> See, e.g., IBA Rules of Evidence, Art. 9.4.

<sup>28</sup> See Swiss Private International Law, Arts. 176, 184; UAE Civil Procedure Code, § 209(2)(b); DIFC Arbitration Law, Arts. 7, 34; see also UNCITRAL Model Law, Arts. 1(2), 27.

<sup>29</sup> See English Arbitration Act 1996, §§ 2(3), 43; German Civil Procedure Code, §§ 1025(2), 1050; Austrian Civil Procedure Code, §§ 577(2), 602.

<sup>30</sup> 28 U.S.C. § 1782(a).

<sup>31</sup> See, e.g., *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

arbitration.<sup>32</sup> Several lower courts recently applied Section 1782 to foreign arbitrations in reliance upon *Intel*, although one lower court declined to do so.<sup>33</sup>

The difference in the territorial scope of application of the judicial assistance provisions can potentially give one party to an arbitration an advantage over the other. Assume, for example, that an arbitration between an English party and a Swiss party is seated in France and that each party's domestic financial advisor refuses voluntarily to produce documents important to the resolution of the dispute. The Swiss courts could not provide assistance in obtaining the documents of the Swiss party's financial advisor because the arbitration is not seated in Switzerland, while the English courts could provide assistance in obtaining the documents of the English party's financial advisor.<sup>34</sup> Under such circumstances, the tribunal should consider whether to level the playing field by denying the Swiss party permission to seek assistance from the English courts or by excluding from evidence some or all of the documents obtained through such assistance.<sup>35</sup>

Another important difference among the judicial assistance provisions relates to the scope of discovery that the courts can order in support of arbitration. In most jurisdictions, the courts must apply the same rules on the taking of evidence that they would apply in regular court proceedings.<sup>36</sup> In civil law jurisdictions, this means that the courts will often order only minimal discovery in support of arbitration. Section

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<sup>32</sup> 542 U.S. 241, 124 S.Ct. 2466, 2479 (2004).

<sup>33</sup> See *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 238-40 (D. Mass. 2008) (applying Section 1782 to international commercial arbitration); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 954-57 (D. Minn. 2007) (same); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006) (same); *In re Oxus Gold PLC*, No. 06-82, 2006 WL 2927615, 2006 U.S. Dist. LEXIS 7411 (D.N.J. Oct. 11, 2006) (applying Section 1782 to investment treaty arbitration). But see *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.*, No. H-08-335, 2008 WL 5070119, 2008 U.S. Dist. LEXIS 94395 (S.D. Tex. Nov. 20, 2008) (declining to apply Section 1782 to international commercial arbitration).

<sup>34</sup> The English courts would have discretion to refuse to provide such assistance. See English Arbitration Act 1996, § 2(3).

<sup>35</sup> See IBA Rules, Art. 9.2(g) (permitting tribunal to exclude documents from evidence based on "considerations of fairness or equality").

<sup>36</sup> See, e.g., English Arbitration Act 1996, § 43(1); Swiss Private International Law, Art. 184; German Civil Procedure Code, § 1050.

1782 provides that a US court “may prescribe the [discovery] practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, . . . [or may be] the Federal Rules of Civil Procedure.” Commentators who oppose the application of Section 1782 to arbitration argue that it disadvantages US-based parties by exposing them and US non-parties to the threat of full-blown US-style document and deposition discovery.<sup>37</sup>

In *Intel*, the US Supreme Court addressed such “parity concerns” (which apply equally when the foreign proceedings are before a court) by emphasizing that district courts have discretion under Section 1782 to deny discovery entirely, to impose conditions on discovery (such as the reciprocal exchange of information), or to limit discovery based on “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the [foreign tribunal] to US federal court judicial assistance.”<sup>38</sup> It nonetheless seems likely that a US court applying Section 1782 will be inclined by culture to order broader discovery in support of arbitration than a French or German court. When an imbalance in the scope of court-ordered discovery puts one party to the arbitration at a significant disadvantage, the tribunal should consider excluding from evidence some or all of the documents obtained by the opposing party.

A third difference between Section 1782 and other judicial assistance provisions is that it entitles a party to apply to the court for assistance in the taking of evidence even if the party has not obtained prior permission from the arbitral tribunal to do so. One commentator has stated that, due to this feature, “Section 1782 threatens to undermine the arbitrators’ control of the discovery process by taking the

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<sup>37</sup> See, e.g., John Fellas, *Using Section 1782 in International Arbitration*, 23/3 *Arbitration International* 379, 387-88 (2007); David W. Rivkin & Barton Legum, *Attempts to Use Section 1782 to Obtain US Discovery in Aid of Foreign Arbitrations*, 14/2 *Arbitration International* 213, 225-26 (1998).

<sup>38</sup> See *Intel*, 542 U.S. 241, 124 S.Ct. at 2481-83.

decision concerning that process out of their hands and putting it into the hands of a US court, which inevitably will have little familiarity with the case and may issue an order permitting a disparity of access to evidence, with the effect that the parties to the proceeding will not be treated equally.”<sup>39</sup>

While Section 1782 does pose a real threat to the tribunal’s control over the discovery process, the tribunal can diminish this threat by communicating to the parties, and if necessary, to the relevant US court that it will exclude from evidence any documents obtained under Section 1782 without its prior permission. As already noted, *Intel* held that a district court presented with a Section 1782 request should take into account, *inter alia*, “the receptivity of the [foreign tribunal] to US federal-court judicial assistance.”

Finally, it is legitimate to ask whether, despite the many faults of Section 1782, its non-application to foreign arbitration would increase the danger of procedural unfairness and inequality of treatment in arbitrations with a US nexus. As pointed out in a recent article, a return to the pre-*Intel* position that Section 1782 does not apply to foreign arbitration “would lead to an inverse procedural inequality to the detriment of non-US parties to foreign private arbitration: they would be denied access to information and evidence located in the United States, while, contrary to the apparent impression in the United States, many foreign legal systems do provide judicial assistance in the taking of evidence for US parties.”<sup>40</sup>

## **V. Possible Limitations on the Requirement of Equal Treatment**

Under certain circumstances, the tribunal may have to sacrifice the equal treatment principle to some extent in order to comply with the fairness principle or to ensure that a party has a full and fair opportunity to present its case.

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<sup>39</sup> Fellas, *supra* note 37, at 402.

<sup>40</sup> See Martin Illmer & Ben Steinbrück, *US Discovery and Foreign Private Arbitration: The Foreign Lawyer’s Perspective*, 25/3 Journal of International Arbitration 329, 330-31 (2008).

Johnny Veeder has suggested, for example, that in a dispute over legal liability insurance, the insurer may not know enough about the insured's documentation to frame an appropriately specific request under Article 3.3 of the IBA Rules, which requires that the requesting party identify the document or a "narrow and specific" category of documents that it is requesting.<sup>41</sup> The tribunal could excuse the insurer from compliance with Article 3.3. Alternatively, the tribunal could order each party's attorney to certify that to the best of that party's knowledge, after a reasonable search, no document remains undisclosed which either supports its opponent's case or detracts from its own case. As Mr. Veeder recognizes, however, this alternative would potentially conflict with the ethical rules applicable to many civil law attorneys.<sup>42</sup>

A different type of example arises when it comes to apportioning the time for a hearing. When one party has seven witnesses and the other two, should the tribunal apportion equal time at the hearing to the parties or allow more time to the party that has more witnesses to cross examine? Most often, the tribunal allocates the available time equally between the parties in order to comply with the principle of equality. But the tribunal does not always have to do so. If it determines that there is a compelling need of one party for more time, it may find a conflict between the principles of fairness and equality, delve into detail, and provide some additional time for one party in the specific area of need (*e.g.*, cross examination of more witnesses) but not necessarily for opening statement or closing argument. Some tribunals have ordered that, as a guiding principle, the time at the hearing will be divided equally, but the tribunal will consider allowing additional time to a party if and as the need arises

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<sup>41</sup> V.V. Veeder, *Document Production in England: Legislative Developments and Current Arbitral Practice*, in *ICC Bulletin: Document Production in International Arbitration* 57, 59-60 (2006 Special Supplement).

<sup>42</sup> *Id.* at 60.

at the hearing. While not ideal, the practice has the advantage of maintaining flexibility in order to ensure fairness between the parties.