A Primer for Redfern Requests – Rule 19 of the VanIAC Rules

by Kenneth Glasner, Q.C., FCIArb.

The purpose of this paper is to provide some insight in understanding and applying Rule 19 of the VanIAC Rules[1] to those who are unfamiliar with the use of a Redfern Schedule to organize document production requests.

On September 1, 2020, the new *Arbitration Act* ("the Act") was introduced in British Columbia. Contemporaneous with the introduction, VanIAC, formerly known as BCICAC introduced a new set of rules ("the Rules") streamlined to dovetail with the Act.

Rule 19 adopted the practice applied in the international arbitration community known as a Redfern Schedule. This process involves document production, details of which include the preparation of a schedule by the requesting party (see Schedule E of the Rules).

The purpose of this process early in the proceeding is to handle, in an efficient way, the production of documents which may find their way to the ultimate hearing.

Redfern and Hunter on, *International Arbitration*, defines its purpose.[2]

> *The purpose of the Redfern schedule is to crystallise the precise issues in dispute, so that the arbitral tribunal knows the position that the parties have reached following the exchanges between them. This makes it possible for the arbitral tribunal to make an informed decision as to whether or not a particular document, or class of documents, should be produced, without having to be involved in the details of the exchange between the parties' lawyers and, usually without the need for a meeting.*

From time to time the parties may, where appropriate, revisit the requests during the document-production process.

The importance of Document Production at an early stage was canvassed in *Abuse of Document Production in International Arbitration: Remedies When the Adverse Inference Falls Short*.[3]

> *3. The Document Production phase is important. Marieke Van Hooijdonk and Yves Herinkckx[4] explain that the process:*
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> > *is an invaluable tool for demonstrating to an arbitral tribunal facts that a party could not prove if it had to rely on the documents already in its possession before commencement of the case. Despite clear disallowance of fishing expeditions under the IBA Evidence Rules, the process can help a claimant whose own records are initially less than convincing.*
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> *Van Hooijdonk and Herinkckx make another compelling observation that is often overlooked: 'Conversely, and this is a worthwhile feature of the system as well, the knowledge that one will have to disclose detrimental documents to the opponent can somewhat refrain prospective claimants from making overly enthusiastic demands or fanciful assertions'.*
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> *4. Tribunals typically require the parties to submit their request for documents in the form of a 'Redfern or Stern Schedule' with the fourth columns left blank for the tribunal's decision on each specific request. This method is supported by, amongst others, the International Chamber of Commerce (ICC) Commission Report on Techniques for Controlling Time and Costs in Arbitration.[5] The theoretical constructs around document production are rational, well understood and supported by many sources of soft law.*

Schedule E closely mirrors the Redfern Schedule adopted by the international community. The Redfern Schedule is a living document with pre-set columns that allow the parties and the arbitrator to track document requests, party positions and rulings. See Appendix A attached. The Stern Schedule version presents the columns horizontally. See Appendix B attached.

The first column sets out the documents or category of documents requested.

The second column titled, Rationale for Document Requests, is divided into two columns; one referring to Submissions/Document; the other to the requesting parties' Comments.

The third column provides an opportunity for opposing party to make specific objections to the documents requested on a line-by-line basis.

The fourth column provides the requesting party the opportunity to reply to the objection.

The last column provides for the tribunal's decision. At the conclusion of this exercise, the tribunal issues a procedural order that provides directions regarding the remaining disputed document production requests.

Some parties agree to incorporate the IBA Rules on *Taking of Evidence in International Arbitration* ("IBA Rules").[4] The IBA Rules have been updated as of December 17, 2020 but are in essence the rules from the last amendment in 2010. The salient Articles are 3 and 9.

Quite often the term used is that the tribunal will be guided – but will not be bound by Articles 3 and 9 of the IBA Rules

Relevant and Material

Much of Article 3 is condensed into Rule 19. The test in Article 3 is:

> *3(b) A statement as to how the documents requested are relevant to the case and material to its outcome.*

The test in Rule 19(g) states:

> *The Arbitral Tribunal shall determine any objections and may order a party to produce any documents at a date to be set by the Arbitral Tribunal. In*

> *determining objections to the production of documents, the Arbitral Tribunal must be satisfied that the documents requested are relevant to an issue in the arbitration and material to the outcome of the arbitration.*

Rule 19 conforms with well developed international practice of the IBA Rules.

The key words are “relevant” and “material”.

At page 382, Redfern and Hunter[5] discuss the relationship between “relevance” and “material”, adopting the two-pronged test.

> *6.98 Most legal practitioners are accustomed to the obligation to satisfy a court, or arbitral tribunal, as to the question of relevance of documents or other information that they are seeking from the opposing party. But the requirement of showing “materiality” to the outcome of the case is an increased burden. It also enables arbitral tribunals to deny document requests where, although the requested documents would generally be relevant, they consider that their production will not affect the outcome of the proceedings.*

Konstantin Pilkov in his paper titled*, Evidence In International Arbitration: Criteria for Admission and Evaluation*, discusses the relationship between relevance and material.[6]

> *Relevance*
>
> *Relevance is probably the first matter parties and arbitrators have to consider when deciding where particular materials deserve to be offered as evidence or requested for production. The term “relevant evidence” in common law generally means evidence having a tendency to make the existence of any fact that is of consequence in the case more probable or less probable than it would be without the evidence. This definition is used in the common law of evidence in which the concept of materiality is merged with relevance. However, in international commercial arbitration these criteria are separated, as the majority of arbitration rules empower arbitrators to decide on relevance and materiality.*

The VanIAC Rules favour the adoption of the relevance/materiality test.

Principles to be Considered by the Tribunal

A number of the principles to be considered by the tribunal in an arbitral setting are set out in *Imperial Oil v. Jacques*.[7]

At paragraph 24:

> *Although the parallel objectives of proportionality and efficiency have become increasingly important in the civil procedural context, seeking the truth remains the cardinal principle in civil proceedings.*

At paragraph 26:

> *The pre-trial "exploratory" stage, which is a key time for this search in court for truth, facilitates the disclosure of evidence that might enable the parties to establish the truth of the facts they allege.*
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> •
> •
> •
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> *This stage enables each of the parties "to be better informed of the facts of the case and, more specifically, of the opposite parties' evidence".*
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> •
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> •
>
> *It also favours admissions, allows the issues to be defined quickly and facilitates transactions.*

At paragraph 28:

> *"At the stage of examination on discovery both before and after defence, the fullest possible disclosure of evidence should be favoured".*

Compare the reference in paragraph 28 to Rule 19(a):

> *19(a) Oral and documentary discovery procedures developed for and used in court procedures are generally not appropriate procedures for obtaining documents and information in an arbitration under these Rules.*

Doubt as to production should be resolved in favour of the requesting party in those cases in which the relevance alleged rests on acceptable objective which the requesting parties declare

it seeks.[8] Even so, at the pre-hearing stage doubt is not carte blanche and objection may be maintained if the request goes beyond the issues in dispute.[9]

The case law confirms that caution is required when assessing the relevance of confidential documents. Confidentiality in itself is not a bar to disclosure and the court retains discretion to impose or require that the parties agree to terms protecting the confidentiality of the documents.[10]

The Court of Appeal of Alberta in *ENMAX Energy Corporation v. Trans Alta Generation Partnership*[11] dealt with the allegations of unfairness which arose out of a series of five procedural orders regarding document production. The limitations imposed by the tribunal resulted in an alleged inability by the two parties to fully present their case.

The Court states in paragraph 30:

> *At first blush this appears to be a dispute over production of documents, an issue upon which this Court normally accords deference. However, in my view, at its core, the proposed appeal is about procedural fairness which attracts the less differential standard of correctness.*

Factors to be Considered by the Tribunal on Objections in a Redfern Schedule

In the Tribunal's decision on the production of documents between *Merrill & Ring Forestry L.P. Claimant* and the *Government of Canada Respondent,* the Tribunal listed a number of factors which gives rise to valid objections:[12]

(a) lack of sufficient relevance or materiality;

(b) legal impediment or privilege under the legal or ethical rules determined by the tribunal to be applicable;

(c) unreasonable burden to produce the requested evidence;

(d) loss or destruction of document that has been reasonably shown to have occurred;

(e) grounds of commercial or technical confidentiality that the Tribunal determines to be compelling;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or public international institution) that the Tribunal determines to be compelling;

(g) consideration of fairness or equality of the disputing parties that the Tribunal determines to be compelling; or the failure to comply with requirements from making a proper document request as set forth in the document production order.

Additional factors are set out at Article 9 of the IBA Rules.

Privilege

Often the issue of privilege arises. This can take the form of solicitor-client privilege; litigation privilege; settlement privilege; and common interest privilege.

The issue of solicitor-client privilege was discussed in *Soprema Inc. v. Wolrige Mahon LLP*[13], within the context of whether waiver of privilege was implied within the matrix of facts.

The court made comment at paragraph 22:

> *[22] It is of course clear that waiver is implied where a party voluntarily injects its understanding of its legal position or relies on legal advice to justify its conduct, and acts in a manner inconsistent with maintain the privilege. In this context, waiver is implied as a result of the voluntary conduct of a party even where it did not intend that result. The cases express the test in various ways. Doman, for example, says:*
>
> > *[12] Solicitor-client privilege, which protects the fundamental civil and legal right of citizens to communication in confidences with their lawyers, will not be lightly abrogated: Descoteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at 875. It will, however, be considered waived when a party makes its state*

> *of mind material to its claim or its defence in such a way that to enforce the privilege would be to confer an unfair litigation advantage on the party claiming it…*

The issue of waiver was subsequently considered in *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 when the court enunciated the principles of waiver at paragraph 53.[14]

> *[53] The foundation of waiver is knowledge and intention. Express has authoritatively been described in the following way at para. 6 of S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd., (1983), 45 B.C.L.R. 218 (S.C.):*
>
> > *Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege: and (2) voluntarily evinces an intention to waive that privilege.*

In *Sable Offshore Energy Projects v. Ameron International Corporation*[15], the Nova Scotia Court of Appeal dealt with two privilege issues; litigation privilege and common interest privilege. Paragraph 50 comments on litigation privilege.

> *[50] With respect to when litigation privilege ends, the chambers judge relied upon Blank v. Canada (Minister of Justice), 2006 SCC 39 wherein Fish, J. noted:*
>
> > *34 The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose - and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.*
> >
> > *38 As mentioned earlier, however, the privilege may retain its purpose – and, therefore, its effect – where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining…litigation more broadly that the particular proceeding which gave rise to the claim" (para. 89); see Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 90 A.R. 323 (C.A.).*

> *39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.*

Sable also dealt with common interest privilege where the court endorsed the passage by Lord Denning in *Buttes Gas and Oil Co. v. Hammer*.

> *[62] The chambers judge undertook a thorough review of the case authorities outlining the creation and nature of common interest privilege. The foundation of her analysis arises from a definition provided by Lord Denning. At paragraph 116 of her decision the chambers judge writes:*
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> > *[116] As Denning, L.J. said in Buttes Gas and Oil Co. v. Hammer (No. 3), [1981] Q.B. 223 (C.A.) at p. 243:*
> >
> > *…There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him – who have the self-same interest as he – and who have consulted lawyers on the same points as he – but these other have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation – because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take a legal advice. Both exchange relevant documents. But only one is a plaintiff.*
> >
> > *An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.*
> >
> > *In all such cases I think the courts should – for the purposes of discovery – treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All*

> *are the subject of privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.*

In *Richard L'Abbé et. Al. v. Allen-Vanguard Corporation*,[16] the issue of settlement privilege was canvassed (as well as solicitor-client privilege and litigation privilege). The court explains the effect of settlement privilege as follows:

> *Settlement Privilege*
>
> *[31] I do need to say something about claims for privilege over settlement discussions. This is an area of law which has been evolving. It has long been understood that offers to settle litigation are privileged within the context of that litigation. Specifically the trier of fact should not be aware of the offer before rendering a decision. This is to avoid the decision being tainted by the idea that an offer is an admission of liability or to avoid the assessment of damages being coloured by the quantum of an offer. Formal offers to settle are specifically protected by the Rules of Civil Procedure. All communications made in mediation are also deemed to be without prejudice settlement discussions.*

The Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.* endorsed the concept of Pierringer Agreements. The court went on to explain Pierringer Agreements at paragraph 6.[17]

> *[6] Sable entered into three Pierringer Agreements with some of the defendants. Named for the 1963 Wisconsin case of Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963), a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other.*

The non-settling defendants sought disclosure of the amount of settlements prior to trial. They were unsuccessful. The reasons are an excellent dissertation on settlement agreements in light of what Abella J. says in paragraph 1.

> [1] *Abella J. – The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlments.*

I add one further privilege – that of public interest immunity claims. Here we are not dealing with a form of privilege as between parties in litigation but rather parties outside of the litigation. In *Dudley v. British Columbia*,[18] the court made comment:

> *[104] In my respectful view, the parties ought not to have asked the chambers judge to rule on the public interest immunity claim without listing the documents. Public interest immunity claims must be asserted and assessed on a case-by-case basis. Competing interests such as those that arise in the case of bar must be carefully weighed, and the balancing exercise carried out in a fact-specific context: Imperial Oil v. Jacques, 2014 SCC 66 at paras. 82-83. As consequence of the manner in which the parties proceeded, the chambers judge was put in the untenable position of attempting to resolve the public interest immunity claims in something approaching a factual vacuum.*

Possible Comments by the Tribunal

I include the type of comment which counsel may expect from the tribunal (arbitrator). Comments are rarely lengthy but rather to the point.

1. Required production is limited to those documents that are "directly relevant".
2. The arbitrator considers that to restrict production to documents pre-dating _____ would be artificial and unrealistic.
3. The identities of the people involved should be apparent from the documents produced and/or witness evidence.
4. If _____ has such documents, they shall be produced.
5. The parties' position on this request are not clear to the tribunal.
6. However, if _____ wishes to pursue its claim for damages under this head, it shall produce directly relevant documents (of whatever date).

7. No decision required.
8. Refused at this stage.
9. So ordered.
10. The Respondent shall on or before _____, 2021 produce to the Claimant the documents requested by the Claimant in its Redfern Schedule Request, 7 to 9 and 14 being _____.
11. Having regard to the pleadings referred to by _____ I find the requested documents set out in items _____ are relevant and material to the outcome of the dispute.
12. No decision required at this time.

Closing

From a visual perspective the Redfern Schedule is prepared in columns; usually the size of print that attracts a magnifying glass.

This format makes it difficult for the reader (the decision maker) to fully appreciate the import of the submission. Consequently, the strength of the argument may be lost.

Some counsel prefer a more user friendly format – the Stern Schedule. Same purpose, same headings but without the need of a magnifying glass.

ENDNOTES

1. Vancouver International Centre, Domestic Arbitration Rules (Effective September 1, 2020)
2. Oxford University Press, 6th Edition, p. 384
3. Abuse of Document Production in International Arbitration: Remedies When the Adverse Inference Falls Short, *Arbitration* Vol. 86 (2020) Issue 4, p. 395
4. IBA Rules on the Taking of Evidence in International Arbitration 17, December 2020
5. See 2 above, at page 382
6. (2014) 80 Arbitration Issue 2, p. 148
7. 2014 SCC 66
8. *Westinghouse v. Arkwright Boston*, 1993 CANLII 4242 (QCCA) p. 14
9. 8127018 *Canada Inc. v. Zagros Development Corporation,* 2017 QCCS, para 44
10. *Imperial Oil v. Jacques* 2014 SCC 66 at para 30
11. 2020 ABCA 68
12. Found website (ICSID Administered Case)
13. 2016 BCCA 471
14. 2017 BCCA 219
15. 2015 NSCA 8
16. 2011 ONSC 7575. The recent decision in *Western Potash Corporation v. Amarillo Gold*, 2020 BCSC 17, provides a discussion of solicitor-client and common interest privilege and arbitration.
17. 2013 SCC 37
18. 2016 BCCA 328

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APPENDIX A

Document Disclosure Schedule

Requesting Party: _____

(a)	(b)	(c)		(d)	(e)	(f)
No.	**Documents or Category of Documents Requested**	**Rationale for Document Request**		**Objections to Document Request**	**Reply to Objections to Document Request**	**Decision of the Arbitral Tribunal**
		Reference to Submissions/Document	**Comments**			

APPENDIX B

Sample Stern Schedule

Document Request No	
A. Documents or category of documents requested (requesting Party)	
B. Relevance and materiality (requesting Party) **(1) para ref to submissions** **(2) comments**	
C. Objections to document request (objecting Party)	
D. Response to objections and request for resolution (requesting Party)	
E. Decision of the Tribunal	