

1986

## Arbitral Discovery and the Iran-United States Claims Tribunal Experience

Monica Petraglia McCabe

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### Recommended Citation

Monica Petraglia McCabe, *Arbitral Discovery and the Iran-United States Claims Tribunal Experience*, 20 INT'L L. 499 (1986)  
<https://scholar.smu.edu/til/vol20/iss2/5>

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## ARTICLES

# Arbitral Discovery and the Iran-United States Claims Tribunal Experience

### I. Introduction

Definitions of discovery presume its time-and money-saving benefits,<sup>1</sup> and presuppose a trial setting.<sup>2</sup> Discovery, however, has not been traditionally considered applicable to arbitration.<sup>3</sup> More recently, though, legal

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\*The author is a Law Clerk for the Honorable Arthur L. Burnett, Sr., U.S. District Court, District of Columbia. She previously served as a paralegal specialist in the Office of International Claims and Investment Disputes, a part of the Department of State's Office of Legal Adviser. The author thanks Sally Cummins, Michael Raboin, James Oldham, and David Stewart for their helpful comments and suggestions. The views expressed herein, however, do not necessarily represent their views, those of the Department of State or those of the United States Government.

1. The *DICTIONARY OF ARBITRATION* defines "discovery" as "a legal procedure invoked before a trial to inform both parties of the facts in a dispute in order to narrow the issues and save *time and expense*." *DICTIONARY OF ARBITRATION AND ITS TERMS* (K. Seide ed. 1970) (emphasis added) [hereinafter cited as *DICTIONARY*]. This may appear ironic to American practitioners because, in practice, discovery procedures in United States courts have been deemed both time-consuming and expensive. See generally Smith, *The Concern over Discovery*, 28 *DRAKE L. REV.* 51 (1978-79); Renfrew, *Discovery Sanctions: A Judicial Perspective*, 6 *LITIGATION* 5 (1980); Kohn, *Discovery Made Simpler (and Cheaper)*, 6 *LITIGATION* 3 (1980).

2. "Modern discovery practice, the process through which a litigant gains pre-trial information upon the oath of his adversary. . . ." Goldstein, *A Short History of Discovery*, 10 *ANGLO-AM. L. REV.* 257 (1981).

3. The *DICTIONARY OF ARBITRATION*, *supra* note 1, at 73 states: "Discovery . . . as a procedure has not been used often in arbitration, since arbitration is itself an informal and simplified procedure. . . ." See Willenken, *Discovery in Aid of Arbitration*, 6 *LITIGATION* 16 (1980) [hereinafter cited as Willenken, *Discovery*]; Willenken, *The Often Overlooked Use of Discovery in Aid of Arbitration and the Spread of the New York Rule to Federal Common Law*, 35 *BUS. LAW.* 173 (1979) [hereinafter cited as Willenken, *The Often Overlooked*].

Discovery was considered to be a procedure which would undermine the supposed advantages of arbitration; see Callahan, *Discovery in Construction Arbitration*, 37 *ARB. J.* 3 (1982);

scholars and practitioners have said that discovery can be efficacious in arbitration to help narrow the issues, alleviate the need for live testimony and elicit important facts in the sole possession of the other party.<sup>4</sup>

After a brief history of the origins and role of discovery, this article discusses the usefulness of discovery in various arbitration settings by comparing the need for discovery in domestic and international arbitration. The importance of discovery in international arbitration will be illustrated through its use at the Iran-United States Claim Tribunal (hereinafter cited as the Tribunal). After a survey of the Tribunal's discovery procedures, standards, and enforcement mechanisms, the article focuses on the problem of enforcement of discovery orders at the Tribunal. The article then suggests alternative mechanisms for enforcement, and finally, it reaches several conclusions concerning the efficacy of discovery in arbitration.

## II. Background

### A. HISTORICAL DEVELOPMENT OF DISCOVERY

The origins of discovery employed in litigation in U.S. courts stem from the British common law,<sup>5</sup> and historians have traced the origins of English discovery procedures back to Roman canon and civil law.<sup>6</sup> From these beginnings, procedures which gradually developed into modern discovery practices spread through the English ecclesiastical courts to the courts of chancery in the fourteenth and fifteenth centuries.<sup>7</sup> Although the chancery

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Goldman, *A Proposed Arbitration Act for Kentucky*, 22 ARB. J. 193 (1967) reprinted in E. TEPLÉ & R. MOBERLY, *ARBITRATION AND CONFLICT RESOLUTION* 492, 494 (1979). But some say that arbitration is not as simple and speedy as it is believed to be. See, e.g., Geokjian, *The Conduct of International Arbitration*, 2 LAW. AMERICAS 409, 424 (1979).

4. See, e.g., Willenken, *Discovery*, *supra* note 3, at 16; Willenken, *The Often Overlooked*, *supra* note 3, at 173; Robert, *Administration of Evidence in International Commercial Arbitration*, 1 Y.B. COM. ARB. 221, 223 (1976); Poppleton, *The Arbitrator's Role in Expediting the Large and Complex Commercial Case*, 36 ARB. J. 6, 8 (1981); Audiotape Presentation by Frederick A. O. Schwartz, reprinted in *ARBITRATION UNDER INTERNATIONAL COMMERCIAL CONTRACTS* 147 (1982) [hereinafter cited as Audiotape].

5. See generally Goldstein, *supra* note 2.

6. See, e.g., W. BUCKLAND & A. McNAIR, *ROMAN AND COMMON LAW: A COMPARISON IN OUTLINE* 406 (2d. rev. 1952) [hereinafter cited as BUCKLAND]; Landfell, *Discovery under the Judicare Acts*, 11 HARV. L. REV. 143 (1898); G. SPENCE, *EQUITABLE JURISDICTION* 228, (1846); Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, cited in Goldstein, *supra* note 2, at 264; but see J. DAWSON, *A HISTORY OF LAY JUDGES*, 148 (1960).

Under the edict *de edendo*, the defendant had a right to compel the production of documents from his adversary; however, the plaintiff was not afforded the same right. See Buckland, *supra*, at 406. In addition, subpoenas and compulsory sworn interrogation originated in Roman practice. Goldstein, *supra* note 2, at 265.

7. See Goldstein, *supra* note 2, at 264. Interestingly, while discovery at common law was impossible both because of the incapability of the parties to testify on their own behalf and because these courts lacked the power to compel answers to interrogatories or production of

procedures benefitted the chancellor more than the litigants, they furnished the "seed for modern discovery."<sup>8</sup> The English common law judges were finally given the authority to compel answers to documents and inspect documents in the mid-nineteenth century.<sup>9</sup> Similar authority was given to American state common law judges at about the same time.<sup>10</sup> Eventually, discovery became a recognized device in federal civil practice in the United States under the Federal Rules of Civil Procedure.<sup>11</sup>

## B. DISCOVERY IN INTERNATIONAL LITIGATION

In the international arena, parties before international tribunals generally have the right of discovery.<sup>12</sup> Parties have the right to the production of documents that are in the sole possession of the opponent.<sup>13</sup> In some cases, document production has been ordered, even where the document was not in the sole possession of the opponent, if the evidence was deemed to be material.<sup>14</sup> Interrogatories and depositions, however, are much less common before international tribunals.<sup>15</sup>

The Rules of the International Court of Justice require that before hearings are commenced, each party inform the Registry of the evidence which it will put forward and that which it wants the Court to obtain.<sup>16</sup> Article 49 of

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documents, the courts of chancery did not suffer from these impediments. *Id.* at 258. The chancellor, employing his authority as the representative of the king, was able to enforce his orders to subpoena documents and compel testimony. *Id.* at 259.

8. See Goldstein, *supra* note 2, at 259.

9. This authority was given under the Common Law Procedure Act of 1854. *Id.* at 266.

10. New York, for example, included discovery as a normal trial procedure. *Id.*

11. FED. R. CIV. P. 26-37.

The broad scope of the federal rules allows discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . ." FED. R. CIV. P. 26. In order to allow parties to obtain this information, the federal rules provide for a variety of discovery methods:

depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examination; and requests for admission.

*Id.* In order to "meet the mounting criticism of uncontrolled overuse of discovery by attorneys whose purpose appears to be the forcing of favorable settlement by driving up the costs of litigation," the Advisory Committee on the Federal Rules proposed several changes in Rule 26. See FED. R. CIV. P. 26 advisory committee note (1983).

12. See D. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 98-9 (1975).

13. *Id.* at 99.

14. See *id.* at 100 citing to Pious Fund Case (United States v. Mexico) May 22, 1902, art. IV, 32 Stat. 1916, 19—, T.S. No. 408 (cited in book as 1 Malloy Treaties 1196).

15. *Id.* at 363-64. There are cases of deposing the adversary cited but these usually occur before claims commissions. For example, the deposition of John Jay was admitted in *Saint Croix River Arbitration*. *Id.* at 187.

16. I.C.J.R. art. 49. A list of names, descriptions, and addresses of the witnesses and experts

the International Court Statute authorizes the court, before oral proceedings, to order the parties to produce any document or supply any explanations.<sup>17</sup> If the party refuses, the Court takes formal note of the refusal.<sup>18</sup> The Court has never exercised this power to take formal note.<sup>19</sup> Under Article 44 of the Statute, the Court can require a state to produce evidence on the spot.<sup>20</sup> Either upon request of one of the parties or *sua sponte*, the International Court is empowered to take all of the necessary measures to allow for the examinations of witnesses or experts not before the Court.<sup>21</sup>

### III. Arbitration and Discovery

While the usefulness of liberal discovery in litigation may be in question,<sup>22</sup> the question is even more debatable in arbitration.<sup>23</sup> Yet, many practitioners and legal journalists agree that a limited form of discovery is helpful in the arbitration process.<sup>24</sup>

#### A. DISCOVERY IN DOMESTIC ARBITRATION

Arbitral discovery in the United States is governed by a maze of federal<sup>25</sup> and state statutes<sup>26</sup> and court decisions, as well as institutional rules such as those promulgated by the American Arbitration Association (hereinafter cited as the AAA). These rules can be divided into several categories: "disallowance of discovery; discovery based upon recommendations of the arbitrators; discovery based upon a showing of necessity or extraordinary circumstances; discovery based upon a showing of no delay; or discovery as

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the party intends to call as well as the relevancy of their testimony must be in the communications to the Court. *Id.*

17. Statute of the International Court of Justice, done at San Francisco, June 26, 1945, 59 Stat. 1055, T.S. No. 993, art. 49 [hereinafter cited as I.C.J. Statute].

18. *Id.*

19. In the *Corfu Channel* case, Britain refused to produce documents because it claimed they were secret and related to an unfulfilled contingency. The International Court deemed the document irrelevant and did not take formal note of the refusal. *Corfu Channel* (U.K. v. Alb.) 1949 I.C.J. 32.

20. I.C.J. Statute art. 44.

21. I.C.J.R. art. 56.

22. See *supra* note 1 and accompanying text.

23. See *supra* notes 2 and 3 and accompanying text.

24. See, e.g., Reynolds, *Discovery in Arbitration*, 18 FORUM 144 (1982); Willenken, *Discovery*, *supra* note 3, at 16; G. GOLDBERG, A LAWYER'S GUIDE TO ARBITRATION 41 (1977).

25. See United States Arbitration Act, 9 U.S.C. § 1, *et. seq.* (1925).

26. See, e.g., Uniform Arbitration Act § 1, *et. seq.* (1955) which was adopted by a majority of the states.

a matter of right (not a rule adopted in its entirety in any known jurisdiction)."<sup>27</sup>

In the past, the federal courts have been reluctant to allow discovery in arbitration although they have had the discretion to do so.<sup>28</sup> Despite this hesitancy in granting discovery, the courts have allowed discovery in cases of "exceptional circumstances."<sup>29</sup> In *Bigge Crane*,<sup>30</sup> a New York district court, reiterating the value of pretrial discovery—as a truth-seeking, time saving and surprise-reducing mechanism—as well as the federal policy of supporting arbitration, called the lack of arbitral discovery "a throwback to the outmoded 'sporting theory of justice.'"<sup>31</sup> In granting pretrial examination under a showing of "necessity," the court stated necessity existed where:

(1) . . . the nature of any defense is unknown; (2) the amounts involved are so substantial that any expense in taking depositions is relatively small; (3) the action has proceeded to such a point that the taking of depositions can probably be accomplished without delaying the arbitration. . . .<sup>32</sup>

27. Willenken, *The Often Overlooked*, *supra* note 3, at 130.

The United States Arbitration Act, which governs contract arbitration concerning maritime, interstate or foreign commerce, provides for limited discovery according to the discretion of the arbitrator. The arbitrator can compel testimony from a witness and issue a *subpoena duces tecum* to produce any document or record which is *material* to the case. 9 U.S.C. § 7. If any person refuses to testify or produce a document, the arbitrators may petition the United States district court for an order and if it is not obeyed, the party will be held in contempt of court. *Id.*

The Uniform Arbitration Act also provides for limited discovery but to a greater extent than the U.S. Arbitration Act. The arbitrators can issue a subpoena to compel witnesses and the production of documents or other evidence which is also backed up by court action. In addition, at the discretion of the arbitrator, the act provides for depositions of witnesses who cannot attend hearings.

The AAA Rules provide for a Pre-Hearing Conference at which parties can exchange information. § 10. In regard to evidence, the rules state: "The parties . . . shall produce such additional evidence as the Arbitrator may deem necessary. . . . When the Arbitrator is authorized by law to subpoena witnesses or documents, he may do so on his own initiative or upon the request of any party." § 30. The AAA Rules are consensual unless they are part of the agreement to arbitrate and the jurisdiction where the arbitration is to take place has an arbitration statute which enforces the agreement to arbitrate. Callahan, *supra* note 7, at 8. For a more detailed comparison of these rules, see generally Callahan, *supra* note 7, at 3; Willenken, *The Often Overlooked*, *supra* note 6, at 173.

28. See, e.g., *Foremost Yarn Mills v. Rose Mills*, 25 F.R.D. 9 (E.D.Pa. 1960) (neither FEDERAL RULES OF CIVIL PROCEDURE nor United States Arbitration Act makes discovery available in arbitration); *Penn Tanker Co. of Delaware v. C.H.Z. Rolimpex, Warsaw*, 199 F. Supp. 716 (S.D.N.Y. 1961) (depositions and interrogatories not used in arbitration unless exceptional need); *Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957) (no discovery permitted because parties chose to avail themselves of procedures peculiar to arbitral rather than judicial process).

29. See, e.g., *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240 (E.D.N.Y. 1973); *Recognition Equipment, Inc., v. NCR Corp.*, 532 F. Supp. 271 (N.D. Tex. 1981).

30. *Bigge Crane*, 371 F. Supp. at 240.

31. *Id.* at 245, 246.

32. *Id.* at 246.

In response to reasoning of this type, several states have passed statutes, some based on the Uniform Arbitration Act, permitting discovery.<sup>33</sup> The New York court, for example, adopted an "exceptional circumstances"<sup>34</sup> test which the federal courts seemed to have also adopted.<sup>35</sup> Despite these statutes, many courts have not granted discovery orders.<sup>36</sup>

### 1. *Commercial Cases*

In simple cases, or in cases where there is not a great deal of money at stake, the value of discovery is probably not worth concomitant delay in the proceedings because there is not a great need for documentary evidence and the issues are already narrow. Complex commercial arbitration, on the other hand, can be very expensive and time consuming.<sup>37</sup> In such cases, prehearing discovery can expedite the proceeding.<sup>38</sup> By presenting evidence in documentary rather than verbal form, for example, by using deposition testimony instead of live testimony at a hearing, the parties can save much time.<sup>39</sup> This method is especially well suited for the testimony of "secondary" witnesses.<sup>40</sup>

A procedural hearing before evidentiary proceedings begin (much the same as that provided for in the AAA rules), at which the parties can discuss the exchange of information and documents as well as scheduling guidelines, will also help expedite the case.<sup>41</sup> In order to promote smooth evidentiary hearings, discovery should take place before, rather than during, these hearings.<sup>42</sup> Production of documents directly relevant to the case can be the least expensive form of discovery, especially from the point of view of the party producing them.<sup>43</sup> The production of books, records, or other written evidence may eliminate the need for live testimony or a deposition from a witness. If the kinds of documents to be discovered are limited to

33. See, e.g., OHIO REV. CODE ANN. § 2711.07 (Anderson 1954); PA. STAT. ANN. tit. 5, § 167 (1963); CONN. GEN. STAT. REV. § 52-412 (1958); N.Y. CIV. PRAC. § 3102(c).

34. Application of Katz (Burken), 3 App. Div.2d 238, 160 N.Y.S. 2d 159 (1st Dept. 1957).

35. See *supra* notes 29-32 and accompanying text.

36. See generally Willenken, *The Often Overlooked*, *supra* note 3, at 174, for full discussion of state court decisions.

37. For example, in one multimillion dollar case the parties thought that hearings would last for over two years. See Poppleton, *supra* note 4, at 6.

38. The Maritime Law Association's Committee on Arbitration recognized the need for discovery in big complex cases in order to reduce hearing time and the lack of information presented at the proceedings. The Committee suggested the use of depositions, interrogatories, and production of documents. MARITIME LAW ASS'N STANDING COMM. ON ARBITRATION INTERIM REP. 10 (Nov. 1975).

39. See Poppleton, *supra* note 4, at 8.

40. See *id.*

41. See *id.* at 7.

42. See Reynolds, *supra* note 24, at 145.

43. See *id.* at 148.

specific issues and if the party against whom discovery is taking place aids his opponent in locating them, the production of documents can be a useful tool in commercial arbitration.<sup>44</sup> Similarly, interrogatories should be focused rather than comprised of overreaching questions that burden the opposing party.<sup>45</sup> It may be helpful for the arbitrator to limit the number of questions to be asked.

In spite of the guidelines set by the arbitrator, there is always the possibility that time-consuming disputes will arise concerning the scope of discovery and the adequacy of compliance.<sup>46</sup> To avoid such disputes, parties to a commercial contract can agree ahead of time to the nature of discovery to be permitted if arbitration becomes necessary.<sup>47</sup> Certain parameters should be set in such an agreement; for instance, discovery can be provided for only if the matter exceeds a certain amount.<sup>48</sup> Attorneys' fees and costs of discovery can be regulated to discourage "fishing expeditions."<sup>49</sup>

Another danger in employing discovery in commercial cases is the chance that a party will obtain confidential information from his adversary.<sup>50</sup> Provision could be made to protect trade-secrets from discovery or for *in camera* review. Discovery designed to harass could also damage a longstanding relationship between the two sides. Often, businessmen choose to arbitrate rather than litigate in order to preserve an amicable atmosphere.<sup>51</sup> Perhaps the desire to continue the relationship itself will prevent the parties from engaging in drawn-out discovery.

If the parties do seek court involvement before arbitrators are appointed to obtain prearbitration information, they will busy the court (which is probably overburdened already) in the arduous task of supervising the procedures.<sup>52</sup> In fact, courts use this rationale to explain their cautiousness in granting discovery in these circumstances.<sup>53</sup> Even after the arbitrators are appointed, the determinations of the judge may influence the arbitrator(s) in granting or denying future requests.<sup>54</sup> Thus, discovery may sometimes burden the courts and the arbitrator as well as the parties.

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44. *See id.* Cases where a party points to a room full of files and tells his opponent to search for as long as he likes should be avoided. Request for "all documents" related to a specific contract should be denied also. *Id.*

45. *See id.* at 147.

46. *See* GOLDBERG, *supra* note 24, at 42.

47. *See id.* Parties can provide for discovery by explicitly stating so or by incorporating by reference an agreement which allows for discovery. Reynolds, *supra* note 24, at 145.

48. *See* Willenken, *Discovery*, *supra* note 3, at 18.

49. *See id.* For example, if the requesting party is required to pay, it will discourage unnecessary discovery. *Id.*

50. *See id.*

51. *See* Reynolds, *supra* note 24, at 148.

52. *See* GOLDBERG, *supra* note 24, at 41.

53. *Id.*; *see also supra* notes 28-36 and accompanying text.

54. *See* GOLDBERG, *supra* note 24, at 41.

## 2. Construction Cases

Construction arbitration often involves large, complicated cases. For this reason, it may be useful to look at discovery in this area. Questions such as whether the labor was done in a workmanlike manner or whether the material used was of sufficient quality often can only be answered through real or documentary evidence.<sup>55</sup> Real evidence can include "soil samples, concrete coils, sections cut from steel beams, plugs from roofing and other samples removed from the structure."<sup>56</sup> "Plans and related details, revisions to the plans, specifications and addenda, vendor's drawings, shop drawings and other data . . ." are documentary evidence.<sup>57</sup> Additional written communications between the parties as well as advertisements, brochures, and photographs may also prove invaluable in a construction case.<sup>58</sup> Discovery will often be the only means by which this evidence can be uncovered; yet it can require much time and money.

In order to balance these considerations, one arbitrator with experience in the construction industry advocates limiting "requests for information to requests that will contribute to the purposes of arbitration. Pre-arbitration information should be requested within the system and backed by reason and logic, rather than an attempt to impose a set of discovery rules from another system of dispute resolution. . . ."<sup>59</sup> In short, resort to extensive discovery such as that specified in the Federal Rules of Civil Procedure in construction arbitration, as in the other areas, will undermine the advantages of speed, simplicity and privacy in arbitration.<sup>60</sup> Without some kind of limitations, a party may be required to produce massive amounts of documents in an intricate case, only a fraction of which may be valuable.<sup>61</sup> Moreover, the arbitrator's expertise in the subject matter should lessen the need for such broad discovery.<sup>62</sup>

In sum, the importance of documentary and material evidence as well as the complex nature of the cases in construction arbitration highlight the need for discovery in these cases although some limitations may make such discovery of greater utility. If limited, depositions of the engineers, contractors, and subcontractors involved in the dispute may also be advantageous.

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55. See Schwartz, *Evidence in Construction Arbitration*, 31 *ARB. J.* 248 (1976).

56. *Id.*

57. *Id.*

58. *Id.* at 249. For a full discussion of useful evidence in a construction case, see generally *id.*

59. Callahan, *supra* note 3, at 5. For example, discovery of the builder's original design calculations in a truss failure to show if the truss was strong enough to support the structure would be reasonable. *Id.*

60. *Id.* at 4.

61. See M. MUSTILL & S. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 285 (1982).

62. *Id.*

### 3. Labor Cases

Except for the limited number of cases tried in federal district courts, there is no uniform system for the production of evidence in the labor field.<sup>63</sup> Before turning to the efficacy of discovery in labor arbitration, a brief description of the various statutes and court decisions concerning the production of evidence may be instructive.<sup>64</sup>

The National Labor Relations Board (hereinafter referred to as NLRB), has found that Section 8(a)(5) of the National Labor Relations Act (hereinafter referred to as NLRA)<sup>65</sup> requires an employer to supply an authorized bargaining agent with information necessary to the performance of its obligations.<sup>66</sup> The duty to furnish information arises in connection with both the negotiation of a collective bargaining agreement and the settling of grievances which arise during the course of the agreement.<sup>67</sup> The Supreme Court has held, however, that a union must make more than a simple assertion that it needs information.<sup>68</sup>

With respect to grievance arbitration, the Supreme Court held in *NLRB v. Acme Industrial Co.*<sup>69</sup> that an employer must turn over to a union information "necessary in order to enable the union to evaluate intelligently the grievances filed."<sup>70</sup> Before an arbitrator's determination of the relevancy of the material requested, the NLRB may make a "threshold determination concerning the potential relevance of . . . requested information."<sup>71</sup> While the courts usually favor disclosure of information, in some cases they have protected confidential information from discovery.<sup>72</sup>

The duty to disclose information may also stem from a collective bargaining agreement between the parties. If the agreement specifies discovery in

63. Comment, *Fear and Loathing in Labor Arbitration: How Can There Possibly Be a Full and Fair Hearing Unless the Arbitrator Can Subpoena Evidence?* 20 WILLAMETTE L.J. 535 (1984) [hereinafter cited as Comment].

64. For a full discussion of NLRB-imposed discovery, standards, see generally French, *Arbitral Discovery Guidelines for Employers*, 50 UMKC L. REV. 141 (1982).

65. 29 U.S.C. § 158(a)(5) (1976).

66. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

67. See, e.g., *Acme Indus.*, 385 U.S. at 436; *Truitt Mfg.*, 351 U.S. at 149; *NLRB v. Custom Excavating Inc.*, 575 F.2d 102, 106 (7th Cir. 1978).

68. *Detroit Edison v. NLRB*, 440 U.S. 30 (1979) (duty to supply information depends on circumstances of each case).

69. 385 U.S. at 435.

70. *Id.*

71. *Id.* at 436. The "relevance" test announced in *Acme* is based on a broad "discovery-type standard." See M. HILL & A. SINICROPI, *EVIDENCE IN ARBITRATION* 98 (1980).

72. See, e.g., *Detroit Edison*, 440 U.S. at 30 (psychological testing results not released to union).

order to negotiate and implement the agreement, the arbitrator will order compliance with the agreement.<sup>73</sup>

If either the union or employer refuses to comply with a discovery order, the arbitrator can either exclude the evidence if later produced during the arbitration or infer that the evidence was damaging to the refusing party.<sup>74</sup> In regard to a refusal to produce documents, one arbitrator wrote:

... He (the Arbitrator) may, however, give such weight as he deems appropriate to the failure of a party to produce documents on demand. The degree of weight to be attached to such failure will depend upon the relevancy of the documents requested to the issues at hand. If the information would appear to be strongly pertinent, the withholding of it may be vital in the making of a decision.<sup>75</sup>

As will be shown below, these two procedures are essential in enforcing compliance in international arbitration.<sup>76</sup>

In addition to the arbitrator's internal procedural powers, the arbitrator may issue a self-enforcing subpoena to induce compliance, possibly under state law or the U.S. Arbitration Act. The Circuits disagree, however, as to the applicability of the federal arbitration statute to collective bargaining agreements.<sup>77</sup> Two commentators have interpreted Section 301 of the Labor-Management Relations Act to provide arbitrators with the necessary authorization to issue subpoenas which are enforceable without the aid of the courts.<sup>78</sup>

The lack of arbitral compulsion power with regard to discovery seems to be one of the biggest disadvantages of discovery in labor cases.<sup>79</sup> In the next section, similar enforcement problems in international arbitration will be demonstrated.<sup>80</sup> Compelling discovery through the NLRB is a very lengthy process.<sup>81</sup> If a party refuses to comply with an NLRB order for production of documents and a court order is necessary, even more time will be consumed.<sup>82</sup>

Disclosure of confidential information may be another danger in allowing discovery in grievance arbitration as it is in commercial arbitration. Some employers have argued that disclosure of certain materials will violate their privacy rights as well as those of customers and employees not a party to the

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73. See M. HILL, *supra* note 71, at 95. Parties should be careful to spell out disclosure requirements, otherwise an arbitrator may hesitate to order it. See *id.*

74. See *id.* at 93.

75. American Telephone & Telegraph Co., 6 LA 31 (1947) (Wallen, Arb.) cited in M. HILL, *supra* note 92, at 93.

76. See *infra* notes 168-178 and accompanying text.

77. See Comment, *supra* note 63, at 555.

78. See M. HILL, *supra* note 71, at 96; Comment, *supra* note 63, at 556.

79. See generally, Comment, *supra* note 63.

80. See *infra* notes 122-127 and accompanying text.

81. See M. HILL, *supra* note 71, at 99. The process can take up to a year and a half. See H.R. REP. NO. 637, 95th Cong., 1st Sess. 28 (1977).

82. *Id.* at 537.

arbitration.<sup>83</sup> To the extent that an employer can show a clear and present danger to employees, a clear privilege or a need for security, the information will be protected.<sup>84</sup> Customer confidentiality, however, has not been upheld as an excuse for refusing to furnish information.<sup>85</sup> Similarly, an employer may attempt to employ discovery to pry into protected union activity; such requests have usually been denied.<sup>86</sup> *In camera* inspection may be one means of protecting the disclosure of confidential information.<sup>87</sup> In some cases, the use of discovery procedures in labor arbitration may undermine the desire for confidentiality, a desire which often causes parties to choose arbitration over litigation.

Reproduction of documents and labor costs in supervising review of documents and in taking depositions can be costly to both sides.<sup>88</sup> If the division of costs is neither settled by law nor agreed upon, more time will be wasted in bargaining on this issue.<sup>89</sup>

On the whole, these disadvantages seem to be outweighed by the clarification prearbitration disclosure can bring to the proceedings. On this issue, one arbitrator said:

Apart from specific rules, it is a salutary principle of arbitration procedure that both parties to the dispute be accorded a full and complete hearing and an opportunity to present such evidence, documentary or otherwise, as is germane to the issues, without regard to whether one or another party has possession or custody of such evidence. The object and purpose of arbitration is to arrive at a fair and just decision, and to this end parties should be assisted in obtaining competent and material evidence where such production may reasonably be had. . . .<sup>90</sup>

The underlying theory for permitting discovery in any kind of arbitration is the belief that it will engender a full and fair hearing in bringing to light all of the relevant and material evidence in a case.<sup>91</sup> In labor, essential documents are often held by one party.<sup>92</sup> In a discipline case, for instance, the union may require certain documents held by an employer such as the grievant's

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83. See French, *supra* note 64, at 159.

84. See *id.* at 161.

85. See, e.g., *NLRB v. Custom Excavating, Inc.*, 575 F.2d 102 (7th Cir. 1978); *Transport of N.J.*, 233 N.L.R.B. 694 (1977).

86. See, e.g., *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712 (D.C. Cir. 1981); see also French, *supra* note 64, at 162.

87. See *Local Lodge 1746, International Association of Machinists v. Pratt & Whitney Division of United Aircraft Corp.*, 329 F. Supp. 283 (D. Conn. 1971).

88. See French, *supra* note 64, at 154.

89. See *id.*

90. *C & P Telephone Co. of West Virginia*, 2 LA 367 (1953) (Dworkin, Arb.) cited in M. HILL, *supra* note 71, at 94.

91. See Comment, *supra* note 63, at 565.

92. See *id.* at 543.

past work record and records of how past employees were disciplined for a like offense in order to ascertain the merits of the grievance.<sup>93</sup> In this way, discovery can aid the union in distinguishing nonmeritorious grievances.<sup>94</sup> Other information held by the employer that may be useful to the union in arbitration can include (depending on the nature of the grievance): wage data, Equal Employment Opportunity data, production standards, wage and benefit data, job evaluations and descriptions, time study data, financial data, subcontracting information, physical plant layout and customer information.<sup>95</sup>

The employer, too, may require information held by the union. For example, where there are several employers to an agreement with one union and an employer believes the agreement is being enforced against him but not the other employers, discovery of union records will be crucial in substantiating the complaining employer's assertion.<sup>96</sup> Statements of coworkers and management personnel can be important in either management's or labor's case.<sup>97</sup> A deposition may save the expense of having witnesses take time from work to testify. If a party refuses to be deposed, some arbitrators have adopted a negative inference from the refusal as they would for a refusal to testify.<sup>98</sup>

To a certain extent, parties to a labor arbitration will voluntarily disclose information, reducing the need for discovery procedures, possibly due to the ongoing nature of their relationship. Moreover, since the parties are experienced in dealing with each other, they may already have knowledge of the facts pertinent to a case.

In general, the efficacy of domestic arbitral discovery will depend on the specific nature of the arbitration. Discovery in simple claims or cases with small amounts of money at stake is inexpedient. Complex commercial claims, especially in the construction area where a significant amount of documentary and material evidence is essential in presenting a case, lend themselves well to the employment of discovery. Prearbitral discovery in labor arbitration may also be requisite in certain types of disputes; however, voluntary exchange of information as well as the parties' past practices and encounters can sometimes substitute for the utilization of discovery. Because of the lack of uniformity in the present array of rules, enforcement of discovery orders may pose a problem in labor arbitration. Unless specifically protected, discovery may result in the disclosure of confidential information

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93. *See id.*

94. *See French, supra* note 64, at 156.

95. *See Comment, supra* note 63, at 143, 145-48.

96. *See Davidson, Brick Co. v. United States Brick & Clay Workers*, 31 Lab. Arb. (BNA) 752 (1958) (Jones, Arb.).

97. *See Comment, supra* note 63, at 542-43.

98. *See Jaeger Machine Co.*, 55 Lab. Arb. (BNA) 850, 852 (1970) (High, Arb.); *S. H. Grossinger Inc.*, 58 Lab. Arb. (BNA) (1972) (Kaplan, Arb.).

in both labor and commercial settings. One commentator's summary of the factors which courts consider in granting prearbitral disclosure highlights the efficacy of discovery in certain situations:

Important information is exclusively within the possession of hostile witnesses; the claim is very large; the issues are complex; documents are essential to proving a party's case; the opponent's defense is unknown to the claimant; the cost of discovery compared to the magnitude of the claim is slight; discovery probably can be accomplished without delaying arbitration; and the identity of potentially liable persons is unknown.<sup>99</sup>

The above considerations are similar to those the U.S. federal district courts are required to take into account when limiting discovery under Rule 26(b)(1).<sup>100</sup>

## B. DISCOVERY IN INTERNATIONAL ARBITRATION: THE IRAN-U.S. CLAIMS TRIBUNAL

To illustrate the efficacy of discovery in international arbitration, the Iran-United States Claims Tribunal will be examined. At the outset, it is important to note that the Tribunal is different from many international arbitral tribunals because it is not an *ad hoc* body set up for a single case but a panel established to settle thousands of claims arising from a particular event.<sup>101</sup> Only minimal guidance in establishing the Tribunal was provided

99. See Willenken, *Discovery*, *supra* note 3, at 17.

100. See *supra* note 11 and accompanying text.

101. For an in-depth look at the Tribunal, see generally Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. L. REV. 1 (1983); see also Selby & Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 INT'L LAW. 211 (1984); Stewart, *The Iran-United States Claims Tribunal: A Review of Developments: 1983-84*, 16 LAW & POL'Y IN INT'L BUS. 677 (1984). A brief description of the Tribunal is ventured here.

The Tribunal was created under the so-called Algiers Accords, see 81 DEP'T ST. BULL. 1 (1981), 20 I.L.M. 223 (1981), the 1981 agreement mediated by the Popular Republic of Algeria between the United States and the Islamic Republic of Iran which resulted in the liberation of the diplomatic hostages seized in 1979 in Iran. Comprised of two different declarations and three implementing or supporting documents, the Accords obligated the United States to keep out of Iranian internal affairs, remove trade sanctions, and to arrange for the transfer of Iranian assets frozen in response to several events, including the capture of fifty-two Americans at the U.S. Embassy in Tehran, as well as Iran's announced intention to withdraw its assets from the United States and to repudiate its debts to U.S. citizens. Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981, 81 DEP'T ST. BULL. 1 (1981), 20 I.L.M. 224 (1981) [hereinafter cited as Declaration]. The United States froze about \$12 billion worth of Iran's assets located both in the United States and abroad.

In addition to the political crisis during the period the hostages were held, the Islamic Revolution created economic havoc between the two countries—contracts were broken, irrevocable letters of credit were dishonored, U.S. property and investments in Iran were expropriated, American workers in Iran were expelled and trade dropped from \$5.7 billion in 1977 to \$501 million in 1980. (See Stewart & Sherman, *supra*, at 2). As a result of the economic chaos during the hostage crisis, American citizens attached the frozen assets in both domestic and foreign courts pursuant to 31 C.F.R. § 535. *Id.* at 3. Merely unfreezing the assets in return

in the Algiers Accords.<sup>102</sup> The arbitrators themselves were faced with the

for the release of the hostages would not solve economic chaos—an alternative means for compensating U.S. nationals had to be devised. *Id.* Consequently, the Claims Settlement Agreement established the mechanism chosen for resolution of the dispute—a nine-member international arbitral panel to which claims could be presented. (Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981, 81 DEP'T ST. BULL. 1 (1981), 20 I.L.M. 230 (1981) [hereinafter cited as Claims Settlement Agreement]).

The Tribunal, which consists of three Iranians, three Americans, and three third-country arbitrators chosen by the original six arbitrators, can hear cases *en banc* or in Chambers. (Claims Settlement Agreement, arts. II(1) & III(1)). Each of the three chambers is composed of one Iranian, one American and one neutral arbitrator. The Tribunal may also be expanded in multiples of three if Iran and the United States deem it necessary. (Claims Settlement Agreement, art. III(1)).

The Tribunal has jurisdiction to hear claims based on debts, contracts, expropriations and other measures affecting property rights brought by U.S. citizens against Iran or Iranian nationals against the United States. Claims Settlement Agreement, art. II(1). In addition, the Tribunal is empowered to hear official claims between the two states based on contracts for the sale of goods and services, interpretative disputes regarding the interpretation or performance of the two Declarations, and certain claims between Iranian and U.S. Banks. (See Selby & Stewart, *supra*, at 212). In the interpretative disputes (the "A" claims), and the official claims (the "B" claims), the United States is represented by the Department of State. In the private claims under \$250,000 (the "small" claims), the American party is also represented by the U.S. Department of State. Private counsel represent American nationals with claims for \$250,000 or more (the "large" claims). (See Claims Settlement Agreement, art. III(3)). Most of the claims filed (over 3,000) are claims by U.S. nationals against Iran. (Selby, *supra* note 122, at 215). The breakdown of claims is as follows:

<i>submitted by</i>	<i>against</i>	<i>type of claim</i>	<i>#</i>
U.S. Gov't on behalf of U.S. nationals	Iranian Gov't	Small	2,782
U.S. nationals	Iranian Gov't	Large	520
U.S. Gov't	Iranian Gov't	Interpretative & Official	20
Iranian nationals or Iranian Gov't on behalf of Iranian nationals	U.S. Gov't	Large & small	24
Iranian Gov't	U.S. Gov't	Interpretative & Official	20
Iranian Gov't	U.S. nationals	*	1,400

See *id.*

\*These claims were withdrawn in 1982, probably because the Tribunal held that it did not have jurisdiction over "direct" claims by one government against the citizens of another. See Case No. A/2, 21 I.L.M. 78 (1982). To further insure payment of awards, all Tribunal decisions and awards are "final and binding" and enforceable against either party "in the courts of any nation in accordance with its laws." Claims Settlement Agreement. *Supra*, arts. IV (1) & (2).

102. See *supra* note 101.

task of implementing the day-to-day operations of the Tribunal.<sup>103</sup> The Accords did, however, specify that the Tribunal would follow the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter cited as UNCITRAL Rules) with such revisions as they might deem necessary.<sup>104</sup> A fair amount of revision of the UNCITRAL Rules<sup>105</sup> was necessary due to the fact that they were primarily designed for use in *ad hoc* commercial arbitration between two private parties.<sup>106</sup>

In studying any aspect of the Tribunal, it is important to keep in mind the context in which it was created. Two commentators with firsthand knowledge have written:

Historically, international claims tribunals have been created at the end of a period of conflict . . . with the goal of resolving outstanding disputes between the participating governments, in the context of resumed diplomatic and commercial relations. In contrast, this Tribunal was established in the midst of intense political confrontation by governments which had (and continue to have) neither diplomatic relations nor the . . . objective of reestablishing such relations.<sup>107</sup>

Moreover, all of the claims stem from one major event—the Iranian Islamic Revolution and its repercussions. Accordingly, the Islamic ideology and its anti-Western, anti-American stance directly affect the arbitral process.<sup>108</sup> Because the Tribunal handles claims based on both private and public international law, the mixture and tension between the two often leads to unique and unforeseen results.<sup>109</sup>

#### IV. Discovery at the Tribunal

##### A. FRAMEWORK

The Tribunal has adopted UNCITRAL Rule 24 (without revision) concerning evidence:

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
2. The arbitral tribunal, may, if it considers it appropriate, require a party to

103. See Selby & Stewart, *supra* note 101, at 213.

104. Claims Settlement Agreement, *supra* note 101, art. III(2). The United Nations promulgated the UNCITRAL Rules in 1976 for use in both institutionally-aided and privately-run arbitrations. See Aksen, *The Iran-U.S. Claims Tribunal and the UNCITRAL Arbitration Rules—An Early Comment*, in *THE ART OF ARBITRATION 1-2* (J. Schultz & A. Vandenberg eds. 1982).

105. Iran-United States Claims Tribunal Final Rules of Procedure, May 3, 1983, *reprinted in* 2 Iran-U.S. C.T.R. 405 (1984) [hereinafter cited as Tribunal Rules].

106. See Aksen, *supra* note 104, at 5.

107. See Selby & Stewart, *supra* note 101, at 216.

108. See *id.* For instance, there was one incident in the early Fall, 1984 when two of the Iranian arbitrators physically attacked one of the neutral arbitrators allegedly for his "pro-American" decisions.

109. See *id.* at 218.

deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as the tribunal shall determine.<sup>110</sup>

In addition, Rule 27 provides for the appointment of an expert to report to the Tribunal "on specific issues to be determined by the tribunal."<sup>111</sup> The parties are required to "give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them."<sup>112</sup> Any dispute over the relevance of required information or production will be settled by the Tribunal.<sup>113</sup> The Tribunal added to the UNCITRAL Rule: "The expert shall invite a representative of each arbitrating party to attend any site inspection, and, when the arbitral tribunal so determines, a representative of each arbitrating party shall be invited to attend other inspections made by the expert."<sup>114</sup>

An order for the production of documents or for the appointment of an expert may result from a request from either party or from the Tribunal acting on its own accord. While there have been a number of cases where the Tribunal, without request of either party, has ordered the production of documents or other evidence<sup>115</sup> and a few cases where it has appointed an expert,<sup>116</sup> this article focuses on those cases where a request was made by either an American or Iranian party<sup>117</sup> and on the requests made for

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110. Tribunal Rules, *supra* note 105, art. 24; *see also* UNCITRAL Rules, art. 24.

111. Tribunal Rules, *supra* note 105, art. 27(1); *see also* UNCITRAL Rules, art. 27(1).

112. *Id.* at art. 24(2).

113. *Id.*

114. Tribunal Rules, *supra* note 105, art. 24(2).

115. For example, the Tribunal has ordered parties to produce documentary proof of patents, corporate ledgers, balance sheets, bank statements, asset and account documents, copies of decisions in the Iranian courts and invoices.

116. Before an American party can reach the merits of a case, it must show that it is a United States national. Claims Settlement Declaration, *supra* note 101, at art. VII(1); *see also* Stewart & Sherman, *supra* note 101, at 20. In order to preserve the confidentiality of corporate shareholders names in one case, the Tribunal ordered an expert to inspect the corporate books and records and thereafter render a report on the nationality of the shareholders without including the shareholders' names. Subsequent to the filing of the report, Chamber One allowed respondent the opportunity to inspect the underlying data used by the expert. Pursuant to Rule 41(2) the Tribunal may provide that a party must deposit a sum of money with the Tribunal to cover the cost of the expert. The Tribunal later decides which party will ultimately bear the cost.

117. With permission of the appropriate parties, the author has examined certain of the discovery requests and orders of the Tribunal. Some of these requests and orders are not publicly available. Certain parties have consented to reference to their cases but have asked that their names not be identified. Thus, for the sake of confidentiality, no references will be made to the names or numbers of any of the cases.

documentary evidence. There is no provision in the rules for either interrogatories or depositions.<sup>118</sup>

## B. REQUESTS AT THE TRIBUNAL

As yet, there have been no requests for the production of documents in the small claims. In the large claims, fifteen U.S. claimants (one claimant made the same request in three claims) have requested documents from either the Government of Iran or an Iranian entity; two Iranian entities have requested documents from American claimants. The United States Government has requested documents from an Iranian national in one case. In the official claims, Iran has requested documents from the United States in one case; the United States has made the same request in eleven similar cases.<sup>119</sup> In one interpretative dispute which has been divided into a number of smaller claims, the United States and Iran have each made a request.

Prehearing conferences are scheduled on many claims at the Tribunal. Document requests can be made prior to or during these prehearing conferences. In practice, claimants have been more likely to get a quicker response from the Tribunal if they submit written requests before the prehearing conference. Such requests can be made in a separate letter or motion to the Tribunal or incorporated in other submissions. Successful document requests typically include specific identification of the document(s) and their location as well as an explanation of why they are necessary, why the claimant does not have access to them and the "reasonable steps" taken to obtain the documents.<sup>120</sup>

In one case in which an American company has a claim for films leased to an Iranian television station, which were never returned, and for unpaid film rental charges, a request was made for: "all documents and records" belonging to the claimant left in the Tehran office; "all documents and records" relating to transactions between claimant's subsidiary and the Iranian TV station; and "all films and film materials in possession or control" of the station or "any instrumentality or licensee of the station. . . ." Chamber Two of the Tribunal denied this request because the claimant neither specified the documents it wanted nor described the steps it had taken to try to acquire the necessary materials. The Tribunal did indicate that it would be willing to accept an amended request which would include a more precise list of the

118. The efficacy of these procedures will be discussed in the next section, *see infra* notes 132-138 and accompanying text.

119. In seven of these cases, a U.S. request for dismissal for lack of jurisdiction is pending. In one instance, Iran withdrew the case because it was identical to another case they had filed.

120. *See Selby, supra* note 122, at 225.

requested documents. A more detailed request was submitted and is still pending before the Tribunal.

Various types of documents have been requested in the cases at the Tribunal: general ledgers; balance sheets; audit reports; bank statements; deposit slips; communications between Iranian government entities; contracts; minutes of shareholder meetings; Statements of Defense filed in other cases; excerpts from the Trade Register in Tehran compiled by the Registration office where all companies in Iran are required to register; certain documents Iranian companies were required to file with the Ministry of Finance such as financial statements and tax returns; certified public accountant statements of assets and liabilities; sales records filed in the Iran Registry of Official Documents; real estate records; construction documents such as drawings, blueprints, material invoices, design specifications; records maintained at the U.S. Embassy in Tehran concerning its routine functions including invoices from such Iranian agencies as the Telecommunication Company of Iran.

### C. TRIBUNAL ORDERS

In almost every case where a reasonably defined request for discovery was made, the Tribunal has ordered the production of the requested items. In many cases, document requests are still pending before the Tribunal. Occasionally, before issuing an order, the Tribunal has asked for the voluntary production of documents or asked the party to ask its opponent directly for the evidence. For instance, in one case where the Iranian respondent was having trouble locating financial data, the Tribunal, in a written request, asked the American claimant to submit the documents if they were available. In another case where there was a deficient request (request was too general and failed to give any information as to what other efforts were made to locate the documents), Chamber One requested the Agent of Iran<sup>121</sup> to aid the claimant in obtaining the necessary documents. Although the claimant sent a letter to the Iranian Agent requesting specified documents, the claimant has not been successful in obtaining them. In fact, Iran in its statement of defense, pointed to the fact that the claimant has failed to document its case.

A deficiency in the request is one of the only bases relied on by the Tribunal in denying requests. In a few instances, the Tribunal has suspended an order for production or postponed making a decision until a preliminary jurisdictional question is settled. In the past year or so, the Tribunal has

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121. Iran and the United States each have a representative at the Tribunal in The Hague to submit filings and act as an agent for their respective countries.

made it a practice to ask the opposing party to reply to a request for documents before issuing an order. The Tribunal's standards upon which production is ordered is summed up in this statement from one of its orders:

. . . the Tribunal will consider any request the [c]laimant may wish to make for an order for the production of specified documents by the [r]espondent, provided such request is *justifiable* and the Tribunal is satisfied that *all reasonable steps have been taken* by the [c]laimant to obtain the specific documents in question. (emphasis added).

The claimant must show that he is unable to obtain the document through alternative channels, probably because it is in the sole possession of his opponent. Thus, the Tribunal standard is much narrower than the all relevant information standard employed in the U.S. courts or standards used in other kinds of arbitration.

This standard, however, is not difficult to meet in light of the circumstances in which the claims arose. A letter sent to the proper Iranian authority, requesting the document(s) in question would most likely meet the "all reasonable steps" standard. As indicated above, all of the disputes resulted from the Islamic Revolution in Iran during which dozens of contracts were terminated and hundreds of American citizens were expelled, often under violent and hurried circumstances. Consequently, many American citizens and companies were forced to leave behind all of their files and/or possessions. Company offices were often expropriated and Americans' homes ransacked. Due to the lack of diplomatic relations between Iran and the United States, it is very difficult for American lawyers to travel to Iran to retrieve the documents or obtain them without the aid of an intervening power. One claimant wrote, for instance: "The gathering of evidence and proof to support my claims has been exceptionally difficult by reason of the previous confiscation of the Government of all of the records, papers and files of . . . Company, Ltd." Indeed, one of the grounds relied upon by the Agent for the United States in a letter to Judge Nils Mangard, former Chairman of the Tribunal, which objected to a Tribunal order which appointed an expert to inventory properties in the United States for an Iranian entity, was the fact that U.S. claimants "never received comparable assistance from the Tribunal in compelling discovery even though it is frequently *impossible for them to make their own investigation or even to gain access to their own relevant records left in Iran.*" (emphasis added).

Iranian parties may also have difficulty in obtaining evidence in the United States. For instance, in the aforementioned case in which the Tribunal appointed an expert for an onsite inspection and inventory, several issues were raised including the availability of visas for Iranians and U.S. security interests. Although the U.S. Agent sought to facilitate issuance of the necessary visas so that the inspection could take place, he could not guarantee that they would be available because such decisions are made by

consular officers on a case-by-case basis. The inspection and inventory was successfully completed, however.

#### D. ENFORCEMENT OF ORDERS

Although production orders may be procured with relative ease, securing compliance with the orders is often difficult. In the large claims, only five of the ten orders for production were fully complied with. In two of these cases, American claimants supplied the Iranian respondents with the requested materials. Iranian respondents "partially" complied in three cases—one in which unrequested documents were submitted but not those requested and two others in which only some of the requested evidence was furnished. In one case, the Iranians submitted one document, a title deed, but stated that two other documents, contracts, could not be found or traced. Examining the three cases where Iran fully obeyed the production order is particularly telling: only one or two easily accessible documents were requested in each case (a contract, statements of defense filed in other claims and a letter); in all of the cases, the document produced either favored or did not damage the Iranian party's case.

Although U.S. requests for the production of documents have been pending in ten official claims since 1982, no orders have been granted as yet.<sup>122</sup> In one large claim against the U.S. Department of Defense, where the Tribunal ordered the parties to exchange documents through their respective agents, both parties complied and are preparing a joint report to show the status of efforts to reconcile discrepancies. Because Iran was the claimant in this case, it was in a position to gain from its acquiescence in the informal discovery procedures.

In an interpretative dispute against the United States, Iran delivered the requested documents. Iran's request for documents in another claim in the same interpretative dispute was assented to by the United States and a joint report on the status of the document exchange has been filed. Finally, a U.S. request for discovery in a case brought against it by an Iranian national has been pending before Chamber Two since September 1982.

On the whole, there has been a great lack of compliance, especially by Iran, with Tribunal discovery orders. Excuses such as that the documents have been destroyed or cannot be located might be plausible in light of the upheaval the Islamic Revolution caused. Requested U.S. films (mentioned above), no doubt, were destroyed in an effort to rid the new Islamic Republic of all American influence. Also, in some cases, the parties may not even be aware of the documents in their possession. Iran's outright refusals

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122. See *supra* note 119.

to produce documents, denials that the party has the right to ask for documents, or claims that the opponent did not comply with Iran's request for documents when there was no order for such documents, however, are unjustifiable excuses aimed at delay. At bottom, the refusals to cooperate in discovery probably stem from the aforementioned political nature of the Tribunal. One claimant's attorney postulated that the lack of compliance is partly due to bad faith and partly due to a lack of understanding of discovery procedures, especially those used by the Americans.<sup>123</sup> Yet, in a startling admission, Iran has contradicted itself in one of its memorials by admitting the duty to disclose all relevant documents before international tribunals:

. . . a universally accepted rule of evidence before international tribunals can be relied upon: that one which makes a duty for each party to disclose any fact, to submit every document which is in his possession. As for American corporations putting forward a claim before the Tribunal they have the duty to produce every document which could be significant for the facts to be proven. No objection of confidentiality could be raised would the evidence be relevant for the function an international Tribunal has the power to assume. [sic].

This position on the obligation of an American party has not affected Iran's own practice, however. The Tribunal's response to the lack of compliance from Iran has been relatively ineffective. Under the Tribunal Rules, the arbitral panel has the following means of enforcement if a party has failed to submit evidence in support of its claims:

If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.<sup>124</sup>

The Tribunal has rarely utilized this enforcement provision. In only three cases did the Tribunal announce its intention to proceed under Article 28(3) of the rules. In one case, a U.S. claimant failed to respond at all to an order for documentary evidence. This order was aimed at an American claimant whose files had been seized in Iran. The claimant then responded with a discovery request which was granted by the Tribunal. Subsequently, the Iranian agent protested and requested the case be decided on the pleadings and documents before the Tribunal at the time the original order was filed. In another case, the respondents, after having been granted ten months of extensions for filing their counter-briefs, requested a further extension. Chamber Three reminded respondents of the possible consequences under Rule 28 if they failed to comply with the Tribunal's orders and further held that it would consider claimant's request for monetary sanctions if the filing deadline was ignored by the respondents.

Finally, Chamber Three, in another case in which respondents were

123. Tribunal Rules, *supra* note 105, art. 28(3); *see also* UNCITRAL Rules, art. 28(3).

124. *See infra* note 148 and accompanying text.

granted numerous extensions, threatened to proceed under Rule 28 if the respondents failed to file their statement of defense on time. Some U.S. claimants have skillfully attempted to use this rule against Iran when Iran has refused to produce documents which the U.S. claimant requested in order to support its claims. For example, when a U.S. national had only secondary evidence as to the existence of a contract between itself and an Iranian ministry, it asked the Tribunal to make an award on the evidence before it if the Iranian respondent failed to produce the actual requested contract. Another U.S. claimant made a similar pleading in regard to its secondary evidence as to amounts owed on the failure to return leased property.

Chamber Three, in response to a U.S. claimant's demand for a full explanation as to why certain documents were not produced (alleging that it was impossible that the Iranian respondent did not have the named documents), concluded that the explanation offered by the respondent was inadequate and ordered the respondent to reply specifically to each item requested. The respondent did file its explanation but still maintained that it had no further evidentiary matter at its disposal.

In the past, the Tribunal has been willing, perhaps too willing, to grant generous extensions for submission deadlines.<sup>125</sup> It has not been uncommon for the Tribunal to allow *at least* three, three-month extensions to one party in a claim. The elapsed time between a document request and a final compliance can range from one month in a very simple request to two or more years. Since the Tribunal now gives opponents the opportunity to reply to a request for documents, the process has even been more time consuming; some parties may take as long as a year just to respond to a discovery motion. Such delays cause the requesting party much frustration and resentment; one attorney sent nine angry letters and telexes over the space of a year to the Tribunal protesting extensions granted to the Iranians. The attorney termed Iran's failure to produce the ordered documents as an "abiding contempt for the Tribunal's authority." Finally, six months after the Tribunal's original production order was filed, Chamber Two declared that it found "no reason to extend the final deadline for the filing of these documents."

As shown previously, a party can abuse discovery procedures by requesting unnecessary documents.<sup>126</sup> Yet, it is often difficult to determine whether delays are caused by real difficulties in obtaining evidence or by a deliberate attempt to stall the proceedings. In an effort to make such a determination, Chamber Two, in response to a request for an eight-month extension after

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125. Cf. Stewart & Sherman, *supra* note 101, at 16.

126. See *supra* notes 59-61 and accompanying text.

several prior extensions totalling seven months had been given, ordered the Iranian party to submit a progress report describing the extent to which evidence had been gathered, problems encountered in the process, and the likelihood that the process would ever be completed. Subsequently, in its progress report, the respondent filed a discovery request with which the claimant complied. Further delays were encountered when the respondent needed more time to examine the disclosed documents "which comprised of seventeen boxes weighing two hundred and fifty-two kilograms and thousands of pages" [sic]. In turn, the claimant objected to further extensions because it noted that none of the documents were critical to the respondent's defense and because most of the documents were duplicates already in the respondent's possession. Apparently ignoring the claimant's assertions, the Tribunal extended the filing deadline for respondent's rebuttal brief seven months. More recently, however, the Tribunal seems a bit more strict with filing deadlines by threatening to proceed under Rule 28. This change may be due to the new leadership at the Tribunal.

#### E. EFFICACY OF DISCOVERY AT THE TRIBUNAL

In view of the lax enforcement of discovery orders and the amount of time wasted in trying to secure compliance at the Tribunal, discovery may appear futile. On the other hand, discovery may be the only means of substantiating or defending a claim before the Tribunal. As illustrated above, records and books are often inaccessible to the parties. Judge Richard Mosk recognized this reality in his concurring opinion in *Utrasystems Inc. v. Iran*:<sup>127</sup>

The parties and the Tribunal operated under difficult circumstances. Of the two key witnesses, one is deceased and the other is incarcerated in Iran. Other witnesses were unavailable. Claimant did not have access to certain documents and witnesses. There were various discrepancies among those documents produced. Restriction on travel between Iran and the United States, the lack of relations between the two countries, the age of the claim and language differences exacerbated proof problems. Of course, it is not unusual for Tribunals such as this one to be 'compelled to act upon the basis of meager, incomplete, and unsatisfactory evidence.' Sandifer, *Evidence Before International Tribunals* 22 (1975).<sup>128</sup>

In *R. N. Pomeroy v. Iran*,<sup>129</sup> Chamber Three adopted this view: "Recognizing the difficulties parties have in producing all of the evidence, the Tribunal notes that when there are unexplained gaps in the evidence the Tribunal has no choice but to rely on inferences it can make from the known circumstances."<sup>130</sup>

127. Award No. 27-84-3 (March 4, 1983), 2 IRAN-U.S. C.T.R. 100 (1984).

128. *Id.* at 115 (Mosk, J., concurring).

129. Award No. 50-40-3 (June 8, 1983), 2 IRAN-U.S. C.T.R. 384 (1984).

130. *Id.* at 384.

As pointed out by Judge Mosk, key witnesses are often unavailable or are unwilling to testify. It is undeniably costly for a witness to travel from either the United States or Iran to the proceedings in The Netherlands. Furthermore, a U.S. or Iranian citizen who may have firsthand knowledge, may be reluctant to testify against his own countrymen. For example, one Iranian witness who actually saw the confiscation of claimant's property refused to appear at the Tribunal in fear of Iranian reprisals against himself and his family; he agreed only to an anonymous affidavit. This situation illustrates another problem at the Tribunal: the lack of power to compel testimony. Article 16(2) of the Tribunal Rules provides that the Tribunal can hear witnesses allowing it to summon them.<sup>131</sup> Other institutional rules also provide for the summoning of witnesses.<sup>132</sup> Part of the problem could possibly be remedied through the use of discovery procedures such as depositions or interrogatories. An imprisoned witness, such as the one referred to by Judge Mosk above, could be ordered to answer interrogatories. Such a procedure would be useful if the Tribunal had sufficient power to enforce it. One commentator has reported the beneficial use of such procedures in both the German-Mexican and the French-Mexican Claims Commissions.<sup>133</sup>

Besides its utility in gathering crucial evidence, discovery can often be effective in inducing settlements.<sup>134</sup> Of the approximate twenty-two document requests at the Tribunal, two of the cases in which requests were made were settled between the parties.<sup>135</sup> In another case, it is hoped that a discovery request may lead to settlement. In neither of the two settlement cases, both large claims in which an American claimant sought documents from an Iranian respondent, were the documents ever produced. It is difficult to speculate at this point but it is plausible that the documents requested were so damaging that the respondent decided to settle. On the other hand, in light of the lack of compliance, it is doubtful whether the

131. Tribunal Rules, *supra* note 137, art. 16(2); *see also* UNCITRAL Rules, art. 16(2). As stated above, Article 24(3) empowers the arbitrators to require the parties to *produce documents, exhibits, or other evidence* but this would not seem to include witnesses. Tribunal Rules, art. 24(3) (emphasis added). For a discussion of compelling testimony under the UNCITRAL Rules in general, *see* Stein & Wotman, *International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1707 (1983).

132. *See* International Chamber of Commerce Rules [hereinafter cited as ICC Rules], arts. 14(1), 15(1), *reprinted in* GUIDE TO ARBITRATION 70 (1983).

133. *See* A. FELLER, THE MEXICAN CLAIMS COMMISSIONS 257 (1935). In the Italian-Mexican Claims Commission, however, it was held that similar procedures were not available where the governments were litigants. *Id.*

134. *See* Goldstein, *supra* note 2, at 267.

135. In one of the cases, an Award on Agreed Terms was filed. An Award on Agreed Terms, provided for in Article 34 of the Tribunal Rules, allows the parties to record a settlement in the form of an arbitral award and to effect payment through the Security Account. *See* Tribunal Rules, *supra* note 105, at art. 34(1).

documents would have ever been actually produced. Hence, in order for discovery to induce settlement, the parties must believe that they will be forced to produce damaging evidence or that the arbitrators will either draw a negative inference or be disinclined to believe their explanations if they fail to produce such evidence.<sup>136</sup>

Discovery is also heralded as a means of uncovering relevant facts in the "search for truth."<sup>137</sup> A decision has been reached in two of the approximately twenty-two cases in which document requests were made. In one case in which a U.S. national claimed that it was retained by an Iranian agency to be consulting engineer, the American claimant sought the production of correspondence that would prove the existence of this contractual relationship. The Iranians did produce the requested letter. In its award to the American claimant, the Tribunal presumed the existence of the contractual relationship from letters, Telexes, minutes of meetings and other data. Therefore, the document produced appears to have aided the Tribunal in uncovering the relevant facts.

In another case, copies of submissions the respondents had previously filed in other cases, on which respondent had relied in the case at the bar, were provided to the American claimant. Claimant received a substantial award but it does not appear the document influenced the decision.<sup>138</sup>

If the enforcement and delay difficulties could be resolved (suggestions to resolve these problems will be discussed below),<sup>139</sup> discovery would seem to be a very helpful device at the Tribunal. Parties probably have no alternative means of evidencing their claims. In some cases, production requests may engender settlement negotiations and in others it may aid the Tribunal in reaching a fair decision in a case.

## V. Efficacy of Discovery in Domestic and International Arbitration

### A. DIFFERENCES

The problems encountered by parties before the United States-Iran Claims Tribunal in gathering evidence, both documentary and testimonial, demonstrate the problems that parties have in obtaining evidence in international arbitration in general. These problems highlight the need for discovery in international arbitration. For example, Mr. Jean Robert, President of

136. For a full discussion on enforcement, see *infra* notes 151-201 and accompanying text.

137. See, e.g., *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1063 (2d Cir. 1979).

138. See *Futura Trading Inc. v. Khuzestan Water and Power Authority*, Award No. 187-325-3 (August 19, 1985).

139. See *infra* notes 151-201 and accompanying text.

the ICC, in comparing international and domestic arbitration, emphasizes the importance documentary evidence may play in international arbitration:

In view of the geographical distance which may separate the parties in international commercial arbitration, documentary evidence may play a far more important role than in domestic arbitration. It may be difficult to bring witnesses and parties together at one place for a hearing. Written statements, produced by the parties and documentary evidence may therefore first be considered. In some cases it may even be possible to decide the case on the sole basis of an exchange of written statements and documentary evidence.<sup>140</sup>

Because of the important role documents can play in international arbitration, Mr. Robert concludes that international arbitrators should have the power to enforce discovery.

Ideological differences as well as geographical distances hinder parties in procuring evidence as illustrated at the Tribunal. Given the political tension that may exist in international arbitrations, it is highly unlikely that parties will volunteer information, as may be possible in a labor arbitration for example.<sup>141</sup> Furthermore, in some types of international as opposed to domestic arbitration, it is less probable that the parties either had or want to continue an ongoing relationship,<sup>142</sup> especially parties before a claims tribunal where political entities present cases.

International arbitrations with a government as a party are not uncommon. Witnesses with firsthand knowledge of the parties' dealings, however, are seldom found in government ministries because of the high turnover in government employment and because of the large volume of work that each employee may handle on a daily basis. For this reason, discovery of documents when a government or government agency is involved may be very helpful.<sup>143</sup> Routine procedures and printed forms are important in government agencies also and may prove invaluable when questioning a government official who does not have primary knowledge of a case.<sup>144</sup>

Perhaps the biggest difference between international and domestic arbitral discovery is the lack of enforcement power in the international area, which is demonstrated at the Tribunal. Even though they are not always utilized, the availability of court orders to subpoena witnesses and documents makes enforcement in domestic arbitration such as labor arbitrations much simpler. The possibility that such procedures will be employed may be enough of an incentive to comply. A few other nations also provide for the

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140. Robert, *supra* note 4, at 223.

141. See *supra* note 98 and accompanying text.

142. See *supra* notes 51 and 98 and accompanying text.

143. See Audiotape, *supra* note 4, at 163.

144. See *id.* at 164.

use of court orders to enforce discovery.<sup>145</sup> The absence of the enforcement authority in international arbitration,<sup>146</sup> reduces the efficacy of arbitral discovery.

In addition to being suspicious of discovery, parties unfamiliar with Anglo-American legal procedures may not understand the operation of these procedures,<sup>147</sup> thus making their use less effective. In one reply to a request for documents, for example, the Iranian respondent stated that the burden of proof was on the claimant and therefore, it was not proper for them to submit the requested documents. In contrast, parties in domestic arbitration presumably have an understanding of discovery thereby facilitating its use.

Perhaps, too, certain Anglo-American discovery procedures are inappropriate for use at the Tribunal, and thus, other types of limited discovery mechanisms could be more usefully employed. The UNCITRAL Rules have attempted to deal with the problem of discovery,<sup>148</sup> but more detailed rules might more clearly guide all parties in effectively employing vital information-gathering procedures.

There are some common characteristics which make discovery efficacious in both the international and domestic arbitral settings. As stated earlier, discovery is most useful in complex or costly cases. Because both international and domestic commercial cases are often complex<sup>149</sup> and costly, the use of discovery is beneficial in both.<sup>150</sup> In any sort of arbitration, it is likely that the adversary will have significant evidence in his sole possession, but the problem is exacerbated in transnational disputes.<sup>151</sup>

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145. The English Arbitration Act gives the High Court the power to order discovery of documents, interrogatories, depositions and inspections. Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 12(6).

Under French law a party may apply to a French court during an arbitration to subpoena witnesses or documents. Nouveau Code de Civile Procedure (Nov. C. Pr. Civ.) art 11(1) (Dalloz ed. 1979). See also Delaume, *International Arbitration under French Law: The Decree of May 12, 1981*, 37 ARB. J. 38, 43 (1982).

In Belgium also, the Court of the First Instance is authorized to compel witnesses and the production of documents. Code Judicare, 14.7.72, art. 16; see also INTERNATIONAL CHAMBER OF COMMERCE, *ARBITRATION LAW IN EUROPE*, 37 (1981).

146. See *supra* notes 79-82 and accompanying text.

147. See MUSTILL & BOYD, *supra* note 61, at 285.

Even a party who is determined to perform his obligations conscientiously by making a full disclosure of his documents may well be at a loss to know how far his obligations extend. Discovery is one of the most difficult aspects of English procedure, and although even an English lawyer may from time to time be daunted by the problem, at least his experience will give him a better chance than a layman of arriving at the correct solutions.

*Id.*; cf. FELLER, *supra* note 133, at 251.

148. See *supra* notes 110-114 and accompanying text.

149. See Audiotape, *supra* note 4, at 160.

150. See *id.*

151. Cf. *id.*

In general, if reasonably limited, discovery can be desirable in both domestic and international arbitration. Typically, though, the international disputant will face many more obstacles in obtaining evidence from his foreign adversary. Accordingly, the need for improvement in discovery procedures in multinational arbitration, especially the production of documents, is much greater than that in domestic arbitration.

## B. GENERAL ENFORCEMENT SUGGESTIONS

If discovery is in fact useful in some arbitral situations, then some provision should be made to ensure adherence to discovery orders. The proposals suggested here are primarily aimed at the international problem, particularly before the Iran-United States Claims Tribunal, but can also be applied to other kinds of arbitration, such as labor, where enforcement may pose difficulties.

First, before enforcement of a discovery order can be effected, the right to such a procedure must be proven. The general right of discovery in international arbitration has already been established. International law scholars, arbitrators, and the arbitration rules themselves have upheld the right of discovery, especially document production, in international arbitration.<sup>152</sup> Even parties refusing to produce documents have admitted the obligation to produce relevant evidence.<sup>153</sup> Moreover, authority to order discovery may be found in the arbitration clause of a contract drawn up between two or more of the adversary parties.

As stated earlier, parties can avoid expensive, time-consuming disputes over discovery by agreeing beforehand to the scope of discovery procedures.<sup>154</sup> Sanctions for failure to comply can also be included in both domestic and international contracts including collective bargaining agreements. If one of the parties refuses to comply or employs dilatory tactics with regard to discovery orders, his opponent may be able to bring an anticipatory repudiation or frustration of contract claim against the recalcitrant party.<sup>155</sup> An abandonment of the agreement to refer the case to arbitration may be a valid claim in the more egregious cases.<sup>156</sup> By agreeing to discovery in the original contract, the parties may avert compliance problems

152. See *supra* notes 12-15 and accompanying text.

153. See *supra* notes 123-124 and accompanying text.

154. See *supra* notes 46-49 and accompanying text.

155. See Thomas, *The Legal Remedies for Dilatoriness in the Prehearing Arbitral Procedure*, 2 LLOYD'S MAR. & COM. L.Q. 315 (1983).

156. *Id.* at 328. Several British cases in which there was undue delay in prearbitral procedures have been decided on the repudiation, frustration or abandonment grounds. See *generally id.* for a full discussion.

altogether, but in the case where such problems do arise, the injured party is armed with strong legal arguments to protect himself.

Besides causing delay and increasing expense, the failure to comply with discovery orders may foster disrespect for the entire arbitral process. Parties who have cooperated in the arbitral proceeding will feel they have been treated unfairly: "[T]he making of an order for discovery takes it for granted that both sides will thoroughly comply with the order . . . if . . . one party gives full discovery while the other does not, the former may be placed at a serious disadvantage."<sup>157</sup> For example, one American claimant's disgust with the respondent's disrespect for a Tribunal discovery order exhibits his frustration with the entire process:

While [company name] is perfectly aware of the practical limitations with which the Tribunal is faced in attempting to deal with outrageous and irresponsible behavior on the part of the [r]espondents in this and other matters, we do feel that [r]espondents must be made aware once and for all that they are not exempt from the rules and procedures by which all participants . . . before the Tribunal are required to abide.

In addition to the deleterious effects on the individual seeking discovery, noncompliance hurts all parties before an international claims commission both by encouraging further noncompliance in subsequent claims and by causing undue delay in the hearing of other claims (especially at the Tribunal where thousands of claims have yet to be adjudicated).<sup>158</sup> Where the parties have an ongoing relationship, such as in labor or domestic commercial arbitration, noncompliance can be especially damaging to the relationship as well as to the conduct of future arbitrations between the parties.<sup>159</sup>

Noncompliance may also cause a party to a domestic or international arbitration to question the finality of an award in court, thereby undermining the effectiveness of arbitration. Courts may refuse enforcement of arbitration awards in labor cases under certain circumstances.<sup>160</sup> In one case, for example, an award was reversed by a New Jersey state court because the employer had presented his production of documents as complete but in reality had offered incomplete documents.<sup>161</sup> Even if a party

157. MUSTILL & BOYD, *supra* note 61, at 285.

158. Cf. K. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 23 (1946).

159. See *supra* notes 48-53 and 98 and accompanying text.

160. See, e.g., *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Holodnak v. Avco Corp. and UAW Local 1010*, 514 F.2d 285 (2nd Cir. 1975), *cert. denied*, 96 S. Ct. 188 (1975); *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2nd Cir. 1966).

161. See *Teamsters v. ABAD*, 135 N.J. Super. 552, 90 L.R.R.M. 2191 (1975). The decision, however, was remanded by the appellate court because there was nothing in the record to show that the employer intentionally withheld documents. *Teamsters v. ABAD*, 93 L.R.R.M. 2791 (1976). See also *Harvey Aluminum v. United Steelworkers of America*, 263 F.Supp. 488 (D.C.

does not appeal to a court or has no authority to do so, there is also the chance that arbitrators may feel compelled to reopen a case if new evidence comes to light.<sup>162</sup> One case before the United States-German Mixed Claims Commission was reopened because new evidence had come to light.<sup>163</sup> While the UNCITRAL Rules provide that all awards are "final and binding,"<sup>164</sup> provision is made for correction of an award for "errors in computation, any clerical or typographical errors, or any errors of a similar nature."<sup>165</sup> Also, the parties can request the Tribunal to issue an additional award "as to claims presented in the arbitral proceeding but omitted from the award."<sup>166</sup> While it is unlikely that these rules are broad enough to allow the reopening of case for new evidence, the possibility of skillful argument on this issue may still remain. If the parties are able to use these rules to upset the finality of an award, the results will be undesirable, especially when the parties may have chosen to arbitrate to achieve a quick, *final* result.

### C. SANCTIONS

#### 1. *Party-imposed: Self-help*

One obviously undesirable enforcement sanction which could be employed is "self-help." Thus, if joint requests are made for documents, one party can withhold requested evidence until his opponent complies. Such measures not only undermine the authority of the arbitrators but also end up in "cat and mouse games" in which both parties wait for the other party to comply first. Where a large number of cases are being adjudicated before a claims tribunal, a number of claimants could try to "gang up" on a single opponent (such as Iran) in an attempt to gain enforcement. Even if such a scheme could be organized properly, the results would be both unsatisfactory and devastating to the whole claims procedure. In domestic commercial or labor arbitration where the parties hope to have a continuing relationship, the refusal of one party to comply in response to his opponent's prior refusal, would be severely detrimental.<sup>167</sup> Hence, self-help tactics are useless.

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Cal. 1967) (court overturned arbitration award where arbitrator did not allow parties to offer all material evidence).

162. Cf. FELLER, *supra* note 133, at 257; CARLSTON, *supra* note 158, at 26 (citing to Rio Grande Irrigation and Land Co., Ltd. v. United States, American and British Claims Arbitration, REPORT OF FRED K. NIELSEN 334 (1926)).

163. See *id.* (citing to Lehigh Valley RR Co. *et al.* v. Germany (1930)).

164. UNCITRAL Rules, art. 32(2).

165. *Id.* at art. 36(1).

166. *Id.* at art. 37(1).

167. See *supra* notes 48-53 and 98 and accompanying text.

## 2. *Negative Inferences*

Probably the most powerful and most easily facilitated enforcement weapon in both domestic and international settings is the arbitrator's assumption of negative inference from the refusal to produce requested evidence. It has been used by many arbitrators.<sup>168</sup> Its use has been strongly advocated in labor arbitration.<sup>169</sup> The Tribunal, in two cases, has drawn a negative inference from the respondent's failure to produce documents available to it.<sup>170</sup> In one case, Chamber One found the respondent's excuse for non-production—the documents were “voluminous”—unconvincing. The American arbitrators before the Tribunal have advocated the use of the negative inference in a number of their opinions.<sup>171</sup> To buttress their assumptions, these arbitrators have cited both international legal authority and Iranian law.<sup>172</sup> France has codified the arbitrator's right to take a lack of cooperation into account when issuing an award.<sup>173</sup> Hence, the arbitrator's authorization to make such an inference is fairly well-established in both international and domestic law. In general, the law of estoppel will also operate against a party who deliberately withholds evidence.<sup>174</sup>

A corollary of this inference, *i.e.*, to infer facts to exist from circumstantial or sketchy evidence, has also been asserted by international authorities.<sup>175</sup> The International Court stated: “By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof. . . . Such a State would be allowed a more liberal recourse to inference of fact and circumstantial evidence. This indirect

168. See, e.g., *supra* notes 74–75 and accompanying text.

169. *Id.*; see also R. FLEMING, *THE LABOR ARBITRATION PROCESS*, 175 (1967).

170. See *INA Corporation v. Iran*, Award No. 184-161-1 (Aug. 13, 1985); *Isaiah v. Bank Mellat*, Award No. 35-219-2 (March 30, 1983), 2 Iran-U.S. C.T.R. 232 (1984).

171. See, e.g., *INA Corp.*, Award No. 184-161-1, at 14; *Ultrasystems Inc.*, 2 Iran-U.S. C.T.R. at 115, 120–21 (Mosk, J., concurring); *Raygo Wagner Equipment Co. v. Iran Express Terminal*, Award No. 30-16-3 (March 18, 1983) (Mosk, J., concurring and dissenting), 2 Iran-U.S. C.T.R. 146, 152–53 (1984); *ITT Industries v. Iran*, Award No. 47-156-2 (May 26, 1983) (Aldrich, J., concurring), 2 Iran-U.S. C.T.R. 349, 355 (1984).

172. Mosk has cited D. Sandifer's *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* a number of times. See, e.g., *Ultrasystems*, 2 Iran-U.S. C.T.R. at 115, 121. He has also cited Articles 300–302, of the *CIVIL PROCEDURE CODE OF IRAN* (Sabi trans. 1972) as authority for this proposition. See *id.*, *Raygo*, 2 Iran-U.S. C.T.R. at 152, 153. Holtzman has cited Witenberg, *La Theorie des Preuves Devant Les Jurisdictions Internationales*, 56 *RECUEIL DES COURS* 5, 47–8 (II–1936). See *J. I. Case Co. v. Iran*, Award No. 57-244-1 (June 15, 1983). Aldrich has cited the Separate Opinion of Judge Jessup in the *Barcelona Traction Case*, 1970 I.C.J. 3, 216. See *ITT*, 2 Iran-U.S. C.T.R. at 355.

173. See *Nouveau Code de Civile Procedure* (Nov. C. Pr. Civ.) art. 11(1); see also J. ROBERT & T. CARBONNEAU, 1 *THE FRENCH LAW OF ARBITRATION*, § 3–12 (1983).

174. See J. SIMPSON & H. FOX, *INTERNATIONAL ARBITRATION—LAW AND PRACTICE*, 226 (1959), citing to *Bowman & Burberry's Ltd. v. United Mexican States*, Decision No. 18, V.U.N. Rep. 104.

175. See, e.g., *Corfu Channel*, 1949 I.C.J. 18; SANDIFER, *supra* note 12, at 22.

evidence is admitted in all systems of law, and its use is recognized by international decisions."<sup>176</sup> The use of both these positive and negative inferences can serve to counterbalance the effects of noncompliance in all types of arbitration.

The primary advantage of these evidentiary assumptions is their ease of administration no matter what statute or agreement the arbitrator is acting under—the arbitrator can act without the aid of outside courts and without the action of either party.<sup>177</sup> The mere possibility that such an inference will be drawn will discourage parties from hiding relevant materials because they will face the possibility of losing an entire case; whereas, with other types of sanctions, they may stand to lose something less than the entire case. An imposition of a fine, for instance, will only cause the refusing party to lose a certain amount of money. The disadvantages of using these inferences will be discussed below.<sup>178</sup>

### 3. *The Burden of Proof*

In the same vein as the evidentiary inference, the arbitrator may also place the burden of proof on the party who has access to the evidence. The procedure seems especially fair when one party refuses to disclose the evidence to which it has access. The Tribunal has used the burden of proof approach in *Dallal v. Iran*,<sup>179</sup> a case in which there was no discovery request. The Tribunal denied the claimant's assertion that his reticence was due to concern for the safety of relatives and business connections in Iran because the Tribunal believed that the claimant could have produced the needed evidence without revealing the identity of relatives and business connections.<sup>180</sup>

The advantages of this approach are similar to that of the evidentiary assumption—it can be effected without procedural hassles. The drawback of these evidentiary sanctions is the possibility that the party against whom the sanction is imposed truly does not have access to the necessary evidence (conceivably because it was destroyed sometime in the past). In an effort to demonstrate its inability to comply with a discovery order, an Iranian ministry reasoned: "When an action is beyond the ability of a person, can it be done and carried out? Of course not." This excerpt exhibits the dilemma facing any arbitrator in trying to enforce discovery orders—he can either

176. *Corfu Channel*, 1949 I.C.J., at 18.

177. Cf. W. CRAIG, W. PARK & J. PAULSSON, 84-1 INTERNATIONAL COMMERCIAL ARBITRATION, 77 (1984).

178. See *infra* notes 180-186 and accompanying text.

179. Award No. 53-149-1 (June 10, 1983), Iranian Assets Litigation Rep. 6,819 (July 7, 1983).

180. *Id.* at 6,827.

accept the word of the refusing party or he can presume a negative inference from the refusal (or put the burden of proof on the refusing party), although the refusal may be legitimate.

If the evidentiary sanctions are indeed imposed on an innocent party, that party may protest the enforceability of the arbitrators' award.<sup>181</sup> Imposition of such sanctions may also cause dissension among the members of an arbitral panel.<sup>182</sup> As shown above, such a protest or appeal to a court will frustrate some of the goals of arbitration.<sup>183</sup>

#### 4. Other Arbitral Sanctions

In regard to compliance problems at the Tribunal, some legal scholars and practitioners have suggested sanctions similar to those imposed under U.S. Rules of Civil Procedure.<sup>184</sup> These sanctions could be used more effectively in domestic arbitration when there is a chance that both parties and the arbitrators have an understanding of how the sanctions work. The suggestions include: taking cases off the active list where the claimant is the refusing party; striking any claim relying in any significant amount on a document not furnished; imposing contempt fines on the refusing party; and issuing a default judgment.<sup>185</sup> The harshness of the sanction imposed would vary with the severity of the offense.<sup>186</sup>

At present, arbitrators will rarely have the authority to impose these sanctions. Indeed, Chamber One has held that claimant's requested sanctions such as taking the claimant's facts as established, refusing to allow respondents to oppose claimant's statement or introduce evidence, striking the counter-claim or entering a default judgment, were not provided for under the Tribunal rules although respondent had failed to comply with the Tribunal's interim award. As stated earlier, parties to a contract or collective bargaining agreement can provide for similar sanctions in the

181. There have been cases in which a party has sought an addition to or correction of an award under Tribunal Rules 36 and 37. See, e.g., *Woodward-Clyde Consultants v. Iran*, Decision (Jan. 5, 1984) on *Woodward-Clyde Consultants v. Iran*, Award No. 73-67-3 (Sept. 2, 1983).

182. For other reasons, certain arbitrators have refused to sign awards at the Tribunal. See, e.g., *Rexnord Inc. v. Iran*, Award No. 21-132-3 (January 10, 1983), 2 Iran-U.S. C.T.R. 6, 14 (1984) (Sani Refusal); *Ataollah Golpira v. Iran*, Award No. 32-211-2 (March 29, 1983), 2 Iran-U.S. C.T.R. 171, 177 (1984) (Shafeiei Refusal).

183. See *supra* notes 74-87 and accompanying text.

184. See Lowenfeld, *The U.S.-Iranian Dispute Settlement Accords: An Arbitrator Looks at the Prospects for Arbitration*, 36 ARB. J. 6 (1981); Audiotape, *supra* note 4, at 172.

185. See Audiotape, *supra* note 4, at 172. For a full discussion of these and other sanctions available in the U.S. courts, see generally Renfrew, *supra* note 1, at 6.

186. See Audiotape, *supra* note 4, at 173; Note, *The Use of Rule 37(b) Sanctions to Enforce Jurisdictional Discovery*, 50 FORDHAM L. REV. 842-46 (1982) [hereinafter cited as *Rule 37(b) Sanctions*].

agreement.<sup>187</sup> Either or both parties may be unwilling to consent to giving the arbitrators these powers. Again, the enforceability of the award may be questioned if such sanctions are employed.

In considering the advisability of granting the right to impose such sanctions, it is helpful to examine briefly the effectiveness of each in light of their use in the U.S. courts. The issue-preclusive sanction is advantageous because it can be tailored to correct the particular harm suffered due to the opponent's disobedience.<sup>188</sup> It also "eliminates the benefit that the defendant may have gained through delaying discovery and thus causing the plaintiff to be inadequately prepared at trial."<sup>189</sup>

A default judgment may often be too harsh a sanction, even in American courts.<sup>190</sup> Because it dismisses an entire case on the basis of noncompliance on perhaps one issue, it may contravene the aim of reaching a fair and reasoned decision.<sup>191</sup> Such a severe sanction should be used only when other sanctions have failed.<sup>192</sup>

The imposition of a lump-sum fine may not induce compliance if the party weighs his options and decides that he would be better off paying the fine rather than complying.<sup>193</sup> Thus, for a fine to be effective, it should accrue until the obligation to disclose information is fulfilled.<sup>194</sup> French law, for instance, provides for the imposition of a daily fine (an *astreinte*) for a failure to comply with a discovery order.<sup>195</sup> The use of such fines could easily be facilitated in domestic arbitration in which both parties may exist in close proximity. At the Tribunal, it might be possible to pay fines from the Security Account previously mentioned. In fact, Chamber Three stated it would consider the imposition of a monetary sanction on the respondents if they failed to comply with the Tribunal's orders. Moreover, the arbitrator will also have to supervise the payment of such fines.<sup>196</sup>

### 5. Court-imposed Sanctions

If the arbitrator is unauthorized to impose sanctions similar to those under U.S. Federal Rules, parties may be able to apply to local courts to impose such sanctions. The French sanction of *astreintes*, for example, must be

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187. See *supra* notes 46-49 and accompanying text; see also *supra* note 73 and accompanying text.

188. See *Rule 37(b) Sanctions*, *supra* note 186, at 845.

189. *Id.* at 846.

190. See *id.* at 843.

191. See *id.* at 845.

192. *Cf. id.*

193. See *id.* at 843.

194. See *id.* at 842.

195. Nov. C. PR. CIV., art. 11(2).

196. See Note, *supra* note 186, at 842.

authorized by a court.<sup>197</sup> Because these procedures are already provided for in both U.S. federal and state statutes and court decisions,<sup>198</sup> court imposed sanctions probably are best suited for arbitration in the United States. The parties' familiarity with the courts and procedures will reduce the time and money spent in procuring such sanctions. As discussed previously, however, some U.S. courts have been hesitant in allowing arbitral discovery.<sup>199</sup> No doubt these courts will balk at imposing discovery sanctions also. If court imposed sanctions are to be effective, the courts must be more willing to take an active role.

At least one commentator believes that, although the UNCITRAL Rules contain no express provision concerning subpoenas, the parties are not precluded from requesting help from the local courts.<sup>200</sup> Such subpoenas could be used as a means of enforcing discovery orders. Other international bodies have also been given the power to invoke the aid of the municipal courts of the states by which they were established.<sup>201</sup>

Besides its questionable authorization unless it is expressly granted, court-aided enforcement can be a cumbersome, lengthy procedure, as exemplified in the labor field where a party may have to go through both the NLRB and the courts.<sup>202</sup> Court-aided enforcement will be even more difficult in international arbitration. For example, if it were to be used before the Tribunal, the question would arise as to which courts—American, Iranian or Dutch—should have the power. It is unlikely that the American or Iranian courts would have much more success than the Tribunal in gaining compliance. Finally, the advantages of arbitration are lost if court involvement becomes necessary.

## VI. Conclusion

From its beginning in Roman law until the present, discovery has been perceived as a useful device in litigation, although the possibility for its abuse is always present. If confined to certain parameters, discovery, particularly the production of documents, can be efficacious in various arbitral settings. Discovery is especially essential to parties before the Iran-U.S. Claims Tribunal because the marshalling of evidence is so difficult. Discovery before the Tribunal, however, has proved to be time-consuming and

197. See ROBERT & CARBONNEAU, *supra* note 173, at § 3-12.

198. See *supra* notes 27-35 and accompanying text.

199. See *supra* notes 27-36 and accompanying text. The British courts have been more willing in this regard. See Stein & Wotman, *supra* note 131, at 1706-07.

200. See Stein & Wotman, *supra* note 131, at 1707.

201. For example, Article 52 of the Franco-German Mixed Arbitral Tribunal Rules of Procedure provided for court assistance. See SIMPSON & FOX, *supra* note 174, at 203.

202. See *supra* notes 81-82 and accompanying text.

virtually unenforceable. Unless the compliance problem in all arbitrations can be dealt with effectively, the process is futile, serving only to frustrate the arbitrating parties and undermine the authority of the arbitrator in hearing all cases. The most effective and widely-used sanction for noncompliance in all arbitral settings would seem to be the arbitrator's ability to adopt a negative inference from a party's failure to produce accessible evidence. Yet, even this sanction has its pitfalls, in that it may cause a party to question the enforceability of a final award. At the Tribunal, at least, this risk is small because of the existence of the Security Account from which awards are paid. In other areas, the ability to question the finality of an award may lead to lengthy court battles, the precise result the parties sought to avoid by employing arbitration.