DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION - IS IT A BENEFICIAL EXERCISE?

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1 INTRODUCTION

As a general rule, a party in an international arbitration case must produce the evidence it intends to rely on in order to support its claim or defence.[1] Obviously, any failure to produce material - or even relevant - evidence may adversely affect the party's chances of proving the facts invoked and, ultimately, the chances of success in the arbitration. In cases where the parties are on an uneven footing in respect of access to important documentary evidence, where such evidence undisputedly exists, and where the party without such access is unlikely to be able to lift its burden of proof regarding factual circumstances (supposedly) documentable by evidence held by the other party, it is relevant to consider whether the parties should have access to filing document production requests against each other in order to elicit relevant evidence. In such cases and at least where a "smoking gun" is produced (or something close to this), document production can be a very helpful tool and even decisive to the outcome of the case.

To strike a balance between the rather intrusive "discovery" procedure known from common law countries, in particular UK and the United States, and the adversarial ("hands off") approach which civil law countries normally profess to, "document production" has emerged in international arbitration practice as a hybrid between these opposites and is frequently used to elicit the relevant evidence from (reluctant) parties.

Document production may take time and is often a (very) costly exercise. Furthermore, and more importantly, unlike under the common law "discovery" system where domestic courts may impose fines and where other coercive measures such as "dawn raids" may also be a possibility, there are no immediately available remedies or sanctions if/when a party fails to produce documents under the arbitral tribunal's production order. An arbitral tribunal cannot force a party to produce withheld evidence, only domestic courts may be able to do so. At least in part because of the absence of severe remedies/sanctions, no party - or lawyer - would normally want to produce a "smoking gun" to the other side in international arbitration *even if* ordered to do so by the tribunal, and thus such evidence is rarely if ever produced. The only remedy available to the aggrieved party in this situation is to request the tribunal to draw adverse inferences, which - depending on case - may also be a difficult principle to apply.

Against this background, the topic of this paper is: *How effective is the document production system in practice?*

The discussion is accordingly focused on the shortcomings of document production in modern international arbitration and in particular a discussion on the advantages - or at least the desired advantages - of this particular procedural step in the proceedings, seen in the light of the cost and time involved in document production.

Notably, the author has a civil law background, and the paper should be read in this light.

2 DOCUMENT PRODUCTION IN PRACTICE

2.1 **Procedural Order No. 1**

In the early stages of an arbitration, seasoned arbitrators (presidents of tribunals) will normally circulate a procedural order (hereinafter referred to as "PO1") setting out the "proposed" procedural framework for the arbitration at hand, which the parties may comment on (but may not finally decide on). It is common that such rules include a formal document production procedure with exchanges of "Redfern Schedules", objections, replies, counter-replies and a decision from the arbitral tribunal. Such formalized procedure may take up to two months, sometimes more, and is "blocked" as a separate phase in the procedural calendar - usually after the first round of exchanges of substantive written pleadings (statement of claim and statement of defence).

A second approach is to leave room for the parties to make less formalized requests at various stages throughout the arbitral proceedings, and a third option is of course to avoid document production altogether.

Especially in the beginning of any arbitration, both parties are usually keen to "show" the arbitral tribunal how sympathetic they are and that they have nothing to hide. Thus, parties will often be hesitant to suggest that large sections - such as the provisions on document production - are completely taken out of PO1, out of fear that such proposal would not only cause the opposing side to object but also the arbitrators to speculate that the party has something to hide. Additionally, even though most tribunals nowadays are highly professional, a party may fear that the tribunal will take offence if the party would suggest to remove the document production phase altogether.

Consequently, a party will often restrict itself in this way even though the party may prefer that document production is avoided. At least partly due to this dynamic, a formal document production phase will often be "accepted" by the parties even though one of them - or both - will be very reluctant to produce anything of value to the other side.

2.2 **The IBA Rules**

In relation to deciding on the parties' document production requests, an arbitral tribunal will usually indicate (in PO1) that it will be "guided but not bound" by the rules set out in the *IBA Rules on the Taking of Evidence in International Arbitration,*[2] and, accordingly, the parties' requests and objections will usually center on these rules of evidence taking.

The Preamble of the IBA Rules contains some interesting considerations for the application of the IBA Rules. In para. 1, it is stated that the rules are intended to provide an *"efficient, economical and fair process"* for the taking of evidence in international arbitration. Presumably, in appreciation that e.g. procedural orders on document production are not enforceable at law, a requirement that each party shall "act in good faith" in the taking of evidence was included in para. 3 of the Preamble under the 2010-revision of the IBA Rules.[3]

The general principle of the IBA Rules is laid down in Article 3(1) stipulating that each party shall introduce those documents available to it and on which it relies. However, this is of course not possible for a party in cases where the relevant (only) documentary evidence rests with the opposing party. Therefore, Articles 3(2)-(8) of the IBA Rules address the issue of document production requests. These rules are the result of a balanced compromise between the broader view generally taken in the common law countries (especially the discovery rules in USA and Great Britain) and the more narrow view generally held in the civil law countries.[4]

Pursuant to Article 3(3) of the IBA Rules, the requesting party shall in his request prepare:

> *"(a)(i) a description of each requested Document sufficient to identify it, or*
>
> *(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;*
>
> *(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and*
>
> *(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and*
>
> *(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party."*

The counterpart has the right to object to the request pursuant to Article 3(5):

> *"If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3."*

While Article 3(3) of the IBA Rules lays down the specific conditions that *must* be met before a party can be ordered to disclose certain documents, Articles 9(2)-(3) sets out the exemptions to production of requested documentation. The exemptions are frequently - if not always - invoked in respect of one or more document production requests from the other side. This necessitates that the tribunal decides on the issue - and this is where it becomes tricky.

It is clear that Article 3(3) is intended to prevent "fishing expeditions",[5] and such are also rarely allowed by arbitral tribunals. However, while parties and tribunals may relatively easily assess and recognize from a document production request's wording and from the supporting reasons whether the request is indeed relevant and may lead to a decision from the tribunal that documents shall be produced by the other side, there is no easy way for the requesting party or the tribunal to assess whether objections invoked by the counterparty are actually valid or whether they, in fact, represent the mirror image of "fishing" for documents, i.e. "fishing" for excuses to produce them.

2.3 **The "legal privilege" exemption**

Especially in recent years, the exemptions to production stated Articles 9(2)-(3) of the IBA Rules seem to be invoked even more frequently, potentially because the international arbitration environment have become more litigious/aggressive after the financial crises of 2008 (onwards). In particular the exemption concerning documents protected by "legal privilege" (Articles 9(2)(b) and 9(3)) is usually invoked with respect to vast groups of documents - also those groups for which one would not normally expect any "legal privilege" to be relevant.

Article 9(2) of the IBA Rules provides:

> *"The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Documents, statements, oral testimony or inspection for any of the following reasons: […]*
>
> *(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable."*

The following is stated in the Commentary to this provision:

> *"Article 9.2(b) provides protection for documents and other evidence that may be covered by certain privileges, under the appropriate applicable law, such as the attorney-client privilege, professional secrecy or the without prejudice privilege. The Working Party felt that it was important that such privileges be recognized in international arbitration."* [6]

The scope of the limitation at hand is confined to privileges *"under the appropriate applicable law"*¸ which is not defined in the IBA Rules. This is not necessarily the same law as the governing law or the law of the seat of arbitration (*lex arbitri*). It may - very well - be the law of the country/countries where the parties are domiciled or the law in which the documents are in fact present. This creates an inherent conflict because parties may be - and often are - from different countries with different legal traditions, i.e. common law vs. civil law.

Accordingly, the concept of "legal privilege" can vary greatly depending on what law - or legal tradition - one applies in practice. Therefore, an arbitral tribunal will normally try to strike a proper balance between the parties' respective - and often opposing - interests and expectations so that no parties are handed an advantage or disadvantage. For instance, if no "legal privilege" concept exists in the country of the claimant it would seem unfair that the claimant would have to produce documents that would have been protected by "legal privilege" under the law of the Respondent's country of domicile and thus be exempted from production.

The tribunal will first have to decide on what the "appropriate applicable law" is in relation to an objection based on "legal privilege", and the perhaps most obvious choice - the law of the objecting party's country - may not be a law which any of the arbitrators are familiar with. Furthermore, different laws may apply to different documents requested from the same party. For instance, in cases where e-mails or other documents have been exchanged between the objecting party and its legal counsel(s) in different countries it may be prudent to apply several "appropriate" laws in relation to a request for production of such documentation and an objection based on the "legal privilege" exemption.

Against this background, a tribunal will often be hesitant to express itself in very clear terms as to the "applicable law" in this context and will also be reluctant to assess whether a certain document actually falls within the concept of "legal privilege" and accordingly, is protected from production under such law. Consequently, there is an inherent risk in modern arbitration proceedings that exemptions like the "legal privilege" exemption is used simply because it is difficult in practice to administer and confirm the validity of this objection.

Parties may argue at length about the validity of a "legal privilege" objection, and the tribunal may choose to examine responsive documents *in camera* in order to determine whether they qualify for exemption or not.[7]

The tribunal's decision may be difficult and will normally involve a number of considerations as also directly set out in Article 9(3) of the IBA Rules. In cases of doubt as to the validity of such an objection, there are basically two different approaches which a tribunal can take: The tribunal can 1) give the objecting party the benefit of the doubt and thereby avoid infringing any (potential) statutory rights/privileges of the objecting party, or, by contrast, the tribunal can 2) give the requesting party the benefit of the doubt and thereby potentially infringe statutory rights/privileges.

Most tribunals would probably give the objecting party the benefit of the doubt, unless it is obvious to the tribunal that the responsive documents are not "privileged". In other cases a tribunal may prefer to say that certain documents shall be produced with the exemption of documents protected by "legal privilege" under a specifically stated law, while leaving the determination of whether a particular document falls within this exemption to the parties (and thereby to domestic courts).

In either of these scenarios, the end result will be that the requested document - which may be a "smoking gun" - is *not* produced, even though it may be apparent to everyone involved that it is *not* protected by "legal privilege" under the specific law applied - or any law at all.

2.4 Lack of effective remedies is case of non-compliance

It is not only the "legal privilege" exemption which is frequently invoked in international arbitration proceedings today. Also the exemption concerning *"commercial or technical confidentiality"* (Article 9(2)(e) of the IBA Rules) is often invoked to prevent production. This exemption poses similar problems as the "legal privilege" exemption discussed above.

Further, reluctant parties may also contend that it is too burdensome to produce requested documents (Article 9(2)(c) of the IBA Rules) simply because there are or may be a significant number of responsive documents, even though the objecting party is fully aware of how to produce the documents (and perhaps already has them ready at hand). There is really no way for a requesting party or an arbitral tribunal to verify such an objection in practice - and it is indeed difficult to specify a request if the requesting party do not know precisely which documents exists (e.g minutes of meeting in a given period, but not specifically from which dates).

Regardless of the exemption invoked, the problem of verification of the validity of an objection to production may exist both *before and after* the tribunal's decision on production. This may be the case where the tribunal has refrained from assessing whether certain documents are protected by an exemption (under Articles 9(2)-9(3) of the IBA Rules) set out in the production order. If a requesting party considers that the opposing party is violating the tribunal's production order, for instance because there is no "legal privilege" protecting under the "appropriate law" designated by the tribunal, the requesting party has no real means to force the opposing party to produce the responsive (withheld) documents.

Indeed, it is not a *real* option for the requesting party to try to enforce the tribunal's production order at domestic courts - if this is legally possible - since such proceedings would no doubt be lengthy as the objecting party would obviously want to object also in local courts and appeal any unfavorable decisions. Therefore, the issue of production may not realistically be decided before the arbitration has ended, and at that point the issue will of course be moot if the intention was to introduce the requested evidence in the arbitration.

The only available remedy is the drawing of adverse inferences (Article 9(5) of the IBA Rules). Pursuant to Article 9(7) of the IBA Rules, a tribunal may also take a failure to produce documents into account in connection with the allocation of costs. However, this is not a (satisfactory) remedy for the requesting party which may have lost the arbitration due to the opposing party's failure to produce documents.

Article 9(5) of the IBA Rules provide as follows:

> *"If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."*

Depending on the specific case, it may be difficult to actually draw adverse inferences from a party's failure to produce documentation. It presupposes a certain knowledge about the content of the documents in question and what the documents would/could reasonably show. Of course, if a requesting party is unware of the existence of a certain document, which is withheld in violation of a production order, it will usually not be possible to even request the drawing of adverse inferences with respect to such document. For instance, withheld minutes from board meetings may reflect various different internal discussions of the objecting party without recording any final decision on a critical point, and this point was precisely the basis for the request to produce such minutes in the first place. It is difficult to see what specific adverse inferences one could draw from a failure to produce such minutes of meeting.

2.5 ***Prima facie* decisions**

Another issue of concern is that the document production phase usually takes place relatively early in the proceedings, normally after the first round of written submissions. At this stage, the Tribunal will rarely have such a comprehensive understanding of the dispute at hand that it is able to systematically and thoroughly decide on the parties' document production requests. As above, in case of doubt, a tribunal may prefer to deny a request simply because it seems less relevant at that stage of the proceedings. Usually, there is no "second bite at the apple" later in the arbitration, unless specific (changed) circumstances warrants this.

Also for this reason, there is a risk that important documentation may not surface even though the parties have spent considerable time and effort on drafting document production requests and objections etc. over the course of up to several months.

3 CONCLUSION

On this basis, one can rightfully question whether document production in international arbitration is truly a beneficial exercise, in particular since most would agree that it is unlikely to result in the production of any "smoking guns", as reluctant parties will try to "hide" behind rules such as the "legal privilege" in order to "legitimize" their omission to produce such evidence even if requested and ordered to do so. Already for this reason, there may very well be an inherent disproportion between the costs of a fully-fledged document production process and the value of the output.

An idea could be that tribunals avoid circulating a draft PO1 - containing detailed rules on document production - before the parties and the tribunal have discussed the need for this. This way, the risk of "acceptance" from the parties to the fully-fledged document production exercise out of fear from stigmatization may be avoided.

Another solution would be for parties and the tribunal to adopt a more flexible approach to document production over the course of the entire proceedings, and not simply have a specifically designated phase. In this way, the risk of premature decisions from the tribunal may be avoided, while the risk of obstructive requests at various points in time of course would exist in such cases. However, a seasoned tribunal should be able to handle this.

Finally, in terms of "enforcement" of a document production order which a party has not complied with, the requesting party and the tribunal should perhaps instead focus on a reversal of the burden of proof for the specific topic in question instead of drawing of - potentially unspecific - adverse inferences that are likely to be unhelpful to the requesting party in the end.

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1 *See, e.g, UNCITRAL Arbitration Rules, Art. 24*

2 *On 29 May 2010, the IBA Council approved the revised version of the IBA Rules on the Taking of Evidence in International Arbitration. Hereinafter "IBA Rules".*

3 *Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 3.*

4 *Commentary on the vised text of the 2010 IBA Rules, p. 8.*

5 *Commentary on the vised text of the 2010 IBA Rules, p. 8*

6 *Commentary on the vised text of the 2010 IBA Rules, p. 25*

7 *This approach was used in a recent decision from the High Court in the U.K.* (*High Court of Justice, Queens's Dench Division, Director of the SFO v ENRC Ltd, 8.5.2017) concerning exemption from production of documents generated during an internal investigation of one of the parties. This investigation had been undertaken by solicitors and forensic accountants that were subject to legal professional privileges. As a part of the investigation, a solicitor interviewed witnesses affiliated with the party in question and made notes from these interviews for the purpose of the investigation. In considering whether these notes had to be produced under a document production request, the High Court stated that "The fact that the notes were made by [the solicitor], rather than being verbatim transcripts, does not strengthen the claim for privilege under this head. A document, such as a witness statement, that would not be privileged if it had been created by a non-lawyer does not acquire a privileged status just because a lawyer has created it. A claim for privilege over lawyers' working papers will only succeed if the documents would betray the trend of the legal advice. That cannot be the case here, because on the evidence, the documents are merely notes of what the lawyers were told by the witnesses."*