Dealing with “Known Unknowns” in Document Exchange: A Comment on the ICCA Congress Session on Early Stages of the Arbitral Process

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Former U.S. Defense Secretary Donald Rumsfeld famously introduced into the American lexicon the oxymoronic concept of the “known unknown”—“that is to say we know there are some things we do not know.”[fn]See Michiko Kakutani, *Rumsfeld’s Defense of Known Decisions*, N.Y. TIMES (Feb. 3, 2011), http://www.nytimes.com/2011/02/04/books/04book.html?pagewanted=all&_r=1& (reviewing DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMIOR (2011)).[/fn] A panel discussion at the recent ICCA Congress in Miami addressed one of the most vexing “known unknowns” in international arbitration— how is a party to know, and what remedies can it seek from the tribunal, when its opponent in an international arbitration is withholding documents?

Most of the discussion at the ICCA Miami 2014 session and in the excellent papers prepared by the panelists in advance focused on the consequences of nondisclosure, namely adverse inferences and the sanctioning of counsel. Article 9(5) of the IBA Rules on the Taking of Evidence in International Arbitration and Articles 26-27 of the IBA Guidelines on Party Representation take a similar tack. I would argue, however, that what is needed is not a more severe or creative form of punishment for nondisclosure, but an effective mechanism for detecting whether parties are withholding evidence — ways to “know the unknown” if you will. Even the most draconian sanctions regime is bound to be ineffective if there is no way to ferret out whether a party is indeed withholding documents. After all, how is a party to know whether to ask the tribunal to draw an adverse inference or impose sanctions as a consequence of nondisclosure, if it cannot prove that there has been a failure to disclose in the first place? Moreover, in many, if not most cases, I suspect the problem of inadequate document disclosure owes more to an incomplete or insufficiently rigorous search for requested documents than to a deliberate decision by the opposing party to withhold documents the tribunal has ordered it to produce. Thus, what is needed, at least in the first instance, are not punitive measures, but mechanisms for encouraging greater transparency in the document-exchange phase of arbitrations.

In addressing these issues, parties and tribunals might take a lesson from an unlikely source, the U.S. Federal Rules of Civil Procedure. Admittedly, the very mention of U.S.-style “discovery” evokes horror in international arbitration circles. And rightly so. U.S. discovery, particularly as it relates to electronically stored information (ESI), is wasteful, notoriously expensive, and rife with opportunities

for gamesmanship. Indeed, these features of the U.S. system are what drive many U.S. companies to opt for arbitration. But if there is one thing to commend the U.S. discovery system it is that it provides litigants with a means to detect whether their adversaries are withholding evidence. And, for this reason, by the time a case reaches trial, the parties in U.S. civil litigation generally have something that parties in international arbitrations often lack—a (relatively) high degree of confidence that they have received most, if not all, of the documents in the other side's possession to which they are entitled.

One key reason for this is Rule 30(b)(6) of the U.S. Federal Rules of Civil Procedure, which facilitates transparency by allowing a party to depose a representative of an opponent corporation about the steps it has taken to fulfill its document disclosure and production obligations. In many cases, the mere threat of a Rule 30(b)(6) deposition is enough to cause the parties to meet and confer on a discovery plan, outside the presence of the court. As a result of these exchanges, parties often will agree in advance, for example, on which employees' files will be searched, what search protocols will be followed, and, in the case of ESI, what search terms will be used to narrow down the universe of potentially responsive documents to a manageable number that can be reviewed in a relatively cost-efficient manner.

To be clear, I am not suggesting that every arbitral tribunal incorporate the text of Rule 30(b)(6) verbatim into its procedural order, only that parties and tribunals in international arbitrations would do well to look to the U.S. experience for guidance when issues regarding transparency in the document-exchange process arise.

As a threshold matter, where a party is concerned that its opponent is withholding documents—either intentionally or inadvertently—it should request that the other side provide details about its document search and review efforts, preferably in writing. Such exchanges need not be adversarial and, if U.S. experience is any guide, often can lead to a constructive, expectation-setting dialogue that gives both parties greater comfort in the integrity of the document-exchange process. These conversations might be particularly useful in preventing misunderstandings between the parties in international arbitrations where the parties' counsel often are from different legal traditions and thus may have very different notions about what constitutes a proper and thorough search for documents.

But simply relying on the opposing side's good faith might be not enough. And where serious questions arise about the integrity of the document-exchange process, tribunals should be willing to step in to provide assistance. Tribunals can do so in various ways. One would be to allow live questioning of a party representative in a limited Rule 30(b)(6)-type deposition. But such a procedure obviously is antithetical to prevailing arbitral practice, and tribunals need not go that far in any event. Instead the tribunal could order that the questioning of a designated party representative be done in writing. Depositions by written questions (which, incidentally, are authorized by Rule 31 of the U.S. Federal Rules of Civil Procedure) should be enough in most cases to allow a party to probe major areas of concern—e.g., the names of employees whose files were searched, what steps counsel took to ensure that employees understood what documents needed to be produced, what search terms (if any) were used to pare down ESI that was collected for review, and what steps the parties took to preserve documents once the dispute arose. These concepts are hardly foreign to international arbitration; they are reflected in IBA Guidelines 12-17.

One could posit ways in which use of a modified Rule 30(b)(6)-like procedure in international arbitrations could be used to harass the opposing party and improperly probe merits-related issues. But there are ways to mitigate that risk. In a Rule 30(b)(6) deposition in the U.S., a party's counsel can object when questions are outside the proper scope of the deposition notice and instruct his or her client not to answer. And, in the international arbitration context, where arbitrators manage the document-exchange process more actively than U.S. judges manage discovery, there is less reason to

fear that limited questioning of a party representative—particularly when done in writing—will devolve into an unauthorized fishing expedition. Moreover, in the U.S., most counsel will tell you that there is an element of mutually assured destruction inherent in the system that helps to deter improper use of procedures like Rule 30(b)(6)—i.e., a deposition notice sent to one's opponent generally will be returned in kind. The same holds true for document search protocols—parties obviously should expect to be held to the same standards they demand of their opponents. Likewise, a party whose own document-collection efforts are lacking obviously should be wary of asking tough questions about what the other side has done.

Again, I am not arguing that Rule 30(b)(6)-like depositions should become commonplace in international arbitrations. But, in appropriate cases, tribunals should take action necessary to give parties comfort that their opponents are not hiding documents. And when determining what action to take, tribunals could learn something from one (perhaps the only) aspect of the U.S. discovery system that functions well, Rule 30(b)(6).