Kluwer Arbitration Blog

Document Production in Chinese Arbitration: Current Status and New Horizons

Li Tingwei, Xu Zhihe (Shanghai International Arbitration Center) · Friday, June 19th, 2020 · Shanghai International Arbitration Center (SHIAC)

The practice of adverse document production or disclosure is largely foreign in civil law jurisdictions like mainland China. Despite resistance, the growth of judicial practice on document production prompted the Supreme People's Court of China ("**SPC**") to make the new Rules of Evidence on Civil Procedure ("**Rules of Evidence**") on December 25, 2019, effective as from May 1, 2020 in which the SPC implemented a Chinese-style document production which was not found in its 2002 version. This post sketches the current status of this new evidentiary procedure in mainland China and its implication. An earlier post discussed the counsel's perspective on these rules.

Evolution of the Legal Framework on Document Production

Adverse document production has a very short history in Chinese civil litigation practice. On the legislative level, the Chinese legal system is not as familiar with document production as many other continental jurisdictions as evidenced by the fact that in China, none of the past amendments on the Civil Procedural Code ("**CPC**") of the People's Republic of China introduced adverse document production. Nevertheless, the need for adverse document production as derived from judicial practice compelled the SPC to suggest its introduction during the amendment procedure for CPC in 2012. However, this was not taken on by the legislative organs.

In 2015, the SPC published its own Judicial Interpretation on the CPC, which introduced adverse document production for the first time. Article 112 of the Judicial Interpretation on the CPC provides that:

> [i]*f certain documents are under the control of the counterparty, the party with the burden of proof may, before the time limit expires, request the court to order the counterparty to produce such documents. If the court finds the request to be substantiated, it should order the counterparty to submit the requested documents while the requesting party should bear the fees incurred for the purpose of the document production. If the counterparty refuses to produce the requested document without legitimate cause, then the court may assume and find that the requesting*

> *party's allegation on the content of the requested yet undisclosed documents to be true.*

This Article is largely procedural and lacks the basic standards of review the courts may adopt. However, a number of Chinese courts including the SPC have developed on this Article through court judgments rendered between 2017 and 2019 after the promulgation of the above-mentioned judicial interpretation. For example, in *Sichuan Shuniu Real Estate Development Co. v. Ping An Bank Corporation Chengdu Branch*, the SPC held that the materiality of the request for document production on the relief sought must be weighed by the court before making the document production order. Further, in a judgment rendered by the Luohe Intermediate People's Court in 2019, the court interpreted that one of the preconditions for document production is that the requested document is indeed in the possession of the requested party. In another judgment rendered by the Zhoushan Intermediate People's Court in 2019, the court found that the requesting party must provide *prima facie* evidence to prove that the requested document itself exists.

As mentioned at the beginning, the Rules of Evidence provide a detailed procedure for document production under Articles 45 to 48 as a complement to Article 112 of the SPC's Judicial Interpretation on CPC in 2015. These four articles lay out the following basic explanation on document production in Chinese litigation practice:

(i) The elements of a proper request for document production should at least include the following: (a) the name or description of the content of the requested document; (b) the facts alleged and established by the requested document and its weight to the outcome of the pending case; and (c) the basis upon which the requested document is believed to be in the possession of the requested party. If the request for document production fails to meet the foregoing three elements, the courts usually would not grant the request.

(ii) By way of example, the scope of document production may include: (a) documents that have already been referred to in the proceedings; (b) documents serving the interests of the requested party; (c) documents accessible by the requested party; and (d) accounting records.

(iii) When considering the request for document production, the court should give the requested party an opportunity to present its opinion on the request; or if the case requires, the courts could order both parties to submit evidence to support or reject the request, or to debate on it.

(iv) If the court orders production of documents but the requested party does not comply with the order without showing any plausible cause, or if the requested party destroys or obstructs the requesting party from obtaining the requested document, the court may draw adverse inference against the requested party.

Document Production in Chinese Commercial Arbitration

The evidentiary procedure of commercial arbitration in China with regard to document production largely resembles that of Chinese civil litigation practice. Traditionally, there are three ways of producing documents in the course of fact-finding in Chinese commercial arbitration:

(i) Voluntary production by the parties pursuant to Article 43 of the Chinese Arbitration Law

which codifies a principle similar to the rules of civil litigation in China that the party should produce the evidence on which it intends to rely.

(ii) Preservation of evidence under both Articles 46 and 48 of the Chinese Arbitration Law which provide that a party may apply for court-assisted evidence preservation if the subject evidence is under the danger of being destroyed or being unable to be obtained afterwards by submitting such application to the relevant arbitration institution to be transferred to the competent court by the institution.

(iii) Evidence collected by the tribunal under Article 43 of the Chinese Arbitration Law which provides that the arbitral tribunal may, upon the parties application or on its own initiative, collect evidence when necessary.

Besides these means of producing documents, there is no evidentiary procedure for adverse document production in Chinese arbitration, nor is there any procedure akin to the requirements of the Rules of Evidence. However, the need for adverse document production in arbitration practice is more prevalent than in the context of litigation. One reason is the need for foreign-related arbitration and international arbitration conducted in China to adhere to international practice including its evidentiary procedure. For example, in a foreign-related arbitration administered by Shanghai International Arbitration Center ("**SHIAC**") involving the allegation of reverse engineering, the holder of the proprietary information requested the respondent user to disclose documents for the purpose of the claimant holder's case. In its procedural order, the tribunal drew reference to the universal legal principle of evidentiary procedure that the party making the allegation or claim should provide evidence supporting it, and accordingly denied the claimant's request for document production and further rejected the request raised by the claimant for the tribunal to draw adverse inference against the respondent in the final award.

Echoing the needs of arbitration practice in China, arbitral institutions have introduced innovation to their procedural rules for evidence. For example, Article 7 of the 2015 version of the CIETAC Guidance on Evidence provides for Request to Disclosure where a party may request the tribunal to order the other party to produce a specific document or a narrow and specific category of documents.

Another illustration is that in a SHIAC-administered arbitration concerning contractual dispute arising out of a private equity transaction, the tribunal ordered pursuant to the investor's request that the fund custodian bank assist with the evidentiary procedure where the fund manager did not participate. In particular, the custodian bank was ordered to disclose documents relating to the operation of the disputed fund during the time of the custody of the bank.

The introduction of new procedural rules together with Chinese commercial arbitration practice demonstrate the current widely adopted approach that tribunal may order one party to produce documents either pursuant to the other party's request or on the tribunal's own initiative after consulting both parties. Another approach is that only document production issues that cannot be resolved through negotiation between the parties will be referred to the tribunal for a decision. If the tribunal grants or issues an order for document production but the ordered party fails to comply without any legitimate cause, the tribunal may draw adverse inference against the non-complying party. With this being said, adverse inference which was provided for in the 2002 version of the Rules of Evidence, has rarely been used by tribunals in reality. This lack of usage of drawing adverse inference is in the line with the basic principle of evidentiary procedure that the party

making the allegation or claim should provide evidence to substantiate it.

Implication of the New Rules to Chinese Arbitration

The relevant provisions for document production in the Rules of Evidence resemble in many aspects, the document disclosure mechanism prescribed in Article 27 of the UNCITRAL Arbitration Rules and Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules on Taking Evidence**").

Similar to litigation, document production may be a critical juncture of the evidentiary procedure in arbitrations such as those arising out of the sales of goods, construction, finance, corporate investment and intellectual property rights where document production may well be needed to assist with the tribunal's fact-finding tasks where the tribunal may make reference to the Rules of Evidence as well as the CPC.

Whilst document production procedure is not mandatory for the arbitral procedure itself in China, a party may challenge an award on the ground of concealment of evidence. In 2018, the SPC issued Several Provisions regarding the enforcement of arbitral awards according to which concealment of evidence is stipulated as a ground for non-enforcement.

At first glance, the refusal to order production of document and the concealment of evidence may be seen as two sides of the same coin. However, that was never the intention of the SPC when making the judicial provisions.

Looking at the text alone, the ground of concealment of evidence is limited to the following situations: (i) that the disputed evidence was the material evidence for establishing the basic facts of the arbitration; (ii) that the disputed evidence was in the possession of the other party and not produced in the arbitral proceeding; and (iii) that the disputed evidence was requested by the party and ordered by the arbitral tribunal to be produced in the arbitral proceeding but the requested party failed to comply with the order without any good cause.

The narrow scope of what may constitute concealment of evidence as a ground for non-enforcement requires the balancing between the Chinese courts' pro-arbitration approach and their duty of judicial review. In practice, the balance has been kept well. In a judgment rendered by the Beijing No.4 Intermediate People's Court in April 2020, the court reasoned that firstly, the principle that the party should produce the evidence on which it intends to rely should be the starting point of judicial review on the allegation of concealment of evidence, as that principle has been laid down in the applicable arbitration rules; secondly, the tribunal is entitled to rely on its discretion to decide on the party's application for document production and the tribunal's ignorance of such application does not violate the principle of due process.

Concluding Remarks

The number of commercial disputes resolved by the Chinese courts appears to be far greater than those resolved through arbitration. It is therefore a reasonable assumption that if the document production mechanism continues to develop through court litigation, it may lead to a higher degree

of familiarity among judges, legal practitioners and arbitrators. Further, the respect shown by Chinese judicial practice towards the tribunal's discretion to decide on document production stands in line with the prevailing practice in international arbitration under the UNCITRAL Model Law regimes. We believe the gap between Chinese arbitration and international arbitration with regard to evidentiary procedure would eventually be filled.

This entry was posted on Friday, June 19th, 2020 at 9:00 am and is filed under Adverse Inference, China, Document Production, Evidence, Legislation
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.