Kluwer Arbitration Blog

Towards Greater Efficiency in Document Production

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International arbitration has been regarded as a flexible and efficient dispute resolution mechanism. While this may hold true for most phases of the arbitration, document production (i.e., the phase where a party requests the other party to produce documents that are in the other party's possession and are relevant to the dispute and material to its outcome) has often led to inefficiencies. Not infrequently, clients and counsel alike complain about the way the document production phase is carried out and the adverse impact that it has on the costs of the arbitration. Likewise, the desire to leave no stone unturned in an effort to win the case pushes parties to ever greater levels of production. This post outlines possible causes of the inefficiencies impacting this phase and offers suggestions to pre-empt these inefficiencies.

Is Document Production Desired at All?

Document production (or any type of exchange of documents during a dispute) is the exception rather than the norm in most legal systems. Civil law countries generally do not have such a phase in their domestic civil procedure rules.

By contrast, common law jurisdictions view the exchange of documents as a necessary process to ensure that the parties can assess the strengths and weaknesses of their case and marshal evidence in support of their case. Exchange of documents is viewed as a fundamental guarantee of the parties' procedural rights. Failure to conduct the exchange of documents in accordance with the relevant laws will typically constitute a breach of ethical standards and attract liability. Civil law jurisdictions, instead, focus on the parties meeting their burden of proof by presenting their factual account based on the documentary evidence already available to them. If these are insufficient, the court will rule against the party that has failed to discharge its burden of proof. Only in rare, exceptional cases, the court may order a party to disclose documents against its will and only for the other party to prove its case, but never to buttress its factual account or legal arguments.

Establishing a procedure that is acceptable to these diverging legal traditions is one of the challenges in international arbitration with the potential of unforeseen conflicts and inefficiencies. Twenty years ago, document production was an exception rather than a norm. Now it is a default assumption in most cases, with the IBA having now published multiple editions of the IBA Rules on the Taking of Evidence (2020) in international arbitration (the "**IBA Rules**"). The IBA Rules were designed to bridge the gap between different legal systems and traditions by offering only limited tools to obtain evidence from other parties to the dispute. For instance, the document

production process is circumscribed to the exchange of narrow and specific categories of documents relevant to the dispute and material to its outcome. Despite the clear language of the IBA Rules, the legal traditions of the tribunal and counsel have often influenced its interpretation, which can vary the scope of the document production phase.

To mitigate inconsistent interpretations as to the scope and to align expectations, the parties should ideally address document production at an early stage. If both parties come from legal traditions where exchange of documents does not exist or arbitration is chosen as an alternative to litigation because of expediency, procedural flexibility, and **not** because document exchange is available, then the parties could specify that the evidentiary issues of the arbitration should adhere to the Rules on the Efficient Conduct of Proceedings in International Arbitration (the "**Prague Rules**"). The Prague Rules offer an alternative to the IBA Rules and were designed to provide a civil law-focused approach to evidentiary issues in international arbitration. They expressly discourage document production.

Choosing the Arbitrators: Discovery or Disclosure Creep?

Practitioners will be familiar with the concept that selecting different rules for the taking of evidence (i.e., the IBA Rules or the Prague Rules) will lead to different results in terms of document production. However, that is often not the end of the story, and in practice, the document production can creep and expand beyond the parameters envisaged by the IBA Rules.

The starting point for scope creep is with legal counsel for the parties (often at the suggestion of their clients). If a request is very wide-ranging, it risks that the tribunal may make a correspondingly wide-ranging order. In the authors' view, lawyers from common law backgrounds are more likely to draft wide-ranging requests, given their familiarity and experience in jurisdictions where disclosure obligations can be wide-ranging.

However, the background of the tribunal will also dictate the style of document production and the extent to which there is scope creep. For example, a tribunal comprised of three English barristers is more likely to order document production in a similar style to English court litigation, given that is the style with which they are familiar. Tribunals such as this may be more prone to scope creep beyond the parameters envisaged by the IBA Rules. By contrast, tribunals comprised of lawyers from civil law jurisdictions may be more restrictive in their approach to document production. In the authors' view, parties should take these factors into account when appointing arbitrators.

This all leads to the question of how the parties and the tribunal can manage the process to prevent scope creep.

Setting Boundaries

The adverse consequences of discovery and disclosure creep in the document production phase can be significant. Overly broad document production obligations will require counsel and their clients to devote more time and resources to locating and reviewing documents to ascertain whether they are responsive. Expansive document production requests can be very disruptive to the day-to-day operations of clients.

Additionally, a document request with a broader scope will very likely yield a larger volume of responsive documents. This means that counsel will spend more time reviewing the documents, which will increase legal costs.

Despite the adverse consequences that discovery and disclosure creep can have on the parties and the arbitration, the arbitration community has not adopted a uniform strategy to ensure that the production of documents in international arbitration strictly adheres to the parameters of the IBA Rules. There are, however, several topics which could be addressed in a procedural order to mitigate discovery and disclosure creep and the inefficiencies resulting therefrom. These suggestions assume that the parties have agreed that the IBA Rules will provide guidance as to the rules of evidence that govern the arbitration.

- Removing fishing expeditions from the scope of document production: these are requests which seek documents that *may* exist and their content *may* support an argument from the requesting party. They are typically used to either validate an argument for which no evidence exists or shift the burden of proof to another party. It is evident that fishing expeditions fall foul of Article 3.3(a)(ii) of the IBA Rules. To avoid any possibility of fishing expeditions being made, parties could expressly set out that the tribunal should reject this type of request outright.
- Reducing the number of requests that may be submitted: procedural orders could include the number of production requests that the parties would find acceptable. They could also include a mechanism that allows the parties to inform the tribunal if they foresee exceeding the number of production requests. This approach has the benefit of ensuring that parties submit truly indispensable production requests while also helping the parties assess the costs of the document production phase.
- Defining the relevant criteria of Article 3.3 of the IBA Rules: a powerful way to prevent discovery or disclosure creep is to define how the tribunal should interpret the relevant criteria of Article 3.3 of the IBA Rules. The parties could set out examples of the type of requests that describe the requested documents in sufficient detail, what constitutes a narrow and specific category of documents, and how the phrase “relevant to the case and material to its outcome” should be assessed. Such a provision will encourage parties to be particularly mindful of the wording and justification supporting their production requests, lest they will be rejected.

Of course, if parties want to minimise disputes and inefficiencies around document production, they should also specify in advance the approach to thorny (and larger) issues such as cross-border privilege. Parties may also wish to provide a template privilege log and specify the amount of detail in which privileged documents should be described.

Conclusion

Document production, more than any other phase of the arbitration, is particularly vulnerable to inefficiencies. The dynamics where one party devotes significant efforts to withhold certain documents and the other makes reciprocal efforts to convince the tribunal that the documents must be produced are well-known to most arbitration practitioners. Most practitioners will also be familiar with situations where the parties have significantly different interpretations of the criteria of the IBA Rules and how to approach the document production phase. All these factors will likely result in inefficiencies, which will impact, among other issues, the costs of the arbitration. Parties, and particularly their counsel, should be aware of the factors creating these inefficiencies, and

proactively take steps to ensure that the document production phase is carried out with maximum efficiency. If the system is to work better, it is incumbent on users to take the necessary steps to maximise the efficiency of the procedure.

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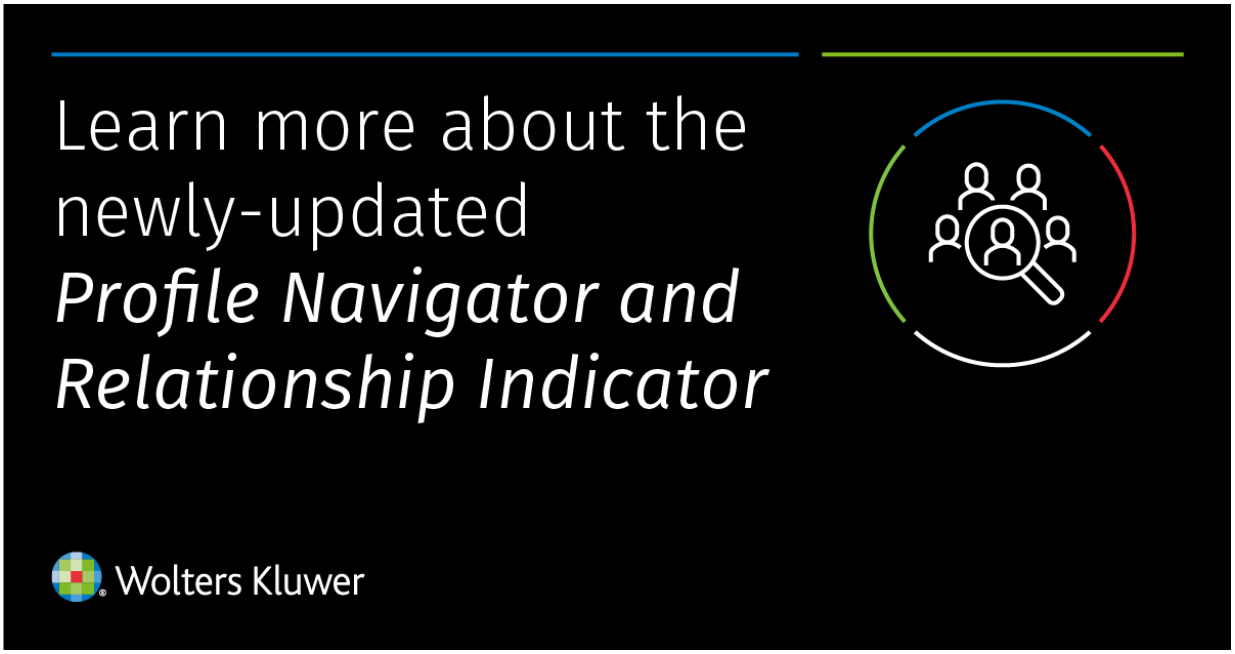

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