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ICCA 2014. Document Production and Interim Measures — Much Yet to Be Accomplished to Maintain Viability and Efficacy of International Arbitration

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ICCA 2014's second break-out session of Monday, 7 April, tackled the challenging issues surrounding document production and interim measures in international arbitration. The discussion was informative and the audience participated with pointed questions and comments.

The first panel, which addressed the issue of document production, was comprised of Moderator John Barkett and Panelists Stephen L. Drymer (Montreal), Murray Smith (Vancouver), and Nicolas Swerdloff (Miami). The panel began by discussing two main issues that are salient in document productions in the international arbitration context — too many documents are produced without regard to relevance or responsiveness (the proverbial "document dump") or documents are produced too late in the process, which causes the non-producing party prejudice. The panel noted that the Tribunal can and should address these issues on the front end, and Panelist Drymer added that including a provision in a model practice directive, early on in the arbitral process, setting forth the consequences for the late production of documents, could serve as a deterrent for the gamesmanship that counsel may want to engage in as the final hearing approaches. Indeed, such a suggestion makes sense — much of the perceived tactical advantage of withholding key documents until the end of the arbitration can be diffused if the producing party knows, for example, that it risks having the Tribunal postpone the final hearing if the offending party produces critical documents after the called-upon disclosure deadlines. Put another way, building in consequences for the late production of relevant documents could streamline the process and remove the perverse incentives for withholding documents.

The panel also discussed the production or disclosure of documents that a party may intend to use for impeachment only. Although the panel noted that the disclosure or production of such documents may not necessarily be warranted if it only goes to the credibility of a witness as opposed to a core issue in the case (while conceding that there was very little in the way of institutional guidance on the issue), the audience, when polled, decidedly went the other way, expressing its opinion that, irrespective of its intended use, any document used for impeachment should be disclosed before the final hearing. Again, in the context of international arbitration, disclosing impeachment evidence advances the goals of the process — parties should be discouraged from hiding the ball and withholding evidence or documents "for impeachment purposes," particularly when such a tactic is susceptible to abuse. As a useful practice pointer, the panel suggested that practitioners discuss the issue with the Tribunal early and expressly hold that

all information and documents — even if initially contemplated for impeachment purposes only — be disclosed as part of the initial process during the arbitration process.

Finally, the document production panel discussed the issue of sanctions — what can and should the Tribunal do when a party, or its counsel, abuses the process and fails to comply with its disclosure obligations. The panel discussed the gamut of potential sanctions available to the Tribunal. The audience, however, generally still felt that Tribunals lacked sufficient "teeth" with respect to potential sanctions and, again, when polled, a significant number of the audience members felt that the document production process in international arbitration was "unfair" and that it encouraged withholding of information and documents by the parties. What we, as practitioners and arbitrators, do to address these issues will go a long way to sustaining the viability of international arbitration as an effective and efficient dispute resolution mechanism. On a final note, the panel would have provided a more helpful discussion had it contained at least one practitioner or arbitrator from a civil law jurisdiction — the panel, comprised of North American practitioners — provided useful insight but it would have been beneficial to hear the opinions of practitioners or arbitrators that come from a tradition where disclosure is more limited. More discussion of the issues related to the disclosure of electronically-stored information also would have been welcome.

Moderator Barkett led the second panel, which featured Hilary Heilbron QC (London), Francisco González de Cossío (Mexico City), and Robert Sills (New York) and focused on the issue of interim measures in the context of international arbitration. Panelist Heilbron discussed the results of her informal survey of numerous practitioners and arbitrators, and the results were interesting: of those surveyed, most thought that interim measures were brought as tactical ploys and that their use was increasing in the international arbitration context. The issue then turned to a discussion of applicable standards when determining whether interim measures are warranted: Panelist Heilbron discussed the formulation of so-called internationally accepted standards, while Panelist González, after comprehensively discussing the state of the art on the subject, advocated for a more lenient standard than the typically used "irreparable harm" standard. Although he put on a valiant effort, the audience, when polled, disagreed, and rejected his position that a "balancing of interests" test should be used instead of the "irreparable harm" test when analyzing whether interim measures are appropriate.

Finally, Panelist Sills drove the point home that, despite improvements in the efficacy of interim measures that have been brought upon by, for example, the ushering in of emergency arbitrators and the like, it ultimately may be in the best interests of your client to resort to preliminary measures available in the respective national courts to secure the interim relief wanted. Although to some it was an obvious point, Panelist Sills's discussion was pointed because oftentimes the paradigm is posited as one of arbitration versus litigation, when, as he noted, many times the two are complimentary of each other. The analysis becomes more compelling when one considers that a Tribunal's coercive powers, although robust, may not be sufficient to enjoin conduct that ultimately may irreparably harm the moving party. Put another way, practitioners and arbitrators must be cognizant of the limitations of emergency interim measures and should not forget that courts have a role to play in ensuring that parties' rights are preserved and that claims of irreparable harm are adequately addressed.

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