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Document Production: Finding the Right Balance

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by Reto Marghitola, Vischer AG

Document production, the topic of my new book, is a permanent issue in international arbitration. Now, it has even entered the fictional world of the Willem C. Vis International Commercial Arbitration Moot. Document production is an important subject matter of this year's competition.

Many of the readers of this post support students as coaches in Vienna. When a student asks, "what is the role of document production in international arbitration?" some practitioners may answer, "it is an essential element of justice" and others may state that "it is a waste of time and money."

Even if both answers may bear some truth, a culturally biased approach is not the way forward in international arbitration. The IBA Rules on the Taking of Evidence in International Arbitration have historically been a compromise between civil law and common law. The current controversies on document production in international arbitration, which are typically disputes on the interpretation of the IBA Rules, must be seen against this backdrop.

What is a good compromise for document production? The former German chancellor Ludwig Erhard once said: "A compromise is the art of dividing a *cake* in such a way that everyone believes he has the biggest piece." The biggest preoccupation of lawyers from common law countries is that limiting discovery prevents them from finding the truth. The major concern of practitioners from civil law countries are the costs related to document production.

The challenge in international arbitration is to satisfy both expectations: Obtaining the disclosure of material evidence at moderate costs. Some might think that this is equal to squaring the circle, and they are not entirely wrong. Document production in current practice is mainly e-document production and tends to be expensive.

Nonetheless, the IBA Rules offer the tools for a limited and focused search of evidence. Two main requirements (specificity and materiality), two additional requirements (relating to the access to the requested documents) and several exclusions from the duty to produce documents allow the separation of the wheat from the chaff among the document production requests of the parties.

A difficulty that arbitrators have in deciding document production requests is that they must look into the facts of the case at a relatively early stage (typically between the first and second round of submissions). As a consequence, good case management requires arbitrators to set aside enough time for dealing with document production requests. Due to busy schedules of successful

arbitrators, this is not a matter of course.

Challenges related to document production requests are a further concern of arbitrators. If document production requests are rejected by the arbitral tribunal, the losing party may challenge the award by arguing that due process or his right to be heard has been violated. Due to this risk of challenges, arbitrators may be sometimes inclined to grant document production requests in the doubt.

The combination of insufficient knowledge of the case at an early stage and the intention of avoiding challenges sometimes lead to the acceptance of numerous and overly broad document production requests even by arbitrators from civil law countries. From my perspective, the fear of challenges is exaggerated, since successful challenges are extremely rare in relation to document production (but see the landmark case of the Higher Regional Court of Frankfurt, decision of 17 February 2011, discussed in the book, 231 et seqq.).

In view of finding the right balance for document production, arbitrators should look at document production not only from a purely legal point of view, but also from a business perspective. Document production is only a part of the arbitration procedure and the total costs of arbitration should be reasonable compared to the amount in dispute.

Furthermore, the expectations of the parties with regard to document production vary considerably. They may be completely different in a dispute between two common law parties than in a dispute between two civil law parties. Hence, there is no single approach to document production, which is the right balance for document production in international arbitration. Rather, the right balance must be found for each type of situation. For this purpose, specific procedural rules may be drafted on an individual basis or by using the model clauses, as suggested in the book, on document production.

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