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Will Adverse Inferences Help Make Document Production in International Arbitration More Efficient?

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The process of document production in international arbitration is important. Documentary evidence is often the primary category of evidence; and legal costs associated with it tend to constitute a significant proportion of the overall costs of arbitral proceedings. Document production may also be one of the very reasons why arbitration has been preferred over litigation. Depending on the parties' legal traditions and expectations, arbitration may offer the possibility of having more limited or broader disclosure than that available in a particular national court.

Yet disclosure rarely hits the evidentiary happy medium: parties are typically either overwhelmed by the number of documents made available to them or find themselves lacking even a bare minimum of information pertaining to a particular issue. If the latter happens due to a failure of one of the parties to comply with a reasonable document request and/or an order to produce, the other party may request that adverse inferences be drawn from such failure. Adverse inferences can be a useful tool in filling an evidentiary gap and assisting a party in presenting its case. On the other hand, adverse inferences may bring in the risk of the ensuing award being challenged on that basis.

Save for the arbitrators' general discretion with respect to the conduct of the proceedings and evidentiary matters, most arbitration rules and laws are entirely silent on the tribunals' power to draw adverse inferences (see however s. 41(7)(b) English Arbitration Act 1996). The IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") do expressly mention such power in Article 9.5, which provides as follows: *"[i]f a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party"*.

Adverse inferences formed part of the reasoning of an ICC award that was recently upheld by the Paris Court of Appeal in a decision which paves the way to a more vigorous use of adverse inferences (CA Paris, 1, 1, 28-02-2017, No. 15/06036).

The Decision of the Paris Court of Appeal

The arbitral proceedings were initiated in 2012 by twelve Spanish companies in relation to a share price dispute and pursuant to a share purchase agreement by which the Spanish entities had agreed to sell shares in a Spanish company, Grupo Guascor SL, to a Delaware company, Dresser-Rand

Inc. Dresser-Rand Inc. had in turn transferred the shares to a Spanish company, Dresser-Rand Holdings Spain. Dresser-Rand Inc. and Dresser-Rand Holdings Spain (the "Dresser-Rand Companies") were both respondents in the arbitration. During document production, the respondents failed to produce the pre-sale reports prepared by UBS and KPMG which had been requested by the claimants. In February 2015, the tribunal composed of Jean Yves Garaud, Carmen Núñez-Lagos and Clifford Hendel (the "Tribunal") rendered an award in favour of the claimants on the basis of *inter alia* an inference that the UBS and KPMG reports were adverse to the interests of the respondents pursuant to Article 9.5 of the IBA Rules.

The Dresser-Rand Companies applied for the annulment of the award on the basis that: first, the Tribunal had gone beyond its mandate by applying the mechanism contemplated in the IBA Rules without prior consultation with the parties; and second, that the inferences had been drawn in violation of due process. With respect to the latter, the respondents complained, in particular, that the Tribunal had concluded that the UBS and KPMG reports were prejudicial to the respondents' position despite having failed to (a) order the production of the reports; and (b) seek the parties' submissions on the matter. In addition, the respondents argued that the claimants had not specifically requested the drawing of such inferences from the Tribunal.

On 28 February 2017, the Paris Court of Appeal upheld the award rejecting all of the arguments brought forward by the Dresser-Rand Companies. In considering the applicability of the IBA Rules, the Court found that the parties through various exchanges had allowed the Tribunal to apply the IBA Rules which were referred to in its procedural order No. 1. The Court held that in being guided by the IBA Rules, the Tribunal had therefore fulfilled its mandate which did not require any further consultation with the parties.

The Court further ruled that the Tribunal had observed due process requirements. In particular, the Court indicated that since the mechanism of adverse inference was available to the Tribunal by virtue of the IBA Rules, there was no need to invite the parties to comment on the matter. Given that the request for production of the audit reports was *"perfectly clear and precise"* and that the respondents had an opportunity to comment on such request and made no objection, it was not necessary for the Tribunal to issue an order for production of said documents to properly exercise its discretion to draw adverse inferences.

Potential ramifications

Anecdotal evidence suggests that tribunals tend to avoid relying on adverse inferences in any express way in their awards. Arbitrators may be concerned about a challenge being brought on the ground that their decision is based on inferences rather than evidence in the arbitration record. As such, the recent decision of the Paris Court of Appeal sends an important message to arbitrators. With the endorsement from a national court, tribunals' general power to draw adverse inferences becomes more tangible and the decision may encourage its more assertive use.

The decision also reinforces the deterrent function that the adverse inference mechanism is designed to have. Production of evidence can be a burdensome and costly task. Yet if parties fail to comply with their obligations to produce certain documents (generally those harmful to their case), document production can turn into a moot exercise. In this context, there seems to be a real benefit in encouraging tribunals to sanction parties who fail to comply with disclosure obligations. The decision of the Paris Court of Appeal appears to support this view; and parties faced with a document request and/or order to produce may want to consider the risks associated with

withholding documents without any valid reason.

As for any procedural pre-requisite that an order to produce the missing documents must have been issued, in most cases adverse inferences will be founded on a party's failure to produce documents which were subject to a disclosure order from the tribunal. By agreeing to arbitrate parties impliedly undertake to engage in the arbitral process (including document production) in good faith. This decision of the Paris Court of Appeal suggests that, provided that the parties have been given an opportunity to object to the requests, an arbitral tribunal is within its powers to draw an inference that documents known to exist and being withheld without a valid reason are prejudicial to a party's case even if no production order has been made.

Due to their nature, whether adverse inferences may be drawn depends on the circumstances of each case, including any applicable rules. In this regard, parties may expressly agree to give the tribunal discretion with respect to the drawing of adverse inferences. However, even if such express discretion exists, the tribunal does not have carte blanche and must exercise it in light of the requirement that each party must be given a reasonable opportunity to present its case. Tribunals should also be minded of the principle of *non ultra petita* when drawing an inference that has not been sought for by any party (Art. V(1)(c) of the New York Convention).

In the Dresser-Rand case, the Paris Court of Appeal underlined that the Tribunal's decision did not turn on adverse inferences, but was instead mostly based on the evidence filed in arbitration. One may wonder whether the outcome of the annulment proceedings would have been different had the inferences been central to the Tribunal's decision on the merits. Further, whether courts in other jurisdictions would be prepared to adopt the approach of the Paris Court of Appeal remains to be seen. In this respect, the fact that this decision on the discretion to draw adverse inferences, a concept of common law origins, was rendered by a court in a civil law jurisdiction is certainly interesting.

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