

Kluwer Arbitration Blog

Efficient Arbitration – Part 4: Document Production in International Arbitration

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In Parts 1 – 3 of our Efficient Arbitration Series, we introduced various efficiency tools. In Part 4 we will discuss one of these tools which has considerable savings potential: “document production”.

Presenting the right evidence is key in arbitration. But, what if a party does not have the documents it needs to prove its case, because they are in the possession of its opponent?

This is where “document production” comes into play: the party will request these documents from its opponent, and the arbitral tribunal will decide whether and to what extent the opponent needs to comply with that request.

As with most aspects of arbitration, document production is also agreed by the parties. The requirements and procedure are best addressed already at the Case Management Conference. This, in particular, as parties do not always see eye to eye when it comes to document production: For one, parties and arbitrators with a common law background are familiar with ‘discovery’. They are likely to provide for more extensive document production than parties and arbitrators with a civil law background. For another, of course, the party seeking documents to prove its case will argue for more extensive document production than its opponent, who would prefer these documents to remain off record.

The commonly used procedure for document production, as set forth by the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration, includes the following steps:

- To avoid ‘fishing expeditions’, a party’s **request** under these IBA Rules should describe the requested documents (or a narrow and specific category of documents), and state that they are relevant and material to the outcome of the case, and not in the possession, custody or control of the requesting, but of another party.
- The other party may either **produce** the documents **or object** to the production. The IBA Rules specify the detailed reasons for refusing to produce documents.
- The tribunal will then **decide** which documents to order the party to produce. To help the tribunal determine the contentious issues and to assess whether a document may be relevant and material, Parties often used the so-called Redfern Schedule. Also, the parties may appoint an impartial and independent expert, the so-called Document Production Master.

Reaching a decision on producing the documents or maintaining objections is often difficult. If the opposition is based on formal grounds, e.g. insufficiently precise application for submitting a category of documents it may, in principle, be resolved without knowledge of the evidence sought. However, deciding on an opposition based on substantive grounds (such as privilege, commercial or technical confidentiality of the documents) may require the tribunal to read the contents of the documents. In such cases appointment of an impartial and independent expert may help the tribunal decide whether to order the party to produce documents.

The expert's task is to opine if the objection is legitimate without disclosing the contents of the documents to the tribunal and other parties. However, even in such a case, the decision to uphold the objection is taken by the arbitral tribunal.

The expert appointed in this way may also be able to decide on the legitimacy of the objections and perform other functions, such as inspecting the parties' headquarters to search for the relevant documents to be submitted in the proceedings.

Ultimately, the decision to appoint an expert, as well as the scope of its competence and powers, is with the parties.

For its complex procedure, document production can be time-consuming and expensive. However, when used properly, it is a powerful tool to strengthen (or weaken) a party's case — in particular if, without document production, one of the parties will lack the evidence that will likely make or break their case.

This makes document production such a great example of an efficiency tool:

If mishandled, document production is an expensive, lengthy process without much of a result. But, if handled properly, it will indeed improve the chances to win the arbitration.

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