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Document Production in International Arbitration: The Good or the Evil?

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Document production is one of the most important and controversial topics in international arbitration. Some practitioners consider the document production as "*an essential element of justice*", whereas some others consider it as "*a waste of time and money*". So, where does the truth lie?

Does Common Law Provide Better Justice than Civil Law or *Vice Versa*?

In common law countries, the rationale for discovery suggests that justice can only be established if both sides have access, as far as possible, to the same materials. Thus, a party must not only produce documents that it intends to rely upon but also those which might have an adverse effect on its case. In common law countries, the discovery of documents is regarded as an indispensable tool in the fact-finding process.

In civil law countries, however, judges enquire into the facts with the assistance of the parties. The parties only present the documents that they wish to rely upon, but certainly do not present anything that would damage their own case. Furthermore, large document production proceedings can be a costly and time-consuming process. Accordingly, most civil lawyers suggest that the discovery adds significant delay and costs to the proceedings, yet rarely contributes much to the outcome.

Is common law justice better than civil law, or *vice versa?* Is American justice better than, French or German, or is it the other way around? It cannot be said that either common law or civil law countries produce a better quality of justice. Also, these legal systems do not call for a change to serve better justice. Further, the users of both systems seem content with the process in their country. Thus, neither system can be said to be inherently problematic, but still the divergent approaches to document production make life difficult for a litigant who is trying to pursue a claim before the national court of a different legal system.

Against this background, the concept of international arbitration emerged as an alternative to litigation before domestic courts and is perceived as the best forum of choice for international disputes. Thus, international arbitration has to accommodate the expectations of the parties from different legal systems. How then should document production be conducted in international arbitration?

As Malcolm Wilkey pointed out: "*an emphatic tribunal should do its best to make both litigants feel at home*."[1] The challenge in international arbitration is to satisfy both expectations: Obtaining the disclosure of documents that are material to the outcome of the case, but at moderate costs.

There is no standard "*one size fits all*" application of document production in international arbitration. What document production is required in a complex construction case might be quite different from a case seeking to determine the meaning of a word in a commercial agreement. This is the inherent advantage of the arbitration: being able to craft a procedure in relation to the needs of each case.

The IBA Rules or the Prague Rules?

Today parties often agree to be governed or at least guided by the International Bar Association Rules on the Taking of Evidence ("**IBA Rules**"). The IBA Rules main goal was to bridge the gap between different legal systems, which is "*particularly useful when the parties come from different legal cultures*". To this purpose, the IBA Rules offer the tools for a limited search of evidence that is relevant and material to the outcome of the arbitration. This formulation is generally accepted as compromising the conflicting approaches as it allows the separation of the "*wheat from the chaff* "among the document production requests.

Nevertheless, nowadays some arbitration practitioners challenge the IBA Rules by arguing that the application of the IBA Rules is leading to the Americanisation of international arbitration. This criticism gave rise to the proposal of a different set of rules, Inquisitorial Rules on the Taking of Evidence in International Arbitration ("**Prague Rules**"), which is to be launched in December 2018 [2] (for related posts on the Prague Rules on Kluwer Arbitration Blog click here, here and here). The defenders of the Prague Rules suggest that the features of the IBA Rules are unknown to the civil law systems and, therefore, causing dominance of common law in international arbitration. They further argue that the application of inquisitorial procedure would contribute to international arbitration particularly by reducing time and costs.

Assuming that the application of the IBA Rules establishes the dominance of the common law approach to international arbitration, should the Prague Rules not receive the same criticism from common law practitioners given that they provide for the inquisitorial approach which is uncommon for common law? In other words, would the application of the Prague Rules not cause international arbitration being played in a more civil law style?

If the parties wanted to resolve their dispute by the rules of the certain legal system, the need for international arbitration would not arise, as the national courts would suffice. The effective resolution of the international disputes could not be sustained by building an illusory divide between common law and civil law, but could only be sustained by bridging those cultural gaps.

Leaving aside the above discussion that is based on the purposes of the IBA Rules and the Prague Rules, there are numerous similarities between them. Both rules leave the ultimate control of the document production to the tribunal. It is the tribunal who will eventually satisfy both parties' expectations by ensuring the production of those documents that are material to the outcome of the case and at a moderate cost.

Nonetheless, the difference arises where the Prague Rules suggest that "*Generally, the Arbitral Tribunal shall avoid extensive production of documents, including any form of e-discovery*" (cf.

Article 4.2). Considering that transactions are conducted predominantly via electronic means nowadays, it seems that prohibiting the production of e-documents is excessive to reconcile the needs of the businesses in this century.

Final Awards May Be Successfully Challenged Based on Document Production Orders

When a losing party is analysing why it was unsuccessful in a case, it generally refers to the document production orders and might say that "*if the tribunal had not rejected my document production request, I could have proven the other party's meritless claims*".

Different legal systems' different approaches to document production also show itself in actions for setting aside and the recognition and enforcement of arbitral awards. In many civil law countries, the prohibition of a "fishing expedition" constitutes a fundamental principle of procedural law. On the other hand, in many common law countries, a relatively extensive document production is considered as an essential requirement for a fair proceeding. Therefore, the issue arises as to whether a tribunal's excessively limited document production or allowance of the fishing expedition, would result in the challenge of the final award due to the violation of public policy.

The issue got even more complicated after the Higher Regional Court of Frankfurt's decision. The dispute arose out of a failed M&A transaction. The American purchaser accused the German vendor of having manipulated the internal debts and initiated arbitration proceedings to claim damages. In the procedural order, the parties agreed to submit all documents that the party-appointed experts had taken into consideration. Afterwards, the claimant submitted two financial expert reports but only submitted 110 out of 1,200 documents that were taken into consideration by those experts. Although the respondent requested the remaining documents to be produced, the tribunal rejected the request by arguing that it was in the tribunal's discretion to order document production. At the end, the tribunal decided in favour of the claimants on the merits, and the respondent challenged the award before the Higher Regional Court of Frankfurt in June 2010.[3)] The applicant argued that the tribunal violated the parties' agreement in the procedural order by refusing to order the production of the documents that the claimant made available to its party-appointed experts. The court set aside the award by stating that it is only in the discretion of the arbitral tribunal to order document production only when the parties' agreements do not restrict the arbitral tribunal's discretion. In the present case, however, the arbitral tribunal was bound by the parties' agreement. Although the losing party appealed the decision before the German Federal Court of Justice, the court considered the appeal inadmissible and rejected it.[4)].

It is crucial for every arbitral tribunal to conclude arbitration proceedings with an enforceable award. If questions of a breach of public policy or parties' agreement stem from document production orders, then concerns as to the ability to enforce the final award under the New York Convention arise. To avoid raising concerns, the tribunals should be cautious when it comes to determining whether they have the discretion to order document production or not; and if yes, to avoid the refusal of sufficient document production or excessively onerous document production.

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References

?1 Malcolm Wilkey, The Practicalities of Cross-Cultural Arbitration, in Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends 79.

?2 Draft of 1 September 2018

?3 Oberlandesgericht Frankfurt, 17.02.2011, 26 Sch 13/10

?4 BGH, 2 Oct. 2012, III ZB 8/11

This entry was posted on Sunday, December 9th, 2018 at 10:00 am and is filed under Arbitration, Arbitration Proceedings, Document Exchange, Document Production, IBA Rules of Evidence, Prague Rules
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