Kluwer Arbitration Blog

Document Production: Quality Over Quantity

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Document production is widely regarded as one of the most time-consuming and costly elements of international arbitration.[1] In its consultation regarding the proposed amendments to the ICSID arbitration rules, many states expressed their concern "*that document production is too lengthy, expensive and burdensome*".[2] The Prague Rules actively encourage the parties "*to avoid any form of document production, including e-discovery*".[3] The pros and cons of document production, and a search for the right balance, have fueled many discussions amongst scholars and practitioners, including on this forum.

In an attempt to reduce the burden imposed by document production while maintaining – and even increasing – its benefits, I propose here the inclusion of an oft-neglected recommendation by the ICC Task Force's report on *Techniques for Controlling Time and Costs in Arbitration*: a limitation of the number of document production requests each party is allowed to make.[4]

The Proposal: Limiting the Number of Document Requests

The proposal is rather straightforward. It is recommended that *the parties agree (or the arbitral tribunal rule) as part of the procedural arrangements struck at the outset of the arbitration, that the number of document production requests put forward by each side be limited to a maximum of ten requests*.

The rationale behind this proposal is obvious. Limiting the number of document requests relieves the opposing side of the obligation to respond to, and the tribunal of the obligation to rule on, a potentially large number of requests, without depriving the parties of the right to put forward those requests that have a high chance of success and can have a material effect on the outcome of the case. Concomitantly, the burden imposed on each party to conduct – often extensive – searches for documents responsive to the requests is alleviated.

Three clarifications need to be made. First, the limitation can be laid down either in an agreement between the parties, or in an order by the tribunal. Ideally, the limitation would be included in the arbitration agreement, as at that stage the parties are least likely to perceive the limitation as benefitting one party over the other. However, arbitration clauses typically do not rank highly on the list of priorities during contractual negotiations, making this option largely theoretical. A more

practicable option is to include the limitation in the procedural arrangements at the outset of the arbitration – either in the terms of reference or in the tribunal's first procedural order.[5] At that stage, while being more prone to the idea that the limitation favours one party over the other, there is still a considerable chance that both sides are amenable to reducing the time and costs involved in document production. Alternatively, the tribunal may also consider imposing the limitation unilaterally, e.g. as a middle ground in cases where one party objects to the inclusion of document production altogether.

Second, while the number of ten requests by each side is somewhat arbitrary, the actual number of requests agreed upon should not deviate substantially from it. After all, a balance must be struck between providing sufficient opportunity to cover all documents that are materially relevant to the outcome of the dispute and limiting the burden put on the other party and the tribunal. In most cases five requests would probably be insufficient to cover all the material issues, while twenty would not lead to the desired increase in efficiency.

Third, the number of requests is limited to ten requests "*by each side*". This turn of phrase is intended to cover the possibility of multiple parties, be it on the side of claimants, respondents, or third parties that have joined the proceedings. Thus, even if there were multiple parties involved, the aggregated number of requests would not exceed a total of twenty.

A Number of Potential Objections Considered

As any suggested measure that deviates from established practice in order to increase efficiency, several objections may be leveled against the above proposal. Some of the most likely objections will be considered below.

A first objection would be that the proposed measure imposes an excessive limitation on the parties' freedom and jeopardizes their due process rights. This objection is misguided for the following reason. While some form of limitation of the parties' freedom will always be required in order to obtain a material increase in efficiency, the proposed measure does not jeopardize the parties' due process rights in any material way. In the vast majority of cases, ten document requests will be sufficient to cover all documents that could have a material effect on the outcome of the case.

A second objection, as formulated by Reto Marghitola, would be that the proposed limitation is not "*sophisticated enough*", and would be "*too rigid and schematic to gain broad acceptance in practice.*"[6] However, this alleged downside is actually one of the strengths of the proposed limitation. Contrary to the more sophisticated proposals made by Marghitola himself,[7] the suggested measure does not require any form of technical analysis or debate between the parties, and adherence to it can thus easily be maintained by the arbitral tribunal. Moreover, Marghitola's proposed model clauses categorically exclude certain types of documents. The impact of such exclusion may be more difficult to assess for the parties at the outset of the arbitration, and will therefore be harder for them to accept. A limit on the number of requests put forward by each side is therefore more likely to be implemented in practice.

A third objection would be that the proposal does not lead to the desired increase in efficiency,

because the parties will find ways to circumvent the agreed-upon limitation, e.g. by subdividing each request into multiple smaller requests. This is indeed a likely scenario – after all, many lawyers have a habit of trying to wiggle out of supposedly firm commitments. However, the general requirement of "specificity" of document requests will bar many such attempts. Moreover, one should avoid throwing away the baby with the bathwater. In many cases, the parties will not try to deviate from the proposed measure, which will thus lead to the intended reduction of time and costs. In other cases, when one of the parties tries to circumvent the limitation, the opposing party may seek guidance from the tribunal to determine whether it needs to respond to all of the subdivided requests put forward, likely resulting in an increase in efficiency even in such cases. Finally, it is by no means guaranteed that a more sophisticated proposal – e.g. containing specific provisions regarding internal documents or e-discovery – would be less prone to circumvention and debate. In fact, the reverse is more likely, as they invite discussion regarding the exact definition and scope of the intended limitations.

A final objection would be that the proposal does not lead to the desired increase in efficiency, because the limitation in the number of requests will be offset by a more extensive debate on each of the individual requests. This may be true to a limited extent. However, a more elaborate discussion of each document request is not necessarily a downside. After all, one often sees a large number of document requests that are poorly substantiated (frequently copying or referring back to the reasoning included for other requests) in an attempt to save space and present the document requests in a format that is still palatable for the arbitral tribunal. Forcing the parties to get rid of the lesser important requests frees up space for the ones that actually matter, and allows such requests to get the attention they deserve. Moreover, a more substantive discussion between the parties on each request allows the tribunal to give each request its due consideration and to provide a more extensive reasoning for granting or dismissing the various requests.

Conclusion

Limiting the number of document requests put forward by each side is a simple but effective way to increase the efficiency of document production in arbitration. By choosing quality over quantity, such limitation alleviates the burden in time and costs imposed on each party while retaining – and even increasing – its benefits.

References

?1 The *2018 International Arbitration Survey: The Evolution of International Arbitration* by the School of International Arbitration at Queen Mary University of London and White & Case lists "*cost*" as arbitration's worst feature, followed by "*lack of effective sanctions during the arbitral process*", "*lack of power in relation to third parties*" and "*lack of speed*".

?2 ICSID Proposals for Amendment of the ICSID Rules, Working Paper #4, para. 89.

?3 Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), Article 4.2.

?4 ICC Commission on Arbitration and ADR Task Force on Reducing Time and Costs in Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, Second Edition, 2012, para. 52. See also Report of the ICC Commission on Arbitration and ADR Task Force on the Production of Electronic Documents in International Arbitration, *Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration*, 2016, para. 5.8.

?5 Reto Marghitola, *Document Production in International Arbitration*, Kluwer Law International 2015, pp. 154-155.

?6 Reto Marghitola, idem, p. 160.

?7 Reto Marghitola, idem, p. 156ff.

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