Kluwer Arbitration Blog

Three Suggestions for Improving Document Production Practice

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Introduction

Document production has become a standard phase in international arbitration, but the documents sought and produced often turn out to be voluminous. As such, document production is perceived as a time-consuming, costly, and burdensome process. This has prompted practitioners to come up with the Rules on the Efficient Conduct of Proceedings in International Arbitration ("**Prague Rules**") as an alternative to the commonly adopted IBA Rules on the Taking of Evidence (2020) ("**IBA Rules**"). (For previous posts on the Prague Rules, see, e.g., here, here, here, here, here and here.) Nevertheless, in the authors' experience, there is still plenty of room for improvement. This post provides three suggestions below.

1. **<u>The Standard of "*Relevant to the Case and Material to Its Outcome*" in Article 3 of the IBA Rules on the Taking of Evidence Should be More Narrowly Applied</u>**

Article 3, sub-section 3(b) of the IBA Rules requires that a request to produce documents should contain "*a statement as to how the Documents requested are relevant to the case and material to its outcome*". This two-prong test of relevance and materiality, which has been extensively relied on by parties and tribunals, raises a few practical questions.

First, it is unclear why a separate "relevance" test is required in addition to a "materiality" test. If a document is considered material to the outcome of a case, it can only be relevant to the case.

Second, the standard "material to its outcome" is often applied in an overly broad manner. In other words, when "outcome of a case" is read broadly to include the entire factual matrix surrounding a case, including ancillary facts, then quite a wide range of documents could be alleged to be material. A party may, for instance, allege that certain documents are material to proving an ancillary fact and that they are material to the outcome of the case, even though that particular ancillary fact would have no bearing on a party's claim or requested relief. In such a case, the above documents sought would only be misused to cause delay and disruption.

As another example, let's say Company "B" breached a contractual obligation it owes to Company "A". Following "B"'s breach of contract, "A" files an arbitration seeking damages from "B". Here, "A" might seek production of an internal email from "B" that was sent within "B"'s organization a

few days after the breach of the contract. “A” would say that “B”’s subjective motive regarding the contractual breach could be shown with that document and that therefore this email is material to the factual matrix underlying “B”’s breach of contract. However, even if such an internal email exists, that normally would have no bearing on “A”’s damages claim against “B”. A contract breach is a breach, hence strictly speaking, it mostly does not matter what “B” thought internally after its breach of contract. Such a document request would only impose an unnecessary burden on the counterparty.

We therefore suggest that the standard of “material to the outcome of the case” be amended to be narrower: it should be “material to the requested relief(s) in the case”. In other words, Article 3 of the IBA Rules should be revised into “material to the determination of any requested relief in the case”. This would prevent a party from seeking production of a document that is somewhat related to an ancillary or indirect fact underlying its case but yet is quite remote (or even legally irrelevant) to a claim or requested relief in a case.

2. **A Request for a Document Unrelated to Proving One’s Claim Should Be Reviewed with Greater Caution**

If broad document production is possible, this may encourage a party to make a document request with the mere aim of receiving the response “*We do not have any such document*” from the other side. Mostly, the purpose of such a document request is not to prove a point – rather it is simply to prevent a possible counterclaim or defense from the counterparty in advance. However, document production only to get an early “admission” from the opponent that certain documents do not exist can be counterproductive. Such a document request must therefore be reviewed with great caution.

To address this concern to an extent, the Prague Rules grant the arbitral tribunal more power in establishing the facts of the case. That is, while Article 4.2 of the Prague Rules encourages the arbitral tribunal to avoid document production in general, Article 4.3 of the Prague Rules requires a party to persuade the arbitral tribunal on why the requested document is needed. However, putting aside that the Prague Rules are not yet that widely adopted by parties in an arbitration compared to the IBA Rules (in 2016, 72% of arbitrations seated in England, 62% in France, and 56% in the USA referenced the IBA Rules), it is questionable whether arbitrators would in fact sanction parties seeking documents solely for the purpose of obtaining an early admission that those documents do not exist. If the tribunal were to investigate such conduct, that would not only be a waste of time and resources, but also be inappropriate because the tribunal’s active role may result in assisting one party at the risk of fairness and impartiality. (*See* Michal Kocur, *Why Civil Law Lawyers Do Not Need the Prague Rules* (2018).)

For reference, there is a misconception that tribunals or courts in the civil law world would exercise their powers to prevent parties from misusing the document production procedure as described above. However, in practice, that is not the case. In most civil law jurisdictions, the requesting party must establish in sufficient detail that the document likely exists and is likely in possession of the counterparty. If that threshold, which is normally very high, is not met, then the court would dismiss the document production request. Furthermore, a court would rarely step in and sanction a party who made unproductive document requests. (*Cf.* Jonatan Baier, Bernhard Meyer, Dominik Vock and Emina Husic, *Perspectives on Document Disclosure* (2021).)

Thus, instead of demanding a tribunal to sanction frivolous document requests, a request for a document solely relating to the counterparty's claim or defense, and not the requesting party's own claim, should be reviewed with greater caution (and be dismissed by the tribunal if it finds that such a request serves no point in positively proving a material fact) to prevent an unnecessary misuse of a document production procedure.

3. **The Parties Should Consider Getting Assistance from a Document Production Facilitator**

It can be time-consuming for a tribunal to address and determine numerous disagreements between the parties on document production. More importantly, inadequate decisions can be made by a tribunal if it is buried in too many document production requests that require rulings within a short span of time. Even after the tribunal makes rulings on document production requests, it is not uncommon for parties to exchange letters complaining about the production of the requested documents. It can be exhausting for everyone involved if a party seeks directions from the tribunal on numerous document-related issues.

In this regard, the authors have recently experienced in a US litigation (at the Delaware Chancery Court) a situation where the court encouraged the parties to jointly retain an impartial and independent 'document production facilitator' similar to a magistrate judge in US litigation. In an arbitration setting, such a facilitator would assist the parties in deciding whether or not to escalate a disputed document production request to the tribunal and also would assist the tribunal in deciding whether a certain document should be produced. In particular, a document production facilitator would advise the parties to narrow the scope of a document request if and when necessary. It would also guide the parties on whether the search and production of documents have been sufficient. Such a facilitator may also opine to the parties on whether the objection to a document request is deemed reasonable. A jointly-appointed or tribunal-appointed document production facilitator could save time and costs for the parties in an arbitration by reducing the number of disputed items in the determination of document requests and the production of documents.

That said, as arbitration is aimed to have less extensive document production than that of litigations, such a facilitator must be directed appropriately by the tribunal to avoid extensive document production. Furthermore, the role of the facilitator must be strictly limited within the document production procedure so that he/she would not influence the merits.

Conclusion

The many complaints about document production in an arbitral process show that there is ample room for document production to be conducted more efficiently. As arbitration is an inherently flexible process, the authors hope that the three suggestions above may facilitate further discussions in the community on ways to improve document production. Streamlining the document production process will help arbitration to keep its edge as a dispute resolution mechanism that is not only fair to the parties but also efficient in resolving a dispute.

To further deepen your knowledge on document production in arbitration proceedings,

including a summary introduction, important considerations, practical guidance, suggested reading and more, please consult the Wolters Kluwer Practical Insights page, available here.

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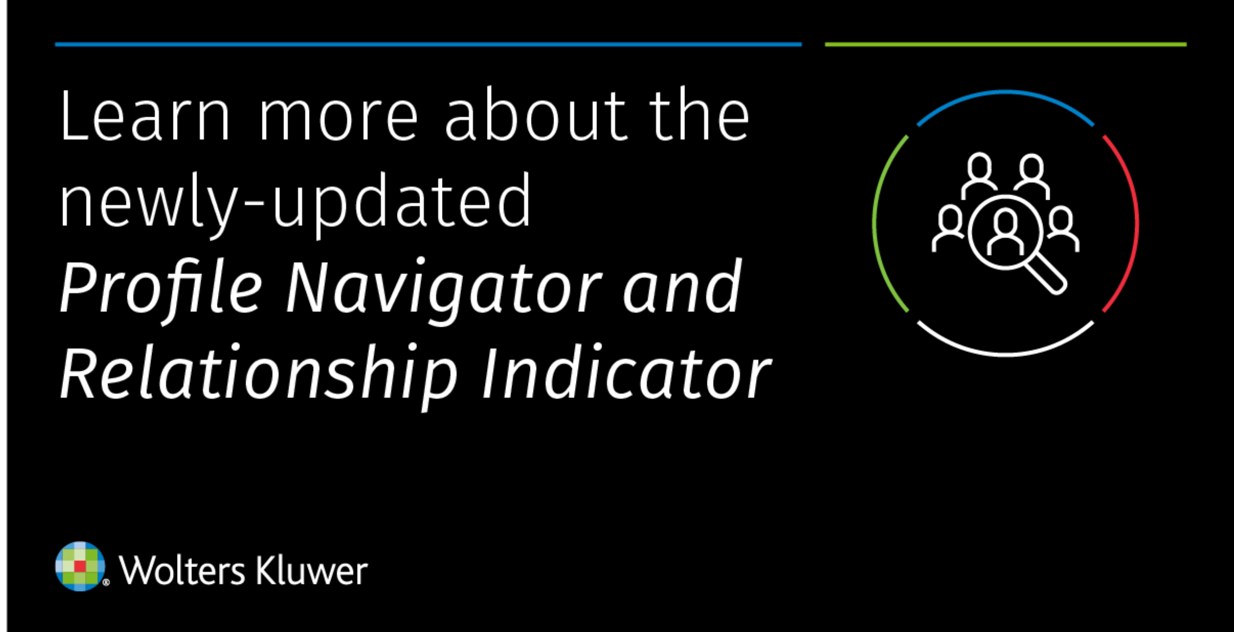

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