Kluwer Arbitration Blog

Australian Arbitration Week Recap: Filling in the Gaps: Inferences, Presumptions, and Burdens of Proof in International Arbitration

Liam McInerney (LK Law) · Thursday, October 17th, 2024 · ACICA 45

Australian Arbitration Week continued in full force on the morning of 16 October 2024, with ACICA45's panel discussion named, "Filling in the Gaps: Inferences, Presumptions, and Burdens of Proof," hosted by Deloitte. The panel was moderated by Brisbane-based ACICA45 Steering Committee members Oliver Cook (Barrister, Level 27 Chambers) and Zara Shafruddin (Associate, Jones Day). Drawing on perspectives from a solicitor, a barrister, and an expert, the panellists comprised:

- Matthew Shelley (Partner, Herbert Smith Freehills)
- Kate Grimley (Partner, Deloitte)
- Mark Johnston KC (Barrister, North Quarter Lane Chambers)

After enjoying breakfast and coffee provided by Deloitte, the moderators commenced with some opening remarks, introducing ACICA45 and the conundrum at the centre of the panel discussion: while institutional rules differ, tribunals may not always be empowered to compel the production of documents and attendance of witnesses to give testimony. So how do tribunals, parties, and their legal representatives overcome gaps in evidence?

The Framework and Starting Propositions

International arbitration presents an opportunity for flexibility in presentation and consideration of evidence, but that flexibility cannot come at the cost of rigour. The fundamental requirement under Art 35.1 of the ACICA Rules 2021 is that each party bears the burden of proving the facts relied upon to support its claim or defence. This requirement is reflected in many institutional rules or is otherwise a convention in many jurisdictions. Where parties fail to produce certain documents or make available certain witnesses to give testimony, a tribunal may draw an adverse inference against that party, subject to the limitations elucidated further throughout the panel discussion.

How Does a "Gap" in Evidence Arise?

With the basic issue now identified, the panel took a step back to ask the question: how do documentary evidence gaps arise in the first place?

The panel identified that clients from different jurisdictions and legal customs will come to an international arbitration with different expectations about what documents they will be required to produce, and what documents they will receive from the other party. Some clients assume that discovery will provide a treasure trove of documents allowing them to prove their case, whereas others will expect a significantly narrower discovery exercise. Managing client expectations from the outset is therefore imperative. Claims should be framed by reference to not only what documents are likely to exist, but what documents are likely to be produced within the relevant framework and customs, either voluntarily or by order of the tribunal. While typically there are mechanisms for requests for production to be made to the tribunal, care ought to be exercised to avoid putting the tribunal offside with an overwhelming volume of requests.

Identifying a True Gap in Evidence

Identifying a gap in documents is not always straightforward and the assistance of an expert may be beneficial. An expert may be able to opine on what documents would typically exist by reference to their experience in a particular industry and the location of the business. This process can assist lawyers to identify any documentary gaps. Experts can then work together with parties and lawyers to identify whether those documentary gaps are material and important, such that requests for production should be pressed, or whether those matters can be established by other documents or lay witnesses.

The panel observed that the International Bar Association Rules on the Taking of Evidence in International Arbitration 2020 ("IBA Rules") limit requests to produce documents to those 'relevant to the case and material to its outcome' (IBA Rules, Art 3(3)(b)). That imposes a somewhat higher standard than what Australian practitioners may ordinarily encounter, with the commonplace test of 'relevance' or even 'direct relevance' (see e.g., *Uniform Civil Procedure Rules 1999 (Qld)*, r 211) being insufficient under the IBA Rules. The panel also discussed the tribunal's lack of coercive power and what steps a tribunal might take if documents are not disclosed, including granting a party leave to apply for a subpoena in a court with relevant jurisdiction (see e.g., Australia's *International Arbitration Act 1974*, s 23) or warning parties about inferences that may arise.

What Inferences Can Arise?

The panel identified that the inference permitted under the IBA Rules is more significant than the usual *Jones v Dunkel* inference that Australian practitioners may be familiar with. Art 9(6) of the IBA Rules permits a tribunal to infer that a document not disclosed ('without satisfactory explanation' and after production has been ordered) would 'be adverse to the interests of that Party,' not simply that the document would not have assisted the party.

The panel briefly discussed what a 'satisfactory explanation' under the IBA Rules might comprise. Once again, an expert witness could provide insight into whether one should ordinarily expect a particular kind of document to exist and to be preserved.

The panellists' general consensus was that such inferences rarely have a material impact on, let alone determine, the outcome of a case. However, the panel cautioned that parties may still lose credibility before a tribunal for failure to comply with document production requests.

While the nature and content of an inference will depend on all the circumstances, the panellists posited four considerations:

1. The extent of the inference must be reasonable in all the circumstances.
2. There must be a logical connection between the document not produced and the adverse inference sought to be drawn.
3. An inference cannot be used to support mere suspicion or intuition.
4. An adverse inference sought to be drawn cannot be inconsistent with facts otherwise established.

Of course, a tribunal may still refuse to draw an inference that may be available to it. Parties should not lose sight of their ultimate burden of proof and the applicable standard of proof. Ultimately, any available inferences drawn (or refused to be drawn) will simply form part of the broader pool of considerations the tribunal will draw upon to determine whether the requisite standard of proof has been met by the party bearing the burden.

What Ethical Considerations Arise?

The panel identified the difficulty that arises when participants to proceedings are operating under different ethical frameworks and legal customs. There is a risk that clients can feel as though the dispute is not a fair fight if their legal representatives are held to more rigorous or burdensome standards of ethical conduct than the opposing party. While strictly beyond the scope of the panel discussion, this author notes that Art 9(4)(e) of the IBA Rules emphasises the need to maintain fairness and equality between the parties, particularly if they are subject to different legal or ethical rules, when the tribunal considers issues of legal impediment or privilege.

In the context of adverse inferences, advocates must ask themselves whether an inference is reasonably open, and if there is a proper basis for inviting the inferences to be drawn. Advocates should not fear inviting an inference to be drawn, unless of course there are circumstances they are aware of which would make such a submission misleading to the tribunal.

Ethical challenges may arise for experts in the grey areas where experts genuinely have differently held opinions on the spectrum of available beliefs. Experts should ensure they are comfortable that they have chosen the most appropriate approach, while acknowledging there are other approaches available. The panel also briefly discussed how slightly differing expert roles might give rise to separate ethical considerations (for example, in the case of a testifying expert as opposed to a consulting expert).

The panel concluded this discussion by reminding attendees that the role of the advocate is not to convince their client or their opponent, but to persuade the tribunal. Parties should not lose sight of this essential function. Parties should consider their ethical obligations but should not make submissions simply because they meet the minimum threshold of being ethical. Advocates should ask whether their submission is compelling and forms part of an overall strategy that is sound.

Parties' ethical obligations, and particularly the conundrum that arises when different parties'

representatives are subject to different obligations, was the focal point of the Q&A discussion that ensued after the panel formally concluded.

Conclusion and Key Takeaways

Attendees were greatly enriched by the panel discussion, with the moderators summarising three key takeaways:

1. The four-limb test posited by the panel for when an inference may be drawn is an extremely useful starting point.
2. Parties may benefit from a low-friction approach to document production requests, and should carefully consider whether their overall strategy necessitates a more adversarial approach.
3. How parties and tribunals deal with inferences will always depend on the specific circumstances of the case. In other words, how do we deal with inferences, presumptions, and the burden of proof? Well, it depends…

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