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Document Production: How to Obtain the Documents you Need

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Overview

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 - Competence of the arbitral tribunal
 - Requirements for document production
- How To Obtain the Documents You Need
- What can be done if a party refuses to disclose the documents
- How to react to an order dismissing document production

Introduction / General Principles

- Development of General Standards regarding the Production of Documents in International Arbitration:
 - American- or even English-style discovery is not available in international arbitration (unless the parties have agreed on it)
 - Some level of document discovery is appropriate
 - The arbitral tribunal has wide discretionary powers in determining the level allowable in a specific case
 - The IBA Rules as „Best Practice“ Codification of the applicable rules



Competence of the Arbitral Tribunal (1)

- Competence of arbitral tribunals to order document production is undisputed
- In general, national arbitration laws do not contain express rules on the production of documents (exception: Section 34(2)(d) of the 1996 English Arbitration Act and Section 7 of the U.S. Federal Arbitration Act)
- In the absence of an express legal rule, arbitral tribunals base their competence on the parties' agreement (principle of party autonomy, e.g., Article 182(1) PILA)



Competence of the Arbitral Tribunal (2)

- Typically, the parties agree on the arbitral procedure (including document production) indirectly, by reference to a set of arbitration rules:
 - Article 24(3) Swiss Rules: “*At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.*”
 - The same wording is contained in Article 24(3) UNCITRAL Rules.
 - Article 20(5) ICC Rules: “*At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence [including documentary evidence].*”
 - Article 27(1) DIS Rules: “*The arbitral tribunal shall establish the facts underlying the dispute. To this end it has the discretion to give directions and, in particular, to hear witnesses and experts and order the production of documents.*”
 - Article 22.1 LCIA Rules: “*Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant.*”



Competence of the Arbitral Tribunal (3)

- If no set of arbitration rules is referred to: parties should include an explicit rule on the production of documents
- In the absence of an agreement by the parties, be it direct or indirect, the arbitral tribunal has the power to set the procedural rules and, thus, decide whether and under which standards they may order document discovery



Requirements for Document Production (1)

- Article 3 IBA Rules on Taking of Evidence in International Arbitration:

“2. *Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal a Request to Produce.*

3. *A Request to Produce shall contain:*

(a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;

(b) a description of how the documents requested are relevant and material to the outcome of the case; and

(c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.”



Requirements for Document Production (2)

- Article 9(2) IBA Rules on Taking of Evidence in International Arbitration:

“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons:

- (a) lack of sufficient relevance or materiality;*
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;*
- (c) unreasonable burden to produce the requested evidence;*
- (d) loss or destruction of the document that has been reasonably shown to have occurred;*
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;*
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or*
- (g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”*



Requirements for Document Production (3)

- (1) A request to produce documents must identify the documents or a narrow category of documents with **reasonable specificity** (Article 3(3)a IBA Rules):
 - the author and/or recipient of the document,
 - the date or presumed time period within which the document(s) was established;and
 - the presumed content of the document.
- (2) The party requesting the production of documents must establish that the documents are **relevant and material** to the outcome of the dispute (Article 3(3)b IBA Rules)



Requirements for Document Production (4)

(3) The documents must be in the **possession** or under the control of the party from which production is sought (Article 3(3)c IBA Rules)

- If the documents are in possession of a third party:
 - Arbitral Tribunals do not have the power to order third parties to produce documents
 - Situation is different if the documents thought are in possession of an affiliated company
 - Recourse to state courts
- If the documents are alleged to be inexistent



Requirements for Document Production (5)

(4) No right to object to the production based on **privileges** (Articles 3(5) and 9(2) IBA Rules):

- professional privileges, such as attorney-client privilege, medical privilege, journalist privilege;
- the privilege against self-incrimination;
- protection of business secrets;
- protection of sensitive governmental information;
- unreasonable burden to produce the requested evidence;
- considerations of fairness or equality of the parties that the arbitral tribunal determines to be compelling.



Requirements for Document Production (6)

(5) Additional criteria typically taken into consideration:

- the parties' procedural cultures and reasonable expectations;
- proportionality of the request;
- consequences for the efficient management of the arbitration process.



Conclusion (1):

- Arbitral tribunals are relatively restrictive in ordering discovery:
 - The number of documents ordered to be disclosed is reciprocally proportional to the number of requests for discovery submitted to arbitral tribunals.
- Do not rely on obtaining the documents you need by way of a request for discovery!

Conclusion (2): Start Early!

- Identification of documents needed from the other party at the very beginning of the dispute
- Include discovery in strategy for the proceedings
- Choice of the arbitrator(s)
- Include rule in the Terms of Reference / Procedural Rules
- Time-table of the proceedings: when should discovery take place?
- Draft your request carefully: Balance between obtaining as much as possible and unallowed „fishing expedition“

What can be done if a party refuses to disclose to documents?

- Recourse to state courts at the seat of the arbitral tribunal:
 - Only in exceptional situations
 - The 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters is not directly applicable to arbitral proceedings
 - Drawing an adverse inference
 - Shifting the burden of proof to the other party



How to react to an order refusing discovery?

- No immediate appeal against the order
- Immediate objection against the order
- Second request / request to revise the order: only in exceptional cases
- Action to set aside the final award on the basis of the refused production of documents?



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