

## Chapter 2

### A CIVIL LAW PERSPECTIVE: "FORGET E-DISCOVERY"

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The common law world, and especially the U.S., faces serious problems in the document production process in litigation when dealing with electronically stored information (ESI). The vast amount of material that is subject to discovery, and its diversity, have required new litigation rules concerning e-discovery in the U.S. and the disclosure of electronic documents in England. The rules concern, in particular, the search for electronically stored information, including deleted information, and the obligations in these jurisdictions to preserve relevant documents.

It has been suggested that these issues should also be considered in international arbitration, and that rules and practices concerning the production of ESI in international arbitration should be adapted to take account of these developments.

The present author does not share this concern. The problems with ESI in the common law world are linked to a particular paradigm in the conduct of civil litigation, in particular, the joint responsibility of the parties for the assembly of the documents related to the dispute at a time before the parties have fully developed their respective cases. This paradigm does not prevail in international arbitration where the parties first present in detail their full case in writing, accompanied by the available evidence, and may then request the production of specific documents.

In international arbitration, the preoccupation with e-discovery and the proposals inspired by new rules on e-discovery constitute a danger which risks eroding the progress made in the past towards a model inspired by civil law procedure, with restrictive and focused document production. This erosion must be resisted.

The preoccupation with the discovery aspects of ESI in international arbitration is also misguided because it distracts from the great advantages which information technologies offer for the efficient conduct of arbitration proceedings and from certain difficult questions and risks which these technologies raise. These aspects should be given increased attention.

## TERMINOLOGY

Before considering these matters in further detail a reference to terminology is helpful. The term “document” must be understood in a very wide sense. In English civil procedure the term electronic document has been defined as extending

... to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media. The definition covers those documents that are stored on servers and back-up systems and electronic documents that have been ‘deleted’. It also extends to information stored and associated with electronic documents known as metadata.<sup>1</sup>

The term “discovery” is used in U.S. civil litigation to describe the process by which the parties provide each other access to their respective evidence, including documents but also witness depositions and other forms of evidence.<sup>2</sup> The term “disclosure” is used for information and evidence which a party must produce on its own initiative. Its scope is far more limited than discovery. In England, disclosure is the principal method by which the parties inform each other of the relevant documentary evidence.<sup>3</sup> A distinction is made between standard disclosure and specific disclosure. The procedures for both differ in a number of important respects from U.S.-style discovery.

In international arbitration, the term “discovery” is generally avoided. The term “disclosure” sometimes is proposed, to avoid associations with U.S. style of discovery.<sup>4</sup> However, since the term “disclosure” is employed as a technical term in English civil procedure in a sense which is different from the practice in international arbitration, it does not appear suitable for describing the process in international arbitration. Frequently, the expression “document production” is used. This is the case, in particular, in the IBA Rules on the Taking of Evidence in International Commercial Arbitration, adopted in their second edition in 1999 (the “IBA Rules”) and is frequently referred to in the context of

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<sup>1</sup> See Appendix 5, Practice Direction supplementing the English Civil Procedure Rules, Part 31, Paragraph 2A.1.

<sup>2</sup> In proceedings before Federal Courts, the process is regulated in Rule 26 of the Federal Rules of Civil Procedure.

<sup>3</sup> The matter is now regulated in Part 31 of the Civil Procedure Rules and the corresponding Practice Direction, applicable in England and Wales, [http://www.justice.gov.uk/civil/procrules\\_fin](http://www.justice.gov.uk/civil/procrules_fin), accessed June 2008.

<sup>4</sup> See, e.g., Smit & Robinson, *E-Disclosure in International Arbitration*, 24-1 ARB. INT’L, 105, 122 (2008).

documentary evidence. The present commentary uses the term "document production" for the process by which a party makes available to another party in an arbitration documents for presentation as evidence.

When documents produced to one of the parties are introduced into the arbitral proceedings, the term "production" also is used occasionally. In order to avoid confusion, it is preferable to use a different term. The UNCITRAL Arbitration Rules<sup>5</sup> and IBA Rules use the term "submit".<sup>6</sup> Therefore, we shall use the term "submit" for the introduction of documentary evidence into the arbitration and its presentation to the arbitral tribunal.

#### PARADIGMS IN CIVIL PROCEDURE: THE SCOPE OF THE COMMON LAW/CIVIL LAW DIVIDE

The recent discussions about electronic evidence, and the issues which it raises in the context of production in international arbitration, show the extent to which concepts and practices often remain influenced by the litigation practice of the protagonists. There is a clearly prevailing trend, or "good practice", in international arbitration, as will be shown below; but the extent to which this trend prevails depends to some degree on the background of the user.

In a recent article on the subject of e-disclosure in international arbitration SMIT and ROBINSON make the daring affirmation that

... the primary *purposes* of disclosure<sup>7</sup> are the same in international arbitration as they are in litigation: to avoid unfair surprise at trial or hearing and to discover the facts and get to the truth in order to create the record necessary for a just result.<sup>8</sup>

This statement and the guidelines proposed by the authors of that article clearly show the influence of U.S.-style discovery rules and practices; as do arbitration practices which one occasionally and, perhaps, increasingly finds in cases in which counsel and tribunal are from a U.S. background. Before considering the impact which electronic evidence may have on international arbitration, the treatment of documentary evidence in domestic civil procedure must be understood and the influence of this procedure in international arbitration must be considered.

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<sup>5</sup> Article 18 (2) for instance speaks of "documents and other evidence [the claimant] will submit".

<sup>6</sup> Article 3 (1) provides that « each Party shall submit to the Arbitral Tribunal ... all documents available to it on which it relies ... ».

<sup>7</sup> The term is used in a sense which resembles US discovery, mitigated by the Sedona principles (see below).

<sup>8</sup> Op.cit, 121.

The distinction between the civil law and common law families of legal systems in many respects can be misleading; there are great differences within each of these families. This is also true in the field of civil procedure. Much has been written about the differences between the legal systems in the field of document production.<sup>9</sup> In this essay only the basic approaches can be highlighted. Most of the variations in the rules of civil procedure in different common law and civil law countries will have to be disregarded. HANOTIAU describes the differences as follows:

In practice this means that in the common law world, and especially in the United States, '[r]equests for documents typically are far-reaching in scope and require parties and non-parties to expend considerable time and expense in responding to such requests', whereas in Continental Europe, Latin America and Arab States it is generally for the parties to submit with their briefs the documents on which they rely; and although national courts may have a residual power to order the production of documents, they rarely seem to use it.<sup>10</sup>

This summary description shows that the difference is often conceived in terms of extent and scope of the required document production. It also points, however, to some more fundamental differences, not just with respect to document production but with respect to the organisation of the procedure as a whole and the roles of the parties in it. One might even speak of a different paradigm which concerns the approach to evidence, especially documentary evidence and, more generally, to truth. Perhaps the difference in paradigms may be described as follows: joint responsibility of the parties for the evidence in the interest of some objective truth in the common law world, differing from the civil law world, in which each party not only has the burden of proof for its case but also has the responsibility for obtaining and producing the supporting evidence and in which the search for truth is less ambitious, limited as it is to the "relative truth" between the parties and their allegations. This difference can also be seen in the manner in which the proceedings progress and how evidentiary questions are treated.

In civil law systems, a party, as a matter of principle, is expected to build its case with the evidence it has available. Before exposing another party to the burden of contentious proceedings, a party is expected to have

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<sup>9</sup> See, e.g., *Document Production in International Arbitration*, 2006 Special Supplement to the ICC International Court of Arbitration Bulletin (referred to as ICC Court Bulletin, 2006 Supplement), with reports from different jurisdictions and a "tentative definition of 'Best Practices'" by HANOTIAU.

<sup>10</sup> *Id.* at 113, 114; the quotation is from KIMMELMAN & MACGRAWTH, "Document Production in the United States", ICC Court Bulletin, 2006 Supplement, 43.

determined that it has solid grounds for doing so and to have made serious efforts to establish its case. As a matter of principle, each party is defending its own case. There is no duty on a party to assist its opponent in the construction of its defence. There are, of course, exceptions to this principle and means and methods to reduce the inequitable effects that would result from a strict application of this approach; but they are exceptions to a principle that determines litigation practice. In this respect, as in some others, it may well be said that the civil law procedures are more "adversary" and less "inquisitorial" than the common law procedures.<sup>11</sup>

The organisation of proceedings in civil and commercial matters before courts in civil law countries may be summarised as follows: the claimant, and then the respondent, set out their case in writing. These written submissions contain the factual allegations of each party and identify the evidence on which each party relies. Documentary evidence may be produced with the submissions or at a later date. Some rules of procedure require each party to contradict specifically the allegations of its opponent; evidence then is required only with respect to allegations which are contested and relevant in the eyes of the court. It is only when both parties have produced their respective submissions and evidence, and the court may have formed a view about the contested allegations and their relevance for the outcome of the dispute, that specific requests for document production are normally made and determined.

In the U.S., the organisation of the procedure follows a different track. Under the Federal Rules of Civil Procedure, a party must file with its first appearance or other procedural act a "Disclosure Statement", identifying "each individual likely to have discoverable information ... that the disclosing party may use to support its claims or defenses", providing documents which it "may use to support its claims or defenses" and a computation of the damages claimed.<sup>12</sup> Parties may also obtain from other parties to the litigation, voluntarily or by court order, "discovery of any matter relevant to the subject matter involved in the action". From a civil law perspective, it is important to note that the relevance of the information that is discoverable is not determined by reference to a particular allegation of fact but very generally by its relation to the "subject matter" of the case. In other words, discovery is not limited to evidence, but goes further. The Federal Rules of Civil Procedure state clearly:

Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.<sup>13</sup>

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<sup>11</sup> See Reymond, *Common Law and Civil Law Procedure: Which is the More Inquisitorial?*, 5-4 ARB. INT'L (1989).

<sup>12</sup> FEDERAL RULES OF CIVIL PROCEDURE, Rules 7.1 (b) and 26 (a),

<sup>13</sup> Rules 26 (b) (1).

A particularly significant feature of this joint responsibility for the evidentiary basis is the “duty to preserve” which rests upon the parties even before litigation has commenced:

In the American judicial system, every litigant know that once a complaint is filed, there is a duty to preserve relevant documents. But that duty usually arises earlier: a claimant or plaintiff must preserve relevant information once it is going to pursue a claim and a respondent or defendant must preserve relevant information once it knows or reasonably anticipates that litigation is coming.<sup>14</sup>

It is in this context and through these pre-trial procedures that the factual basis is established for the case which is then presented at trial. In other words, the parties have an obligation jointly to cooperate in the establishment of this factual basis. Its relevance for the case, i.e. its evidentiary nature, is fully revealed only at the trial.

The rules in England have evolved away from the rules still practiced in the U.S. and, especially since the Woolf reform, have come closer to the civil law paradigm. Each of the parties discloses its documentary evidence in what is called “standard disclosure”<sup>15</sup> shortly after the commencement of the proceedings or, exceptionally, before their start.<sup>16</sup> It is only when a party considers this disclosure is “inadequate” that it may apply for an order of “specific disclosure”, which requires the addressee to carry out a search for specific documents or classes of documents and to disclose them.<sup>17</sup> Standard disclosure requires a party to identify not only the documents upon which it relies for its case but also those which adversely affect its case and which support or adversely affect the other party’s case. In the pre-trial period, litigants in England are now, as a result of the Woolf reform, better informed about their opponents case, since the CPR require the submission not only of particulars of claim at the commencement of the litigation but also of a statement of claim and a statement of defence. However, these statements are rarely as developed as what is required in submissions under the civil procedure in most civil law countries.

## LEADING PARADIGM IN INTERNATIONAL ARBITRATION

Arbitration practitioners often continue to approach international arbitration procedures with the experience of the rules and practices developed in litigation before their domestic courts. Even where these

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<sup>14</sup> Barkett, *E-Discovery For Arbitrators*, 1-2 DISP. RES. INT’L, 129, 148 (2007). See also Chapter 4 below.

<sup>15</sup> Civil Procedure Rules (CPR) 31.6.

<sup>16</sup> CPR 31.16.

<sup>17</sup> CPR 31.12 and Practice Direction – Disclosure and Inspection, para. 5.1.

practitioners are frequently engaged in international arbitration, the influence of domestic litigation practices is often apparent. The discussion of e-discovery in international arbitration is a good example of the extent to which the approach to arbitration issues remains under the influence of domestic litigation experience.<sup>18</sup>

However, despite the prevailing cultural differences the specificity of arbitration, and international arbitration in particular, is generally recognised. In many respects international arbitration differs clearly from the civil procedure of any particular jurisdiction. With respect to the organisation of the procedure and the collection and presentation of evidence a leading paradigm has evolved. The UNCITRAL Arbitration Rules are a good expression of this paradigm. Their application in the proceedings before the Iran-US Claims Tribunal has further developed this paradigm and, through the formation of a new generation of international arbitration lawyers, mainly from a US background, have further advanced this arbitration practice. The following explanations on international arbitration practice are illustrated primarily by the UNCITRAL Arbitration Rules, in their original version of 1976 and the now ongoing revision of these rules, which may be taken as an expression of the prevailing practice in international arbitration, and by some reference to their application in The Hague.

#### *Organisation of the procedure*

In international arbitral proceedings the notice or request for arbitration which initiates the proceedings, and a possible response to this notice,<sup>19</sup> is followed in the vast majority of cases by an exchange of detailed written submissions and the production by each party of the evidence which it can muster in the form of documents, witness statements and expert opinions. The 1976 UNCITRAL Arbitration Rules describe the initial round of submissions as "Statement of Claim" and "Statement of Defence". In the former, the claimant must provide a "statement of the facts supporting the claim"; it may join all documents deemed relevant, or make a reference to the evidence which it intends to submit.<sup>20</sup> The respondent then

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<sup>18</sup> See, e.g., the observation of TSE and PETER, "Confronting the Matrix: Do the IBA Rules Require Amendment to Deal with the Challenges Posed by Electronically Stored Information?" *Arbitration*, vol. 74, N° 1 (February 2008), 28, at 33 wherein they write: "The fact that the two pre-eminent common law jurisdictions have seen the need to amend their procedural rules to deal with the questions surrounding electronically stored information is a measure of the importance of the issue." They conclude that the reforms in these countries justify a reconsideration of the IBA Evidence Rules.

<sup>19</sup> The absence of a rule on such an answer was one of the principal deficiencies in the 1976 UNCITRAL Rules which lead to the now ongoing revision. In the work concerning this revision it is undisputed that a new article dealing with the response to the notice of arbitration will be introduced.

<sup>20</sup> Article 18 (2).

replies to the statement of facts which the claimant has presented and may annex "the documents on which he relies for his defence", or may make reference to the evidence which it intends to produce.<sup>21</sup>

In the ongoing revision of these rules the importance of these two statements is further emphasised. The PAULSSON/PETROCHILOS Report, which was the principal study addressing the revisions, proposed two significant changes. The requirement for the statement of claim to contain a "statement of facts supporting the case" was expanded to include also the legal principles invoked by the claimant. Further, the report proposed that joining the relevant documents to the statement of claim should no longer be optional. Instead, an amendment to the second paragraph of Article 18 (2) was proposed as follows:

The Statement of Claim shall as far as possible be accompanied by all documents and other evidentiary materials relied upon by the Claimant, or by references to them ....<sup>22</sup>

Corresponding changes were proposed with respect to the statement of defence. In support of their proposals, the authors referred to other arbitration rules which had adopted similarly compelling provisions and which the authors of the report considered to be good practice. UNCITRAL Working Group II, which is in the course of preparing the revised version of the Arbitration Rules, followed in substance these proposals, even though the final version of the new Articles 18 and 19 has not yet been adopted.<sup>23</sup>

It is indeed now good practice in international arbitration that the first detailed written submission of the claimant and the respondent, respectively, present the full case of each party and identify the evidence on which each party relies. Normally the evidence so identified is submitted at the same time.

#### *Scope and timing of requests for production*

In the UNCITRAL Rules, this is the principal provision dealing with the submission of documentary evidence. Each party submits its own evidence. As the Iran-US Claims Tribunal expressly pointed out

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<sup>21</sup> Article 19 (2).

<sup>22</sup> PAULSSON/PETROCHILOS, "Revision of the UNCITRAL Arbitration Rules", a report commissioned by the UNCITRAL Secretariat, September 2006, p. 90.

<sup>23</sup> In A/CN.9.WG.II/WP.147/Add.1 of 3 August 2007, containing the second draft for consideration by the Working Group, a new letter (e) is added to Article 18 (2) requiring that the statement of claim shall include "the legal [argument] [grounds] supporting the claim"; it also contains a provision identical to the second paragraph that had been proposed in the PAULSSON/PETROCHILOS Report.

