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Articles

The Limits of the IBA Rules on the Taking of Evidence in International Arbitration: Document Production Based on Contractual or Statutory Rights

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The revision of the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") in 2010 has generated numerous articles and notes. Even the critics of the IBA Rules of Evidence grudgingly admit that they have become an unavoidable tool for international arbitration tribunals and counsel alike. The present article aims neither to criticise nor praise the IBA Rules of Evidence, even though much could be said both in criticism and praise of the Rules. Instead, this article briefly explores the IBA Rules' provisions on document production, and more specifically the instances in which they do not apply.

The IBA Rules have led to an increase in document-production requests. Therefore, to some extent, they regulate a problem of their own making, although they do at least provide a framework for finding solutions to that problem. The IBA Rules however set forth only procedural rules, not substantive ones. This is clear from the foreword to the Rules, as well as from their terms. They govern the taking of evidence in the framework of arbitration proceedings only.[1] Yet, document production is not necessarily premised on procedural rules nor does it require a pending arbitration. Indeed, the right to obtain documents from another party can derive from other sources and apply even where no arbitration or court proceedings are ongoing.

Statutory rules or case law may afford a party a substantive right to documents. For instance, in many jurisdictions, shareholders and directors have access to certain documents of their company, members of joint ventures are authorised to request documents regarding the joint venture's business from the other members, agents and sales representatives are entitled to be given information about activities of the principal and vice versa (especially to the extent that a party's remuneration depends on acts of the other party, for example sales), and service providers have to disclose information and documents to the principal, banks to their customers, and employers to their employees. Moreover, parties might also provide for access to documents in a *contract*.[2]

Although it is a trite proposition, it is worth emphasising that the IBA Rules are not meant to limit substantive rights to documents. The IBA Rules cannot be used by a party to renege or limit its contractual undertakings or statutory obligations. Yet, in arbitral practice it is not uncommon that a party relies on a contractual or statutory right to obtain documents, while its opponent resists the production on the basis of the IBA Rules. Typically, the opponent will argue that the Rules have not been adopted, that the production request does not meet the requirements of art.3(3) of the Rules, or that there are valid grounds to refuse production (art.9). In this type of dispute, however, the IBA Rules have no place. It would be wrong to require that a party which has the benefit of a statutory or contractual right to production comply with the IBA Rules' requirements on production requests (art.3(3)) or other threshold provisions in the IBA Rules. Both form and substance of production requests which are based on a substantive right have to be examined against the yardstick of the applicable substantive laws (which may impose similar requirements as the IBA Rules). Two concrete examples illustrate the point:

- If a bank is obliged under the applicable banking regulations and/or contract to disclose to its customers information pertaining to the customer's account, the bank cannot oppose the customer's request in ensuing arbitration proceedings on the ground that the request does not comply with the IBA Rules.
- If an agent is entitled to a fee on all sales of the principal in a given territory and the agency agreement provides that the agent has a right to audit the principal's sales figures, the principal cannot rely on the IBA Rules against the audit request in a fee dispute.

In practice, many arbitral tribunals still seek guidance in the IBA Rules in these situations. The relevant law or contract provision may not specify how documents need to be requested and produced. Likewise, the possible limits to disclosure and the sanction for non-disclosures

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[1] "The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures."

[2] In reality this second hypothesis is often a subcategory of the first since case law or statute determine to what extent the parties' agreement is valid.

may not be clearly set out in the applicable substantive law, or may be part of the (non applicable) civil-procedural codes of the country the law of which governs the merits of the dispute. In such circumstances, arbitral tribunals sometimes turn to the IBA Rules to complement an incomplete contractual or statutory rule, or to corroborate a solution that flows from contract or statutory law. However, application of the IBA Rules, if appropriate at all, can only be by analogy, and must not interfere with applicable contractual or statutory law.

A few arbitral decisions below illustrate the dichotomy between substantive and procedural rights to documents.

Swiss Rules of International Arbitration, partial award (2009)

In this matter, an independent broker claimed fees from a hedge fund to which he had referred a certain number of investors on the basis of a referral agreement ("agreement"). Under the agreement the broker was in certain circumstances entitled to a fee on referred investments. The agreement comprised an arbitration agreement according to which all disputes were subject to the Swiss Rules of International Arbitration. A dispute arose regarding fees that the fund allegedly owed to the broker for referred investors. The broker initiated arbitration. In its procedural directions, the arbitral tribunal stated that it would, "take inspiration from the IBA Rules on the Taking of Evidence in International Commercial Arbitration without being bound by them".

The broker's prayers for relief included a request for document production whereby he requested that the fund provide a certain number of documents which the broker allegedly needed to establish whether a fee was owed to him. The broker relied on a provision in the agreement that contemplated a release of certain information to the broker.

The fund resisted the request. According to the fund, the document production request in the prayers for relief was of a procedural nature, and hence subject to the IBA Rules. For the fund, the request was tantamount to a fishing expedition, aimed at documents which were unrelated to investments triggering a fee, and went beyond the disclosure foreseen in the agreement. Therefore, the requested documents were neither relevant nor material to the outcome of the case.

The arbitral tribunal rendered a partial award wherein it decided, among other things, on the broker's document production request by ruling as follows:

Extracts

"The Tribunal's decision

1. Regrettably, document production requests have become endemic in international arbitration. The IBA Rules provide a framework which aims at limiting production requests to what is considered acceptable in today's arbitration practice. Under the Swiss Rules, Arbitral Tribunals can order the production of documents as an interim measure or in form of an interim award (Article 26). The Tribunal therefore clearly has jurisdiction to order document production. If the request were based on procedural rules, the Tribunal would have to consider the usual parameters, such as proportionality, relevancy, specificity, materiality, and, if appropriate, urgency. These are important thresholds to avoid 'fishing expeditions'. However, document production requests are not necessarily grounded on procedural law. A party may have a right to receive documents from another party as a matter of contract or of statutory law (for the latter, see, e.g., Article 418 k CO, Article 541 CO).
2. In fact, the Claimants' request is not based on procedural rules, but on a contract right, the Agreement itself. The request is of substantive nature. It is brought forward in reaction to an alleged breach of a contractual provision of the Agreement providing for delivery of documents and the Claimants seek performance of said obligations.[3]
3. In the present case, the Claimants request documents containing two types of information. The document production is mentioned in an explicit manner in the Agreement, in Section X, which reads:

   > 'X. **Account Statements and Performance Results**
   >
   > [Fund] will deliver promptly to [Broker] copies of all account statements and performance results regarding [...].'

4. [The tribunal finds that the prayers for relief reflect the rights to documents in s.X.]
5. As this request is grounded on the contract, the power to deal with it is vested in the Tribunal by the contract itself. The Tribunal has the power, and the duty, to address the merits of the dispute. The Claimants' request pertains to the merits. The arguments of the Respondent, which are grounded on procedural considerations and the IBA Rules (which are also of procedural nature), are inapposite. The Claimants have a contractual right to receive the information identified in the Agreement.

[3] Claimants' statement of claim, para.87.

6. It is common in international arbitration that documents are ordered to be produced in disputes wherein a party seeks a remuneration from another party based on agency or similar contracts. Often, a party will seek production precisely in order to quantify its alleged claim ('Stufenklage'). See for instance the Swiss Supreme Court decision of 28 March 2007 (based on a Swiss Rules arbitration).[4] In a principal-agent dispute, the agent had requested the production of documents from the principal and all its affiliates showing sales in the territory contractually allocated to the agent. Under the agency agreement, such sales were the triggering event for the agent's fees. The tribunal found that the principal was obliged, under the agreement, to give access to its sales figures and ordered production in a partial award.

7. The Tribunal's decision must take the form of an award since the matter is one of substance. It will be noted, however, that even if the document production request were of procedural nature, the Tribunal could issue an award (Article 26.2 of the Swiss Rules)."

Swiss Rules of International Arbitration, partial award (2005)

The arbitral tribunal in the abovementioned case referred to an award rendered by another arbitral tribunal sitting under the aegis of the Swiss Chambers. That award is unpublished but was summarised in a decision of the Swiss Federal Supreme Court dealing with a request to set it aside. [5]

In a principal-agent dispute, the agent (of Iranian nationality) had requested the production of documents from the principal (of German nationality) and all its affiliates showing sales in the territory contractually allocated to the agent. Under the agency agreement, such sales triggered the agent's fees. The tribunal found that the principal was obliged, under the agreement, to give access to its sales figures. It ordered the production in the following terms (partial award of June 24, 2005):

> "Respondent is ordered to submit to the Arbitrator and Claimant, by 29 July 2005, a comprehensive list, duly signed by Respondent, showing all sales or economically equivalent transactions (such as leasing agreements) made by Respondent and/or any of its affiliates, including Y. S.p.A. and/or any company owned or controlled by the Y. -Group, into the territories of Saudi Arabia, the United Arab Emirates, Oman, Quatar, Bahrain and Kuwait from 1 January 2002 until 13 December 2004, and into the territory of Iran from 1 January 2002 until 6 April 2006, with respect to (i) products produced by Respondent, or (ii) to the exteut produced by a different manufacturer, products identical or similar in their function and design to products formerly manufactured by Respondent."

The arbitrator further directed the principal to grant an independent auditor access to the list to check its completeness and accuracy.

Interestingly, the order was issued as an award, as it was included in the operative part of the partial award rendered by the arbitrator. This is unusual for requests for interim measures that are based only on procedural law. Interim measures on procedural matters are usually issued in the form of a procedural order (although arbitral tribunals have the right to render an interim award (art.26.2 of the Swiss Rules)). In the present case, however, the request appears to have been founded, at least in part, on substantive law, in this case on the contract itself. To the extent that it orders the performance of a contractual duty, the document production order could indeed take the form of an award. In addition, the partial award ordered the performance of other contractual obligations, namely the payment of penalties.

The principal did not however comply with the arbitral tribunal order for production. It did not provide a complete list and failed to confirm that it would grant an auditor access to the list. The tribunal considered that this was a violation of the procedural duty to co-operate in evidence gathering ("*Verletzung der Mitwirkung bei der Beweiserhebung*") and drew an adverse inference on the number of sales based on the IBA Rules. The principal challenged this inference before the Supreme Court, which found that an adverse inference is not a violation of the party's right to be heard. More generally, the Court ruled that a violation of the IBA Rules, or of the evidentiary rules of the local (Zurich) Procedural Code, were not grounds for challenging an arbitral award.

ICC arbitration, procedural order (2009)

In this matter between an agent and a principal, the agent alleged the existence of a consultancy agreement according to which the agent was entitled to a fee for certain contracts entered into between the principal and third parties. The agent sought to obtain access to the contracts allegedly entered into by the principal. The principal refused to disclose any contracts on a number of grounds, including privilege (art.9.3 of the IBA Rules). The arbitral tribunal rejected the argument and ordered production of the contracts:

> "Moreover, and more importantly, as already mentioned in the Tribunal's letter of ... 2009, the Claimant cannot oppose alleged privileges to its own agent. The agent has a contractual right to receive information which allows the calculation of the

[4] Decision 4A_2/2007 of March 28, 2007 (2007) 3 ASA Bull. 610.
[5] Swiss Federal Supreme Court Decision 4A_2/2007 of March 28, 2007 (2007) 3 ASA Bull. 610.

remuneration under such contract. The IBA Rules do not limit, and should not be used to restrict production of documents to which the party seeking production is entitled as a matter of statutory law and/or contract. A similar situation would be that of a contract dispute between party A and party B regarding the question whether party B had a right to enter into a contract with a third party. The confidentiality which party B might owe to the third party under this new agreement is no valid ground for party B to refuse to disclose information on this agreement to A in the dispute arising under the contract between A and B on the very issue whether the conclusion of an agreement with a third party was lawful (Klaus Günther, *Einschränkung der Erhebung von Dokumentenbeweisen aufgrund von Vertraulichkeit und Geschäftsgeheimnissen*, in Festschrift für Otto Sandrock zum 70. Geburtstag, p. 341, 350)."

UNCITRAL arbitration, procedural order (2010)

This arbitration dealt with a dispute between two consultants as to their respective rights under a consultancy agreement and to fees paid by third parties. Each consultant claimed fees from the other for contracts allegedly entered into by the other consultant with third parties. As a preliminary matter, both parties requested the production of documents relating to such third party contracts and payments received under them. The consultancy agreement contemplated the parties' right to receive information from each other regarding third-party contracts. In the ad hoc arbitration seated in Geneva, the parties' respective requests for production relied on this substantive right as well as procedural rights. The arbitral tribunal ordered the production of documents based on *procedural* rights, considering that it was not yet in a position at that stage of the arbitration to determine the scope of the parties' *substantive* rights to document production. The fact that certain parties to the dispute from which documents were sought challenged the jurisdiction of the arbitral tribunal on the ground that they had not signed the arbitration agreement may have played a role in the tribunal's approach.

Extracts

"B. **On the Production of Documents**

69. The Specific Procedural Rule N°5 [ad hoc procedural rules adopted by the arbitral tribunal] provides that:

> *'If any of the parties refuses to produce documents upon a simple request by the other party (which need not be copied to the Arbitral Tribunal), the Arbitral Tribunal shall be entitled, upon specific and precise request of one of the parties, to order the parties to produce document(s) in their possession or under their control.*
>
> *Any such request shall identify the document(s) with a reasonable degree of specificity and shall establish the relevance of the document(s) for the determination of the present dispute. The Arbitral Tribunal shall, in its discretion, decide on the issue taking into account in particular the legitimate interests of the other party. The Arbitral Tribunal may seek guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.*
>
> *Any document(s) produced pursuant to this rule can only be relied upon after it/they has/have been introduced as exhibit(s) into the procedure.'*

70. A similar rule is laid down at Article 24 (3) of the UNCITRAL Arbitration Rules which indicates that:

> *'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.'*

71. A distinction must be made between on the one hand, the right to request the production of documents because these are relevant for the outeome of the dispute, *and on the other hand a right of a party to receive, on the basis of a contract, specific documents from its counterparty.* The latter category does not come under the concept of the Specific Rule N°5. Therefore, documents to which a party may be entitled

to on the basis of a contractual right cannot in principle be requested in reliance on Specific Rule N°5 since this implies that the Arbitral Tribunal would be deciding on the contractual rights of the parties which is a substantive issue on which a ruling, in principle, is to be made in the form of an award.

72. At this stage in the procedure, the Arbitral Tribunal cannot be expected to decide on issues relating to the merits such as for example whether the Parties are bound by the terms of the XX Agreement dated YY or whether any other contracts are subject to the Agreement.

73. The Arbitral Tribunal can only assess the Parties' procedural right to receive documents which may or may not exist in a party's file and whether the requested documents are *prima facie* relevant for the settlement of the dispute without prejudice to its final decision.

74. For this, the Arbitral Tribunal will examine the following conditions which must be fulfilled for the production of documents to be granted.

a. whether the requested documents are in the possession or under the control of the Party which should produce them;

b. whether the requested documents have been identified with a reasonable degree of specificity;

c. whether the requesting Party has established the relevance of the documents for the settlement of the dispute[6].

75. The Arbitral Tribunal will examine separately Claimant's general request for documents, Claimant's specific request and First Respondent's request in light of these three conditions.

76. For the sake of clarity, the Arbitral Tribunal stresses that the Specific Rule N°5 concerns only contemporary documents which may or may not exist in a party's file. They do not include documentation which must be created specifically for the arbitration.

...

81. Whereas both Claimant and First Respondent *base their requests for information and documents on their contractual rights based on Articles 530 ff CO as well as on the procedural rules laid down at Articles 8 of the Swiss Civil Code and Article 3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration*, the Arbitral Tribunal, as stated above (paragraphs 71 & 72), will only base its decision on the procedural rules applicable to document production (Specific Rule N°5 and Article 24(3) of the UNCITRAL Arbitration Rules)

82. Neither Party can quantify its claim or counterclaim without details of the payments received by the other Party [for contracts triggering a fee]. The type of information/documents requested by Claimant and First Respondent is of the same nature, the aim being mainly to enable them to establish the amounts that they consider due to them on the basis of their cooperation. For Claimant the contractual and financial documents required would enable it to assess the amounts received by First Respondent in relation to the ZZ contract. For the efficient and expeditious settlement of this dispute, the Parties must be in a position to quantify their claims and counterclaims, preferably prior to any witness hearings, so that such hearings can also address issues of quantum.

83. Therefore, the Arbitral Tribunal concludes in the light of the above mentioned procedural rules that the relevance test of the requested

[6] These three conditions are laid down by art.3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration and addressed in a number of arbitral precedents, see in particular, ICC International Court of Arbitration, *Document Production In International Arbitration* (Bulletin, 2006 Special Supplement).

documents is satisfied without prejudice to the Arbitral Tribunal's decision on the merits."