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Document Production in International Arbitration: A Critique from 'Across the Pond'

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DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION: A CRITIQUE FROM 'ACROSS THE POND'

Peter Ashford[†]

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I. Introduction

Discovery is an essential part of the procedural framework in the United States and other common law countries.¹ It encompasses document production but, in the United States, it also includes depositions, interrogatories, admissions, and much more. The essential feature of it is that it is a prelude to an adversarial contest before a judge whose role it is to see fair play and then determine (either himself or with a jury) the victor. The rationale for discovery proceeds on the premise that the adversarial contest can only be fair if both sides have access, as far as possible, to the same materials. Thus, a party must produce documents not only that it intends to rely upon but also those, which damage its own case. It is perceived that without this advance exchange of materials the fundamental basis of the adversarial fight is undermined.

The position is quite different in civil law jurisdictions. In such arenas, a judge enquires into the facts with the assistance of the parties producing those documents they wish to rely upon (but certainly not anything that would damage their own case).

It cannot be said that either the common law systems or civil law systems produce a better quality of justice. Does United States-style discovery result in a better standard or higher quality of justice? Is American justice better than, say, English or French? And, if so, is that due to the discovery process? Is justice to be judged by the volume of paperwork produced or the perceived fairness of the process—the fairness, unbiased nature, impartiality and independence of the determination—and the ability of potential users to have access to that system of justice?

Whilst undoubtedly different both in approach and procedure the fundamentals of each of the common law systems and of the civil law systems have survived the test of time and neither system has any meaningful calls for change, or likelihood of being changed, in their adopted countries. It follows that the users of

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¹ The nomenclature will vary however; in England, for example, it is termed 'disclosure.'

those systems are seemingly content with the process they adopt. Thus, neither system can be said to be inherently flawed.

It is from this background that the relatively modern concept of international arbitration emerged. It provides an alternative to litigation before domestic courts and is perceived as the forum of choice for international disputes—whether private disputes arising under a contract or public disputes arising under international treaties. Necessarily, these disputes will usually involve parties from different jurisdictions and indeed often with very different legal systems. International arbitration has to accommodate the private expectations of these parties—those expectations often being governed, or at least heavily influenced, by their own experience of domestic litigation in their own country.

How then should discovery be conducted in international arbitration? The simple answer is that it should not be. Discovery itself is an unhelpful term, especially because of the wider connotations it has in the United States and the international perception of the onerous obligations it brings. “Disclosure” is a better term but “document production” is what, in most cases, is truly being discussed and directed and does not carry the pejorative meaning of “discovery” and, to a lesser extent, “disclosure.” Accordingly, this paper will use the term “document production.”

II. Background

Document production cannot be considered in isolation. It serves as part of a process towards a final determination on the merits. That arbitral process will invariably start in earnest with some form of document setting out each party’s case. Whatever that document is termed—be it statement of case, memorial, points or particulars of claim—they serve the same end: to clarify and define the issues between the parties and what the tribunal must decide. For the purposes of this paper I will use the term “memorial” to cover these documents.

Usually memorials will be confined to factual issues rather than advancing propositions of law, but sometimes these will be included at this stage (rather than in pre- or post-hearing briefs). For the purpose of this paper it is material only that the memorials will usually include the setting out of material facts that are to be relied upon in support of the claims made and defences advanced. Certainly, so far as English Court procedure is concerned, the function of “statements of case” (previously called “pleadings”) has been clarified:

The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is

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important is that the pleadings should make clear the general nature of the case of the pleader. . . . As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements pleadings frequently become of only historic interest. . .²

The key function of these statements is to set out the parameters and issues and identify the material facts supporting the cause of action or defence. The key documents relied upon will, at the very least, be identified and often annexed.

From these preliminary exchanges of memorials the parties are likely to then embark on the further stage of document production. That process can range from something akin to a civil law process where documents relied upon are produced to something that would be recognisable, in part, to a US trial lawyer preparing for discovery.

The fundamental proposition is that all forms of document production are there to assist in a fair resolution of the dispute without unnecessary delay or expense. Equally fundamental, however, are the propositions that: (a) a party has the burden of proving facts upon the affirmative of which he relies and that are in issue and must do so to the required standard, and (b) that forcing a party in a different sovereign state to undertake any act (e.g. disclosing documents contrary to its interests) is, to a degree, an exercise of sovereignty over a foreign subject that should always be exercised carefully.³

III. Discussion

Some form of document production is appropriate in the majority of cases but should not be put into the standard “one size fits all” category. What document production is required in a case of complex fraud might be quite different from a case seeking to determine the meaning of a word or phrase in a commercial agreement. This is the inherent advantage of the arbitral process—being able to craft a procedure around the dispute. Rarely will it be appropriate to impose the duties and costs of US-style discovery on a party.

More often than not it will be something much closer to the civil law regimes than the common law regimes. Indeed the documents relied upon are often the starting and ending point of document production. However, that is not normally the end of the matter. The parties will often have agreed to be governed or influenced by the International Bar Association Rules on the Taking of Evidence

² The nomenclature will vary however; in England, for example, it is termed ‘disclosure.’

³ *Cookney v. Anderson* (1863) 1 De. G. J. & S. 365, 380–81. For example, in this English case, Lord Westbury LC said:

The right of administering justice is the attribute of sovereignty, and all persons within the dominions of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served in the territory of another, and summons a foreign subject to his court of justice, it is in fact an invasion of sovereignty, and would be unjustifiable, unless done with consent . . .

Id.

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in International Arbitration (the “Rules”).⁴ These Rules provide for parties to produce documents relied upon.⁵ The Rules also permit a limited and defined request for the production of documents or class of documents that is relevant and material to the outcome of the arbitration.⁶ If such request is refused, the arbitral tribunal may consider it and order production of all or some of what was sought if it considers it appropriate. Such a process is usually accepted as meeting conflicting international norms.⁷

This limitation or reduction on extensive document production is a result of the perceived unnecessary time and cost incurred in wholesale US-style discovery.⁸ It follows that the question posed at the outset of whether the common law and the US-style in particular produces a better standard or quality of justice has been, to an extent answered by the international arbitration community—and not in a manner that would please proponents of US-style discovery.

The Rules provide an internationally accepted code that serves most situations well.⁹ It should be the starting point for most, if not all, questions on document production and in the majority of cases, will be sufficient in itself.

It is not only the arbitration community that has steered away from extensive document production. English court procedure has also seen a significant shift away from discovery. The Civil Procedure Rules¹⁰ introduced in 1999 did away with the term “discovery” substituting “disclosure” in its place.¹¹ But it was not simply a change of terminology. The philosophy underlying the change was to do away with the time and cost involved in discovery.¹² The prevailing test until 1999 had been defined in 1882¹³ as any document that one may reasonably suppose “contains information which may enable the party (applying for discovery)

⁴ INT’L BAR ASS’N [IBA], IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), available at http://www.ibanet.org/Publications/publications_IBA_guides_-and_free_materials.aspx [hereinafter IBA RULES].

⁵ *Id.* art. 3(1).

⁶ *Id.* art. 3(3).

⁷ Or in other words, balancing the conflicting expectations of the common law and civil law approach to the disclosure of documents.

⁸ Although not mentioned expressly in the Rules the Commentary by the drafting committee makes it clear that conflicting views can arise from different legal backgrounds and cultures and that the Rules contain procedures developed from both common law and civil jurisdictions. It is implicit from this that neither the limit on the extent of disclosure obligations has been adopted and the US being one end of the spectrum, nor has the Committee plainly excluded the US style.

⁹ IBA RULES, *supra* note 4. The Forward to the IBA Rules states:

The IBA issued these Rules . . . to provide an efficient, economical and fair process . . . The IBA Rules . . . reflect procedures in use in many different legal systems and they may be particularly useful when the parties come from different legal systems. Since . . . 1999, the IBA Rules . . . have gained wide acceptance . . .

Id.

¹⁰ Civil Procedure Rules, 1998, S.I. 1998/3132 (U.K.), available at <http://www.justice.gov.uk/courts/procedure-rules/civil> [hereinafter CPR].

¹¹ *Id.* pt. 31.

¹² THE RIGHT HONOURABLE THE LORD WOOLF, MASTER OF THE ROLLS, ACCESS TO JUSTICE FINAL REPORT (1996) (U.K.).

¹³ *Compagnie Financiere du Pacifique v. Peruvian Guano*, [1882] 11 Q.B.D. 55, 63 (Eng.).

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either to advance his own case or to damage that of his adversary, [or] if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences” must be disclosed.¹⁴

Lord Woolf’s final report in 1996¹⁵ made the recommendations that resulted in the Civil Procedure Rules.¹⁶ One of the key justifications in doing so was to enhance the international competitiveness of the English legal system. He said:

. . . the process for discovery of documents (which I now recommend should be called ‘disclosure’). . . had become disproportionate, especially in larger cases where large numbers of documents may have to be searched for and disclosed, though only a small number turn out to be significant. Nevertheless, I considered that disclosure contributes to the just resolution of disputes and should therefore be retained, but in a more limited form.¹⁷

He recommended a solution involving the identification of four categories of documents that may require disclosure. These were:

- (1) the parties’ own documents, which they rely upon in support of their contentions in the proceedings;
- (2) adverse documents of which a party is aware and which to a material extent adversely affect his own case or support another party’s case;
- (3) documents which do not fall within categories (1) or (2) but are part of the ‘story’ or background, including documents which, though relevant, may not be necessary for the fair disposal of the case;
- (4) train of inquiry documents: these are documents which may lead to a train of inquiry enabling a party to advance his own case or damage that of his opponent.¹⁸

In simple cases, the current practice in England provides for a basic duty of disclosure limited to categories (1) and (2) known as “standard disclosure.”¹⁹ In more complex cases, the initial obligation will similarly be to make standard disclosure only.

Subsequent, extra disclosure over and above standard disclosure is by court order only.²⁰ When ordering such extra disclosure, the court must be satisfied not only that it is necessary for justice, but that the cost of such disclosure would not be disproportionate to the benefit it provides and that a party’s ability to continue the litigation would not be impaired by an order for specific disclosure against him.²¹

¹⁴ *Id.*

¹⁵ WOOLF, *supra* note 12, ch. 12, ¶ 37.

¹⁶ *See generally* CPR, *supra* note 10.

¹⁷ WOOLF, *supra* note 12, ch. 12, ¶ 37.

¹⁸ *Id.* ch. 12, ¶ 38.

¹⁹ CPR, *supra* note 10, pt. 31.6.

²⁰ CPR, *supra* note 10, pt. 31.12.

²¹ CPR, *supra* note 10, pt. 1.

IV. Analysis

It is no use limiting the categories of documents a party has to disclose if he still has to search through all his documents to identify those in categories (1) and (2). In fact, Lord Woolf recommended “that initial disclosure should apply only to relevant documents of which a party is aware at the time when the obligation to disclose arises.”²² The detailed rationale is outside the scope of this paper, but Lord Woolf acknowledged that discovery “depends on the honesty and diligence of the parties.”²³ Withholding documents cannot necessarily be detected, so the temptation to do this had always existed (and still exists). Furthermore, he recognised that the “alternatives to [his] proposal would be to dispense with disclosure entirely (like the continental systems) or to limit initial disclosure to documents on which a party intended to rely.”²⁴ Both of these, he felt, went too far: “[T]he latter would be inefficient because it would simply increase the volume of routine applications for disclosure.”²⁵ Lord Woolf felt that his proposal:

has the effect of preventing a party, if he acts reasonably honestly, from putting forward a case which he knows to be inconsistent with his own documents . . . [and it] offers not a perfect, but a realistic, balance between keeping the burden of disclosure in check while enabling it still to contribute to the achievement of justice.²⁶

It follows that if the memorials have fulfilled their function and set out the material facts relevant to the issues to be determined, the documents that fall within the twin categories of (1) the parties’ own documents which they rely upon in support of their contentions in the proceedings, and (2) adverse documents of which a party is aware and which to a material extent adversely affect his own case or support another party’s case, should be readily identifiable and capable of being produced.

As we have seen, category (1) documents are normally not controversial.²⁷ Parties may themselves come to the conclusion by accident or design that they will produce documents relied upon. It is consistent with discharging the evidential burden and the default under the IBA Rules. Category (2) documents are not, however, routinely directed to be produced and nothing in the IBA Rules specifically addresses this category.

Lord Woolf recognized that his recommendations might not produce a perfect result in every case, but overall the justice across a spectrum of cases is fairer, or better, as justice is both an absolute and relative concept. If the starting point is that justice in international arbitration is to “obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense,” then an imperfect

²² WOOLF, *supra* note 12, ch. 12, ¶ 41.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ IBA RULES, *supra* note 4, art. 7. Parties will wish to produce the documents that they rely upon to prove their own case. The IBA Rules Article 3(1) follows this procedure.

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world might be appropriate.²⁸ Avoiding unnecessary delay and expense is arguably better justice than that achieved by extensive discovery, at potentially considerable delay and cost, that might identify a document or documents that change the result of an arbitral reference.

The further role of justice is to have an enforceable award.²⁹ This is an essential duty of the arbitral tribunal. The grounds under which an award can be refused recognition and enforcement is the following: (a) a party was unable to present his case³⁰ and (b) the procedure was not in accordance with the law of the country where the arbitration took place or was agreed by the parties.³¹ The former generally encompasses 'due process' arguments. There are few reported examples³² of successful due process challenges, but the prospect for an arbitral tribunal to add to the short list is unattractive. To avoid raising due process issues, arbitral tribunals will be wary in refusing disclosure but equally will be wary of the disclosure process taking over the entire process.

V. Proposal

This author suggests that the biggest challenge to document production in international arbitration is not the absence of US-style discovery but rather the fact that category (2) documents are not addressed. If parties have agreed to resolve their disputes by arbitration they must be presumed to have agreed to something akin to the aim identified in the English Arbitration Act. If that is so, the end goal must be to reconcile a fair process and a fair resolution with the failure to address category (2) documents. On what basis can it be fair to have a process where the parties can advance a case when they possess, but have not disclosed, documents inconsistent or detrimental to that case? One answer might be that ethical considerations prevent counsel from advancing a case they know to be false or wrong. That answer merely raises more questions. Has counsel seen the documents? Has counsel turned a "Nelsonian"³³ eye to the issues raised in the

²⁸ Arbitration Act, 1996, c. 23, §1 (U.K.); United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985). Although not a provision deriving from the Model Law (the English Act took a 'buffet' style approach to the Model Law – adopting parts and supplementing) it is probably a definition to which most in the arbitration community would subscribe. When it came to their own cases, however, they might take issue with the fairness as applied to themselves or their clients.

²⁹ See, e.g., Article 41 of the ICC Rules: ". . . the arbitral tribunal shall . . . make every effort to make sure that the award is enforceable at law." INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION (2012); see also THE LONDON COURT OF INTERNATIONAL ARBITRATION RULES, art. 32.2 (1998) (having a similar effect as Article 41 of the ICC Rules).

³⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(b), June 10, 1958, 9 U.S.C. § 201, 330 U.N.T.S. 3 [hereinafter New York Convention].

³¹ *Id.* art. V(1)(d).

³² *Iran Aircraft Ind. v. Avco Corp.*, 980 F. 2d 141 (2nd Cir. 1992). This case is an example where a US corporation was told there was no need to submit detailed invoices only to have its claims dismissed for failure to submit detailed invoices. *Id.*

³³ Arbitration Act, 1996, c. 23, §1 (U.K.); United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985). During the Battle of Copenhagen on April 1, 1801, Sir Hyde Parker led the British fleet. The then Vice Admiral Horatio Nelson was ordered via flag signal to disengage and retreat due to the hopelessness of the situation. Realizing that

documents? What system of ethics binds counsel in any event (a substantial topic in itself)?

The solution could be simply to include a direction addressing category (2) documents or require some sort of certificate to be signed by parties and/or counsel to certify that based on a reasonable and proportionate search no documents within category (2) have been identified. The settlement rate for international arbitrations is far lower than that for English court actions.³⁴ Whether this is linked to the general absence of any direction relating to category (2) documents is beyond the purview of this article.

To further illustrate the scope of potentially undesirable consequences of US-style discovery, a look to 28 USC §1782 is instructive. The statute is often hailed as a useful tool to aid arbitration.³⁵ Essentially, it allows parties involved in disputes outside the US to obtain documents and oral evidence from companies and individuals within the US.³⁶ Does it make for better justice? This author suggests that it does not—if justice is viewed as obtaining a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense—for it undoubtedly incurs very considerable expense and delay and only potentially produces evidence that is determinative.

Parties agree upon international arbitration for a variety of reasons, but the exclusion of discovery is often a conscious decision—one far more likely than an agreement to arbitrate outside the US so as to import §1782. To impose “back-door” discovery via §1782, may well run contrary to the original intent of the parties, be contrary to or without the consent of all parties, and may not have tribunal approval.³⁷ It must be questioned whether unilateral steps towards §1782 are consistent with Article 19(1) of the Model Law: the freedom of parties to agree on procedure. The parties are quite unlikely to have applied their minds to the availability of §1782 when agreeing upon arbitration: it will be something that is suggested by counsel as part of the arbitral process.

any attempt to retreat through the shallow waters would result in catastrophic loss, Nelson, famously, placed his telescope to his blind eye and remarked that he could see no such signal. He then continued the battle and destroyed numerous enemy ships, and was able to negotiate with the Danes thereby saving many lives by turning his blind eye to the reality. It is generally accepted to be dishonest to ignore the obvious or willfully put oneself in a position of not knowing.

³⁴ See CHRISTIAN BÜHRING-UHLE, LARS KIRCHOFF & GABRIELE SCHERER, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 112 (2nd ed. 2006) (estimating a settlement rate of 43% on average). This article estimates the settlement rate at approximately 50%.

³⁵ Jane Wessel & Peter J. Eyre, *US Discovery in Aid of Foreign or International Proceedings: Recent Developments Relating to Title 28 US Code Section 1782*, 75 *ARB.* 158 (2009).

³⁶ 28 U.S.C.A. § 1782 (West 1996). The section provides that: “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . .” *Id.*

³⁷ *Id.* The nature of §1782 is that the application can be made and relief granted without the consent (and indeed in the face of opposition from) of the other party or parties and without the consent of the tribunal, although it will often be desirable to have such consent.

VI. Conclusion

It is not to say that US discovery is of no assistance to the international arbitration community. Issues in discovery move on, and “e-disclosure” is still in nascent form in international arbitration and can take valuable lessons from the courts—both in the US and elsewhere. Much has been written and good practice is being distilled. US-style Electronically Stored Information rules will not be incorporated wholesale into international arbitration, but elements of good practice will emerge. For example, destruction (rather the prevention of destruction) should be addressed at an early stage and no later than the first procedural meeting. The IBA Rules provide for costs sanctions if destruction is not in good faith.³⁸ Spoliation will rarely result in the dismissal of a claim in international arbitration³⁹ and although financial sanctions beyond costs are currently not possible, there are other remedies in which an aggrieved party may seek recourse.

Finally, it is fundamental to any arbitral process that it results in an enforceable award. If substantial questions of due process stem from either the refusal of sufficient document production or excessively onerous document production, then questions will arise over the ability to enforce the award under the New York Convention.⁴⁰ Any process must be subservient to the ultimate aim of enforceability.

³⁸ IBA RULES, *supra* note 4, art. 4, 20.

³⁹ Although, if a fair hearing is rendered impossible, then it might be considered.

⁴⁰ *See, e.g.*, New York Convention, *supra* note 30.

