

DOCUMENT PRODUCTION IN INTERNATIONAL INVESTMENT ARBITRATION

Kiev, 16 November 2012

Christophe Guibert de Bruet



LALIVE

OVERVIEW

- I. What is production of documents ?
- II. Duty of disclosure
- III. Requests for production of documents
- IV. The Tribunal's power to order the production of documents
- V. Party's failure to comply with a Tribunal's order to produce documents
- VI. Requests to third parties
- VII. Practical considerations and Conclusion

I. What is production of documents?

A. Defining production of documents

1. It is the process by which a party produces and requests materials for use in substantiating the parties' claims in arbitral proceedings.
2. It generally occurs as a result of a duty to produce, a request from the opposing party, or an order from the Tribunal.

I. What is production of documents?

B. What constitutes a "document" ?

"Document' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;"

IBA Rules on the Taking of Evidence in International Arbitration (2010) ("the IBA Rules")



II. Duty of disclosure

A. What rules apply?

1. Rules of professional conduct: the lawyer's home rules and the rules of the seat of the arbitration
2. The rules of evidence selected by the Tribunal (almost invariably the IBA Rules)

B. Documents that must be disclosed

1. Article 3.1 of the IBA Rules provides that a party must produce all documents upon which it intends to rely.
2. This includes evidence that is solely intended for use in cross examination.

II. Duty of disclosure

C. Is there a duty to produce adverse documents?

1. Point 3 of the Preamble of the IBA Rules states that each party shall act in good faith as to the taking of evidence; therefore a failure to provide relevant, albeit adverse evidence may be a breach of a duty to engage in arbitration in good faith.
2. Selectively producing only favorable documents can, in extreme cases, be tantamount to fraud if the selective documents suggest a factual picture that a party knows to be false.

II. Duty of disclosure

3. Rule 3.3(a)(4) of the DC Bar Rules of Professional Conduct forbids a lawyer to "Offer evidence that the lawyer knows to be false..."
4. Section 4(4) of the Code of Conduct of European lawyers provides that "A lawyer shall never knowingly give false or misleading information to the court."
5. Rule 3.3 ABA Model Rules of Professional Conduct, Article 1 of Rules of Professional Conduct of the Swiss Bar Association, and Outcomes 5.1 and 5.2 of the 2012 English Solicitors' Regulation Authority Code of Conduct all require lawyers to comply with basic obligations of candor and fairness towards tribunals.

III. Requests for production of documents

- A. The Tribunal and the parties are free to structure the schedule for requests as they see fit.
- B. Article 2 of the IBA Rules requires the Tribunal to consult the parties at the earliest appropriate time with a view to agreeing on an efficient, economical and fair process for taking evidence, and includes a non-exhaustive list of matters which such should be address.

III. Requests for production of documents

- C. Pursuant to Article 3.3 of the IBA Rules, a request for production must contain:
1. A description of a document or a narrow and specific category of documents which the party seeks to obtain
 2. A description of how these documents are relevant and material to the outcome of the case
 3. Confirmation that these documents are not in the "possession, custody or control" of the requesting party, and of the reason why that party assumes such documents to be in the "possession, custody or control" of the other party

III. Requests for production of documents



III. Requests for production of documents

D. The requested party must respond by either:

1. Producing the requested documents; it should be noted that under the IBA Rules the requested documents are not produced directly to the Tribunal.
2. Objecting to a request: Article 3.4 of the IBA Rules provides that parties may object to requests for any of the reasons listed in Article 9.2 of the IBA Rules, or due to a failure to satisfy any of the requirements of Article 3.3.

III. Requests for production of documents

- E. Article 9.2 of the IBA Rules provides that Tribunal shall, at the request of a Party or on its own motion, exclude from production any requested document for any of the following reasons:
1. lack of sufficient relevance to the case or materiality to its outcome
 2. legal impediment or privilege under the legal or ethical rules determined by the Tribunal to be applicable
 3. unreasonable burden to produce the requested evidence
 4. loss or destruction of the Document that has been shown with reasonable likelihood to have occurred

III. Requests for production of documents

5. grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling
6. 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
7. considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling

III. Requests for production of documents

F. Considerations specific to sovereigns:

1. On one hand a State may successfully seek to argue national security or other sovereign immunities, while on the other hand principles of freedom of information and transparency might argue for an even broader duty to respond to production requests.
2. The Mexico-US Claims Commission stated, in *William A Parker (USA) v. United Mexican State*, that “the parties before this Commission are sovereign Nations who are in honor bound to make full disclosure of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them.”
3. Requests for documents that involve separate government agencies can significantly complicate and frustrate the State’s good faith efforts to respond to the request for production.

III. Requests for production of documents

Respondent's Document Requests					
No.	Respondent's Document Request	Respondent's Statement of Relevance & Materiality	Claimant's Objections/Observations	Respondent's Reply	Arbitral Tribunal's Decision
		Henry Posner III's first statement			
10.	Study conducted by Mesoamérica/Bain & Company sometime in 2006 or early 2007 exploring the feasibility of rehabilitating, developing, and operating the railroad in Guatemala.	Cementos Progreso is Claimant's local partner and minority shareholder in FVG. This document is relevant to weigh Claimant's allegations regarding the viability of its alleged plans for investing in and operating the railroad in Guatemala, in particular along the Pacific/South corridor as alleged in paragraph 90 of the Memorial on the Merits and 48 of Jorge Senn's first statement.	Claimant objects to this request as not relevant or material to the outcome of the case. Subject to and without waiving the foregoing objection, Claimant states that it does not have (and has never had) this document in its possession, custody or control.	Respondent takes note of Claimant's representation that there are no responsive documents for this request in its custody, possession, or control. Respondent reminds Claimant of its continuing obligation to produce additional responsive documents if and when they come into its custody, possession, or control. Additionally, Respondent rejects Claimant's objection regarding the relevance of the document requested.	No decision necessary at this time.

IV. The Tribunal's power to order the production of documents

A. ICSID Arbitrations

1. Article 43 of the ICSID Convention:

"Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate."

IV. The Tribunal's power to order the production of documents

2. Rule 34(2) of the ICSID Arbitration Rules:

"The Tribunal may, if it deems it necessary at any stage of the proceeding:

(a) call upon the parties to produce documents, witnesses and experts; and

(b) visit any place connected with the dispute or conduct inquiries there."

IV. The Tribunal's power to order the production of documents

B. Other investment arbitrations

1. Evidence-taking and disclosure are governed by the arbitration legislation of the arbitral seat, together with the relevant BIT and any incorporated institutional rules.
2. Section 34(2)(d) of the UK Arbitration Act 1996 gives Tribunals seated in England, in the absence of agreement between the parties, the power to decide "whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage."
3. Section 7 of the U.S. Federal Arbitration Act, provides that arbitrators "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."

IV. The Tribunal's power to order the production of documents

C. Criteria used to evaluate whether to order production

"[The Tribunal] bears in mind a number of considerations in evaluating whether or not to order the production of evidence. These considerations include: the necessity of the requests made to the point the requesting party wishes to support, the relevance and likely merit of the point the requesting party seeks to support, the cost and burden of the request on the Claimant and the question of how the request may be specified so as to both fulfill legitimate requests by a party while not allowing inquires that are an abuse of process."

Aguas del Tunari SA v. Republic of Bolivia, Procedural Order No. 1,
ICSID Case No. ARB/02/3 (8 April 2003)

V. Party's failure to comply with a Tribunal's order to produce documents

A. Article 9.5 of the IBA Rules provides that

"If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."

V. Party's failure to comply with a Tribunal's order to produce documents

B. Article 9.7 of the IBA Rules provides that

"If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence."

V. Party's failure to comply with a Tribunal's order to produce documents

C. Article 34(3) of the ICSID Arbitration Rules:

"The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure."

VI. Requests to third parties

- A. Article 3.9 of the IBA Rules provides that a party may request that the Tribunal "take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself."
1. The party must submit a request to the Tribunal in writing, including the particulars set forth in Article 3.3.
 2. Provided that none of the Article 9.2 objections apply, the Tribunal, if it decides to grant the request, can "take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate..."

VI. Requests to third parties

B. Judicial assistance in the taking of evidence:

1. Article 27 of the UNCITRAL Model Law states that: “The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”
2. Section 26 of the Swedish Arbitration Act, Article 1696(2) of the Belgian Judicial Code, Article 1041(2) of the Netherlands Code of Civil Procedure similarly do not permit a party to seek judicial assistance in taking evidence without the Tribunal's approval.

VI. Requests to third parties

3. The possibility that a party may seek judicial assistance, with only the agreement of the other party, and without the Tribunal's consent, distinguishes Section 44 of the U.K. Arbitration Act 1996 from Article 27 of the Model Law.
4. Section 7 of the U.S. Federal Arbitration Act grants a Tribunal seated in the United States authority to order document production, including by third parties, in certain circumstances
5. Pursuant to 28 U.S.C. Section 1782 U.S. courts can order discovery at the request of either a "foreign or international tribunal" or "any interested person.;" Intel Corp. v. Advanced Micro Devices; In re OXUS Gold PLC.

VII. Practical considerations and Conclusion

- A. Carefully choose the timing of your requests for production
- B. Make clients aware of steps that can be implemented, prior to the dispute, to reduce vulnerability to document production
- C. Draft document production requests defensively as well as offensively

cguibert@lalive.ch