CHAPTER 8

DOCUMENT PRODUCTION AND E-DISCOVERY IN INTERNATIONAL ARBITRATION

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I INTRODUCTION

Documentary evidence is essential for the resolution of disputes by parties in any arbitration or litigation in court. It can be stated "with some confidence that in relation to disputed facts, modern international arbitral tribunals accord greater weight to the contents of contemporary documents than to oral testimony given".[1]

The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") guarantees the parties' freedom to agree on the procedure in arbitration (including the procedure on document production), subject to the applicable mandatory rules, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate.[2]

The fundamental requirements for procedural fairness and justice ensure that parties are treated with equality and are given full (or at least reasonable) opportunity to present their cases respectively in the dispute.[3] It is settled law that parties to international arbitration are free to agree on what procedure, including the document production procedure, to be used in the proceedings subject only to the mandatory provisions of the *lex arbitri* and public policy of the place of arbitration[4].

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1 Nigel Blackaby, Constantine Partasides, Alan Redfern and Marin Hunter *Redfern and Hunter on International Arbitration* (5th ed, Oxford University Press, USA, 2009) at para 6.97.

2 Article 19 of the UNCITRAL Model Law on International Commercial Arbitration.

3 Ibid at art 18.

4 See Alastair Henderson "Lex Arbitri, Procedural Law and the Seat of Arbitration" (2014) 26 Singapore Academy of Law Journal 886-910.

Procedural flexibility is one of the advantages of international arbitration. It allows parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts. Only when the parties cannot agree the arbitral tribunal may step in "to tailor the conduct of the proceedings to the specific features of the case without being hindered by non-mandatory domestic rules dealing with the conduct of the proceedings, including any domestic rule on evidence."[5]

In the course of interpreting Article V(1)(d) of the New York Convention the courts have affirmed that "the parties can agree on a national procedural law or institutional rules to govern these matters, or can agree on their own rules independent of any system."[6]

The common law and the civil law approaches to document production or discovery (as it is called in court litigation in the US and Hong Kong) have different jurisprudential roots leading to the adoption of different procedures. The common law style of discovery that 'leaves no stone unturned' or requires the 'cards face up on the table', has been, and still is, influenced by the view that a discovery procedure requiring the parties (subject to necessary limitations) to inform and show each other relevant documents bearing on the issues in dispute can ensure that justice is done. It has been said[7] that "a party denied access to crucial documents in the control of the other side may in practice find it impossible to proceed". Discovery is therefore an important means for establishing a greater equality of arms between parties with unequal resources. The civil law approach to document production, on the other hand, is premised on the parties' respective burdens of proof of their allegations in a dispute.[8] The usual practice is for each party to produce the documents upon which it relies to establish its case; and only in an exceptional case, to ask for the production of specific documents which it believes to be the possession of the opposing party, and likely to assist its case.

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5 United Nations Commission on International Trade Law "UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration" (May 2012) <www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> at page 100 (Article 19, Introduction note 2).

6 United Nations Commission on International Trade Law "Updated Bibliography on the New York Convention" *1958 New York Convention Guide* <http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&provision=42417> at NYC Article V (1) (d), paragraph 11.

7 Chief Justice's Working Party on Civil Justice Reform "Civil Justice Reform Interim Report and Consultative Paper" (30 April 2002) <www.civiljustice.gov.hk/ir/documents/FullReport.pdf> at Paragraph 405.

8 See Michael E Schneider "A Civil Law Perspective: 'Forget e-discovery'" in David J Howell (ed) *Electric Disclosure in International Arbitration* (JurisNet LLC, Huntington, 2008) 13 at chapter 2.

To harmonize these different approaches, the 2010 IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") offer "an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions"; and "supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration".[9] These rules "are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and parties and arbitral tribunals are free to adapt them to the particular circumstances of each arbitration";[10] and they cover both paper documents and documents in electronic form as well as other forms of evidence (that are not dealt with in this paper).

This paper addresses two essential questions. First, as a matter of dispute resolution tactics in international arbitration what matters should be taken into consideration for parties and their counsel to tailor the appropriate document production procedure in the proceedings. Second, in what manner an arbitral tribunal should manage the document production procedure in a particular case.

In order to address these questions, a review of the document production or discovery procedures in both arbitration and litigation in the common law tradition in Hong Kong and also of those in the civil law tradition in Mainland China will be undertaken. It will be followed by a review of the relevant 'harmonization' measures in the IBA Rules. It is hoped that from these procedural experiences, an informed recommendation can be made to answer the questions identified in this paper.

Of course, international arbitration is not litigation in court. The statutory rules and procedures that govern civil court actions generally do not apply to arbitration. While it is widely accepted that with the IBA Rules, "the idea that there is a 'common law approach' and a 'civil law approach' to the practice of international arbitration is now outdated",[11] it seems that with the emerging practice of e-discovery adopted by courts across the world, the underlying principles of these varied procedural approaches to documentary evidence are still of relevant consideration by parties, their counsel and arbitral tribunal when formulating the appropriate procedure to meet the particular needs and circumstances of an international arbitration.

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9 International Bar Association *IBA Rules on the Taking of Evidence in International Arbitration* (International Bar Association, London, 2010) at Preamble 1.

10 Ibid at Preamble 2.

11 See Blackaby et al, above n 1 at paragraph 1.247.

II DOCUMENT PRODUCTION OR DISCOVERY PROCEDURES IN HONG KONG

By the enactment of the Arbitration Ordinance ("the Ordinance")[12] in 2011, Hong Kong has become a unitary Model Law regime for domestic and international arbitration.

When conducting arbitral proceedings or exercising its power under the Ordinance, an arbitral tribunal is required: (a) to treat the parties with equality;[13] (b) to be independent;[14] (c) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents;[15] and (d) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.[16]

Related to the production of document, the Ordinance provides that unless otherwise agreed by the parties, an arbitral tribunal has the power (a) to make an order directing the discovery of documents;[17] and (b) to direct a witness to attend before it to give evidence or to produce documents or other evidence[18] but such witness is not required to produce in arbitral proceedings any document or other evidence that the person could not be required to produce in civil proceedings before a court.[19] This is a mandatory provision in the Ordinance.

Section 47 of the Ordinance gives effect to article 19 of the Model Law. When conducting arbitral proceedings, an arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings.[20]

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12 Cap 609 of the laws of Hong Kong.

13 Ibid at s 46 (2); See Model Law, above n 2 at art 18.

14 See Cap 609, above n 12 at s 46 (3) (a).

15 See Cap 609, above n 12 at s 46 (3) (b).

16 See Cap 609, above n 12 at s 46 (3) (b).

17 See Cap 609, above n 12 at s 56 (1).

18 See Cap 609, above n 12 at s 56 (8) (c).

19 See Cap 609, above n 12 at s 56 (9).

20 See Cap 609, above n 12 at s 47 (3).

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures to preserve evidence that may be relevant and material to the resolution of the dispute.[21]

When a party fails, without showing sufficient cause, to comply with any order or direction of the arbitral tribunal, the tribunal may make a peremptory order to the same effect, prescribing the time for compliance with it that the arbitral tribunal considers appropriate.[22] If a party fails to comply with a peremptory order, the arbitral tribunal may (a) direct that the party is not entitled to rely on any allegation or material which was the subject matter of the peremptory order; (b) draw any adverse inferences that the circumstances may justify from the non-compliance; (c) make an award on the basis of any materials which have been properly provided to the arbitral tribunal; or (d) make any order that the arbitral tribunal thinks fit as to the payment of the costs of the arbitration incurred in consequence of the non-compliance.[23] Another provision in the discovery context is article 25(c) of the Model Law which is given effect to by s 53(1) of the Ordinance. It provides that unless otherwise agreed by the parties, if, without showing sufficient cause, any party fails to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Arbitration in Hong Kong may be ad hoc or institutional. It is common for parties to ad hoc arbitration to adopt the UNCITRAL Arbitration Rules which provide that each party shall have the burden of proving the facts relied on to support its claim or defence.[24] As a first step, the procedure laid under the UNCITRAL Rules requires all documents or other evidence relied upon by the parties respectively be accompanied with the statement of claim and the defence;[25] and empowers the arbitral tribunal to order for the production of other relevant documents that are in the possession of the opponent as it considers fit.[26]

The 2013 revised HKIAC Administered Arbitration Rules offers parties a choice for administered arbitration. Similar to the UNCITRAL Rules, under the revised

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21 See Cap 609, above n 12 at s 35(1) (d) giving effect to Article 17 of the Model Law.

22 See Cap 609, above n 12 at s 53 (3).

23 See Cap 609, above n 12 at s 53 (4).

24 Article 27(1) of the UNCITRAL Arbitration Rules (as revised in 2010).

25 Ibid at Articles 20(4) and 21(2).

26 Ibid at Article 27(3): "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 arbitral tribunal shall determine."

HKIAC Administered Rules, each party bears the burden of proof;[27] and documents on which parties respectively rely must be annexed to the statement of claim and the defence.[28] The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence;[29] and the arbitral tribunal may allow or require a party to produce documents or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome.[30]

The 2015 HKIAC Procedures for the Administration of International Arbitration that came into effect on 1 January 2015 apply to arbitrations where an agreement to arbitrate or a treaty providing for the protection of investments or investors either: (a) provides for these Procedures to apply; or (b) provides for arbitration under the UNCITRAL Rules administered by HKIAC or words to similar effect.[31]

While there is much anecdotal evidence that the IBA Rules have commonly applied in international arbitration seated in Hong Kong, available public information on their use is limited.

Discovery of documents in civil litigation in Hong Kong on the other hand is by mutual service of list of documents "relating to matters in question in the action", followed by inspection or provision of copies of the documents.[32] Under the Peruvian Guano test of relevance[33] that applies in Hong Kong, four classes of document are relevant for discovery: (1) the parties' own documents that a party relies upon in support of its contentions; (2) adverse documents that a party is aware and which to a material extent adversely affect its own case or support the opponent's case; (3) the documents that are relevant to the issues in the proceedings, but which do not fall into categories 1 or 2 because they do not obviously support or undermine either side's case;[34] and (4) the documents referred to by Brett LJ in the Peruvian

27 Article 22.1 of the 2013 HKIAC Administered Arbitration Rules.

28 Ibid at Articles 16.3 and 17.4.

29 Ibid at Article 22.2.

30 Ibid at Article 22.3.

31 Article 1.2 of the 2015 HKIAC Procedures for the Administration of International Arbitration.

32 Order 24 r. 1(1) of the Rules of the High Court, Cap 4A of the Laws of Hong Kong.

33 Derived from the oft-cited dicta of Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55.

34 "They are part of the "story" or background. The category includes documents which, though relevant, may not be necessary for the fair disposal of the case. It is fair to say that this category produces proportionately the greatest number of documents disclosed and to least effect." See Chief Justice's Working Party on Civil Justice Reform, above n 7 at paragraphs 408.

Guano case as the "train of inquiry documents". It is acknowledged that this test of relevance is too wide and is a major cause for delay and expenses in civil litigation. But parties may by agreement "dispense with or limit the discovery of documents which they would otherwise be required to make to each other".[35] The court may limit document discovery in managing a case for the objectives of cost effectiveness, procedural expediency, proportionality, procedural economy, and fairness between the parties.[36]

The court in one case[37] noted that the discovery of irrelevant e-documents by the plaintiffs has placed an excessive burden in time and cost on the party to whom discovery is given. In that case, the plaintiffs had already obtained 120,000 electronic documents from the defendants' group computer, including emails, but could not demonstrate how any of the emails related to their alleged conspiracy claim. The court considered the plaintiffs' request for electronic copies of all of the defendants' personal emails a "fishing expedition"; and rejected their e-discovery applications. In the judgment the court summarized the legal principles in making a specific order for discovery of paper as well as electronic documents as follows:

(1) A party seeking an order for discovery must make out a prima facie case that: (a) the specified document or class of documents exist; (b) the party against whom discovery is sought has or had the documents in his possession, custody or power; (c) the documents relate to a matter in question in the action; and (d) discovery is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Even if existence, possession etc. and relevancy were established, discovery would only still be granted if it was not necessary for fairly disposing of the cause or matter.

(3) The task of the court will often be to determine when "doing justice to the claim" stops and "fishing" starts. At that point the onerous nature of the discovery exercise passes from the necessary and permissible to the unnecessary and impermissible.

(4) The pleadings in an action define the issues to be tried. Discovery is not required of documents which relate to irrelevant allegations in pleadings which even if substantiated could not affect the result of the action. This is similar to the requirement for materiality to the outcome under the IBA Rule.

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35 See Rules of the High Court, above n 32 at Order 24 r. 1(2).

36 See Rules of the High Court, above n 32 at Order 24 r. 15A.

37 In *Chinacast Education Corporation & Others v Chan Ngon & Others* (HCA 1062/2012).

(5) In deciding whether to permit the discovery of any document, the court should always bear in mind the objectives of cost effectiveness, expeditious disposal of cases, proportionality, procedural economy and fairness between the parties.

(6) Whether a class of documents as a whole is relevant for discovery purposes must depend upon what information it is reasonable to suppose the documents of the class contain and whether such information may enable the plaintiffs to advance their own case or damage that of the defendant. It must be defined by reference to the plaintiffs' pleaded claim in its general sense, as distinct from its detailed exposition and by the defendants' pleaded defence in the sense of its general refutation of the plaintiffs' claim.

(7) For e-discovery applications, the court should in addition bear in mind that: (a) e-discovery requests must not be oppressive and must be necessary for a fair trial or saving costs; (b) the scope of e-discovery depends on issues at trial; discovery should be limited to what is relevant and necessary; courts should discourage "satellite" litigation and propose a proportionality test as to costs and the importance of documents; (c) a party who fails to cooperate with the other side and to comply with court orders for discovery has to pay extra costs that the other party has incurred in order to gain access to the electronic documents; (d) the courts have, increasingly, limited discovery in the context of actively managing cases; (e) costs should be limited as far as possible; a "staged" approach can be adopted for appropriate cases; (f) in the case of a dispute over privileged documents, a special committee can be set up by the court to handle issues of sorting out privileged material from a storage of e-information; and (g) duplication of documents must be avoided; a party who fails to carry out de-duplication may be ordered to pay costs.

Practice Direction SL1.2 on the pilot scheme for discovery and provision of electronically stored documents was introduced by the Hong Kong Judiciary on 1 September 2014.[38] It provides a framework for reasonable, proportionate and economical discovery and supply of electronic documents including any data or information held in electronic form and metadata.

38 Practice Direction – SL1.2, Directions Made by the Judge in Charge of the Commercial List Pursuant to Order 72, R 2(3) of the Rules of the High Court, Pilot Scheme for Discovery and Provision of Electronically Stored Documents in Cases in the Commercial List <http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PDSL1.2.htm&lang=EN>.

III DOCUMENT PRODUCTION PROCEDURES IN THE PEOPLE'S REPUBLIC OF CHINA

Under the Arbitration Law of the PRC that came into effect on 1 September 1995 arbitration is on the basis of the free will of the parties and their arbitration agreement.[39] The law provides that each party must submit evidence in support of its claim or defence;[40] and the arbitration tribunal may, as it considers necessary, collect evidence on its own. A party may apply to the relevant court for an order for preservation of the evidence where the evidence may be destroyed or lost or difficult to obtain.[41]

Special provisions apply for arbitration involving foreign elements.[42] Foreign-related arbitration rules may be formulated by the China Chamber of International Commerce in accordance with the Arbitration Law and the relevant provisions of the Civil Procedure Law of the PRC.[43] The CIETAC Arbitration Rules that came into effect on 1 January 2015 apply (a) international or foreign-related disputes; (b) disputes related to the Hong Kong SAR, the Macao SAR and the Taiwan region; and (c) domestic disputes.[44] These Rules provide among other things that parties shall proceed with the arbitration in good faith.[45] They reaffirm the principle that each party shall bear the burden of proving the facts on which it relies to support its claim, defense or counterclaim.[46] If a party bearing the burden of proof fails to produce evidence within the specified time period, or if the produced evidence is not sufficient to support its claim or counterclaim, it shall bear the consequences thereof.[47] A claimant must attach to its request for arbitration the documentary and other evidence on which its claim is based[48] and the respondent must include in its statement of defence the relevant documentary and other evidence on which it relies.[49]

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39 Article 4 of the Arbitration Law of the PRC.

40 Ibid at art 43.

41 Ibid at art 46.

42 Ibid at Chapter VII.

43 Article 73 of the Civil Procedure Law of the PRC.

44 Article 3 of the CIETAC Arbitration Rules.

45 Ibid at art 9.

46 Ibid at art 41(1).

47 Ibid at art 41(3).

48 Ibid at art 12(2).

49 Ibid at art 15(2).

There are special provisions for arbitration cases accepted and administered by the CIETAC Hong Kong Arbitration Center,[50] in particular, that "unless otherwise agreed by the parties, for an arbitration administered by the CIETAC Hong Kong Arbitration Center, the place of arbitration shall be Hong Kong, the law applicable to the arbitral proceedings shall be the arbitration law of Hong Kong, and the arbitral award shall be a Hong Kong award.[51]

The CIETAC Guidelines on Evidence that came into effect on 1 March 2015 were published by CIETAC with appropriate reference to the IBA Rules and those of the Chinese principles of evidence in civil litigation that are suitable for use in arbitration. The application of the Guidelines is presumably to be more appropriate in an arbitration the seat of which is in Mainland China and where the Arbitration Law of the PRC is applicable to the arbitration procedure. Parties may agree to adopt the Guidelines in whole or in part, or they may agree to vary them or for reference only.

Consistent with the provisions in the Arbitration Law of the PRC, the Guidelines provide that each party bears the burden of proving the facts that it alleges.[52] A party must disclose and submit to the tribunal and to the other party all evidence on which it relies.[53] Documentary evidence includes "documents in printed and hand-written form, documentary evidence includes electronic data (eg electronic documents, e-mails) and any other readable evidence in an electronic form".[54] The Guidelines clarify that "unless otherwise agreed by the parties or determined by the tribunal after consultation with the parties, when submitting a document that originates in a jurisdiction outside Mainland China, notarization and certification of that document is not required".[55]

Following the practice of the IBA Rules, a party may request the tribunal to order the other party to produce a specific document or a narrow and specific category of documents (the "RFP").[56] Similar to the Redfern Schedule,[57] the requesting party must state in the RFP the reasons for its request, identify in sufficient detail the

50 Ibid at Chapter VI.

51 Ibid at art 74.

52 Article 1.1 of the CIETAC Guidelines on Evidence.

53 Ibid at art 4.

54 Ibid at art 6.

55 Ibid at art 6.3.

56 Ibid at art 7.1.

57 Described in detail below.

requested document(s), and explain the relevance and materiality of the requested document(s). The tribunal shall invite the other party to comment on the RFP. Where the other party does not object to the RFP, the relevant document(s) shall be produced. Where the other party objects, the tribunal shall decide whether or not to grant the RFP. At the request of the other party, the tribunal may dismiss a RFP for any of the following reasons: (1) the document(s) requested lacks sufficient relevance to the case or materiality to its outcome; (2) production of the document(s) may result in violation of the applicable laws or professional ethics; (3) production of the document(s) may imposes an unreasonable burden on the producing party; (4) the requested document(s) is not in the possession, custody or control of the producing party, or is likely to have been lost or destroyed; (5) production of the document(s) may result in the divulgence of state secrets, trade secrets or technological secrets; and (6) considerations of procedural economy, fairness or equality of the parties.[58] Where a party refuses, without justifiable reasons, to produce the document(s) pursuant to a RFP ordered by the tribunal, the tribunal may draw adverse inferences against the party refusing to produce the document(s).[59]

During the arbitration proceedings, the tribunal may, on its own initiative, require a party to produce any evidence that the tribunal considers necessary. The tribunal shall ensure that the other party has an opportunity to comment on the evidence produced.[60]

At the request of a party and where it is necessary and feasible, the tribunal may itself collect evidence related to the dispute; and the evidence collected by the tribunal shall be forwarded to the parties for their comments.[61] A party may apply to a court of law for the preservation of evidence in accordance with the applicable law;[62] and the tribunal may order the preservation of evidence if the applicable law so permits.[63] The submission and exchange of evidence shall in principle be completed before the oral hearing on the merits; and the tribunal may to refuse to admit evidence submitted after the expiry of the stipulated time period for submission and exchange[64] thereby avoiding trial by ambush.

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58 See CIETAC Guidelines on Evidence, above n 52 at art 7.3.

59 See CIETAC Guidelines on Evidence, above n 52 at art 23.

60 See CIETAC Guidelines on Evidence, above n 52 at art 11.1.

61 See CIETAC Guidelines on Evidence, above n 52 at art 11.2.

62 See CIETAC Guidelines on Evidence, above n 52 at art 12.1.

63 See CIETAC Guidelines on Evidence, above n 52 at art 12.2.

64 See CIETAC Guidelines on Evidence, above n 52 at art 5.1.

The tribunal, in its sole discretion, shall determine the admissibility, relevance, materiality and weight of evidence.[65] The tribunal may, pursuant to rules on the privilege it considers appropriate, decide not to admit certain evidence, particularly confidential communications between a lawyer and his/her client and evidence related to settlement negotiations between the parties.[66]

Evidence adduced and information disclosed only in the course of mediation proceedings shall not be admissible in the arbitration, and shall not be permitted to form the basis for the arbitral award.[67] This provision could facilitate mediation if parties so choose in the course of the arbitral proceedings, known to be a common practice in Mainland China. For disputed documents in respect of which there is no original, the tribunal may, taking into account other evidence, the parties' submissions and the circumstances of the entire case, determine such evidence be admissible.[68]

Where conflicting evidence has been adduced by the parties in respect of a particular fact, the tribunal may make a determination of the fact pursuant to the principle of the preponderance of evidence;[69] and the tribunal shall make a finding of fraud only if clear and convincing evidence exists to support the fact.[70]

The Civil Procedure Law of the PRC recognizes that parties in civil litigation have equal litigation rights.[71] It is the duty of a party to an action to provide evidence in support of his allegations.[72] Common with the civil law inquisitorial tradition, if, for objective reasons, a party is unable to collect the evidence by itself or if the court considers the evidence necessary for the trial of the case, the court shall investigate and collect it. To ensure the authenticity of documentary evidence, it is provided that any document submitted as evidence must be the original.[73] If a document in a foreign language is submitted as evidence, a Chinese translation must be appended. The court shall verify audio-visual materials (including electronic documents) and determine after their examination in the light of other evidence in the case whether

65 See CIETAC Guidelines on Evidence, above n 52 at art 18.

66 See CIETAC Guidelines on Evidence, above n 52 at art 19.1.

67 See CIETAC Guidelines on Evidence, above n 52 at art 19.2.

68 See CIETAC Guidelines on Evidence, above n 52 at art 20.

69 See CIETAC Guidelines on Evidence, above n 52 at art 24.1.

70 See CIETAC Guidelines on Evidence, above n 52 at art 24.2.

71 See Civil Procedure Law of the PRC, above n 43 at art 8.

72 See Civil Procedure Law of the PRC, above n 43 at art 64.

73 See Civil Procedure Law of the PRC, above n 43 at art 68.

they can be taken as a basis for ascertaining the facts.[74] There are provisions governing the production documentary evidence in electronic form.[75]

The Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC (the "Interpretation") that came into force on February 4, 2015 provides specifically a party may make a RFP 'where the documentary evidence is under the control of the opposite party' requesting the court to order the opposite party to submit it before the expiry of the time limit for adducing evidence;[76] and where the grounds for the application for a RFP are tenable, the court shall order the opposite party to submit. It is also provided that the expenses arising from the submission of documentary evidence shall be borne by the applicant. Where the opposite party refuses to submit without justified reason, the court may identify that the contents of the documentary evidence adduced by the applicant are true. It is also provided in the Interpretation that a party shall provide evidence to prove the facts on which his claims are based or to repudiate the facts on which the claims of the opposing party are based, unless it is otherwise prescribed by any law.[77] Where a party fails to provide evidence or the evidence provided is insufficient to support his claims before a judgment is entered, the party bearing the burden of proof shall take the adverse consequences. For evidence which a party and its litigation representative are unable to collect for some objective reasons, the Interpretation provides that the party may apply in writing to the court for investigation and collection before the expiration of the evidence-production period.[78] There is criminal sanction of a fine or detention for the destruction of documentary evidence for the purpose of impeding the use by the opposite party under the Civil Procedure Law of the PRC.[79]

IV DOCUMENT PRODUCTION PROCEDURE UNDER THE IBA RULES

Parties and tribunals may adopt the IBA Rules in whole or in part, to govern the arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures, or to adapt them to the particular circumstances of

74 See Civil Procedure Law of the PRC, above n 43 at art 69.

75 Article 116 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC.

76 Ibid at art 112.

77 Ibid at art 90.

78 Ibid at art 94.

79 Ibid at art 113.

an arbitration.[80] There is a requirement for each party to "act in good faith and be entitled to know, reasonably in advance of any evidential hearing or any fact or merits determination, the evidence on which the other parties rely".[81]

The IBA Rules adopt a "meet and consult" approach. Article 2.1 provides for a mandatory consultation between the arbitral tribunal and the parties "at the earliest appropriate time in the proceedings with a view to agreeing on an efficient, economical and fair process for the taking of evidence, such as the requirements, procedure and format (ie paper or electronic) applicable to the production of documents.

The IBA Rules begin with the principle that each party shall produce the documents on which it relies.[82] Document is defined to mean "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", i.e. either paper or electronic document.

A typical example of the document production procedure under the IBA Rules is in the following terms:[83] (1) Articles 3 and 9 of the IBA Rules may guide the tribunal and the parties regarding document production in this case; (2) Every request for production of documents shall precisely identify each document, or category of documents, sought and establish its relevance and materiality to the outcome of the case. Such a request shall not be copied to the tribunal; (3) Each Party shall state in writing its responses or objections to the requested documents with reference to the objections listed in Article 9(2) of the IBA Rules. The requesting Party shall file its comments in writing on any response or objection made to document requests with respect to any outstanding disputes relating to such requests with the tribunal, with a copy to the other Party (in both Word and PDF formats); and (4) The request, responses or objections to the request, the reply to the responses or objections to the request, and the tribunal's decisions shall be recorded in a joint schedule in the form of the Redfern Schedule.[84]

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80 See IBA Rules on the Taking of Evidence in International Arbitration 2010, above n 9 at Preamble 2.

81 See IBA Rules on the Taking of Evidence in International Arbitration 2010, above n 9 at Preamble 2.

82 See IBA Rules on the Taking of Evidence in International Arbitration 2010, above n 9 at art 3.1.

83 See Procedural Order No 1 dated 22 August 2013 in *The Renco Group, Inc v Republic of Peru* (UNCT/13/1) <www.italaw.com/sites/default/files/case-documents/italaw5006.pdf>

84 Typically, a 6-column document request schedule, namely: (i) reference number, (ii) documents or category of documents requested, (iii) relevance and materiality according to requesting party (with

Based on the guidance from the IBA Rules, an ICSID tribunal set out the applicable standards for document production as follows: the tribunal will rule on the parties' requests taking into account (i) the prima facie relevance of the request (which includes the relevance to the dispute and materiality to the outcome); (ii) the specificity of the request, (iii) whether the requested documents are likely to exist and to be within the possession, custody or control of the requested party; and (iv) any counterbalancing considerations, such as legal privileges, confidentiality, and the burden which production would impose on the requested Party.[85]

Article 3.3 provides a RFP must contain: (a) (i) a description of each 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; in the case of documents maintained in electronic form, the requesting party may, or the tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner; (b) a statement as to how the documents requested are relevant to the case and material to its outcome; and (c) (i) a statement that the documents requested are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents, and (ii) a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party.

Article 3.5 provides if the party to whom the RFP is addressed has an objection to some or all of the documents requested, it shall state the objection in writing to the tribunal and the other parties within the time stipulated. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3. Under Article 9.2 document production may be refused due to: (a) lack of sufficient relevance to the case or materiality to its outcome; (b) legal impediment or privilege under the legal or ethical rules determined by the tribunal to be applicable; (c) unreasonable burden to produce the requested evidence; (d) loss or destruction of the document that has been shown with reasonable likelihood to have occurred; (e) grounds of commercial or technical confidentiality that the 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 tribunal determines to be

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reference to pleadings, exhibits, statements or reports etc.), (iv) responses/objections to document requests, (v) replies to objections to document requests, and (vi) tribunal's decisions.

85 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40), Procedural Order No 18 dated 6 July 2015.

compelling; or (g) considerations of procedural economy, proportionality, fairness or equality of the parties that the tribunal determines to be compelling.

Article 9.4 provides that the tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

The tribunal may draw adverse inference if a party fails to produce any document ordered to be produced;[86] and may in addition impose a cost sanction if a party has failed to conduct itself in good faith in the taking of evidence.[87]

In the 2012 International Arbitration Survey by Queen Mary University of London it shows the IBA Rules are used in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules. Interviewees explained that they prefer adopting the IBA Rules as guidelines as it provides for more flexibility. On document production, despite the differing traditional approaches to document production in civil and common law systems, the survey reveals that 70% of respondents believe that Article 3 of the IBA Rules requiring only documents relevant to the case and material to its outcome be produced should be the applicable standard in international arbitration.

It should be pointed out that the IBA Rules encompasses the production of electronic documents. The CIArb Protocol for E-Disclosure in Arbitration issued by the Chartered Institute of Arbitrators in October 2008, for instance, serves (i) to encourage early consideration of disclosure of documents in electronic form; (ii) to focus the parties and the arbitrator on issues relating to the production of electronic document; and (iii) to address these issues by allowing parties to adopt the Protocol. The Protocol provides for early consideration of these issues, such as what types of electronic documents each party possesses, what preservation steps should be undertaken, what rules should apply to the scope and extent of their production, whether the parties may wish to agree on limits such as categories of data, date ranges or identified custodians, and search terms, whether any special arrangements regarding privilege issues should be reached, and whether professional guidance on information technology issues should be sought.

V RECOMMENDATIONS

First of all, 'know your case'. This principle is often easier said than done, particularly with large corporations operating globally. In the well-known patent

86 See IBA Rules on the Taking of Evidence in International Arbitration 2010, above n 9 at art 9.5.

87 See IBA Rules on the Taking of Evidence in International Arbitration 2010, above n 9 at art 9.7.

case,[88] an entire group of relevant and material emails was omitted in the extensive discovery procedures undertaken; and such omission was only emerged when a witness was cross-examined at the trial of the case.

Secondly, there must be no 'fishing expedition' in the hope of turning mere speculation into evidence in support of the alleged case as illustrated by the Hong Kong case referred above. Parties must act in good faith.

Thirdly, no production of documents by the opponent[89] could, in an appropriate case, be a realistic option where documentary evidence is not necessary to support a contention. A good example is contractual interpretation. It is settled under the English law, for instance, that subjective intention of the parties and pre-contractual negotiations are irrelevant to determining the objective intention of the parties as expressed in the terms of a concluded contract. In such a case, it is unnecessary to secure to production of the record of the related pre-contract negotiations between the parties.

Fourthly, tailor-made the document production procedure in a realistic matter by parties in consultation with their legal counsel (when the amount at stake or the complexity of the case justify the engagement of legal counsel) and come up with a procedural agreement with the other parties either before or in the course of the proceedings in a timely manner. The IBA Rules can be adopted or modified. Appropriate modifications to the IBA Rules should be considered, such as no production of internal board meeting minutes be required; or no recovery of deleted data and the restoration of back-up tapes be required, if production of electronic documents is anticipated. These recovery and restoration are usually unreasonably burdensome.

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88 *Qualicomm Incorporated v Broadcom Corporation* US Dist. Ct. Southern Dist. Of California (Case No 05cv1958-B (BLM)): "The fundamental problem in this case was an incredible breakdown in communication. The lack of meaningful communication permeated all of the relationships (amongst Qualcomm employees (including between Qualcomm engineers and in-house legal staff), between Qualcomm employees and outside legal counsel, and amongst outside counsel) and contributed to all of the other failures. The Court was not presented with any evidence establishing that either in-house lawyers or outside counsel met in person with the appropriate Qualcomm engineers (those who were likely to have been involved in the conduct at issue and who were likely to be witnesses) at the beginning of the case to explain the legal issues and discuss appropriate document collection. Moreover, outside counsel did not obtain sufficient information from any source to understand how Qualcomm's computer system is organized: where emails are stored, how often and to what location laptops and personal computers are backed up, whether, when and under what circumstances data from laptops are copied into repositories, what type of information is contained within the various databases and repositories, what records are maintained regarding the search for, and collection of, documents for litigation, etc. …These fundamental failures led to the discovery violations." per Barbara L Major, US Magistrate Judge.

89 See Joerg Risse "Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings" (2013) 29 (3) The Journal of the London Court of International Arbitration 453-466.

Fifthly, consider to apply evidence preservation order in a timely manner if necessary. There are usually specific provisions on evidence preservation to cater for such a need by a party in arbitration.

Sixthly, mediate or settle the arbitration dispute whenever it is appropriate to do so.

The above principles are relevant for consideration by parties and their counsel in formulating a strategy for document production procedure in an international arbitration proceedings.

When managing the document production process, due regard must be given by an arbitral tribunal to procedural fairness, equality in treatment of the parties, procedural efficiency, cost-effectiveness and justice. Regard must always be given to the mandatory provisions relevant to the proceedings. For instance section 56(9) of the Ordinance highlighted above that might not be on all fours with article 9.2 of the IBA Rules.

Over-lawyering and the use of guerrilla tactics in arbitration procedures by parties in some cases might often pose procedural difficulties to arbitral tribunals. Challenges to arbitrators for either refusing or allowing a party's RFP are not uncommon. [90] The IBA Rules certainly offer yardsticks of widely accepted principles and practices by international arbitration community that may guide the exercise of arbitral discretion in a proper manner.

Today, electronic communications have played a dominant role not just in social but also business dealings. It is inevitable that contemporaneous electronic documents can be relevant and material to the determination of disputed facts in an arbitration. But leading arbitration institutions, like the ICC, have cautioned that "the advent of electronic documents should not lead to any expansion of the traditional and prevailing approach to document production".[91]

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90 See, for example, *Jung Science Information Technology Co Ltd v ZTE Corpor*ation (HCCT 14/2008)] where an arbitrator was challenged, among other grounds, for refusing to allow a request for production of certain category of documents that the other party had already denied its existence.

91 See International Chamber of Commerce *ICC Commission Report-Managing E-document Production* (International Chamber of Commerce, Paris, 2012) at page 2. It adds that "request for the production of electronic documents, like requests for the production of paper documents – to the extent they are deemed necessary and appropriate in any given arbitration – should remain limited, tailored to the specific circumstances of the case subject to the general document production principles of specificity, relevance, materiality and proportionality." This Report contains "a primer on electronic documents" at Appendix I.