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Beyond Good Will
—
Enforcing Document Production
From Parties to an
International Commercial
Arbitration

Master thesis
20 points

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Dispute Resolution

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Summary

Documentary evidence is crucial in most arbitration cases. Increasingly, parties are facing the problem of how to compel or induce their adversaries to produce documents exclusively possessed by the latter. Courts possess the power to enforce their orders for the production of such documents. For arbitral tribunals, lacking *imperium* or means of coercion, there are real doubts as to the enforceability of cross-border document production orders.

This thesis identifies the three most viable methods for such enforcement. Firstly, enforcement via national law. Generally, national arbitration law provide for enforcement of document production orders from a tribunal seated within the country. In some jurisdictions, enforcement mechanisms are provided also when the arbitral tribunal is seated in a foreign state. An increasing number of jurisdictions are in national arbitration legislation opening up for such court enforcement of cross-border documentary orders. Secondly, enforcement via adverse inferences. This is the most frequently cited and, as anecdotal evidence has it, most commonly used method of enforcement: the tribunal drawing or posing the threat of drawing adverse inferences from the party's failure to produce certain documents. Thirdly, the New York Convention has lent itself to enforcement in at least one case.

These enforcement methods will be researched, using classical legal method. In an attempt to give advice as to which method is better, they will be compared. The latter analysis is done in relation to two parameters: efficiency and due process. The thesis concludes that all three methods may be useful, however in different factual circumstances.

Sammanfattning

Bevisning i form av dokument är avgörande i många skiljeförfaranden. I allt större utsträckning stöter parter på problem då de försöker framtvunga bevisning i form av dokument av sin motpart, i fall då det bara är den senare som har tillgång till dem. Domstolar har statens tvångsapparat till sitt förfogande för att verkställa denna typ av editionsförelägganden. När det gäller skiljetribunaler, föreligger verkliga tvivel angående möjligheten till verkställning av internationella editionsförelägganden.

Den här uppsatsen identifierar de tre metoder som ger störst möjligheter till verkställighet. Den första är verkställighet via nationell rätt. I allmänhet ger nationella lagar om skiljeförfarande möjlighet till verkställighet av editionsförelägganden som givits av en tribunal med sitt säte inom landet i fråga. I vissa jurisdiktioner ges möjlighet till sådan verkställighet också när tribunalen har sitt säte utanför landets gränser. Fler och fler jurisdiktioner öppnar upp för verkställighet av editionsförelägganden givna av en tribunal med sitt säte utomlands. Den andra undersökta metoden är att tillmäta icke-produktion negativ bevisverkan. Detta är den metod som är oftast hänvisad till i litteratur och kommentarer och den utgör, hävdas det, den mest använda metoden för verkställighet. Den tredje metoden består i att använda den så kallade New York konventionen, vilken har varit till hjälp i åtminstone ett verkställighetsfall av den här typen.

These enforcement methods will be researched, using classical legal method. In an attempt to give advice as to which method is better, they will be compared. The latter analysis is done in relation to two parameters: efficiency and due process. The thesis concludes that all three methods may be useful, however in different factual circumstances.

Dessa verkställighetsmetoder kommer att bli undersökta. Jag kommer då använda klassisk juridisk metod. I ett försök att ge råd angående vilken metod som är den bättre, kommer de jämföras. Denna senare analys görs i relation till två parametrar: effektivitet och rättssäkerhet¹

¹ Rättssäkerhet är inte en adekvat översättning av det anglosaxiska due process. Begreppen har skild historia och implicerar olika värden. Båda anspelar dock på skyddet för individen i rättsskipningen, varför begreppet rättssäkerhet har valts som översättning.

Preface

I would like to express my gratitude to arbitrator and Professor Henri Alvarez and arbitration lawyer and Professor Tina Cicchetti. The two teach arbitration law at the University of British Columbia. During their lessons, my interest in the subject was born, and with their encouragement, it has grown.

I would like to thank all the great people at the Hong Kong International Arbitration Centre (HKIAC), where I did my internship. Especially, I would like to thank Christopher To, Secretary General of the HKIAC, who guided me in arbitration and in writing. Further, Dennis Cai of the HKIAC, for advising me on the inner workings of Hong Kong and Chinese arbitration law.

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Lastly, my appreciation goes to my thesis supervisor Peter Westberg, Professor at the University of Lund, for his very valuable guidance.

Abbreviations

AAA	American Arbitration Association
APRAG	Asia-Pacific Regional Arbitration Group
FIDIC	International Federation of Consulting Engineers
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Chamber of Commerce Arbitration
LCIA	London Court of International Arbitration
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
SCC	Stockholm Chamber of Commerce

1 Introduction

Documentary evidence is of major importance to the outcome of almost every commercial dispute², and arbitrators nearly invariably place the greatest weight on documents – letters, memoranda and so forth.³ Producing relevant documents to the arbitral tribunal is therefore of the utmost importance to parties. Where a party is in exclusive possession of documents which might prove to be unfavorable to his case and the other party wishes to rely on these documents, problems may arise.⁴ Parties in arbitral proceedings are increasingly required to address situations where their adversaries have failed to produce certain key documents of evidence.⁵

Courts generally provide a party with a mechanism for obtaining key relevant documents from the other party.⁶ This is not true for international arbitration, where enforceability of cross-border documentary orders is uncertain.⁷ This thesis studies and compares the three most viable methods of enforcement available.

There is constant pressure on the international arbitration community to make arbitration more efficient.⁸ This has been pronounced recently in two major reports⁹. Efficiency is paramount in serving the customers of arbitration. However, customers do not want ever so efficient execution of unfair rulings. Efficiency and due process are therefore very important parameters in gauging the usefulness of enforcement measures.

² Brocker, *Discovery in International Arbitration...*, p. 19.

³ Hunter, *Modern Trends...*, p. 211.

⁴ Brocker, *Discovery in International Arbitration...*, p. 19.

⁵ Griffin, *Recent Trends...*, p. 19.

⁶ Webster, *Obtaining Documents from Adverse Parties...*, p. 41.

⁷ Webster, *Obtaining Documents from Adverse Parties...*, p. 41.

⁸ Hunter, *Modern Trends...*, p. 212.

⁹ The Report of the ICC Task Force on Reducing Time and Cost in Arbitration and the University of London/PriceWaterHouseCoopers research report published by Mistelis as *International arbitration - Corporate attitudes and practices. 12 perceptions tested: Myths, data and analysis*, 2006 and the report of the ICC Task Force on Reducing Time and Cost in International Arbitration: ICC Publication 843, *Techniques for Controlling Time and Costs in Arbitration*, 2007.

2 Problem

This thesis seeks to answer three questions:

- 1) What viable methods are there for cross-border enforcement of document production orders in international commercial arbitration?
- 2) How do those methods operate?
- 3) How useful are those methods by the parameters of efficiency and due process?

3 Preceding Research

The issue of what methods for enforcement an arbitrator can use or a party can call for, remains relatively uncharted by legal scholars.¹⁰ In this thesis three methods are being studied and compared by the parameters of efficiency and due process. Preceding research has studied each method in its own right. Rarely have methods been compared in earlier research.¹¹

3.1 National Arbitration Law

There is little written on the legal situation regarding court enforcement of cross-border document production orders. This is true for several big trading nations. Even regarding jurisdictions of major arbitration venues, commentary is sparse.¹² This is probably due to two circumstances. Firstly, according to the international paradigm, set by the UNCITRAL Model Law, there is no such thing as enforcement of cross-border procedural orders. Generally, there seems to be a lack of awareness of the fact that several countries now have amended their arbitration laws to provide for cross-border enforcement. In many cases, authors writing on their home jurisdiction's opening up or potential opening up for cross-border enforcement, characterize it as a rather unique phenomenon. This paper concludes, however, that even though the UNCITRAL Model Law still does not provide for it, cross-border enforcement mechanisms in national arbitration laws are not all that rare anymore. Indeed, amending the Model Law in this direction has been suggested by an eminent commentator on the subject.¹³ Secondly, the enforcement route via national courts is not popular within the arbitration community as it is seen as an impediment to efficiency.¹⁴

¹⁰ O'Neill, *The Power of Arbitrators...*, p. 62.

¹¹ Rogers, in *Improving Procedure...*, has comparative elements in his brief analysis. He concludes that he prefers adverse inferences. However, he includes neither national law nor the New York Convention in his analysis. Instead, his analysis is based on the following methods: 1) Self-help, meaning that if one party refuses to produce, the other could do the same in retaliation; 2) Adverse Inferences; 3) Shift the burden of proof to the party with access to the evidence. This is, as Rogers acknowledges, a harsh version of adverse inferences, and 4) Striking out a claim.

¹² There may be more to find in the respective languages. Research for this thesis has for the most part been limited to English language sources.

¹³ Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, p. 229-230.

¹⁴ This contention is based on anecdotal evidence, backed up by the lack of court cases on the issue.

3.2 Adverse Inferences

As regards adverse inferences, they are very often referred to in scholarly articles and books.¹⁵ Several sets of arbitration rules as well as the IBA Rules on the Taking of Evidence in International Commercial Arbitration endorse the use of adverse inferences. It seems to be the means of enforcement most trusted in the international arbitration community of today.¹⁶ However, preceding research generally offers little guidance as to the application of inferences. An exception is Sharpe's 2006 systematization of cases from the Iran-U.S. tribunal dealing with the issue.¹⁷

3.3 The New York Convention

The New York Convention has offered assistance in at least one case; *Publicis*. The case has been dealt with by commentators, significantly Webster¹⁸ and Branson¹⁹. Webster's analyses of the *Publicis* case and of *Resorts*, a case where enforcement under similar but distinct circumstances was denied, have been of great value in researching this thesis.

¹⁵ Indeed, Sharpe writes that "commentators... reflexively cite arbitrators' power to draw adverse inferences", *Drawing Adverse Inferences...*, 2006.

¹⁶ It could be argued that adverse inferences are not an enforcement mechanism *strictu sensu*. Adverse inferences operates as an inducement for the non-compliant party to produce or as or, lacking production, a principle of evidence law ensuring that the requesting party is not fatally disadvantaged by its adversary's refusal to produce. In wide and pragmatic terms, it is thus operates as an enforcement mechanism.

¹⁷ Sharpe, *Drawing Adverse Inferences...*

¹⁸ Webster, *Obtaining Documents...*

¹⁹ Branson, *The Enforcement of Interim Measures...*

4 Materials and Method

This thesis is based on comparative law, international instruments and arbitration theory and practice. Commentary published in international law journals have been of great value in researching this thesis.

Available enforcement methods are researched, using classic legal method. In an effort to give advice on which method is the better one, they are compared. The latter analysis is based on two parameters: efficiency and due process.

4.1 Efficiency

Efficiency is for present purposes defined as: Obtaining the desired result with relatively little time and cost spent on enforcement measures and/or proceedings.

There are two types of efficiency, both relevant for gauging the usefulness of modes of enforcement. Those are efficiency pertaining to the desired result, that is: how efficient is a particular method at actually producing the documents wanted? The other type of efficiency may be referred to as cost-efficiency; this concept conveys how economical a certain method of enforcement is: at what cost can the wanted documents be obtained? The reader is throughout the paper informed of what type of efficiency is dealt with. The concepts are seen as two aspects of a general issue; efficiency, and are therefore analyzed in conjunction.

The ICC recently published the work of its Task Force on Reducing Time and Cost in Arbitration, highlighting the importance of efficiency in arbitration.²⁰ The University of London in 2006 published its empirical study on corporate attitudes and practices in international arbitration. Time and cost were the two top disadvantages of arbitration cited by respondents.²¹

The efficiency of international arbitration as compared to transnational litigation used to be heralded as one of its great advantages. In the University of London report, this perception is declared a “myth”. It is concluded that for small to medium size cases, international arbitration is now “at least as expensive” as transnational litigation and “with proceedings increasingly simulating court proceedings in the length of time it takes to complete an arbitration case [time consumption] is now perceived as a

²⁰ ICC Publication 843, *Techniques for Controlling Time and Costs in Arbitration*, 2007.

²¹ Mistelis; *Corporate Attitudes...*, p. 15: “Eighty online respondents answered the question on what was the most important disadvantage of arbitration. Fifty percent of them (40 respondents) ranked expense (cost) as the most important disadvantage of international arbitration. Time is ranked the most important disadvantage by 14 respondents...”

disadvantage.²² At recent conferences, topics such as “The Management of Costs in Arbitration”,²³ and “Controlling Cost and reducing Delay”²⁴ have been popular and sparked debate. Arbitration is a business, and there is much pressure on this business sector to improve efficiency in order to keep its premier position in relation to its state funded competitor; litigation.²⁵

It is beyond the scope of this paper to explain the increased time and cost in international arbitration. However, it is of relevance for the present study that dilatory tactics and methods for trying to obstruct the arbitration process have become more frequent.²⁶ Refusing to produce ordered documents is an example of such tactics and methods. Abusing enforcement proceedings in order to stall a process would be another.

Arbitrators almost invariably place the greatest reliance on documentary evidence.²⁷ Arbitral institutions launch fast-track procedures where oral examinations and even hearings in their entirety are weeded out and documentary evidence is emphasised.²⁸ Reliance on documents does improve efficiency, if documents are readily available for the tribunal. Efficient methods for obtaining documents are thus key.

4.2 Due Process

Due process is for present purposes defined as:

“[T]hose basic legal elements which are necessary for the proceedings to qualify as arbitration and for the decision to be classified as an enforceable title of execution.”²⁹

The “basic legal elements” referred to are such fundamentals as equal treatment of the parties and the opportunity to present one’s case. Attempts have been made to identify those principles as a general notion of procedural fairness, good faith³⁰, or, the term chosen for this thesis; “due process”.³¹ “Due” refers to compatibility with a specific national procedural law or set of rules, such as institutional rules. “Process” refers to

²² University of London and PriceWaterHouseCooper’s jointly published leaflet on the study, *International Arbitration: Corporate Attitudes and Practices 2006*, p.7

²³ A hot topic at the APRAG Conference, 3-5 December 2006, Four Seasons Hotel, Hong Kong. The session was moderated by Kim Rooney.

²⁴ Panel debate at the conference “International Arbitration as an Effective Risk Management Tool, London, 19 April, Mandarin Oriental Hyde Park Hotel, London.

²⁵ For a very interesting account of the rise of this rather unique business sector, see Dezalay and Garth, *Dealing in Virtue*.

²⁶ Magnusson; *Fast Track Arbitration...*, p. 1.

²⁷ Hunter, *Modern Trends...*, p. 211.

²⁸ An example of this is the LMAA’s Small Claims Procedure of 2002. Its article 5(g) states: “There shall be no hearing unless, in exceptional circumstances, the arbitrator requires this”.

²⁹ Kurkela, *Due Process in Arbitration...*, p. 224-225.

³⁰ Veeder, *The Lawyer’s Duty to Arbitrate in Good Faith*.

³¹ Kaufmann-Kohler, *Globalization of Arbitral Procedure*.

proceedings that must be conducted in a certain manner.³² Thus, what constitutes due process may vary by legal system, country and arbitral rules.³³ As Redfern and Hunter poignantly puts it:

“Most lawyers with experience of litigation or arbitration, whether domestic or international, should find it relatively easy to agree upon these basic principles. The same body of lawyers, however, may find it more difficult to agree upon a specific set of rules designed to implement them.”³⁴

When a question arises as to whether or not an arbitration was conducted in accordance with due process, each national court approaches the question from its own particular national standpoint.³⁵ Since the New York Convention accepts refusal of recognition and enforcement if such should be contrary to public policy in the country where it is sought, due process issues in practice translate into issues of public policy.³⁶ If due process, as defined by the enforcing country, has not been exercised, the public policy exception to enforcement can be claimed.³⁷ It is therefore crucial that efficient methods of document production do not infringe on due process.

³² Kurkela, *Due Process: Laws May Vary But the Principles are Universal...*

³³ Alvarez, *Autonomy of International Arbitration Process*, p. 3-6.

³⁴ Redfern and Hunter, *Law and Practice...*, p. 490.

³⁵ Redfern and Hunter, *Law and Practice...*, p. 491.

³⁶ New York Convention, Article V(2)(b).

³⁷ Kurkela, *Due Process in Arbitration...*, p. 223; Kurkela there deals with due process as reflected in national and international public policy.

5 Scope of the Present Study

This thesis attempts to deal with the subject of enforcing orders for document production in international commercial arbitration. The topic is, naturally, bordering on other subjects. Relevant distinctions are made below.

5.1 Enforcement of Interim Measures

There is a substantial amount of research done on interim measures in international arbitration.³⁸ However, authors and scholars differ on whether a document production order could be defined as an interim measure. There is no concrete definition of the concept of interim measures or its scope found in international arbitration.³⁹ Yesilirmak, whose doctoral thesis is on the subject, defines interim measures rather tentatively as:

“[A] remedy or relief that is aimed at safeguarding the rights of parties to a dispute pending its final resolution. The underlying principle... is that no party right should be damaged or affected due to the duration of adjudication. The objective of such measures is generally to facilitate the effectiveness of judicial or arbitral protection, by providing interim relief, which complements the final relief.”⁴⁰

From Yesilirmak’s definition one can draw a distinction between the *preservation* of evidence, which is an interim measure, and the *production* of evidence, which is not.⁴¹ Production orders differ from preservation orders in that they aim to collect evidence rather than preserve it.⁴² However, Yesilirmak notes that this distinction may, in many cases, not be of much substance, as orders for production of documents can preserve evidence as well as collect it.⁴³ Also Donovan, a leading arbitrator⁴⁴, makes a distinction between procedural orders, in which category documentary production orders would fall, and interim measures.⁴⁵ Conversely Branson, another leading arbitrator⁴⁶, acknowledges that there may be varying

³⁸ See, for example, Branson, *The Enforcement of Interim Measures of Protection “Awards”*, in *Important Contemporary Questions*; Donovan, *Powers of the Arbitrators to Issue Procedural Orders...*; Werbicki, *Arbitral Interim Measures: Fact or fiction?*, 2002; Yesilirmak, *Provisional measures...*; UN Documents A/CN.9/WG.II/WP.108 and A/CN.9/WG.II/WP.141.

³⁹ UN Doc A/CN.9/WG.II/WP.108, para. 65.

⁴⁰ Yesilirmak, *Provisional Measures...*, p. 5. Footnotes omitted. Yesilirmak uses the term “provisional measures” when defining the concept. He states that the terms “provisional” and “interim” are used interchangeably in international arbitration and that they allude to the same concept; p. 8-9.

⁴¹ Yesilirmak, *Provisional Measures...*, p. 11.

⁴² Yesilirmak, *Provisional Measures...*, p. 11.

⁴³ Yesilirmak, *Provisional Measures...*, p. 11.

⁴⁴ Chambers Global 2006 and Chambers USA 2006.

⁴⁵ Donovan, *Powers of the Arbitrators to Issue Procedural Orders...*, p. 1.

⁴⁶ Former Executive Director of the British Columbia International Commercial Arbitration Centre and current delegate to the UNCITRAL.

viewpoints on the matter but includes document production in his suggested list of the “functions of interim measures of protection”.⁴⁷

This distinction is not merely of academic interest, as the law relating to enforcement of interim measures develops. This is continuously done on national levels and there are now a few countries where courts lend their assistance in enforcing interim orders issued by arbitrators seated in a foreign state.⁴⁸ In addition, the UNCITRAL Working Group⁴⁹ has proposed amendments to the Model Law to the effect that interim measures are to be recognized and enforced internationally.⁵⁰ In such a legal setting, it may be advantageous for the party seeking document production to have it defined as an interim measure.⁵¹

For present purposes however, orders for the production of documents are not defined as interim measures, and are thus beyond the scope of the present study.⁵²

5.2 Enforcement Against Third Parties

This thesis deals with the enforcement of document production from a party to an international arbitration. Entirely different considerations apply when enforcement is sought for document production orders addressed to third parties.⁵³ Arbitration being a consensual dispute resolution method, the tribunal simply lacks jurisdiction over third parties. The arbitration

⁴⁷ Branson, *The Enforcement of Interim Measures of Protection “Awards”*, in *Important Contemporary Questions*, p. 169. First on his list of “functions of interim measures of protection” comes “[T]o facilitate the conduct of the arbitral proceedings, including -taking evidence... -requiring discovery... “.

⁴⁸ “Arbitral provisional measures may be enforced abroad where the law of the forum of enforcement allows their enforcement. Under this view, courts of the enforcement forum lend their assistance to arbitrators seated in a foreign state. Laws of a minority of states, for example, Australia, Hong Kong, and Switzerland permit the enforcement of arbitral provisional measures issued abroad.”, Yesilirmak, p. 258-259.

⁴⁹ UNCITRAL Working Group II (Arbitration).

⁵⁰ The proposed amendment, under the name Article 17 *de novies*, reads: “An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 *novies*.”, UN Doc A/CN.9/WG.II/WP.141, p. 5.

⁵¹ However, the frequent lack of power for arbitral tribunals to enforce interim measures of protection is currently a problem in international commercial arbitration (Ferguson, *Interim Measures of Protection...*, p. 5). There is as yet no international regime in the area akin to the New York Convention. None of the existing arbitration rules address the enforceability of interim measures of protection ordered by the arbitral tribunal (Ferguson, p. 4). Enforceability of interim measures of protection has been a topic of much debate in recent years, as both Ferguson (in *ibid* at p. 4) and Webster (in *Obtaining Documents...* at p. 55) remarks.

⁵² However, it is recognized that the problem of enforcement of interim measures and enforcement of production orders are closely related and that generally research done in that area can be of use in dealing with the issue of enforcement of production orders.

⁵³ Hunter, *Modern Trends...*, p. 207.

agreement does not extend to them. However, national arbitration laws may provide a means for such enforcement.⁵⁴ The issue is outside the scope of this paper.⁵⁵

5.3 Enforcement in a Domestic Context

In a domestic setting, when enforcement of a document production order is sought at the *situs* of the arbitration, national arbitration law generally provides for court assistance in enforcement. The UNCITRAL Model Law provides for such assistance, in contrast to cross-border enforcement, which is not provided for.⁵⁶ The fact that court assistance generally is available does not make the situation unproblematic; as will be shown in this paper there are efficiency problems in involving national courts.⁵⁷ However, international arbitrations are by definition cross-border in nature. The *situs* of the arbitration is often chosen precisely because none of the parties is domiciled there. Documents are thus unlikely to be in the *lex fori* jurisdiction. Such situations are outside the scope of this paper.

5.4 Authority of Arbitrator to Issue an Order

Where the power or authority to issue an order resides may be determinative for the enforcement mechanisms available. For example, the enforcement mechanisms available may be drastically different if there is a substantial contractual right to certain documents, as opposed to if the right to issue an order is only inherent in the agreement to arbitrate or in the arbitration rules agreed to. To the extent that authority issues are determinate for enforcement issues, they are within the scope of this paper. However, it is not disputed that the arbitrator has the power to require document production by the parties *per se*.⁵⁸ The concern at hand is the enforcement of that right.

⁵⁴ Franklin; *Discovery and Production of Evidence*, in International Arbitration Checklists.

⁵⁵ For an interesting discussion on obtaining evidence from third parties, see Webster, *Obtaining Evidence from Third Parties in International Arbitration* and Davies, de Kluyver and Link, *Third Party Discovery in Arbitration Proceedings*. Further, from a U.S. perspective, see Watkins; *Open Questions Regarding Non-Party Discovery in Commercial Arbitration*.

⁵⁶ The Model Law's take on enforcement of orders for documents is to be found in its article 1 and 27.

⁵⁷ In this context, it is usually cost-efficiency which poses the greatest problem, as parallel court proceedings, however successful, are time-consuming; and a haltering of the arbitration proceedings is costly.

⁵⁸ O'Neill, p. 63, outlines the source of that power as residing in: "(i) the parties' agreement; (ii) the institutional arbitration rules governing the procedures, which either expressly authorize such discovery or place the scope of discovery in the discretion of the arbitrator; or (iii) applicable arbitration statutes, such as the Federal Arbitration Act (FAA)." Also Goldman, in *The Complimentary Roles of Judges and Arbitrators in Ensuring that International Arbitration is Effective*, points out that "It is always admitted that arbitrators can request parties to produce a document in their possession", p. 277. Examples of institutional arbitration rules granting the tribunal authority to require

5.5 Methods of Enforcement

This thesis explores and compares three methods for enforcement of document production orders; via national law, via adverse inferences, and via the New York Convention. Those are the most widely accepted and, as it seems, most useful methods. However, this is a field yearning for ingenuity and other methods have been employed, and will continue to prop up, tailored to fill the specific information-gaps facing the requesting party and the tribunal. For example, if the information lacking can be reconstructed or otherwise estimated, a party or tribunal could have an expert's estimate fill the void. The tribunal declaring that an expert's estimate will be used may induce production.

Many arbitration rules allow the tribunal, in case of failure to produce documentary evidence, to make an award on the evidence before it.⁵⁹ This could be termed an enforcement technique, but is nevertheless irrelevant for present purposes as it would be an incentive to produce only for a party that actually *wants* the tribunal to have a look at the documents he is withholding.⁶⁰ Such situations are outside the scope of this paper. More problematic, and perhaps more common, is the reverse situation when a party is recalcitrant because he actually want to keep the documents from the tribunal. Such a situation is the topic of this thesis.

document production are in ICC Arbitration Rules, Article 20(5), in UNCITRAL Arbitration Rules, Article 24(3) and in the LCIA Rules, Article 22.1(c)(e).

⁵⁹ AAA does this in Art. 23(3): *If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may make the award on the evidence before it.* UNCITRAL does the same in 28(3): *If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.* LCIA in 15.8: *If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Counterclaim, or if at any point any party fails to avail itself of the opportunity to present its case in the manner determined by Article 15.2 to 15.6 or directed by the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration and make an award.*

⁶⁰ On this type of enforcement measures, see for example Donovan; *Powers of the Arbitrators...*

6 Applicable Law

Arbitration is a consensual dispute resolution method. Seeking the enforcement of an order for documents is therefore equivalent to seeking the enforcement of a contract – the agreement to arbitrate or, if existent, enforcement of substantive clauses providing for the exchange of information.

6.1 The Arbitration Agreement and its Limits

The arbitration agreement includes: (a) its express language; (b) provisions incorporated by reference; and (c) the procedural and substantive laws designated to govern the arbitration proceedings.⁶¹ Regularly, institutional arbitration rules are incorporated into the arbitration agreement as a procedural framework. Rules relating specifically to evidence, such as the IBA Rules on the Taking of Evidence in International Arbitration are also commonly incorporated.⁶² The procedural law governing the arbitration agreement is chosen by way of choosing the seat for the arbitral tribunal. What cannot be chosen, however, is according to what law a document production order is to be enforced. Normally, jurisdiction resides with the courts where the custodian of the relevant documents is domiciled.

6.2 Substantive Law

Substantive clauses on exchange of information are common in many types of international contracts.⁶³ Such provisions have been shown to open up potential for enforcement in accordance with the New York Convention, as will be discussed below.⁶⁴ On substantive clauses, substantive law is applicable; the law chosen to govern the contract.

6.3 Incorporated Rules

The express language of an arbitration agreement rarely, if ever, touches upon the enforcement of document production orders. Generally, institutional rules for international commercial arbitration provide only vague guidelines for the production of documents⁶⁵ and seem right out reluctant to do more than touch upon how they are to be executed –

⁶¹ O'Neill, *The Power of Arbitrators...*, p. 63.

⁶² See, for example, Kaufman-Kohler, *The Globalization of Arbitral Procedure*.

⁶³ Webster, *Obtaining Documents...*, p. 45.

⁶⁴ See discussion on the case of *Publicis*, below.

⁶⁵ Lehner gives a good account of various arbitration rules' take on the production of documents in *The Discovery Process in International Arbitration*.

probably perceiving the restraint of the tribunal's lack of *imperium* or coercive powers. For example, it is rather striking that the IBA Rules, devoted solely to the taking of evidence in international arbitration, on enforcement merely states that in case of non-production, the tribunal "may infer that such document would be adverse to the interests of that party".⁶⁶

⁶⁶ IBA Rules on the Taking of Evidence in International Commercial Arbitration, Article 9.4.

7 Enforcing via National Law

“I am afraid we must recognize that arbitrators are impotent. They can make all sorts of orders for pleadings, discovery and the like: but they are exhortatory only. Either party can cock-a-snook at the arbitrator. Either can disobey with impunity. It is only the court that can bring a party to book”.

- English Judge Lord Denning M.R. in [1981] A.C. 909, 921.

7.1 A Model of Isolationism

The UNCITRAL Model Law on International Arbitration, a non-binding document adopted by the United Nations trade commission (UNCITRAL) in 1985, has served as a role model for countries updating their arbitration legislation, and in many cases been adopted with only minor changes. To date, it has been adopted in 47 countries and in four states in the U.S.⁶⁷ However, none of the major western arbitration jurisdictions have adopted the Model Law.⁶⁸

In the UNCITRAL Model Law, court assistance in document production is limited to purely domestic contexts. That is, a court will execute an order for documents only if the seat of the tribunal is within the jurisdiction of the court. The Model Law’s take on enforcement of orders for documents is to be found in its article 27:

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.

However, this seemingly liberal approach is very much limited by the restriction in article 1:

The provisions of this law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

These two paragraphs read in conjunction grant tribunals the right to request assistance in enforcing an order for documents, but only when the seat of the tribunal and the custodian of the document requested are to be found within one and the same jurisdiction. In international arbitration, this is rarely the case. Generally, the arbitral seat is chosen precisely because it is the home jurisdiction of neither party; thus it is perceived as neutral ground.

⁶⁷ These numbers are from 2006. Lew, *Achieving the Dream...*, p. 191.

⁶⁸ Lew, p. 191. Examples of those are England, France, U.S.A., Sweden and Switzerland. Their take on the matter of enforcement of foreign tribunal’s orders for document will be looked into in the following.

7.2 Unilateral Internationalism

Some countries have implemented what could be termed unilateral internationalism. That is, they offer assistance in enforcement also when the seat of the tribunal is outside the court's jurisdiction.⁶⁹ They do not require reciprocity. A few major arbitration venues, such as Hong Kong and Sweden, have adopted such legislation.

In the Hong Kong Arbitration Ordinance it has been expressed as follows:

Section 2GG

(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.

(2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong.

In Swedish law, the provisions are designed as follows:

Section 26

Where a party wishes a witness or an expert to testify under oath, or a party to be examined under truth affirmation, the party may, after obtaining the consent of the arbitrators, submit an application to such effect to the District Court. The aforementioned shall apply where a party wishes that a party or other person be ordered to produce as evidence a document or an object. If the arbitrators consider that the measure is justified having regard to the evidence in the case, they shall approve the request. Where the measure may lawfully be taken, the District Court shall grant the application.

The provisions of the Code of Judicial Procedure shall apply with respect to a measure as referred to in the first paragraph. The arbitrators shall be summoned to hear the testimony of a witness, an expert, or a party, and be afforded the opportunity to ask questions. The absence of an arbitrator from the giving of testimony shall not prevent the hearing from taking place.

Section 50

The provisions of sections 26 and 44 regarding the taking of evidence during the arbitral proceedings in Sweden shall also apply in respect of arbitral proceedings which take place abroad, where the proceedings are based upon an arbitration agreement and, pursuant to Swedish law, the issues which are referred to the arbitrators may be resolved by arbitrators.

The passage above exemplifies how unilateral internationalism can be construed. Hong Kong law gives the tribunal full discretion as to what categories of documents can be obtained. Swedish law on the other hand, enforces only documents obtainable according to Swedish civil procedure law. Hong Kong and Sweden are both major arbitration venues. However, it

⁶⁹ Naturally, the person subjected to enforcement has to be within the court's jurisdiction.

is not the big arbitration nations stand on this issue that is of greatest interest, but rather that of big trading nations. The custodian of the requested document (that is, the non-compliant party), is very much more likely to reside in a major trading nation, rather than in a major arbitration jurisdiction. Below is an account of the take of the world's largest trading nations.

7.2.1 The U.S. Approach

The U.S. approach on this matter has been the subject of much debate as case law on the matter is unclear. The relevant provision in U.S. federal law seems by its wording to have been written with the sole purpose of availing U.S. federal courts for cross-border enforcement of document production orders. It reads:

28 U.S.C. 1782

(a) 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... The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

In the case of *National Broadcasting*⁷⁰, it was held that an international commercial arbitral tribunal was not a 'foreign or international tribunal' within the meaning of the act. Thus, the provision did not provide for assistance in enforcement of document production orders. In the *Kazakhstan*⁷¹ case, the *National Broadcasting* ruling was followed. The judges referred to the legislative history of the provision as well as concern that if allowed, such applications would "undermine the federal policy in favor of arbitration", as it would lead to derailment of arbitral proceedings. This view has been criticized and contested. Professor Hans Smith⁷² is of the opinion that the legislative history has been misread and that private international tribunals do come within the application of section 1782. Significantly, in two other cases where the provision has been applied, the rulings have implied that "the availability of judicial assistance under section 1782 in effect depends on the parties having exhausted the procedures for obtaining evidence prescribed by the arbitration rules applicable to the arbitration itself." If such procedures are duly exhausted, it is argued, section 1782 would assist international commercial arbitration tribunals.⁷³

⁷⁰ In Re: the Application of National Broadcasting Company, 1998 Lexis 385 (S.D.N.Y. 1998)

⁷¹ Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. Tex. 1999).

⁷² Professor at the University of Columbia Law School.

⁷³ Underhill and Valentin; *Securing Evidence for Foreign Arbitrations*, p. 206.

In December 2006, a Georgia federal judge ruled that an Austrian arbitral panel was a tribunal within the scope of 1782. The judge relied on the U.S. Supreme Court case *Intel* of 2004, where it was held that the Directorate-General of Competition for the commission of the European Communities was a “tribunal” within the meaning of 1782. Judge Duffey held that:

“Although Intel did not expressly hold arbitral bodies to be ‘tribunals,’ it quoted approvingly language that included ‘arbitral tribunals’ within the term’s meaning in 1782(a). The Supreme Court also determined the DG-Competition to constitute a ‘tribunal’ when it acted as a first-instance decisionmaker in a proceeding ‘that leads to a dispositive ruling, i.e., a final administrative action both responsive to the complaint and reviewable in court’... The centre’s arbitral panels are similarly ‘first-instance decisionmaker[s]’ that issue decisions ‘both responsive to the complaint and reviewable in court’”.⁷⁴

Because of the variations in case law and the lack of a Supreme Court ruling on the actual issue, the state of U.S. law on this point is as yet unclear.

7.2.2 The Chinese Approach

Chinese Arbitration Law is silent on the issue of enforcement of document production orders.⁷⁵ The sole paragraph relating to document production⁷⁶ in Chinese law deals with document *preservation*. The relevant provision reads:

Article 46

Under circumstances where the evidence may be destroyed or lost or difficult to obtain at a later time, a party may apply for preservation of the evidence. If a party applies for preservation of the evidence, the arbitration commission shall submit his application to the basic people’s court in the place where the evidence is located.

As Yesilirmak has stated, the difference may in some cases be more semantic than substantial and one can imagine using the above provision for production orders. However, it is territorially limited to arbitral tribunals seated within the People’s Republic of China. Thus, Chinese law does not provide for cross-border enforcement of document production orders.

7.2.3 The German Approach

German law provides for cross-border enforcement of document production orders in the following terms:

⁷⁴ In Re: Application of Roz Trading Ltd.; No. 1.06 cv 02305-WSD, N.D. Ga., Atlanta Div.).

⁷⁵ It may be noted in this connection that Chinese arbitration law is not yet quite in line with commonly accepted international arbitration practice (Choong; *Clarifying the PRC Arbitration Law*; 2006).

⁷⁶ See discussion on the distinction between document production and document preservation above in section on interim measures.

Section 1050, Court assistance in taking evidence and other judicial acts

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a court assistance in taking evidence or performance of other judicial acts which the arbitral tribunal is not empowered to carry out. Unless it regards the application as inadmissible, the court shall execute the request according to its rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions.

Section 1025, Scope of application

(1) The provisions of this Book apply if the place of arbitration as referred to in section 1043 subs. 1 is situated in Germany.

(2) The provisions of sections 1032, 1033 and 1050 also apply if the place of arbitration is situated outside Germany or has not yet been determined.

Hence, German law provides for the enforcement of documents or categories of documents obtainable according to German civil procedure legislation.

7.2.4 Anglo-Franco Ambivalence

France and England are both quite big trading nations and big arbitration jurisdictions. French law on the matter is unclear. Some argue that in lack of statutory authority on this point, arbitrators do not have standing to make document requests.⁷⁷ Others, such as de Boissesson, argue that nothing prevents the arbitrator from issuing a preliminary award, capable of enforcement, “if the production of documents is essential to resolve the points in dispute”.⁷⁸ As regards England, the law is similarly unclear. It appears that a tribunal cannot have a document production order enforced unless at least one of the hearings is conducted in England, Wales or Northern Ireland.⁷⁹

⁷⁷ Griffin, *Recent Trends in the Conduct of International Arbitration...*, p. 25.

⁷⁸ De Boissesson, *Le droit francais de l'arbitrage interne et international*, p. 734.

⁷⁹ Holding hearings in the UK would, according to this point of view, render enforcement under s. 43 of the English Arbitration Act of 1996 possible. See Webster, *Obtaining Documents...* p. 47 and Underhill and Valentin, *Securing Evidence for Foreign Arbitrations*.

8 Efficiency in Enforcing via National Law

When the Model Law was drafted, the issue of whether cross-border enforcement should be provided for was debated at length by the Working Group on the basis of a Secretariat Note and successive drafts.⁸⁰ With a nod to efficiency, it was held that a cross-border enforcement measure “would contribute considerably to the facilitation of taking evidence in international commercial arbitration.”⁸¹ Even so, such measures were excluded and the final version of what is now Article 27 was adopted as a compromise between not providing for court assistance in enforcement at all and extending court assistance to foreign arbitral tribunals.⁸² The Working Group concluded that national law providing for cross-border enforcement would enhance efficiency⁸³, but that such a provision had no place in the Model Law as states would be “reluctant to accept such an obligation”.⁸⁴

Perhaps somewhat counter-intuitive, the strongest argument against enforcement of document production orders via national law could be one of efficiency. Such is the position of the court in the Kazakhstan case, as the applicant is denied recourse to U.S. courts for enforcement of an order for documents:

“Empowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution. The course of the litigation before us suggests that arbitration’s principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.”⁸⁵

The U.S. court makes the point that efficiency of arbitration is threatened when courts are involved in the proceedings. The conducting of ancillary

⁸⁰ See A/CN.9/WG.II/WP.41 and A/CN.9/246.

⁸¹ A/CN.9/WG.II/WP.41, para 31.

⁸² The major consideration regarding international extension seems to have been the contention that states would not be willing to show such generosity: “[A] State may be reluctant to accept the obligation to provide assistance to all foreign arbitral tribunals particularly if the State is not prepared to provide assistance to courts of all states. The State may also be reluctant to accept such an obligation if the request comes from an arbitral tribunal of a State whose courts are not prepared to give assistance to arbitral tribunals of the first State. This reluctance may be overcome if the obligation were subject to reciprocity, although it should be recognized that the principle of reciprocity has many difficulties in application.” See A/CN.9/246, paras. 95-96. Such reluctance may be a fact of many countries, but it is not a relevant argument analyzing the issue in terms of efficiency and due process.

⁸³ It is somewhat unclear which type of efficiency, result- or costbased, the Working Group had in mind. Judging from the circumstances, the author submits that it is the result-based efficiency they are referring to.

⁸⁴ See A/CN.9/246, paras. 95-96.

⁸⁵ Republic of Kazakhstan v. Biedermann Int’l, 168 F.3d 880 (5th Cir. Tex. 1999).

court proceedings may result in the parties and the arbitral tribunal losing the control they would normally have over an arbitration proceeding. However, one can imagine an efficient no-review court enforcement proceeding not requiring much time. Furthermore, there being a clear right to court enforcement would induce parties to produce without actually having to be taken to court.

Dilatory tactics have attracted attention as a threat to efficiency in modern international arbitration.⁸⁶ It was argued in the sessions of the Working Group drafting the Model Law that granting the option of court enforcement through national law might tempt parties to dilatory or obstructionist requests for evidence.⁸⁷ However, those arguments are no longer being regarded as very forceful, as “the Model Law itself contains a device for preventing dilatory tactics, namely the requirement of the arbitral tribunal’s consent to any such request to a court”.⁸⁸ One may indeed feel compelled to accept that argument. Conversely, it could be contended that refusing a party the option of going to court when such a possibility is technically present, may be difficult for tribunals. After all, they cannot tell how important those documents are before they have actually seen them. It is important for a tribunal not to open up the coming award for challenges.⁸⁹ Tribunals may therefore be reluctant to hinder such recourse. If recourse is granted, the tribunal may find itself assisted by the court. Alternatively, it may find that proceedings are stalled as a recalcitrant party is effectively hindering the arbitral process by reference to a lingering procedure.⁹⁰

⁸⁶ Magnusson, *Fast-Track Arbitration*.

⁸⁷ Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, p. 229-230.

⁸⁸ Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, p. 230.

⁸⁹ A ground for setting aside an award according to the New York Convention, is that a party “was unable to present his case”, article V(1)(b).

⁹⁰ The latter scenario is especially a risk in less-reliable jurisdictions. In China, for example, local courts are infamous for the lack of action in New York Convention enforcement claims (see, for example, Peerenboom, *Seeking Truths From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*). One can imagine enforcement of documents would not be treated any differently.

9 Due Process in Enforcing via National Law

Could employing national law and national courts for enforcement of document production orders constitute a threat to due process? The answer would depend on which concept of due process is applied to whom. As chartered above, legal systems entertain different ideas of what due process implies. Redfern and Hunter put it expressively: “Each national system works well according to its own concepts”.⁹¹

As has been shown, provisions of national law for the enforcement of document requests could be designed to function in two different ways. Either national law could provide a mere enforcement mechanism, leaving it to the arbitrators to decide what documents are obtainable. This is how the Hong Kong Arbitration Ordinance operates on the matter. The alternative is the Swedish/German approach where national law provides the option of applying for production with the courts, which execute it according to its own procedural rules. This means that documents or categories of document which cannot be subject to coercive disclosure in Swedish and German law, respectively, cannot be obtained via the Swedish or German courts.

The method chosen has bearing on due process considerations. One might argue that national law opening up for enforcement of orders it does not consider enforceable, could be conceived as contrary to perceptions of due process in that particular country.⁹² The Swedish/German method, however, seems of more concern; if a common law party is subjected to the very limited disclosure available in civil law courts, he might perceive it as a lack of due process. U.S. lawyers tend to view full-scale discovery as basic procedural fairness.⁹³

If court enforcement according to national law as in the examples of Sweden and Germany is employed, only enforcement of categories of documents obtainable in civil proceedings of the enforcement jurisdiction can be obtained via the court. This could be a very real problem, as different legal systems have very different approaches to how wide a range of documents

⁹¹ Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, p. 490, 2004.

⁹² Such an argument is, however, based on a status view of arbitration; that arbitrations are an extension of the national court system. With a contractual approach (which is now the dominating view) arbitrators ordering different categories of documents than a given national court would do, is not a problem, as the parties have contracted to give the arbitrator that right. See Hong-Lin Yu, *Explore the Void – An Evaluation of Arbitration Theories: Part I and Part II*.

⁹³ To illustrate this point, Park tells of a U.S. lawyer, a former student of Park’s, calling him to ask for advice: “With the fullest sincerity he asked if it was true that the ICC Rules did not provide what he called ‘even the most basic guarantee for pre-trial fairness’. By this oblique reference he meant the right to full U.S.-style discovery.” See *Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*.

can be obtained, i.e. how specific a document request must be. By incorporating the IBA Rules, which is commonly done, parties contract on how specific document requests must be. A national court in a civil law jurisdiction may consider enforcement of such documents unlawful, as only very specific document requests are allowed in the civil law tradition.⁹⁴ The common/civil law divide in discovery or disclosure has been the subject of much debate in the international arbitration community. There is consensus on a compromise: the IBA Rules.

It might be regarded as questionable for a national court to review the tribunal's decision on document production. National courts do not review awards they enforce under the New York Convention; why would enforcement of procedural decisions call for more interference than awards do? Such review is inefficient⁹⁵, and may, as shown above, imply concerns of a due process nature.

⁹⁴ The place of arbitration is not significant in this regard. As Hunter writes; “[I]t is unusual for the law of the place of arbitration to forbid the parties from agreeing on the way in which evidence is presented; and most sets of arbitration rules (which, when imported, operate as an agreement between the parties) permit the arbitral tribunal itself to determine the way in which the arbitration is to be conducted if the parties fail to agree.” The place of enforcement of an order for documents, however, may very well be relevant. *Modern Trends...*, p. 205.

⁹⁵ Here referring to costs as a review entails prolonging the procedure and additional counsel work.

10 Enforcing via Adverse Inferences

“When a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt.”

- American Judge Learned Hand in *Warner Barnes & Co. v. Kokosai Kisen Kabushiti Kaisha*, 102 F. 450, 453 (2^d Cir. 1939).

Rather than making an order for documents and trying to enforce it in a national court, arbitrators often prefer to indicate to the refusing party that its refusal to produce documents may result in the tribunal drawing adverse inferences. Thus, the refusal will be taken into account, albeit in conjunction with the reason given by the party for its refusal, when evaluating the evidence in relation to the factual issues in question.⁹⁶

Adverse inferences are often the starting point when a party is recalcitrant in producing documents. It is a widely accepted method⁹⁷ and there appears to be little doubt that based on the ICC, UNCITRAL, LCIA and AAA International Arbitration Rules, an arbitral tribunal is entitled to draw an adverse inference.⁹⁸ It is commonly referred to in arbitration literature, and endorsed by the IBA in its rules on evidence. Article 9.4 of the IBA Rules provides the right to draw adverse inferences for failure to comply with an order for document production:

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.⁹⁹

However, even though there is a more or less undisputed right to use adverse inferences, it is somewhat unclear whether the instrument is in actuality employed very often. A Swedish commentator writes that adverse inferences and shifting the burden of proof “are [measures] rather delicate to apply”. His impression is that “they are seldom applied as such at least not by Swedish arbitrators.”¹⁰⁰ The same view is expressed by Paulsson, in saying that for all their benefits, adverse inferences may not be “the fearsome weapon some lawyers seem to imagine, given the fact that most

⁹⁶ Hunter, *Modern Trends...*, p. 206-207.

⁹⁷ The IBA Rules Working Group commented that “... [a]rbitral tribunals routinely create such inferences in current practice”; See IBA Working Party, *Commentary on the New IBA Rules of Evidence...*, p. 34.

⁹⁸ Webster, *Obtaining Documents...*, p. 51 and Sharpe *Drawing Adverse Inferences...*, p. 549.

⁹⁹ IBA Rules on the Taking of Evidence in International Commercial Arbitration, Article 9 (4).

¹⁰⁰ Brocker, *Discovery in International Arbitration...*, p. 25.

arbitrators would be disturbed by the thought of deeming the burden of proof discharged by an inference”.¹⁰¹ A third commentator suggests that “In an extreme case, the party which fails to carry out an order of the tribunal may find itself ‘punished’ by having an adverse award made against it (but it would seem that this would only be defensible if justified by the evidence and arguments advanced by the winning party).” One has to agree with Sharpe in his criticism of this passage, pointing out that if an award is justified by evidence and arguments, adverse inferences appear superfluous.¹⁰² These concerns are related to due process, and will be dealt with below. For now, it suffices to say that the institution of adverse inferences may be referred to more often than it is actually employed.

10.1 What are Adverse Inferences?

Ultimately, an adverse inference alters the standard of proof or dispenses with the burden of proof. In literature on the subject the issue of drawing adverse inferences and changing the burden of proof are dealt with in conjunction, but as different concepts.¹⁰³ An adverse inference may change the burden of proof. It may also lower the standard of proof, corroborate the adversary’s proof or dilute the non-producing party’s proof.

A thorough examination of evidentiary issues is outside the scope of this paper. However, for the concept of adverse inferences to make sense, one must bear in mind the fundamental concepts of standard and burden of proof.

The *standard* of proof in commercial arbitration proceedings is generally in accordance with the idea of preponderance of the evidence; that is, to be considered as proved, a contingency needs to appear more likely than not.¹⁰⁴ However, in civil law systems, judges are often required to have a ‘personal belief’, ‘inner conviction’, or ‘full conviction’ as to the truth of the claim. This could indeed have consequences for the standard of proof applied in arbitrations with arbitrators of civil law background.

Regarding the *burden* of proof, the general rule in international arbitration is that each party bears the burden of proving the facts relied upon to support its own claim or defense.¹⁰⁵ The party’s formal position as claimant or respondent is thus irrelevant. International tribunals “have generally and consistently accepted and applied the rule that the party who asserts a fact,

¹⁰¹ Paulsson, *Overview of Methods of Presenting Evidence...*, p. 118.

¹⁰² Sharpe, *Drawing Adverse Inferences...*, p. 550.

¹⁰³ Brocker and Rogers both make a distinction between drawing adverse inferences and shifting the burden of proof. Brocker; *Discovery in International Arbitration...*, p. 25 and Rogers, 139 - 140.

¹⁰⁴ Huleatt-James and Hunter, *The Law and Rules Applicable to Evidence in International Commercial Arbitration and Some Issues Relating to their Determination and Application*, p. 270 ff.

¹⁰⁵ Sharpe, ‘*Drawing Adverse Inferences from the Non-production of Evidence*’, p. 552. The UNCITRAL Rules state this approach in its article 24(1): ‘Each party shall have the burden of proving the facts relied on to support his claim or defense.’

whether the claimant or the respondent, is responsible for providing proof thereof”.¹⁰⁶

10.2 Requirements for Drawing Adverse Inferences

Adverse inferences are routinely referred to in scholarly articles and books.¹⁰⁷ Generally, arbitration rules broadly empower arbitrators in evidential matters and the IBA Rules on the Taking of Evidence in International Commercial Arbitration specifically endorse the use of adverse inferences. It seems to be the means of enforcement most trusted in the international arbitration community today.¹⁰⁸ Nonetheless, little is written on exactly what arbitrators are permitted to do in this area, and under what circumstances. The general requirements for drawing or refusing to draw adverse inferences have been summarized as follows:

- 1) The party seeking the adverse inference must produce all available evidence corroborating the inference sought;
- 2) The requested evidence must be accessible to the inference opponent;
- 3) The inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld;
- 4) The party seeking the adverse inference must produce prima facie evidence;
- 5) The inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought.¹⁰⁹

These criteria have been distilled by Sharpe, in an analysis of case law from the Iran-United States Claims Tribunal. He chose the Claims Tribunal’s case law because it offers “unparalleled treatment” of adverse inferences. The tribunal was routinely confronted with these issues, as revolutionary turmoil in Iran had much documentation missing.¹¹⁰ The tribunal drew inferences “in a wide variety of contexts, including in matters of ownership, expropriation and valuation.”¹¹¹ The arbitrators came from a wide variety of legal backgrounds, including common and civil law. The arbitrations were conducted under the UNCITRAL Arbitration Rules (with only minor modifications). “Like most sets of arbitration rules”, Sharpe comments; “the

¹⁰⁶ Marvin Feldman v. Mexico, Case no. ARB(AF)/99/1, award of 16 December 2002, (2003) ILM 625 at 662.

¹⁰⁷ Indeed, Sharpe writes that “commentators... reflexively cite arbitrators’ power to draw adverse inferences”, *Drawing Adverse Inferences...*

¹⁰⁸ It could be argued that adverse inferences is not an enforcement mechanism *strictu sensu*. Adverse inferences operates as an inducement for the non-compliant party to produce or as or, lacking production, a principle of evidence law ensuring that the requesting party is not fatally disadvantaged by its adversary’s refusal to produce. In wide and pragmatic terms, it is thus operates as an enforcement mechanism.

¹⁰⁹ Sharpe, *Drawing Adverse Inferences...*, p. 551. See also Browner and Sharpe in *Determining the Extent of Discovery and Dealing with Requests for Discovery...*

¹¹⁰ Sharpe, *Drawing Adverse Inferences...*, p. 551.

¹¹¹ Sharpe, *Drawing Adverse Inferences...*, p. 551.

UNCITRAL Rules broadly empower arbitrators in evidential matters but say nothing specific about adverse inferences”.¹¹²

Sharpe’s distillation of the Tribunal’s use of adverse inferences elucidates application of the instrument.¹¹³ Therefore, Sharpe’s five requirements for drawing or not drawing adverse inferences have been summarized below.

10.2.1 Corroborating Evidence

Adverse inferences were not drawn when the requesting party itself had not produced corroborating evidence that was likely to be at its disposal.¹¹⁴ Sharpe concludes that “the party seeking the adverse inference must produce all available evidence corroborating the inference sought.”¹¹⁵

10.2.2 Access Established

Adverse inferences were not drawn for a party’s non-compliance when the claimant failed to convince the tribunal that the respondent “came into actual possession of the documents in question”.¹¹⁶ Sharpe concludes that the requested evidence must be accessible to the inference opponent.¹¹⁷

10.2.3 Reasonable, Consistent, Logical

The inference sought must be reasonable. In many cases, reasonableness reflects the arbitrators’ understanding of commercial practice. An example of this is the Tribunal’s conclusion that “in the absence of contemporaneous objections, invoices or payment documents presented during the course of the contract are presumed to be correct, satisfactory and payable”.¹¹⁸

The inference sought must be consistent with facts in the record. Naturally, no inference can be drawn which is inconsistent with facts incontrovertibly established by the evidence.¹¹⁹

The requesting party must “establish a logical connection between likely nature of evidence withheld and inference sought.”¹²⁰ In the Iran-U.S. Claims Tribunal, adverse inferences sought from the respondent’s failure to

¹¹² Sharpe, *Drawing Adverse Inferences...*, p. 551.

¹¹³ As always in international arbitration, one can question the applicability of precedent; can there be an analogous application of the The Iran-United States Claims Tribunal cases on international commercial arbitration cases. There are of course no formal rules for adhering to precedent, but if the reasoning is found convincing, it will be applied.

¹¹⁴ William J. Levitt v. Islamic Republic of Iran, award no. 520-210-3 (29 August 1991), 27 Iran-US Cl. Trib. Rep. 145.

¹¹⁵ Sharpe, *Drawing Adverse Inferences...* p. 554.

¹¹⁶ George Edwards v. Government of the Islamic Republic of Iran, award no. 184-161-1 (12 August 1985), 8 Iran-US Cl. Trib. Rep 290.

¹¹⁷ Sharpe, p. 557 – 558.

¹¹⁸ Sharpe, 559-560.

¹¹⁹ Sharpe, p. 560.

¹²⁰ Sharpe, p. 560.

produce the company share register and public registration documents, were not drawn when the logical connection was faulting. The tribunal concluded that:

Iranian law does not require that transfers of bearer shares be entered into share registers of the companies. In addition, Article 10 of the Article of Association of Koshkeh provides that only the transfer of registered shares requires the approval of the board of directors and recording in the share register. The Tribunal therefore is not convinced that the share register or other requested corporate records of Koshkeh would show that the Claimant owned these 510 bearer shares and that the transfer of those shares from her spouse took place before his shares were expropriated.¹²¹

10.2.4 Produce Prima Facie Evidence

Prima facie evidence is evidence “sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive.”¹²² Such must be produced and must be, under the circumstances, reasonably consistent, complete and detailed.¹²³

10.2.5 Sufficient Opportunity to Produce

Failing to advise parties of their evidential obligations opens up the award to challenge, as was graphically shown in the Avco case at the Iran-United States tribunal. The chairman of the tribunal stated that he was not ‘enthusiastic [about] getting kilos and kilos of invoices’¹²⁴ and “was understood to have agreed that the claimant could substitute an auditor’s report for the actual invoices.”¹²⁵ Three years later, however, with a new chairman, the tribunal rejected the auditor’s report stating that it could not substitute for the actual invoices to prove the invoice claim. The respondent thus prevailed on the issue. Subsequently, enforcement in a U.S. court was prevented by the claim that the tribunal had misled, “however unwittingly” the claimant.¹²⁶

10.3 Fulfilling Requirements

Of these five requirements, it seems that to establish access and to produce prima facie evidence hold the highest potential hurdles for a requesting party. The problem of establishing access is, however, generic to this issue. Whichever method chosen for enforcement, access has to be established. The requirement of a prima facie case is, conversely, particular to the

¹²¹ Frederica Lincoln Riahi v. Government of the Islamic Republic of Iran, award no. 600-485-1 (27 February 2003, (1993) 28 YB Com. Arb. 474.

¹²² Kenneth P. Yeager v. Islamic Republic of Iran, award no 566-316-2 (25 February 1988).

¹²³ Sharpe, p. 564.

¹²⁴ Avco Corp v. Iran Aircraft Industry, award no. 377-261-3 (18 July 1988), 19 Iran-US Cl. Trib. Rep. 200.

¹²⁵ Sharpe, p. 569.

¹²⁶ Iran Aircraft Indus. v. Avco Corp., 980 F2d 141 (2nd Cir. 1992).

method of adverse inferences and may indeed in some cases be difficult to overcome.

11 Efficiency in Enforcing via Adverse Inferences

Sandifier considers adverse inferences to be “the most effective sanction” international tribunals can impose upon recalcitrant parties.¹²⁷ The statement may be more telling of the problems facing the tribunal when a party is unwilling to produce, than of the wonders of adverse inferences as an enforcement method.

Webster and Darwazeh criticize the institute of adverse inferences in much the same terms. They pin-point three major problems, all related to efficiency.

Firstly, adverse inferences may be too vague to change to course of the proceedings.¹²⁸ The tribunal would of course rather rely on evidence than on inferences.¹²⁹ A closely related concern is whether an inference carries enough weight to actually have a bearing on the outcome of a case.¹³⁰ If the course of the proceedings is not changed by an inference drawn, there is a clear efficiency problem as ‘the desired result’ cannot be obtained: that is there is a complete lack of result-based efficiency.

Secondly, Webster is concerned with the determination of ‘reasonably satisfactory excuse’ for a failure to produce. The IBA Rules, as well as the case *Edwards*¹³¹, hold that if a ‘satisfactory explanation’¹³² as to why the relevant documents cannot be produced is put forward, adverse inferences cannot be drawn. This may result in lengthy procedural squabble on whether an explanation is in fact satisfactory or not, severely compromising efficiency (here in terms of cost, as a prolonged procedure is expensive). In addition, if adverse inferences are drawn in face of an explanation put forward as ‘satisfactory’, there is an opening for due process issues in enforcement proceedings, which will be considered below.

Thirdly, Darwazeh points to the difficulty of determining what inference ought to be drawn from a party’s non-compliance. She gives two illustrative examples, the first in a setting of a joint venture dispute:

“[I]n the context of a dispute over the termination of a joint venture agreement, Party A may request that Party B produce all board minutes regarding the termination of the joint venture agreement. If Party B fails

¹²⁷ Sandifier, *Evidence Before International Tribunals*, p. 147.

¹²⁸ Webster p. 51 and Darwazeh, *Document Discovery and the IBA Rules on Evidence...*, p. 11.

¹²⁹ Webster p. 51 and Darwazeh p. 11.

¹³⁰ Webster, p. 51.

¹³¹ *George Edwards v. Government of the Islamic Republic of Iran* award no. 451-251-2 (5 December 1989), 23 Iran-US Claims Tribunal Reports 290.

¹³² IBA Rules, Article 9.4.

to comply with the request to produce, it may be difficult for the tribunal to determine which particular information the board minutes were likely to contain. Consequently, it will be difficult for the tribunal to determine what specific adverse inference it should draw. Would it be reasonable for the tribunal to draw the adverse inference that the board specifically understood its firm to be liable for damages if it terminated the joint venture agreement?”

By way of further example, Darwazeh considers a construction delay claim:

“[I]n a dispute involving a construction delay claim, the owner may request that the contractor produce all construction schedules. Again, if the contractor fails to comply with the request to produce, the tribunal may find it difficult to establish which adverse inference it may reasonably draw. Is it reasonable for the tribunal to draw the adverse inference that the contractor breached the scheduling requirements? Alternatively, would it be fair for the tribunal to infer that the contractor concealed from the owner the fact that the project would be delayed?”

Darwazeh concludes that in some situations it may be “difficult if not impossible to establish an adverse inference based solely on a party’s non-compliance with a document request.” This rhymes well with the list of requirements established by Sharpe; lack of document production cannot be enough to draw an adverse inference. In the cases sketched up above, what seems to be lacking is prima facie evidence and, if there is any, production by the requesting party of corroborating evidence. If such evidence is produced, adverse inferences could be an efficient method in these cases as well.

A major efficiency problem regarding adverse inferences may thus be that in order to obtain the desired result, the requesting party must be able to produce prima facie evidence.¹³³ If he doesn’t possess any evidence amounting to a prima facie case, adverse inferences will not be an efficient enforcement method in terms of results.

Adverse inferences may not always be enough to compel production. And, as shown, the inference then drawn may not make up for the documentation missing. Hence; obtaining the desired result with adverse inferences is not a safe bet. As Webster puts it:

To date, practitioners have sought to avoid the problem with enforcement of documentary orders by reference to adverse inferences and to the effect on the tribunal, as is done in the IBA Rules of Evidence. For non-essential documents, those solutions may be reasonably effective (although this tends to lead to a ‘watering-down’ of the orders and the tribunal’s authority). But for critical documents that solution is not adequate...¹³⁴

¹³³ The major obstacle for parties seeking adverse inferences (Browner and Sharpe, *Determining the Extent of Discovery and and Dealing with Requests for Discovery...*, p. 334) has been to establish that those documents are actually accessible to the inferences opponent. However, this is a problem plaguing every enforcement method, and not a problem specific to adverse inferences.

¹³⁴ Webster, p. 43.

From the perspective of efficiency, this paper argues that adverse inferences may be a good option in cases where documents are not key. In such cases, there is no a great incentive for the recalcitrant party to withhold documents in face of a threat of adverse inferences. Document may even so be of use to the requesting party, as they may corroborate other evidence. Also, in cases where the requesting party has established a strong and clear prima facie case, adverse inferences would be efficient. The tribunal would be rid of the problems of vagueness and weight and there would be no doubt as to exactly what the requesting party want the tribunal to infer.

12 Due Process in Enforcing via Adverse Inferences

Adverse inferences, or the mere threat of drawing adverse inferences, can impel recalcitrant parties to produce the evidence sought. The tribunal drawing adverse inferences can make it possible for a claimant to rightly win a case it otherwise would not have been able to prove.¹³⁵ However, with these opportunities there are also risks. The question arises under what circumstances drawing an adverse inference could amount to due process infringement.¹³⁶

From a due process perspective it is important that the party against whom adverse inferences may be drawn is first presented with the opportunity of rebutting the plausible inference. Therefore, a tribunal always has to be careful to inform the parties in clear terms that adverse inferences may be drawn regarding a given issue. Otherwise an award may be susceptible to challenges on a due process basis.¹³⁷

Further from a due process perspective, it has been suggested that ‘most arbitrators would be disturbed by the thought of deeming the burden of proof discharged by an inference’.¹³⁸ Although many a text on evidence in arbitral procedure refer to the possibility of drawing adverse inferences, little is written on what exactly arbitrators are permitted to do, and in what situations. As commentators acknowledge; drawing adverse inferences is no easy task. Indeed, it has been suggested that adverse inferences are rarely used because of the difficulties related to their application.¹³⁹ However, one may contend that Sharpe has a point in his pleading for adverse inferences:

“Equitably allocating the parties’ evidential burdens, weighing direct and circumstantial evidence and applying inferences rationally and fairly is no small task for any court or tribunal, but that difficulty cannot be a reason for denying parties relief to which they are entitled.”¹⁴⁰

¹³⁵ Sharpe, ‘*Drawing Adverse Inferences from the Non-production of Evidence*’, p. 550.

¹³⁶ As discussed above, lack of due process may result in the award being unenforceable.

The New York Convention, granting and regulating the right to international enforcement of arbitral awards, states in its article V(d) that recognition and enforcement may be denied if, failing agreement between the parties, the arbitral procedure was not in accordance with the law of the country where the arbitration took place. In addition, in article V(2)(b) it relieves the enforcing country of the commitment to enforce if enforcement would be contrary to the public policy of that country. Lack of due process can be held as against public policy.

¹³⁷ Darwazeh; *Document Discovery...*, p. 11-12 and Webster, *Obtaining Documents from Adverse Parties...*, p. 51.

¹³⁸ Paulsson, *Overview of Methods of Presenting Evidence in Different Legal Systems*, p. 118.

¹³⁹ Brocker, *Discovery in International Arbitration...*, p. 25.

¹⁴⁰ Sharpe, p. 571.

Adverse inferences must be applied with care. It should be recognized that drawing adverse inferences is to fiddle with the burden of proof. A tribunal would take on the task only with caution and care. Using the Iran-U.S. Claims Tribunal's rulings on requirements for drawing adverse inferences would be helpful for a party in requesting certain inferences, and for a tribunal in applying them.

13 Enforcing via the New York Convention

“There may or may not have been a golden age when parties voluntarily complied with arbitral awards and arbitral procedural orders, although some attribute compliance more to the New York Convention than a spirit of co-operation.”

- Arbitrator Thomas H. Webster in *Obtaining Documents from Adverse Parties in International Arbitration*, 2001.

The New York Convention is often mentioned as the single most important factor to make international arbitration so successful.¹⁴¹ It was signed by the original parties in 1958 and today practically every trading nation is a signatory.¹⁴² The New York Convention makes arbitral awards enforceable in the signing country, wherever the award has been made.¹⁴³ Document production orders as such are not enforceable under the New York Convention as they are not awards. However, if such an order would qualify as an award, it would arguably be enforceable under the Convention.

The New York Convention does not define the term ‘award’. It simply states in its Article I (1):

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

It is a recognized problem that the term award is not defined.¹⁴⁴ However, there seems to be consensus that the term does not exclude partial awards; that is, awards by which parts of a dispute is finally resolved. There is nothing in the legislative history of the Convention that suggests such exclusion.¹⁴⁵ Further, one of the leading commentators, Albert Jan van den Berg, acknowledges that the Convention does not preclude a right to enforcement of partial awards.¹⁴⁶

¹⁴¹ See, for example, Branson, *The Enforcement of Interim Measures of Protection “Awards”*, p. 164. The Convention’s popularity is mirrored in the University of London report on attitudes of users of arbitration, where the New York Convention was held by respondents to be a great advantage of arbitration, Mistelis, *International Arbitration – Corporate Attitudes and Practices...*, p. 14.

¹⁴² Taiwan is a notable exception; the republic is not a signatory.

¹⁴³ The convention give contracting states the option of requiring reciprocity; Article 1(3).

¹⁴⁴ See, for example, To, *To Arbitrate or not to Arbitrate*, p. 29.

¹⁴⁵ Brocker, *Discovery in International Arbitration...*, p. 29.

¹⁴⁶ Van den Berg, *The New-York Convention: Summary of Court Decisions*, p. 58.

The issue at hand is whether cross-border document production orders can be enforced via the Convention. Key is to define the term ‘award’ in the context of enforcement of orders for documents. On that very issue, there have been two cases, one Australian and one American. In the Australian case, *Resorts*, enforcement was denied. In the American case, *Publicis*, enforcement was granted. Both cases were on the interpretation of The New York Convention and its term ‘award’. For an arbitral tribunal’s decision to qualify as an award it has to be final, according to both of these cases. In *Resorts*, the decision was not deemed final, in *Publicis* it was.

13.1 Source of Authority

Publicis and *Resorts* deal with two types of situations. Firstly, cases where there is a substantial contractual right to documents. That is where the parties have actually agreed on information exchange in their original contract. Secondly, cases where there is merely a procedural right to documents. That is, the authority of the arbitration tribunal to order document production is either inherent in the agreement to arbitrate or incorporated into the same by incorporation of arbitration rules or rules on evidence.¹⁴⁷

13.2 The Case of Resorts

In this case, the documents for which production was ordered included documents for which there was a substantial contractual right as well as documents for which there was merely a procedural right. The dispute was between a franchisor and a franchisee. The franchisor claimed, inter alia, that the franchisee had breached its obligations under the franchise agreement by failing to provide an annual audit of its operations and not allowing the claimant and its auditors access to books and records of operations. However, there was no distinction drawn between document production claims based on a substantial contractual right under the license agreement and those based merely on procedural rights. The tribunal issued “an interim order and award”. It granted broad, U.S.-style discovery. Furthermore, the award was expressed to apply “during the pendency of this arbitration”.¹⁴⁸ The claimant sought to enforce the measure in Australia. The court denied enforcement stating:

“These orders... are clearly of an interlocutory and procedural nature and in no way purport to finally resolve the disputes or any of them referred... for decision or to finally resolve the legal rights of the parties. They are

¹⁴⁷ The source of the arbitral tribunal’s power to order documents matters when dealing with the New York Convention, as it is designed to enforce awards on substantial rulings, not procedural. Regarding national law, substantial claims are outside the court’s jurisdiction as they are referred to arbitration. As regards adverse inferences the distinction is irrelevant as adverse inferences does not deal with enforcing a right per se, but rather tries to determine what information the required documents likely contain.

¹⁴⁸ This, of course, could be interpreted as a reference to its interim nature and thus lack of finality.

provisional only and liable to be rescinded, suspended, varied or reopened by the tribunal which pronounced them.”¹⁴⁹

The initial findings of the court; that the orders did in no way purport to finally resolve the legal rights of the parties were determinative for the outcome of the case, as the term award under the New York Convention is considered to require finality. In the words of the Australian judge, it is not applicable to “an order which merely deals with procedural or interlocutory matters.” The orders in question were deemed to do only that, and thus enforcement was denied.

13.3 The Case of Publicis

In this case it was clear that there was a substantial contractual right to the documents requested. There was an order for the French company, Publicis, to turn over tax records to its joint venture partner, the American company True North. Enforcement was granted by reference to the substantial contractual nature of Publicis’ obligation to turn over the documents:

“In the situation at hand, whether or not Publicis had to turn over the tax records is the whole ball of wax. The tribunal’s order resolved the dispute, or was supposed to, at any rate. Producing the documents wasn’t just some procedural matter – it was the very issue True North wanted arbitrated.”¹⁵⁰

The order issued by the tribunal was not termed ‘award’, and was not signed by all three arbitrators, which an award should be according to the UNCITRAL Rules under which they arbitrated.¹⁵¹ Even so, the order for the documents was accepted as an award and enforced in the U.S. court, by virtue of its final nature:

Publicis says the tribunal’s decision was an interim order and, under the convention, only arbitral ‘awards’ are final and subject to confirmation. Publicis insists that until the order was final, True North was confined to seeking relief from the tribunal itself or the courts of England, the site of the arbitration... Although Publicis suggests that our ruling will cause the international arbitration earth to quake and mountains to crumble, resolving this case actually requires determining only whether or not this particular order by this particular arbitration tribunal regarding these particular tax records was final.¹⁵²

13.4 An Opening for Procedural Rights

Resorts and Publicis have left commentators hopeful as to the possibility of enforcing orders for documents through a good old friend of international arbitration; the New York Convention.

¹⁴⁹ Publicis Commun v. True North Communs. Inc., 206 F3d 725 (7th Circuit Ill.), 2000.

¹⁵⁰ Publicis Commun v. True North Communs. Inc., 206 F3d 725 (7th Circuit Ill.), 2000.

¹⁵¹ UNCITRAL Arbitration Rules, article 32(4).

¹⁵² Publicis Commun v. True North Communs. Inc., 206 F3d 725 (7th Circuit Ill.), 2000.

Branson sees a principle emerging, that unless the arbitral tribunal's decision concerns a matter which is wholly interlocutory, as it was deemed to be in *Resorts*, but rather relates to a discrete issue which is not merely procedural in its impact, it may be enforced via the Convention.¹⁵³ His analysis follows the reasoning in *Resorts*, where the orders were considered to be just that: merely procedural.¹⁵⁴

However, to be able to use this mechanism there has to be a substantial contractual right to the requested documents. In *Publicis* there was such a right, and it was emphasized by the tribunal that whether True North could rightly obtain the tax records was “the very issue True North wanted arbitrated”.¹⁵⁵

Webster argues that *Publicis* may open up for enforcement of documents to which there is merely a procedural right. He emphasizes that the finality of the orders issued was decisive for the court, not the substantial clause granting right to documents. He points out that “virtually every legal system requires a party to perform the obligations of a contract in good faith, and there is no reason why this principle should not be applicable to the arbitration agreement itself.” As discussed above, the tribunal does have the authority to make orders for documents. And, as stated by one commentator: “Simply put, if the arbitrators have authority to issue a given procedural order, the parties have a corresponding obligation to abide by it.”¹⁵⁶ Hence, the New York Convention would be applicable in enforcing a partial award dealing with one party's breach of the arbitration agreement in that it is not carrying out its obligation to arbitrate in good faith.

Branson argues that whether orders to produce certain documents will be enforced via the New York Convention depends on how the court characterizes the measure before it. It has been suggested that some U.S. courts would be more likely to characterize the document production orders which were before the Queensland court in *Resorts* as “not merely procedural in their substantive effect”. They would thus be enforced.¹⁵⁷ This issue boils down to whether document production orders are an interim measure.¹⁵⁸ Interim measures do not typically have substantive effect, as they can be rescinded. This does not fit well with document production, as information given cannot be taken back. Thus, in the view of the author, document production orders are not to be considered as interim measures and do have substantive effect. That effect could be of relevance for a judgment on finality, such as *Resorts* and *Publicis*.

¹⁵³ Branson, p. 169.

¹⁵⁴ *Resort Condominiums International Inc. v. Boldwell and another* (1993) 118 ALR 655.

¹⁵⁵ *Publicis Commun v. True North Communs. Inc.*, 206 F3d 725 (7th Circuit Ill., 2000).

¹⁵⁶ Webster, p. 57.

¹⁵⁷ Branson, p. 169.

¹⁵⁸ The definition is dealt with above in part on Scope.

14 Efficiency in Enforcing via the New York Convention

There is a big difference in terms of efficiency between situations where there is a substantial right to documents, and where that right is based on procedural rules or principles made contractual by way of a good faith obligation. Those two situations do share one drawback in relation to efficiency: that the requesting party has to actually involve the courts, which inevitably slows down proceedings and increases costs. It is therefore the cost aspect of efficiency that is of relevance in this setting.

14.1 Enforcing a Substantial Right

In cases where there is a substantive contractual right to documents, an award on such production is enforceable under *Publicis*.¹⁵⁹ Would such enforcement be efficient? According to Webster it would, provided that the requesting party looks after its timing. The claim for the documents is not to be treated at the same time, and definitely not in the same fashion, as procedural requests:

“[W]here a party has a contractual right to documents, and those documents are potentially important for its case, it would be more effective to separate out the claim for the documents. That matter could be decided immediately after jurisdiction and before the parties agree on other aspects of the procedure and establish a tentative timetable.”¹⁶⁰

If there are provisions for document production, those are usually pretty clear.¹⁶¹ Since they are contractual the tribunal should not be occupied with

¹⁵⁹ *Publicis* is, of course, a U.S. case and does not have binding effect outside the U.S. However, it has persuasive power.

¹⁶⁰ Webster, p. 56.

¹⁶¹ Webster writes in this connection: “In the franchising area, for example, either the franchisee has submitted the documents that it is required to under the franchise agreement or it has not done so.”, p. 56. Further, on information covenants in international contracts: “One of the essential terms of many types of international contracts is the exchange of information that the parties agree to with respect to the contract. License agreements usually provide for reporting requirements as to various technical and commercial matters that are relevant to the use of the technology and the calculation of royalties that may be due under the contract. Distribution contracts tend to have less onerous information covenants. However, the manufacturer will want to keep informed of various matters such as technical problems with returned products.” In construction projects, the FIDIC Red Book, for example, requires the contractor to provide extensive information relating to matters such as the design information, programme, cash flow, etc., much of which may be relevant to any dispute between the parties with respect to the work. If the contractual relationship breaks down and arbitration is looming, it is natural that the party with the contractual right to receive the information will want to enforce that right. It is also understandable that the other party may resist handing over information that could affect its chances in the arbitration. Therefore, there is an issue as to enforcement of such information covenants and the timing of such enforcement.”, Webster, p. 45.

procedural considerations. Thus, whether the request is burdensome or onerous or in line with the IBA Rules need not, and should not, be considered. Neither should the tribunal's authority to issue procedural orders. Ridding the procedure of these considerations would of course increase efficiency. Webster cautions the practitioner as to timing, warning that contractual rights may be lost in procedural squabble and not recognized as contractual rights if timing is bad:

“[I]f [a substantial contractual] right exists, an arbitral tribunal should be prepared to enforce it at the outset of the proceedings. This issue of the timing of the claim for the documents is especially true with the current attempts to accelerate arbitration procedure. Whether right or wrong, it is submitted that a substantive contractual claim for documents that is raised after the tentative timetable has been set in the arbitration proceedings will be treated differently from a claim submitted with the Request for Arbitration.”¹⁶²

If claimed in a timely manner, substantial clauses would thus make enforcement via the New York Convention efficient.

14.2 Enforcing a Procedural Right

The all else overriding problem facing a party going for New York Convention enforcement of a procedural right is the rather significant risk that the argument will not be accepted by the relevant court. Webster acknowledges that many practitioners have doubts about the enforceability of such an order. He believes, however, “that perception may evolve based on the nature of arbitration itself”. By that, he is referring to the contractual nature of arbitration:

“Parties are not forced to arbitrate. They do so as a matter of mutual consent as part of a contractual bargain. And by agreeing to arbitration, they are accepting the rules that grant the arbitration tribunal the authority to issue procedural orders. Therefore, as one commentator recently stated: ‘Simply put, if the arbitrators have authority to issue a given procedural order, the parties have a corresponding obligation to abide by it.’”¹⁶³

It is submitted that this argument is perfectly logical. What could be held against such application of the Convention is that it was not the original intent of the drafters to make the Convention a tool for enforcing document production orders. It has been held by prominent commentators that there is “a certain flaw” in using the Convention for those purposes, as it was not designed for that.¹⁶⁴

If national courts would accept the Convention to be employed in such situations, enforcement would be efficient. It does spell court involvement, but only on a limited scale. The New York Convention has a hands-off approach not found in national laws granting enforcement of foreign

¹⁶² Webster, p. 56.

¹⁶³ Webster, p. 57.

¹⁶⁴ Craig, Park, Paulsson; International Chamber of Commerce Arbitration, p. 465-466.

tribunal's documentary orders.¹⁶⁵ On the other hand, there is much to lose for a party going down this path; the risk of protracted court proceedings ending with a judgment denying enforcement.

¹⁶⁵ As shown in part on National Law, some national laws, such as Sweden and Germany, keeps the control of what can be produced with the national courts. Others, such as Hong Kong, give more leeway to the arbitrators' orders. None of those are, however, as restrictive in possible court involvement as the New York Convention.

15 Due Process in Enforcing via the New York Convention

Enforcing via the New York Convention does not on the face of it call into question any issues of due process. Of course, opening up for internationally enforceable procedural powers vested with the arbitrators increases the autonomy of the arbitration process. That does not, however, translate into due process concerns as The New York convention itself opens up for challenges of awards where due process has not been observed. As has been mentioned above, different jurisdictions have different ideas of what due process actually is. The Convention leaves the field open for the enforcing country to apply its own notions. This means that a tribunal awarding certain document production must make sure that such production is within what is considered as due process in the particular jurisdiction where it is to be enforced.

16 Analysis

Each chapter above is followed by an analysis of the respective method by the parameters of efficiency and due process. Below, the most focal points are elaborated on.

16.1 Efficiency

Efficiency is defined as: ‘Obtaining the desired result with relatively little time and cost spent on enforcement measures and/or enforcement proceedings.’

16.1.1 Enforcing via National Law

The central efficiency concern in this setting is that a parallel national court proceeding slows down the arbitral proceedings. It is thus the cost aspect of the efficiency concept that is at play here. This concern can be treated in two ways.

Firstly, if there is an efficient judicial system in place where enforcement would be sought, an enforcement application need not be exceedingly time consuming. As counsel, this is an important contingency to look into when considering what enforcement route to take. The exact wording of the clause permitting enforcement of cross-border production orders is of relevance, as seen in the examples of Sweden and Hong Kong. The more court review of an order national law allows the greater is the risk for protracted proceedings.

Secondly, from the perspective of the legislator, once the option of enforcing via national law is in place there is a strong incentive for parties to produce without actually going to court. Opening up national law for enforcement of cross-border documentary orders will thus benefit efficiency in arbitration proceedings.

16.1.2 Enforcing via Adverse Inferences

There are two major efficiency concerns in this setting. Firstly, the risk of procedural squabbling on what exactly arbitrators are permitted to do, and in what situation. Has a ‘satisfactory explanation’ to the non-production of documents been put forward? Is there a prima facie case? Both the cost- and the result aspect of efficiency is thus of relevance.

Secondly, adverse inferences are of no avail at all if the requirements (as summarized by Sharpe) cannot be fulfilled. In that setting the very same requirements are troublesome; for the requesting party to show that its adversary has the relevant documents and to make a strong and precise

prima facie case for the inferences sought. If that cannot be done, the institute of adverse inferences has nothing to offer.

16.1.3 Enforcing via the New York Convention

The main concern in this setting is that the enforcing court may not accept the argument and thus deny the applicant enforcement. It is the efficiency pertaining to result that is relevant. As regards cases where there is a substantial right to documents, it seems a claim ought to be accepted. As regards cases where there is merely a procedural right, however, it is uncertain how national courts will view the issue of enforcement via the New York Convention, as the Convention was not designed for enforcement of procedural decisions.

16.2 Due Process

Due process is defined as ‘those basic legal elements which are necessary for the proceedings to qualify as arbitration and for the decision to be classified as an enforceable title of execution. In this setting of enforcement of arbitral awards, due process concerns what requirements must be met to legitimately force documents from a party.¹⁶⁶ Arbitral tribunals are generally good with due process, as arbitrators are looking to protect the coming award from challenges.

16.2.1 Enforcing via National Law

The central due process concern in this setting is related to the concept’s protean nature. As different jurisdictions have different views of what due process requires, it may be that the limits to what can be produced according to the enforcing court is not enough for a fair hearing in the jurisdiction of the party seeking document production. However, a challenge to an award would presumably not succeed on such a basis as it would not be considered as against public policy within the meaning of the New York Convention.

16.2.2 Enforcing via Adverse Inferences

Firstly, it must be stated that it is crucial for the tribunal to inform the parties of any inferences it considers drawing. If the party against whom inferences are drawn has not had a proper chance to rebut the inference, due process may indeed be considered to be infringed.

Secondly, adverse inferences is an issue of evidence law and the tribunal employing this institute must make sure that the evidential standards to

¹⁶⁶ What those requirements are depends on what right to documents a given legal system grants. In an Anglo-American setting, such rights are far-reaching, whilst in the Continental tradition they are much more narrow. The IBA Rules on the Taking of Evidence in International Commercial Arbitration sets a bench mark in outlining a compromise between the two traditions, see The IBA Rules, Article 3.

which they chose to adhere are reasonable. Using Sharpe's five 'rules' would be helpful in that regard.

16.2.3 Enforcing via the New York Convention

As the New York Convention has an exception for enforcement that entails lack of due process, it is not a fundamental concern in this setting.

17 Conclusion

Lastly, this paper seeks to put the thesis in a practical setting, translating the analysis to check points in choosing enforcement measures.

17.1 National Law

Whether or not national law is a suitable method depends to a very large measure on the enforcement jurisdiction's legislation. If the enforcement jurisdiction grants a clear-cut right to cross-border enforcement of documentary orders, it may well be the most efficient method.

If the relevant legislation prescribes application of its own procedural law to the document request (that is, it reviews the arbitral tribunal's order) it needs to be made sure that the requests are within the realm of what the relevant court will enforce. Crucial points in that regard are that the document request is specific enough and that the information requested is not privileged in any way. Furthermore, a party would want to look into how long cases are generally left pending before the relevant court. If pending times are long, national law may not be a viable method in that particular jurisdiction.

17.2 Adverse Inferences

Where the requesting party has a strong prima facie case and corroborating evidence can be produced, adverse inferences may be a good way to go. Its principal advantage is that no courts have to be involved, which enhances efficiency. A prima facie case needs not only to be strong, it also needs to be precise in order for the tribunal to know exactly what to infer.

Other situations, in which adverse inferences may be a good route, are ones where the documents are not actually key to the requesting party's case. In such situations, the adversary lack strong incentives to withhold documents and may then, in face of the threat of adverse inferences (however vague), produce the requested documents.

17.3 New York Convention

The New York Convention should be a good way to go in cases where there are substantial provisions on information exchange in the relevant contract. Publicis, the case that demonstrated how this is done, does of course not have more than persuasive powers outside the U.S. This paper argues that Publicis' reasoning is clear and logic. There is no reason why a part of the dispute, which obviously needs to be enforced at an early stage, should not be so in the form of a partial award.

Less assurance can be offered in a case where there is merely a procedural right to documents. As the outcome is unsure, the path is not recommended, unless there is no other way to go. Where national law doesn't offer assistance and the requesting party has no prima facie evidence, this may be its only bet.

17.4 Suggestions for Further Research

Further research would be useful on the possibility of enforcement via the New York Convention of document production orders, both where there is a substantial right and where the right is merely procedural. In this connection, it may also be considered whether another convention, targeted at procedural and/or interim decisions would be useful and feasible, and, if so, how it ought to be designed.

The difficulty of applying adverse inferences has been pointed out by several eminent commentators on arbitration. This is by itself a call for further research. For adverse inferences to be applied efficiently without due process infringements, more needs to be known on how to apply them, in what circumstances. Adverse inferences are also used in national court proceedings. There must be a rather substantial number of cases dealing with the issue, which would form a solid basis for further research.

On national law, is it still a rule of thumb that a foreign tribunal's order for document production cannot be enforced? It seems that the paradigm is shifting, and increasingly individual countries do avail their courts for enforcement of orders from foreign tribunals. And indeed, nations are fine with enforcing substantial awards on very large amounts of money without review; why should enforcing orders for documents be an issue at all? A comparative study on national law would be of much interest.

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