

Dispute Resolution: An Overview of Document Production in Egypt

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Background

In common law jurisdictions, parties to a dispute disclose the documents or information in their possession that are relevant to the dispute in hand (the specific requirements differ from one jurisdiction to another). Contrary to the common law legal system, civil law jurisdictions do not normally recognise the disclosure and discovery of documents as an element of the pre trial fact-finding process.

The civil legal system approach mainly entails that each party to a dispute shall submit the proof supporting the position set out in the claim or defence (as applicable).

However, the development of international arbitration as a mechanism for dispute resolution complicated matters as it frequently involved parties from different legal systems. This drove the international arbitration community to find a common ground for the taking of evidence. Therefore, the International Bar Association Rules on the Taking of Evidence in International Arbitration were adopted in 1999 and revised in 2010 as guidelines for the evidentiary aspect of arbitration proceedings ("IBA Rules"). Although Egypt does not fall far from other civil law countries with relation to the evidence rules, the Egyptian Law No. 25 of Year 1968 on Evidence in Civil and Commercial Procedures (the "Evidence Law") recognizes "Production of Documents" as an instrument of discovery that exists in the common legal system.

In order to compare the Egyptian principle of document production as against the IBA Rules, it is necessary to first consider the former in some detail.

Production of Documents under the Evidence Law

As constitutionally established, one shall not be compelled to provide an evidence against himself under Egyptian law. Notwithstanding the aforesaid legal principle, Article 20 of the Evidence Law permits the party to a dispute to request that the opposing party produce documents in his possession that may assist the former to evidence his case. With this respect, the Article provides three grounds under which the request for the production of documents may be granted:

- If the law permits the request for providing or delivery of a document (eg. the Egyptian Trade Law entitles the court to order the trader, even at its own initiative, to produce its commercial books).
- If the requested document is common between the parties. In other words, if the document is in the interest of the parties or serves as a proof of their obligations and their mutual rights.
- If the document subject to request was relied on by the opposing party at any stage of the proceedings.

Furthermore, Article 21 of the Evidence Law sets out the following requirements to be satisfied in order for any request for document production to be considered before the Court:

- The description of the requested document.

- The subject of the requested documents in detail.
- The fact that is alleged to be proved by the requested document.
- The circumstances which prove that the requested document is under the possession of the opposing party.
- The reason for which the opposing party shall produce the requested document.

The judge does not have a discretionary power with relation to a production of documents request and is obliged to order the immediate production of documents in the following three cases: (i) if the requesting party proves that the requested documents do exist under the possession of the counterparty; (ii) if the party requested to produce the documents acknowledges possession; or (iii) the party requested to produce the documents is silent in response to the request and provided that the requested document(s) are specified, detailed, relevant and material. Conversely, if the party requesting production did not provide sufficient proof that the documents were indeed in the counterpart's possession or if the counterparty denied the possession of such documents he would be ordered to take an oath to the effect that the requested documents do not exist nor he is aware of their existence.

The judge may, upon failure of a party to produce the ordered documents or taking of the oath (as set out above), consider a copy of the requested document as evidence that it exists, or establish his decision based on the formality and content description provided by the requesting party.

Article 27 of the Evidence Law has established a wider spectrum for the production of documents that are under the possession of the opponent or a third party, which applies if the circumstances under Article 20 are not satisfied in the production of documents request.

Under this Article, the Evidence Law widens the scope to include a third party or parties who are in possession of the requested documents. To elaborate, Article 27 compels the production of documents provided it meets it is material to the claim before the court and sufficiently specific. In essence, the requesting party must demonstrate that the document(s) sought would have an impact on the outcome of the case albeit that it does not necessarily have to be constitute absolute proof of the issue at hand. This Article has a broad scope and includes all types of evidence including documents, paintings, pictures etc.

However, Article 27 is limited where it may prejudice a legitimate interest of the party to whom the request has been issued such as the right to confidentiality. Nevertheless, the judge may reconcile between the right to gather evidence and the right to confidentiality through ordering the production of a specific part of the requested document. The judge may also order a party to produce a document that would solely be reviewed by the Court.

Although outside the scope of the Evidence Law, it is also worth mentioning that the Rules of the Cairo Regional for International Commercial Arbitration ("CRCICA") have provided for the issue of production of documents. The CRCICA does not require the production of documents of documents upon a party's request. However, Article 27/1 of CRCICA has left the power to order the production of documents to the Arbitral Tribunal whenever it considers it necessary to adjudicate the subject matter. Pursuant to Article 30.4, if the party requested to produce the document(s) does not comply with the order of the Arbitral Tribunal, the latter would be at liberty to make any necessary inferences.

The IBA Rules

The IBA Rules has empowered Arbitral Tribunals to order a party to a dispute to produce documents or take reasonable steps to obtain such documents whether upon the request of the counterparty or according to its own discretion. The Rules have established three requirements for ordering production of documents, namely;

Specificity, the party requesting production shall provide a sufficient description of the requested

document(s). The party shall also provide the reasons that make him assume that such documents are under the possession of the counterparty.

Materiality and Relevance, the party requesting production shall clarify why the requested document(s) are relevant to the dispute and how they would be material to the outcome of the case.

Finally, the party requesting the documents production shall demonstrate why he believes that such documents are under the possession, custody or control of the counterparty; and why production would not constitute a burden upon on the latter.

Moreover, the IBA Rules allow the Arbitral Tribunal to order third party to produce documents in accordance with the aforementioned requirements.

In a nutshell, the standards for production of documents under Article 27 of the Evidence Law are somewhat similar to their homologue under the IBA Rules which are specificity, materiality and relevance. Similar to Article 30.4 of the CRCICA Rules, as a deterrent, if the party ordered to produce document fails to produce this document or did not raise an adequate objection, the Arbitral Tribunal may draw an adverse inference.

Conclusion

The Evidence Law provides for diverse situations where documents require to be produced. Articles 20 and 21 have set an exhaustive list of fairly stringent conditions and standards before a judge is entitled to order a party to produce a specific document(s). However, Article 27 sets out a broader scope whereby production of documents may be ordered to include a third party or parties in possession of the requested documents. Moreover, the wide-ranging scope of Article 27 encompasses any form of evidence that is deemed necessary in order to allow the courts to establish the existence and extent of a claim.

There is a significant resemblance and cross over between Article 27 and the IBA Rules. There are no legal impediments preventing the parties in Egyptian arbitration in agreeing to rely upon the IBA Rules. Further, it is not uncommon in international arbitral proceedings seated in Egypt that Arbitral Tribunals order that it shall seek guidance from the IBA Rules when the issue of document production arises.