

17 November 2011,
“KIEV ARBITRATION DAYS 2011”: Think Big!

SAYENKO KHARENKO
— ATTORNEYS AT LAW —

**Evidence in international arbitration:
practical overview**

Dr. Tatyana Slipachuk
Partner

STARTING POINT

Take nothing on its looks; take everything on evidence.
There's no better rule.

Great Expectations

Mr Jaggers to Pip, Chapter 40

Charles Dickens

“EVIDENCE POCKET DICTIONARY”

Document production

E-discovery and e-disclosure

Oral evidence

Expert evidence

Evidentiary privilege

Forged evidence

SOURCE OF RULES OF EVIDENCE COLLECTION AND ADMISSIBILITY

- National laws
- Arbitration rules
- What is agreed in each case by the parties
- IBA Rules on the Taking Evidence in International Arbitration (as of 29 May 2010): necessary, practical and safe

DOCUMENTS ...AND DOCUMENT PRODUCTION

What is document?

a piece of paper or other tangible item or e-mail or computer database or voicemail messages or...

Option I for Article 7 of UNCITRAL Model Law:

a document can take many different forms “including but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy” which can be “generated, sent, received or stored by electronic, magnetic, optical or similar means”

The parties assisted by a number of legal and other experts

VS

one or three individuals

DOCUMENTS' CHARACTERISTICS

- (a) original contract documents and precontractual documents;
- (b) documents prepared in course of contract performance;
- (c) documents prepared for dispute;
- (d) documents prepared during the dispute including legal correspondence;
- (e) third parties' documents;
- (f) e-documents (“ESI”)

E-DISCOVERY: DOES IT SUIT INTERNATIONAL ARBITRATION

The purpose of discovery in English civil procedure is to ensure that all documents including those that are unfavorable to a party, should be produced by him to a court

W.G. Morgan, Discovery in Arbitration (1986)

Discovery obligation vs Disclosure of documents

How access to the ESI held by another party can be allowed? And *should* it be allowed at all?

Preservation of ESI

Awareness of technicalities

Data protection and privacy legislation (i.e. EU vs non-EU countries)

ICDR Guidelines for Information Exchange in International Arbitration, 2008

(to all ICDR cases unless parties agrees to opt of their application)

CIArb Protocol “E-disclosure in Arbitration”, 2008 *(if time and cost burdens of giving disclosure may be an issue)*

ORAL EVIDENCE

Memory is not so much like reading a book as it is like writing one from fragmentary notes

Due process: does it require oral evidence and cross examination?

Ethical standards

Credibility

Psychological aspects

Medical aspects

Time and costs

EXPERT EVIDENCE

In the kingdom of the blind, the one-eyed man is king

Party Retained Expert:

- a party's witness? an investigator?
- an aide to the legal team?
- perhaps more controversially, an advocate?

Tribunal Appointed Experts:

- a witness? an investigator for the arbitral tribunal?
- as the sole determiner of issues?
- additional member to the tribunal?

EVIDENTIARY PRIVILEGE

IBA Rules in Article 9 (2):

“The Arbitral Tribunal shall, at the request of a party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: (...) (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable”

Applicable rules of privilege, confidentiality and secrecy

Rules affecting party or counsel

Impact of ethical rules and legal practice of national jurisdictions

Lack of clear best practice or international consensus

FORGED EVIDENCE

Production of forged or false documents

- *forged documents may be produced by the claimant to evidence the source of claim*
- *forged or false documents may be produced by claimant or respondent as written evidence supporting a specific allegations made in support of the claim or defence*

Production of fraudulently obtained documents

- *a claimant or respondent may produce documents that have been obtained by fraud or through other illegal methods (stolen or obtained against the will of issuer)*

“Consensual fraud” (money laundering)

Should arbitrators address the issue *ex officio* or only upon request of the party?

Dismissing the claim vs disregarding of forged documents? Duty to report?

Thank you for your kind attention!

Contact details:

Dr. Tatyana Slipachuk, FCI Arb

Partner

SAYENKO KHARENKO

tel: +380 44 499 6000

E-mail: tslipachuk@sk.ua

www.sk.ua