Austrian Yearbook

on

International Arbitration 2019

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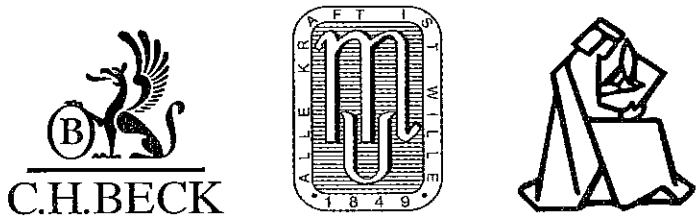
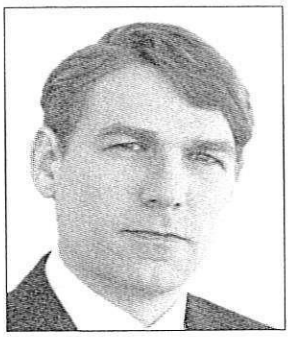


Wien 2019
MANZ'sche Verlags- und Universitätsbuchhandlung
Verlag C.H. Beck, München
Stämpfli Verlag, Bern



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Document Production against the Background of Private Enforcement

Florian Neumayr

I. Introduction

It seems fair to state that private enforcement has eventually taken-off in Europe. Some Member States have – to stick to the aviation language – built better run-ways than others but generally follow-on damages claims are increasingly seen in state fora.[1]) This not only holds true of the meanwhile almost "usual suspects" – the UK, Netherlands and Germany – but also of other jurisdictions. France, for example, is one of the Member States where state courts have handed down a significant number of decisions awarding damages.[2]) However, also smaller jurisdictions such as Belgium and Austria are home to prominent private enforcement cases.[3])

In arbitration, particularly follow-on antitrust actions are still to be considered a "new field".[4]) However, there are more and more articles on the

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[1]) For example, Hausfeld & Co LLP, an established US "plaintiff firm" which has meanwhile opened several offices also in Europe, estimated the aggregate number of cartel damages claims in Europe to be 18 in 2009 and at least 70 in 2016, respectively – quoted by Jean-Francois Laborde, *Cartel damages claims in Europe: How courts have assessed overcharges*, Concurrences 36 (No 1-2017).

[2]) A very good overview on judgements in cartel damages claims in Europe is provided by Laborde, *Cartel damages claims in Europe, supra* note 1, at 36 with an update forthcoming.

[3]) In Belgium, for example, the European Commission is suing for civil damages following its own fine decision in case COMP/E-1/38.823 (*Elevators & Escalators*). In Austria, already in 2007 the first follow-on damages for breach of anti-trust rules have been awarded (LG Graz, Aug 17, 2007, docket no. 17 R 91/07p); since then, Austrian proceedings have, *inter alia*, given rise to a preliminary ruling by the CJEU establishing that, in principle, umbrella claims (claims by parties that have bought in the relevant market but not from the cartelists) can be brought under EU law (ECJ, Case C-557/12 [*Kone*]).

[4]) As such the topic was, for example, also discussed in the course of the 2018 Vienna Arbitration Days.

topic[5]) and it seems generally accepted that claims stemming from antitrust infringements are arbitrable and, at least according to the jurisprudence in most Member States, covered by standard arbitration clauses.[6]) In "one-to-one scenarios", that is mainly against the background of a particular (long term) agreement which, according to one party, infringes the prohibition to abuse a dominant position[7]) or also the cartel prohibition,[8]) there will often exist such clauses.

It is in "one-to-one scenarios", where competition law has clearly already found its way to arbitration and issues of evidencing (potentially) anti-competitive behavior and its consequences arise. Document production, the topic this article focuses on, and that outside of arbitration has only recently been introduced in civil law jurisdictions by way of implementing the EU Damages Directive,[9]) becomes relevant. However, also for "multi-party scenarios" (the typical follow-on situation where many potential claimants face several cartelists), where arbitration should be considered as an alternative and potentially preferable way of dispute resolution,[10]) it can be critical for all sides to understand what the document production, if any, may entail.

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[5]) *Cf.*, with further references, for example, Michael Nueber & Nada Ina Pauer, *Arbitration as a Means of Private Enforcement of Competition Law – Where do we stand?, in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2018 95 (Klausegger et al. eds., 2018).

[6]) While this has been doubted by some particularly in the light of the decision by ECJ, Case C-352/13 (*CDC*), *inter alia*, the English High Court and the Regional Court Dortmund with, in the author's views, convincing arguments have reasoned that follow-on claims are covered by standard arbitration clauses (English High Court decision [2017] EWHC 374 [CH] of Feb 28, 2017, and Regional Court Dortmund decision 13 O [Kart] 23/09 of Apr 29, 2013), respectively). The German court has even held that a narrow arbitration clause ("all disputes ... out of ..." and not also "... in connection with ...") cover private enforcement actions.

[7]) In the EU, this prohibition is enshrined in Article 102 TFEU and corresponding national law provisions – in Austria, for example, in Section 5 of the Austrian Cartel Act (*Kartellgesetz* 2005).

[8]) Article 101 TFEU and corresponding national pieces of legislation – in Austria, Section 1 of the Austrian Cartel Act.

[9]) European Directive 2014/104/EU on Certain Rules Governing Actions for Damages Under National Laws for Infringements of the Competition Law Provisions of the Member States and the European Union.

[10]) While it takes "two to tango" (or even more) for an often necessary post hoc submission in a multi-party scenario, institutes such as joint liability, limited right to contribution (as re-enforced by the Damages Directive), avoidance of national procedural peculiarities and the general advantages of arbitration ("chose your judge" to ensure knowledgeable persons decide in suitable proceedings what are typically very complex matters, "speed" as opposed to facing very high interest claims simply due to lengthy proceedings, etc) may well convince both sides.

II. Document Production

The production of documents is a feature of arbitration, which particularly from a civil law perspective often raises questions. While, for instance, cross examination and the submission of written witness statements (typically *in lieu* of direct examination) are seemingly more easily accepted and embraced also by practitioners with a civil law background, document production in the form of document discovery is not.[11])

Document production as a means to obtain documented information from the opposing party[12]) to close gaps in the own body of evidence[13]) and potentially for the own line of (extended) argument is, at least at first sight, quite at odds with rules of state court civil procedure in civil law legal systems. While the latter also know some form of document production,[14]) they are hardly used in practice. They appear cumbersome and restrictive in scope with typically little if any added value to one's position in court. When it comes to not only closing gaps in one's body of evidence but seeking information to potentially substantiate or even extending the own line of argument the term "fishing expedition"[15]) comes to mind, which is generally regarded as something to be avoided[16]) and inadmissible.[17])

Having said that, particularly in private enforcement of anti-trust rules, there is often a significant lack of evidence and information on the side of the potential victim(s). Cartels, to start with the obvious, are virtually by definition

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[11]) *Cf.*, for example, with further references Christian Konrad & Philipp Peters, *Die Anordnung der Urkundenvorlage im Internationalen Schiedsverfahren*, ecolex 763 (2010).

[12]) As further elaborated on below, there are also scenarios where a third party may be the subject of a document production request.

[13]) *Cf.* James Carter, *Five Fundamental Things about Document Production, and a Quetsion*, ICCA CONGRESS SERIES 2006 593, 2007.

[14]) Such as the production of a joint document pursuant to Sect 304 of the Austrian Code of Civil Procedure (*Zivilprozessordnung* – ACCP) and there have also pre Damages Directive been some provisions that could be ascribed some "discovery like" scope of application – *see*, for example, on Sect 184 ACCP *Rassi, Sect 184 ZPO in* KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN II/3 (Fasching & Konency eds., 3rd ed. 2015).

[15]) In German, the more technical term "*Erkundungsbeweis*" would be used.

[16]) Even the official *travaux preparatoir* regarding the transposition of the Damages Directive into Austrian law stress that the Damages Directive does not demand a possibility for document production before an action is filed.

[17]) *Cf.*, for example, OGH, Apr 16, 1998, docket no. 8 Ob 341/97y *in* ZAS 1980, 139; *Rechberger, Vor § 266 ZPO in* KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN III/1 (Fasching & Konency eds., 3rd ed. 2017)[3] regarding the inadmissibility in Austria; BGH NJW 1974, 1710, *Prütting*, Sect 284 para. 79 *in* MÜNCHNER KOMMENTAR ZIVILPROZESSORDNUNG (5th ed. 2016) regarding the inadmissibility in Germany.

secret.[18]) The cartel outsider will typically have little information on the cartel – maybe apart from what (in a follow-on scenario) can be derived from a respective fine decision by a competent competition authority. In market dominance scenarios, it can also be crucial already at the stage of establishing illegality and that one is affected by the behavior in question to obtain additional information namely from the opposing party; for example, to establish that some pricing was indeed below cost[19]) and as of when or until when behavior was abusive.

When it comes to proving damage or ascertaining the quantum, potential victims are often yet more dependent on information also from the cartelists or dominant firm, as the case may be. A during/after analysis, for example, may yield a very different result is (only) prices and certain proxies for cost are taken into account versus factoring in actual cost data; the latter, however, is typically only known by the cartelist(s) or dominant firm.

However, also the cartelist or dominant firm has a need for information when it comes to showing passing-on, for instance, ie that some or all of any harm inflicted may have been passed on by the opposing party to another market level.

It is against this background that the Damages Directive has introduced document production to court proceedings throughout the EU.[20])

The question that shall be further addressed here is what have already been the available means in arbitration to accommodate needs for obtaining information in form of documents and what is the (potential) impact of the Damages Directive henceforth.

III. "Traditional" Ways of Getting Document Production in Arbitration

As a matter of course, a document discovery phase may be introduced into arbitration proceedings upon agreement by the parties.[21])

Rarely will such agreement, however, be included in the arbitration clause. Reference to institutional rules such as VIAC or ICC does not automatically bring about document production either as these rules generally only refer to

[18]) *Cf., e.g.* the EU Leniency Notice OJ 2006 C 298, which "sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community".

[19]) *Cf.*, for example, ECJ, Case C-202/07 (*France Telecom*) referring to the dominant undertaking's costs as the relevant yard stick.

[20]) *Cf.* European Commission, Competition policy brief, Issue 2015-1, p. 2 (online available at the time of publication: http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf).

[21]) As arbitration is based on the consent of the parties, it is also generally in their hands to agree on the course of the arbitral proceedings.

the possibility that the arbitral tribunal orders the production of documents.[22]) The *lex fori*, as the legal framework for any arbitration, is, namely in civil law legal systems, also largely silent on document production, let alone its scope.[23])

That of course does not mean that there is no room for the production of documents. The parties may also when the dispute unfolds agree on a document production phase and its corner stones or even details. That is particularly relevant in private enforcement, where, in cartel follow-on scenarios, there will often be no arbitration clause in the first place. Hence, the entering into a *post hoc* arbitration will – given the significance of information typically (only) found in the sphere of the opposing party –[24]) likely largely depend also on how each party sees their needs to documentary information being accommodated in arbitral proceedings. It may be tempting to jump to the conclusion that the cartelist(s) will anyway only want to shield themselves from document discovery. However, particularly when it comes to pass-on, a very relevant and almost always raised defence, it is the cartelist(s) that need information typically resting with the prospective claimant(s). Document production may, to mention another aspect, also be helpful for the prospective defendant to prove that the claims are time barred.

In the absence of an express agreement by the parties, the arbitral tribunal may still order the production of documents.[25]) Here, it is often the IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) that serve as a yardstick or the very framework for the document production phase. The rules aim at striking a compromise between the approaches of common and civil law legal systems.[26]) Relevance and specifity are relevant criteria[27]) and the party subjected to the request for document production can raise objections not only on grounds such as legal privilege but also proportionality and others.[28])

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[22]) *Cf.* Article 25 para. 5 ICC Rules, Article 29 para. 1 VIAC.

[23]) While this still holds for Austria and other EU Member States, particularly regarding private enforcement the national laws now include document production as a procedural tool. *See* on the potential impact of this below.

[24]) *See* on that already above.

[25]) Most *leges fororum* put the steering and structuring of the arbitral proceedings in the hands of the tribunal; so do generally institutional rules – see with further references *e.g.* Konrad & Peters, *Die Anordnung der Urkundenvorlage*, *supra* note 11, at 765.

[26]) *Cf.* IBA Working Party, BLI 2000, 21.

[27]) *See*, for example, Gabrielle Kaufmann-Köhler & Philippe Bärtsch, *Discovery in international arbitration: How much is too much?*, SchiedsVZ 13, 17 *et seq.* (2004).

[28]) *Cf.* Sebastian Kneisel & Claudia Lecking, *Verteidigungsstrategien gegen die Anordnung der Document-Production – insbesondere nach den IBA-Regeln zur Beweisaufnahme in der internationalen Schiedsgerichtsbarkeit*, SchiedsVZ 150, 154 *et seqq.* (2013).

Absent an agreement, the tribunal should, however, not even impose the IBA rules or other document production framework[29]) if not within the (reasonable) expectation of the parties.[30]) Particularly also for this question the Damages Directive seems relevant:

IV. (Potential) New Ways

The (reasonable) expectation of the parties – as an expression of what may or may not have been covered by their consent to enter into arbitration – should, as noted, be the yardstick for the scope of document production.

While prior to the Damages Directive, parties in continental Europe may not have expected to be subjected to document discovery (maybe even at all), this is no longer (reasonably) the case in the context of competition law private enforcement. The Damages Directive sets out rules on document production that are, at the end of the day, not so different from the IBA Rules: It is primarily individualized documents or well defined categories of documents that may be sought. There is a need to show relevance, significance and also – depending on the setting – a more or less strict proportionality test.[31]) Notably, the rules have essentially entered into force with regard to all state litigation proceedings instigated as of the foreseen implementation of the Damages Directive (by 26 December 2016), ie also regarding long past anti-trust behavior that has been or will be made subject to proceedings as of 26 December 2016 (or, depending on the lex fori, even an earlier implementation date). Hence, to date, everyone in the EU has to expect document production in private enforcement cases.

As a consequence, arbitral tribunals are in the author's view free to and, where the circumstances call for it, should order document production as foreseen in the Damages Directive at least in proceedings that have commenced since its implementation deadline.[32]) Absent an agreement to the

[29]) A document production absent an agreement that would even go beyond the IBA rules – in particular, including a fishing expedition – would arguably be against odre public in Austria – *cf.* with further references Adolf Peter, *Cross-examination und document production nach US-amerikanischem Vorbild in internationalen Schiedsverfahren mit Sitz in Österreich: Kollision mit österreichischem Schiedsverfahrens- bzw Prozessrecht?*, SchiedsVZ 199, 204 (2016).

[30]) *Cf.*, for example, Konrad & Peters, *Die Anordnung der Urkundenvorlage, supra* note 11, at 766); see also Kaufmann-Kohler & Bärtsch, *Discovery in international arbitration supra* note 27, at 20.

[31]) *Cf.* Article 5 para. 3, Artcile 6 para. 4 Damages Directive.

[32]) Even critical voices on document production consider that it should "meet the expectation of the parties" – *cf., pars pro toto*, Jarred Pinkston, *The Case for a Continental European Arbitral Institution to Limit Document Production*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011 87, 110 (Pitkowits et al. eds., 2011).

contrary,[33]) this, in the author's view, holds true for all parties to arbitration proceedings with a competition law aspect from common law legal systems (having document production in state courts that goes well beyond the Damages Directive)[34]) and the EU.

An interesting feature of the new rules brought about by the Damages Directive is the request of documents in the hands of third parties (including competition authorities). However, arbitral tribunals generally have no means to directly take steps vis-à-vis parties (let alone state authorities) that have not subjected themselves to the respective tribunal by way of an arbitration clause.[35]) Moreover, while the parties to the arbitration will generally be incentivized to follow production orders by the tribunal even though it cannot resort to means of enforcement if the order were not complied with[36]) because the tribunal can (and typically will) take that into account in its appraisal of the facts,[37]) the matter is different with third parties who do not have to fear an adverse outcome of the case.

Such expectation can, nowadays, in private enforcement only be a document production as foreseen in the Damages Directive.

[33]) An opinion that, essentially based on the judgement by the ECJ in the *Eco Swiss* case, Case C-126/97, an arbitral tribunal may even be obliged to follow the provisions of the Damages Directive – *cf.* Alfred Siwy, *Beweisvorlageanträge in Schadenersatzverfahren aus Wettbewerbsverstößen vor staatlichen Gerichten und Schiedsgerichten*, wbl 193, 196 *et seqq.* (2017) – would go too far; see in that direction also Nueber & Pauer, *Arbitration as a Means of Private Enforcement of Competition Law*, *supra* note 5 at 118.

[34]) *Cf., e.g.* Rule 26(b) para. 1 of the US Federal Rules of Civil Procedure: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim [...], the court may order discovery of any matter relevant to the subject matter of the action. Relevant information need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence".

[35]) It may be noted in this context that the Damages Directive defines the bodies that may order the production of documents as "court[s] or tribunal[s] of a Member State" and recalled that the ECJ has clarified that arbitral tribunals do not qualify as such – see, with further references, Nueber & Pauer, Arbitration as a Means of Private Enforcement of Competition Law, *supra* note 5, at 118.

[36]) *Cf.*, for Austria, for example, Hausmaninger, *§ 594 para. 1* in KOMMENTAR ZU ZIVILPROZESSGESETZEN (Fasching & Konency eds., 2nd ed. 2015).

[37]) Even where the *lex fori* allows the arbitral tribunal (or a party to the arbitration) to seek the assistance of a domestic court to enforce a production order vis-a-vis a party, it appears that such remedy is hardly used in practice – see with further references, Kaufmann-Kohler & Bärtsch, *Discovery in international arbitration*, *supra* note 27, at 21. By way of a side note it may be mentioned that, in Austria, seeking production from the opposing party by the help of state courts is, in general, not even permissible. Only in exceptional circumstances, where without a look into the document the facts cannot be established it is argued that such means should be allowed – *cf.* with further reference Peter, *Cross-examination und document production nach US-amerikanischem Vorbild*, *supra* note 29, at 205 *et seq.*

Here, arbitration may have a weakness as compared to state litigation. If the potential claimant suspects documents it needs in the hands of third parties (other than potential defendants), it would need to consider seeking document production with the respective state court(s) rather than through arbitration. While in some jurisdictions this may be done independently from an action, in Austria, for example, document production through the domestic courts can only be effected in the course of bringing an action.

This would block the road to post hoc arbitration and the question arises what happens if there is a valid arbitration clause excluding state litigation. Under an Austrian lex fori, a possible way out may be that an arbitral tribunal requests the help by the domestic courts to have the respective third party produce the documents in question if such are joint ones (of the party seeking the production and the third party)[38]) or the substantive law provides for an obligation of the third party to produce such documents.[39])

[38]) Such as a written contract.

[39]) *Cf.* with further references *id.* at 204 *et seq.*