



GÜN + PARTNERS

DOCUMENT PRODUCTION THE GOOD OR THE EVIL?

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How Document Production is Perceived?

- **Common law approach:**
 - *“It is essential element of justice”.*
- **Civil law approach:**
 - *“It is waste of time and money”.*



Common Law Approach

- Document production is a procedural tool to discover written evidence that would otherwise not be available
 - more cases are decided on facts than on legal arguments
 - arbitrators usually give more importance to written evidence

“The key” to winning arbitration proceedings.



Civil Law Approach

- Costly and time-consuming
- Unnecessarily complicates the arbitration
- Production of e-documents
- Parties from civil law countries unaccustomed to discovery proceedings may be dissatisfied with an order to produce a huge amount of documents

Adds significant delay and cost to the process, yet rarely contributes much to the outcome of the arbitration.



Balancing the Conflicting Interests

- The former German chancellor Ludwig Erhard once said:
 - *“A compromise is the art of dividing a cake in such a way that everyone believes he has the biggest piece.”*
- In one corner of the ring, Common Law practitioners prefer wide-ranging document production where no stone is left unturned;
- On the other corner, Civil Law practitioners prefer limited approach to the document production.

**The challenge is to satisfy both expectations:
Obtaining the disclosure of material evidence at moderate costs**

Balancing the Conflicting Interests

- IBA Rules occupy an outstanding position for this purpose
- The harmonization of rules has led to the popular **misconception** that the legal problems related to document production have been resolved.
- In reality, the legal debate is still marked by **cultural differences**.
 - Interpretation of the IBA Rules
 - Hundreds pages requests
 - One page request

Balancing the Conflicting Interests

- For arbitration practitioners, the understanding of both civil law and common law concepts is of paramount importance
- A former US ambassador pointed out: “*an empathetic tribunal should do its best to make both litigants feel at home.*”

Balancing the Conflicting Interests

- According to a German article, arbitral tribunals have the duty to balance different procedural expectations of civil law and common law parties.
- Whether an arbitral tribunal has a duty to find a middle path between procedural expectations of the parties ?

Balancing the Conflicting Interests

- **The Prague Rules: *Inquisitorial Rules on the Taking of Evidence in International Arbitration* (“The Prague Rules”)**
 - The arbitral tribunal “*shall avoid extensive production of documents, including any form of e-discovery*” (article 4.1).
 - Suppression of e-discovery: The Good or the Evil?

Document Production Orders

- a losing party may think, “*If I had got access to the other party’s internal documents, I could have proven the other party’s dishonesty.*”
- The analysis of grounds for annulment and non-enforcement have a different focus in civil law and common law countries

Document Production Orders

- In many civil law countries, it is controversially discussed whether fishing expeditions in arbitration violate public policy and can lead to the annulment of an award.
- In common law countries, the issue of whether a refusal of document production requests is a violation of the party's ability to present its case primarily arises in common law countries

Document Production Orders

- The fear that unjustified document production requests could be a ground of annulment or non-enforcement is common among the arbitrators.
 - Insufficient knowledge of the case
 - Avoiding challenges

Document Production Orders

- In view of finding the right balance for document production, arbitrators should look at document production not only from a purely legal point of view but also from a business perspective. Document production is only a part of the arbitration procedure, and the total costs of arbitration should be reasonable compared to the amount in dispute.

From a Counsel Perspective

- It is important to have an experienced counsel
- Counsel must be able to adopt a right strategy depending on its case's needs and the counterparty's approach to the document production. Besides, the Counsel must also be able to foresee to how the Tribunal interprets IBA Rules depending on the case's needs. Otherwise, the result will be the rejection of the all document production requests.



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Thank you!

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