

DEFENCE OF A MAXIMALIST POSITION ON DOCUMENT PRODUCTION



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I. What is document production?

- a party does not only have to produce the documents it wishes to rely upon in support of its case
- upon request, it also has to make documents available to the other side - even if those should be detrimental to its case

II. Background

- document production has its roots in English common law which was based on trials before lay juries
- contrary to popular belief, mechanisms to seek production of documents exist in many civil law systems, e.g.
 - France, Art. 11(2) CCP
 - Germany, Arts. 142 and 421 et seq. CCP
 - Switzerland, Art. 186 Federal CCP

«[F]or cultural, historic and constitutional reasons, there is a deeply-seated resistance in many [civil law] jurisdictions to requiring a party to legal proceedings to assist the other side in gathering information that might be used against the producing party in court .»

(Report by the ICC Task Force on the Production of Electronic Documents in International Arbitration, Finally Adopted in March 2011, Sec. 1.4)

III. The Legal Basis for Document Production in Arbitration Today

- certain national arbitration laws explicitly mention it (e.g. Sec. 34(2)(d) of the English Arbitration Act while others are silent
- the majority of international arbitration rules provide for it (e.g. Art. 20(5) 1998 ICC Rules, 24(3) UNCITRAL Rules, Art. 22.1 LCIA Rules, Art. 34(2) ICSID Arbitration Rules, Art. 27(1) DIS Arbitration Rules)

- practice confirms that:
 - arbitrators have no hesitation to assume the power to order document production
 - they do so whether or not such power is expressly granted by the competent national legislation, the applicable arbitration rules or the parties' written agreement
 - where there is no express power, arbitrators regard it as included within their general authority to determine the procedure

IV. The Purpose of Document Production

- civil and common law system have different notions regarding the role of truth in court proceedings
- common law system is based on the foundation that a judgement should be made when aware of the full truth of facts - costs spent in order get there are worth spending
- the aim is to create a level playing field where no side has an undue information advantage

- *« The rest of the world needs to understand why the American oberver is perplexed at the willingness in other countries to countenance what seems to us a remarkable indifference to getting out the truth [...]. »*

(R.L. Marcus, « Retooling American Discovery for the 21st Century: Towards a New World Order? » in M. Tartuffo, ed., Abuse of Procudural Rights: Comparative Standards of Procedural Fairness, Kluwer Law International, Nov. 1999, 281, 286)

V. Additional Advantages of Document Production:

- it encourages parties to settle
- it discourages frivolous claims

VI. Avoiding Abuse

- problems are not automatic but caused by those involved, namely parties, counsel and arbitrators
- arbitrators should have the courage to apply a strong hand in case of abuse of the process
- measures to be taken by arbitrators include:
 - considering the parties' and counsel's legal cultures
 - proportionality of the requests made
 - efficient management of the arbitration process

VII. And finally...

- arbitration is a dispute mechanism which was designed to solve business disputes by bridging the cultural gap between companies and entities of different nationalities who did not want to go to one side's local courts
- if we want to do justice to this idea, we need to allow that all sides can contribute to this dispute resolution mechanism so that it will be appreciated by users from everywhere and not just from civil law jurisdictions