

KIEV ARBITRATION DAYS 2011



FOR A MINIMUM OF DOCUMENT PRODUCTION

Kiev Arbitration Days
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- For a minimum of document production by discovery
- – STOP THE TORTURE
- Definition: Disclosure by a party to an action, at the other party's instance, of facts or documents relevant to the lawsuit
- Does not cover production of a party's own evidence

- The English invented *discovery* while seeking a substitute for torture for parties unwilling to reveal facts at issue in a lawsuit
- The pain is now mental and financial, not physical
- We should keep even mental and financial pain at a minimum

- Wrong:
- The 1999 IBA Rules have achieved a good balance between the common law-style discovery (excessive) and civil law systems (very restrictive). This balance has been maintained in the new IBA Rules on the Taking of Evidence in International Arbitration, adopted by the IBA Council in 2010

- **Correct:**
- Parties lose much time by seeing document production introduced by overly internationally minded tribunals as one step in the arbitration timetable
- This will add months to the time before an award is given
- Who benefits from this?

- Beneficiaries:
- Parties that want to cause distraction and delay
- Unethical parties
- Ethical parties with unethical lawyers
- Lawyers selling more time while inventing, formulating and defending requests for production and complying with requests from the other side

Why do we say this?

1. The idea that a party should rely on its own evidence, or at least written evidence that it can specify, is well rooted and sound
2. Across the board, the focus on document production does more harm than good
3. Especially, it adds to the time and expense of arbitration at a time when it is being attacked as increasingly expensive
4. When arbitrator fees are based on the value of the dispute rather than time spent, the arbitrators also lose out

- Parties and counsel can suppress documents – a greater problem for fairness when one side does it and not the other
- The timing of requests can disrupt the proceedings (the solution is less production, not a stricter timetable for the arbitration)

A party can overwhelm the other with documents, making the financial side more critical, forcing expense on the other and increasing the costs of legal representation