

Editors:

Klausegger
Klein
Kremslehner
Petsche
Pitkowitz
Power
Welser
Zeiler

Austrian Yearbook on International Arbitration 2011

C.H.BECK · STÄMPFLI

MANZ 

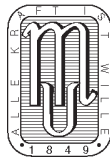
Austrian Yearbook on **International Arbitration** **2011**

The Editors

**Christian Klausegger, Peter Klein, Florian Kremslehner,
Alexander Petsche, Nikolaus Pitkowitz, Jenny Power,
Irene Welser, Gerold Zeiler**

The Authors

Lisa Beisteiner, Gordon Blanke, Dominique Brown-Berset, László Burger,
Giovanni De Berti, Rachel Foxton, Günther J. Horvath, Celine Abi Habib Kanakri,
Vladimir Khvalei, Olivier Mosimann, Gabriele Nater-Bass, Veit Öhlberger,
Minn Naing Oo, Philipp Peters, Jarred Pinkston, Nikolaus Pitkowitz,
Friederike Schäfer, Luca Schicho, Markus Schifferl, Alfred Siwy, Irene Welser,
Stephan Wilske



Wien 2011

Manzsche Verlags- und Universitätsbuchhandlung
Verlag C.H. Beck, München
Stämpfli Verlag, Bern

To be cited as:

Author [first and last name], *Title of Work*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011 [first page on which work appears, pincite] (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2011)

Disclaimer

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publisher. Permission to use this content must be obtained from the copyright owner. Please apply to: Manz'sche Verlags- und Universitätsbuchhandlung, Kohlmarkt 16, 1010 Vienna, Austria.

While all reasonable care has been taken to ensure the accuracy of this publication, the publisher, the editors and the authors cannot accept responsibility for any errors or omissions. The views expressed by the authors are entirely their own, unless otherwise specified, and do not reflect the opinions of the publisher, editors or their respective law firms.

ISBN 978-3-214-00771-3 (Manz)
ISBN 978-3-406-61953-3 (Beck)
ISBN 978-3-7272-1492-9 (Stämpfli)

© 2011 Manz'sche Verlags- und Universitätsbuchhandlung GmbH, Vienna
Telephone: +43 1 531 61-0
E-Mail: verlag@MANZ.at
www.MANZ.at

Data Conversion and Type Setting: Zehetner Ges. m. b. H., 2105 Oberrohrbach
Printed by: FINIDR, s.r.o., Český Těšín

The Case for a Continental European Arbitral Institution to Limit Document Production

Jarred Pinkston

I. Introduction

“At its heart, arbitration is a service industry”,¹⁾ a fact often forgotten by attorneys who have their world view colored by their background (education and work experience) in, for lack of a better term, the justice industry, *i.e.*, the system whereby courts receive their mandate from a sovereign power and not from the parties to a dispute. The lines between the arbitration and justice industries often overlap in that the law establishes a playing field in which arbitration can provide its services to customers (aka clients).²⁾ This leads many attorneys to assume that customers expect and desire justice in arbitration in the same way that they expect it from courts. Such an assumption can lead to situations where the service provided by arbitration (supply) differs from what customers desire (demand). Nowhere is the divergence more clear than on the issue of broad document production in arbitration. The first arbitral institution to modify its rules to limit document production will benefit from aligning its rules with customer demand and it is proposed that continental European arbitral institutions are best placed to do so given their customer base and legal heritage.

Document production has (generally) established itself as a standard element of international arbitral practice by way of arbitrator discretion and under the guise of doing justice (*i.e.*, that document production prevents one party from getting away with something that it should not, by way of justice, be allowed to get away with). Even the most gifted of attorneys has a problem arguing against doing justice in the abstract and this has allowed the early seeds of document production to take plant and sprout into a tree that threatens to overshadow the positive aspects of international arbitration. Customers turn to international arbitration for

¹⁾ Joshua D. H. Karton, *Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of its own Drummer?*, 60 UNIV. N.B. L.J. 32 (2010).

²⁾ This article will use the term “customer” throughout because it wishes to emphasize the fact that arbitration is at the end of the day a service industry beholden to its customers like other service industries.

a range of reasons: speed, efficiency, confidentiality, expertise and so on. If parties wanted to seek true justice, in the abstract sense (*i.e.*, the *only* thing that matters is a just result), they would have resorted to the courts that have that specific mandate. This is not to say that parties are indifferent to justice in the abstract but in “Maslow’s hierarchy of [arbitral] needs” it would probably not rank at the top.

Failing to recognize and respect the distinction between providing a service and doing justice for justice’s sake can create a disconnect between what customers want and the service arbitration provides. As will be discussed herein, numerous reasons exist for customers to want less document production and, therefore, a market exists for a provider of arbitral services to meet this unmet demand.

This article will make the case as to why a continental European arbitral institution should amend its rules to limit – not necessarily abolish document production. Sound reasons exist both for having a robust role for document production and for limiting it. This article will likely be interpreted as being biased against document production. However, the goal of this article is not to malign document production in international arbitration but rather to set out the case for why customers of international arbitration have grounded reasons for avoiding or limiting document production. Such customers will seek out an arbitral institution that offers a service in line with their wishes. The international arbitral community, in this author’s opinion,³⁾ has not done an adequate job of providing multiple flavors of arbitration from which customers can choose.⁴⁾ The rush to best practices and the emerging conformity of arbitral institutional rules and national laws, has led to the situation where the international arbitration institutions are left asking the customer “which flavor of vanilla would you like?”⁵⁾ The international arbitration community might like vanilla but customers might have their own tastes. In short, “[t]he present system [that has opened the door for broad document production] derives more from institutional fear of alienating one constituency or another rather than from any reliable indication of what the business community really wants.”⁶⁾

³⁾ All opinions expressed in this article are the author’s own and his alone. In addition, this article at times speaks in generalities. Any member of the arbitral community will be able to think of examples that fall outside or contradict some of the generalizations found in this article. Many points raised in this article are based on the author’s view of human inclination and experience in arbitration.

⁴⁾ Many readers will intuitively react to this proposition with a unified response that parties are always free to structure their arbitral procedure as they see fit, particularly at the time of contract formation. See Sec IV (C) which addresses this issue.

⁵⁾ See William W. Park, *The 2002 Freshfields Lecture – Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19 INT’L ARB. 3, at 284 (2003) (“More often than not [...] provisions [of the different arbitration institutional rules] are remarkably similar. Assuming each side gets an opportunity to be heard, conduct of the proceedings is left to the arbitrators, permitting arbitral institutions to avoid the nitty-gritty procedural questions where the real demons lurk”).

⁶⁾ *Id.* at 295. See also Lucy Reed, *More on Corporate Criticism of International Arbitration*, available at <http://kluwarbitrationblog.com/blog/2010/07/16/more-on-corporate->

The market for international arbitration has grown substantially over the past 10–20 years⁷) and, as a result, the market has reached a point where an international arbitration institution can benefit by attempting to capture certain segments of the market by offering a unique/differentiated service rather than providing a homogeneous product. On the issue of document production, this author believes that a substantial market exists for arbitral rules that limit document production. A simple premise underlines this article's analysis: one does not get ahead of the pack by attempting to be like the pack. A continental European arbitral institution can differentiate itself from the pack by limiting document production. This article will address: (Sec II.) how broad document production invites "guerilla tactics" which decrease efficiency and run up costs to the chagrin of customers; (Sec III.) the pushing of the "square peg into a round hole" nature of incorporating common law procedures into a civil law-flavored arbitration or how parties who come from a civil law background simply have no expectation or desire to engage in substantial document production; and (Sec IV.) the business case for limiting document production. This article will (Sec V.) conclude with a brief section containing suggestions on how to limit, but not remove, document production from continental-flavored arbitration. In essence, the proposal calls for limiting request for "categories" of documents but leaving the current system in place for "identifiable" individual documents.⁸)

criticism-of-international-arbitration/ (last visited December 14, 2010) (in discussing why customers have become dissatisfied with international arbitration, noted that parties requesting too many documents has played a role and that "some blame the arbitral institutions for not constructing a system that reins in everyone").

⁷) Michael Pryles, *The Growth of International Arbitration*, available at [www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/0417185A03AF31B7CA256C8A00025187/\\$file/GrowthINtArb.pdf](http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/0417185A03AF31B7CA256C8A00025187/$file/GrowthINtArb.pdf) (last visited December 14, 2010) (acknowledging that no comprehensive statistics exist but that it can still be shown that international arbitration has experienced a period of sustained growth and surmising as to why: limited discovery was cited as a key reason as to why many parties prefer international arbitration). See also Stephan Wilske, *The Impact of the Financial Crises on International Arbitration*, 65 DISP. RESOL. J. 82 (2010) (providing statistics from the various arbitral associations on the increase in the number of arbitrations filed as a result of the financial crisis).

⁸) The 2010 IBA Rules on the Taking of Evidence distinguishes between identifiable and categories of documents in Rules 3 (3) (a) (i) and (ii). A specific document entails "a description of each requested Document sufficient to identify it" ("identifiable"). "A description will compromise the following elements: presumed author and/or recipient of the document, the date or presumed time within which the document was established and the presumed content of the document." Gabrielle Kaufman-Kohler & Philippe Bäertsch, *Discovery in International Arbitration, How much is too much?*, 1 SCHIEDS VZ 13, 18 (2004). In contrast, a category of documents entails "a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist" ("category"). This article will rely on this distinction, *i.e.*, a category of documents is a group of documents that a party believes exists but has no tangible proof of their existence.

II. Why Customers Might not Like Document Production (Part I) – Inviting Guerilla Tactics

At the 2010 Vienna Arbitration Days, one of the more popular panels took up the topic of guerrilla tactics in international arbitration.⁹⁾ The panel discussed – inter alia – what constituted guerrilla tactics, the ethics of guerrilla tactics, and how to react to guerrilla tactics. As with many other illnesses, prevention provides the best and most effective method of addressing the problem. Alas, here, the topic of prevention escaped significant discussion. No area of international arbitration practice provides as many opportunities for advocacy mischief as document production because “document production is inherently subject to tactical abuse”.¹⁰⁾ Party counsel with guerrilla inclinations can easily exploit the process: it does not take a particularly skilled attorney to draft overly broad document production requests or find fault with a party’s attempt to meet a broad document production request or simply make a document disappear.

The most effective means of addressing such shenanigans is to nip them in the bud before they have the opportunity to bloom into full blown arbitral guerilla insurgencies. Nipping such shenanigans in the bud before an arbitration even begins will increase efficiency, which lowers costs, and ultimately pleases customers. The forthcoming analysis provides a grounded reason for customers to conclude they would simply prefer to limit the scope of document production before proceedings even take shape.

A. The Open Ended Nature of Document Production Creates Opportunities for Arbitral Guerillas

Very few, if any, international arbitration practitioners have been involved in a document production exercise without hearing, *ad nauseam*, the term “fishing expedition”.¹¹⁾ The reason for this is clear: the whole point of a document production request for a category of documents is to obtain information (or proof) that

⁹⁾ See Günther Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle: Is there Need for a Universal Code of Ethics?* in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011 297 (Klausegger et al. eds., 2011); Stephan Wilske, *Arbitration Guerrillas at the Gate – Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011 315 (Klausegger et al. eds., 2011); Vladimir Khvalei, *Guerilla Tactics in International Arbitration: The Russian View*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011 335 (Klausegger et al. eds., 2011).

¹⁰⁾ James Carter, *Five Fundamental Things About Document Production, and a Question, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?* 593 (Albert van den Berg ed., 2007).

¹¹⁾ Fishing Expedition is defined as “a search for information without knowledge of whether such information exists” see *McGraw-Hill Dictionary of American Idioms and Phrasal Verbs*, available at <http://idioms.thefreedictionary.com/fishing+expedition> (last visited December 14, 2010).

was not already in one party's possession from the other party. Seeking such information naturally entails a certain hit or miss element because, by definition, if you do not know something (or cannot prove it), you are making a leap of faith in speculating that the other party has this information, which naturally gives rise to the fishing expedition allegations. As an interesting digression, the term "fishing expedition" appears to have its roots in late 1900th century English case law when the term "fishing interrogatories" was used, which later morphed into the widely used term fishing expedition.¹²⁾

A request for a *category* of documents, which will invariably resemble a fishing expedition, can entail two different elements. **First**, a party may cast a wide net hoping to snare a fish. Examples of such requests include requesting all communications between two parties over a given time period (without any obvious limitation) or all internal memos or notes relating to an issue. **Second**, a party can cast a net blindly in the hope of catching something, anything. Such a request would entail making a document production request based on nothing other than pure speculation. Any document production request for a category of documents will involve one of the two foregoing elements because if a party could name a document with specificity it would not need to rely on a request for a category of documents.

Document production requests for a category of documents may vary in scope, but the underlying dynamic does not change, in that a party is seeking documents it does not already have and whose existence (or exact contents) it has no means of confirming at the time it makes the request. The case for known and identifiable documents fundamentally differs and that is why this article draws a distinction between categories of documents and identifiable document requests (see Sec V. below).

From the perspective of a party objecting to a document production request for a category of documents, it is clear that it should object to the extent possible because any document it produces will clearly not advance its case. If the document did advance its case the party would submit the document itself. Therefore, two alternatives are left as to how a requested document could affect a party's case: either (a) it does nothing (*i.e.*, it is irrelevant); or (b) it is negative to that party's case. Moreover, from the perspective of a party who is subject to a document production request, it may not be clear as to how a document could be exploited by the other side. As a result, the natural inclination for a party is to object to any and all document production requests. In short, the fact that a party has even re-

¹²⁾ *Hennessy v. Wright* (No. 2), 24 Q.B.D. 445; 4 T.L.R. 662; 36 W.R. 879 (1888).

... the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing new, which might enable him to make a case of which he has no knowledge at present. If that is the effect of the interrogatories, it seems to me that they come within the description of fishing interrogatories, and on that ground cannot be allowed.

A special thank you to Jenny Power and Margarita Michael of Freshfields for locating this interesting tidbit of legal trivia.

quested a document (in the hope of using the document against the other party) can only harm the requestee's case and will certainly not assist its case. In such a situation, it comes as no surprise that most document production requests are summarily objected to.

This system creates a perverse incentive for both parties to manipulate the process. A party seeking document production has an incentive to seek the widest amount of document production possible, while the party objecting to document production has an incentive not to produce anything. These conflicting incentives lead to the (on the verge of bickering) back and forth submissions and communications on the issue of document production and, at the end, of the day leads to very few highly relevant documents being produced, particularly when a request is made for a category of documents (*see* Sec II [B], below).

An arbitrator overseeing this process is often left scratching his or her head when confronted with such diametrically opposite positions early in the arbitration before the case has fully developed. The natural instinct of many arbitrators is to find a compromise and give each party something; this only encourages the behavior outlined above because a party knows that simply seeking a broad category of documents will likely lead to it obtaining something (potentially) useful.

The difference between a reasonable document production request and a fishing expedition is a difference of degree and not a difference in kind. On the one hand, fishing expeditions are considered bad, while, on the other hand, reasonable document production requests for a category of documents are good. However, there is no clear line distinguishing the two; whether a document production request is a fishing expedition or a reasonable request is often simply in the eye of the beholder. When this subjective issue is presented to a tribunal, comprised of arbitrators from vastly divergent backgrounds, who have been given a broad grant of discretion to conduct the proceedings as they see fit, it creates a great deal of uncertainty for customers. Customers have little or no means of predicting before a dispute fully develops if they could be dragged into a multi-million dollar document production exercise that will expose their internal (potentially sensitive) documents to scrutiny from a competitor.

The foregoing shortcomings in the document production process can easily be compounded by even a moderately skilled arbitral guerrilla. "One of the most common guerilla tactics experienced by arbitrators is a delay tactic."¹³⁾ The subjective element of the document production process and (naturally) perverse incentives provide a wealth of opportunities for a guerilla to slow down the process and to distract from the real issues in dispute. In addition, the "withholding of evidence" has been defined as constituting a guerilla tactic,¹⁴⁾ and as discussed below, the risk of a party not producing a document falling under a document production order for a class of documents clearly exists.

¹³⁾ Horvath, *supra* note 9, at 299.

¹⁴⁾ *Id.* at 299 citing Edward R. Leahy & Carlos J. Bianchi, *The Changing Face of International Arbitration*, 17-4 INT'L ARB. 19, 19 (2000).

B. No Real Sanction for Failing to Comply with an Order to Produce a Category of Documents

The foregoing outline of inherent shortcomings in the document production process alone would provide a basis for parties to rationally conclude that they would prefer to simply avoid the whole process, at least with regard to a category of documents. This grounded conclusion only becomes compounded by the fact that the remedies in place to ensure the document production exercise runs smoothly and fairly may exacerbate the problem.

1. The Difficulty in Even Identifying Guerilla Tactics in the Document Production Process

When dealing with a request for a category of documents, the tribunal or the opposing party will rarely have confirmation that they have not received all relevant documents falling under a document production order. By the very open-ended nature of seeking a category of documents, a party will never know if the opposing party has completely complied with the order because such requests are only based on one party's belief that such documents exist and not "a description of each requested Document sufficient to identify it".¹⁵⁾ The risk exists that a highly relevant document, in the hands of a less-than-scrupulous attorney, might not be handed over, regardless of what a procedural order may direct. A party can speculate and accuse the other party of not complying with an order but, at the end of the day, without evidence, it is nothing more than speculation and a party cannot be punished based on nothing more than speculation.

Unlike a court, a tribunal will rarely have the means to test a party's assertion that it has complied with a procedural order to produce documents. Certainly situations exist where a tribunal or the opposing party can resort to the courts of certain jurisdictions (e.g., in the U.S. under 28 U.S.C 1728) but this may be an arduous process whose cost outweighs any potential benefit, and without proof that a document(s) exists, a (potentially) futile process.¹⁶⁾ Alternatively stated, if a tribunal does not have adequate evidence to directly censure a party or party counsel for non-compliance with a production order,¹⁷⁾ resorting to the courts without some kind of proof of a document's(s') existence will likely prove to be a fruitless endeavor.

¹⁵⁾ 2010 IBA Rules on the Taking of Evidence distinguishes between specific and categories of documents in Rule 3 (3) (a) (i).

¹⁶⁾ Jeremy K. Sharpe, *Drawing Adverse Inference from the Non-production of Evidence*, 22 INT'L ARB. 4, at 549 (2006) ("Judicial assistance also has its limits, as obtaining documents from courts is rarely an effective remedy in international arbitration"). See also Kaufman-Kohler, *supra* note 8, at 18–19.

¹⁷⁾ *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2010) (acknowledging that an arbitrator has the authority to sanction wrongful conduct).

If a tribunal has adequate proof that a party has engaged in wrongful conduct, the tribunal has a number of remedies available to it (e.g., awarding of costs) and the courts will generally support tribunals in such a situation. However, that is not the relevant issue here; this article surmises that the evidentiary difficulties in determining whether a party has complied with a document production order to produce a category of documents will undermine any authority a tribunal might legally have to enforce an order it has made.

2. The Circular Shortcoming of Using a Negative Inference when Applied to a Category of Documents

The common remedy applied by a tribunal against a party that has not adequately complied with an order to produce documents is to use a negative inference.¹⁸⁾ However, in light of the very nature of a category of documents the threat of negative inference does not provide an adequate remedy. “[A]dverse inferences properly may be drawn ‘only if ha[s] been sufficiently shown that the defendant held documents of evidentiary value which it refused to submit.’”¹⁹⁾

As discussed above, a clear evidentiary problem exists in even ascertaining whether a party has breached a duty to produce a document that falls within a category of documents. The IBA defines a category of documents merely as documents “reasonably believed to exist”²⁰⁾ and, therefore, by definition, implies that no proof of the existence of such documents actually exists. If a tribunal can only sanction a party via a negative inference if it knows such a document exists and is in a party’s possession, then it follows that a negative inference will have limited, to no, utility when applied to a category of documents. By definition, if a document can be specified to the extent that it can be proven it exists and that it is in a party’s position, it follows that such a document will no longer fall within a category of documents. Therefore, a negative inference is a toothless sanction when dealing with a failure to produce a document falling within a category of documents.

¹⁸⁾ See Thomas Webster, *Obtaining Documents from Adverse Parties in International Arbitration*, 17 INT’L ARB. 1, at 43 (2001) (the “IBA Rules do not and could not deal with how parties enforce their procedural right to obtain such documents. Instead the Rules provide only the vague remedy of the possible adverse for a failure to comply with an order for documentary production”).

¹⁹⁾ Sharpe, *supra* note 16, at 557: quoting Decisions of the Arbitral Commission on Property Rights and Interests in Germany, The Arbitral Commission, Koblenz, 195-67, vol. 2, p. 210. This article went on to name the additional following criteria before a tribunal can grant a negative inference: (a) “the party seeking the adverse inference must produce all available evidence corroborating the inference sought”; (b) “the inference sought must be reasonable, consistent with the facts in the record and logically related to the likely nature of the evidence withheld”; the party seeking the adverse must produce *prima facie* evidence”; and (c) “the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse sought”.

²⁰⁾ 2010 IBA Rules on the Taking of Evidence, Rule 3 (3) (a) (ii).

3. No Effective Means of Sanctioning an Attorney Engaged in Guerilla Tactics

Günther Horvath, in the 2011 edition of the *Austrian Yearbook on International Arbitration*, clearly sets out the difficulty of attempting to sanction an attorney who engages in questionable conduct (assuming that one can even prove the attorney has engaged in wrongful conduct):

If such sharp practice was employed before national courts, anyone could file a grievance against the offending attorney with the local bar association, but in international arbitration, with whom would one file a complaint? There is no established procedure for lodging complaints against counsel with arbitral institutions. In most cases, the misconduct would take place outside the jurisdiction where the counsel is licensed, and it is likely pointless for an arbitrator to notify the local Swiss Bar, for example, about unethical behavior of an attorney licensed in New York. The only option would be to contact the bar association to which the counsel is licensed, though it remains unclear whether the home state bar association would give consideration to an ethical breach alleged to arise in an arbitration.²¹⁾

This clearly sums up the situation: even if a party could somehow prove the other party's attorney has wrongfully exploited the document production process (a big if – see Sec II (B) (1) above – a separate and distinct issue from a tribunal sanctioning such conduct) the accusing party remains without an effective remedy. If there is no real remedy, what is to keep an attorney from giving in to the pressure or temptation to advance his or her client's case by undermining the document production process?

A recent case out of the Fifth Circuit Federal Court of Appeals in the United States clearly shows the difficulty of attempting to reprimand an attorney for wrongful conduct in arbitral proceedings.²²⁾ An attorney, over the course of an arbitration, advised on “various discovery matters” and, after a tortured procedural history, the opposing party obtained the attorney's client's attorney-client and work product rights.²³⁾ Upon obtaining the file, the party concluded the attorney had breached various legal obligations and sought sanctions against the attorney, which the district court granted.²⁴⁾ The appellate court then reversed the district court's decision because the “FAA provides for minimum judicial involvement in resolving an arbitrable dispute; the court is limited to only few narrowly defined, largely procedural tasks”.²⁵⁾ “But by using its power to sanction, a court would seize control over substantive aspects of arbitration.”²⁶⁾ In summary, a U.S. court

²¹⁾ Horvath, *supra* note 9, at 299.

²²⁾ *Positive Software Solutions*, 476 F.3d 278.

²³⁾ *Id.*

²⁴⁾ *Id.*

²⁵⁾ *Id.*

²⁶⁾ *Id.*

lacks the authority to sanction wrongful conduct committed over the course of an arbitration, regardless of the degree of the wrongful conduct. The Fifth Circuit agreed with Mr. Horvath that the proper forum to raise such a complaint is with is with the attorney's local bar association.²⁷⁾

One potential means of preventing an attorney from engaging in wrongful conduct (indirect sanction) would be to rely on an attorney's desire to protect his or her reputation, certainly an important factor. However, as outlined above, if a party or tribunal can only speculate (or assume) an attorney has been less than forthcoming in the document production process, the danger to an attorney's reputation is remote (*i.e.*, it is doubtful that an attorney will be black-listed based on speculation). The case becomes different if evidence exists that an attorney acted inappropriately but, that would be the rare case, as the proof of such behavior would be with the party who has a clear incentive to keep it under wraps. Ultimately, as the demand for arbitration grows, so does the demand for international arbitral attorneys. This influx of new and disparate blood into the international arbitral pool weakens the importance of reputation because it simply becomes harder to know everyone.²⁸⁾

III. Why Customers Might not Like Document Production (Part II) – Forcing the Square Peg Into the Round Hole

As a common law-trained attorney practicing international arbitration in Vienna, Austria (with the majority of cases focused on the CEE region), this author has a different insight into how the civil law has attempted to cope with the unchecked march of common law-style document production. This author would describe the process as attempting to place a square peg into a round hole. If one pushes hard enough, he or she might get the peg in but it will not fit well. Quite simply, the civil law does not have the same experience, well-established structure, educational background, or mindset as the common law. Therefore, the wholesale attempt to incorporate common law document production into civil law-centric arbitrations simply does not work well.

This extends to CEE arbitral customers: they tend to have limited (if any) experience with document production and are often shocked to find themselves dragged into the process. It boggles the mind that a tribunal sitting in continental

²⁷⁾ *Id.* fn 2 (“The clerk is directed to send a copy of this opinion to the Office of the General Counsel of the State Bar of Texas”).

²⁸⁾ This overly generalized statement does not completely address the nuisances of the issue of reputation in the field of international arbitration. With regard to high end arbitration (headline grabbing disputes and disputes with a significant amount in dispute) the importance of reputation has only grown in importance as the parties want to entrust their dispute to brand name arbitrators and counsel. In addition, within individual arbitration communities (such as Vienna) reputation still carries great importance.

Europe can infer an intent by the parties to engage in a broad document production exercise in situations where: (1) both parties come from civil law countries with no history of discovery; (2) the parties gave no indication in their contract of a desire to engage in document production exercise (let alone a broad one); and (3) most continental arbitral rules are silent on document production. However, this routinely happens. Despite the foregoing, document production plays an ever-increasing role in continental arbitration because many arbitrators and party counsel simply assume it should play a role. *See* Sec IV (D), which discusses how, under the guise of discretion, tribunals have expanded document production.

A. Common Law (America) Experience v. Civil Law (Austria) Experience

When speaking of the differences between civil and common law, it becomes easy to descend into generalities (*e.g.*, common law v. civil law) or generic platitudes (*e.g.*, common law loves discovery). Gross disparities exist between various jurisdictions within each legal tradition (*e.g.*, U.S. v. England and Austria v. Spain). Therefore, this article will limit itself to the two jurisdictions with which the author is most familiar: Austria and the United States. A reader can extrapolate from those two systems generalities that can extend to legal systems with the same characteristics. The following two brief overviews are not meant to be authoritative, but simply a means of highlighting the depth of the differences between the two legal traditions.

1. American Experience

Common law countries and parties have a long and deep experience with discovery (document production)²⁹⁾ as playing a fundamental role in the litigation process. This can lead to customers and attorneys from common law countries never taking the time to step back and analyze the particulars of their situation.

The roots of the American legal system begin in feudal England. The earliest means of discovery in the English legal system was a form of the modern Request for Admission, which was used in the Court of Chancery (court of equity) as far

²⁹⁾ “The term ‘discovery’, in the broadest sense, describes the mechanisms available in some legal systems—usually those with a common law tradition—whereby parties can obtain the production of documents from their opponent or from third parties.” Peter Griffin, *Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness hearings*, *Journal of International Arbitration*, KLUWER LAW INT. 20 (2000 Vol. 17 Issue 2). Discovery “mechanisms” include document production, depositions, interrogatories and so on. Document production is simply a sub-part of the discovery process. In common law systems discovery and document production are somewhat indistinguishable and, therefore, in the given context, it makes sense to refer to the broader term discovery to convey the process used by common law courts.

back as the 1200s.³⁰) Developed from Romano-canonical principles, the Court of Chancery employed “positions” which were affirmative propositions to be categorically answered under oath by the opposing party.³¹) By the late 1600s, chancery complaints included an *interrogating part* which contained specific interrogatories addressed to the defendant.³²) The defendant was able to challenge these interrogatories with a demurrer³³) (to contest a point of law) or a plea (contest a point of fact).³⁴) Additionally, through a cross-bill,³⁵) the defendant was able to elicit discovery from the plaintiff. Should the defendant refuse to answer a given position, the defendant could be held in contempt or the entire bill (complaint) could be taken as confessed against him (under the Romano-canonical system, like under modern law, failure or refusal to answer a position was taken as an affirmation).³⁶) The root of discovery in equity simply confirms the “doing justice” nature of modern day document production.

During that era, the common-law courts did not have their own discovery system, but parties to a common-law action were able to bring a bill to the Court of Chancery for the purpose of discovering material evidence to be used in the common-law trial.³⁷) The earliest common-law courts to be granted the power to compel discovery were in the United States where South Carolina courts were permitted to exercise this power in minor causes as early as 1800³⁸) and Kentucky courts were permitted the same nine years later.³⁹) By the mid-19th Century, the use of discovery devices was permitted in at least 11 states⁴⁰) and became progressively more widespread.⁴¹) The American concept of discovery over this time period eclipsed that of England.⁴²)

³⁰) Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* 206, THE LAW BOOK EXCHANGE, Ltd. 1952 (2005). See also William Morgan, *Discovery in Arbitration*, 3 INT’L ARB. 3, at 9–10 (1986).

³¹) Millar, *supra* note 30, at 206.

³²) LANGDELL, SUMMARY OF EQUITY PLEADING 63, Note 1 (2nd ed. 1883).

³³) “A pleading stating that although the facts alleged in a complaint may be true they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer.” BLACK’S LAW DICTIONARY 465 (8th ed. 2004)

³⁴) Millar, *supra* note 30, at 202.

³⁵) “A bill brought by the defendant against the plaintiff in the same suit, or against other defendants in the same suit, relating to the matters alleged in the original bill.” BLACK’S LAW DICTIONARY 174 (8th ed. 2004).

³⁶) *Id.*; Daniell Chancery Practice 684–685 (3rd Am. From 3rd Eng ed. 1937).

³⁷) Millar, *supra* note 30, at 204.

³⁸) Robert Wyness Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 199–200 (1937).

³⁹) Act of February 1, 1809: 4 Littell, Statute Law of Kentucky (1814) 35.

⁴⁰) See Millar, *supra* note 30 (South Carolina [1800]; Kentucky [1809]; Mississippi [1828]; Virginia [1831]; Missouri [1835]; Connecticut [1836]; Arkansas [1837]; Alabama [1837]; Georgia [1847]; New York [1848]; Massachusetts [1851]).

⁴¹) Millar, *supra* note 30, at 204.05.

⁴²) Morgan, *supra* note 30, at 9–10 (“discovery, in its American meaning, is an enlargement of the procedure evolved in the old equity courts”).

With regard to the production of actual documents, the common law provided for the right to inspect sealed documents upon which the claim or defense in question directly rested, but beyond that there was little opportunity for the discovery and inspection of documents under common law.⁴³⁾ In the 1700s, documents which could be considered property of both parties were also opened to inspection at common law.⁴⁴⁾ In the Courts of Chancery, if the defendant was compelled, through the use of interrogatories, to admit under oath the possession or control of specific documents, he could be made to produce and submit those documents to the plaintiff for inspection.⁴⁵⁾ In 1828, New York granted its Supreme Court the power to permit documentary discovery and production to either party, on petition, as necessary to enable petitioner to draft his pleadings or prepare for trial.⁴⁶⁾ In 1849, the New York Code authorized the court to “to order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers and document in his possession or under his control, containing evidence relating to the merits of the action, or the defense therein.”⁴⁷⁾ From these early roots, discovery/document production has grown into the elaborate, expansive and costly process known to all legal practitioners. “For some Americans, discovery sometimes serves as a vacuum cleaner to suck all the minimally relevant pieces of paper that might possibly yield information ... reasonably calculated to lead to the discovery of admissible evidence.”⁴⁸⁾

Over this time period, the American legal system has developed well-established means of sanctioning attorneys – either via ethical rules or court-enforced measures – who shirk their duties to engage in the discovery process in good faith.⁴⁹⁾ These sanctions greatly discourage an attorney from undermining the discovery process. Quite simply, losing one’s license, monetary sanctions, or even potential time spent in jail (*i.e.*, court sanction for contempt of court) ensure the process runs smoothly and as envisioned. In addition, the legal system has developed elaborate rules on privilege.

Such a long history gives rise to strong cultural differences between attorneys grounded in such a system and attorneys from civil law countries. Young U.S. attorneys learn at an early stage of their career about the discovery process and how to exploit it to their client’s advantage.⁵⁰⁾ It should not be forgotten that U.S. attorneys generally have an ethical obligation to “zealously” represent their client’s

⁴³⁾ *Id.* 219.

⁴⁴⁾ *Id.*

⁴⁵⁾ Langdell, *supra* note 32.

⁴⁶⁾ N.Y. Rev. Stat. 1829, Pt. III, C. I, tit. III §§ 21, 22 (Vol. II, p. 199).

⁴⁷⁾ Code of 1849, § 388.

⁴⁸⁾ William W. Park, *Arbitration’s Discontents: Of Elephants and Pornography*, 17 INT’L ARB. 3, at 284 (2001).

⁴⁹⁾ See also Arthur Marriott, *Evidence in International Arbitration*, 5 INT’L ARB. 3, at 283 (1989). (“Common law lawyers in [England] and in the United States have developed sophisticated, time-consuming and very expensive means of discovery of documents. There are highly intricate rules and layer upon layer of precedent to be followed in their application”).

⁵⁰⁾ Many law schools offer classes on the specific topic of discovery. See, *e.g.*,

interest⁵¹) and document production provides a very clear opportunity to do so, which leads to an ever more expansive use of document production (one good current example being E-discovery). This training and ethical mindset do not automatically dissipate once a U.S. attorney enters the international arbitral arena and has led to the relentless push by such attorneys to have document production play an ever greater role in international arbitration.

The foregoing history of discovery simply goes to show that the American legal system and discovery are intimately intertwined and this has led to a situation where parties and attorneys do not even question the wisdom of discovery generally or discovery specifically in the context of international arbitration. If arbitral customers (or their counsel) from legal systems such as the American system are willing to challenge their underlying assumptions regarding document production they may conclude that the benefits of speed, efficiency, predictability and so on, can be better served by limiting document production.

2. Austrian Experience

Austria has no real experience with discovery. The only clear provision of the Austrian code addressing the exchange of documents is ZPO Art 304, which directs parties to exchange documents in three, limited, situations: (1) if the opposing party itself referenced the document during its argument in the instant trial; (2) if the opposing party is required to issue or disclose the document under the civil code; and (3) if the document is a common document of the parties (to be interpreted by the contents of the document).⁵² These are obviously very limited bases for compelling a party to produce a document. As a result, Austria has had no need to develop rules (either court rules or ethical rules) for addressing document production violations or rules of privilege to serve as a shield to blunt overreaching in the discovery process. Quite simply, Austria does not have substantial experience with party driven document production outside of the arbitral arena.⁵³)

Austria is indicative of the civil law's approach to discovery generally, *i.e.*, no discovery in the same sense or scope as American-style discovery.⁵⁴) The gap between the civil law and the common law on the issue of discovery is well documented and does not require elaboration. This complete lack of familiarity and

www.law.georgetown.edu/curriculum/tab_courses.cfm?Status=Course&Detail=1899 (last visited December 14, 2010).

⁵¹) DC Bar Rule of Professional Conduct 1.3 (a). *See also* New York Rule of Conduct 1.3; California Rules of Professional Conduct 3-110; ABA Model Rules Preamble Art. 2.

⁵²) Pursuant to Art 304 (2) of the ZPO a “document will be considered a ‘common document’ of the parties if it was created in the interests of the parties or if it stipulates their legal position vis-à-vis each other. Documents will also be considered ‘common’ when it deals with the negotiations between the parties or between one of the parties and a common broker.”

⁵³) *See generally* Christian W. Konrad & Philipp Peters, *Die Anordnung der Urkundenvorlage im Internationalen Schiedsverfahren*, 8 *ECOLEX* 763–766 (2010).

⁵⁴) Kaufman-Kohler, *supra* note 8, at 15.

experience with discovery extends to customers from continental European countries, who make up the majority of continental European arbitral institutions' customers. These customers generally have no expectation of being involved in a broad document production exercise but often find themselves in such a situation. As no arbitral institution can completely disentangle itself of its legal roots or the legal markets it serves, continental European arbitral institutions should not lose sight of the fact that the vast majority of its customers come from legal traditions that share a legal heritage that does not embrace a concept of broad document production.

B. The Ideal v. Reality of Discovery

This author has heard, on a number of occasions, civil law attorneys express the belief that common law attorneys view discovery (document production) as a matter of justice. This author is a common law attorney and, although the author cannot speak for all common law attorneys, the author can safely say that such an idealistic notion bears limited semblance to reality. Discovery in practice, as opposed to theory, has little to do with justice. Document production can promote justice ("ideal") but it often serves many other functions ("reality"). Common law attorneys are smart enough to sugar coat the negative aspects of discovery as a by-product of doing justice. The following comparisons of the ideal versus the reality highlight the more diverse role that document production plays.

1. David v. Goliath Scenario

Ideal: Discovery can allow David to defeat Goliath.

Reality: Discovery allows Goliath to walk all over David or allows David to game the system.

When people give a positive example of discovery, invariably the example involves a weaker party using the system to defeat a stronger party by obtaining information that allows the weaker party to win its case.⁵⁵) The reality is not so exemplary. Discovery can easily be used as a tool to run up costs and acts as a weapon. This can happen in two very different situations.

First, a financially stronger party can swamp a weaker party with a substantial discovery process that will run up costs and the time involved.⁵⁶) In marginal

⁵⁵) See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 518 (2004) (discussing the media's inclination to make sure the "audience receives the reassuring message that David generally manages to beat Goliath, as well as the disturbing corollary that undeserving or spurious Davids are thick on the ground").

⁵⁶) DAVID SIEGEL, *NEW YORK PRACTICE* 549 (2005) ("the very freedom of use that has been accorded the disclosure devices sometimes generate a game of its own, with one side with abundant resources over-using them to the disadvantage of another and less affluent side"). See also Carter, *supra* note 10, at 593.

cases, where the weaker party has a solid, if not slam dunk case, this can have a strong influence on the weaker party's decision to file a suit and or proceed with the case once filed. It is important to bear in mind that under the U.S. system a party cannot generally collect attorneys fees, *i.e.*, costs do not follow the event.

Second, a weaker party can exploit its lower economies of scale to compel a stronger party to quickly settle for an amount lower than what it would have wasted on the discovery process.⁵⁷⁾ For example, in a case where an individual sues a large corporation alleging that a product was defective, a large disparity immediately develops independently of the merits of the case. It is safe to assume that the individual will not have many documents of relevance in his or her possession, whereas the corporation will have voluminous files that it would (likely) prefer to keep out of the public domain. In such a situation, the corporation clearly has an incentive to settle quickly. These cases are settled for what is called "nuisance value". Companies develop scales of how much it will take to litigate a case and then are often willing to settle for an amount lower than that in order to simply save money regardless of the merits of the case (assuming the company has no other incentive to go to trial, *e.g.*, to obtain a positive precedent or to send a message to other potential claimants). A winner under the U.S. system generally does not collect attorneys' fees, so even if a party believes it has a meritorious case it has a financial incentive to settle as any legal fees incurred will be a sunk cost.

In a system in which costs follow the event, such risks are greatly reduced. However, no standard rule exists on the awarding of costs in international arbitration and the issue becomes one of arbitrator discretion.⁵⁸⁾ In such an unpredictable situation, the dampening effect of awarding of costs on document production becomes attenuated.

2. Courts are Neutral in the Discovery Process

Ideal: Courts are neutral arbiters of the discovery process.

Reality: Courts use discovery to promote settlement in order to avoid time consuming trials.

U.S. trial courts are over-worked and underfunded. As a result, courts have every reason to encourage the parties to settle and, other than cajoling, one of the best tools available to the courts is to allow the discovery process to run its course because the process will: (A) fatigue the parties; and (B) crystallize any open issues.

⁵⁷⁾ Carter, *supra* note 10, at 593 ("the 'weak' party may exert pressure by demanding document production from its opponent in a situation where the stronger party has virtually all the documents and the weaker party is not subject to any risk of parallel production").

⁵⁸⁾ Park, *supra* note 5 at 288 ("major institutional rules stipulate that arbitrators have discretion to allocate attorney's fees, but do not suggest how that power should be exercised").

Under most rules of procedure,⁵⁹⁾ the court does not play an active role in the discovery process.⁶⁰⁾ The parties are directed to conduct the process on their own and only resort to the courts when they are unable to resolve an issue amongst themselves. At that point of time, a court should insert itself in the process to keep the process from spiralling into something unreasonable. However, judges are too overworked to delve into the details of a case at an early stage and know that the longer the discovery process runs that the likelihood of settlement increase. In America only 3% cases filed end in trial.⁶¹⁾ Clearly the discovery process plays a significant role in the high settlement rates and, consequently, courts have less incentive to rein in discovery than one would think. Alternatively stated, judges will let discovery run its own course (*i.e.*, let the parties bludgeon each other into fatigue) because in many instances a case will likely resolve itself without substantial court intervention.⁶²⁾

This author has worked in chambers of a U.S. trial court where it was considered a failure if a case went to trial.⁶³⁾ The judge and the judge's clerks made every effort to encourage a settlement, all the while investing as little effort into a case as possible until it was necessary. This is the reality of an overworked judiciary.

3. Attorneys Seek to Limit Discovery

Ideal: Attorneys act in their client's best interest and attempt to limit discovery (*i.e.*, attorneys are conscious of the costs to customers).

Reality: In the heat of battle many attorneys focus (rightly) on winning and often fail to do a cost-benefit analysis from the same perspective as the customer.

For customers the equation is often simply a matter of dollars spent to avoid a certain amount of financial risk. By contrast, attorneys may fight every issue to the bitter end regardless of how many billable hours this incurs.

In addition, attorneys laboring under a system with exorbitant discovery processes will derive a substantial amount of their income from the process, which can shade their view of the process. Discovery can drag on for years and has spawned its own cottage industry of secondary business to support the process.

⁵⁹⁾ For non-U.S. lawyers a brief explanation would help. The U.S. has a federal system, whereby federal courts work in tandem with the various state courts. Each court system has its own rules of procedure, which will structure the discovery process. Therefore, one cannot speak of a uniform discovery procedure in the U.S.

⁶⁰⁾ English courts take a similar hands-off approach to the discovery process and even allow discovery before proceedings have started. *See generally* English Civil Procedure Rules (CPR) Part 31.

⁶¹⁾ *See* <http://sacramento.bizjournals.com/sacramento/stories/2004/05/24/focus3.html> (last visited December 14, 2010). *See generally* Galanter, *supra* note 52; Herbert Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. LEGAL STUD. 735, 754 (2004) (comparing the decrease in trials in America, England and Canada).

⁶²⁾ Kaufman-Kohler, *supra* note 8, at 15 ("Pre-Trial Discovery is conducted for the most part by counsel without the need for involvement of the court").

⁶³⁾ *See generally* Galanter, *supra* Note 55 at 520.

Large firms that already have hundreds of attorneys will often need to employ yet additional help to properly complete the discovery process. Many staffing agencies exist that specialize in providing short-term contract attorneys to assist in the process. At the end of the day, discovery can be quite lucrative for attorneys and their law firms, *i.e.*, it is costly to the parties. When an attorney transitions from such a system, the mindset that the high costs of broad discovery are simply an inherent cost within the system, will likely transition with them into the arbitral arena. More precisely, attorneys from a system with exorbitant discovery may simply assume such high costs are acceptable and simply a part of doing business.

The foregoing three examples of when the ideal differs from reality certainly do not apply to every case. Situations that clearly fall outside the given examples do exist and in such situations the case for allowing discovery is strong. However, the three foregoing examples certainly provide a basis for a customer to rationally conclude that it wants to avoid document production. Therein lies the beauty and advantage of arbitration. The parties can choose their procedure and they can choose to limit document production by selecting a set of rules that limit document production.

IV. The Case for a Continental European Arbitral Institution to Limit Document Production

Sometimes it is good to be different. International arbitral practice, laws (*e.g.*, wide acceptance and enactment of the model law), institutional rules and so on have generally marched in the same direction over the last 30 to 40 years. The UNCITRAL Model Law has been called the “great flattener” and the great flattener has reached Austria⁶⁴), as well as many other continental countries. But as any Austrian knows, a few well-placed mountains can draw customers (tourists) in and are, ergo, profitable.⁶⁵)

The convergence of international arbitral practice and procedure has had the effect of making the rules of the various arbitral institutions conform more or less to each other. Granted, differences certainly exist, but generally those differences are a difference in degree and not in kind. For example, most arbitral rules follow the same basic blueprint of giving the arbitral tribunal the widest latitude possible in conducting the proceedings.⁶⁶) There are some sound and not so sound reasons

⁶⁴) GEROLD ZEILER AND BARBARA STEINDL, *THE NEW AUSTRIAN ARBITRATION LAW – A BASIC PRIMER* (2006).

⁶⁵) Austria generated € 21.49 billion in revenue from tourism in 2009. *See Tourism in Austria 2009 Factsheet*, available at www.austriatourism.com/media/8998/2009E_Factsheet%20Tourismus%20in%20%C3%96%202009_Englisch.pdf (last visited December 14, 2010).

⁶⁶) *See* LCIA Rule 14.2 (“the Arbitral Tribunal shall have the *widest discretion* to discharge its duties allowed under such law”); SIAC Rule 12.6 (“widest discretion”); ICC Rule 15.1; DIAC Rule 17.1; AAA Rule 30; SCC Institute Rule 19 (“the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate”); Swiss Rules 15(1) (“Subject

for this.⁶⁷) However, this has the effect of making the arbitral institutions indistinguishable with regard to the actual conduct of the proceedings.⁶⁸)

By default or design, this has led to document production taking on an ever greater role in international arbitration, a result few customers appreciate. The displeasure of customers with broad document production has created a window of opportunity for the arbitral institution that is willing to attempt grab this segment of the arbitration market. A sound business case can be made for the arbitral institution willing to attempt to grab that market and a continental European arbitral institution stands in an ideal situation to do so.

A. The Fierce Competition for International Arbitration Business (Supply)

The competition to be the “go to” destination for international arbitration is very real and fierce. The reason for such competition is clear: international arbitration is lucrative for local attorneys, good for the local economy, and adds to the prestige of the location.⁶⁹)

Stephan Wilske and Todd Fox in the 2009 of edition of the *Austrian Yearbook on International Arbitration* identified three tiers of competitors for arbitral business. The first tier consisted of Switzerland, France, England and the United States. The second tier of countries, those attempting to eat into the first tier’s market share, include: Austria, China (including Hong Kong), Germany, Singapore, and Sweden. The final tier was a hodgepodge ranging from Spain to Dubai to Korea. Messrs. Wilske and Fox noted that to grab market share, international “governments and institutions try to adjust and improve their arbitration laws and *arbitration rules* required or expected by the final users” (emphasis added).⁷⁰)

Although all of these locations are attempting to attract international arbitral business, the majority appear to be doing so by attempting to offer a homogeneous product with regard to the actual conduct of the proceedings. None of the real competitors have sought to distinguish themselves by expressly limiting doc-

to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.”); DIS (Deutsche Institution für Schiedsgerichtbarkeit) Rule 24.1 (“the arbitral tribunal shall have complete discretion to determine the procedure”); CIETAC Rule 28 (“Unless otherwise agreed by the parties, and on the condition that it abides by these Rules, the arbitral tribunal may conduct the arbitration in any way that it deems appropriate.”).

⁶⁷) Park, *supra* note 5 at 279–301 (“the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good; and arbitration’s malleability often comes at an unjustifiable price”).

⁶⁸) *Id.* at 282–283.

⁶⁹) Stephan Wilske & Todd Fox, *The Global Competition for the “Best Place for International Arbitration – Myth, Prejudice, and Reality Bits*, *Austrian Arbitration Yearbook 2009* 386–388 (Klausegger et al. eds., 2009).

⁷⁰) *Id.*

ument production.⁷¹⁾ The ICDR has made some tentative efforts to reign in document production by issuing guidelines on document production.⁷²⁾ It is probably safe to say, as a U.S.-grounded arbitral institution, comparatively speaking, the ICDR has seen some of the worst abuses of the document production process. However, as Professor Park has noted,⁷³⁾ arbitral institutions pushing the problem on to the arbitrators (*e.g.*, with non-binding guidelines or broad grants of discretion), rather than making a firm decision via their rules, is the easy way out and does not change the underlying dynamic of the continued forward march of document production into the international arbitral practice. Document production (as discussed above and below) provides an issue in which a clear opportunity exists for a continental European arbitral institution to distinguish itself from its competitors because a gap exists between demand and supply.

It should be noted that competition for arbitration goes in positive and negative directions. One Australian has gone so far to market Australia's strength in the black arts (ability to sidetrack arbitrations).⁷⁴⁾ In the long term, a continental European arbitral institution's interest would be best served by avoiding a race to the bottom by focusing on limiting the opportunities for practitioners to sidetrack arbitral proceedings.

B. What Customer's Want (Demand)

Present a customer (generally a large multinational corporation in the context of international arbitration) with the following abstract question at the time of contract formation, before they have any idea of what kind of dispute will arise (*e.g.*, when they do not know whether they are the claimant or the respondent or of the nature dispute): "If given the choice between broad document production,

⁷¹⁾ Some institutional rules have moved in opposite direction. For example, under LCIA Rule 22.1 (e) a tribunal has the express power "to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession custody or power which the Arbitral Tribunal determines to be relevant." See also AAA Rule 19(3).

⁷²⁾ *ICDR Guidelines for Arbitrators Concerning Exchanges of Information*, International Centre for Dispute Resolution, available at www.adr.org/si.asp?id=5288 (last visited December 14, 2010).

One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other party, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of a simpler, less expensive, and more expeditious process.

⁷³⁾ Park, *supra* note 5.

⁷⁴⁾ Sam Luttrell, *Opportunities for Australian Arbitration Practitioners in the "Global Financial Crisis"*, 75 INT'L ARB. MEDIATION & DISP. MGMT. 415 (2009).

narrow document production or to simply give an arbitrator the unfettered discretion to set the terms of document production, which would a customer honestly prefer?" For the many reasons set out above, the answer would be a resounding call for a narrow document production exercise, with only the most ardent of document production fans wanting a broad document production exercise. There are many institutions that already cater to such customers, most which are unsurprisingly based in common law countries.⁷⁵⁾

This conclusion was confirmed in the recent study conducted by the Corporate Counsel International Arbitration Group ("CCIAG"). Of the corporate counsel surveyed by CCIAG, 100% cited excessive document disclosure as a factor contributing to the rising inefficiency of international arbitration.⁷⁶⁾ Therefore, there exists a real demand from customers (if not the arbitral community) for more streamlined arbitral proceedings with limited document production.

In addition, the recent "2010 International Arbitration Survey: Choices in International Arbitration", conducted by White & Case and Queen Mary University of London found that customers listed document production as a primary cause of delay in international arbitration.⁷⁷⁾ The study concluded that the "main causes of delay are within the control of the parties, although corporations feel that arbitrators and *arbitration institutions* are best placed to reduce delay" (emphasis added).⁷⁸⁾ This empirical evidence clearly confirms this article's thesis: customers "prefer pro-active arbitration institutions" that seek to streamline arbitral proceedings and to reduce costs.⁷⁹⁾

C. Why not Give Customers What they Want (Demand = Supply)

There is much merit in limiting document production (*see* Sec II and III above) but this is not determinative because, as a service industry, everything revolves around the customer's wishes. A maxim for all service industries is "the customer is always right" – why should international arbitration be different? Many arbitration practitioners have quixotic notions of justice; that international arbitration is a twin sibling of the courts who have the specific mandate of performing justice. If international arbitration is related to the courts it is only as a third cousin. Yes, they share some characteristics, but at the end of the day each is unique and must be evaluated on its own merit. Courts act as an extension of sovereign power, while arbitration directly arises from the parties consent. Arbitra-

⁷⁵⁾ See fn 71 (discussing LCIA and AAA Arbitral Rules).

⁷⁶⁾ Reed, *supra* note 6.

⁷⁷⁾ 2010 *International Arbitration Survey: Choices in International Arbitration* 32 available at www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf (last visited December 14, 2010).

⁷⁸⁾ *Id.*

⁷⁹⁾ *Id.*

tion should not forget that its mandate begins with the customers and that it can ultimately end with the customers, if it does not provide a service customers desire.

The natural retort to this article's proposal for a continental European arbitral institution to change its rules is that the parties can establish the arbitral procedure in their arbitration agreement and, therefore, no need exists to change the arbitral rules of an institution. Although technically true, this does not happen in practice because, as the champagne clause, the arbitration agreement often does not receive the due consideration it deserves.⁸⁰) When the intoxicating scent of a nearly-completed deal hangs in the air, parties generally prefer to avoid injecting the stink of negativity into negotiations by broaching the topic of what should happen when the deal goes bad and today's valued partner becomes tomorrow's respondent or claimant. To avoid this, parties often simply rely on the recommended standard clauses suggested by arbitral institutions without (substantial) further consideration. An arbitral institution that takes the realities of such situations into consideration and does not rely on a generalized platitude (*i.e.*, that parties can and do structure their own procedure before a dispute arises) will make those parties' (whose wish is to avoid broad document production) lives easier. Rather than bringing up the topic of how to conduct a potential arbitration at an inopportune time, customers can simply propose a particular institution's rules without further comment. If a continental European arbitral institution takes human nature into consideration and offers this service, customers should reward it by inserting that institution's arbitral clauses into their contracts.

In addition, another maxim of business is "know thy customers". The strong majority of a continental European arbitral institution's customers come from continental Europe. As outlined above, customers from civil law countries generally have no desire or expectation of conducting a broad document production exercise. Despite this, these customers can, and often do, find themselves embroiled in such an exercise. With regard to those customers coming from countries with entrenched broad document production, it is highly doubtful that they agreed on a continental European arbitral institution in the hope of obtaining broad document production. If broad document production was a priority for such customers they would surely have chosen another arbitral institution, such as LCIA or ICDR, whose rules have a stronger common law flavor. In summary, the current system of broad arbitrator discretion, which can give rise to a broad document production exercise, does not conform to the majority of a continental Eu-

⁸⁰) Park, *supra* note 5 at 294:

Usually arbitration clauses will be 'cut and paste' jobs by transactional lawyers who have little relish for questions about evidence and briefing schedules. The corporate lawyers who write contracts are out of touch with the procedural mishaps that occur during arbitration, and generally remain in the dark about how their arbitration clauses play out during litigation. This absence of well-informed reflection about the consequences of the arbitration clause inhibits rationale decision-making, which creates a market failure. Only after the dispute arises, when the transaction has gone sour, does the importance of rules hit home.

ropean arbitral institution's customers' expectations and will not likely attract any new business (if common law customers wanted such a product they would have stayed closer to home). A continental European arbitral institution should take affirmative measures to ensure the product it sells conforms to the majority of its customers' expectations and to offer a product that may lure in customers from common law countries who are experiencing document production fatigue.

As a final point, if a continental European arbitral institution takes up this article's proposal it should market directly to customers. Obviously, a continental European arbitral institution cannot bypass the arbitral community in marketing its wares. As already acknowledged, benefits exist to document production and some arbitration practitioners will not warm to the idea, particularly common law attorneys who cannot fathom limited document production. That notwithstanding, the fact remains that customers write the checks and some (likely many) are cost conscious and pre-disposed to look unfavorably upon broad document production. If customers are aware of a product that appeals to them (more than its alternative) they will buy it regardless of any hesitation their outside counsel (who has different incentives) may have.

D. Arbitrator Discretion v. Customers' Wishes

The issue of broad versus narrow document discovery should be an issue of what the parties want, and not, as has generally been the case, what the arbitration industry wants. To combat the continued march of document production requires affirmative action by either the parties or the arbitral institutions because arbitrators have been more than willing to extend their authority to embrace the practice of broad document production.

Practice does confirm that arbitrators have no hesitation assuming the power to order document production [...]. Practice also shows that they do so whether or not such power is expressly granted by the competent national legislator, the applicable arbitration rules or the parties' agreement. Where there is no express power, they regard it as included within their general authority to determine the procedure failing an agreement by the parties.⁸¹⁾

Quite simply, arbitrators do not always provide the best bulwark against the expansion of their own authority.

The natural consequence of a continental European arbitral institution changing its rules to provide greater procedural guidance would be a limitation on arbitrators' discretion in conducting arbitral proceedings; a thought abhorrent to many arbitrators. However, arbitration is not about the arbitrators, it is about satisfying those who pay for the process. Professor Park has argued:

⁸¹⁾ Kaufman-Kohler, *supra* note 8, at 15.

To many in the arbitration community, any suggestion that arbitral discretion should be curtailed may be as welcome as ants at a picnic. The flexibility inherent in arbitrator discretion not only constitutes a pillar of orthodoxy, but rests on deeply entrenched practical considerations. Arbitral institutions that aspire to market their services globally are understandably shy about taking sides in long-standing debates between different national legal systems, particularly on those controversies that divide continental and Anglo-Arbitration civil litigation. By leaving procedural matters to the arbitrators' direction, institutions side-step the hard choices about what exactly it means to conduct a fair and efficient proceeding.⁸²⁾

Continental European arbitral institutions are in the position to make the "hard choice" of whether they should limit arbitrator discretion on the narrow issue of broad document production. At least one continental European arbitral institution should put on its businessman's cap, rather than its lawyer hat, when looking at the issue of attracting customers. As outlined above, many good reasons exist for customers to have an unfavorable view of document production. Reducing the role of document production will not lead to any miscarriages of justice as continental legal systems have functioned quite effectively without any standardized form of document production.

V. Suggestions on How to Limit Document Production

Valid reasons exist as to why international arbitration has developed a role for document production. The foregoing article notwithstanding, the author does not believe document production should be banished from the arbitral process entirely, but rather, that document production should be circumscribed to meet the expectations of the customers and to produce a better, more efficient, process. This article suggests the following criteria for limiting document production.

First, any change to the rules should focus on limiting document production with regard to categories of documents. This article has hopefully made the case that document production requests for categories of documents differ in kind from request for specific (identifiable) documents and, as a result, customers have a well grounded basis for wishing to avoid the fishing expeditions that arise from the former.

Second, the request for specific (identifiable) documents will not be affected by any change to a continental European arbitral institution's rules. This distinction is in line with 2010 IBA Rules on the Taking of Evidence, which distinguishes between identifiable and categories of documents in Rules 3 (3) (a) (i) and (ii). Much of the criticism of document production outlined above does not really apply when a document is identifiable, known to exist and clearly in the possession of a party.

⁸²⁾ Park, *supra* note 5, at 283–284.

Third, the parties should be able to circumvent any new rule by mutually agreeing on a broader document production exercise than one limited to identifiable documents. The principle that parties can structure their proceedings as they see fit should certainly extend to the issue of document production. In essence, the current opt-out system (parties agree to limited document production) is replaced with an opt-in system (parties agree to have broad document production).⁸³)

A potential **fourth** criterion would be to provide a safety valve mechanism that allows a tribunal or sole arbitrator to grant document production requests for categories of documents in extraordinary circumstances. Such extraordinary circumstances could include a *prima facie* showing of fraud or criminal conduct. This article expresses no opinion on the inclusion of such a clause but includes it as a potential point of discussion.

This article has hopefully made the case to why a market exists for a set of arbitral rules that limit document production. If a continental European arbitral institution takes up this task it should reap the first mover benefits of attempting to cater to this market.

⁸³) An approach favored by Professor Park. See Park, *supra* note 5, at 289, (“institutional provisions could contain specific protocols that the arbitrator would be required to apply unless modified by party agreement of all parties”).