

# **Contrastive Analysis on the Documentary Evidence Production Rules of Common Law System and Civil Law System in International Commercial Arbitration**

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**Abstract:** International commercial arbitration is playing an increasing role in solving international commercial disputes day by day. Evidence is the most important thing in arbitration procedure and greatly affects the results of arbitration. Among numerous evidences, documentary evidences characterized by objectivity and authenticity always become an important kind of evidence for the proof of case facts. Due to differentiated geographical position and law development history, different countries have many discrepancies in legal culture, and there is a big gap in the rules and regulations of documentary evidence production between common law system and civil law system. Making clear of such discrepancies is of great value for appropriately selecting applicable documentary evidence production rules in international commercial arbitration practices. Therefore, this paper focused on clarifying the documentary evidence production rules of common law system and civil law system, made a comparison of the two, and finally came to a conclusion.

## **1. Introduction**

In international commercial arbitration, the disputes always happen between parties of different countries, and their lawyers and the personnel of arbitral tribunal often come from different countries. Presently, the various rules and procedures widely used in international arbitration embody a fusion and coordination of two legal norms, especially in evidence rules and procedures. In the process of international commercial arbitration, the way of producing or disclosing documentary evidence usually has crucial impact on the judgement of cases, so during a lawsuit, the submission of documentary evidence is the core of game between two parties[1]. The great difference of common law system and civil law system makes it hard for both parties to come to a consensus, which would not only affect arbitration efficiency but also cause the parties to doubt due to dissatisfaction with proof procedure. Under the efforts of the United Nations Commission on International Trade Law, every country has been studying and fusing their documentary evidence demonstration rules with each other, which are tending to develop in harmony now. Clarifying the difference of documentary evidence production rules in international commercial arbitration between common law countries and civil law countries is of great value to better application of relevant system. [2]

## **2. Discrepancies of Documentary Evidence Production Rules Between Common Law System and Civil Law System**

Common law system lays emphasis on a comprehensive understanding of cases for finding the facts. In view of the unbalance of documentary evidences held by the parties, it requires the parties to provide all evidence related to the case for finding the facts. Civil law system has no so-called facts finding procedure. Its basic idea is that both parties have their own opinions, while documentary evidence is only used to prove the claim of the requesting party according to the principle of burden of proof [3].

## **2.1 Documentary evidence production rules of common law countries**

In the U.S. Federal Rules of Civil Procedure, a great number documentary evidence can be obtained by using “discovery” procedure. Both parties actively communicate on all relevant issues beyond confidentiality required in the case, no matter this document is beneficial to their own party or not. The scope of “matters related to the case” is very broad, and any evidence relevant to the case can be informed, which is the characteristic of a great number of evidence description in America.[4] Before 1999, the convention of Britain was similar to America, and “discovery” procedure was applicable to: first, the documents claimed by the parties beneficial to themselves; second, a document held by each party adverse to the other side; third, a document that may lead to a train of enquiry results with the results to be the first or second situation. It covers almost all documents related to cases, which covers “matters related to the case” of America. The UK government considered that such practice would result in the exposure of lots of useless documents, wasting a large amount of time and money. So in 1999, a new civil procedure rules of Britain stipulated that “disclosure” referred to that according to the disclosure order of court, the parties not only needed to disclose documentary evidence in support of their own claim, but also disclose the evidences adverse to its own party as well as beneficial or adverse to the other side, excluding the previous documents that may trigger a train of enquiry. Though there is still a gap in the evidence disclosure between America and Britain, there are more kinds of evidences raised in the legal system of Britain, America and so on, and the parties must provide documents in favor of or adverse to their own interest. [5]

## **2.2 Documentary evidence production rules of civil law countries**

There is no documentary evidence system corresponding to common law system in civil law system. German Civil Procedure Law stipulates that both parties must provide the evidence for the facts claimed by themselves or contradicting to the facts claimed by the other side. The traditional legal principle of Germany is unlike the discovery or disclosure in common law system, and the parties are only responsible for the proof of their own claims but don't assume universal burden of evidence. German courts rarely order both parties to disclose the documents that they hold or control. A Swiss scholar explained that the principle of burden of proof prevented the court from assisting one party to obtain evidence from the other party, while the British and American modes were deemed as an infringe to personal privacy which was only adopted in the criminal case involving public interest. The traditional principle of France is similar to Germany, and both parties have to transmit a document to the other parties automatically when citing this documentary evidence. In common law system and civil law system, the biggest difference in evidence disclosure or discovery between the two systems is disclosure of evidence. While, the scope of evidence revelation or disclosure in common law system is broader, which may be beneficial or adverse to the parties, and this aims to find the facts of case by abundant disclosure. Civil law countries generally believe that the value of disclosing various writs is not recognized, and as long as the parties provide evidence that their claims rely on, the judge can determine the case according to the views and evidences of both parties.[6]

## **3. Development of Documentary Evidence Production Rules in International Commercial Arbitration**

As commercial activities appear, international commercial activities become more and more frequent, causing increasing international disputes. In these disputes, the parties, lawyers and arbitrators may come from different countries, so they are probably to have divergence in arbitration procedure. In order to drive international arbitration to proceed smoothly, the UNCITRAL Model Law on International Commercial Conciliation stipulated a series of arbitration rules, to boost the internationalization of arbitration system and the coordination of different countries' arbitration laws. Regarding the submission of documentary evidence, it is stipulated that both parties could provide documentary evidences in filing a claim or defense to prove their own claims; comparing

the arbitration laws and regulation of various countries and the rules of arbitral institutions with the Model Law on International Commercial Conciliation, there is no big difference in documentary evidence production between the arbitration laws and regulation of various countries and the rules of arbitral institutions, on the contrary, there is a coordinated and unified relationship between them.

### **3.1 Common law system**

In the U.S. Federal Arbitration Law, there is no procedure relevant to discovery, but it endows arbitral tribunal with the power of asking the parties to provide abundant information disclosure under the condition that both parties haven't reached to an agreement on arbitration procedure or even disagree the arbitration procedure. The conversion from wide disclosure to limited disclosure is more obvious in Britain. The British Arbitration Act stipulates that the parties are obliged to actively submit relevant documentary evidence they hold to arbitral tribunal, which is similar to the disclosure in civil action. However, the new arbitration law released in 1996 stipulates that the parties shouldn't voluntarily disclose the materials adverse to themselves, and arbitral tribunal shall disclose at its discretion and submit to the parties. Different from the disclosure standard of civil procedure, in an arbitration, the voluntary statement of the parties is only limited to the evidence on which its request or defense bases on. Both of the arbitration law and rules of Britain and America avoid the procedures of evidence demonstration and disclosure and leave the issues raised by evidence to arbitral tribunal to determine. Although the arbitrators give their orders according to their education levels and professional habits, the documentary evidence provided by them is still very wide, which reflects the impact of civil law system on arbitration practices.[7]

### **3.2 Civil law system**

To sum up, in civil law litigation, it is a general operation that the parties provide documentary evidence to prove their claims, rather than asking the other side to provide evidence adverse to itself. But in arbitration law, arbitral tribunal has the power to request the parties to provide relevant evidence. In German Arbitration Law, it is rare to set universal and compulsory basic principle in arbitration procedure, but it allows the parties to consult with each other. In case of no agreement or other clauses, arbitral tribunal has the power to decide whether to collect evidence at its discretion. France clearly declares that if a party holds one evidence or material, the arbitrators can order it to submit to arbitration procedure. Under the coordination and integration of the Model Law on International Commercial Conciliation, the common law of Britain and America together with Germany and France establish the evidence disclosure or discovery rules that can't be widely used in international commercial arbitration, and deliver discretionary power to arbitral tribunal, so as to reduce disputes. Thereby, it becomes a foundation for promoting international commercial arbitration. In international commercial arbitration, the submission process of documentary evidence differs from that in America and Britain. "Production" is a regular expression in international commercial arbitration, so we use it to indicate its difference from "discovery" and "disclosure". [8]

## **4. Conclusion**

Common law system and civil law system adopt varied patterns. Common law countries endow arbitral tribunals with greater power of disclosure than civil law countries due to their tradition in disclosure procedure[9]. Civil law system seldom allows broad disclosure system in domestic laws, so their attitude on disclosure is very cautious, and they endow arbitral tribunals with passive and limited power. Now, the disclosure system has become very common in international arbitration practice. How to realize the balance of disclosure procedure between civil law system and common law system and make domestic arbitral tribunals more attractive to the cases of different countries are seldom involved in the modes adopted in domestic laws of above-mentioned countries. The British disclosure scope has got wide identification in international arbitration practice. The documentary disclosure scope of other civil law countries has been limited to specific and definite document types, and the disclosure scope is restricted and not allowed to be too wide. The scope of

disclosure will inevitably cause conflicts in international arbitration cases participated by arbitration participators (including the parties, arbitrators, attorney agents, etc.) with different law system traditions.

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