



Due process without discovery and production of documents in civil law jurisdictions
大陆法系之正当程序并无要求披露或提交文件



Jorge Neto Valente
JNV LEGAL - Macau SAR
华年达
华年达律师事务所 - 澳门特区
www.jnvlegal.com



華年
律師
事務所

1. INTRODUCTION 简介

2. ANALYSIS 分析

2.1. First Question: how civil law systems safeguard the principle of «due process» without «discovery»

第一个问题：大陆法系如何在无需“披露文件”下捍卫“正当法律程序原则”？

2.2. Second Question: to what extent Macau civil law system provide for «production of documents»

第二个问题：澳门法有关“提交文件”之规定？

3. MAIN CONCEPTS 主要概念

3.1. Due Process 正当法律程序

3.2. Methods of obtaining evidence 取得证据之方法

a) Inquisitorial Method 纠问式

b) Adversarial method 对抗式

3.3. Discovery 披露文件

3.4. Production of documents 提交文件

4. DUE PROCESS WITHOUT DISCOVERY 不存在文件披露下之正当法律程序

- No discovery in Macau legal system
在澳门的法律制度中并不存在文件披露
- The first moment for submitting evidence: the claim (*claimant*) or the defense (*defendant*).
提交证据的首个时刻：申索 (申索人) 或答辩 (被告) 之时
- No obligation for one party to disclose documents to the other party.
任一方均不具义务向他方披露文件
- System of «burden of proof».
“举证责任” 制度

4. DUE PROCESS WITHOUT DISCOVERY 不存在文件披露下之正当法律程序

System of «burden of proof» “举证责任” 制度

Art. 335/1 of the Macau Civil Code (M-CC): «*Whoever invokes a right must prove the facts which constitute the alleged right*»

澳门《民法典》第335条第1款：“创设权利之事实，由主张权利之人负责证明”

Art. 335/2 M-CC: «*The proof of the facts suspending, modifying or extinguishing the invoked right is up to the one against whom the right is invoked*»

澳门《民法典》第335条第2款：“就他人所主张之权利存有阻碍、变更或消灭权利之事实，由主张权利所针对之人负责证明”

4. DUE PROCESS WITHOUT DISCOVERY

不存在文件透露下之正当法律程序

System of «burden of proof» “举证责任” 制度

In Macau, rules of burden of proof are substantive rules, the so-called «substantive law of evidence».

在澳门，举证责任之规则乃属实体法，亦即“证据之实体法”。

Distinction 区别：

- Substantive law of evidence: set of rules regulating the admissibility of means of evidence and the weight of evidence;
实体证据法：一系列规范证据方法之可接纳性及其证明效力之规则；
- Procedural law of evidence: set of rules regulating the means of offering or producing evidence.
程序证据法：一系列规范提交及举证方法之规则。

4. DUE PROCESS WITHOUT DISCOVERY 不存在文件披露下之正当法律程序

- Discovery is contrary to the system of burden of proof
文件披露与举证责任制度相反
- System of burden of proof is deemed to assure due process of law
举证责任制度被视作用来确保正当法律程序
- What matters is that each party has the same opportunities to present her/his case and to offer evidence for the facts she/he is invoking and relying upon.
重点在于各当事人均具同等机会提呈其案件，并就其援引及依靠之事实提供证据

4. DUE PROCESS WITHOUT DISCOVERY 不存在文件披露下之正当法律程序

How do Civil Law Lawyers look at «discovery»?
民法法系律师如何看待“文件披露”？

- Method they are not used to
非惯常使用之方法
- Not aligned with the system of burden of proof
有别于举证责任制度
- Costly in terms of time, energy and resources
花耗时间、精力及资源
- Doubtfully effective in relation to the results obtained
就所获取之结果的效用抱有疑虑
- May increase the fees
可能增加费用
- Risk of breach of confidentiality
违反保密性之风险

5. PRODUCTION OF DOCUMENTS IN CIVIL LAW SYSTEMS 大陆法系中的提交文件

In Macau:
在澳门：

- There is no discovery, nor any similar mechanism of listing documents on the possession of the parties
既不存在文件披露，亦不存在陈列各当事人所持有之有关文件的类似机制
- Within the system of burden of proof: it's for the party to present the evidence she/he need to support her/his claim
在举证责任制度中，由当事人负责提交用作支撑其申索之证据

5. PRODUCTION OF DOCUMENTS IN CIVIL LAW SYSTEMS 大陆法系中的提交文件

However: some rules lead to similar results:

然而，某些规则会促成相似的结果：

Art. 8/1 of the Macau Civil Procedure Code (M-CPC) *«In conducting and participating in the process, magistrates, court agents and parties must cooperate with each other, giving their contribution to obtain, quickly and effectively, a fair settlement of the dispute»;* (principle of cooperation)

澳门《民事诉讼法典》第8条第1款：“在主导或参与诉讼程序方面，司法官、诉讼代理人及当事人应相互合作，以便迅速、有效及合理解决争议”；(合作原则)。

Art. 8/4 M-CPC: *«Whenever any party justifiably alleges serious difficulty in obtaining a document or information that undermines the effective exercise of a right or the fulfilment of a procedural duty or obligation, the judge must, whenever possible, provide for the removal of the obstacle»*

澳门《民事诉讼法典》第8条第4款：“如任一方当事人提出合理理由，说明有重大困难获得某此文件或资料，以致影响其有效行使权能或履行诉讼上之责任或义务，法官应尽可能采取措施，排除有关障碍”

5. PRODUCTION OF DOCUMENTS IN CIVIL LAW SYSTEMS 大陆法系中的提交文件

Art. 442/1 M-CPC: provides for a special duty of cooperation for the discovery of the truth: *«Any person, whether party or not, has a duty to collaborate to discover the truth, answering to what they is being asked, submitting to the necessary inspections, providing what is requested and performing the acts that are prescribed».*

澳门《民事诉讼法典》第442条第1款：为着发现事实真相而特别地规定的合作义务；“任何人均有义务协助发现事实真相，不论其是否案件之当事人；为此，须回答向其提出之问题，接受必要之检验，提交被要求提交之物，以及作出被指定之行为”。

Art. 61/1 of *«The arbitral tribunal, or any party with the consent of the arbitral tribunal, may request assistance from the court in obtaining evidence, particularly when the evidence to be produced relies upon the will of one of the parties or a third party and they refuse the collaboration needed»*

澳门《仲裁法》第61条第1款：“仲裁庭或任一方当事人在仲裁庭同意下，可请求法院协助获得证据，尤其当调查证据取决于一方当事人或第三人的意愿，且其拒绝提供必要的合作时”

5. PRODUCTION OF DOCUMENTS IN CIVIL LAW SYSTEMS 大陆法系中的提交文件

Despite those solutions 尽管该等解决办法：

- Rarely parties require or obtain the cooperation of the other party under those articles
鲜有当事人按照该等条文要求或获得他方当事人的合作
- The party must identify which documents she/he wishes to be “produced” and has to prove that the documents are relevant to the resolution of the dispute
当事人必须指出其欲“提交”之文件，并证实该等文件就解决争端而言具重大关系

Accordingly 因此：

- There is no real production of documents in civil law systems
在大陆法系中并不存在实质的提交文件
- Those articles are designed to produce concrete evidence for the benefit of the court/arbitral tribunal’s discovery of the truth
该等条文旨在惠及法院/仲裁庭，以便其发现事实

6. CONCLUSIONS 结论

- There is no discovery in civil law systems
大陆法系中并不存在文件透露制度
- The system of burden of proof assures due process
举证责任制度对正当法律程序作出了保障
- There is no real production of documents in civil law systems
大陆法系中并不存在实质的提交文件

Unlike in common law systems, where there is a process for the production of documents; in civil law systems, there is a process that is essentially the production of evidence only.

与普通法法系中的提交文件不同；在大陆法法系中，实为提交证据。

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THANK YOU!
谢谢!