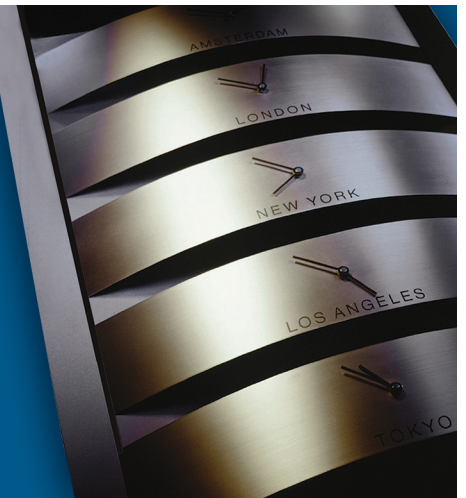


# International Arbitration

PERSPECTIVES ON DISCLOSURE, DATA PRIVACY  
AND ELECTRONICALLY STORED INFORMATION



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## About Our Practice

Mayer Brown's International Arbitration practice helps businesses and governmental entities resolve cross-border disputes worldwide. We frequently represent corporations, companies, partnerships, financial institutions, insurers and governmental entities before the leading international arbitration bodies. We also advise our clients on how to reduce risk when entering into cross-border transactions and investments. When disputes arise, we put together lean teams of experienced practitioners who know how to overcome such problems as multiple languages, documents scattered across the globe and differing legal traditions to achieve desired results in a cost-efficient manner. The services we provide fall into two broad categories:

**Advocacy.** In resolving both commercial and investor-state disputes, we apply our extensive experience in marshalling complex evidence, analyzing applicable law and procedures, developing and evaluating alternative strategies and engaging in compelling written and oral advocacy.

**Risk Management.** We help our clients manage the risks inherent in international business operations by drafting effective dispute resolution agreements and structuring transactions to take full advantage of the substantive protections available under the expanding network of international trade and investment treaties. We are particularly adept at ensuring that any disputes will be resolved in a neutral forum, rather than in the courts of the opposing party or host country.

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In this latest edition of Mayer Brown's International Arbitration Perspectives we have focused on issues related to data privacy and traditional and electronic disclosure of documents in International Arbitration proceedings. Significant tensions often occur during the arbitration process where the parties come from different backgrounds and have differing expectations of the document production process.

In our feature article, we consider what the best practice should be for arbitrators in disputes involving parties from differing legal backgrounds when it comes to the production of documents. This and related topics are addressed in articles by our authors (from Brazil, the United States, Germany, France, the United Kingdom and the People's Republic of China), including new protocols and guidelines issued by various arbitral institutions to assist in the discovery

process, the extent to which new court rules in England provide a helpful guide to parties in arbitration for managing these processes and the particular issues raised by data privacy regulation in the European Union so far as concerns document production. We also address document production issues that are specific to investor-state disputes.

Document production is very often the single most time and cost-intensive phase of a dispute process. We hope that our analysis of the issues will provide some helpful insight into the ways in which such processes are best managed. If you have any questions about any of the matters raised in this edition, please do not hesitate to contact any of the authors or the editors.

With best wishes,  
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# Production of Documents in Cross-Border Arbitration: Bridging the Cultural Divide

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## Introduction

In cross-border arbitration, differing jurisdictional rules and priorities can create significant problems, particularly in the area of discovery. In fact, depending on the jurisdiction, a party's domestic litigation background may provide very little experience with the pre-trial discovery or written witness evidence often required in arbitration proceedings.

In this article, we review the court and arbitration rules in Germany, Brazil, the People's Republic of China and England and Wales and demonstrate how these rules can collide when gathering evidence in international arbitration. We then ask whether an arbitral tribunal should, in dealing with issues relating to these topics, permit each party to present its case in a way with which it is familiar (i.e., by providing pre-trial disclosure and witness evidence only to the extent that that would be permitted in their home jurisdiction). We consider such an approach to be flawed, and present our reasons in the conclusion.

## Germany DISCLOSURE IN COURT PROCEEDINGS IN GERMANY

German civil proceedings are characterized by the principle of party autonomy. In contrast to an inquisitorial system in which the court, *ex officio*, investigates the facts of the case, in Germany the parties must present the case themselves.

As a general rule, the claimant must bring forward all the facts that support a claim, while the defendant must present the facts that may lead to a dismissal. Where facts are contested, the burden of proof is generally on the party that puts forward a fact to substantiate its case. If the party bearing the burden of proof fails to produce evidence, it will generally lose on that aspect of the court proceeding.

The German Code of Civil Procedure (*Zivilprozessordnung* or ZPO) provides for the following methods of presenting evidence: (i) testimony of experts, (ii) judicial inspection, (iii) examination of witnesses, (iv) testimony of the parties and (v) submission and inspection of documents. With respect to documentary evidence, there are no provisions for pre-trial discovery or, in particular, for electronic discovery. Indeed, the German Federal Court of Justice (BGH) has made it clear that a party is generally not obligated to provide the opponent with material that the opponent does not already possess. However, Sections 422 and 423 of the ZPO provide for a narrow obligation to produce *specific* documents if one party has a material right under civil law to receive the document, or if the party possessing the document refers to it in a brief to the court without also submitting the document. Although German law does not allow for "fishing expeditions," in these situations a party

may request that the court order the other party to produce that specific document.

Section 142 of the ZPO provides that the court may order a party or a third person to produce any documents that have been referred to by such party or third person. However, the German Federal Supreme Court has held that Section 142 does not relieve the party that makes reference to a specific document from its obligation to specify and substantiate the facts supporting its claim. Accordingly, the civil court must not order the production of documents merely aiming at retrieving information (BGH NJW 2007, 2989, para. 20). In other words, Section 142 must not be used as a tool to discover new facts. Section 142 may only be used to retrieve evidence for facts which have already been stated by the respective party.

A party's failure to comply with an order to produce a specific document means that the assertions of the other party concerning the nature and contents of the document may be considered as proven (Section 427 of the ZPO). The same applies if a document is concealed or destroyed by one of the parties with the intent to deprive the opposing party of its use. Thus, a party must bear the potentially adverse consequences if it fails to produce or if it conceals evidence. The conduct of the party will be taken into consideration when the court assesses whether a factual allegation is true or untrue.

#### DISCLOSURE IN ARBITRATION PROCEEDINGS IN GERMANY

In accordance with the principle of party autonomy, the German Code of Civil Procedure provides that parties to an arbitration proceeding are free to determine the applicable rules of procedure. In this respect, the parties may agree that they shall disclose documents to the other party.

In international arbitration—especially if US parties are involved—the parties often agree on the exchange of documents, although usually in a more limited way than in US pre-trial discovery. Such agreement often follows the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”). The parties may also agree on the rules of an arbitration institution, such as the

International Chamber of Commerce (ICC) or the German Institution of Arbitration (DIS).

The arbitration rules chosen will determine the rules of procedure, including the question of whether the parties are obliged to disclose documents. For example, the DIS Arbitration Rules specify that the applicable rules will be the statutory law in force at the place of arbitration, the DIS Arbitration Rules and any additional rules agreed upon by the parties (in particular the IBA Rules). Otherwise, the arbitral tribunal shall have complete discretion to determine the procedure.

The DIS Arbitration Rules also provide that the arbitral tribunal shall determine the facts underlying the dispute. To this end the tribunal has the discretion to give directions, to hear witnesses and experts and to order the production of documents. In this regard, the arbitral tribunal has more flexibility as to questions of the production of documents than does a state court in court proceedings. However, the arbitral tribunal will normally not make use of this power under the DIS Arbitration Rules in a way that is comparable to, for example, US pre-trial discovery; instead the tribunal will take a more restricted approach to document production, e.g., along the lines of the IBA Rules.

#### Brazil

##### DISCLOSURE IN COURT PROCEEDINGS IN BRAZIL

The Brazilian Code of Civil Procedure does not provide for a pre-trial discovery phase. Despite the plaintiffs being allowed to submit documentary evidence with the initial complaint, it is only later in the proceedings that the production of evidence takes place.

Litigation in Brazil starts with the plaintiff's submission of its initial complaint. This must contain, among other items, a statement of the facts and considerations of law, a detailed description of the claim and a description of the evidence the plaintiff intends to present or use during trial.<sup>1</sup> This requirement, however, is a mere formality, as most plaintiffs request, in their initial submission, the opportunity to use all types of evidence permitted by law.

The specification, and subsequent production, of evidence normally occurs under the direction of



the court after the submission of the defendant's answer to the plaintiff's initial complaint. During this post-answer discovery phase, the parties may submit requests for the production of evidence and courts may admit any type of evidence allowed by law, such as testimonial, documentary or real evidence,<sup>2</sup> which includes expert reports. A judge has the authority, or may be asked by the parties, to determine which types of evidence are really necessary to the trial and to reject those deemed irrelevant or merely dilatory.<sup>3</sup>

In making a request for the mandatory production of documentary evidence by the other party, the requesting party must provide a complete and individualized description of the document or object, explain the purpose of such evidence and state why the document or object is believed to be in the other party's possession. If the other party unreasonably refuses to produce such evidence, the judge may issue an order for search and seizure and, when necessary, request law enforcement assistance.

The Brazilian Code of Civil Procedure and the Constitution, however, provide for a number of privileges and immunities with respect to evidence requested of a party.<sup>4</sup> These privileges and immunities include evidence that may:

- Concern the intimacy of the party's family
- Offend a duty of honor or a professional or confessional obligation if presented
- Result in the disgrace of the party or the party's family if publicized
- Otherwise result in the party's self-incrimination
- Meet any other relevant reason, at the discretion of the courts

Therefore, the distinction between discovery as provided in the Brazilian civil procedure and that of common law systems concerns not only its timing, but also the power granted to courts to intervene, to decide on the relevance of the evidence and to decide on the extent of the parties' obligation to submit evidence that may be unfavorable to their own defense.

## DISCLOSURE IN ARBITRATION PROCEEDINGS IN BRAZIL

Parties conducting arbitration in Brazil are authorized by Brazilian Arbitration Law to freely choose the rules applicable to their dispute, provided that "there is no violation of the good morals or public policy."<sup>5</sup> In the same way, the law authorizes the parties to elect the national laws or institutional rules to govern the arbitration procedures. Regardless of the procedures to be adopted, arbitration must always observe due process, a principle contained in Article 5, LIV of the Brazilian Constitution. This comprises all other procedural principles, such as the adversarial system, the equal treatment of parties and the impartiality and independence of arbitrators.

Accordingly, Brazilian Arbitration Law clearly grants parties considerable freedom to decide which procedure best fits their interests. This freedom includes allowing the parties to decide on the best moment for the production and presentation of evidence, the level of control that the arbitrators have over the production of evidence and even the extent of the parties' obligation to produce evidence.

Theoretically, the parties may establish a preliminary phase for the production of evidence with minimum interference by the arbitrators, similar to typical US pre-trial discovery, or the parties may even make reference to the US pre-trial discovery rules. In the event of a refusal by a party to disclose certain unspecified documents, however, the results may be somewhat different.

According to the Brazilian Arbitration Law, if it is necessary to enforce an order for the presentation of certain evidence, the arbitrators shall submit the order to the ordinary courts with jurisdiction over the matter. Brazilian courts have been deciding that requests for the production of evidence must clearly specify the documents sought<sup>6</sup> and it is not clear how a Brazilian court would enforce an arbitral order for the production of unspecified evidence. Courts could certainly refuse to enforce an order mandating the disclosure of documents or information in violation of legal privileges and immunities, as such an order would be against public policy and good morals. There is no settled law, however, governing the extent to

which the courts have authority in refusing to enforce an arbitral order other than on grounds of violation of public policy and good morals.

As an alternative to requesting judicial enforcement of the request for evidence, arbitrators may order the parties to present evidence and draw adverse inferences from a party's refusal to deliver a document. Brazilian Arbitration Law is not clear on this subject, but it does state that a party's failure to comply with a procedural order must be taken into account by the arbitral tribunal when resolving the case.<sup>7</sup> This alternative is consistent with the Brazilian Code of Civil Procedure, according to which the judge shall consider the facts as true when a party unlawfully refuses to present a document.<sup>8</sup> Therefore an arbitration award based on such adverse inferences arising out of a failure to produce documents is unlikely to be considered inconsistent with Brazilian law or public policy.

Although the Brazilian Arbitration Law does not expressly restrict the freedom of parties to decide on the rules that govern the arbitration procedures, the election of discovery rules too different from the standard civil procedure rules may therefore bring a certain degree of uncertainty to an arbitral proceeding.

## People's Republic Of China (PRC)

### DISCLOSURE IN COURT PROCEEDINGS IN THE PRC

Strictly speaking, there is no discovery concept in a civil litigation in the PRC. This corresponds to its origins of being a civil law system and, more specifically, reflects the inquisitorial approach adopted by the PRC courts, where the court investigates, inquires and collects evidence, rather than permitting the parties to compel one another to produce evidence.

The PRC Civil Procedure Law and its related judicial interpretations establish the burdens of proof that the parties to a civil litigation should abide by.

Essentially, the idea of a burden of proof is that the "one who asserts must prove." The parties should produce evidence to prove the facts on which their own claim/allegation and/or refutation/rebuttal are based. The party that bears the burden of proof may lose the case if it fails to produce evidence or if the evidence it produces does not prove its case. In cases

where a party cannot obtain evidence due to no fault of its own, the court may conduct its own investigation and collect relevant evidence upon the request of the party or of the court's own motion. Additionally, a shifting of the burden of proof may occur in certain types of tort litigation as prescribed by law.

With respect to the form of production of documentary evidence:

- Original documents must be produced in court and copies of the documents are allowed after they are verified by the court against the originals.
- Documents that are created outside Mainland China must be notarized and legalized. Chinese translations must be attached to any non-Chinese documents submitted to the court.

The PRC Civil Procedure Law and its related judicial interpretations do not include any procedure by which a party to a civil litigation is to be compelled to produce documents upon the request of the other party or by an order of the court. However, the court can order preservation of evidence, including documents, by means of its own motion or at the request of the other party in certain circumstances. An order for "preservation" means that the court is exercising control or jurisdiction over the relevant evidence, including documents. A party failing to produce the evidence ordered to be preserved by the court may be subject to penalties, which could include criminal charges.

### DISCLOSURE IN ARBITRATION PROCEEDINGS IN THE PRC

The PRC Arbitration Law, which governs both domestic arbitration and "foreign-related" arbitration seated in China (the latter covers an arbitration in which the parties are domiciled in different jurisdictions), follows the rules of burden of proof provided in the PRC Civil Procedure Law. Arbitration rules of the arbitral institutions in China also comply with the PRC Arbitration Law and Civil Procedure Law. Therefore, the approach to disclosure in both domestic and "foreign-related" arbitration is basically the same as that of a civil litigation before a PRC court, as described previously.



Foreign-related arbitration is usually conducted in Mainland China under the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules. These rules adopt the “one who asserts must prove” format, and do not expressly provide for discovery of documents. However, Article 29 of the Rules permits the arbitral tribunal to adopt an inquisitorial or adversarial approach when examining the case, and the arbitral tribunal has power under Articles 37 and 38 to investigate and to require parties to produce evidence. Additionally, Article 7 requires the parties to “proceed with the arbitration in bona fide cooperation.”

It may therefore be possible for a party to draw the attention of the arbitral tribunal to the existence of relevant documents that have not been disclosed by the other party, and to request the tribunal to make inquiries concerning such documents, but the tribunal does not have power to force any party to disclose documents.

While it is possible for the parties to agree to bring in a different set of arbitration rules replacing or modifying the CIETAC Arbitration Rules, such practice is generally not encouraged and the CIETAC Arbitration Rules also impose certain practical and legal constraints on such a practice.

## England and Wales

### DISCLOSURE IN COURT PROCEEDINGS IN ENGLAND AND WALES

The basic principle concerning disclosure obligations of parties to an English court litigation is that the parties have a duty both to search for documents and to produce documents revealed by that search, if those documents either help or damage the case of the party producing them or the case of another party to the proceedings. This principle is set forth in Civil Procedure Rules (CPR) Part 31.

However, nothing in CPR<sup>31</sup> addresses the question of disclosure obligations on foreign parties to proceedings before the courts of England and Wales. By submission to the jurisdiction of the courts of England and Wales, parties are obliged to adopt and comply with the Civil Procedure Rules, including the duties of search and disclosure as set forth above.

### DISCLOSURE IN ARBITRATION PROCEEDINGS IN ENGLAND AND WALES

As a matter of English law, the Arbitration Act 1996 (1996 Act) sets forth a broad general principle with respect to evidence in arbitration proceedings seated in London. Section 34(2)(d) of the 1996 Act provides that “it shall be for the Tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. Procedural and evidential matters include [among other things] whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage.”

The broad discretion given to English tribunals by this provision is free from any requirement that the tribunal bring to bear any concept of national law with respect to the document production process.

Under earlier arbitration laws in England and Wales, the court had power to intervene in the arbitration to assist in the disclosure process, by ordering discovery of documents and interrogatories. That power was repealed when the 1996 Act was introduced and courts have subsequently concluded<sup>9</sup> that: “There [is] nothing in the UNCITRAL<sup>10</sup> Model Law which suggests that the Courts should assist with the process of disclosure. Indeed disclosure questions have been taken from the Court ... and given back to the Arbitral Tribunal. That was recognised by sections 34 and 35 of the 1996 Act including section 34(2)(d) which makes disclosure by the parties a matter for the Arbitral Tribunal.”

Accordingly, where a tribunal is faced with parties from differing backgrounds in a dispute having its seat in London, there is nothing in the applicable legislation that provides a code by which the tribunal should prescribe the form of disclosure to be given by each party.

### Adoption of IBA Rules for Disclosure

What commonly happens in cross-border arbitrations is that the tribunal may either (i) invite the parties to consent to the application of rules such as the IBA Rules or (ii) (perhaps in cases where the parties have already expressed widely differing views on the

appropriate scope of disclosure) indicate that it will be guided with respect to disclosure issues by the provisions of the IBA Rules, without formally adopting them into the process.

The effect of using the IBA Rules, either by way of agreement between the parties or as a set of guiding principles for the tribunal, is that there is a degree of “shared pain” between the parties. Parties in common law-based jurisdictions such as England, who are used to having a duty to search extensively for relevant material and to produce such material, whether or not it is helpful to their case, may to some extent be relieved by having initially at least only to search for and produce the documents on which they wish to rely. These parties may, however, regret the fact that the opposing party is not subject to a broad duty of search and disclosure of documents which may be unhelpful to their case.

On the other side, parties in civil law-based jurisdictions, who would not normally be required to produce much, if any, documentation before trial, may find it less unnerving merely to have to produce the documents on which they wish to rely at the first stage, rather than having to produce all of their documents.

The second phase of disclosure prescribed by the IBA Rules (the making of specific requests for additional disclosure and ultimate determination by the tribunal of any disputed categories of disclosure) provides a degree of supervision over, and restraint on, the parties’ further disclosure requests. Experience suggests that tribunals generally adopt a reasonably pragmatic approach to the determination of disputed requests for additional production. While it is likely to be the case that the overall volume of document production is smaller than in common law litigation, the reality is that the core documents upon which the matter will be decided at trial are likely to be those which the parties have produced as a result of the application of an IBA Rules process.

## Adoption of National Rules for Disclosure

Based on this country-by-country analysis, it seems to us that, were a tribunal to order differing disclosure obligations depending on the rules of each party’s location, the tribunal would risk undermining the validity of its award in two ways. First, the tribunal would breach the principle that appears in most UNCITRAL Model Law arbitration laws, namely, that the tribunal must adopt procedures that are fair to the parties and that allow each party a reasonable opportunity of proving its case. Second, a disclosure process that does not impose the same obligations on each party might give rise to a challenge to the award on the grounds that either: (i) a party was unable to present its case as a result of not getting disclosure from the other party or (ii) the arbitral procedure was not in accordance with the law of the country in which the arbitration took place because the procedures adopted were not applied equally to both parties.

Given the sensitivity of arbitral tribunals to the risk of an appeal or challenge to the award, it seems to us unlikely that a tribunal would be persuaded that it is appropriate to order differential disclosure in cases involving parties from different backgrounds. No case law to that effect exists in the jurisdictions considered in this article, and we believe that the question should be determined by analogy to the way in which disclosure rules apply in national courts. In such proceedings, once the parties have submitted to the court’s jurisdiction, they waive their right to behave, in the dispute resolution process, as they would, or would be able to, were the proceedings taking place in their own domestic court.

The ability of arbitral tribunals to deal with disclosure issues fairly, without having to adopt national rules, has been, and remains, a key positive feature for using arbitration in cross-border disputes. Although particular issues may arise with respect to, for example, the treatment of documents for which a claim of privilege is made, the scope of such disputes is likely to be more limited than in a court proceeding and should not significantly delay or derail the resolution of the underlying issues in the international arbitration. ♦

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Observations in this article about Brazilian law are by Tauil & Chequer Advogados. They are not intended to provide legal advice to any entity; any entity considering the possibility of a transaction must seek advice tailored to its particular circumstances.

## Endnotes

- 1 Código de Processo Civil [CPC] art. 282
- 2 There is no substantial distinction between demonstrative and real evidence under Brazilian law, the courts being allowed to attribute to the evidence the value that they may deem fit.
- 3 CPC art. 130
- 4 CPC art. 363
- 5 Lei No. 9.307 de 23 de setembro 1996, D.O.U. de 24.9.1996, art. 2, § 1
- 6 See “The request for exhibition of document shall strictly provide the maximum specification of the document, as well as the purpose of this evidence,” TRF-5 [regional federal court of appeals], AG No. 9005013940, Relator Francisco Falcão, 06.25.1990, and [INSERIR].
- 7 Brazilian Arbitration Law art. 22, § 2
- 8 CPC art. 359
- 9 In the case of *BNP Paribas v. Deloitte & Touche LLP* [2003] EWHC 2874 (Comm).
- 10 United Nations Commission on International Trade Law.

# Discovery in Investor-State Disputes: A Different Matter Altogether

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The exchange of discovery, generally, let alone e-discovery, specifically, is uncommon in investor-state arbitration (arbitration between a foreign investor and the host sovereign state of the investment, generally conducted pursuant to an investment treaty). Indeed, practitioners prefer to employ the term “document production” to describe the concept of discovery in these arbitrations.

The main reason why the concept of discovery is uncommon in these investor-state arbitrations is that, typically, the parties come from various legal backgrounds, including civil law traditions where document production is extremely limited. In investor-state disputes, each party is primarily responsible for establishing the facts of its case, contrary to the common law tradition where parties may request considerable production of documents.

However, complex issues of document production do sometimes occur in investor-state disputes. Parties and arbitrators faced with such issues can rely on rules from various sources. Moreover, document production in an investor-state dispute requires a specific approach, owing to the fact that a sovereign state is always a party in the proceeding.

## Legal Grounds for Requesting Documents

The Washington Convention of 1965 created the International Centre for

Settlement of Investment Disputes (ICSID), which administers most investor-state disputes. At the outset, it must be noted that neither the ICSID Convention nor the ICSID Arbitration Rules address discovery. Similarly, the UNCITRAL Arbitration Rules, which are generally employed in *ad hoc* investor-state disputes, are also silent on the subject.

There are, however, rules on document production. Article 34(2)(a) of the ICSID Arbitration Rules provides that “the Tribunal may, if it deems it necessary at any stage of the proceeding, ... call upon the parties to produce documents, witnesses and experts.” Furthermore, Article 24(3) of the UNCITRAL Rules mentions that “at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents.”

Despite these provisions, many questions remain unanswered when arbitral tribunals have to deal with requests for the production of documents in investor-state disputes. These requests happen frequently: in 2009, for example, 12 of the 21 publicly available awards granted in the course of investor-state disputes (excluding decisions on annulment) included a document production procedure.

Generally, the parties agree to rely on the International Bar Association Rules on the Taking of Evidence in International

Arbitration (the IBA Rules), as a non-binding reference, as early as the first session with the arbitral tribunal, which takes place mandatorily within two months of the constitution of the tribunal. The parties and the arbitral tribunal then refer to the IBA Rules in deciding on these issues.<sup>1</sup> The IBA Rules are thus considered to be acceptable for both common law and civil law parties and their representatives, in that they represent a middle ground between the two legal cultures. Not surprisingly, in all relevant, published investor-state awards, the arbitral tribunals ordered narrow and specific document production as promoted in the IBA Rules.

### Specific Features of Document Production in Investor-State Disputes

An arbitration procedure involving a state is not a typical day-to-day commercial dispute. This is particularly true of investor-state arbitration as it concerns a state's acts that are performed in the exercise of its sovereign rights over territory (such as expropriation, enactment or revocation of laws, statutes or regulations) or sometimes in the context of local political or economical crises. As such, these proceedings may relate to particularly sensitive issues in the host state, and this may, in certain cases, lead to obstacles at the document production stage.

One way that states seek to avoid producing requested documents is to rely on the exception of classified information. The North American Free Trade Agreement (NAFTA), Chapter 11 of which is the basis for many investor-state disputes, contains a specific provision on this matter. Indeed, Article 2102 provides that “nothing in this Agreement shall be construed to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.” Some bilateral investment treaties (BITs) also contain similar terms. The Canada-Jordan BIT of 2009, for example, provides that “the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.”

Arbitral case law shows that states sometimes try, with some success, to extend the scope of the state secrets privilege by relying on provisions contained in their own domestic law. The tribunals' reactions on the subject are disparate. In *Pope & Talbot v. Canada* (a NAFTA-based UNCITRAL case), the state relied on the Canadian notion of “cabinet confidence” to object to the production of a range of documents. The NAFTA tribunal judged the objection to be valid where state secrets were concerned, but it rejected the application of Canadian law, which provided for a broader scope of privilege, by deeming it inapplicable to an international arbitral tribunal. Yet in *Glamis Gold v. USA* (also a NAFTA-based UNCITRAL case), the tribunal upheld the USA's objection related to “deliberative process privilege” with regard to various pre-decisional and deliberative documents comprising part of the process by which governmental decisions and policies were formulated.

In *Biwater Gauff v. Tanzania* (a BIT-based ICSID case), the state objected to the production of various documents on the basis of the Tanzanian principle of “public interest immunity.” This principle allegedly applied to unpublished official records and communications received by a public officer, the disclosure of which would be prejudicial to public interest. The tribunal rejected the objection, noting that the objection was based on Tanzanian law, which was not applicable to an international arbitral tribunal.

Another complication regarding investor-state arbitration is that the investor is often a company set up specifically for the requirements of the investment and may otherwise be inactive (e.g., a shell company). A document production order against such a company will bear little fruit, as the substantial documentary evidence will be held by those actually controlling that company. As a third party to the arbitration, this person or entity is beyond the arbitral tribunal's jurisdiction and cannot be subjected to an order to produce the requested documents.

Within their own borders, states are in a stronger position to obtain documents despite a pending international arbitration. In this context, certain states have been known to resort to their own legal systems to obtain documents, notably those belonging to the investor. By employing “help-yourself” discovery

tactics, a state can effectively bypass the arbitral tribunal and its powers to decide on the production of documents. For example, a state may seize the investor's documents in the context of criminal proceedings, whether initiated on valid grounds or as a means of pressuring or retaliating against the investor. In this case, the investor may find itself in the very awkward position of having to request, before the arbitral tribunal, the production of its own documents, seized and sealed by the police or related authorities.

Finally, investors should be cautious as to what they can expect to receive in terms of document production, particularly in the form of electronic documents. Very few states have centralized or unified information technology (IT) systems. Thus, there is a strong

possibility that IT policies regarding storage and destruction of information differ from department to department as well as from nation to nation. Moreover, multiple servers and/or databases may need to be searched for potentially relevant documents. As a result, electronic searches may be considered overly burdensome, and thus may be rejected by arbitral tribunals. ♦

## Endnotes

- <sup>1</sup> See for recent example, *Biwater Gauff v. United Republic of Tanzania* (ICSID Case No. ARB/05/22); *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12); *TCW Group & Dominican Energy Holdings v. The Dominican Republic* (UNCITRAL); *Cementonia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2).



# Culture Clash—E-Disclosure vs. European Data Protection Law in International Arbitration

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## Introduction

In international arbitration, particularly where US parties are involved, the parties frequently agree on the exchange of documents, although the exchange is usually more limited than in US pre-trial discovery. Such disclosure proceedings often are not limited to physical documents but also include electronically stored information (ESI). However, to the extent that European parties are involved, the processing and transfer of ESI may conflict with European data protection law if such information contains personal data, which is data that identifies an individual or makes that individual identifiable.

Any request for the production of ESI may lead to a clash between the obligation to disclose information and the duty to protect personal data. The controller of the information faces severe sanctions when breaching either of these obligations. On the one hand, non-compliance with a request for production of data may lead to the drawing of adverse inferences, to a shifting of the burden of proof and/or to a negative decision on costs. On the other hand, the violation of data protection law may trigger damage claims, fines and, in some Member States, even criminal prosecution. In this article we will provide practical guidance on how to deal with this dilemma.

In the European Union (EU), as well as

in the European Economic Area (EEA), data protection law is based on the European Directive 46/95/EC, dated October 24, 1995 (the Directive). This Directive is concerned with protecting individuals with regard to the processing of their personal data as well as with the free movement of such data. The data protection laws of the Member States are based on this Directive: for example, the German Federal Data Protection Act (*Bundesdatenschutzgesetz* or BDSG) and the British Data Protection Act of 1998. However, while based on the same principles, as implemented, the national laws may vary in certain details.

These national laws, which do apply to arbitration, limit requests for disclosure of information in foreign jurisdictions from a national law point of view. However, US courts have characterised these laws as Blocking Statutes and have rejected arguments that such laws provide a valid defense against disclosure requests in relation to US litigation.<sup>1</sup>

Pursuant to the general principles established by the Directive, the collection, processing and use of personal data is only lawful if the data subject has consented, or if the preconditions for another justification explicitly acknowledged by the Directive are fulfilled. The same is true for the transfer of personal data to a third party, whereby additional requirements have to be met if personal data is transferred to third parties located outside of

the EU or the EEA (as we discuss below). In practice, consent of the data subject can rarely be used as a justification. This is because, firstly, the law sets high requirements for a declaration of consent and, secondly, the volume of data typically requested in disclosure proceedings makes it impossible to procure the written consent of every person whose data might be concerned. For that reason we will focus below on other available grounds for justification.

## Data Retention

Parties should prepare for the exchange of ESI long before arbitration or litigation is anticipated. As a general rule, subject to legal requirements for retention of data for regulatory and other purposes, data controllers may choose to retain as little ESI as is legally required. They also can implement efficient data retention policies to ensure that ESI that is not needed anymore, and which will not be required to prove a party's own case in the event of a dispute, is routinely deleted. However, as soon as arbitral proceedings can reasonably be anticipated, the data controller is usually required to implement a "litigation hold" in order to ensure that data, which might be decisive in the arbitral proceedings, is preserved.

Under the Directive, any active retention, preservation or archiving of data in anticipation of arbitral proceedings amounts to the processing of data, which requires special justification. The same is true for the search for, and compilation of, personal data in order to comply with a document request.

Pursuant to Article 7(c) of the Directive, the data controller may process personal data if the processing is required in order to comply with other legal obligations. However, disclosure in arbitral proceedings is based on an agreement between the arbitrating parties. Such agreement does not constitute a legal obligation within the meaning of Article 7(c) of the Directive. Hence, Article 7(c) of the Directive does not provide a justification to process personal data for use in arbitral proceedings.

However, Article 7(f) of the Directive allows for the processing of personal data if such processing serves the legitimate interests of the data controller, as long as these interests are not outweighed by the data subject's fundamental rights and freedoms. Hence,

Article 7(f) of the Directive requires a balancing of the legally protected interests of the data controller and those of the data subject. As a consequence, the data controller should liaise with the arbitral tribunal at an early stage in order to prevent overly broad production requests. Only if the requested personal data reasonably appears to be relevant for the arbitral proceedings can its processing be justified under Article 7(f) of the Directive. Moreover, the data controller should explore with the arbitral tribunal the extent to which the personal data can be rendered anonymous or pseudonymous without deleting data relevant to the arbitral proceedings.

## Data Transfer

Once the requested data has been collected, it has to be transferred to the requesting party. Here, one has to differentiate whether this other party is located within the EU, the EEA or another country that provides for a comparable level of data protection.

The transfer of personal data to an opposing party based in the EU, the EEA or in a country that is considered by the European Commission to have an adequate level of data protection (i.e., Argentina, Canada, Guernsey, Isle of Man, Jersey and Switzerland) is lawful if this transfer is necessary to serve the legitimate interests of the controller, unless such interests are overridden by the fundamental rights and freedoms of the data subject. The transfer of personal data in arbitral proceedings does serve the legitimate interests of the controller to the extent such data can be reasonably regarded as relevant for the outcome of the case.

For the transfer of personal data to an opposing party located outside the EU, the EEA or another country that offers a comparable level of data protection, additional requirements have to be observed. In such cases, the transfer of personal data to the opposing party is only allowed if (i) the requirements of Article 7(f) of the Directive are fulfilled (as described above) and (ii) the receiving party can guarantee an adequate level of data protection. The following can ensure such adequate level of data protection:

- Both the data importer and data exporter sign the EU standard contractual clauses,
- The data importer is "Safe Harbor" certified, or
- The data importer has implemented "Binding Corporate Rules," which have been certified.

However, in arbitral proceedings (as well as in litigation) the opposing party will most likely not be willing to agree to the EU standard contractual clauses. Moreover, the Safe Harbor Principles are both time- and cost-intensive to implement and are not applicable to all industries. Binding Corporate Rules are also of limited use in arbitral proceedings, as their approval and implementation often take several years until completion. Hence, in practice, the receiving party will in most cases neither be able nor willing to provide for a guarantee on an adequate level of data protection within the meaning of the Directive.

In these circumstances the provision of Article 26(1)(d) of the Directive may be considered. This article allows for the transfer of personal data without the need to guarantee an adequate protection level if the transfer is necessary “for the establishment, exercise or defence of legal claims.” It is worth noting that, for instance, the English-language version does not require the establishment, exercise or defence of legal claims to take place in a specific forum, while other language versions,<sup>2</sup> such as the German version of the Directive, require “court proceedings.” Therefore, it is debatable whether Article 26(1)(d) of the Directive also covers arbitral proceedings.

One could argue that the legal interests of a party subject to arbitration are exactly the same as if this party litigated before a state court. However, Article 26(1)(d) of the Directive forms an exception to data protection, which has to be interpreted narrowly in order not to circumvent the European data protection standard.<sup>3</sup> Moreover, as a means of private dispute resolution, arbitral proceedings are made to fit the needs of the parties and, in comparison to state courts, pay less attention to the needs and interests of third parties not engaged in the arbitration.

Most importantly, an arbitral tribunal derives its power from the parties’ agreement and, thus, lacks the power to issue orders that have negative effects on third parties. Therefore, a request to produce data by an arbitral tribunal cannot decrease the level of protection that the respective national law offers to the data subject. That leads to the conclusion that the exception of Article 26(1)(d) of the Directive is not applicable to arbitral proceedings. As a consequence, the transfer of personal data to a party outside of the

EU or the EEA, in the arbitral context, usually violates European data protection law. Only if the requesting party seeks assistance from the state courts, for instance under 28 USC § 1782, are the preconditions of Article 26(1)(d) of the Directive fulfilled.<sup>4</sup>

## Conclusion

The export of personal data outside of the EU and the EEA in arbitration proceedings remains a legal problem that requires careful consideration, particularly by the arbitral tribunal. On the one hand, the arbitral tribunal should be cautious not to force a party to violate data protection law. On the other hand, European parties requesting personal data must not be given an unfair advantage vis-à-vis parties from other countries, in particular the United States, which have less strict data protection rules. It would be against the principles of due process if a European party could request personal data from a US party but could block equivalent requests from the US party by reference to European data protection law.

The IBA Rules on the Taking of Evidence in International Commercial Arbitration (the IBA Rules), for instance, address this dilemma as follows: Pursuant to Article 9(2)(b) of the IBA Rules the arbitral tribunal shall exclude from production any document if such production is unlawful. On the other hand, Article 9(3)(e) of the IBA Rules expressly acknowledges the need to maintain fairness and equality between the parties, particularly if they are subject to different legal or ethical rules.

In practical terms, arbitrators should endeavor to restrict the disclosure to those documents that are likely to be of high evidentiary value and relevance to their decision. They can do so by structuring the dispute, identifying the relevant factual questions and giving close guidance to the parties from the beginning of the arbitral proceedings. If, nevertheless, ESI containing personal data needs to be disclosed, the arbitral tribunal should consider if, and to what extent, such personal data can be rendered anonymously or through the use of pseudonyms.

Moreover, if the receiving party is or could be represented by counsel located within the EU or the EEA, one could consider reaching an agreement that personal data is only disclosed to counsel. Parties, or potential parties, to arbitration should implement a strict

document retention policy prior to arbitration. Subject to general retention obligations for regulatory and other legal purposes, and having ensured that documents that will be required to prove the party's own case are preserved, the less personal data a party stores, the fewer conflicts with data protection law will arise when it comes to arbitration. ♦

## Endnotes

1 Article 29 Data Protection Working Party, WP 158, p. 6. *Accessdata Corp. v. Alste Technologies GmbH*, Decision of January 21, 2010, Case No. 2:08cv569, LEXIS 4566, MMR 2010, 275 et seq.; Spies/Schröder, MMR 2010, 276 et seq.; Knöfel, RIW 2010, 403 et seq. In other countries, for example in France, there exist explicit blocking statutes for international judicial proceedings. However, the French national Blocking Statute no. 68-678 does not apply to the arbitration situation as it only prohibits the disclosure of

information in “foreign judicial and administrative proceedings,” which does not cover arbitration proceedings.

2 Namely, the Czech, Dutch, German, Greek, Italian, Latvian, Portuguese, Romanian and Spanish language versions.

3 Gabel, in: Taeger/Gabel, BDSG, § 4c no. 11 holds that this provision only applies to proceedings that are covered by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Pursuant to Brühann, in: Grabitz/Hilf, *Das Recht der Europäischen Union*, Article 30 no. 9, the provision covers only state court proceedings as only such proceedings guarantee adequate protection of personal data.

4 Hilgard, *Electronic Discovery im Schiedsverfahren*, *SchiedsVZ* 2008, 122, 123; Kraayvanger/Richter, *Die US-amerikanische Beweishilfe nach der Intel-Entscheidung des Supreme-Court*, RIW 2007, 177 et seq., Kraayvanger, *Discovery im deutschen Zivilprozess – über den Umweg der US-amerikanischen Beweishilfe*, RIW 2007, 496 et seq.

# Production of Electronically Stored Information Under International Arbitration Rules: Recent Developments

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Arbitral institutions have traditionally published procedural rules and guidelines that include provisions concerning the production of documentary evidence.

As the volume of electronic data grows exponentially, it has been estimated that some 90 percent of corporate records are no longer printed. These records are commonly referred to as electronically stored information (ESI).

Recently, leading arbitral institutions have amended their rules, or have issued guidelines or protocols, to deal with the growing volume of ESI. In doing so, the focus is clearly on the emerging challenges of managing large volumes of potentially relevant data while ensuring fair and efficient conduct of arbitration proceedings.

This article explores key themes common to the following recently published rules and guidelines and protocols:

- International Centre for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information (May 2008)<sup>1</sup> (ICDR Guidelines)
- Chartered Institute of Arbitrators (CIArb) Protocol for E-disclosure in Arbitration (October 2008)<sup>2</sup> (CIArb Protocol)
- International Institute for Conflict Prevention & Resolution (CPR) Protocol on Disclosure of Documents and Presentation

of Witnesses in Commercial Arbitration (December 2008)<sup>3</sup> (CPR Protocol)

- International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (revised-May 2010)<sup>4</sup> (Revised IBA Rules)

## Fundamental Objectives: Efficiency, Economy, Proportionality and Fairness

In the context of ESI, there is a real risk that extensive “e-discovery” type procedures can become disproportionate and uneconomical if not kept within defined limits. The summary below demonstrates that the principal objective adopted by each arbitral institution is to ensure that the arbitration procedures relating to ESI are conducted efficiently and economically, while ensuring fairness and proportionality.

The Revised IBA Rules:

- Are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between parties from different legal traditions (Preamble).
- State that parties are expected to act in good faith and are entitled to reasonable advance notice of the evidence on which the other parties rely (Preamble).
- Forbid the arbitral tribunal from ordering production of ESI where



it involves an unreasonable burden, or where there are compelling considerations of procedural economy, proportionality, fairness or equality of the parties (Article 9.2).

#### The CPR Protocol:

- Seeks to address concerns that arbitration proceedings, particularly in disputes involving parties from different nations, lack predictability and are becoming more complex, costly and time-consuming, by making recommendations for reasonable limitations to be placed on disclosure and witness testimony (Introduction).
- Refers to a “Philosophy Underlying Document Disclosure,” which is the general principle that arbitration be expeditious, cost-effective and fundamentally fair, and which states that disclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position (Section 1(a)).
- Requires the arbitral tribunal to consider the costs and burdens associated with disclosure of ESI (which can be reduced when requests are for reasonably specific and accessible ESI) and to balance the likely value of documents requested against the costs and burdens involved in production (Section 1(d)(1) and 1(e)(2)).
- Provides for parties to select one of four modes of disclosure of ESI (Section 1(d)(2) and Schedule 2). At the “minimal” end of the spectrum, “Mode A” is limited to copies of ESI relied upon by each party, presented in printed or other reasonably usable form, whereas at the “extensive” end of the spectrum, “Mode D” includes all relevant, non-privileged documents, subject only to requirements that the requests be reasonable, not be duplicative of other requests and not cause an undue burden.
- The CIArb Protocol:
- Is intended for use in cases where the time and cost for disclosing ESI may be an issue; it seeks to achieve early consideration of disclosure of ESI where necessary and appropriate for the avoidance of unnecessary cost and delay (Purpose).
- Can be adopted as a supplement to the agreed-upon arbitration rules, the applicable arbitral law

and any agreed-upon rules of evidence, e.g., the IBA Rules (Purpose and Article 3(iv)).

- Requires the arbitral tribunal to consider the appropriate scope and extent of disclosure of ESI under the agreed arbitration rules, applicable arbitral law, agreed-upon rules of evidence and any specific agreements between the parties (Article 5).
- Requires that, in making any order or direction for e-disclosure, the arbitral tribunal should consider reasonableness and proportionality, fairness and equality, and the opportunity for all parties to present their cases. This examination includes balancing considerations of the value and nature of the dispute, and the likely relevance and materiality of requested documents, against the cost and burden of producing the ESI (Article 6).

#### The ICDR Guidelines:

- Seek to implement a commitment that international commercial arbitration provides a simpler, less expensive and more expeditious form of dispute resolution than that available from national courts (Introduction).
- Expressly recognise that procedural devices allowing one party access to information in the possession of the other, without full consideration of the differences between arbitration and litigation, contribute to complexity, expense and delay (Introduction).
- Require the arbitral tribunal to manage the exchange of information with a view toward maintaining efficiency and economy and avoiding unnecessary delay and expense, while balancing the goals of equality of treatment, avoiding surprise and affording parties the opportunity to present claims and defences fairly (paragraph 1a).

In contrast to the publications of other arbitral institutions, the ICDR Guidelines are short and concise, and they do not prescribe any detailed procedures for disclosure requests and production of ESI such as those referred to below. Instead, the ICDR Guidelines explicitly encourage arbitrators to be receptive to “creative solutions” for achieving exchanges of information in ways that avoid costs and delay (paragraph 6a).



## Early Consideration and Consultation on Production of ESI

A critical feature of e-discovery rules and practice directions published by courts in common law countries (including the United States, England, Singapore and Australia) is the early “meet and confer” process. This has been adopted in the arbitration context, as summarised below.

The CIArb Protocol prescribes in detail the need for the arbitral tribunal and the parties to confer, at the earliest opportunity, regarding the preservation and disclosure of ESI, to agree to the scope and methods of production (Article 1) and to consider:

- At the earliest opportunity, whether e-disclosure issues may arise (Article 2)
- The types of computer and storage systems, media, data retention policies and practices that will be required for preservation (Articles 3(ii) and (iii))
- The available tools and techniques that can reduce the burden and cost of production, including limiting the scope and extent of e-disclosure to particular date ranges or custodians and agreeing to set search terms, software tools and data sampling (Article 3(vi))
- Special arrangements with regard to privacy and privilege issues (Article 3(vii))
- Whether any party and/or the arbitral tribunal may benefit from professional guidance on IT issues relating to disclosure of ESI (Article 3(viii)). Further provision for technical guidance on e-disclosure is made in Article 13.

The Revised IBA Rules require the arbitral tribunal and the parties:

- To consult at the earliest appropriate time on an efficient, economical and fair process for the taking of evidence (Article 2.1)
- To address the requirements, procedure and format applicable to the production of ESI and the promotion of efficiency, economy and conservation of resources

Under the CPR Protocol:

- Parties selecting Modes B, C or D agree to meet and confer, prior to an initial scheduling conference

with the arbitral tribunal, concerning the specific modalities and timetable for disclosure of ESI (Schedule 2)

- Issues regarding preservation of documents (Section 1(a)) or other issues or disagreements regarding disclosure (Section 1(e)(1)) should be identified and resolved as early as possible, preferably at an early scheduling conference

## Narrow, Specific and Justifiable Requests for ESI

Article 3 of the Revised IBA Rules (which is also adopted in Article 4 of the CIArb Protocol), retains the well-established formula that a request for production (both paper and ESI) must:

- Include a description of a specific document, or a narrow and specific category of documents that are reasonably believed to exist;
- State the reasons why the documents are assumed to be in the possession, custody or control of the other party and not of the requesting party; and
- State how the requested documents are relevant and material to the outcome of the case.

The Revised IBA Rules require a requesting party (on its own or by order of the arbitral tribunal) to identify specific files, search terms, individuals or other means of searching for ESI in an efficient and economical manner (Article 3(a)(ii)). There is also a provision, which seems most appropriate in relation to ESI, that a party may request that documents already in its possession, custody or control be produced by the other party, but it must state the reasons why it would be unreasonably burdensome for the requesting party to produce such documents (Article 3(c)(i)).

The CIArb Protocol states that:

- The primary source of ESI should be reasonably accessible data: namely, active data, near-line data or offline data on disks (Article 7)
- The restoration of back-up tapes, erased, damaged or fragmented data, archived data or data routinely deleted in the normal course of business operations will not be ordered unless the requesting party can demonstrate that the relevance and materiality outweigh the costs and burdens of retrieval and production (Article 7)

- A party requesting disclosure of metadata must demonstrate that its relevance and materiality outweigh the costs and burdens of production (unless the format of production of ESI includes metadata)

The CPR Protocol (Section 1(d)(1) and Schedule 2):

- Recognises that ESI found in the active or archived files of key witnesses, or in shared drives, is more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests
- States that production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need
- States that requests for back-up tapes or fragmented or deleted files should only be granted in cases where there is a reasonable likelihood of deliberate destruction or alteration in anticipation of litigation or arbitration that took place outside of that party's normal document-retention policies (this may be expanded by agreement under "Mode C" to instances of special need or relevance)

### Timing and Format of Production

The CPR Protocol:

- Provides for disclosure in a "reasonably usable form" (Schedule 2)
- Requires a reasonable and expeditious timetable for disclosure (Section 1(e)(1))

The Revised IBA Rules (Article 12(b)) provide that, unless otherwise agreed or directed, ESI shall be submitted or produced in the form most convenient or economical to the producing party that is reasonably usable by the recipients.

The CIARB Protocol:

- Provides for production of ESI in the format in which the information is ordinarily maintained, or in a reasonably usable form (Article 8)
- Requires the arbitral tribunal, in cases of disagreement, to decide whether production of ESI should be in native or another format (Article 8)
- Requires a clear and efficient procedure for production requests and disclosure of ESI (Article 11)

- Requires advance notice of the electronic tools and processes intended to be used for disclosure of ESI (Article 12)

### Cost Allocation

Where extraordinary circumstances justify production of information, and the costs and burdens of disclosure are likely to be substantial, the CPR Protocol (Section 1(e)(2)) provides for the arbitral tribunal to order the disclosure on the condition that the requesting party pays the reasonable costs incurred by the producing party.

In its assignment of the costs of the arbitration, the Revised IBA Rules (Article 9.7) permit the arbitral tribunal to take into account the failure of any party to conduct itself in good faith in the taking of evidence.

The CIARB Protocol (Article 10) requires the arbitral tribunal to consider the appropriate allocation of costs in making an order or direction for e-disclosure.

### Sanctions for Failure to Disclose ESI

Where a party fails to produce evidence that was properly requested, or was ordered to be produced, and fails to provide a satisfactory explanation for the failure to produce, the Revised IBA Rules (Article 9.5) permit the arbitral tribunal to draw an adverse inference against that party.

Where a party fails to produce evidence that was properly requested, or was ordered to be produced, or otherwise fails to comply with the CIARB Protocol after its use has been agreed to or ordered, the CIARB Protocol (Article 14) permits the arbitral tribunal to draw such inferences as it considers appropriate when ruling on the substance of the dispute or deciding on any award of costs or other relief.

### Conclusion

Disclosure of ESI is becoming increasingly important in international arbitrations. Practitioners and arbitrators now have at their disposal various rules, guidelines and protocols to refer to when seeking to implement regimes for e-disclosure that are consistent with the objectives of efficiency, economy, fairness and proportionality.

On another note, with appropriate technical guidance, e-disclosure has the potential to be used in a positive and proactive manner to reduce the volume of paper and open up possibilities for the strategic use of technology, such as data analytics, e-bundles, electronic presentation of evidence and e-briefs, which may serve to make the process of arbitration more streamlined and cost-effective, rather than more burdensome and costly. ♦

## Endnotes

- 1 <http://www.adr.org/si.asp?id=5288>.
- 2 <http://www.ciarb.org/information-and-resources/E-Disclosure%20in%20Arbitration.pdf>.
- 3 <http://www.cpradr.org/Resources/ADRTools/ADRProtocolsModelClauses.aspx>
- 4 <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>.

# The Seven Point System: Managing the Risks and Costs of Preserving and Producing Electronically Stored Information in International Arbitration

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International arbitration generally continues to be a safe haven from the ever-expanding document production obligations under US law. The increasing importance of electronically stored information (ESI) however, including emails, texts, instant messages and social networking communications, threatens that sheltered status.

Key documents are no longer found only in filing cabinets. Instead, they may be among thousands of electronic documents housed on hard drives, remotely located servers, backup tapes and the like. It is imperative to actively manage the risks associated with this information.

Several ESI-related issues should be addressed or, at a minimum, considered, in every international agreement at the contracting stage and in every international arbitration as soon as a dispute arises.

## Contracting Stage: Seven Parameters for Drafting Arbitration Agreements

While the negotiation of an arbitration clause in a commercial contract is often a last-minute affair, including seven parameters can greatly reduce later disputes about whether, and to what extent, a party must preserve and produce ESI. These parameters include:

- Confining disclosure requirements to a specified number of custodians

(perhaps with leave to request disclosure of additional custodians from the arbitrator upon a showing of good cause);

- Limiting or prohibiting disclosure from third parties (including affiliates, wholly owned subsidiaries, etc.);
- Narrowing the relevant time period;
- Disclosing from specified accessible active data sources only;
- Limiting the form of production to native format;
- Specifying whether it is necessary to produce privilege and confidentiality logs; and
- Limiting the pool of eligible arbitrators to those who are knowledgeable about disclosure of ESI.

## When a Dispute Arises

Particularly in the early stages of an arbitration, there are a number of opportunities to manage the size and scope of electronic disclosure in the event that the arbitration agreement and/or rules are insufficient to do so on their own. These points of time include: (i) notification of arbitration, (ii) negotiations with opposing counsel, (iii) constitution of the arbitral tribunal and (iv) the pre-hearing conference.

## NOTICE OF ARBITRATION: PRESERVATION OF DOCUMENTS

Once a party receives or serves a notice of arbitration—or reasonably anticipates

that it will receive or serve a notice of arbitration—that party should take *reasonable* action to preserve documents that it believes may be relevant.<sup>1</sup> The party must keep in mind that discarding valuable documents may lead to an adverse inference.<sup>2</sup>

Continued good faith adherence to a party's document-retention policies is considered reasonable action.<sup>3</sup> It is "unreasonable to expect a party to take every conceivable step to preserve every potentially relevant electronic document."<sup>4</sup> Therefore, a party must "carefully balance the likely value of documents requested against the cost and burdens, both financial and temporal, involved in producing the documents[.]"<sup>5</sup>

Costly and burdensome steps might include preservation of ESI from a wide range of users or custodians (absent a showing of "extraordinary need")<sup>6</sup> and "inaccessible" sources, such as backup tapes, legacy data, databases not programmed to produce the sought-after information, cell phones, PDAs, voice-mails and fragmented, erased or damaged data.<sup>7</sup>

Strategies for ensuring that a party is taking reasonable action to preserve documents include:

- Immediately obtaining record management policies and procedures;
- Promptly interviewing key personnel to the dispute to determine relevant custodians;
- Promptly interviewing IT and record management personnel to identify potential data sources, preservation cycles and dynamic ESI;
- Consulting with an ESI collection specialist to determine the most efficient methods to collect, preserve and produce ESI;<sup>8</sup>
- Employing early case assessment tools to index and search ESI by specified parameters;
- Identifying data privacy concerns and ensuring protection of privileged and proprietary information; and
- Periodically communicating ESI preservation and collection obligations to key personnel and documenting those communications.

## NEGOTIATIONS WITH OPPOSING COUNSEL

To avoid protracted disputes on preservation and production of documents, it is often advisable,

immediately upon receipt or service of a notice of arbitration, to contact opposing counsel. The intent is to reach agreement on a preservation and production protocol to the extent that the arbitration agreement and/or rules do not adequately address such matters or are ill-suited to the dispute.<sup>9</sup>

Seven items to consider in this negotiation are:

- Establishing a binding timeline for disclosure;
- Agreeing to limit preservation of ESI to certain sources, durations and formats; e.g., allowing production of ESI only from active data sources and determining whether data from dynamic database systems should be preserved;
- Agreeing on protocols for collecting and reviewing ESI, including use of search terms, date limitations, data sampling and other means of efficiently searching for ESI. Discuss testing the search terms, methods for duplicating ESI (such as within the data of each custodian or across the entire data population) and any other means of searching to ensure desirable results and the relevance of the ESI;
- Agreeing on the format in which to produce ESI, including in a static or native format (if native, discuss how to identify the documents), inclusion of metadata and whether the ESI should be searchable;
- Establishing rules regarding privilege (and waiver)—options include creating clawback agreements, limiting the types of communications (such as communications with outside counsel) that must be logged and adopting rules that are consistent with the "lowest common denominator of the parties' respective national law";<sup>10</sup>
- Allocating costs for ESI preservation, review and disclosure; and
- Identifying the areas of disagreement that need to be resolved with the tribunal.

## CONSTITUTION OF THE ARBITRAL TRIBUNAL

Absent the development of a disclosure protocol among the parties, the scope of permitted disclosure is governed by the arbitration clause, the arbitral institution's rules and, particularly, the individual arbitrator's personal views of the acceptable limits of disclosure. Therefore, an arbitrator's practice in a civil



or common law country, for example, may greatly affect whether, and to what extent, ESI disclosure is allowed. Generally, common law countries, particularly the United States, permit wide-ranging disclosure. In contrast, civil law countries place significant restrictions on disclosure. As a result, in addition to those factors normally taken into consideration when constituting an arbitral tribunal, a party should consider whether it is in its interest to nominate an arbitrator trained in a civil or common law country.

## THE PRE-HEARING CONFERENCE

If some or all of these strategies fail, or if unanticipated obstacles arise, a party should endeavor to manage the costs and risks associated with preservation and production of ESI by appealing directly to the arbitrator at, and after, the pre-hearing conference. In extreme cases, a party may also consider seeking relief from a court with relevant jurisdiction. Courts in the United States, for example, may have the jurisdiction to compel or prevent disclosure of documents notwithstanding an arbitration's governing rules.<sup>11</sup>

## Conclusion

The best way to avoid costly disputes about ESI is to include our recommended seven parameters in arbitration clauses. Once a dispute arises, applying our seven proposed strategies for ensuring reasonable preservation of documents and raising our seven items for prompt negotiation with opposing counsel can prevent disputes about ESI from undermining the efficiency of international arbitration. ♦

## Endnotes

- 1 Generally, "relevant" documents are those that are material to the outcome of a case. See International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, Article 3.3.
- 2 E.g., Chartered Institute of Arbitrators, *Protocol for*

*E-disclosure in Arbitration*, Article 14.

- 3 See CPR Institute, *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, Section 1(d)(1).
- 4 Chartered Institute of Arbitrators, *Protocol for E-disclosure in Arbitration*, Article 3. Robert Smith and Tyler Robinson in *E-Disclosure in International Arbitration* explain that this "rifle-shot" approach by arbitral institutions permits "narrowly targeted information requests to penetrate otherwise hugely voluminous amounts of electronically stored information" by "organiz[ing] and filter[ing] electronic information, by date, custodian, location, and through the application of specific search terms." 24 *Arbitration International* 105, 125 (2008).
- 5 CPR Institute, *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, Section 1(e)(2). Similarly, the International Centre for Dispute Resolution requires, in any dispute concerning disclosure, the "requesting party to justify the time and expense that its request may involve[.]" *ICDR Guidelines for Arbitrators concerning Exchanges of Information*, Paragraph 8.
- 6 CPR Institute, *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, Section 1(d)(1).
- 7 International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, Article 9.2.
- 8 See, e.g., *International Centre for Dispute Resolution, ICDR Guidelines for Arbitrators concerning Exchanges of Information*, Paragraph 4 ("When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it[.]").
- 9 Be aware that some arbitral institutions require express written agreements to supersede the institution's rules. See, e.g., International Centre for Dispute Resolution, *ICDR Guidelines for Arbitrators Concerning Exchanges of Information*, Paragraph 1(b) ("To the extent that the Parties wish to depart from this standard, they may do so only on the basis of an express agreement among all of them in writing and in consultation with the tribunal.").
- 10 J. Martin, H. Hunter and Gregory Travaini, *Electronically Stored Information and Privilege in International Arbitration*, in *Liber Amicorum Bernardo Cremades* (La Ley 2010) 615, 622 (M. Á. Fernández-Ballesteros and David Arias, eds., 2010).
- 11 28 U.S.C. § 1782 (1996).



# E-Disclosure in the English Courts: Can the Arbitration World Learn from the New Court Rules?

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In this article we consider whether new English court rules applicable to production of electronically stored information (ESI) can provide a useful reference point for arbitrators where the parties have failed to adopt any of the arbitration-specific proposals on ESI recently published by institutions such as the International Institute for Conflict Prevention and Resolution (CPR), the International Bar Association (IBA) and the Chartered Institute of Arbitrators (CIArb).

We also consider whether the proliferation of rules with respect to the production of ESI could lead to wider disclosure in arbitration processes, to the detriment of their efficacy and efficiency. Finally, we discuss whether the overall trend toward regulating the production of ESI would be unnecessary if the parties could be persuaded to resolve the issue through consultation and agreement.

## Disclosure Obligations on Parties to Litigation in the English Courts

Generally, parties to litigation in England and Wales are only obliged to disclose documents on which they rely, documents that adversely affect their own case, documents that adversely affect or support the case of another party and documents required to be disclosed by a Practice Direction (CPR 31.6). This obligation applies equally to ESI as it does to physical documents.

Aligned to the duty of disclosure is a duty to search. CPR 31.7 states that a party is “required to make a reasonable search for documents falling within rule 31.6(b) or (c).” CPR 31.9(2) continues: “The factors relevant in deciding the reasonableness of a search include the following: (a) the number of documents involved; (b) the nature and complexity of the proceedings; (c) the ease and expense of retrieval of any particular document;<sup>1</sup> and (d) the significance of any document which is likely to be located during the search.” Finally, CPR 31.7(3) states that where a party “has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.”

## Treatment of ESI Disclosure: Practice Directions and Case Law before October 2010

Until October 1, 2010, the disclosure of ESI in proceedings in the courts of England and Wales was governed by the Practice Direction (PD) to Part 31 of the Civil Procedure Rules. Paragraph 2A of that PD set forth some principles as to liaison between the parties with respect to issues relating to the production of ESI. The paragraph was, however, expressed in permissive, rather than prescriptive, language: the parties “should” discuss and “should” cooperate, on the basis that

it “may” be reasonable to search some or all of the parties’ electronic storage systems to satisfy the parties’ obligations under CPR 31.6 and 31.7.

The effect of the use of permissive language seems to have been that, in a number of cases, parties simply ignored the provisions of the Practice Direction. Instead of discussing and agreeing on an approach to the production of ESI, parties unilaterally conducted their searches and document productions. As a result, issues relating to the scope of such searches and productions often reached the courts not at an early stage (the PD expressing the view that disputes about the modalities of disclosure of ESI should be raised with the judge at the first case management conference), but much later in the proceedings.

In the 2009 case of *Earles v. Barclays Bank PLC*,<sup>2</sup> the court was asked to draw adverse inferences at trial against the defendant bank for failing to produce its phone and email records in respect of its contacts with the claimant; the dispute centred around whether the claimant had authorised transfers of funds between his personal account with the bank and his business account. Although the court’s ruling in the underlying case ultimately went against the claimant, the court took the view that the production of the bank’s documents would have been likely to dispose of the matter earlier. As a result, the bank was penalised when it came to the award of costs. As the successful party, the bank should have recovered its costs from the unsuccessful claimant, but the defects in the bank’s approach to production of ESI led the judge to cut the recoverable costs by 50 percent.

In an earlier decision in the *Digicel*<sup>3</sup> case, the parties failed to consult with each other with respect to the production of documents at an early stage, as the PD suggested they should have done. Instead, they each adopted their own approach to the searching of ESI repositories. The claimants then sought additional specific disclosure of documents that had not been produced by the defendants following their searches and review of ESI. Essentially, the claimants wanted the defendants to redo their searches on the basis of a wider selection of keywords and by reference to additional potential sources of ESI that might draw out additional relevant information and material for the purposes of the claim. The defendants had

conducted their initial searches on the basis of 10 keywords and a limited number of custodians, and the claimants sought an order requiring the searches to be rerun using a further 19 keywords and looking at the email records of additional custodians.

The test applied by the *Digicel* court was whether the defendants’ original search parameters were reasonable within the scope of CDR 31.7, and, if not, then to consider whether it was proportionate to add additional custodians and/or further keywords to the search parameters. The court found that it was appropriate to require the defendants to revisit their searches of ESI and to apply a further eight keywords to the search parameters in respect of the email accounts of 16 identified individuals. In a case in which the defendants had already spent £2 million in fees and 6,700 hours of lawyers’ time examining the documents extracted as a result of the application of 10 keywords, the effect of the order was significant and undoubtedly resulted in duplication of effort and costs. These additional efforts and costs could have been avoided had the issues relating to the scope of ESI disclosure been discussed at an earlier stage in the proceedings, before the searches were undertaken.

### Practice Direction 31B: Disclosure of Electronic Documents

In response to the perception that parties were not taking seriously enough the guidance provided in paragraph 2A of the PD, the Civil Procedure Rules Committee has produced a new Practice Direction 31B (PD 31B) that came into force on October 1, 2010, which applies to proceedings commenced on or after that date. The new PD 31B is solely concerned with disclosure of ESI.

The key provisions of PD 31B are an obligation on the parties and their legal representatives to discuss with their opponents both the disclosure of ESI and the technology to be used in gathering and preparing disclosure and presenting material to the court. PD 31B emphasizes that this discussion should be conducted as early as possible and, in any event, before the first case management conference (equivalent to the parties’ first meeting with the arbitral tribunal). With respect to the disclosure of ESI, the parties are required to consider several factors, including:

- The categories of ESI within the parties' control
- The computer systems, electronic devices and media on which any relevant documents may be held
- Storage systems and document retention policies
- The scope of the reasonable search for ESI required by rule 31.7
- The tools and techniques that should be considered to reduce the burden and cost of disclosure of ESI, such as the use of restricted date ranges, lists of custodians, types of document and keyword searches
- The preservation of ESI
- The format to be used on inspection of disclosed ESI
- The use of a neutral electronic repository for storage of ESI

PD 31B also incorporates an Electronic Documents Questionnaire (the Questionnaire) that the parties may voluntarily exchange as part of the process of discussion described above. In the event that the parties do not reach agreement on these matters, the court will either give written directions on disclosure or will arrange a separate hearing on disclosure, prior to which the parties may be directed to complete all or some parts of the Questionnaire.

In addition, PD 31B provides guidance as to the suitability of automated search techniques. These include, for example, keyword searches, disclosure of metadata and the formatting of lists of disclosed ESI.

The Questionnaire provides a structured means for each party to identify the core aspects of its proposed search by giving details, at an early stage, of the date range, custodians, types of material, databases, search methods and accessibility, preservation and inspection issues related to the documents they intend to produce. The Questionnaire also provides each party an early opportunity to make proposals as to the disclosure of ESI by the other party or parties.

After it is finalized, the Questionnaire must be signed and affirmed as true by a representative of the party, who must then be present at any hearing with respect to ESI disclosure issues. Therefore, each party is directly involved in the process from a very early stage.

According to the Senior Master who headed the Civil Procedure Rules Committee, the group responsible

for reviewing and enhancing the ESI rules, the emphasis of PD 31B is to facilitate agreement between the parties concerning appropriate and proportionate approaches to ESI production, and thus to minimize the need for court intervention. The potential cost consequences of inadequate ESI production are so serious that the priority is to bring ESI production to the attention of both the parties and the judge at an early stage.

PD 31B permits the court to step in and make appropriate directions where agreement is not reached. According to the Senior Master, the Questionnaire is a useful checklist of the questions that a lawyer would be likely to ask of the client in scoping the disclosure process. Its completion should not add to the burden on the parties; rather, it should ensure that ESI production is carried out within appropriate parameters. This will enable the case to proceed in line with the overriding objectives of the Civil Procedure Rules: that cases should be dealt with justly and expeditiously while adopting procedures that put the parties on an equal footing and seek to reduce costs.

## Disclosure in Arbitration: Principles

Arbitration rules and procedures normally take a permissive approach to disclosure, in the sense that the parties are not usually subject to express duties with respect to the scope of disclosure required or the extent of search deemed to be reasonable. For the most part, national arbitration laws and institutional rules generally give the arbitral tribunal wide discretion to make such orders as are necessary to effect production of documents. In many ways, and particularly in common law jurisdictions, this approach has been one of the main attractions of arbitration, precisely because it reduces the time and cost spent by parties in meeting the parameters often specified by national court rules with respect to document production.

Arbitrators generally owe a duty to the parties to act fairly and impartially, giving each party a reasonable opportunity to present its case and to deal with the case presented by its opponent. Thus, arbitrators must adopt procedures that are suitable to the circumstances of the particular case and must avoid unnecessary delay or expense in order to provide a fair means for its resolution.<sup>4</sup>

## Does International Arbitration Practice Need to Change Because of ESI?

Those familiar with the process of document production in international arbitration will generally expect that the parties will be required to produce, as a first step, the documents on which they wish to rely. Further document production normally arises in response to requests from other parties for specific documents or for particular classes or categories of documents. Typically, those requests are only submitted after the initial production of each party's documents has taken place. Disputed requests are referred to the arbitral tribunal for determination.

In circumstances where the overwhelming majority of business documents are now ESI rather than physical documents, however, does this system still offer the best and most cost-effective means of managing the process? The complexity of information retrieval does not, in itself, rule out the possibility that an arbitral tribunal will order production of classes of ESI. As was seen in the *Digicel* case, where further searches are ordered, they may be very costly and the party conducting them is likely to have to bear those costs.

Looking at the various procedural rules and guidelines produced by institutions such as the International Centre for Dispute Resolution (ICDR), CIArb, CPR and IBA, the objectives and obligations of the arbitral tribunal with respect to the consideration of ESI issues broadly mirror the aims and objectives of PD 31B. All of these authorities require that expense, proportionality and fairness be considered by arbitral tribunals in managing the ESI disclosure process, and some of them suggest procedures to give structure to the process. None of these proposals, however, is as detailed as that set forth in PD 31B, and there is risk that parties will not be proactive in following the guidance, leading to potential *Digicel*-type situations.

Therefore, we ask: Does the Questionnaire present a template for information gathering and sharing between the parties that may assist an arbitral tribunal in managing the disclosure process fairly and cost-effectively (particularly where the parties have not agreed to apply any of the arbitral institutions' guidance/rules on the topic)? Or does it create a momentum that is unnecessary in arbitration proceedings, forcing parties to take extensive,

costly document retrieval and production measures that could otherwise be avoided?

Detailed rules and procedures such as those set forth in PD 31B are not normally used in international arbitration, and the parties habitually rely on the arbitral tribunal to manage cases fairly with wide discretion. It seems to us, however, that the particular challenges of ESI may require a more structured approach that ultimately may be of greater benefit to the parties than the broader statements of principle set forth in the institutional guidance.

Every arbitration claim will continue to be managed by arbitral tribunals in accordance with their duty to the parties. In appropriate cases, arbitral tribunals may legitimately determine that no purpose will be served by extensive discussion between the parties with respect to ESI. In other cases, however, where there are potentially millions of ESI items connected with the dispute, a structured process involving the exchange of information between the parties as to the identity and sources of their ESI may provide the best means of controlling the cost and time required for that process.

As yet, there is no case law from which we can draw any conclusions as to the efficacy of PD 31B and the Questionnaire. However, in our view, the purposes of the Questionnaire, as described by the Senior Master, are to enable the parties to structure a discussion about document production at an early stage and to avoid costly wrangling over techniques, keywords and production formats that may otherwise cause significant delay and additional expense in the proceedings.

These purposes seem to us to reflect the arbitral tribunal's duty to the parties with respect to management of arbitration proceedings and, therefore, to offer the arbitral tribunal and the parties a structure to guide the course of document production. By encouraging the parties to meet and discuss these issues at an early stage, the arbitral tribunal and the parties may create an early agreed "universe" of potentially relevant documents. The first stage of production will then proceed with each party working to the same template in terms of concepts or keywords, and the identity of document custodians will be known in advance. Production of documents other than those on which a party wishes to rely will still be determined by the



arbitral tribunal based on the application of relevant tests in the applicable procedural rules.

The arbitral practice of staged disclosure is echoed in PD 31B, which refers to and recognises it as another means of managing the process effectively by using initial disclosure of limited categories of documents. Those categories may subsequently be extended or limited, depending on the results initially obtained.

It seems inevitable that more documents will be produced in arbitrations where a structured approach—such as that set forth in the Questionnaire—is adopted. Clients may feel that such an approach will increase the time and cost involved in performing searches in accordance with the parties' agreement. The corollary benefit, however, is that there are likely to be fewer interim applications to the arbitral tribunal with respect to additional disclosure when the scope and depth of each party's searches is known to the other. Further, if the parties have agreed on the parameters of their respective searches for ESI, it will be much more difficult for one party to force the other to conduct additional ESI searches later in the arbitration. Use of a structured process, then, may ultimately save parties time and money, and provide

to all parties, and the arbitral tribunal, a useful road map for the conduct of electronic disclosure in international arbitration. ♦

## Endnotes

- 1 For the purposes of ESI searching, the factors considered with respect to ease and expense are:
  - (i) the accessibility of electronic documents, including email communications on computer systems, servers, backup systems and other electronic devices or media that may contain such documents, taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents;
  - (ii) the location of relevant electronic documents, data, computer systems, servers, backup systems and other electronic devices or media that may contain such documents;
  - (iii) the likelihood of locating relevant data;
  - (iv) the cost of recovering any electronic documents;
  - (v) the cost of disclosing and providing inspection of any relevant electronic documents; and
  - (vi) the likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.
- 2 *Timothy Duncan Earles v. Barclays Bank PLC* [2009] EWHC 2500 (Mercantile)
- 3 *Digicel (St Lucia) Limited and 7 Others v. Cable & Wireless PLC and 5 Others* [2008] EWHC 2522 (Ch)
- 4 Section 33 of the Arbitration Act of 1996, which amplifies Article 18 of the UNCITRAL Model Law: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

# College of Commercial Arbitrators Targets Disclosure of Documents in New Protocols

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The College of Commercial Arbitrators (CCA) is a US-based organization of commercial arbitrators that, among other things, develops best practices for the major stakeholders in arbitration: i.e., (i) business users and in-house counsel, (ii) arbitration providers, (iii) outside counsel and (iv) arbitrators.<sup>1</sup> Recognizing that “[t]he major complaint against commercial arbitration is that it now can cost as much and take just as long as litigation,” the CCA, in August 2010, released *Protocols for Expedient, Cost Effective Commercial Arbitration* (Protocols).<sup>2</sup>

Set forth below are the Protocols’ action items relating to limiting document disclosure for each of the stakeholders, as well as a short discussion of how those stakeholders have been approaching limiting document disclosure to date.

## PROTOCOL I Business Users and In-House Counsel

Action 2. “Limit discovery to what is essential; do not simply replicate court discovery.”

- “Place meaningful limits on discovery in the arbitration agreement or incorporated arbitration procedures.”
- “[T]horoughly discuss the cost versus benefit of various courses of discovery” with outside counsel.
- “[M]emorialize in writing,” for

the benefit of outside counsel, the decision as to the nature and extent of discovery planned.

Various corporate counsel publications report that in-house counsel have already begun focusing their efforts on limiting document disclosure.<sup>3</sup> In-house counsel are considering—and often putting into practice—significant limitations on document disclosure in arbitration agreements.<sup>4</sup> In fact, in at least one case, corporate counsel has insisted on an arbitration agreement that prohibits document disclosure altogether.<sup>5</sup>

## PROTOCOL II Arbitration Providers

Action 3. “Develop and publish rules that provide effective ways of limiting discovery to essential information.”

- Narrowly tailor the list of electronic disclosure custodians to include only those “whose electronic data may reasonably be expected to contain evidence that is material to the dispute and cannot be obtained from other sources.”
- Filter data “based on file type, date ranges, sender, receiver, search term or other similar parameters.”
- Limit disclosure to “reasonably accessible active data from primary storage facilities. Information from back-up tapes or back-up servers, cell phones, PDAs, voicemails and the like should only be subject to



disclosure if a particularized showing of exceptional need is made.”

- “[A]ddress the essential scope and limits of e-discovery,” including “handling of the costs of retrieval and review for privilege, the duty to preserve electronic information, spoliation issues and related sanctions.”
- Permit parties to make electronic documents “available in the form most convenient and economical for it.”
- Relieve parties “of the obligation to conduct a pre-production privilege review of all electronic documents” and allow clawback of privileged documents.
- Have parties identify “likely informational needs and [agree] on what information needs to be preserved, in what format, and for how long.”

Arbitration providers have “been slower than the courts in common law jurisdictions” to address document disclosure.<sup>6</sup> While some organizations have developed voluntary protocols that promote limiting document disclosure, most major institutions have been reluctant “to impose mandatory obligations[.]”<sup>7</sup> For example, while the International Chamber of Commerce (ICC) Commission on Arbitration published *Techniques for Controlling Time and Costs in Arbitration* (ICC Techniques) to encourage controlling the duration and cost of arbitration by, among other things, limiting document disclosure, the ICC Techniques are not mandatory.<sup>8</sup> Provisions regarding document discovery in the ICC’s mandatory rules—the ICC Rules of Arbitration—simply direct the arbitrator “to establish the facts of the case by all appropriate means ... within as short a time as possible.”<sup>9</sup> Under such a standard, an arbitrator has wide discretion to impose extensive document discovery on the parties.

The International Centre for Dispute Resolution (ICDR) is one of the few institutions that have imposed mandatory duties on arbitrators relating to document discovery. However, those duties are still not specific enough to achieve the goals set forth in Protocol II above.<sup>10</sup> For example, the ICDR’s Guidelines direct the arbitrator to “manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy,” but they do not address whether it is appropriate to limit document disclosure to active

data, restrict the number of custodians a party may request or waive preservation obligations.

### PROTOCOL III

#### Outside Counsel

Action 4. “Seek to limit discovery in a manner consistent with client goals.”

- “[C]ooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery in a manner consistent with the stated goals of the client.”

Recent trends suggest that agreeing to reasonable limitations on electronic disclosure with opposing counsel will be challenging in the absence of mandatory rules and/or an arbitrator that tightly controls the disclosure process. For example, in one recent international arbitration, outside counsel to the petitioner reported that it had sought “e-mails, accounting records, and certain public filings in electronic form” because its client “had almost no electronic information” and the respondent had “substantial amounts of [potentially responsive] ESI[.]”

Not surprisingly, cooperation among the parties to set reasonable discovery limits was non-existent. On the one hand, the petitioner had no incentive to limit or streamline discovery because the documents were entirely in the possession of the respondent. On the other hand, it was strategically unwise for the respondent to agree to even a reasonable amount of discovery.<sup>11</sup> Accordingly, encouraging outside counsel, who are beholden to the interests of their clients, to streamline discovery may only come at the insistence of other stakeholders.

### PROTOCOL IV

#### Arbitrators

Action 6. “Streamline discovery; supervise pre-hearing activities.”

- “[M]ake clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation[.]”
- “[W]ork with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances.”
- “[K]eep a close eye on the progress of discovery” and “promptly resolve any problems that might disrupt

the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreements and each side's position with regard to the dispute, rather than formal written submissions)."

Arbitrators now have a number of tools, in addition to Protocol IV, to assist in streamlining discovery. These include the *ICDR Guidelines for Arbitrators Concerning Exchanges of Information*,<sup>12</sup> the ICC's *Techniques for Controlling Time and Costs in Arbitration*,<sup>13</sup> the Chartered Institute of Arbitrators' *Protocol for E-Disclosure in Arbitration*<sup>14</sup> and the *International Bar Association Rules on the Taking of Evidence in International Arbitration*.<sup>15</sup>

Notwithstanding this recent abundance of guidelines, it appears there is still room for further, more specific rules on how to reconcile the often conflicting understandings of what a "streamlined" arbitration entails between lawyers from civil law and common law countries.<sup>16</sup> In civil law jurisdictions, "parties are relatively immune from orders to produce documents."<sup>17</sup> In common law jurisdictions, particularly the United States, parties are subject to broad document production rules that require them to preserve and produce mass quantities of ESI. Therefore, an arbitrator with a US or UK background routinely interprets "streamlined" to allow for far greater disclosure than an arbitrator with a civil law background.<sup>18</sup>

## Conclusion

The Protocols are an excellent tool for encouraging all stakeholders to take steps to ensure that arbitration can return to its roots as a more efficient and less costly means to resolve disputes. While many of the stakeholders have made some effort to reduce one of the most costly aspects of arbitration—namely, document disclosure—adhering to the Protocols will result in a substantially greater level of success. ♦

## Endnotes

- 1 College of Commercial Arbitrators home page, <http://www.thecca.net>.
- 2 College of Commercial Arbitrators, *Protocols for Expeditious, Cost Effective Commercial Arbitration* (Thomas J. Stipanowich et al. eds., 2010), available at [http://www.thecca.net/CCA\\_Protocols.pdf](http://www.thecca.net/CCA_Protocols.pdf). The Protocols were developed in the context of commercial arbitration in the United States. *Id.* at iv. Nevertheless, they are useful in other contexts, including international arbitration.
- 3 M. Scott Donahey, *Unique Considerations for the International Arbitration of Intellectual Property Disputes*, 65 APR Disp. Resol. J. 38, 43 (2010).
- 4 See *id.*
- 5 See *id.*
- 6 John J. Range and Jonathan M. Wilan, *E-Discovery in Arbitration Leading Lawyers on Recovering Electronic Evidence, Meeting New Disclosure Guidelines, and Implementing Measures to Streamline the Process*, Aspatore, 2010 WL 556203 (February 2010).
- 7 See *id.*
- 8 International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, ICC Publication 843 (2007), available at [http://www.iccwbo.org/uploadedFiles/TimeCost\\_E.pdf](http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf).
- 9 International Chamber of Commerce, *Rules of Arbitration* Article 20(1) (1998), available at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf).
- 10 International Centre for Dispute Resolution, *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* (2008), available at <http://www.adr.org/si.asp?id=5288> (hereinafter "ICDR Guidelines").
- 11 Range & Wilan, *supra* note 6.
- 12 *ICDR Guidelines*, *supra* note 10.
- 13 *ICC Techniques*, *supra* note 8.
- 14 Chartered Institute of Arbitrators, *Protocol for E-Disclosure in Arbitration* (2008), available at <http://www.ciarb.org/information-and-resources/E-Disclosure%20in%20Arbitration.pdf>.
- 15 International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), available at [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Projects.aspx#ArbitrationRules](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#ArbitrationRules).
- 16 Jonathan L. Frank and Julie Bédard, *Electronic Discovery in International Arbitration: Where Neither the IBA Rules Nor U.S. Litigation Principles Are Enough*, Disp. Resol. J. 62, 68 (2008).
- 17 See *id.*
- 18 Steven Seidenberg, *International Arbitration Loses its Grip: Are U.S. Lawyers to Blame?* 96 APR A.B.A.J. 50, 55 (Apr. 2010).

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