

Disclosure in arbitration

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What is disclosure?

Disclosure is the process by which parties to a dispute make known to each other documents which relate to the dispute. In this context, 'documents' encompasses hard copy and electronic documents such as hand-written notes, drawings, emails, voice recordings and embedded data.

The purpose of disclosure is to allow the parties the opportunity to be aware of relevant evidence to support and prepare their case and answer the case against them.

Disclosure in arbitration vs litigation

Disclosure in arbitral proceedings is typically less onerous than standard disclosure in English litigation. This may be because arbitration originated as a largely consensual process which allows parties greater autonomy to agree how proceedings are conducted, rather than being subject to strict civil procedure rules (CPR) as in litigation. See practice note [An introduction to arbitration](#).

For example, parties to an arbitration may agree to disclose only documents upon which they intend to rely, rather than all relevant documents within their control, whether helpful or harmful, as is required by CPR 31.6.

[References: CPR 31](#)

[CPR PD 31A-31B](#)

Advantages and disadvantages of limited disclosure

The more limited disclosure in arbitration reduces the risk of parties disclosing vast quantities of irrelevant documents, which has the obvious benefits of increasing efficiency and reducing the overall cost and duration of the proceedings. This may be a particular consideration in choosing arbitration for construction disputes because of the amount of documents generated during a project.

However, more limited disclosure also has disadvantages. In particular, it may allow parties to withhold documents which are adverse to its case unless another party requests specific disclosure of those documents. However, given the limited documents which are disclosed, it may be difficult to formulate such requests. Parties should therefore give careful consideration to which rules will govern their disclosure (if any) and to the disclosure process itself.

Agreeing the rules for disclosure

The courts actively encourage parties to agree the scope and procedure for disclosure, in particular, e-disclosure (see links to cases). This should also be considered best practice in arbitration.

Parties often agree how arbitral proceedings will be governed in the arbitration agreement in the contract. This can be done in a number of ways, as follows:

Institutional rules

Parties may specify that particular institutional rules will apply to arbitral proceedings, such as those produced by the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC).

ICC Rules

The LCIA rules require parties to provide with their statements of case copies of all documents relied upon and, where appropriate, samples and exhibits.

Meanwhile, the ICC Rules allow (but do not require) parties to submit with their pleadings documents the parties consider appropriate or which may assist to resolve the dispute. However, the parties and tribunal must make every effort to conduct the arbitration in an 'expeditious and cost-effective manner' appropriate for the complexity and quantum of the dispute.

Seat of arbitration

The arbitration agreement should also specify a seat of arbitration, in which case any relevant laws of that jurisdiction will apply to the proceedings. For example, if London is specified as the seat of arbitration, the Arbitration Act 1996 will apply.

Section 34 of the Arbitration Act gives the tribunal the general power to determine all matters relating to procedure and evidence including disclosure, subject to the parties' agreement and the tribunal's duties set out in section 33 to act fairly and impartially and adopt procedures which avoid 'unnecessary delay or expense'.

Specific procedural rules governing disclosure

Parties may prefer to adopt or refer to rules prepared specifically for disclosure such as those set out by the International Bar Association (IBA) and the Chartered Institute of Arbitrators (CIArb). Both rules are commonly used in international disputes and provide a familiar procedure for parties from different jurisdictions who may be used to different forms of disclosure. Parties will often direct the tribunal to use the rules as a guide, rather than making them compulsory.

References: [Timothy Duncan Earles v Barclays Bank \[2009\] EWHC 2562 \(QB\)](#)
[Digicel \(St Lucia\) v Cable & Wireless \[2009\] 2 All ER 1094, \[2008\] EWHC 2522 \(Ch\)](#)

References: [LCIA Rules](#)

References: [LCIA Rules, para 15.6](#)

References: [ICC Rules, arts 4\(3\), 5](#)
[ICC Rules, art 22\(1\)](#)

References: [AA 1996](#)

References: [AA 1996, ss 33-34](#)

The IBA Rules on the Taking of Evidence in International Commercial Arbitration (adopted by the IBA Council on 29 May 2010) (IBA Rules)

In summary, the IBA Rules:

- require that the tribunal consults the parties at the earliest appropriate time and invites them to agree an 'efficient, economical and fair process' for the taking of evidence in the proceeding, including disclosure
- require parties to disclose all documents upon which they rely
- allow parties to request disclosure of certain documents via a Request to Produce and provide a procedure to resolve any objection to the Request to Produce, and
- allow the tribunal and parties to seek documents held by non-parties to the proceeding

The CIArb Arbitration Rules (2000 edition) (CIArb Rules)

The CIArb Rules allow parties to choose between a standard procedure and a short form procedure.

Under the short form procedure, parties agree to conduct the arbitration on a documents-only basis. Whilst the absence of a hearing can offer substantial time and cost savings overall, this should be balanced against the limitation of not having the evidence tested in a hearing. The short form procedure is unlikely to be suitable for construction disputes of any complexity and, for those disputes which may be suitable, adjudication would be a more familiar method of resolving the dispute.

Under the standard procedure, if the claim is based on a written agreement, parties must disclose the contract. Parties may also, but are not obliged to, serve with their pleadings copies of documents considered 'necessary' to their claim.

Requests for disclosure are not specifically provided for, but may be permitted under the tribunal's general discretion regarding all procedural and evidential matters.

[References: IBA Rules](#)

[References: IBA Rules, art 2.1](#)

[References: IBA Rules, art 3.1](#)

[References: IBA Rules, arts 3.1-3.8](#)

[References: IBA Rules, arts 3.9-3.10](#)

[References: CIArb Rules, Standard Procedure, arts 1-12](#)

[References: CIArb Rules, Short Form Procedure, First Schedule](#)

[References: CIArb Rules, Standard Procedure, arts 8.4-8.5](#)

[References: CIArb Rules, Standard Procedure, arts 6.1, 1.2](#)

The CIArb Protocol for E-disclosure in Arbitration (CIArb Protocol)

The increasing use of technology to create and store documents makes e-disclosure a critical yet protracted and expensive process. However, some guidance is available to assist.

The CIArb Protocol specifically caters for e-disclosure and encourages parties to agree an appropriate scope and procedure. Matters to be considered at the earliest opportunity include where and how the documents are held, the parties' data retention policies and practices and any relevant tools which may lessen the cost and burden of the task (for example, limiting disclosure by category, date range or custodian).

Under the CIArb Protocol, the tribunal must exercise its broad discretion with regard to principles of reasonableness and proportionality; fair and equal treatment; natural justice; and the cost and burden of e-disclosure.

References: CIArb Protocol, arts 1, 3(v) and 3(vi)

References: CIArb Protocol, arts 5-6

Key practical issues to consider

The following considerations may assist to identify potential problems before undertaking disclosure and to formulate specific disclosure requests.

Collecting the documents

- Who are the key custodians in the dispute? This may include non-parties to the dispute such as consultants or subcontractors.
- Is it possible to limit disclosure by reference to date ranges or categories of documents?
- How did the custodians conduct their business? Did they rely on hard copy documents (diaries, notebooks or scraps of paper) or electronic documents (smart phones, laptops or databases such as Building Information Warehouse (BIW))?
- Where, and in what format, are the documents stored? This may include the custodians' residence, storage facility or a shared network server. Care should be taken to preserve the original format of documents to avoid subsequent queries regarding authenticity.
- What is the custodians' practice for document retention and/or destruction? Is time of the essence to preserve relevant documents?

Reviewing the documents

Once collected, the documents should be reviewed for relevance and privilege. De-duplicating identical copies will reduce the number of documents for review. Where appropriate, e-disclosure software may achieve this quickly and easily.

Parties may also wish to agree key search terms (such as the project name or reference) to identify relevant documents in the first instance.

Disclosing the documents

Parties should consider the easiest and most cost-effective way of providing disclosable documents to the tribunal and other parties. For example, electronic documents may be disclosed via portable storage devices or by providing access to a discrete and secure part of a database holding those documents.

Requests for documents and objections

Where permitted by the relevant procedure, parties may request disclosure of certain documents. For example, where documents known (or suspected) to have been held by a particular custodian are not disclosed or where there are chronological gaps in the disclosed documents.

Parties may generally object to such requests on the basis of proportionality and privilege. The IBA Rules set out further reasons for objections. In such circumstances, depending on the applicable rules, the requesting party may re-shape its original request to narrow the scope and/or the tribunal will decide the request.

References: [IBA Rules, art 9\(2\)](#)

It may be useful to create and maintain a 'Redfern Schedule', which sets out in table format any requests to produce, the reasons in support, any objections and the tribunal's decision. These are often used in international arbitrations to keep track of requests for disclosure.

Conclusion

Unlike in litigation, parties to arbitral proceedings are very much in control of the scope and burden (and therefore cost) of disclosure. Notwithstanding tactical considerations and parties' reticence to make concessions, agreement can often be reached because there are tried and tested rules and guidelines which can assist in finding a practical and proportionate way forward.

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