

Managing the Discovery Process in International Arbitration

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The nature and scope of the discovery process in international arbitration is subject to the agreement of the parties and otherwise to the discretion of the arbitral tribunal. In international arbitration, the parties are able to request the disclosure of documents from one another, unless the parties agreed otherwise in the arbitration agreement. The extent of discovery in international arbitration is generally narrower than the scope of discovery seen in litigation in the United States. Disclosure is generally limited to the targeted production of documents. Depositions, written interrogatories and requests for admission, which commonly are seen in litigation before the US courts, are not available unless agreed to by the parties.

It is important to note at the outset that arbitrations differ significantly in terms of their approach to the disclosure process. The UNCITRAL Arbitration Rules that commonly apply in ad hoc arbitrations empower the arbitral tribunal to order the production of documents, but are silent as to the scope of the disclosure process or the procedures to be applied. Institutional arbitration rules take different approaches. The ICC Rules do not expressly address the topic of disclosure. They empower the tribunal to “establish the facts of the case by all appropriate means” (Art. 25(1)) and “may summon any party to provide additional evidence.” (Art. 25(4)). The SIAC Arbitration Rules are likewise silent as to the nature and extent of the disclosure process. The ICDR Rules, on the other hand, specify that “[a]t any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate.” Art. 20(4). The ICDR Rules also provide specific procedural requirements for the disclosure process. See Art. 21. The LCIA Rules empower the tribunal “to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant.” (Art. 22.1).

The disclosure process in international arbitration is generally conducted in accordance with the framework established in the IBA Rules on the Taking of Evidence in International Arbitration, originally adopted in 1999 and updated most recently in

December 2020. While some tribunals may formally adopt the IBA Rules for use in a particular arbitration, other tribunals commonly use the IBA Rules as informal guidance.

The specific procedures that will be applied in an international arbitration are subject to the agreement of the parties and the order of the arbitral tribunal. This is commonly established at the outset of the arbitration during the initial procedural conference of the tribunal and the parties. In general, the discovery process is limited to the exchange of documents.

The discovery process generally operates as follows:

Generally, the parties are required at the outset of the arbitration to exchange the documents that they intend to rely upon. At a specified point in the arbitration, the parties also will be able to exchange requests for the production of documents. The process generally takes place either at the outset of the proceedings before the parties make their initial written submissions on the merits, or after the parties have made their initial written submissions (Statement of Claim and Statement of Defense) and before they make their final written submissions (the Reply/Rejoinder).

There are advantages and disadvantages of each timing approach for the disclosure process. The primary advantage of having the disclosure process take place at the outset of the arbitration is that the parties can then use the documents exchanged in their opening written submissions on the merits, with the subsequent round used simply to reply to arguments made by the claimant and respondent in their opening submissions. The disadvantage of an early disclosure process is that it is more difficult for the tribunal to judge the relevance of requested documents because the parties' claims and defenses have not been set out in detail. Scheduling the disclosure process after the first round of submissions avoids this problem. However, the disadvantage of having the disclosure process later in the arbitration is that the parties will only have one round of written submissions to address the significance of documents exchanged during the disclosure process.

When requesting documents, each document request must contain a description of a requested document sufficient to identify it or describe a narrow and specific category of documents that are reasonably believed to exist. The requesting party must also provide a statement as to how the documents requested are relevant to

the case and material to its outcome, along with a confirmation that the requested documents are not in the possession of the requesting party and the reasons why the requesting party believes that the requested documents are in the possession of the party from whom they are requested.

The discovery process in international arbitration generally reflects a hybrid approach between the common law and civil law traditions. The ability of parties to request the production of documents from one another derives from the common law tradition. However, the process is designed to avoid fishing expeditions, limiting parties to specific documents or narrow categories of documents that they reasonably know to exist. Overbroad categorical requests for documents are rarely allowed.

After the parties exchange their document requests, they each will have the opportunity either to produce the requested documents or to submit objections. If objections are made, the requesting party will be given an opportunity to respond to the objections. The requests, objections and responses generally are combined into a table known as a “Redfern Schedule”, which allows the tribunal to efficiently review the requests and objections and make a ruling on each request. The ruling is also contained in the Redfern schedule.

To effectively manage the disclosure process, it is important for parties to be prepared well in advance. For instance, parties should conduct as much factual investigation into the documents, particularly their own documents, to know what documents they have and do not have, and what their documents say. Parties also should be prepared to demonstrate how they know that the documents they plan to seek exist. Parties should also make sure that the written submissions they have made prior to the disclosure process will demonstrate the relevance of the documents they plan to seek in the disclosure process, as those pleadings will provide the principal basis for the tribunal to rule on the relevance and propriety of specific requests for disclosure.

Finally, it is important to note that perhaps the most important step that a party can take to manage the disclosure process in international arbitration is to define it in the arbitration clause. For instance, if a contracting party does not wish to have a discovery process in an arbitration, that must be specified in the

arbitration. Otherwise, the arbitral tribunal will have the power to order the disclosure of documents, as explained above. The parties can also agree on the scope of disclosure in the arbitration clause. If the parties wish to have clarity as to how the disclosure process will be carried out without adding too much detail to the arbitration clause, the easiest way to accomplish that is to specify that the disclosure process will be carried out in accordance with the *IBA Rules on the Taking of Evidence*, either on a mandatory basis or as guidance.

Additional sources:

- Rubinstein (2004) "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions," Chicago Journal of International Law: Vol. 5: No. 1, Article 20. Available at: <https://chicagounbound.uchicago.edu/cjil/vol5/iss1/20/>
- Cremades, Managing Discovery in International Arbitration – Dispute Resolution Journal – Vol. 57, no. 4
- Ashford, Documentary Discovery and International Commercial Arbitration – American Review of International Arbitration, Vol. 17 No. 1 (2007)