Reliance Document Management – Improving Efficiency

Murray L. Smith, LL.M., Chartered Arbitrator
www.smithbarristers.com
msmith@smithbarristers.com

Introduction

The reputation of arbitration has suffered as the cost and time to complete complex cases has increased. One of the most significant aspects of organizing arbitral proceedings is the management of documents tendered by the parties. The arbitral tribunal can make a significant contribution to the fairness and efficiency of the proceeding by establishing guidelines early on for the organization of the documentary record.

Stephen Jagusch writes that it is rare for arbitrators to get involved in organizing and presenting documentary evidence, "it being a matter considered the domain of the advocates", but he adds that there is a role for the tribunal in the early stages of document heavy cases to streamline the presentations of counsel.[1]

Parties come from varying backgrounds and traditions. Misunderstandings and confusion relating to requirements for document productions can impair the efficiency of the proceeding and lead to perceptions of unfairness.

The effective management of documents in arbitration proceedings is a key element in minimizing costs and delay. In international cases the parties typically tender documents that will be relied upon to prove their case. In addition documents may be produced on discovery or tendered to challenge the case brought by the opposing party as part of the defence raised. The initial concern is not in respect of tendering too few documents but rather with excessive and disorganized productions.

It is essential that the parties are treated equally and given a full opportunity to both make their own case and know the case to be met. These objectives can be imperiled where

[1] Stephen Jagusch, "Organization and Presentation of Documents to the Tribunal", Chapter 11 in "The Art of Advocacy in International Arbitration", 2nd ed. 2010, Doak Bishop and Edward G. Kehoe Editors

documents are not presented in a clear, concise and coherent fashion or where documents are not tendered in time to allow an adequate opportunity for response.

The arbitral tribunal should consider issuing guidelines at the earliest stage of the proceeding so that the parties will know what is expected in terms of relevance, materiality, timing and organization of document productions. The tribunal can streamline the process by obtaining the agreement of the parties regarding the requirements for tendering Reliance Documents, the need for authentication of documents and the process for challenges to disputed documents as well as confirming expectations in respect of confidentiality of productions.

Reliance Documents

There are five stages in an arbitral proceeding when documents may be tendered:

a. Accompanying pleadings,

b. Discovery disclosures,

c. Attachments to witness statements and expert reports,

d. Attachments to written briefs and

e. Documents produced for impeachment purposes on cross-examination.

a. <u>Documents filed with pleadings</u>

Statements of Claim, Defence and Reply are typically accompanied by Reliance Documents. The LCIA Rules provide that pleadings shall be accompanied by copies of all essential documents on which the party relies and which have not been previously submitted by another party.[2]

The UNCITRAL Arbitration Rules provide that pleadings should as far as possible be accompanied by all documents relied upon.[3]

[2] LCIA Arbitration Rules, Rule 15.6
[3] UNCITRAL Arbitration Rules, Article 20

The IBA Rules provide for each party to submit all documents available to it on which it relies. The IBA Rules contemplate submission of additional documents which have become relevant to the case and material to its outcome as a consequence of issues raised in witness statements, expert reports or submissions of the parties. The IBA Rules further provide that copies of documents shall conform to the originals and be available for inspection, that documents in electronic form should be produced in a form that is reasonably useable by the recipients, and that translations should be submitted. [4]

Even where the rules adopted do not specify that pleadings be accompanied by Reliance Documents, or where the parties have not agreed to use institutional Rules or the IBA Rules, it is more common than not in international cases for the parties to agree that pleadings be accompanied by Reliance Documents. One of the objects for the tribunal is to encourage counsel to apply their minds to documents early on. It will be more difficult with time constraints for delivery of pleadings for a respondent to identify all relevant documents to accompany a response to a claim or Statement of Defence. Supplementary lists from both parties will follow in most cases. It is incumbent upon counsel to get a handle on necessary documents at the very earliest stages of an arbitration.

The arbitral tribunal should be proactive early on to clarify procedures for the tendering of Reliance Documents and obtain the agreement of the parties regarding the nature, form and timing for document deliveries. The IBA Rules, whether adopted by the parties or not, are a good starting point for suggestions to the parties. Discussions among the tribunal and counsel should result in the tribunal issuing directions covering when documents are to be submitted, whether documents may be delivered in electronic form, whether the tribunal members should be provided with hard copies, whether translations will be required, and whether or not originals must be made available for inspection.

At the pleadings stage the parties should be encouraged to restrict document productions to those documents that are relevant and material. In this context materiality is meant to confine productions to those documents that are necessary or essential for the proof of a party's case or to answer the opposing party's case. The tribunal should gently admonish

[4] IBA Rules on the taking of evidence in international arbitrations, Article 3

the parties to avoid excessive productions, discourage the proverbial document dump, and direct that document deliveries be in a form reasonably digestible by the tribunal and the other parties. Early directions for documents to be indexed and listed in chronological or some other coherent order will streamline the process. It is not unheard of for counsel to file lists of documents that are hundreds of pages long referencing thousands and thousands of pages, perhaps out of an abundance of caution to maintain maximum latitude in access to documents that may become relevant as the case unfolds.

A proactive arbitral tribunal will strive to limit productions to avoid unnecessary expense and confusion without impeding the right of a party to make its case. By addressing this subject at the earliest possible stage, the tribunal can encourage counsel to focus on the documents that are necessary. How to concentrate the minds of counsel on the need for limited productions is a matter for the creativity of the arbitral tribunal. The first step is simple moral suasion and the final step may be cost consequences for document productions that are clearly excessive. There are few metrics for measuring excessive productions because only the parties know what documents are essential to make their case. One such metric may be whether or not a document is required reading for the tribunal members to understand the case.

Arbitrators take different approaches to reviewing Reliance Documents. Some arbitrators read all documents that accompany pleadings well in advance of the hearing date. Others prefer to wait until a common book of documents or core bundle is delivered before the arbitration hearing. The parties should expect that the members of the tribunal will read all of the documents that accompany pleadings, witness statements, expert reports and written briefs, as well as all documents that are relied upon in cross-examination. The cost to review unnecessary documents could be substantial. If it is apparent that a party has tendered documents that were clearly not necessary reading for the tribunal members or that have increased the time and expense for the opposing party to respond and that have extended the time necessary to complete the hearings, then cost sanctions may be appropriate. It is imperative that the direction regarding Reliance Documents issued at a preliminary meeting address the potential for cost sanctions so that the parties are

forewarned and naturally encouraged to limit document productions to essential documents.

b. Discovery Disclosures

Much has been written about documentary discovery in arbitration. Such disclosures as are made do not necessarily become Reliance Documents for use in the arbitration. Typically the party obtaining disclosure will use those documents that are helpful to its case and to avoid confusion should list those documents as Reliance Documents at some stage of the proceeding, whether attached to amended pleadings, as exhibits to expert reports or witness statements, attached to written submissions or included in common book of documents. The process for making discovery demands, the legal test for disclosure, the use of a Redfern Schedule and the question of whether or not in answering an order made for disclosure, privileged documents must be listed in a manner that asserts the privilege but that does not reveal the contents of the privileged document is a matter for much more detailed consideration and may be too much for the first preliminary meeting and the initial Documents Direction. It may be that simply asserting privilege on the Redfern Schedule will be considered by the parties as sufficient.

The party making disclosure may consider that the documents it has disclosed are available at large for use in cross-examination or in oral submissions at the hearing. The party receiving disclosure may also consider that the documents are generally available for use whether listed as Reliance Documents or not.

The right of a party to prove its claim and to make full answer and defence cannot be restricted. Accordingly, documents produced on discovery are generally available for use by either party at any juncture, including for the purpose of cross-examination, whether or not each document was listed as a Reliance Document or was included in the common book of documents. The fundamental principle is to avoid a situation where a party is caught by surprise by documents produced out of the blue. That concern is lessened where documents have been disclosed though not listed as Reliance Documents but the parties may wish a direction that any party planning to use documents produced on discovery must provide a supplementary list of such Reliance Documents.

Whether or not a direction is made for the listing of discovery documents as Reliance Documents for use in the hearing of those documents there is a minimum role for the tribunal in managing documents disclosed on discovery. Documents disclosed in response to discovery requests or produced on orders for disclosure are equally susceptible to the document dump problem and the tribunal should encourage the parties to exercise reasonable caution in producing documents that are relevant and material and that are organized in a fashion that make them reasonably useable by the other party.

c. Witness Statements

Witness statements and expert reports will often have documents attached as exhibits. In theory the documents should already have been listed as Reliance Documents. It would not be realistic to rule new documents inadmissible unless there was a prior agreement that no new documents may be tendered after a certain date. The potential for the other party to be caught by surprise is ameliorated by the opportunity to provide rebuttal witness statements and to comment on Reliance Documents in briefs that will follow witness statements.

The extraordinary circumstance may arise where a party is able to assert unfair prejudice caused by late disclosure. In such a case the tribunal must make a ruling on admissibility or allow an adjournment to permit an opportunity to deal with the late production. The Direction on Documents could address this potential problem by specifying whether or not new Reliance Documents will be permitted as attachments to witness statements and expert reports generally, or only in more limited circumstances such as where a case can be made for late documents being tendered in unforeseeable circumstances.

d. Written Briefs

Written briefs will reference Reliance Documents. The documents that are referenced should in theory have been listed as Reliance Documents at an earlier juncture. As with documents attached to witness statements and expert reports, it may be appropriate to have a limiting direction early on from the tribunal that allows reliance on new documents tendered at such a late date only in exceptional circumstances. The initial

Documents Direction might provide that document lists may be supplemented at the stage that written briefs are filed but a reason should be given for such late disclosure and if prejudice to the other party should result and an adjournment is required, that there may be cost consequences visited upon the recalcitrant party.

e. Documents Produced on Cross-Examination

This is a problematic area. Parties may uncover a topic in the course of cross-examination that warrants an attempt to impeach with documents that have not been made part of the record in the proceeding to that point. This is another area for the tribunal to address an objection based on prejudice resulting from late production. The objecting party might argue they have been caught by surprise and were not permitted a reasonable opportunity to respond. The cross-examining party will say the document is a smoking gun tendered on cross-examination because it goes to credibility as opposed to the unfolding of the narrative. While a party cannot be restricted from a full opportunity to prove its case or to make full answer or defence, a party should be discouraged from lying in the weeds with clearly relevant evidence. This is a situation which brings into sharp relief the distinction between common law and civil law traditions. In the common law tradition a party would be obliged to disclose all documents in possession or control that were relevant or that could lead to a relevant train of inquiry while in the civil law tradition a party would only disclose those documents that were necessary to make their case.

There is no one-size-fits-all solution to problems that may arise where new documents are used solely for impeachment purposes. The potential for such problems was considered in the Protocol on Disclosure of Documents in Presentation of Witnesses in Commercial Arbitration published by the International Institute for Conflict Prevention and Resolution (CPR). That protocol provides as follows:

> "Except for the purpose of impeaching the testimony of witnesses, the tribunal should not permit a party to use in support of its case, at a hearing or otherwise, documents or electronic information unless the party has presented them as part of its case or previously disclosed them. But the tribunal should not permit a party to withhold documents or electronic information otherwise required to be disclosed on the basis that the

> documents will be used by it for the impeachment of another party's witnesses."[5]

The Documents Direction issued at the preliminary hearing should record the agreement of the parties as to how the tribunal ought to deal with documents produced for the first time in the course of the hearing. Such a direction will likely restrict late productions except in defined extraordinary circumstances that permit sufficient flexibility for the arbitral tribunal to do justice to the party seeking to use an undisclosed document because of unforeseeable circumstances and protect the other party from prejudice that would result from late disclosure. There are more complicated issues that may arise that may not be suitable for early resolution. An example is the question of whether or not a party may withhold privileged documents for use in cross-examination when the privilege would be waived. As with the question of whether or not privileged documents must be listed in responding to an order for production of documents on requests for discovery, this may be a matter for much more detailed consideration and may be too much for the first preliminary meeting and the initial Documents Direction

Common Book of Documents

While the parties will be inclined to be expansive in listing Reliance Documents as part of the pleading process, the time and cost for the tribunal members to review relevant and material documents may be reduced by the parties preparing a common book of documents or core bundle. To the furthest extent possible the parties should be encouraged to include documents to be relied upon in a common book of documents to be delivered shortly in advance of the hearing. If this approach is adopted by the parties, the panel members may not consider it necessary to review every listed Reliance Document in advance of the hearings and will trust that the parties will cull the necessary documents for review. A common book of documents will also go some way in minimizing confusion regarding which documents produced on discovery will be relied upon at the hearing. Significant time savings will be realized where everyone at the

[5] Protocol on Disclosure of Documents in Presentation of Witnesses in Commercial Arbitration, International Institute for Conflict Prevention and Resolution

hearing can quickly turn to the same book to read a document being referred to by a witness or counsel.

Documents Agreement

The time and cost to prove a document may be minimized by the parties agreeing in advance to a Documents Agreement that confirms the authenticity of documents unless specifically challenged. A typical Documents Agreement will specify that copies may be tendered (with originals available on request), and that the documents were sent and received where indicated and record accurately the information contained therein. Either party is able to challenge any particular document or class of documents that may then require more elaborate proof. With the benefit of a Documents Agreement the parties will be able to avoid unnecessary proofs and the tribunal may take some comfort in relying upon the authenticity of documents which have not been specifically challenged.

The parties might attempt to reach consensus on a Documents Agreement using the following model that could be circulated by the tribunal and amended as the parties see fit:

DOCUMENTS AGREEMENT

For the purpose of this arbitration, the parties agree as follows with respect to the documents tendered during the course of the proceedings:

a. *Copies of documents may be tendered in evidence as representing true copies of the originals;*
b. *The original of any copy, if in the possession or control of the party relying upon the document, will be produced for inspection upon request;*
c. *Unless challenged, it will be presumed that a document was prepared by or on behalf of the author on or about the date indicated on its face, and that the author had knowledge of its contents at the time. If the document indicates that it was delivered to another person, it will be presumed that it was sent to and received by the intended recipient in the ordinary course on or about the date shown;*
d. *Purported signatures appearing on a document are authentic;*

e. *If any party wishes to challenge a document for any reason then at least 30 days before hearings begin notice must be given of the reason for challenge so that more formal proof of the document may be made.*

2. *Nothing in this Agreement shall limit the right of either party to:*
    a. *Lead evidence or prove documents in any manner that might otherwise be permitted if this Agreement had not been made including reliance upon civil rules or legislation in the arbitral forum for the proof of business records;*
    b. *Lead evidence to contradict any document;*
    c. *Object to the admissibility of any document on grounds of privilege or any other ground not in conflict with this Agreement;*
    d. *Argue the weight or relevance that should be attributed to any document;*
    e. *Challenge any document on the basis that it is fraudulent or does not accord with one or more of the matters identified in paragraph 1 of this Agreement;*
    f. *Challenge the truth or authenticity of any document in the course of hearings or the authority of the tribunal to hear such challenge in the absence of advance notice of challenge where the tribunal is satisfied that there is a reasonable explanation for no challenge notice having been given. In that event the party tendering the challenged document will be given a reasonable opportunity to make a more formal proof of the document.*
3. *This Agreement does not constitute an admission by either party as to the truth of the contents of any document.*
4. *Nothing in this Agreement will prevent a party from seeking further directions from the tribunal to resolve questions related to proof of documents.*

Confidentiality Agreement

There will invariably be concerns regarding the confidentiality of documents disclosed on discovery requests or listed as Reliance Documents. The laws on confidentiality vary from jurisdiction to jurisdiction. The LCIA Rules provide in Article 30 that the parties, as a general principle, undertake to keep all matters relating to the proceedings confidential. There is an exception for disclosures that are necessary to protect a legal duty or to protect or pursue a legal right. The English Arbitration Act 1996, unlike the arbitration statutes of some countries, does not address confidentiality, so the parties to

arbitrations seated in England would be governed by the LCIA rules and common law principles regarding any duty of confidentiality. Because there are different approaches internationally, the parties should be encouraged to make a Confidentiality Agreement, especially so as to avoid the tribunal having to make specific confidentiality directions in respect of individual documents. The confidentiality conundrum is much discussed in the literature. It is not necessary to reinvent the wheel. The tribunal could offer the parties a precedent. One of the best precedents is contained in the Debevoise and Plimpton publication "Annotated Model Arbitration Clause for International Contracts", 2011. The Debevoise and Plimpton clause reads as follows:

> "The parties, any arbitrator, and their agents or representatives, shall keep confidential and not disclose to any non-party the existence of the arbitration, non-public materials and information provided in the arbitration by another party, and orders or awards made in the arbitration (together, the "Confidential Information"). If a party or an arbitrator wishes to involve in the arbitration a non-party – including a fact or expert witness, stenographer, translator or any other person – the party or arbitrator shall make reasonable efforts to secure the non-party's advance agreement to preserve the confidentiality of the Confidential Information. Notwithstanding the foregoing, a party may disclose Confidential Information to the extent necessary to: (1) prosecute or defend the arbitration or proceedings related to it (including enforcement or annulment proceedings), or to pursue a legal right; (2) respond to a compulsory order or request for information of a governmental or regulatory body; (3) make disclosure required by law or by the rules of a securities exchange; (4) seek legal, accounting or other professional services, or satisfy information requests of potential acquirers, investors or lenders, provided that in each case of any disclosure allowed under the foregoing circumstances (1) through (4), where possible, the producing party takes reasonable measures to ensure that the recipient preserves the confidentiality of the information provided. The arbitral tribunal may permit further disclosure of Confidential Information where there is a demonstrated need to disclose that outweighs any party's legitimate interest in preserving confidentiality. This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract. This confidentiality provision may be enforced by any arbitral tribunal or any court of competent jurisdiction, and an application to a court to enforce this provision shall not waive or in any way derogate from the agreement to arbitrate"[6]

The Debevoise and Plimpton model clause provides that disputes regarding confidentiality may be enforced by an arbitral tribunal or any court of competent

[6] Debevoise and Plimpton "Annotated Model Arbitration Clause for International Contracts", 2011, p. 42

jurisdiction, but this may leave questions as to the best or most appropriate forum. Would the existing arbitral tribunal have jurisdiction to resolve confidentiality complaints, including claims for damages for breach confidentiality in the existing arbitration? Until the existing tribunal is *functus,* would breaches of confidentiality in the existing arbitration be subject to the original arbitration agreement, or would the matter need to go to a court in the arbitral forum? This cause for uncertainty is well articulated by Simon Crookenden in "Who Should Decide Arbitration Confidentiality Issues?" As he notes at page 606:

> "In the past, such issues have generally been determined by the court but the view has been expressed in the English Court of Appeal that, at least as long as there is an existing tribunal in a pending arbitration, issues of confidentiality should be determined by the tribunal in the reference in which the documents in issue have been produced or generated." [7]

The Debevoise and Plimpton model confidentiality agreement might be amended to specify which tribunal or court will have jurisdiction to decide confidentiality issues that arise up to the point that the existing tribunal becomes *functus,* and which tribunal or court is agreed for disputes regarding confidentiality that arise thereafter. The Debevoise and Plimpton model agreement might also be amended to address requirements for destruction of documents produced in the arbitration once the proceeding or any appeal is concluded.

Model Documents Direction

A model direction for the management of documents might be circulated by the arbitral tribunal either at, or before, the first preliminary meeting. The arbitration belongs to the parties who may design the process in any fashion they choose. Not all counsel in international arbitrations are experienced in international best practices. By circulating a proposed direction for documents in advance of the preliminary hearing, the parties may consider whether or not to agree some or all of the proposed direction. Not every issue may be appropriate for the initial Direction. Procedures for dealing with discovery requests, the use of a Redfern Schedule and any requirement for listing discovery

[7] Arbitration International, vol. 25, no. 4, 2009, p. 603.

documents that the parties intend to rely upon might be better dealt with in a subsequent direction at a later stage. Likewise, issues relating to claims of privilege both in responding to discovery requests and in respect of documents produced for the first time on cross-examination might be left for more detailed discussion.

The following is a suggested Documents Direction to cover the basics:

> *"Pleadings including Statements of Claim, Defence, Counterclaim and Reply shall be accompanied by Reliance Documents. Reliance Documents are those documents upon which a party will rely in making its case or defence. Reliance Documents must be listed in an organized fashion, whether chronologically or otherwise, that permits the other party and the tribunal to identify documents easily and connect the documents to the relevant issues. The manner of organization is left to counsel but Reliance Documents should be indexed in a coherent fashion.*
>
> *Reliance Documents should include only documents necessary to a claim or defence. Counsel are encouraged to be vigilant to ensure that documents listed as Reliance Documents are not excessive and do not include documents of doubtful relevance.*
>
> *Documents in languages other than English shall be accompanied by translations.*
>
> *The parties will endeavour to reach an agreement on documents using as a guide the Model Documents Agreement attached to these directions.*
>
> *The parties will endeavour to reach an agreement in respect of confidentiality of documents tendered in the proceeding using as a guide the Model Confidentiality Agreement attached to these directions.*
>
> *Parties will be permitted to supplement their list of Reliance Documents with documents that were not reasonably foreseen as relevant but are deemed necessary at later stages of the arbitration including attachments to witness statements, expert reports and written submissions but documents may not be used at the hearings that were not listed and produced earlier except for impeachment purposes on cross-examination where the document is collaterally relevant only to credibility and was not a document that obviously should have been listed as a Reliance Document. Witness statements, expert reports and written briefs should not refer to documents that were not listed as Reliance Documents unless an reasonable justification is provided and in the event such supplementary listing necessitates an adjournment to permit the other party an opportunity to respond then cost consequences may be visited upon the party tendering new documents at a late stage. This requirement would not apply to new documents created by experts but would apply to historic documents relied*

upon by experts. A document should not be deliberately withheld where the relevance of the document is clear. Objection may be taken to late disclosure where prejudice would result to a party taken by surprise.

The parties are directed to prepare a Common Book of Documents for use at the hearing. The common book of documents will contain all of the documents that the parties expect will be referred to in the course of the hearing and that should be reviewed by the arbitral tribunal. The list of documents that will be included in the Common Book of Documents should be delivered to the tribunal 14 days in advance of the first day of hearings. The tribunal members should be provided with hard copies of the common book of documents in indexed binders and in electronic form.

Copies of Reliance Documents may be delivered to the other party and the tribunal in electronic form. Originals of documents, where available, must be produced for inspection upon request.

The parties are encouraged to exercise care to exclude documents of doubtful relevance from lists of Reliance Documents. The tribunal may consider costs consequences where it is determined that excessive documents have been listed that were obviously not necessary for review by the tribunal members and the other party or that have been delivered or indexed in a manner that is not coherent and does not admit of reasonable review for relevance.

Conclusion

It will always be difficult at the preliminary hearing to anticipate every problem that might arise in respect of reliance documents. Some cases will have relatively few documents while others may be document heavy. Usually though, there will be enough documents to warrant a robust direction by the tribunal so that the parties will have a clear understanding of what is expected.

Most arbitrators will prepare an agenda for the preliminary meeting but do not always circulate a draft Documents Direction in advance of the first meeting. There is much to recommend a modest yet robust early approach to management of reliance documents, as well as preparation of Documents Agreements, Confidentiality Agreements and Common Books of Documents. The parties will know what is expected of them, the arbitrators can limit unnecessary reading of documents and the parties will have confidence that they will not be caught by surprise. The haphazard tendering of documents and piecemeal treatment of basic reliance document issues as they arise can only extend the time for completion and increase the cost of arbitration.