

eDisclosure in International Arbitration: A High Level Guide

There is no substitute for reading the relevant rules in detail and appreciating the relevant procedural rules applicable to the jurisdiction within which the arbitration is seated. This note is not intended as a substitute to those relevant rules but is merely a comparative guide.

NOTE: Most tribunals have general discretion to decide the scope of disclosure in an arbitration. Tribunals, and the parties involved, may supplement international arbitration rules with the Rules set out in this table. When conducting disclosure in arbitrations, parties should confine themselves to narrow and specific document categories to alleviate the associated costs of eDisclosure.

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International Arbitration Rules

IBA Rules

The IBA Rules are intended to supplement any institutional or other arbitration rules that have been adopted by the parties – the IBA Rules can be incorporated into the arbitration agreement or agreed for use in arbitration at the stage the parties discuss the first procedural order and the timetable (IBA Rules, Preamble, 2).

- ▶ The IBA Rules are typically applied in a flexible manner to suit the particular proceedings.
- ▶ The IBA Rules address all forms of evidence, including witness and expert evidence.
- ▶ The IBA Rules are frequently adopted by tribunals as guidelines for the management of evidence in an arbitration, including disclosure and the production of documents.
- ▶ The preamble of the IBA Rules states that each party is entitled to know reasonably in advance of any evidentiary hearing or any fact or merits determination and the evidence on which the other parties rely (IBA Rules, Preamble, 3).
- ▶ Key provisions within the IBA Rules regarding document production include:
 - ▶ **Document definition:** A “document” means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means (Definitions, IBA Rules).
 - ▶ **Production timing and means:** *Consultation on Evidentiary Issues (Article 2)*: Addresses the timing and means of the tribunal’s and parties’ production of documents in arbitration proceedings, which should take place at the earliest appropriate time in the proceedings so that an efficient, economical and fair processes can be agreed.
 - ▶ **Production form:** *Documents (Article 3)*: Addresses a suggested outline for production, including the form the requests should take, as well as the information required for a request.
 - ▶ **Admissibility and Assessment of Evidence:** *(Article 9)*: Addresses the tribunal’s powers in relation to the admissibility and assessment of evidence, together with any grounds on which a request for document production may be opposed. Article 9 also addresses privilege and confidentiality, and provides for sanctions where a party does not comply with document production.

CIArb Protocol

The CIArb Protocol considers the parameters exercised by the parties when requesting the production of electronic documents, and by the tribunal if it is making an order for production.

- ▶ The CIArb Protocol can be incorporated into an arbitration agreement or used in an existing dispute¹.
- ▶ The CIArb Protocol considers electronic disclosure at an early stage of the proceedings to avoid unnecessary cost and delay.
- ▶ The CIArb Protocol aims to streamline the scope and parameters of electronic disclosure.

¹ Preamble to CIArb Protocol.

CPR Protocol²

The International Institute for Conflict Prevention & Resolution's (CPR Institute) Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (CPR Protocol)³ notes that voluminous e-disclosure can be costly and burdensome and should be granted only upon a showing of extraordinary need.

- ▶ The CPR Protocol sets out four alternative models for disclosure of electronic documents (*Schedule 2*):
 - ▶ **Model A:** No disclosure, other than the disclosure, prior to the hearing, of electronic information that each side may rely on to support its claims or defences, presented in reasonably usable form.
 - ▶ **Model B:** Disclosure provided for under Mode A together with (1) disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] of designated custodians; (2) provision only of information created between the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration; (3) disclosure of information from primary storage facilities only; (4) no disclosure of information other than reasonably accessible active data; and (5) the disclosure shall be limited to electronic information that is relevant and material to the outcome of the dispute and for which the requesting party can demonstrate a substantial need, subject to limitations of reasonableness, duplication, proportionality, and undue burden.
 - ▶ **Model C:** Same as Mode B, but covering a larger number of custodians [specify number] and a wider time period [to be specified]. The parties may also agree to permit upon a showing of special need and relevance disclosure of deleted, fragmented or other information difficult to obtain other than through forensic means.
 - ▶ **Model D:** Disclosure of electronic information that is relevant to any party's claim or defence, subject to limitations of reasonableness, duplication, proportionality, and undue burden.
- ▶ Parties selecting Modes B, C, or D must agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure.
- ▶ *Section 1(d) of the CPR Protocol* gives guidance on disclosure of electronic information, including General Principles, Modes of Disclosure, and Preservation of Electronic Information.

United National Commission on International Trade Law (UNCITRAL) Arbitration Rules

The UNCITRAL Arbitration Rules (2010 and 2013) ("**UNCITRAL Rules**") can be adopted in any arbitration and are often adopted in ad hoc arbitrations. The UNCITRAL Rules can be adopted into an arbitration agreement.

- ▶ **Production Framework:** *Article 3 of the UNCITRAL Rules* provides a suggested framework for the production and use of documentary evidence in an arbitration, including how document production requests could be managed by the tribunal and the parties. In particular:
 - ▶ Parties should disclose documents upon which they rely (*Article 3(1)*).
 - ▶ Where a request to produce a document is made, it must contain a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that is reasonably believed to exist. Insofar as electronic documents are concerned, the requesting party, or the arbitral tribunal, may order the requesting party to identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner (*Article 3(3)*).
 - ▶ Documents that a party maintains in electronic form should be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients (*Article 3(12)(b)*).
 - ▶ To ensure de-duplication and the requirement to only review one iteration of each document, a party is not obliged to produce multiple copies of documents that are "essentially identical" (*Article 3(12)(c)*).

² CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

³ https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-disclosure-of-documents-presentation-of-witnesses-in-commercial-arbitration/_res/id=Attachments/index=0/Protocol%20on%20Disclosure%20of%20Documents%20&%20Presentation%20of%20Witnesses%20in%20Commercial%20Arbitration%20Revised%202021.pdf

United National Commission on International Trade Law (UNCITRAL) Arbitration Rules⁴

Continued

- ▶ **Admissibility and Assessment of Evidence:** *Article 9 of the UNCITRAL Rules* addresses the possible questions about the admissibility and assessment of evidence (which includes electronic disclosure).
 - ▶ A tribunal can exclude evidence on grounds of “unreasonable burden to produce” (*Article 9(2)(c)*).
 - ▶ Evidence that can be shown to have been destroyed or lost does not need to be produced (*Article 9(2)(d)*).
 - ▶ Evidence may be excluded from production on grounds of procedural economy, proportionality or fairness and equality of the parties (*Article 9(2)(g)*).
- ▶ **Order to Produce:** The UNCITRAL Rules provide that the tribunal may at any time during the proceedings require the parties to produce documents, exhibits or other evidence within such period of time as the tribunal shall determine (*Article 27(3)*).
- ▶ **Conduct of Proceedings:** *Article 2 of the UNCITRAL Rules*, addresses how and when the tribunal and parties should address the organisation of document production, in particular the scope, timing and manner of document production.

⁴ <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf>.

Arbitral Body	London Court of International Arbitration (LCIA) Rules ⁵	International Chamber of Commerce (ICC) Rules ⁶	International Centre for Settlement of Investment Dispute (IC SID) Rules ⁷
<p>eDisclosure Requirements</p>	<p>Article 15(2), 15(3), 15(4) and 15(5) of LCIA Rules requires parties to submit all documents relied upon.</p> <p>Article 14.4 requires parties to agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal.</p> <p>A large scope of discretion is given to the arbitral tribunal to order parties to produce relevant documents in their possession, custody or power which the arbitral tribunal decides to be relevant (Article 22.1 (v)).</p>	<p>Documents should be limited to documents or categories of documents that are relevant and material to the outcome of the case (2017 and 2021 Rules, Appendix IV, paragraph (d)).</p>	<p>Documents should be limited to documents or categories of documents that are relevant and material to the outcome of the case (2017 and 2021 Rules, Appendix IV, paragraph (d)).</p>
<p>Rules</p>	<p>London Court of International Arbitration (LCIA) Rules 2014 & 2020</p>	<p>The International Chamber of Commerce (ICC) Arbitration Rules 2017 & 2021</p>	<p>ICSID convention, Regulations and rules</p>
<p>Document Production Process</p>	<p>Parties to arbitration under the LCIA Rules can agree to apply international guidelines, i.e. IBA Rules/CI Arb Protocol for E-Disclosure in Arbitration⁸ to the production process.</p>	<p>A specific set of eDisclosure rules are not necessary (per the ICC Commission Report, Managing E-Document Production (“ICC Report”)).</p> <p>However, the ICC Report notes that the following techniques and considerations should be employed in any eDisclosure exercise in arbitration:</p> <ul style="list-style-type: none"> › Scope/volume of documents; › Appropriate preservation of documents; › Effective searching parameters (i.e., keyword or concept searches, specific custodians, document types, identification of privilege content etc.); › Cooperation between the parties regarding searching parameters; › Assistance from IT experts/individuals familiar with the document source systems subject to searches; › Costs of the edisclosure exercise and the provision of the documents to the other party; › Effective format for production. 	<p>Tribunals often organise requests for production of documents in a “Redfern Schedule.”</p> <p>This Schedule contains four columns with respect to document requests:</p> <ul style="list-style-type: none"> › Document/category identification; › Reason for each request; › Summary of any objections by the other party to the production/categories of documents requested; › The tribunal’s decision on each request.

⁵ https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx

⁶ <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>

⁷ https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf

⁸ Chartered Institute of Arbitrators’ Protocol for E-Disclosure in Arbitration

Arbitral Body	London Court of International Arbitration (LCIA) Rules ⁵	International Chamber of Commerce (ICC) Rules ⁶	International Centre for Settlement of Investment Dispute (IC SID) Rules ⁷
Order to Produce	<p>Article 22.1(v)</p> <p>The Tribunal can order any party to produce documents or classes of documents in their possession, custody or power.</p>	<p>Article 25(1), 2017 and 2021 Rules</p> <p>The tribunal has authority to establish the facts of the case by all appropriate means (Article 25(1), 2017 and 2021 Rules), and therefore the tribunal has the authority to order the production of documents it considers important to the arbitration.</p>	<p>Article 43, ICSID Rules</p> <p>The tribunal can call upon parties to produce documents or other evidence, except as the parties otherwise agree. If any party fails to cooperate, an adverse inference may be drawn by the tribunal, who may make an adverse cost award.</p>
Conduct of Proceedings	<p>Article 14</p> <p>Parties can agree on suitable procedures and, unless otherwise agreed by the parties, the tribunal has discretion over the procedures used. to the production process.</p>	<p>Article 22.1, 2017 and 2021 Rules</p> <p>Under the 2017 and 2021 ICC Rules:</p> <ul style="list-style-type: none"> › The tribunal and the parties must “Make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute”. (Article 22.1). › To control the time involved and the associated costs of eDisclosure, the tribunal must consider avoiding requests for document production when appropriate. › The tribunal must “act fairly and impartially and ensure that each party has a reasonable opportunity to present its case” (Article 22(4)), including holding a case management conference at which the tribunal will consider whether the case management techniques set out in Appendix IV of the ICC Rules should be adopted (Article 24.1, 2017 ICC Rules; Article 22.2, 2021 ICC Rules). 	<p>Article 34, Rule 29 ICSID Rules</p> <p>Parties can agree on suitable procedures, otherwise the tribunal has discretion over the procedures used.</p> <ul style="list-style-type: none"> › The parties are required to provide the tribunal with any information to clarify the issues in dispute (Rule 29(2)) › The parties must provide documents, and other information, at any stage of the proceedings (Rule 29 (2)). › The parties are required to cooperate, particularly where the tribunal requests the parties to furnish all relevant documents, information and explanations, as well as the means of their disposal in order to enable the tribunal to hear witness and expert evidence Rule 29.
Data Protection	<p>Article 30A, 202 Rules</p> <p>With the parties, the tribunal can consider adopting any specific security measures to protect the physical and electronic information shared in the arbitration; and any means to address the processing of personal data produced or exchange in the arbitration in light of applicable data protection or equivalent legislation. The tribunal can issue directions addressing information security or data protection, which shall be binding on the parties and on members of the tribunal.</p>		

Requirements

Preserving electronic documents

When should documents be located?

Sources of Electronic Documents

Cost Considerations

General Requirements

Unlike in UK litigation, there is no obligation to preserve potentially relevant documents as soon as an arbitration is contemplated or becomes apparent. However, adverse inferences will be drawn by the Arbitration Tribunal where parties fail to produce documents that a party has been ordered to disclose.

NOTE: Where the IBA Guidelines are being relied upon, Article 12 requires parties to preserve, so far as reasonably possible, relevant documents, including electronic documents that would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business.

Both the CIArb Protocol⁹ and the CPR Protocol address the issue of preservation of documents once an arbitration has commenced.

The proportionality of document location, the volume of documents, and the cost involved in collecting documents should be considered in any arbitration. In addition, parties should consider the categories of documents sought from the other side. Parties may be ordered to produce categories by the tribunal.

In many instances, the issues to be arbitrated may not become evident until an initial document review exercise is underway – this is why document preservation is such an important requirement. Therefore categories and sources of documents should be considered at the following stages:

- › As soon as arbitration becomes apparent, documents on which are relevant to the parties' pleaded cases should be located.
- › Further statements of case will be accompanied by supporting documents.
- › Tribunals may order additional documents to be disclosed (at a set date), particularly where new document sources become apparent.
- › Parties in international arbitration may request particular categories of documents from their opponent(s). Any required document searches will be contingent on the specific request, as well as any order made by the tribunal.

An initial step for any parties involved in an arbitration is to interview individuals/custodians. Ideally, written questionnaires should be maintained for any interviews conducted. The interviews should address particular documents (both hard copy and electronic), as well as date ranges, document volumes, and document sources.

IT departments should be consulted with respect to back-ups, retention and document-collection facilities. For any eDisclosure exercise, electronic documents must have their metadata maintained and unaltered.

Primary document sources include:

- › Hard copy/scanned documents
- › PCs
- › Notebooks/Laptops
- › Back-up tapes/Archives
- › Off-site storage
- › Mobile phones/Handheld devices
- › Portable media devices/external hard drives/USB keys
- › Email servers
- › File servers
- › Document management systems
- › Accounting systems
- › Web servers
- › Proxy servers
- › Web-based applications
- › Cloud storage and retrieval systems
- › Active/online/cloud data
- › Residual data/deleted documents/carved data
- › Temporary/deleted files

Early cooperation between the parties with respect to document sources, custodians, date ranges, volumes, and relevant keywords will assist in managing the costs of any eDisclosure exercise.

Cooperation regarding search proportionality should also be considered, including applicable search parameters and keyword application.

Article 1.3(vii) of the CIArb Protocol (Article 1 – Early consideration) provides that at preliminary stages of the arbitration, the parties and the tribunal should consider the most appropriate tools and techniques to reduce the burden and cost of eDisclosure, including:

- › limiting disclosure of documents or certain categories of documents to particular date ranges or to particular custodians of documents;
- › the use of agreed search terms (keywords and keyword strings);
- › the use of agreed software tools;
- › the use of data sampling; and
- › the format and methods of eDisclosure.

Where eDisclosure costs are significant, and disproportionate, the tribunal will consider the weight of the evidential value of the documents against edisclosure costs for the producing party. Article 3.2 CIArb Protocol provides that, without a particular justification, it will not normally be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations.

⁹ Article 1 of the CIArb Protocol provides that: "In any arbitration in which issues relating to e-disclosure are likely to arise the parties should confer at the earliest opportunity regarding the preservation and disclosure of electronically stored documents."

Requirements

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Sources of Electronic Documents

Cost Considerations

General Requirements -
continued

In-scope document sources within these primary sources will include

- > Database files
- > Financial files
- > E-mail/messages
- > Instant messenger
- > Mobile messenger (i.e., text messages; WhatsApps, etc.)
- > Document files (word / PDFs/ Text files)
- > Spreadsheets
- > Calendar entries
- > Graphics and presentation files
- > Project files
- > AutoCAD drawings
- > Compressed files
- > Backup files
- > Photo / Image files
- > Multimedia files: Audio and video


A party making such a request will be required to demonstrate that the relevance and materiality outweigh the costs and burdens of retrieving and producing the same.

Timeline

At the earliest opportunity, parties should preserve documents upon which they seek to rely. Adverse inferences will be drawn by the tribunal where evidence has not been preserved.

Unless agreed by the parties, timelines may be set by the tribunal.


Early cooperation is required between the parties. Costs will be considered with the tribunal's input.

Phase		Requirement
Dispute arises	<p>Stage 1: Initiating an Arbitration</p> 	Claimant requests for and submits the dispute to arbitration – this may be to a specific arbitrator, or an arbitral institution ¹⁰ .
Commence Arbitration		Claimant sends “request for arbitration” / “notice to arbitrate” to the other party. .
Determine Arbitration Rules		The parties agree on an arbitrator or the arbitration may be conducted in accordance with rules of a particular arbitration institution (please see a summary of the disclosure rules in the table above), which will prescribe what should be included in the notice to arbitrate.
Response from opposing party		The other party has an opportunity to respond within a set period of time, and in some instances, to select an arbitrator.
Arbitrator accepts appointment		Preliminary meeting at arbitrator’s request. This may be a joint session with everyone present or may be conducted via video conference.
Consultation with the Tribunal		<ul style="list-style-type: none"> › Tribunal formally consulted¹¹ › Issues for determination are confirmed ¹² › Arbitration process and timeline determined by the parties and the tribunal. At this stage, the requirement to use any eDiscovery or technical assistance should be confirmed by the parties and the tribunal.
Arbitrator Issues Directions on Conduct		<ul style="list-style-type: none"> › The arbitration commences in line with the procedures adopted. › Virtual / In-Person Arrangements Determined <p>Procedures for the following requirements are set:</p> <ul style="list-style-type: none"> › Written submissions › Written witness statements › Expert reports › Disclosure › The use of technology for document review <p>Arrangements for the arbitration including hire of venue and travel arrangements or technical setup for virtual hearings is usually organised by the parties with or without the assistance of an arbitral institution.</p>

¹⁰ The choices may be set out by way of pre-contractual term in the agreement that has given rise to the dispute.


¹¹ In a two party dispute, typically each party will select an arbitrator, with the nominees/arbitration institution selecting a third as chair. Note, the arbitration agreement or the arbitral institution's rules may set out the appropriate approach to selecting the tribunal where additional arbitrators are sought.

¹² Issues of fact / law / quantum

Phase		Requirement
Pleading Submissions	<p>Stage 2: Initiating an Arbitration</p> 	Claims / counterclaims and response to counterclaim.
Disclosure and preparation of agreed documents.		Disclosure requirements will be guided by the specific arbitral body, or arbitration rules adopted by the arbitral body. There will be an emphasis on the parties working together. Please see the Practical Considerations section below.
PRACTICAL CONSIDERATIONS		
Practical Steps when Searching for documents		Making document accessible
	Collecting electronic documents	<p>Ensure that IT personnel can appropriately self-collect in a defensible manner or where necessary, ensure that an ediscovery/edisclosure vendor with the requisite expertise is engaged for the document collection process. Data collection is perhaps the most technically rigorous and complex of any phase involving electronic documents in an arbitration. Collection involves the extraction of potentially relevant electronically stored information (ESI) from its native source into a separate repository. Because collection involves direct interaction with data, most people think of it as principally an IT activity. However, an effective collection strategy demands active combined involvement of both legal and IT professionals.</p> <p>Common categories of data sources in-scope for collection will include:</p> <ul style="list-style-type: none"> › Active data - data that parties interact with on a regular basis, such as email and other traditional files that are stored on a local hard drive or network drive. This ESI tends to be fairly easy to access and collect); › Cloud data - Data created and stored on cloud servers, ranging from software as a service applications to Google Drive and social media accounts, have grown exponentially in the past several years. Cloud providers have their own policies for accessing data, but an ediscovery/edisclosure vendor will have the ability to integrate with many of the most popular cloud services to assist with effective collection. › Mobile data - Collecting data from mobile devices often requires sophisticated tools and highly specialised expertise, often requiring external consultants. as more and more parties have embraced bring your own device (BYOD) policies, they have to be prepared to preserve and collect ESI from call logs, text messages, instant messaging, geolocation data, and other applications. › Offline data - Data that is no longer in active use but is stored or archived. Even though offline data cannot be accessed over a shared server, collecting it usually presents fairly minimal challenges as long as the physical location of the data and the system on which it's stored is known. › Backup data - Traditional backup tapes or disaster recovery systems are designed to store data in the event that it must be restored. These systems compress files and are not easily searchable or accessible and therefore they tend to present significant collection hurdles. › Hidden data - Previously deleted or fragmented files that exist on various systems and are usually not readily visible to regular system users. These files are highly inaccessible, and attempting to recover them requires specialised tools.

Phase		Requirement	
Practical Steps when Searching for documents... Continued	Stage 2: Initiating an Arbitration.. <i>Continued</i>	Filtering / Processing electronic documents	<p>To ensure efficiency and eDisclosure cost management, document filtering should be proportionate to allow parties capture relevant information, without setting the parameters too narrow. Filtering methods should be discussed between the parties at the earliest opportunity, with a view to agreeing the filtering parameters of collected documents, as well as applicable date ranges. This approach tends to avoid later disputes about whether the search criteria was adequate. To avoid disputes about the applicable filtering methodology at any stage of the arbitration, it is best practice to keep an audit log of the filtering criteria applied, as well as the reasons.</p> <p>Standard Filtering Methods</p> <ul style="list-style-type: none"> > DeNIST: DeNIST is a list of common system files compiled by the National Institute for Standards and Technology. De-NISTing is the process of removing all so-called system files that are deemed to have no evidentiary value, like executables, OS Files, DLLs, etc. > De-duplication: Duplicate documents should be removed to avoid the time and cost of reviewing them. <ul style="list-style-type: none"> ▶ de-duplication only occurs where two electronic copies of a document are identical. It is possible to run a near-duplicate analysis and suppress documents that are almost identical. ▶ Global de-duplication vs. custodian de-duplication: In global deduplication, documents are de-duplicated against every document within the data set. In custodian deduplication, documents are de-duplicated against every document within the data set which belongs to a unique 'custodian'. Each custodian then has a unique copy of the same document. If a record has been kept of the de-duplication process, such items can be reinstated if necessary. ▶ De-duplication does not remove email threats – it is best to apply email threading and keep the most inclusive email. > Email threading: Email threading groups a string of related emails together in a chain. Legal teams can eliminate the whole chain at once if immaterial. > Custodian Filtering: Filtering by reference to author or custodian. If de-duplication has been carried out and a duplicate e-mail is removed from the document set of every custodian but one, that one custodian's email will be reviewed. > Date Range Filtering: Date ranges relevant to the categories for disclosure should be identified. > File-type filtering: Parties should determine a set of file types that can be excluded from the document review pool. Documents should be segregated by their file types, based on disclosure requirements. For example, audio and video files may need to be isolated for later review. Many computer operating systems identify the type of file using a three-character suffix and documents that are less likely to be relevant (because they are computer generated, rather than created by a custodian) can be excluded as they are unlikely to render relevant content, i.e. ".exe", ".bat", ".sys" and ".ocx". > Keyword filtering: In advance of applying keywords or keyword strings to identify relevant content, keywords should be used to suppress not relevant content. Generic emails or mass emails should be isolated and taken out of review circulation. Documents containing text such as "Do not reply" or "Out of Office" should be filtered in advance. Keyword searching can also be applied across the contents of documents themselves, for example, to include or exclude documents containing particular words or combinations of words. Ideally, the keywords to be searched should be agreed with the other party, in conjunction with the categories of data sought.

Phase		Requirement	
Practical Steps when Searching for documents... <i>Continued</i>	Stage 2: Initiating an Arbitration.. <i>Continued</i>	Filtering / Processing electronic documents... <i>Continued</i>	<ul style="list-style-type: none"> › Domain filtering: Like a spam filter, searching by known domains can eliminate junk mail, newsletters, and other items that cannot possibly be relevant to your case. › Concept searching: In its simplest form, concept searching is a variation of standard keyword searching that automatically includes synonyms and variants of words (for example, a search for “cars” might also automatically include “automobiles”). › Concept clustering functionality: This method of searching uses linguistic analysis and algorithms to identify key concepts. It groups all documents that fall within those key concepts into one group, which can then be reviewed for the purposes of the arbitration. › Predictive coding: Predictive coding is court-approved method Technology Assisted Review (TAR) - also known as computer-assisted review (CAR)). It is used to train a computer algorithm to recognise relevant documents within an eDisclosure dataset, thereby eliminating the requirement to review all documents in a review pool. Predictive coding uses expert reviewers to train documents (meaning the documents are coded or tagged), thus allowing the algorithm to identify documents that are most likely relevant. A human reviewer then reviews these relevant documents. This creates an iterative cycle of prediction and analysis, which is run over other documents within the review corpus to predict accurate coding outcomes. Documents that have been trained by TAR to not respond to relevant criteria can be deemed not relevant, thereby excluding them from review. In practice, a sample of these not relevant documents will be evaluated to “validate” the algorithm’s scoring accuracy. Predictive coding and exact methodologies used in the process will vary from one eDisclosure provider to the next. Versions of TAR have an associated number: TAR 1.0, TAR 2.0 and, more recently, TAR 3.0. Each TAR version comes with its merits, therefore a comprehensive understanding of the underlying process and technology is required in selecting the correct TAR model suited to each particular eDisclosure exercise. <p><i>Not all of these efforts are just aimed at removing files. Some of your filtering can be used to identify places where evidence might be hidden. For example, text can be hidden in image files or scanned document TIFFs and may be relevant for review.</i></p>
		Hard copy documents	Many eDisclosure providers provide software that can convert hand-written documents into extracted text. In addition, hard copy documents can undergo optical character recognition (“OCR”) and their text extracted so that the text responds to keyword searches.
		REVIEWING ELECTRONIC DOCUMENTS	
		Categorisation	Once an eDisclosure dataset has been filtered (using methods described in Filtering electronic documents, above), pre-review categorisation is a helpful way of assessing privileged documents en masse, as well as categorising documents that respond to relevant keywords. Conceptual searching can be used to assess relevant documents that do not respond to keywords. Many Early Case Assessment tools are available that offer clustering, sentiment analysis, email correspondence interaction analysis, and document themes. Visual analytics can be used to categorise documents so that the review pool is reduced by the time the documents are promoted to the review platform.

Phase		Requirement	
Practical Steps when Searching for documents... <i>Continued</i>	Stage 2: Initiating an Arbitration.. <i>Continued</i>	Categorisation... <i>Continued</i>	Preliminary pre-tags may be applied in the following way: <ul style="list-style-type: none"> > Potentially Privileged: Documents containing law firm email addresses for example, could be pre-categorised with a “potentially privileged” tag and isolated into a saved search for later review. > Relevant keywords: Documents that respond to one or more categories of disclosure may be isolated into streamlined searches, per request. > Conceptually relevant documents: Conceptual documents identified as being relevant to certain disclosure categories may be isolated into streamlined searches, per request.
		Tagging Tree / Layout setup	The tagging tree/layout can be set up to include information such as the document type, the custodian, the document’s metadata etc. Tagging trees can be set up in accordance to the tier of review to which it relates, for example: <ul style="list-style-type: none"> > First Level Review > Second Level Review > Privilege Review > Quality Control Review > Privilege Review > Redaction Review Layouts can include helpful comments boxes to allow reviewers input their assessment, in addition to tagging a document as relevant.
		PRODUCING ELECTRONIC DOCUMENTS	
Producing Electronic Documents		Timing of document production	Delivery of document production requests will depend very much on the circumstances of the arbitration, and the directions of the tribunal. There very often will be more than one round of document production. An initial production will take place after submissions have been filed. Where an arbitration contains large volumes of documents, the document review exercise may take time and productions may occur in tranches. Further considerations, such as the format for production will need to be considered in any production timetable. Parties should factor these considerations into any production timetable agreed, and discussed with the tribunal, so that a realistic timetable can be put in place.
		Privileged documents	Privileged documents should be omitted from a disclosure. Parties should be mindful that the scope of privilege varies according to the jurisdiction ¹³ .

¹³ The CIArb Protocol suggests that parties may wish to consider reaching an agreement on the treatment of inadvertent waiver of privilege (article a.3(viii), CIArb Protocol). Section 1(b) of the CPR Protocol (applicable to both hard copy and electronic disclosure) provides that, unless there has been an express waiver of privilege, inadvertently disclosed privileged documents may not be introduced in evidence and must be returned immediately.

Phase	Requirement	Requirement	Requirement
Producing electronic documents... <i>Continued</i>	Stage 2: Initiating an Arbitration.. <i>Continued</i>	Different formats for production	Most productions take one of three forms: TIFF/text, searchable PDFs, or native form productions. <ul style="list-style-type: none"> › Native format Documents provided in native format requires no additional time, effort, or money to produce, as files don't have to be converted, translated, or imaged. Native production should always include complete and unchanged metadata. Documents such as video files, audio files, and excel files will always be produced in native format. › Image format The document is converted into a set of images of each page of each document. These images are usually provided in TIFF images or PDF files. <ul style="list-style-type: none"> ▶ TIFF: TIFF is an acronym for tagged image format file. It is a common graphic file format and the extension related to this format is .tif. In a TIFF production, all documents are converted from their native format to black and white, single-page .tif files. It is as if a "picture" of the ESI is taken such that it appears to the end user in the same way one would view it on screen or if printed. For each record, document level text, an image (.opt) load file, and a metadata (.dat) load file is provided. By producing the image with the accompanying extracted text and metadata in load files the image is viewable and searchable in a review tool. Although converting native files to .tif involves a cost, the advantages of an image production include the ability to number, redact and mark documents as confidential, as well as the ability to control the metadata fields that are produced. Imaged files also carry less risk of accidental alteration because they are not capable of being edited. › Text/Searchable PDF Production: A searchable PDF is effectively the same as a .tif production. However, rather than simply exporting the converted images to a review tool, the images are converted to PDFs and then OCR'd to incorporate searchability. Often one requests PDFs if they plan on reviewing the production outside of a review tool. However, even an OCR'd PDF can suffer from incomplete and imprecise search functionality - PDF productions are therefore less desirable than a .tif.
		Production format considerations	The arbitral bodies' rules, as well as any rules adopted in the arbitration, should be checked in advance of any production ¹⁴ . Typically, production formats should be discussed and agreed between the parties at the earliest opportunity. Where agreement cannot be reached regarding the production method, the tribunal will decide the production method ¹⁵ . Significant production considerations should include: <ul style="list-style-type: none"> › Cost: Converting native files to image format can be expensive to create and the quality of the document may be affected by imaging. Imaging, however, controls the amount of metadata disclosed.

¹⁴ Under the ICDR Rules 2021, the producing party may make documents available in the most convenient and economical form, unless the tribunal determines that there is a compelling need for access to the documents in a different form (article 24.6). Paragraph 4 expressly envisages that the most convenient and economical form may be paper copies. Article 3(12)(b) of the IBA Rules provides that unless the parties have agreed otherwise, or the tribunal orders it, documents in electronic form should be submitted or produced "in the form most convenient or economical to it that it is reasonably usable by the recipients". This approach is endorsed in the ICC Commission Report (paragraphs 5.24-5.25).


¹⁵ The CIArb Protocol envisages that electronic documents will normally be ordered to be produced in native format or "in a reasonably usable form", although the requesting party can request production in some other form (article 4.1, CIArb Protocol).

Phase	Requirement		
Producing electronic documents... <i>Continued</i>	Stage 2: Initiating an Arbitration.. <i>Continued</i>	Production format considerations ... <i>Continued</i>	<ul style="list-style-type: none"> › Compilation of Production methods: In practice, electronic documents will very often be produced in a combination of image and native formats. For example, excel spreadsheets will invariably be produced in native format. Redacted documents that would otherwise have been disclosed as natives, will be imaged.
			<p><i>The format in which documents are to be produced may include metadata (or some metadata). If a party requires additional metadata, the requesting party will normally have to persuade the tribunal that the relevance and materiality of the requested metadata outweighs the cost and burden of producing it¹⁶</i></p>
EXCHANGE FORMAT			
		Production format	<p>Large Production Sets:</p> <ul style="list-style-type: none"> › External Hard Drive › Secure File Transfer Portal (SFTP) <p>Smaller Data Sets:</p> <ul style="list-style-type: none"> › USB › DVD › Secure File Transfer Portal (SFTP)
		Failure to produce documents	<p>Tribunals is entitled to draw adverse inferences where parties fail to produce documents without a satisfactory explanation - this may have an adverse cost implication for the producing party¹⁷.</p> <p>Typically tribunals will sanction the non-producing party only where they appear to have deliberately or carelessly flouted an order of the tribunal, with a view to affecting the outcome of the arbitration.</p>
COST CONSIDERATIONS			
		Costs	<p>The cost of retrieving and producing documents normally forms part of the parties' legal costs, to be allocated at the end of the arbitration in the usual way. However, in the case of electronic disclosure, a tribunal may consider ordering a party who has requested production of particular documents to bear the producing party's costs. In practice, costs shifting orders are most likely to be made where the requested production may be disproportionately expensive (for example, as may be the case in relation to production involving retrieval of back-up tapes, deleted data and perhaps metadata). Some arbitration guidelines and rules contain express provisions addressing tribunal powers in connection with costs of document production¹⁸.</p>

¹⁶ The CPR Protocol contains an express provision with respect to metadata, "A party requesting disclosure of metadata in respect of electronic documents shall be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing the same, unless the documents will otherwise be produced in a form that includes the requested metadata" (article 4.2, CIArb Protocol). The ICC Commission Report suggests that tribunals should consider applying a presumption against requiring the production of hidden metadata, unless the requesting party establishes a degree of relevance and materiality that outweighs the burden and costs involved (paragraph 5.11).

¹⁷ article 3.2, CIArb Practice Guideline: Managing Arbitrations and Procedural Orders - <https://www.ciarb.org/media/4198/guideline-6-managing-arbitrations-and-procedural-orders-2015.pdf> (sanctions for non-compliance); article 5.5, CPR Protocol; article 24.9, ICDR Rules 2021; and article 9(6), IBA Rules

¹⁸ Article 5.1 of the CIArb Protocol provides that: "The Tribunal shall consider the appropriate allocation of costs in making an order or direction for e-disclosure"; Section 1(e)(2) of the CPR Protocol provides that: "Where the costs and burdens of disclosure requested are likely to be substantial in comparison to the amount in dispute or the need for the information to aid in resolving the dispute, the tribunal should ordinarily deny such requests. If extraordinary circumstances justify production of the information, the tribunal should condition disclosure on the requesting party's paying to the requested party the reasonable costs of a disclosure (with such costs subject to reallocation upon issuance of the final award)."; Article 24.8 of the ICDR Rules 2021 provides that: "In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award."

Phase		Requirement
Hearing date set	<p>Stage 3: The Hearing</p> 	Hearing in person / Virtual Hearings
Technology considerations		<ul style="list-style-type: none"> › Witness locations and time zones › Remote hearing platform (and appropriate technical support), methods of document presentation. Appropriate platform test sessions should be held. › Appropriate A/V hardware and software › Waiting rooms and break-out rooms › Backup platform / backup procedures › Cybersecurity › Venues/locations › Stenographers / Transcription › Interpreter(s)
Hearing held		<p>All parties, representatives, witnesses, experts will be in attendance, alongside the arbitrator(s).</p> <p>The length of the time for hearing will depend on the matter and issues being arbitrated.</p>
Hearing date set	<p>Stage 4: The Award</p>	<p>At the end of the arbitration hearing, the arbitrator will make an award. If the arbitration rules do not prescribe a timeframe for the award, it may be set by agreement between the parties and the arbitrator. The award includes the decisions the Tribunal head reached on the issues before it. The award determines the rights and obligations of the parties</p>
If non compliance		<p>Action for enforcement or challenge of or to award.</p>



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