Reliance Document Management

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I. INTRODUCTION

The reputation of arbitration has suffered as the cost and time to complete complex cases have increased. International commercial arbitration has in many cases become less efficient and less effective. One of the most important tasks in the organization of efficient proceedings is the management of documents. The arbitral tribunal can make a significant contribution to fairness and efficiency by establishing ground rules 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 is a key element in minimizing costs and delay. The parties tender the documents that will be relied upon to prove their case. In addition, documents will be produced in response to discovery requests or as exhibits to expert reports. The concern is typically not that a party discloses too few documents but rather that there are too many documents that are tendered in a disorganized fashion.

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1. Stephen JAGUSCH, "Organization and Presentation of Documents to the Tribunal", Chapter 11 in Doak BISHOP and Edward G. KEHOE, eds., *The Art of Advocacy in International Arbitration*, 2nd edn. (Juris Publishing 2010).

The parties must be treated equally and be given a full opportunity to make their own case and know the case to be met. These objectives can be imperiled where documents are not presented in a concise or coherent fashion or where documents are not tendered in time to allow an adequate opportunity for response.

The arbitral tribunal should issue 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 requirements for tendering Reliance Documents, the need for authentication of documents, the process for challenges to disputed documents as well as expectations in respect of confidentiality of productions.

II. RELIANCE DOCUMENTS

There are four stages in an arbitral proceeding when Reliance Documents might be tendered:

(1) accompanying pleadings;
(2) discovery disclosures;
(3) attachments to witness statements and expert reports; and
(4) documents used for impeachment purposes.

1. Documents Filed with Pleadings

The offset to very limited discovery being available in international commercial arbitration is the early disclosure of all Reliance Documents. Statements of Claim, Defence and Reply are commonly accompanied by Reliance Documents. The Rules of the London Court of International Arbitration (LCIA), for example, 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 Arbitration Rules of the United Nations Commission of International Trade Law (UNCITRAL) provide that pleadings should as far as possible be accompanied by all documents relied upon.[3]

Under the heading "Documents on Which a Party Relies", the Guidelines for Arbitrators Concerning Exchanges of Information published by the International Centre for Dispute Resolution (ICDR) recommend that: "Parties shall exchange, in advance of the hearing, all documents upon which each party intends to rely."

The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration 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

2. LCIA Arbitration Rules, Rule 15.6.
3. UNCITRAL Arbitration Rules, Art. 20.

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 that Reliance Documents be exchanged in advance of the hearing, 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 objectives for the tribunal at the preliminary hearing is to encourage counsel to apply their minds to documents early on. 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 the arbitration proceeding.

The arbitral tribunal should be proactive to clarify procedures for the tendering of Reliance Documents and should seek the agreement of the parties regarding the nature, form and timing of document deliveries. The IBA Rules, whether adopted in full 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 should be made available for inspection.

At the pleadings stage the parties should be encouraged to restrict productions to those documents that are relevant and material. In this context the requirement for 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 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 other coherent fashion 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 for 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 tribunal. The first step is simple moral suasion and the final step may be cost consequences for document productions that are 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.

Arbitrators take different approaches to reviewing Reliance Documents. Some arbitrators read all documents that accompany pleadings well in advance of the hearing

4. IBA Rules on the Taking of Evidence in International Arbitrations, Art. 3.

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 may read all of the documents that accompany pleadings, witness statements, expert reports and written briefs unless told to do otherwise. The cost to review unnecessary documents could be substantial. If it is apparent that a party has tendered documents that were not necessary reading or that have increased the time and expense for response or 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 the preliminary meeting address the potential for cost sanctions so that the parties are forewarned and naturally encouraged to limit document productions to necessary documents.

2. Discovery Disclosures

Much has been written about document 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. Such documents may not be listed as Reliance Documents by the producing party. To avoid confusion, a party planning to use documents produced on discovery as Reliance Documents should list those documents as Reliance Documents at some stage of the proceeding. The process for answering 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 a Redfern Schedule will be considered by the parties as sufficient.

The party making discovery disclosures 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. To avoid confusion this matter should be discussed at a preliminary hearing. Each party should have a Master List of Reliance Documents. This list will be condensed when a Common Book of Documents (to be discussed below) is prepared.

The right of a party to prove its claim and to make full answer and defence cannot be restricted. 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 that have been disclosed are listed as Reliance Documents because a party intends to rely upon them. The parties may wish to have 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 that will be used in the hearing, 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 of 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.

3. Witness Statements

Witness statements and expert reports will often have documents attached as exhibits. In theory the documents attached to witness statements should already have been listed as Reliance Documents. The potential for the other party to be caught by surprise is reduced by the opportunity to provide rebuttal witness statements and to comment in briefs that will follow witness statements.

The 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 listing of Reliance Documents. 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 only in unforeseeable circumstances.

The initial Documents Direction might provide that document lists may be supplemented but that a reason must be given for late disclosure and, if prejudice to the other party results, that an adjournment may be required with cost consequences to the party making late disclosures.

4. Documents Used for Impeachment

This is a problematic area. Parties may uncover a topic in the course of cross-examination that calls for impeachment with documents that have not been made part of the record in the proceeding. An objection may be made 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 that the need for the document was not foreseeable and that it is 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 for their own case.

There is no one-size-fits-all solution to problems that arise when 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 to deal with documents produced for the first time in the course of the hearing. Such a direction will restrict late productions except in defined extraordinary circumstances that permit sufficient flexibility for the tribunal to do justice to the party seeking to use an undisclosed document because of unforeseeable circumstances, yet 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 then 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.

III. COMMON BOOK OF DOCUMENTS

While the parties may 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 will be reduced by the parties preparing a common book of documents or core bundle. Mustill and Boyd, 2nd ed. (1989) at p. 327 describe what has come to be known as the core bundle in English practice:

> "Recent experience has shown that the labour of conducting the hearing has been increased, and hence the efficiency of the process has been materially reduced, by the need to man-handle large quantities of copy documents, most of them quite useless, and to keep track of the much smaller number which are really relevant; so much so, that it has now become the practice for each side to isolate a 'working bundle', containing the documents which are likely to be relied upon, and to ignore the 'agreed bundle' altogether."

5. Protocol on Disclosure of Documents in Presentation of Witnesses in Commercial Arbitration, International Institute for Conflict Prevention and Resolution, p. 9. The Protocol can be downloaded from <www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/614/CPR-Protocol-on-Disclosure-of-Documents-and-Presentation-of-Witnesses-in-Commercial-Arbitration.aspx>.

To the fullest extent possible, the parties should be encouraged to list documents to be relied upon in a common book or core bundle 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 hearing and will trust that the parties will cull the necessary documents for actual 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 hearing can quickly turn to the same page of the book to read the same document being referenced by a witness or by counsel.

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration, 3rd ed. (2014) at p. 185 makes the following suggestion:

> "Arbitrators should consider requiring the parties to jointly assemble and submit, as soon after the preliminary conference as feasible, a tabbed and indexed notebook that (depending on the preferences of the arbitrators) can be paper or electronic or both and that contains paginated copies of the key documents in the case (the core exhibits)."

This approach can be improved by starting out with a well-indexed list of Reliance Documents from each side that can be supplemented as the case goes on and that can be reduced shortly in advance of the hearing to a core book of documents that comprises all of the documents that should be reviewed by the tribunal before the hearing starts.

The mechanics of preparing the Common Book of Documents can be fairly straightforward. The claimant will provide a list of core documents. The respondent will add its key documents that have not already been listed. The claimant can add new documents to the list that are necessary to respond to the respondent's key documents. When that process is complete the documents in the book will be assembled, usually in chronological order. Documents listed for the Common Book will have two numbers at the top. The first number will be the order in which the document is listed in the Common Book and the second number will be the number of the same document from the list of Reliance Documents of the party adding the document to the list. Thus the first Tab of the Common Book will have at the top right the number "#1" and beside it the number "Cl. #77", for example. Where the respondent adds a new document to the list or a different version of one listed by the claimant it would be numbered "#122- R. #99", for example, for the 122nd Tab of the Common Book. One of the parties will prepare identical tabbed binders for the tribunal, with another copy to be marked as the formal Exhibit, one for opposing counsel and one copy for use by the witness who is testifying. Everyone will always be looking at the same document that can be easily found and it will not be necessary to mark hundreds of exhibits.

Assembly costs initially would be shared pending final allocation of costs by the tribunal in the final award. At the hearing, the Common Book will be marked as Exhibit A. Other documents that are used at the hearing and that were previously listed as Reliance Documents but not included in the Common Book will be marked as separate exhibits as the case unfolds. Documents attached to expert reports would just be made a part of the expert report that is marked as a separate exhibit.

A party that does not cooperate by either listing too few documents for the Common Book, or by listing too many documents, may attract cost consequences at the end of the day for wasteful or bad faith conduct. The situation of too few documents will become apparent if one party seeks to mark extensive documents as exhibits on the hearing that were not listed by that party for the Common Book. The too many documents situation will become apparent if the Common Book contains excessive documents listed by a party that were not used.

IV. DOCUMENTS THAT ARE NOT USED

Every experienced arbitrator has come across the situation where a documents record is extensive, often filling many volumes, but many documents were not relied upon. Documents may have been contained in the Common Book but not referenced by any witness. There may be many documents in the binders at the end of the hearings that were never mentioned by counsel. What use is to be made of surplus documents that were tendered and made part of the evidentiary hearing record? Should unused documents be pulled from the binders? Would the tribunal err in law (possibly going to a denial of due process such as to imperil the final award under the New York Convention) if the tribunal were to say in the final award that documents that were not referenced by a witness or in argument were not taken into consideration? Must the tribunal members review all tendered documents to ensure that there is no relevant information missed whether or not they were referenced in the hearings or briefs? There are ways to confront this issue in advance. One way is to have the parties enter into a Documents Agreement that deals with whether or not tendered documents serve as proof of the truth of the contents (as discussed below). A recent court case in British Columbia highlighted the problem of unused documents. In *Kim v. Hong*, [2013] BCSC 587 beginning at para. 449 Griffin J. wrote:

> "I wish to make an observation about the volume of documents filed in this case. The parties filed a large number of binders of documents as exhibits during the trial, by agreement. This is a common practice, meant to speed up the hearing of oral evidence during the trial.
>
> With the expectation that the documents were going to be referred to by a witness, or at a minimum, in submissions where the impact of the evidence was agreed, I allowed these volumes of documents to be marked as exhibits. In hindsight, I now consider this to have been less than helpful.
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> Unfortunately there were vast volumes of documents filed as exhibits to which there was no reference by any witness and either no reference in final argument or no agreement as to how they could be interpreted. I presume the documents were filed by counsel just in case they needed them during examination of a witness, but it turned out that they did not refer to many of them. Those documents that were referred to were scattered throughout the numerous binders."

It is apparent from the comments of the judge that she either did not consider or did not give any weight to documents that were not used during the hearings. Is this an error of law that would implicate due process? A hypothetical question might arise in such a case as to whether or not the judge was entitled to find as a fact, for example, that there was no evidence of tax consequences to one of the parties when there was extensive reference to the nature and amount of tax consequences in unused documents.

The unused documents issue was considered by the College of Commercial Arbitrators in the *Guide to Best Practices in Commercial Arbitration*, 3rd ed. (2014), a consensus of the views of many arbitrators, at p. 184:

> "More specifically, an early discussion with the parties regarding what will be done with marked but unmentioned exhibits can best insure (1) that the parties are provided an opportunity to resolve the question by agreement; (2) that none of the parties are later surprised by the fact that such exhibits have been excluded from, or included in, the record; (3) that when such exhibits are not to be included in the record, the parties are able to conform their presentations in a manner that guarantees their ability to introduce all material evidence through a live witness, or if permitted, by mention in prehearing briefing or oral argument; and (4) that disputes do not arise regarding whether the parties were unfairly deprived of an opportunity to be heard with respect to exhibits that were marked by their opponent and included in the record even though not mentioned in the hearing."

V. 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 that 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

1. 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.

VI. 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 Art. 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 (or other Rules that

may be chosen) 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 re-invent the wheel. The tribunal could offer the parties a precedent. A good precedent 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 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 disputes arising out of alleged

6. Debevoise and Plimpton "Annotated Model Arbitration Clause for International Contracts" (2011) p. 42.

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 described by Simon Crookenden in "Who Should Decide Arbitration Confidentiality Issues?" As he notes at p. 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 or review process is concluded.

VII. WHAT CAN THE TRIBUNAL DO TO LIMIT DOCUMENTS?

As already noted, the tribunal cannot restrict a party from reliance upon any document that might assist its case. But there are techniques to limit the volume of the document record and minimize the amount of reading for the tribunal. One way to limit the size of the core bundle or Common Book is to include only relevant excerpts of long contracts or accounting records. The full document can be made available electronically or otherwise if context is needed but for the most part only the relevant clause need be read in advance of the hearing, will be commented upon by a witness or in argument or need be referenced when writing the final award. It would be of immense value to the tribunal if counsel were to use a core bundle or Common Book that can be referenced in written or oral submissions that would allow the arbitrators to move quickly to the necessary and relevant excerpts and thus allow greater continuity when reading briefs. Much time will be saved.

Another device that may assist in document-heavy cases is the use of a secretary to the tribunal. The extra cost is immediately ameliorated by the time saved by a three member tribunal attempting to coordinate or organize massive volumes. Even with a sole arbitrator, who may not be very expert in managing the flow of electronic filings, there can be significant costs savings by the arbitrator employing a skilled assistant.

Should the tribunal discuss with the parties a need for proportionality in the number of documents to be tendered? For a case in which the amount in issue is not large should there be an admonition to the parties that excessive document production disproportionate to the amount in controversy might attract cost consequences?

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7. 25 Arbitration International (2009, no. 4) p. 603.

The tribunal has few tools beyond moral suasion to keep the document binders down to a manageable size. The only coercive tool available is to sanction a party in costs where there are excessive unused documents of marginal relevance, where there have been disorganized disclosures or there are examples of bad faith such as deliberate late production or the proverbial document dump to hide a few documents. It is only fair that the innocent party should not have to bear the costs of the other party's sins.

VIII. COST SANCTIONS

No arbitrator likes to impose cost sanctions. It is a tool to be used sparingly. Nevertheless, and especially where there have been warnings in advance, cost sanctions can be a useful tool to ensure that a case proceeds in a less expensive, fairer and more efficient way. Mustill and Boyd, 2nd ed. (1989) at p. 327 suggest that an arbitrator "make clear his opposition to the deployment of large quantities of waste paper" and in respect of costs sanctions write:

> "In particularly bad cases, the arbitrator would be justified in penalizing in costs a party whose lawyers have copied, not those documents which have in the event not proved to be useful (for this is hard to predict) but those which on any possible turn of events could not have been relevant."

Most institutional Rules of Procedure will confer a general discretion and authority upon the tribunal to impose costs sanctions for wasteful conduct. In addition to the broad discretion given arbitrators under such Rules as Art. 31 of the ICDR Rules which allow an arbitrator to apportion costs, specific Rules may give a more direct authority to impose sanctions. Art. 31(5) of the ICDR Arbitration Rules, for example, provides that:

> "(5) Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. *This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration.*" (Emphasis added)

IX. MODEL DOCUMENTS DIRECTION

A model direction for the management of documents might be circulated by the arbitral tribunal at, or even before, the first preliminary meeting. The arbitration belongs to the parties who may design the process in any fashion they choose. Some counsel are not familiar with 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 to some or all of the proposed directions. 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 documents over

which the parties intend to claim privilege might be better dealt with in a subsequent direction.

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

MODEL DOCUMENTS DIRECTION

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 allows the other party and the tribunal to easily identify documents 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. The tribunal shall be provided with an electronic copy of the List of Reliance Documents and the documents themselves but need not be provided with hard copies until a Common Book of Documents as described below is agreed. Hard copies of critical documents or excerpts may be filed with pleadings at the discretion of counsel.

Reliance Documents should include only those documents that are 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 marginal relevance. Wherever possible excerpts of documents should be used with the full document made available upon request.

Documents in languages other than English shall be accompanied by translations.

The parties will attempt to reach an agreement on documents using as a guide the Model Documents Agreement attached to these directions.

The parties will attempt 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 where new issues are raised in witness statements, expert reports or pre-hearing submissions. Documents may not be used at the evidentiary hearings that were not listed and produced earlier except for impeachment purposes on cross-examination. New documents will not be admissible at the evidentiary hearings except in the most extraordinary of circumstances. Impeachment documents not previously listed must be relevant only to credibility and not consist of documents that should obviously have been listed as Reliance Documents because, for example, they were essential to the natural unfolding of the narrative. Witness statements should not refer to documents that were not listed as Reliance Documents unless a reasonable justification is provided and in the event supplementary listing of new documents necessitates an adjournment to permit the other party an opportunity to respond then cost consequences may follow. A document should not be deliberately withheld where the relevance of the document was clear at an earlier time.

In addition to Lists of Reliance Documents the parties are directed to prepare a Common Book of Documents or core bundle for use at the hearing. The parties will agree that one of the parties will produce hard copies of the Common Book with one copy to be marked as the formal exhibit, one copy for each member of the tribunal, one copy for the other party and one copy for the witness. The costs of preparing the hard copies will be initially shared

subject to the final award as to costs. The common book of documents will contain all of the documents or excerpts that each party expects will be referenced in the course of the hearing and that should be reviewed by the arbitral tribunal in advance. The Common Book of Documents should be delivered in hard copy and electronic form to the tribunal 14 days in advance of the first day of hearings. The parties should advise the tribunal as to whether or not the tribunal need not review the documents in the Common Book in advance of the evidentiary hearings. There is no objection to a party using a document at the hearing that is not contained in the Common Book so long as the document was listed as a Reliance Document. Unused documents in the Common Book that are not referenced by a witness or by counsel in argument need not be considered by the tribunal in making the award. Excessive use of unnecessary or marginally relevant documents by a party may attract cost consequences.

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

The tribunal may consider costs consequences where it is determined that documents have been delivered or indexed in a manner that is not coherent and does not admit of reasonable review for relevance.

X. 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 will be document heavy. Usually though, there will be a sufficient number of 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. We do not have to re-invent the wheel every time. There is much to recommend a modest yet robust early approach to management of Reliance Documents relying upon a Model Documents Agreement, a Confidentiality Agreement and a Documents Direction. A Common Book of Documents or Core Bundle can be a godsend. The parties will know what is expected, 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.

We have all had the experience of coping with disorganized and late filing of documents. It makes the arbitrator's task that much more difficult. Time and money can be saved by anticipating problems. To quote Benjamin Franklin: "An ounce of prevention is worth a pound of cure." Or in a more modern context: "A good preliminary direction on documents can save a lot of Benjamins."