CPR
International Institute for
Conflict Prevention & Resolution

Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration

"Thank you for the protocol. It was the most succinct and lucid compendium of options for arbitration evidence that I have seen. It will be the basis of my future discussions with counsel concerning discovery and evidence at hearings. Well done!" - Hon. William A. Dreier of Norris, McLaughlin & Marcus, P.A.

Introduction

The CPR Protocol addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different nations, a lack of predictability in the ways in which the arbitration proceedings are conducted and that arbitration is becoming increasingly more complex, costly and time-consuming. The Protocol addresses these concerns by providing guidance in the form of recommendations as to practices that arbitrators may follow in administering proceedings before them, including proceedings conducted under the CPR Rules or under other *ad hoc* or institutional rules. The practices recommended deal with ways in which reasonable limitations may be placed on disclosure and efficiencies gained in the presentation of witness testimony in arbitration hearings.

Recognizing that there may be different interests and expectations on the part of arbitration users and their counsel, the Protocol offers various "modes" of disclosure and presentation of witnesses, ranging from minimal to extensive, so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which their arbitration proceedings will be conducted in the important areas of document disclosure and witness presentation.

The Protocol is the product of two working groups of the Information Exchange Subcommittee chaired by Prof. Thomas J. Stipanowich of the CPR Arbitration Committee. The Working Group on the presentation of witnesses was chaired by Ben H. Sheppard, Jr. and the other Working Group, on documentary disclosure, was chaired by me. Members of those groups and members of the Arbitration Committee who have participated in the several meetings over the time since early in 2007 when this project was started are listed on the last page of this document.

Lawrence W. Newman
Chairman of the CPR International
Committee on Arbitration

Preamble

1. This Protocol has two purposes. The first is to assist the arbitrators in CPR or other tribunals (hereinafter "the arbitrators" or "the tribunal") in carrying out their responsibilities under Rule 11 of the CPR Rules by setting out general principles for dealing with requests for the disclosure of documents and electronic information[1] and for establishing procedures for the testimony of witnesses. The second purpose is to afford to the parties to an arbitration agreement the opportunity to adopt, before or after a dispute arises, certain modes of dealing with the disclosure of documents and the presentation of witnesses, as they may select from Schedules 1, 2 and 3.

2. The tribunal is encouraged to direct the attention of the parties to this Protocol at the outset of the arbitration and to draw upon it in organizing and managing the proceeding.

3. References to CPR Rules are to the CPR Non-Administered Arbitration Rules effective November 1, 2007. However, arbitrators are encouraged to draw upon this Protocol in organizing and managing arbitrations under any of the CPR arbitration rules or under the rules of any other institution.

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[1] As used herein, the term "documents" is intended to refer to all types of stored or recorded information, whether in the form of physical documents or not, including electronic information.

Section 1. DISCLOSURE OF DOCUMENTS

General Considerations

(a) Philosophy Underlying Document Disclosure

Whether or not the parties adopt any of the modes of disclosure as provided herein, parties whose arbitrations are conducted under the CPR Rules should understand that CPR arbitrators are expected to conduct proceedings before them in accordance with the general principle that arbitration be expeditious and cost-effective as well as fundamentally fair. Consistent with this philosophy, it is expected that the parties will ensure that their counsel appreciate that arbitration is not the place for an approach of "leave no stone unturned," and that zealous advocacy in arbitration must be tempered by an appreciation for the need for speed and efficiency. Since requests for information based on possible relevance are generally incompatible with these goals, disclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position. CPR arbitrators should supervise any disclosure process actively to ensure that these goals are met.

(b) Attorney-Client Privilege and Attorney-Work-Product Protection

No documents obtained through inadvertent disclosure of documents covered by the attorney-client privilege or attorney work-product protection may be introduced in evidence and any documents so

obtained must upon request of the party holding the privilege or work product protection, be returned forthwith, unless such party expressly waives the privilege or work product protection. The arbitrators should apply the provisions of applicable law that afford the greatest protection of attorney client communications and work product documents.

(c) Party-Agreed Disclosure

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter, for certain modes of disclosure that they and the tribunal will follow. Suggested modes are set forth in Schedule 1 hereto and may be agreed to by the parties in such language as the following:

"The parties agree that disclosure of documents shall be implemented by the tribunal consistently with Mode [?> in Schedule 1 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders for disclosure of documents pursuant to a time schedule and other reasonable conditions that are consistent with the parties' agreement. Any mode of disclosure so chosen by the parties shall be binding upon the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of disclosure. Disclosure of documents different from that which is provided for in the mode of disclosure selected by the parties may be ordered by the tribunal if it determines that there is a compelling need for such disclosure.

(d) Disclosure of Electronic Information

(1) General Principles

In making rulings on disclosure, the tribunal should bear in mind the high cost and burdens associated with compliance with requests for the disclosure of electronic information. It is frequently recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need. Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

(2) Modes of Disclosure

In order to give themselves greater assurance of predictability as to the extent of disclosure of electronic information, the parties may wish to provide, in their agreement to arbitrate or separately thereafter, for certain modes of disclosure of electronic information as set out in Schedule 2, pursuant to such language as the following:

"The parties agree that disclosure of electronic information shall be implemented by the tribunal

consistently with Mode [?> in Schedule 2 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

If the parties do not select a mode of disclosure for electronic documents under Schedule 2, the mode of disclosure selected by the parties from Schedule 1 shall apply to both electronic information and non-electronic documents.

(3) Preservation of Electronic Information

In view of the high cost and burden of preserving documents, particularly in the form of electronic information, issues regarding the scope of the parties' obligation to preserve documents for potential disclosure in the arbitration should be dealt with at an early scheduling conference, or as soon as possible thereafter. The parties' preservation obligations should comport with the Schedule 2 mode of disclosure of electronic information selected.

(e) Tribunal Orders for the Disclosure of Documents and Information

The arbitrators should ensure that they are sufficiently informed as to the issues to be determined, the burden and costs of preserving and producing requested documents and other information, and the relative value of the requested information to the issues to be determined, so as to enable the arbitrators to make a fair decision as to the requested disclosure.

Whether or not the parties have selected one of the modes for disclosure in Schedules 1 and/or 2, the tribunal, in making rulings on the disclosure of documents and information, should bear in mind the points set forth below:

(1) Timing of Disclosure

The tribunal should establish a reasonable and expeditious timetable for disclosure. Any issues or disagreements regarding disclosure should be identified and resolved as early as possible, preferably at a scheduling conference with the parties held early in the proceeding for the purpose of discussing the scope and timing of disclosure, identifying areas of disagreement and adopting expeditious procedures for resolving any such disagreements.

(2) Burdens versus Benefits

Arbitrators should carefully balance the likely value of documents requested against the cost and burdens, both financial and temporal, involved in producing the documents or information requested. 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.

(3) Documents for Use in Impeachment in Cross-examination

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.

SCHEDULE 1

Modes of Disclosure

Mode A. No disclosure of documents other than the disclosure, prior to the hearing, of documents that each side will present in support of its case.

Mode B. Disclosure provided for under Mode A together with pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.

Mode C. Disclosure provided for under Mode B together with disclosure, prior to the hearing, of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.

Mode D. Pre hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.

SCHEDULE 2

Modes of Disclosure of Electronic Information

Mode A. Disclosure by each party limited to copies of electronic information to be presented in support of that party's case, in print-out or another reasonably usable form.

Mode B. (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; no information required to be disclosed from back up servers or back up tapes; no disclosure of information from cell phones, PDAs, voicemails, etc. (4) No disclosure of information other than reasonably accessible active data.

Mode 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.

Mode D. Disclosure of electronic information regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.

Parties selecting Modes B, C, or D 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 2. PRESENTATION OF WITNESSES

The CPR Non-Administered Arbitration Rules provide that the testimony of witnesses "may be presented in written and/or oral form as the Tribunal may determine is appropriate." Rule 12.2.

(a) Testimony of Witnesses in Written Form (Witness Statements)

Witness statements are detailed presentations in writing of the testimony, including references to documents that are also presented, that a witness would give if questioned before the tribunal. These statements are exchanged prior to the presentation of oral evidence at a hearing. Witnesses then appear at the hearing to be questioned concerning their written statements.

Witness statements have been found to save considerable time that would otherwise be spent in hearings before the tribunal and offer other advantages as well: They serve to eliminate surprise, narrow the issues and permit more focused questioning of the witness at the hearings. They may also eliminate the need for oral testimony from uncontroversial or distant witnesses. Witness statements also allow the arbitrators and the parties to become acquainted with material facts in advance of the hearing, and they may therefore promote settlement.

The use of witness statements is referred to in the rules of the major international arbitral institutions, in the UNCITRAL Arbitration Rules and in the IBA Rules on the Taking of Evidence in International Commercial Arbitration.
The following are procedures that generally apply to the use of witness statements:

1. Each statement should be signed by the witness, contain an affirmation of its truth and be sufficiently detailed to constitute the entire evidence of that witness.

2. Each witness who has provided a statement must appear for examination at the evidentiary hearing by the opposing parties and the tribunal unless the parties and the tribunal agree otherwise. The tribunal may disregard the statement of any witness who fails to appear in support of it.

3. The parties may agree or the tribunal may direct that the witness statement shall serve as the direct testimony of the witness. In that event, the witness should, at a hearing before the tribunal, swear or affirm to tell the truth, confirm her/his witness statement following an opportunity to make any needed corrections to the statement and then be subject to cross-examination. However, absent party agreement, the tribunal may consider whether to permit witnesses who have submitted a statement to respond to questions from the sponsoring party before being cross-examined so long as this oral testimony is brief and does not introduce matters not contained in the written statement. This allows the witness to "warm to the seat" and permits the tribunal to hear the witness testify in her/his own words.

4. The tribunal may wish to explore with the parties alternative forms of witness statements. Although such statements are commonly submitted in narrative form, they may also be submitted in question and answer format, as they are in some administrative proceedings in the United States. Testimony submitted in

question and answer format is potentially more interesting and persuasive than a narrative text and more nearly replicates the presentation of oral testimony.

5. The tribunal should also explore with the parties whether witness statements are to be submitted simultaneously or sequentially, as well as the need for reply or rejoinder submissions.

6. A party may elect, a reasonable time prior to the hearing, not to question a witness presented by an opposing party. In such event, the tribunal should consider whether it wishes to have the witness appear before it for questioning by members of the tribunal.

(b) Testimony of Witnesses in Oral Form

In the absence of a witness statement, the testimony of a witness is presented at a hearing through questioning by counsel and the tribunal. Since the oral process permits the witness to present the evidence in her/his own words, the tribunal may benefit, especially where the credibility of a witness is important, from having the opportunity to observe the demeanor of witness in presenting his or her position in the case.

(c) Depositions

Depositions are recorded sessions at which witnesses are questioned by the parties outside the presence of the tribunal, enabling the parties to obtain information from witnesses in advance of their testifying at the hearings. Depositions should be permitted only where the testimony is expected to be material to the outcome of the case and where one or more of the following exigent circumstances apply: Witness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal. The tribunal should impose strict limits on the number and length of any depositions allowed. Deposition transcripts may, as the tribunal determines, be used at hearings or otherwise be made part of the record before the tribunal.

(d) Determining the Appropriate Forms of Witness Evidence

The tribunal in its agenda for the initial pre-hearing conference should call to the attention of the parties the options for the presentation of witness testimony and should explore those options with the parties at the conference. The “Modes of Presenting Witnesses” set forth on Schedule 3, to the extent not previously agreed on by the parties, may be useful for this purpose. See Section 2(h) below. Any of the “modes” or variants of them can be effective methods for the presentation of witness testimony depending upon the circumstances of the particular case. Any procedure elected should be applied consistently with the expectations of the parties and their counsel and with the cost-effective resolution of the dispute.

(e) Presentations by Party-Appointed Experts

Although the tribunal is empowered to appoint neutral experts, this authority appears to have been seldom employed. Instead, the prevailing practice is for the parties to present the evidence of experts retained by them in support of their positions.

The following procedures may be applied to the use of party-appointed experts.

1. At the initial conference with the parties, the tribunal should ascertain whether the parties intend to present the evidence of expert witnesses and, if so, establish a schedule for the submission of expert reports.

2. Each expert witness should submit a signed report, setting forth the facts considered and conclusions reached in sufficient detail to serve as the entire evidence of the expert, together with a curriculum vitae or other biographical information describing the qualifications and experience of the witness.

3. The tribunal should discuss with the parties whether expert reports will be submitted simultaneously or sequentially, and whether there will be a need for reply or rejoinder submissions from the experts.

4 Each expert who has submitted a report must appear at a hearing before the tribunal unless the parties agree otherwise and the tribunal accepts this agreement. The tribunal may disregard the report of an expert who fails to appear at a hearing.

5. The tribunal may wish to consider directing that, within a specified period of time after the exchange of expert reports, opposing experts on the same issues meet and confer, without the parties or their counsel and prior to the submission of any reply expert reports, for the purpose of narrowing the scope of disputed issues among the experts.

6. The sequencing of expert testimony may be important. In order to avoid having experts on the same issue testify days or weeks apart, the tribunal may wish to arrange for such witnesses to testify sufficiently close to one another in time to enable the tribunal most effectively to consider the subjects of their testimony.

(f) Hearings

As a supplement to the applicable arbitration rules, the following procedures may also apply to the conduct of hearings:

1. The tribunal should require every witness to affirm, in a manner determined appropriate by the tribunal, that she or he is telling the truth. If the witness has submitted a witness statement or expert report, he or she should confirm the statement or report and note any corrections to it. In the tribunal's discretion the witness whose testimony has been presented in writing may thereafter be briefly questioned by the party presenting the witness, provided that no new testimony other than corrections is presented in this way.

2. The tribunal may consider whether to direct that expert or fact witnesses appear before them at the same time for questioning, in a process known as "witness conferencing." A typical application is for expert witnesses to provide their written or oral testimony separately and then appear jointly for further questioning by the tribunal and counsel.

(g) Cross examination of Witnesses

Any witness whose testimony is received by the tribunal must be made available for examination by other parties and the tribunal. The form and length of cross examination should be such as to afford a fair opportunity for the testimony of a witness to be fully clarified and/or challenged.

(h) Party-Agreed Procedures for the Presentation of Witnesses

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter (as in an initial conference with the tribunal – see paragraph (d) above), for certain modes of witness presentation that they and the tribunal will follow. Suggested modes are set forth in Schedule 3 hereto and may be agreed to by the parties in such language as the following:

"The parties agree that the presentation of witnesses shall be implemented by the tribunal consistently with Mode [?> concerning witness presentation selected from Schedule 3 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders and shall conduct the proceeding consistently with the parties' agreement. Any agreed mode of witness presentation shall be binding on the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of witness presentation. The tribunal may direct the use of procedures apart from the mode of presentation selected by the parties if it determines that there is a compelling need for such procedure.

SCHEDULE 3

Modes of Presenting Witnesses

Mode A. Submission in advance of the hearing of a written statement from each witness on whose testimony a party relies, sufficient to serve as that witness's entire evidence, supplemented, at the option of the party presenting the witness, by short oral testimony by the witness before being cross-examined on matters not outside the written statement. No depositions of witnesses who have submitted statements.

Mode B. No witness statements. Direct testimony presented orally at the hearing. No depositions of witnesses.

Mode C. As in Mode B, except depositions as allowed by the tribunal or as agreed by the parties, but in either event subject to such limitations as the tribunal may deem appropriate.

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Attachments: Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration PDF