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Discovery of Documents in Arbitral Proceedings

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Arbitration is undoubtedly one of the most effective alternative dispute resolution mechanisms, offering a myriad of benefits ranging from being cost-effective, expeditious, confidential, and adaptable, thereby giving utmost priority to party autonomy. Along with the significant discretion and flexibility in determining the procedure, one major drawback in the field of arbitration is that it is ostensibly an extensive pleading process. In contrast to court litigation, where the judge may lay more emphasis on the documentary/ oral submissions, which are often related to legal aspects, in arbitrations, the concerned arbitrator primarily needs to focus on the documentary evidence relied upon by the parties to establish facts necessary for determining the issues in dispute. As such, in arbitral proceedings, the stage of document production is as important, if not more important, than oral submissions. This evidentiary stage is significant for parties to support their respective case and establish any facts in their favour, which consequently assists the arbitrator in delivering a reasoned award. A necessary, albeit often overlooked, evil that arises because of the importance of evidence in arbitral proceedings is the filing of bulky/ voluminous documentation leading to a protracted and expensive arbitration, which is particularly intensified when a party relies on documents in possession, control or custody of the other party and vice versa. The author in this article endeavours to explain the process of document discovery/ disclosure in domestic and international arbitrations in India, as well as how the global community has attempted to tackle and alleviate the issues concerning such process.

Keywords: *domestic arbitration, international arbitration, discovery of documents, schedule, arbitration.*

INTRODUCTION: DOCUMENT DISCOVERY IN DOMESTIC ARBITRATIONS

Domestic Arbitrations are arbitrations involving disputes between two Indian parties having a jurisdictional seat in India, are statutorily governed by the Arbitration and Conciliation Act, 1996 (A&C Act). In terms of Section 19 of the A&C Act[1], the arbitral tribunal is not bound by the Code of Civil Procedure, 1908 (CPC) or the Indian Evidence Act, 1872[2] (IEA), and the parties are free to agree upon a procedure to be followed by the arbitral tribunal for conducting its proceedings. Further, in the absence of any such agreement between the parties, the arbitral tribunal may itself conduct the proceedings in any manner it considers appropriate. Insofar as the stage of document discovery is concerned, though there is no specific provision in the A&C Act conferring power on the arbitral tribunal to order discovery of documents, however, by way of a necessary corollary to Section 19, it has been interpreted and conclusively settled by courts that the arbitral tribunal has the power to direct discovery under the said provision.

In the case of Union of India v Reliance Industries Ltd. and Ors,[3] the Hon'ble High Court of Delhi held that the source of power conferred on the arbitral tribunal to order the discovery of documents can be found in Section 19 of the A&C Act. The relevant excerpt is provided below for ease of reference:

"73. *A perusal of Sections 19(4) and 27 of the 1996 Act shows that the Arbitral Tribunal has the implicit power to order disclosure and discovery of documents. Apart from the fact that upon failure of parties to agree to a procedure about conduct of arbitration under Sub-Section (3) of Section 19, the Arbitral Tribunal can adopt an appropriate procedure, Section 19(4) grants the power to the Arbitral Tribunal to ascertain the admissibility, relevance, materiality and weight of any evidence*". Further, upon failure of the parties to produce the documents as directed under Section 19 of the A&C Act, the arbitral tribunal may draw adverse inference against the defaulting party or the arbitral tribunal may, on its own, or a party with the approval of the arbitral tribunal, may apply to the court for seeking assistance in taking evidence.[4] This technique of drawing

[1] Arbitration and Conciliation Act 1996, s 19
[2] Bharatiya Sakshya Adhiniyam 2023
[3] *Union of India v Reliance Industries Ltd. and Ors* (2018) SCC OnLine Del 13018
[4] Arbitration and Conciliation Act 1996, s 27

adverse inference is also statutorily envisaged in the Indian jurisprudence by way of Section 119(g)[5] of the Bharatiya Sakshya Adhiniyam, 2023 (BSA).

Further, in Thiess Iviinecs India v NTPC Ltd. & Anr,[6] the Hon'ble High Court of Delhi held that in exercise of powers under Section 27[7], the court cannot determine the admissibility, relevance, materiality and weight of any evidence, which is only within the jurisdiction of the concerned arbitral tribunal. However, although an order passed by the arbitral tribunal, granting permission to the concerned applicant to apply to the court for seeking assistance in taking evidence, is not liable to be disturbed by judicial interference; since the court while exercising powers under Section 27 is not hearing an appeal over the decision of the arbitral tribunal.[8] A court is still not bound to act on the request of the arbitral tribunal mechanically, especially when the order appears to have been passed by the arbitral tribunal on a misconception of law.

In such a situation, the court would not only be entitled to, but would be duty-bound to correct the error, if any, found in the order passed by the tribunal.[9] Especially considering that there is no provision for appeal against an order passed under Section 19[10] or Section 27[11]. Pertinently, a remedy by way of a petition under Article 227[12] against such an order in exercise of the High Court's supervisory jurisdiction, though maintainable, would have an extremely limited/ narrow scope of interference.

As explained above, in domestic arbitrations, the rules governing document discovery/disclosure are statutorily enshrined under Sections 19 and 27. Though the parties or the tribunal, as the case may be, are free to determine the procedure for conducting the arbitration and are not bound by the technical rules of evidence, the arbitral tribunal may still draw sustenance from the fundamental principles underlying CPC and BSA.[13]

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[5] Bharatiya Sakshya Adhiniyam 2023, s 119(g)
[6] *Thiess Iviinecs India v NTPC Ltd. & Anr* (2016) SCC OnLine Del 1819
[7] Arbitration and Conciliation Act 1996, s 27
[8] *Steel Authority of India Ltd. v Uniper Global Commodities* (2023) SCC OnLine Del 7586
[9] *Bharat Heavy Electricals Ltd. v Silor Associates* (2014) SCC OnLine Del 4442
[10] Arbitration and Conciliation Act 1996, s 19
[11] Arbitration and Conciliation Act 1996, s 27
[12] Constitution of India 1950, art 227
[13] *SREI Infrastructure Finance Ltd. v Tuff Drilling Pvt. Ltd.* (2018) 11 SCC 470

The process that follows is the filing of an application (like and/or akin to an application under Order XI Rule 12 and 14 of CPC[14]) by a party seeking production of a document from the other/opposing party, which has the liberty to file its reply/ objections to the same. Thereafter, the arbitral tribunal is required to adjudicate upon the said application and pass an order, thereby allowing or rejecting the application.

In case the application is allowed, the party against which the order has been passed would be obligated to file on record the requested documents and failure to do so would result in drawing of adverse inferences against such party or in the alternative, invocation of Section 27 of the A&C Act seeking assistance of the court. A practical issue that arises in such cases is that separate applications would have to be filed by either party seeking production of a document from the other party, and the arbitral tribunal would be required to adjudicate upon both such applications and/ or any other applications that may be filed subsequently thereto. Further, there are no provisions/ guidelines which govern the arbitral tribunal in determining what documents may be required to be produced or not.

The same would solely depend on the discretion of the arbitral tribunal in ascertaining the admissibility, relevance, materiality and weight of any evidence.[15] Though the above procedure for document discovery in domestic arbitrations appears relatively straightforward, however, in cases where strong reliance is placed by a party on the evidence/ documents in the possession, control or custody of the other party and equally strong objections are made by such opposing party, the entire process can quickly turn highly demanding and time-consuming, which is inevitably burdensome on the parties as well as the arbitral tribunal. Such is generally the case in international arbitrations involving complex and technical commercial transactions, because of which certain techniques have been mutually agreed upon by the global community to make the process more efficient, which shall be discussed hereinafter.

DOCUMENT DISCOVERY IN INTERNATIONAL ARBITRATIONS

With the advent of technology and the rise in global networking, there has been an inevitable and consequent increase in cross-border transactions/ deals amongst various national and

[14] Code of Civil Procedure 1908, Or XI r 12 and r 14
[15] Arbitration and Conciliation Act 1996, s 19(4)

international enterprises, resulting in the need for a mechanism for quick and efficient methods of adjudicating disputes. A globally recognised and effective way of handling the disputes arising out of such transactions is dispute resolution by way of arbitration.

To make this process more seamless and cost effective and to improve ease of doing business, the international community has joined together to formulate rules and establish reputable institutions such as the International Court of Arbitration (ICC), Singapore International Arbitration Centre (SIAC), Delhi International Arbitration Centre (DIAC), etc., to facilitate such arbitral proceedings.

As the present article is primarily aimed towards arbitrations conducted in India, the discussions hereinafter shall be confined to international commercial arbitrations as defined under Section 2(f).[16] Seated in India (hereinafter, interchangeably referred to as international arbitrations), as opposed to foreign-seated arbitrations. As such, the substantive law governing such international arbitrations would necessarily be the A&C Act, though the parties involved in such arbitrations would be free to adopt, inter alia, any of the institutional rules.

IBA RULES ON THE TAKING OF EVIDENCE

Document discovery in international arbitrations is generally governed by the IBA (International Bar Association) Rules, 2020[17] (IBA Rules). In contrast to court proceedings, which are generally governed by procedural/ substantive laws, in arbitrations, particularly international arbitrations, party autonomy is given the highest priority, and as such, even institutional rules leave much to the discretion of the parties and the arbitral tribunal[18], which are free to determine the procedure in the conduct of the arbitral proceedings and are not limited by the technical rules of evidence of the relevant jurisdiction.

Such discretion qua document discovery/disclosure is often exercised in international arbitrations by mutual adoption of the IBA Rules, which is a globally recognised, efficient and cost-effective process for taking evidence in international arbitrations. It may be

[16] Arbitration and Conciliation Act 1996, s 2(f)
[17] IBA Rules on the Taking of Evidence in International Arbitration 2020
[18] James Hope and Marcus Eklund, 'Approaches to Evidence across Legal Cultures' (*Global Arbitration Review*, 12 October 2023) <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/2nd-edition/article/approaches-evidence-across-legal-cultures> accessed 28 March 2025

pertinent to mention that the adoption of the IBA Rules, which are only specific to the evidentiary stage, would be in addition to any institutional or ad hoc rules already adopted to govern the overall procedure of the proceedings. The foreword of the IBA Rules explains the objective behind the framing of such rules, which is reproduced below:

The IBA issued these Rules as a resource to parties and arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings.

The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

Parties intending to adopt the IBA Rules are advised to insert the following clause, and may even elect to adopt the said rules, in whole or in part, at the commencement of the arbitration, or at any time thereafter. In addition to the institutional, ad hoc or other rules chosen by the parties, the parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of this agreement/the commencement of the arbitration.

SALIENT FEATURES OF THE IBA RULES

Any party shall, within the time ordered by the arbitral tribunal, submit all the documents on which it relies,[19] and may submit to the arbitral tribunal and to the other party a request to produce any document in the possession of such party.[20]

Further, the IBA Rules stipulate that any request to produce documents shall contain:

1. A Description of each of the requested documents in sufficient detail such that the other party can identify it;[21]

[19] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(1)
[20] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(2)
[21] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(3)(a)(i)

2. A Description in sufficient detail of a narrow and specific requested category of documents that are reasonably believed to exist;[22]

3. A Statement as to how the documents requested are relevant to the case and material to its outcome;[23] and

4. A Statement that the requested documents are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such documents, and[24]

5. A Statement of the reasons as to why the requesting party assumes that the documents requested are in the possession, custody or control of the other party.[25]

6. Any party to whom the request to produce is made shall produce the requested document,[26] or, in case such party has any objection to producing the requested document, may object in writing to the arbitral tribunal and the other party. The requesting party may respond to such objections, if so, directed by the arbitral tribunal.[27]

The reasons for such objections shall be any of those outlined in Articles 9(2)[28] or 9(3)[29], or a failure to satisfy any of the requirements of Article 3(3)[30], which, inter alia, includes:

1. Lack of Sufficient Relevance to the case or Materiality to its Outcome;[31]

2. Legal Impediment or Privilege under the Legal or Ethical Rules;[32]

3. Unreasonable Burden to Produce the requested Evidence;[33]

[22] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(3)(a)(ii)
[23] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(3)(b)
[24] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(3)(c)(i)
[25] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(3)(c)(ii)
[26] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(4)
[27] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(5)
[28] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 9(2)
[29] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 9(3)
[30] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(3)
[31] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 9(2)(a)
[32] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 9(2)(b)
[33] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 9(2)(c)

4. Loss or Destruction of the Document that has been shown with Reasonable Likelihood to have occurred;[34]

5. Evidence obtained illegally.[35]

6. Upon receipt of the objection and any response thereto, the arbitral tribunal may, upon due consideration, order the party to whom the request is addressed to produce the requested document.[36]

7. If any party fails, without satisfactory explanation, to produce any requested document to which it has not objected in due time or any document ordered to be produced by the arbitral tribunal, the arbitral tribunal may infer that such document would be averse to the interests of such party.[37]

8. This technique of drawing an adverse inference from the silence of party, or failure of a party to comply with an order of the tribunal about the production of any documentary or witness evidence, is followed by arbitral tribunals coming from different systems and cultures and consequently, has been adopted by way of Articles 9(6) and 9(7) in the IBA Rules.[38]

RESTRICTIONS UNDER THE IBA RULES

Though efficient and cost-effective, the IBA Rules are deliberately framed to be broad and open to interpretation so as not to be restricted by the technical rules of evidence. For example, the standard for describing the requested documents in sufficient detail of narrow and specific requested category of Documents and the condition for including a statement as to how the Documents requested are relevant to the case and material to its outcome are particularly vague and may give rise to complexities since how the terms are to be interpreted and harmonized with the intent of the IBA Rules.

However, one cannot deny that such restrictions are put in place to discourage and prevent the document disclosure regime from being turned into a fishing and roving exercise to

[34] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 9(2)(d)
[35] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 9(3)
[36] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 3(6) and 3(7)
[37] IBA Rules on the Taking of Evidence in International Arbitration 2020, art 9(6)
[38] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022)

unnecessarily burden any party with countless immaterial enquiries/ requests leading to a protracted arbitration and thus, defeating the object and purpose of the IBA Rules.

Be that as it may, the most significant restriction placed under the IBA Rules is the incorporation of the expression relevant to the case and material to its outcome provided under Article 3(3)(b) of the said rules. The relationship between relevancy and materiality is explained on page 353 of Redfern and Hunter.[39]

"*6.96 Most legal practitioners are accustomed to the obligation to satisfy a court, or an arbitral tribunal, as to the question of relevance of documents or other information that they are seeking from the opposing party. But the requirement of showing materiality to the outcome of the case is an increased burden. It also enables arbitral tribunals to deny document requests where, although the requested documents would generally be relevant, they consider that their production will not affect the outcome of the proceedings.*"

The standard of proving the relevancy of any document is ostensibly more conventional and could be satisfied by showing how a particular document would outright establish or make more probable the existence of a fact necessary for determining the issues at hand. However, the requirement of showing the materiality of a document to the outcome of a case is an increased burden aimed at maintaining the sanctity of the stage of document discovery.

In simpler terms, a relevant document may not necessarily be material to the outcome of a case and the party requesting disclosure of any such document is required to establish independently both the relevancy to the case and the materiality to the outcome.

REDFERN SCHEDULE

As discussed above, the IBA Rules provide a skeletal guideline to efficiently govern the process of document disclosure/discovery, however, it is still a time-consuming process involving various exchanges of correspondence between counsels about their respective requests, which are faced with objections or agreement, in whole or in part. Such objections may be followed up with replies to such objections, thereby leading to the modification/ withdrawal of certain erstwhile requests and may include, inter alia, a new document request based on any fresh information emerging from documents already received and so

[39] *Ibid*

on. To be able to finally adjudicate upon and decide which document requests should be allowed, the arbitral tribunal must sift through all such requests, objections, modifications and replies thereto. Suffice it to say that there was a need to make this process more efficient and structured, which is precisely where the Redfern Schedule comes into play.

The Redfern Schedule, devised in the year 2000 by Alan Redfern, a renowned international arbitrator, aims to streamline the often-contentious process of document disclosure in international arbitration. It is essentially a tool which facilitates the process of document discovery by providing a structured tabular format for the parties to place their document requests and corresponding objections and replies thereto. The purpose of the Redfern Schedule is defined on page 355 of Redfern and Hunter.

"6.102 The purpose of the Redfern Schedule, then, is to crystallize the precise issues in dispute about the production of documents so that the arbitral tribunal knows the position that the parties have reached following the various exchanges between them, this makes it possible for the arbitral tribunal to make an informed decision as to whether or not a particular document, or class of documents, should be produced, without becoming involved in the details of the exchanges between the parties' lawyers."

As far as the practical application of the Redfern Schedule is concerned, the same is employed in the form of a table with a few columns, each intended to effectively summarise and collate a specific stage of the evidentiary process. A tabular representation of the Redfern Schedule is indicated below:

Request for Documents under the Redfern Schedule					
S. No.	Description of the Document	Relevance/ Materiality of Document	Objections to the request	Reply to the Objections	Tribunal's Decision

Generally, the information set out in the table would be sufficient for the arbitral tribunal to adjudicate upon the disputed requests for documents and pass a reasonable order. However, in certain cases, wherein sufficient information is not provided or where serious objections have been made necessitating oral submissions to be heard by the tribunal from the respective parties, the arbitral tribunal may either call for additional information or hold

a procedural hearing to determine the validity and legality of the objections made by the parties to the document request.[40] In either case, the Redfern Schedule ensures that the entire document disclosure/ discovery process is concluded in a relatively shorter duration, which is cost-effective and less intricate.

CONCLUDING REMARKS

As expounded hereinabove, document discovery/ disclosure is a significant stage in any arbitration proceeding, having the potential to make or break a case for any party. As such, the intent to make the process more efficient and convenient for the parties and the arbitral tribunal has led to significant developments in this field through academic discussions and contributions.

The arbitral community has made conscious efforts to harmonise and not be restricted by the rigours of the technical rules of evidence of different jurisdictions, thereby giving utmost priority to party autonomy and reaffirming the faith of the general populace in the effectiveness of arbitration as an alternative dispute resolution mechanism.

In this regard, credit must be given to the international community for birthing effective ways to navigate the discovery process, such as the IBA Rules and the Redfern Schedule. Though these methods of document discovery are generally not adopted in domestic arbitrations in India, since the reliance is primarily on the Code of Civil Procedure, however, given Section 19 of the Arbitration Act which provides much leeway to the tribunal to govern the arbitral proceedings, there is no express prohibition in adoption of such methods in domestic arbitrations. It will be interesting to see in the coming years if the arbitral tribunals, constituted in domestic arbitrations, would be willing to adopt such techniques evolved by the international arbitral community and the impact that results from their implementation.

[40] *Ibid*