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Club

Discovery and disclosure – English and American perspectives

The process of disclosing and exchanging relevant information before a trial or arbitral hearing is now common in many parts of the world. However, there remain some key differences in how the process takes place depending on the jurisdiction.

*'...In plain language, litigation in this country is conducted "cards face up on the table". Some people from other lands regard this as incomprehensible. "Why," they ask, "should I be expected to provide my opponent with the means of defeating me?"' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object...'*¹

In many parts of the world today, especially in international arbitration and in the common law jurisdictions, as a general rule, a litigant is obliged to disclose to and exchange with his opponent all relevant documents and information that he will rely upon during litigation.

The following two articles examine the processes in two major shipping jurisdictions, namely 'discovery' in the United States and 'disclosure'² in England.

The objective of this procedural stage is to give parties the opportunity to review the evidence (both their own and the opponent's) and to assess the strengths and weaknesses of their own and the other party's case before a trial or arbitral hearing. With all relevant information 'on the table', the parties are much better placed to concentrate their minds on the issues at hand – a process that promotes settlement.

Given its significance in helping resolve claims, we believe that our members may find useful a review of the English disclosure and US discovery processes. While similar in many respects, there remain key differences. Richard Singleton II, of law firm Blank Rome, provides an outline of the discovery process in the context of New York court litigation and Nevil Phillips, of Quadrant Chambers, provides an outline of the disclosure process in the context of English arbitration proceedings.

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From the club's experience, discovery and disclosure promote negotiation, and many cases do in fact settle as a result.

1 Per Sir John Donaldson M.R. in *Davies v Eli Lilly & Co* [1987] 1 W.L.R. 428.

2 The reality is that the process is now generically referred to as 'disclosure' in England, but was (until the advent of the reform to the English Civil Procedure Rules (CPR) in High Court litigation in the mid-to-late 1990s) previously also known as 'discovery'. In institutional international arbitration (eg commodities, construction, energy disputes, but less so in conventional maritime arbitration), the process is often more broadly referred to as 'document production'.

Pre-trial discovery: the United States litigation perspective

This article explains the procedure for obtaining information and evidence in the possession of an opponent in United States litigation, and the benefits of this procedure.



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Introduction

In United States litigation, the procedure for obtaining information and evidence in the possession of an opponent is known as 'discovery'. The main methods for obtaining discovery include:

- initial disclosures
- requests for production of documents
- requests for admissions
- interrogatories
- depositions

This article explains these methods.

Initial disclosures

Shortly after commencement of litigation, each party is required to make initial disclosures, which obligates each party to voluntarily disclose all documents relevant to its claims or defences, and identify all witnesses with knowledge of relevant facts.

Requests for production of documents

Each party thereafter has a right to serve requests for production of documents, seeking documents not included in the initial disclosures. These requests can be for specific identifiable documents or broad categories of documents.

Requests for admissions

Requests for admissions are statements that the opponent must either admit or deny, with cost-shifting provisions in the event a denial is proven wrongful at trial.

Interrogatories

Interrogatories are open-ended written questions that must be answered by a party with knowledge, under oath.

Depositions

The final discovery method, the deposition, is one of the hallmarks of the United States legal system and in many respects one of its greatest strengths.

Purposes of depositions

Depositions allow a party to achieve a variety of objectives. They enable parties to:

- examine witnesses prior to trial to determine what the witnesses will contribute to the issues presented for trial
- probe weaknesses in the witness testimonies
- evaluate the credibility of those witnesses.

It is a powerful method for exposing the truth, and if used properly together with the other forms of discovery outlined above, can be extremely effective in revealing the intimate details of the other party's case. This minimises the chance of any unpleasant surprises at trial.

Formalities

Depositions are obtained by simply serving a notice on the parties to the litigation. The depositions of non-parties can be obtained by serving a subpoena. Depositions of a corporation can also be obtained, requiring a person with knowledge to appear and testify on behalf of the corporation.

The deponent (party, non-party or corporate representative) must appear at the place and time designated in the notice, unless otherwise agreed, and answer questions posed by the opponent's lawyer.

Scope of questioning

The scope of permissible questioning is very broad and, with the exception of questions that infringe on attorney-client or work-product privilege, a witness must answer all questions asked. Parties can make objections, but by rule in federal court, all objections (except as to the form of the question) are reserved for the time of trial. Objections are therefore not necessary, except for objections to questions that could be corrected by rephrasing the question. Even when an objection is made, the witness must still answer the question, subject only to the limitation regarding privileges mentioned above.

The questioning proceeds much as it would in court. However, remarkably, whilst the deposition is taken, no judge is present – only the parties' lawyers are in attendance. The goal of the examining lawyer is to find out as much as possible about the opponent's case and the evidence the deponent will contribute to it, and to lock the deponent into one version of events. The party tendering the deponent generally does not ask questions unless the witness is likely to be unavailable for trial or follow-up questions are necessary to clarify or correct any testimony that was inaccurate or misleading. All questions and answers, including everything said by the lawyers during the deposition, are recorded by a certified court reporter – unless expressly agreed to be off the record. The court reporter then prepares a transcript of the deposition, which is provided to the parties.

Preparation for a deposition

Attorneys are permitted to prepare deponents prior to their deposition by reviewing the facts and documents with them and suggesting subjects and specific questions the examining lawyer will likely ask. Such preparation is almost always done. But once the deposition commences and a question is pending, the deponent is prohibited from discussing his testimony with his lawyer, unless the discussion relates to the assertion of privilege.

Maximum length of a deposition

In federal court, the deposition is limited to seven hours unless agreed otherwise or extended by the court. It is not unusual in important or complex cases, or in cases with multiple parties, for a deposition to continue for several days.

Relevance of depositions to trial

Deposition transcripts have two main uses at trial. First, if the witness is unavailable, his sworn deposition testimony may be submitted in evidence in place of his live testimony. Second, the transcript can be used to impeach a witness who testifies at trial inconsistently with the testimony he or she gave at the deposition. This is a compelling means to demonstrate to the court that a witness's trial testimony is not credible or worthy of belief.

Although valuable at trial, the deposition perhaps has even more value in advance of trial. Many cases are settled after depositions are taken because the facts are known, the credibility of key witnesses (or lack thereof) has been established and the witnesses are usually locked into positions on the issues, making it difficult for them to change their position at trial. Stated another way, after the depositions are taken, all of the cards to be played at trial are on the table for all to see.

Conclusion

While depositions admittedly can increase the cost of litigating in the United States, they can also result in considerable savings by allowing the parties to more accurately and transparently assess the issues and evaluate their chances of prevailing at trial, which promotes settlements. And even if settlement is not possible, the availability of depositions greatly enhances the likelihood that the trial will be decided on the merits and the truth, rather than on tactics and surprise.

Disclosure: the pre-hearing London arbitration perspective

There are no rigid rules or parameters for disclosure in London arbitration (at least which arise as a matter of law). However, in practice, certain approaches have become well established.



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Procedural discretion

Arbitration in London may take many forms. However, the default position in all those forms, as regards procedural and evidential matters (which will include the scope of any document production or 'disclosure') is contained in s 34 of the Arbitration Act 1996.

In this regard, s 34(1) of the Act provides that: *'It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.'* In turn, s 34(2)(d) provides that: *'Procedural and evidential matters include ... whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage.'*

Thus, the scope of disclosure in London arbitration will, in practice, be determined by the arbitral tribunal in each case (assuming that the parties do not themselves agree upon such matters in advance – which the 1996 Act permits them to do).

It follows that, strictly speaking, there are no rigid rules or parameters for disclosure in London arbitration (at least which arise as a matter of law) – each case will turn upon its own demands and requirements. This is reflected in the fact that, even under well-known institutional arbitral rules, there are no rigid limits for disclosure or document production.

Thus, for example, the London Court of International Arbitration (LCIA) Rules 2014 provide in Article 22.1(v) that the tribunal may *'order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant'*. The International Chamber of Commerce (ICC) Rules 2017 provide for a similar breadth of procedural discretion.

However, in practice, certain approaches in relation to disclosure have become well established.

International Bar Association (IBA) rules – limited default disclosure

In this regard, the position in relation to large-scale international commercial arbitration in London sometimes evidences a preference for disclosure founded upon the IBA Rules on the Taking of Evidence in International Arbitration (2010). Those Rules (by Article 3.1) provide for very limited default disclosure by a party: *'Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.'* That is supplemented by a facility (under Article 3.2 ff) for each party to serve a *'Request to Produce'*, which may seek to widen the scope of the disclosure provided.

LMAA terms – indication of the scope of disclosure required

However, maritime arbitration in London is more commonly conducted under the LMAA Terms (presently in their 2017 version). Helpfully, those provide some indication of the scope of disclosure that will be required. In this respect, paragraph 9 of the Second Schedule of the Terms provides expressly:

'Subject to any specific agreement between the parties or ruling from the tribunal, the parties are entitled at any stage to ask each other for any documentation that they consider to be relevant which has not previously been disclosed. Parties will not generally be required to provide broader disclosure than is required by the courts. Generally, a party will only be required to disclose the documents on which it relies or which adversely affect its own case, as well as documents which either support or affect the other party's case.'

As can be seen, the scope of disclosure there anticipated is broader than that required by default under the IBA Rules – while the IBA Rules require a party to disclose only 'Documents available to it on which it relies', the LMAA Terms require (unless otherwise ordered) disclosure by a party of 'the documents on which it relies or which adversely affect its own case, as well as documents which either support or affect the other party's case'.

As paragraph 9 of the Second Schedule of the LMAA Terms intimates, the general ethos is that this scope of disclosure will marry with that which would ordinarily be required in litigation before the English courts. In the latter regard, Rule 31.6 of the Civil Procedure Rules (CPR) provides for a default position of 'Standard Disclosure' to be provided by a party. That comprises 'the documents on which he relies; and ... the documents which – (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case ...'.

Thus, as can be seen, disclosure in LMAA arbitration tracks disclosure before the courts, although the Commercial Court in London is shortly, from March or April 2018, to embrace a two-year pilot scheme of revised and more tailored disclosure in which the default position will comprise only 'Basic Disclosure', requiring a party to disclose '(1) the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case; and (2) the key documents that are necessary to enable the other parties to understand the case they have to meet'¹.

Expanding on the scope of disclosure

In practice, it is possible (usually by way of a request or application for Specific Disclosure) to further expand the scope of disclosure where sufficient justification can be made out.

Ordinarily, arbitral tribunals in maritime matters will (in appropriate circumstances) be amenable to an application for what is traditionally referred to as 'Peruvian Guano' disclosure. That derives from a test as to documentary relevance articulated by Brett LJ in the old case of *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at page 63:

'It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences...'

The idea behind disclosure meeting the *Peruvian Guano* test is that a party should disclose documents that may lead to a train of inquiry that might produce documents that meet the test for Standard Disclosure, ie which advance his own case or which damage the case of his adversary.

However, as indicated above, this is not the default position and will require the tribunal to be persuaded that there is a genuine basis for the application (and a demonstrable reason for believing that certain documents, if disclosed, will lead to further relevant disclosure). Tribunals will be alert to head off what is often termed 'a fishing expedition' (where one party simply 'fishes' indiscriminately for disclosure in the hope simply that something of relevance might turn up).

Finding a balance

Against this backdrop, it can be seen that the English approach to document production in maritime arbitration is one that seeks to adopt a balance between benefit and burden. The system is intended to ensure a relatively level playing field in terms of pre-hearing disclosure (of greater practical value, perhaps, than a very narrow IBA-style default position), while avoiding the potentially negative consequences (in terms of delay and expense) that can otherwise come from a more expansive disclosure system.

This attraction is enhanced by a measure of flexibility which comes from leaving the arbitral tribunal as the master of its own procedure (further to s 34 of the 1996 Act), with the ability to entertain (where appropriate) discrete applications for (potentially wider) specific disclosure.

However, disclosure in this sense is a strictly documentary process. There is (ordinarily) no facility under English procedure for anything approaching the deposition process in the United States (whereby individual witnesses may be interrogated on the documents or on their evidence in advance of the final hearing). Thus, while where there is a question mark as to the adequacy or integrity of one party's disclosure, it may be possible for the tribunal to require that a 'responsible officer' of a corporate party provide a witness statement explaining the inability to provide certain disclosure, but there will ordinarily be no procedural opportunity to question that individual on that issue before the final hearing.

Nevertheless, the sufficiency of the disclosure process in London arbitration, coupled with the adversarial nature of any final hearing (whether oral or on documents alone), almost invariably permits a thorough and just examination of any claim, but with a weather eye on costs and efficiency (as matters of ever-increasing sensitivity).

¹ See <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/draft-practicedirection-2-nov-2017.pdf>