Chartered Institute of Arbitrators

CIArb

Protocol for
E-Disclosure in Arbitration

1 Purpose of CIArb Protocol for E-disclosure in Arbitration

This Protocol is for use in those cases (not all) in which potentially disclosable documents are in electronic form and in which the time and cost for giving disclosure may be an issue. It is intended:

- to achieve early consideration of disclosure of documents in electronic form ("e-disclosure") in those cases in which early consideration is necessary and appropriate for the avoidance of unnecessary cost and delay;

- to focus the parties and the Tribunal on e-disclosure issues for consideration, including the scope and conduct of e-disclosure (if any); and

- to address e-disclosure issues by allowing parties to adopt this Protocol as part of their agreement to arbitrate a potential or existing dispute.

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Early consideration

1 In any arbitration in which issues relating to e-disclosure are likely to arise the parties should confer at the earliest opportunity regarding the preservation and disclosure of electronically stored documents and seek to agree the scope and methods of production.

2 The Tribunal shall raise with the parties the question of whether e-disclosure may arise for consideration in the circumstances of the dispute(s) at the earliest opportunity and in any event no later than the preliminary meeting.

3 The matters for early consideration include:

(i) whether documents in electronic form are likely to be the subject of a request for disclosure (if any) during the course of the proceedings, and if so;

(ii) what types of electronic documents are within each party's power or control, and what are the computer systems, electronic devices, storage systems and media on which they are held;

(iii) what (if any) steps may be appropriate for the retention and preservation of electronic documents, having regard to a party's electronic document management system and data retention policy and practice, provided that it is unreasonable to expect a party to take every conceivable step to preserve every potentially relevant electronic document;

(iv) what rules and practice apply to the scope and extent of disclosure of electronic documents in the arbitration, whether under the agreed arbitration rules, the applicable arbitral law, any agreed rules of evidence (for example, the IBA Rules on the Taking of Evidence in International Commercial Arbitration), this Protocol or otherwise;

(v) whether the parties have made, or wish to make, an agreement to limit the scope and extent of electronic disclosure of documents;

- (vi) what tools and techniques may be usefully considered to reduce the burden and cost of e-disclosure (if any), including:

  - (a) limiting disclosure of documents or certain categories of documents to particular date ranges or to particular custodians of documents;

  - (b) the use of agreed search terms;

  - (c) the use of agreed software tools;

  - (d) the use of data sampling; and

  - (e) the format and methods of e-disclosure;

- (vii) whether any special arrangements with regard to data privacy obligations, privilege or waiver of privilege in respect of electronic documents disclosed may be agreed; and

- (viii) whether any party and/or the Tribunal may benefit from professional guidance on IT issues relating to e-disclosure having regard to the requirements of the case.

Request for disclosure of electronic documents

4 Any request for the disclosure of electronic documents shall contain:

- (i) a description of the document or of a narrow and specific requested category of documents;

- (ii) a description of how the documents requested are relevant and material to the outcome of the case;

- (iii) a statement that the documents are not in the possession or control of the party requesting the documents; and

- (iv) a statement of the reason why the documents are assumed to be in the possession or control of the other party.

Order or direction for disclosure of electronic documents

5 In making any order or direction for e-disclosure, or for the retention and preservation of electronic documents, the Tribunal shall have regard to the appropriate scope and extent of disclosure of electronic documents in the arbitration, whether under the agreed arbitration rules, the applicable

arbitral law, any agreed rules of evidence (for example, the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and this Protocol. The Tribunal shall have due regard to any agreement between the parties to limit the scope and extent of disclosure of documents.

6 In making any order or direction for e-disclosure the Tribunal shall have regard to considerations of:

(i) reasonableness and proportionality;

(ii) fairness and equality of treatment of the parties; and

(iii) ensuring that each party has a reasonable opportunity to present its case

by reference to the cost and burden of complying with the same. This shall include balancing considerations of the amount and nature of the dispute and the likely relevance and materiality of the documents requested against the cost and burden of giving e-disclosure.

7 The primary source of disclosure of electronic documents should be reasonably accessible data; namely, active data, near-line data or offline data on disks. In the absence of particular justification it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations. A party requesting disclosure of such electronic documents shall be required to demonstrate that the relevance and materiality outweigh the costs and burdens of retrieving and producing the same.

Production of electronic documents

8 Production of electronic documents ordered to be disclosed shall normally be made in the format in which the information is ordinarily maintained or in a reasonably usable form. The requesting party may request that the electronic documents be produced in some other form. In the absence of agreement between the parties the Tribunal shall decide whether production of electronic documents ordered to be disclosed should be in native format or otherwise.

9 A party requesting disclosure of metadata in respect of electronic documents shall be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing the same, unless the documents will otherwise be produced in a form that includes the requested metadata.

Procedure and costs

10 The Tribunal shall consider the appropriate allocation of costs in making an order or direction for e-disclosure.

11 The Tribunal shall establish a clear and efficient procedure for the disclosure of electronic documents, including an appropriate timetable for the submission of and compliance with requests for e-disclosure.

12 The Tribunal shall require that a producing party give advance notice to the requesting party of the electronic tools and processes that it intends to use in complying with any order for disclosure of electronic documents.

13 The Tribunal may, after discussion with the parties, obtain technical guidance on e-disclosure issues. Such discussion shall include the question of who is to be instructed to provide technical guidance and the costs expected to be incurred. The costs of this shall be included in the costs of the arbitration.

14 In the event that a party fails to provide disclosure of electronic documents ordered to be disclosed or fails to comply with this Protocol after its use has been agreed by the parties and the Tribunal or ordered by the Tribunal, the Tribunal shall be entitled to draw such inferences as it considers appropriate when determining the substance of the dispute or any award of costs or other relief.

The Chartered Institute of Arbitrators takes no responsibility for damage or loss suffered by any user of this Protocol.

*Setting **global** standards for dispute management*

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