CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration

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CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration

INTRODUCTION:

The CPR Protocol addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different legal cultures, 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 tribunals may follow in administering proceedings before them, including proceedings conducted under 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. When drafting their agreements to arbitrate, parties should carefully consider the extent to which they anticipate disclosure from the parties and third parties will be relevant and material to resolving potential disputes satisfactorily.

The Protocol was 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 Lawrence W. Newman, who was also the chair of the CPR Arbitration Committee. Members of the working groups and members of the Arbitration Committee who participated are listed on the penultimate page of this document.

The CPR Arbitration Committee established a Task Force in 2021 to review the Protocol in light of current best practices in arbitration. The co-chairs of the 2021 Task Force are Lawrence W. Newman and Viren Mascarenhas. Members of the 2021 Task Force are listed on the last page of this document.
**PREAMBLE**

1. This Protocol has two purposes. The first 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. The second is to assist CPR or other tribunals (hereinafter “the tribunal”) in carrying out their responsibilities regarding the conduct of the arbitral proceedings, such as those in the CPR rules, by setting out general principles for dealing with requests for the disclosure of documents and electronic information and for establishing procedures for the testimony of witnesses.

2. The tribunal is encouraged to direct the attention of the parties to this Protocol prior to or at the initial prehearing conference and to draw upon it in organizing and managing the proceeding.

3. The tribunal is 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 as well as ad hoc arbitrations. The full set of CPR arbitration rules may be accessed [here](http://www.cpradr.org).

Any questions regarding this Protocol should be referred to [cprneutrals@cpradr.org](mailto:cprneutrals@cpradr.org).

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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, the tribunal is 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 understood 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 to the outcome of the dispute and for which a party can demonstrate a need in order to present its position, taking into account proportionality criteria set forth in Section 1(e) below. The tribunal should decide disclosure disputes that the parties are unable to resolve themselves through procedural orders or case management conferences.

(b) ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY-WORK-PRODUCT PROTECTION

The tribunal should apply the provisions of applicable law that afford the greatest protection of attorney-client communications and work product documents. 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.

(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. The modes set forth in Schedule 1 include pre-hearing disclosure of documents in the possession, custody or control of witnesses presented by the parties. Disclosure of documents different from that which is provided for in the mode of disclosure selected by the parties may be restricted or permitted by the tribunal, in exceptional circumstances, including to achieve fundamental fairness.
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 and privacy concerns and applicable laws that may restrict or prohibit disclosures. 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 may be 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 electronic information that is not easily accessible, such as electronic information stored on back-up servers or systems, or fragmented or deleted files should be granted only in extraordinary circumstances or 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.”

The modes set forth in Schedule 2 include pre-hearing disclosure of electronic information in the possession, custody or control of witnesses presented by the parties.

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 imposition of an “evergreen” preservation requirement (i.e., requiring preservation of documents created after notice of the requirement) is generally only appropriate upon a showing of substantial need. The parties’ preservation obligations and requests for preservation of specified electronic information should comport with the Schedule B mode of disclosure of electronic information selected.

2. The tribunal and the parties may consider best practices issued in relevant protocols such as the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020).
TRIBUNAL ORDERS FOR THE DISCLOSURE OF DOCUMENTS AND INFORMATION

The tribunal should make a fair decision as to the requested disclosure of parties and non-parties by taking into account 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. The tribunal should consider whether to hold a hearing to decide any disclosure disputes that the parties have been unable to resolve themselves.

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 the initial prehearing conference, identifying areas of disagreement and adopting expeditious procedures for resolving any such disagreements.

(2) Burdens versus Benefits

The tribunal 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 (with such costs subject to reallocation upon issuance of the final award).

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

The tribunal should not permit a party to use in support of its case, at a hearing or otherwise, documents or electronic information unless a party has presented them as part of its case or previously disclosed them. The tribunal may permit such use in exceptional circumstances for the sole purpose of impeaching 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 may rely on to support its claims or defenses.

Mode B. Disclosure provided for under Mode A together with pre-hearing disclosure of documents that are relevant and material to the outcome of the dispute and for which the requesting party can demonstrate a substantial need, subject to limitations of reasonableness, duplication, proportionality, and undue burden.

Mode C. Disclosure provided for under Mode A together with pre-hearing disclosure of documents that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication, proportionality, and undue burden.
SCHEDULE 2

Since technologies used to store and review electronically stored information are rapidly changing, tribunals and parties should make use of devices, applications and repositories of electronic information that will minimize the cost of review and disclosure of electronic information and agree on search terms, algorithms and AI-assisted technology that will enable them to take advantage of advances in information technology.

MODES OF DISCLOSURE OF ELECTRONIC INFORMATION

Mode A. No disclosure, other than the disclosure, prior to the hearing, of electronic information that each side may rely on to support its claims or defenses, presented in reasonably usable form.

Mode B. Disclosure provided for under Mode A together with (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; (4) no disclosure of information other than reasonably accessible active data; and (5) the disclosure shall be limited to electronic information that is relevant and material to the outcome of the dispute and for which the requesting party can demonstrate a substantial need, subject to limitations of reasonableness, duplication, proportionality, and undue burden.

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 that is relevant to any party’s claim or defense, subject to limitations of reasonableness, duplication, proportionality, 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

Arbitral rules typically contain provisions regarding presentation of witnesses, if appropriate. The parties may agree that the tribunal shall decide the arbitration on the basis of documents only, dispensing with testimony.³

(a) DIRECT TESTIMONY OF WITNESSES IN WRITTEN FORM (WITNESS STATEMENTS)

Witness statements are detailed presentations in writing of the witness’s direct testimony. They may include references to documents that are also presented. These statements are exchanged prior to the hearing. Witnesses then are usually called to 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 eliciting the direct testimony of witnesses at hearings. They also serve to reduce the element of surprise, narrow the issues, and permit more focused questioning of the witness at the hearing. Witness statements also allow the tribunal and the parties to become more acquainted with material facts in advance of the hearing, and they may therefore promote settlement.

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. The tribunal may wish to explore alternative forms of witness statements with the parties. 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. Although testimony submitted in question and answer format potentially may be more persuasive than a narrative text and may more nearly replicate the presentation of oral testimony, the use of such format is relatively uncommon.

3. 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.

4. Each witness who has provided a statement is expected to appear for examination at the evidentiary hearing if called by the opposing parties or the tribunal. Absent a showing of good cause, the tribunal may disregard the statement of any witness who fails to appear in support of it.

5. 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 or by the sponsoring party. If the tribunal elects not to do so, it should treat the witness statement as it would treat a witness who testified orally but was not cross-examined.

³ This Protocol addresses only the presentation of witnesses, and does not address disclosure obligations of the parties, witnesses and the tribunal, which should be addressed prior to the presentation of witnesses. Generally, reference to witnesses covers both fact witnesses and expert witnesses, except where specific provisions of Section 2 treat witnesses and experts separately, in those cases, reference to witnesses refers to fact witnesses only.
(b) **TESTIMONY OF WITNESSES IN ORAL FORM**

In the absence of a witness statement, the testimony of a witness is elicited at a hearing through questioning by counsel and the tribunal.

(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 relevant and material to the outcome of the dispute and usually where one or more of the following 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 telephone or videoconference, before the tribunal. The tribunal should impose strict limits on the number and length of any depositions allowed, taking into account any agreement between the parties. If appropriate, the tribunal may issue subpoenas for depositions of third parties in accordance with applicable law. 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(g) 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 is not exercised frequently. 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 experts and, if so, establish a schedule for the submission of expert reports.

2. Each expert should submit a signed report, setting forth a curriculum vitae or other biographical information describing the qualifications and experience of the witness; the facts considered; a description of the methods, evidence and information used in arriving at the conclusions reached in sufficient detail to serve as the entire evidence of the expert; and submission of the evidence relied on in the report if not otherwise in the arbitration record.⁴

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 With regard to the presentation of experts on damages, the tribunal should refer to the [CPR Protocol on Determination of Damages in Arbitration](#).
4. Each expert who has submitted a report is expected to appear at a hearing if called by the opposing parties or the tribunal. The tribunal may disregard the report of an expert who fails to appear at a hearing absent a showing of good cause. In some cases, the opposing party may elect not to question the expert. In such event, the tribunal should consider whether it wishes to have the expert appear before it for questioning by members of the tribunal or the sponsoring party. If the tribunal elects not to do so, it should treat the expert report as it would treat an expert who testified orally but was not examined.

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 for the purpose of narrowing the scope of disputed issues among the experts.

6. Corrections of errors made in an expert report should be submitted in writing to the parties and the tribunal at a reasonable time prior to the hearing.

7. 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.

2. If the witness has submitted a witness statement, then the witness statement serves as the direct testimony of the witness. 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.

3. Absent party agreement or a determination by the tribunal that direct examination may be more extensive, the tribunal should order that witnesses who have submitted a statement may respond to questions from the sponsoring party before being cross-examined so long as this oral testimony is brief and does not introduce factual matters not contained in the written statement (unless such matters arose subsequent to the submission of that statement).

4. If the expert has submitted an expert report, then the expert report serves as the direct testimony of the expert. The expert should, at a hearing before the tribunal, swear or affirm to tell the truth, and confirm his/her expert report(s). The tribunal may permit an expert to provide an overview of his/her expert report(s), which could be conducted in the form of a presentation by the expert or question-and-answer between counsel and expert, with the proviso that the scope of such testimony should be limited to matters discussed in his/her report(s) or in the opposing expert’s report(s).

5. The form and length of cross examinations should be such as to afford a fair opportunity for the testimony of a witness or expert to be fully clarified and/or challenged, subject to the overall time limits in a chess-clock proceeding.
6. The tribunal may order that all witnesses of fact, except for a designated party representative who is also a witness, may not attend the hearing or review the hearing transcripts until after all witnesses of fact have been examined. Such procedure should not apply to experts who, in the ordinary course, may attend the hearing or review the hearing transcripts prior to their examination.

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

8. The tribunal should consult CPR's Annotated Model Procedural Order for Remote Video Arbitration Proceedings to address issues unique to arbitration proceedings conducted in whole or in part via videoconference regarding examination of witnesses and experts.

(g) 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, including to achieve fundamental fairness.
SCHEDULE 3

MODES OF PRESENTING WITNESSES (INCLUDING EXPERTS)

**Mode A.** No [witness statements] [or expert reports]. Direct testimony presented orally at the hearing by [the witness] [or expert] before being cross-examined. No depositions of [witnesses] [or experts].

**Mode B.** Submission in advance of the hearing of [a written statement from each witness] [or expert report from each expert] on whose testimony a party relies, sufficient to serve as that [witness’s] [or expert’s] entire evidence, supplemented, at the option of the party presenting the [witness, by short summary of the witness statement by the witness through direct examination] [or the expert, by short summary of the expert report through presentation or direct examination] before his/her cross-examination.

**Mode C.** Submission in advance of the hearing of [a written statement from each witness] [or expert report from each expert] on whose testimony a party relies, sufficient to serve as that [witness’s] or [expert’s] entire evidence, supplemented by more expansive direct examination of [the witness] or [the expert] than in Mode B before his/her cross-examination.

**Mode D.** As in Mode [B] or [C], 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.
INFORMATION EXCHANGE WORKING GROUPS (2007)*

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