

The need to control disclosure of documents in modern commercial arbitration: a South African perspective

By David Butler*

1) Introduction

The abuse of the process for disclosure of documents has long been identified as one of the causes of excessive delay and unnecessary expense in arbitration proceedings, particularly in countries like South Africa with a “common-law” procedural tradition.¹ Notwithstanding the fact that arbitration rules for many years have imposed a duty on arbitral tribunals to conduct arbitrations without unnecessary delay and expense, this remains a problem today. As recently as 2015, a survey of users of international arbitration identified the need for opposing counsel to cooperate in order to reduce excessive requests for disclosure of documents and for arbitrators to be more proactive in curbing this trend.²

The writer’s own experience of discovery and arbitration was obtained in a substantial arbitration in Cape Town in the mid-nineteen seventies.³ Counsel for the parties initially agreed without discussion that formal discovery would be unnecessary. Yet the writer, as attorney for the claimant, can distinctly remember drafting a very lengthy discovery affidavit after an expensive postponement and undertaking inspection of documents disclosed by the other side in various offices of the respondent, at a time when wet-process photocopiers were the only mobile type of copier available.⁴ The writer may be an academic but this experience has made me a long-term adherent to the need to control disclosure of documents in arbitration.

Some South African legal practitioners are not averse to agreeing to conduct arbitrations under the Uniform Rules of the High Court, a form of privatised litigation. Under these rules, the parties are entitled to full discovery, as of right, after the close of pleadings.⁵ However, if these practitioners want to become involved in international arbitration or to encourage their clients to become repeat users of domestic arbitration to resolve major commercial disputes, they will need to be aware of ongoing development of best international practices to curb the cost and time spent on disclosure.

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¹ See Butler 1994 *SA Merc LJ* 251 254-255.

² See QMUL and White and Case Survey 2015 30-31.

³ See *Cape Town Municipality v Yeld* 1978 4 SA 802 (C). As the arbitration was open to the public the issue of confidentiality does not arise.

⁴ The claimant also undertook to make disclosure of documents in possession of its holding company that was not a party to the arbitration, for the purpose of establishing that respondent’s averment that the holding company had not, prior to the expropriation, already decided to close its cement factory outside Cape Town. This would have meant that the claimant had no use for the limestone on the property expropriated by the respondent for purposes of establishing the city-sized housing estate of Mitchell’s Plain.

⁵ See Rule 35(1).

2) The development of rules on disclosure of documents in ad hoc arbitration in South Africa

Domestic arbitration in South Africa today takes place under the Arbitration Act 42 of 1965, legislation which is widely regarded as outdated, particularly as regards the powers of the arbitral tribunal.⁶ Ironically, on the issue of disclosure or discovery of documents, the drafters of the 1965 Act provided for present-day requirements. Section 14(1)a(i) states that unless the arbitration agreement otherwise provides, an arbitral tribunal⁷ on application may “require any party to the reference, subject to any legal objection, to make discovery of documents by way of affidavit ... and to produce such documents for inspection”.⁸

This provision both respects party autonomy, in that it is subject to the arbitration agreement, and empowers the arbitral tribunal to control disclosure as the statute’s default position. Parties may therefore refine the powers of the arbitral tribunal further by means of their choice of rules, as discussed below, or they can deprive the tribunal of its power to control disclosure by depriving it of this power, which by implication occurs when the parties agree to arbitrate under the High Court Rules.

The Association of Arbitrators (Southern Africa) was established in 1979 and has always promoted an *ad hoc* arbitration culture rather than providing administered arbitration services. From the outset, the Association’s Standard Procedure Rules have been intended for *ad hoc* arbitration. The second edition of the Standard Procedure Rules of 1990 regrettably followed the High Court Rules by giving either party the right to require a discovery affidavit after the close of pleadings.⁹ Future editions of the Standard Procedure Rules restored control over disclosure to the discretion of the arbitral tribunal.¹⁰

In 2013 the Association decided to bring its Standard Procedure Rules in line with international standards by adopting the UNCITRAL Arbitration Rules of 2010,¹¹ with only minor amendments. Although the process for the commencement of arbitration proceedings is now dealt with in greater detail,¹² the UNCITRAL Arbitration Rules provide much less detail on how the arbitration should be conducted after the exchange of a Statement of Claim and a Statement of Defence than the locally developed rules which they replaced.¹³

It has sometimes been asserted that the UNCITRAL Arbitration Rules do not address the issue of discovery or disclosure of documents. This assertion is not correct. Both the UNCITRAL

⁶ See e.g. D Butler “South African arbitration legislation – the need for reform” (1994) 27 *CILSA* 118 149-150.

⁷ In a domestic arbitration the arbitral tribunal will normally consist of a sole arbitrator. In this note, the term “arbitral tribunal” is used instead of “arbitrator” out of respect for gender sensitivity.

⁸ The English Arbitration Act of 1950 s 12(1) conferred a similar power on the arbitral tribunal, with the difference that the power of the tribunal under the South African Act can only be exercised on the application of a party. See Butler 1994 *SA Merc LJ* 278.

⁹ See Rule 12.4 and 12.5; Butler 1994 *SA Merc LJ* 278.

¹⁰ See e.g. the 6th edition of the Standard Procedure Rules (2009) rule 27.1.

¹¹ It is clear from article 1.1 of the UNCITRAL Arbitration Rules that their drafters did not intend to restrict the use of the rules to international arbitration.

¹² See e.g. articles 3-4 of the 2018 edition of the Standard Procedure Rules.

¹³ Compare e.g. articles 17, 27 and 28 of the 2018 edition of the Standard Procedure Rules (that are closely based on the corresponding articles of the UNCITRAL Rules) with rules 10-11, 20-29 and 31 of the 6th edition of the Standard Procedure Rules (2009).

Rules and the Standard Procedure Rules empower the arbitral tribunal to order disclosure in article 27.3:

“At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.”

Compared to the rule which it replaced, this provision is very terse. Provisions like this in the UNCITRAL Rules required the Association of Arbitrators to make a choice. There were two options. The one was for the association to draft and issue practice notes to guide users of its own Standard Procedure Rules. However, the whole purpose of adopting the UNCITRAL Arbitration Rules was to comply with international standards. Practice notes would have amounted to importing local standards again through the back door. Instead, the Association recommends that the parties should refer to the IBA Rules on the Taking of Evidence in International Arbitration of 2010. These rules are specifically designed so that they can either be used to supplement the parties' chosen rules if the parties so agree, or alternatively the tribunal, after consulting the parties could use the IBA Rules as guidelines.¹⁴ The provisions in the IBA Rules on disclosure of documents are discussed in paragraph 4 below.

3) Principles and Process

Since the reforms to the procedures for litigation in the English courts resulting from the Woolf Report in 1996, the term “disclosure of documents” has been preferred to the traditional term “discovery of documents” and is generally used in this note. The English writers Mustill and Boyd regard discovery of documents as an essential feature of the English adversarial system, in that it compensates for the tribunal's lack of inquisitorial powers.¹⁵ They nevertheless add that if the process is carried out thoroughly, it involves the parties and their legal representatives in huge expenditure of time and money, which could be better spent in preparing evidence for the hearing.¹⁶

Arbitration is a process, which can be usefully compared in this context to a ship. The parties are the owners of the process as it takes place pursuant to their arbitration agreement, but the arbitral tribunal is the captain of the ship. Once the arbitrator accepts appointment, a new contractual relationship comes into existence by way of what has been termed the arbitrator's agreement between the arbitrator and the parties.¹⁷ The arbitrator's agreement arguably imposes a useful check on party autonomy, namely the freedom of the parties to agree how their dispute should be resolved by arbitration, subject only to those safeguards as are necessary in the public interest.¹⁸ Thus, if the parties have agreed that the arbitration must take place under the Standard Procedure Rules of the Association of Arbitrators, it is on that

¹⁴ See the preamble to the IBA Rules, paras 1 and 2.

¹⁵ See MJ Mustill & SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edition, Butterworths, London 1989) 324. This work played a major role in ensuring that English arbitration law was understood as a coherent and principled system as opposed to a rather ramshackle structure built on somewhat haphazard legislation and generations of precedents.

¹⁶ Mustill & Boyd 325.

¹⁷ See GB Born *International Commercial Arbitration* (2nd ed Kluwer International, The Netherlands, 2014) 1975-1976. See also *Jivraj v Hashwani* [2011] UKSC 40 para 77 per Lord Mance.

¹⁸ See the English Arbitration Act of 1996 s 1(b). In a South African context, for example, party autonomy is restrained by the requirement that the process must be fair. See *Lufuno Maphuphul & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) paras 221-223, where the court was quick to stress that “fairness” in this context should not be equated to the process in the High Court Rules.

basis that the arbitral tribunal is appointed and concludes its arbitrator's agreement with the parties. As a result, once the arbitral tribunal has accepted appointment, the parties are no longer free to curb the tribunal's power to control disclosure as contained in the rules without the tribunal's consent. If the parties were to state at the preliminary meeting that they had agreed on the basis of legal advice to do just that, the arbitrator could point out that this constitutes a breach of the arbitrator's agreement and offer to resign. The reason for this suggestion is that the arbitral tribunal is no longer able to fulfil its duty under the rules to conduct the proceedings so as to avoid unnecessary delay and expense.¹⁹

Besides party autonomy, and the restrictions typically placed on this by the wide discretionary procedural powers usually conferred on the arbitral tribunal in the parties' chosen rules, the other important principle is that of proportionality. The proportionality principle entails that the scope and expense of disclosure will be restricted to what is reasonable, having regard to the amount in dispute and the relative importance of the issue in relation to which document production is sought.²⁰

It is particularly important that the arbitral tribunal should discuss its general approach to disclosure of documents with the parties at the first preliminary meeting or case management meeting and that general directions in this regard be incorporated into the first procedural directive.²¹ This approach has two advantages. Firstly, the tribunal has set out how it intends to deal with document disclosure before the matter has become a contested issue, protecting the tribunal's impartiality. Secondly, the parties are informed of the ground rules, which prevents them from incurring unnecessary expenditure.²²

4) The IBA Rules on the Taking of Evidence in International Arbitration²³

As stated above, the Association of Arbitrators opted to encourage arbitrators using its Rules to refer to the IBA Rules for more detail on issues like disclosure of documents, rather than attempting to provide its own guidelines.

Article 3 of the IBA Rules, dealing with the production of documents in international arbitration, aims to achieve a balance between the over-wide disclosure of documents under the common-law systems and the overly restrictive limits on the production of documents in civil-law systems. Article 3 aims to assist parties to discharge the burden of proving their respective

¹⁹ See the Standard Procedure Rules article 17.2, second sentence, which follows the corresponding provision in the UNCITRAL Arbitration Rules verbatim.

²⁰ See Redfern & Hunter 4th edition 299.

²¹ Compare the IBA Rules article 2.

²² On the second point see the IBA's *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* (hereafter "the IBA's *Commentary*") regarding article 2 at 5-6.

²³ The first edition of these rules in 1983 were controversial and not particularly successful. The second edition in 1998 was a substantially revised version, which in the context of document disclosure "became almost universally recognised as the international standard for an effective, pragmatic, and relatively economical document production regime." See N Blackaby & C Partasides *Redfern and Hunter on International Arbitration* (6th edition, Oxford, 2015) 381. The revision for the latest version in 2010 was largely restricted to updates and refinements.

cases,²⁴ but not to build that case by means of a US-style fishing expedition.²⁵ This intention is clearly demonstrated by the contents of a request to produce, as set out in article 3(3).

Notwithstanding the undoubted benefits of appropriate discovery, the disadvantage of uncontrolled discovery is succinctly described by Park as follows: “Discovery serves as a vacuum cleaner to Hoover up even marginally relevant pieces of paper that might lead to admissible evidence”.²⁶ Article 3 of the IBA Rules deals with three separate classes of documents, each of which is subject to a different procedural treatment. The first class relates to documents which are at a party's own disposal, and which it relies on to support its case (article 3(1)). The second class concerns documents which a party wishes to use as evidence, but cannot produce on its own because the documents are either in the possession of the other party to the arbitration or of a third party (article 3(2)-(9)).²⁷ The third class comprises those documents which neither party has sought to introduce but which are regarded as relevant by the tribunal. The tribunal may request a party to produce these documents under article 3(10).²⁸

Regarding the first class, these documents will normally be disclosed together with the relevant party's statement of claim or statement of defence.²⁹ Alternatively, the document must be disclosed and produced by the deadline stipulated by the tribunal in its directive, if a party intends relying on that document during the arbitration proceedings.³⁰ The production of documents under this category establishes clearly why an order for full discovery of documents is unnecessary. On the other hand, a party is not going to disclose a document in its possession which is predominantly adverse to its own case or which supports that of its opponent under this category. This justifies the need for the second category of disclosure discussed below.

Concerning the third class, it is conceivable that documents produced by both parties refer to a certain report, but neither party discloses or produces the report. The parties have each decided not to rely on the report because it contains statements adverse to their respective cases. The tribunal could legitimately request one of the parties to produce the document to facilitate its efforts “to establish the facts by all appropriate means”.³¹ This power of the arbitrator is in effect an investigative power, and is an additional reason why an order by the tribunal to parties to make full discovery is both unnecessary and disproportionate.

The second category relates to the right of a party to submit a “Request to Produce”. This request must either be limited to specific documents which are adequately described in the

²⁴ In terms of the UNCITRAL Rules article 27.1, each party has the burden of proving the facts relied on to support its claim or defence.

²⁵ G Blanke “Document production in international arbitration: from civil and common law dichotomy to operational synergies” (2017) 83 *Arbitration* 423 426-427.

²⁶ Park WW “The 2002 Freshfields Lecture – Arbitration's protean nature: the value of rules and the risks of discretion” (2003) 19 *Arbitration International* 279 at 287.

²⁷ Regarding documents in the possession of a non-party, compare s 16 of the (South African) Arbitration Act 42 of 1965 and article 27 of the UNCITRAL Model Law.

²⁸ See H Raeschke-Kessler “The production of documents in international arbitration – a commentary on article 3 of the new IBA Rules of Evidence” (2002) 18 *Arbitration International* 411 411-412.

²⁹ See the Standard Procedure Rules articles 20.4 and 21.4.

³⁰ See the IBA Rules article 3.1 and 3.11.

³¹ See the Standard Procedure Rules article 27.1, read with the IBA Rules, article 3.10; and the IBA's *Commentary* 11.

request or a “narrow and specific requested category of Documents that are reasonably believed to exist”.³² In addition the requesting party must state how the requested documents are relevant to the case and material to its outcome; a statement that the documents requested are not in possession of the party making the request and why the documents are assumed to be in the possession of the other party.³³ These restrictions are clearly designed to prevent a request to produce being abused as a mere fishing expedition.³⁴ The tribunal may then rule on the request.³⁵

Where the other party objects to the production of a requested document, for example because it is privileged, the parties should first attempt to resolve the objection. If these attempts fail, either party may request the tribunal to rule on the objection.³⁶

It is submitted that article 3 of the IBA Rules contains a well-balanced and fair process which enables the arbitral tribunal to deal with issues regarding disclosure of documents promptly and effectively.

An additional tool which has developed in practice to enable the tribunal to deal with such requests without the need for an oral hearing is the “Redfern Schedule”.³⁷ This will typically be drawn up at a meeting between the parties’ lawyers after one of the parties has submitted a request to produce. The Redfern Schedule usually comprises four columns, which are easy to synchronize with the relevant provisions of the IBA Rules.³⁸ The party requiring disclosure identifies the category of documents required (see article 3.3(a)(i) & (ii) of the IBA Rules) and in the next column furnishes succinct reasons justifying the request (see article 3.3(b) & (c) of the IBA Rules). The opposing party responds item by item in a separate column, basing any objections to disclosure on article 3.5 read with articles 3.3 and 9.2 of the IBA Rules. The last column is for the tribunal’s decision, which will be made having regard to the considerations in article 9.2 of the IBA Rules.³⁹ The main advantage of the schedule is that it can avoid the need for a (special) case management meeting, which even if conducted by teleconference, still requires finding a time which is convenient for the tribunal and the parties’ counsel.

The question which still needs to be addressed concerns how an arbitral tribunal should set about exercising its discretion to order disclosure, following an opposed request? King and Bosman⁴⁰ suggest that the following factors should be taken into account:

³² See the IBA Rules article 3(a)(i) and (ii). The request could e.g. relate to minutes of board meetings of the other party during a specified period.

³³ See the IBA Rules article 3.3(b) and (c) and the IBA’s *Commentary* at 8-11.

³⁴ See the IBA’s *Commentary* at 8.

³⁵ See the IBA Rules article 3.4.

³⁶ See the IBA Rules article 3.5-7. In exceptional circumstances the tribunal, after consulting the parties, may appoint an independent and impartial expert to review and report on the objection, so that the tribunal does not have to read the document.

³⁷ See generally on the Redfern Schedule Blackaby and Partasides *Redfern and Hunter on International Arbitration* (6th edition) 383-385; J Sutton, J Gill & M Gearing Russell on Arbitration (24th edition, Sweet & Maxwell, London, 2015) 257.

³⁸ See Blanke (2017) 83 *Arbitration* 427-429.

³⁹ Article 9(2)(b) allows the tribunal to exclude evidence on the basis of “legal impediments or privilege under the legal or ethical rules” that the tribunal considers applicable. In a South African domestic context the ordinary rules regarding privilege will apply.

⁴⁰ King B & Bosman L “Rethinking discovery in international arbitration: beyond the common law/civil law divide” (2001) 12(1) *ICC ICArb Bul* 30-33.

- The nature of the case: Where the issues in dispute are mainly factual some degree of discovery may well be required as parties are unlikely knowingly to disclose damaging documents. Discovery may however be unnecessary where the central issue is one of law, for example the interpretation of a clause in a contract.
- The amount in dispute: Where the amount in dispute is comparatively small, the costs of using a discovery process may be disproportionately high. In other words, the tribunal must always have regard to the proportionality principle in order to discharge its duty to avoid unnecessary delay and expense.
- The nature of the claims: Broader discovery may be justified where documents capable of proving or refuting a claim reside solely in the possession of the party directed to make discovery.

Before exercising its discretion to grant an opposed request for disclosure, the arbitral tribunal must be satisfied that the requirements of article 3.7 of the IBA Rules are met. The document requested must relate to issues “relevant to the case *and material to its outcome*” (my italics). Relevance alone is not sufficient and the burden to satisfy the tribunal regarding materiality is clearly on the party requesting production. The tribunal should weigh materiality to the outcome against proportionality (which includes the cost and burden of complying with the procedural order).⁴¹ Also, none of the objections to admissibility in article 9(2) must apply. Article 9(2)(g) contains as a reason on account of which production must be excluded “considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”⁴²

For those practitioners who may still find the IBA Rules pertaining to document disclosure a rather too drastic departure from the High Court Rules, they will find the Prague Rules of 2018 an even more radical departure. These Rules are briefly referred to below.

5) Other soft-law instruments

One useful source of advice for an arbitral tribunal on issues of arbitral procedure is the UNCITRAL Notes on Organizing Arbitration Proceedings (2016).⁴³ These Notes are designed to provide guidance on the sort of questions which an arbitral tribunal should consider when conducting an international arbitration, particularly when the parties and their respective lawyers have different traditions regarding legal procedure. The Notes are specifically designed so that they cannot be adopted as procedural rules. On the issue of requests to disclose documents, the Notes provide the following general advice:

“Approaches of arbitration laws and practices vary on whether a party may request the other party or parties to disclose specified documents and to what extent the arbitral tribunal should order such disclosure (for possible submission as evidence), when the requested party refuses to disclose voluntarily. Therefore, it may be useful for the arbitral tribunal to clarify with the parties at an early stage of the proceedings whether a party may request the other party to disclose documents and,

⁴¹ Blackaby & Partasides *Redfern and Hunter* (6th edition 2015) 386.

⁴² See PJ Rees “The Revised IBA Rules of Evidence” (2010) 76 *Arbitration* 514, 517.

⁴³ This document is available at www.uncitral.org, under the tags Texts and status; International Commercial Arbitration; and Explanatory texts.

if so, to indicate the scope of such disclosure, and to set out the relevant time limits, the form of disclosure requests and the procedures for contesting requests, if relevant.”⁴⁴

It is submitted that the second sentence provides useful advice to an arbitral tribunal in a domestic arbitration in South Africa as to how the issue of disclosure should be approached by the tribunal at a preliminary meeting.

Concerns among some lawyers, particularly those from a civil-law tradition, regarding the costs and duration of international commercial arbitration, led to the drafting of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration. The rules became available in December 2018.⁴⁵ The Prague Rules may be seen as an alternative to the IBA Rules, although they have a wider ambit, and like the IBA Rules are intended to supplement other institutional rules adopted by the parties in their arbitration agreement. Like the IBA Rules, they may either be formally adopted by the parties or used as a source of guidance by the arbitral tribunal.⁴⁶ The Prague Rules require the arbitral tribunal to play a proactive role and when establishing the procedural timetable, after having heard the parties, the tribunal may decide on “the form and extent of document production (if any)”.

Article 4 of the Prague Rules deals with documentary evidence. A party is required to submit the documentary evidence on which it relies to support its case as early as possible.⁴⁷ Article 4.2 provides:

“Generally the arbitral tribunal and parties are encouraged to avoid any form of document production, including e-discovery.”

This rule is not intended as an outright prohibition on disclosure of documents as practised in England and South Africa.⁴⁸ Nevertheless, it will be up to the party that believes that it will need to request documents from the other party, to convince the tribunal that this belief is well founded, so that the tribunal, “if satisfied that document production may be needed” can decide on the procedure to be followed and accommodate it in the procedural timetable.⁴⁹ The Prague Rules envisage a stricter approach to the disclosure of documents than that adopted in the IBA Rules in the interests of procedural efficiency. It is submitted that the IBA approach is clearly preferable in a South African context as it has more explicit safeguards to ensure procedural fairness.

6) The challenge of E-disclosure

A discussion of the challenge presented by e-disclosure is beyond the scope of this note. It is said that at least 80% of documents, correspondence and other information generated in the course of business is stored electronically. The revised definition of “document” in the IBA Rules, like its predecessor, is clearly wide enough to include any currently known form of

⁴⁴ See the UNCITRAL Notes para 76.

⁴⁵ The Prague Rules are available at <https://praguerules.com>. See also G Stampa “The Prague rules” (2019) 35 *Arbitration International* 221-244 for an informative discussion.

⁴⁶ See the preamble to the Prague Rules and article 1.1 and 1.2.

⁴⁷ Article 4.1.

⁴⁸ See Stampa (2019) *Arbitration International* 236.

⁴⁹ See article 4.2. Having regard to article 4.1, “document production” in the context of article 4.2 and 4.3 must be understood to refer to a request for disclosure of documents in possession of the other party.

electronically stored information (ESI).⁵⁰ The provisions of article 3 of the IBA Rules apply to ESI and the rule makes no distinction in principle (as opposed to detail) between ESI and hard copies.

Useful guidance in dealing with E-disclosure is provided by the Chartered Institute of Arbitrators' Protocol for E-Disclosure in International Arbitration (first published in 2008 and since updated). Both the preamble and article 1 stress the need for early consideration to be given to this issue. The English case of *Digicel (St Lucia) Ltd v Cable & Wireless*⁵¹ provides a striking example of the need to discuss E-disclosure at an early stage. In the *Digicel* case, the parties only met to discuss the issue after the defendant had incurred expenditure amounting to £2,175 million relating to E-disclosure. The judge, having heard both parties, decided that additional and more refined searches were required, with the result that much of the work done by the defendant had to be repeated.⁵² This case illustrates the need for the parties and the tribunal to discuss E-disclosure at an early stage. The parties will probably require specialist advice, while bearing in mind the proportionality principle.

7) Concluding comments

If private arbitration is to fulfil its potential as a quicker and more cost-effective alternative to litigation in the context of domestic commercial disputes, it is vital that arbitral tribunals are able to deal with issues relating to the disclosure of documents effectively and fairly. The arbitral tribunal should set out its general approach to disclosure clearly at the first preliminary meeting and confirm this in its first procedural directive. It should then apply that approach boldly but fairly, after asking the parties for their submissions on the specific procedural dispute. It is most unlikely that the court will then be prepared to accept that a procedural order by the tribunal on disclosure constitutes a procedural irregularity which would justify the court in interfering with the award.⁵³

⁵⁰ Blackaby & Partasides *Redfern and Hunter* (6th ed 2015) 385-387.

⁵¹ [2008] EWHC 2522 (Ch).

⁵² See the discussion of the *Digicel* case in Lord Jackson *Review of Civil Litigation Costs: Preliminary Report* vol 2 (May 2009) 379-380. Ch 40 of the report contains an illuminating discussion on the challenges of e-disclosure under the English model of disclosure.

⁵³ See generally FDJ Brand "Judicial review of arbitration awards" (2014) *Stell LR* 247 252-255.