Bristows

English developments in civil procedure rules and innovations applicable to arbitration

The Courts of England and Wales are innovators when it comes to procedure. Over the last 20 years, these innovations have generally been directed at improving the parties' focus on the issues in dispute, to ensure procedural compliance, to speed up disputes and to try to ensure that litigation is conducted proportionately.

However, there have been more recent innovations which are specifically directed at the huge data volumes needed in many commercial disputes. These changes put the onus on the lawyers to ensure that documents are preserved and that the materials disclosed are closely focussed on the issues.

In a similar vein, the Courts have sought to address a practice that had emerged, to use of witness statements (written evidence-in-chief) as a means of introducing documents into evidence. Witness preparation or "coaching" has always been a prohibited practice in England and Wales. However, it was considered that the previous practice of writing statements which tracked through the documentary evidence was making the statements excessively long and it was corrupting the memories of witnesses.

English procedure is now full of checklists, lists of issues and certificates. Lawyers and their clients are repeatedly asked to confirm that the procedure has been complied with, that certain obligations have been explained (and are understood) and to be transparent about the processes for the collection of documents and the taking of factual evidence.

Some of these innovations may be helpful or persuasive, when choosing a procedure or directions for an international arbitration.

Disclosure/Discovery

Disclosure Pilot Scheme and Practice Direction 57AD

From 1 January 2019 – 1 October 2022, the Courts of England and Wales ran a "Disclosure Pilot Scheme" ("**DPS**") in the Business and Property Courts. From 1 October 2022, the DPS was approved and began operating on a permanent basis through the Civil Procedure Rules Practice Direction 57AD.

The DPS was intended to achieve a complete culture change in the approach to disclosure in civil litigation in England and Wales, with a focus on controlling and maintaining proportionality in the time and cost spent on the disclosure process. The origins, objectives and an overview of the DPS are explained in the original Press Announcement from the Disclosure Working Group. A summary of the changes is below:

1. **Duties in relation to disclosure** – paragraphs 3 and 4 of PD57AD
    a. PD57AD creates duties on both the parties and the legal representatives conducting litigation in relation to disclosure, including preservation of documents, compliance with orders, searches for documents, and in relation to reviewing documents and disclosing irrelevant documents.
    b. Duty to preserve documents - clients are increasingly required to have stringent and robust systems in place to ensure no documents are deleted or otherwise permanently destroyed once litigation is in contemplation, particularly as

documents are now primarily held in digital format (see rules relating to the **preservation of documents** – paragraph 4 of PD57AD).

2. The concept of **Initial Disclosure** – paragraph 5 of PD57AD:

a. In English Court proceedings, parties are now required to provide to all other parties at the same time as its statement of case a list of documents and copies of (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 (including the documents referred to in that statement of case); and (2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

b. Initial disclosure is intended to allow each party to understand the case against it and to review the most relevant and pertinent documents which may have given rise to a claim or defence.

3. The **Disclosure Review Document** ("**DRD**") – paragraph 10 of PD57AD**:**

a. The DRD requires the parties to identify, discuss and agree the scope of disclosure and provide relevant information to the court. It is intended to be a shared document which sets out all matters relevant to disclosure for both parties including the list of issues and models for disclosure, details about the documents held by each party's custodians and how the relevant party holds documents.

b. A copy of the template DRD is here.

4. List of **Issues for Disclosure** and models of **Extended Disclosure** – paragraph 7 and 8 of PD57AD.

a. Disclosure under the new rules is intended to be "issue-based".

b. The parties are required to seek to agree a List of Issues for Disclosure – the issues to be included are only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case.

c. The parties are then required to agree an Extended Disclosure model to apply to each Issue for Disclosure. The models are as follows:

i. **Model A: Disclosure confined to known adverse documents.**

ii. **Model B: Limited Disclosure** - where and to the extent that they have not already done so by way of Initial Disclosure, and without limit as to quantity, disclosure of: (a) the key documents on which they have relied (expressly or otherwise) in support of the claims or defences advanced in their statement(s) of case; and (b) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

iii. **Model C: Disclosure of particular documents or narrow classes of documents** – this model of disclosure is intended to be "request-led".

iv. **Model D: Narrow search-based disclosure, with or without Narrative Documents** - each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D disclosure has been ordered.

v. **Model E: Wide search-based disclosure** - this is an exceptional model for disclosure requiring a party to disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure.

vi. Under all of the above models the parties are required to disclose known documents which are adverse to its own case.

5. Use of **Technology Assisted Review** to assist lawyers in reviewing documents for relevance

a. This is actively promoted by the Civil Procedure Rules and now has support in the jurisprudence from the English Courts, particularly see *Pyrrho Investments Limited v MWB Property Limited* [2016] EWHC 256 (Ch).[1]

b. There are numerous e-disclosure providers in the UK that deliver legal forensic technologies, and provide TAR products:

i. https://www.alvarezandmarsal.com/insights/ai-neural-networks-forensic-technology-looks-future

ii. https://www.epiqglobal.com/epiq/media/thinking/ediscovery/tar-models-investigative-features-explained.pdf

iii. https://www.consilio.com/wp-content/uploads/2019/03/TAR-Guidelines-January-2019.pdf

iv. Most of the disclosure providers in the UK use a review platform called Relativity, which provides its own assisted review tools.

Application to arbitrations

The ICC rules contain no specific provisions governing the production of documents. The IBA Rules, whilst not binding, provide a framework and guidance as to the production of documents, primarily based on requests for narrow and specific categories of documents.

Parties resolving their disputes by arbitration should consider whether it would assist to formulate a requirement for controlled disclosure in their arbitration agreement in line with the new English Disclosure rules. The rules set out above provide a balanced approach to disclosure,

[1] Note this case pre-dates the new disclosure rules but the decision is equally (if not more so) applicable.

allowing the parties to understand the case made against them whilst keeping disclosure limited to documents that are relevant and proportionate to specific issues only.

The ICC has provided helpful guidance on Managing E-Document Production and it is clear that the approach in the Courts of England and Wales is in alignment with those objectives.

Witness statements

Witness statements and Practice Direction 57AC

Similar to disclosure in English litigation, in 2021 new Civil Procedure Rule Practice Direction 57AC ("**PD57AC**") was brought into force in relation to witness statements for use in trial.

The requirements of the rules and key changes have been summarised here.

The Courts have required strict compliance with these rules and the consequences are potentially costly:

1. In McKinney Plant & Safety Ltd v Construction Industry Training Board [2022] EWHC 2361, the court gave the claimant permission to file an amended witness statement after the original version failed to comply with PD57AC, but ordered the claimant to pay the defendant's costs, which were summarily assessed, on an indemnity basis.

2. In *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC) the judge refused permission to allow a trial witness statement to be relied on at trial, ordering a compliant statement to be served and calling the statement in question an *"egregious case of serious non-compliance"*.

3. In *Angela Denise Curtiss and others vs (1) Zurich Insurance PLC (2) East West Insurance Company Limited*, the Court struck out four witness statements in their entirety.

4. In *Primavera Associates Ltd v Hertsmere Borough Council* [2022] EWHC 1240 (Ch), the Court ordered particular paragraphs f the trial witness statement to be struck out for non-compliance because they contained argument or were narrative from documents, and as such were not compliant with the new rules.

What has been the consequence of these changes to the process of producing witness statements in England and Wales?

1. Witness statements must now be produced in accordance with the Statement of Best Practice in the Appendix to PD57AC.

2. Witness statement must reflect the words of the witness used in any witness interviews and leading questions must be avoided (leading questions are defined as questions which "expressly or by implication suggests a desired answer or puts words into the mouth, or information into the mind, of a witness"). The intention of this change is to prevent "over-lawyering" of witness statements and to ensure the statement reflects the witness's true recollection.

3. Witnesses should only be shown documents where necessary and it must be disclosed in the witness statement that they were shown a document and whether they saw it at the relevant time. This is marked change from the previous culture in which witnesses

would be taken through a significant number of documents to comment on them. The intention of this change is to allow documents to "speak for themselves" and witnesses to provide only information which the documents cannot.

Application to arbitrations

There has been increasing awareness across international arbitration circles of the importance of the evidence-taking process in relation to witnesses and witness statements.

The ICC produced a report in 2020 on The Accuracy of Fact Witness Memory in International Arbitration describing the work undertaken by the ICC Task Force on Maximising the Probative Value of Witness Evidence.

The report should be read in full but the Task Force ultimately concludes that memory distortion can impact the reliability of evidence given and it is exactly this concern that the changes to the English procedures around witness statement seek to resolve. Many of the recommendations align with the requirements under English procedure and in some instances go further.

It would not be surprising to expect that some aspects of the English procedure witness statement reforms could be applied to arbitrations in English-seated cases. However in light of this report, it is likely that arbitrations seated elsewhere may also move towards similar practices in relation to witness evidence, and so parties may consider whether to incorporate or adopt a similar approach to the witness statement rules provided for and tested by the English Courts in PD57AC.

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