# DISCOVERY IN A DOMESTIC ARBITRATION: WHAT IS THE DEFAULT SETTING NOW?

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In just one generation we have gone from envelopes and stamps (and, for very urgent matters, telegrams and telexes) to instant messaging, worldwide. Already the facsimile machine, that wonder of the 1980's, has all but disappeared from modern commercial life. Documents that would once have had to be printed, copied and sent by post to a defined list of recipients can be delivered in a heartbeat to many destinations, with little hope of being able to find out later how widely they have been disseminated.

It is obvious that if there is to be a fair hearing of a disputed issue then the parties should be able to prepare on a properly informed basis. Holding documents back so that they can be produced with a flourish for the first time mid-trial cannot be condoned. As a matter of principle it still makes sense to say, as the Court in *Peruvian Guano*[2] did some 130 years ago, that all documents that are or might be relevant to what the adjudicator will have to decide should be discovered in advance of a hearing. But while the principle may be sound, the difficulty is that the logistics of seeing it done even in modest cases has itself become a significant roadblock to justice. *Peruvian Guano* discovery has collapsed under the weight of information that is now routinely generated and disseminated at the click of a mouse.

Until recently, an arbitrator in New Zealand would have had little difficulty identifying what principles to apply in the case of disagreement between parties as to what ought, or ought not, to be discovered in any given case. Both the District Court and the High Court Rules were built on the *Peruvian Guano* approach. Of course generalisations about arbitration practice are always difficult, but at least before the mid-1990's discovery in arbitral proceedings probably looked little different from discovery in the Courts. There was an easy[3] 'default setting' to refer to.

Things have changed. There are new District Court rules[4], and new High Court Rules[5]. And, at least as significantly, one consequence of the Arbitration Act 1996[6] has been that international touchstones such as the IBA Rules on the Taking of Evidence in International Arbitrations[7] have been brought to attention as never before.

So: when all else fails, is there a quick 'default setting' for an arbitrator to use today?

This paper is concerned with the substantive rules governing the discovery of documents in a domestic arbitration in New Zealand. To be clear:

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[2] *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at p. 62 per Esher MR.

[3] In the sense of being easy for the arbitrator to order; perhaps not so easy for the parties to achieve.

[4] District Court Rules 2009. In essence *Peruvian Guano* discovery is still available but only at or after a directions conference, and then only if the Judge is satisfied that discovery on that basis is economically justifiable; something which was expected to be '... a relatively rare occurrence.': see '*The New District Court Process – a radical change,* NZLS CLE Seminar (August 2009) at p11. On the other hand the information capsules that are required where a claim is defended must ' ... *list or describe sufficiently the essential documents* ... ' which support the case for the party filing the capsule: see Rules 2.14.3(e) and 2.15 .3(f) of those Rules.

[5] High Court Rules Amendment Rules (No.2) 2011.

[6] 'The Act'.

[7] At http://www.int-bar.org/images/downloads/iba%20rules%20on%20the%20taking%20of%20evidence.pdf. Discussed in detail in Chapter 25 of *Williams & Kawharu on Arbitration*, LexisNexis (2011).

- There is a fine line between the substantive obligation and the practical realities of getting discovery done in any given case. However the reference to 'substantive rules' is intended to focus discussion on the underlying question of what it is that a party must, or need not, make available on discovery to an opposing party. This is not a paper about the mechanics by which the obligation to give discovery might be discharged;

- The reference to domestic arbitration is important. Of course practice throws up different permutations, but the subject of discussion is an arbitration between New Zealand parties, concerning events that have taken place in New Zealand, which is governed by New Zealand law, and in which the place of the arbitration is in New Zealand;

- Being in arbitration, naturally the parties have it within their power to reach whatever agreement they wish in respect of their discovery obligations in the particular case.[8] The focus here, however, is on an arbitration that is being conducted under the Act, and where the only power that the arbitrator has to deal with disagreements about what should (or need not) be discovered has to be derived from the Act.

Assume that, in the course of such an arbitration, the parties fall into dispute as to the extent of their respective obligations to give discovery. The claimant contends that full discovery of all documents that are or might be relevant to matters at issue must be given.[9] The first respondent replies that it will be more than enough for each party to discover only those documents which they will rely on at the hearing, and those which may be adverse to their own case.[10] The second respondent argues that core documents should each be submitted with the parties' pleadings, and that there should then be a process by which the parties will have to request any further discovery by letter, identifying what they are looking for with some specificity.[11]

Schedule 1 of the Act necessarily applies in a domestic arbitration.[12] Article 19(2) provides that failing agreement between the parties the arbitral tribunal may *"... conduct the arbitration in such manner as it considers appropriate"*. Assuming that all of the provisions of the Second Schedule to the Act also apply, those powers are amplified by the provisions of Schedule 2 which relevantly includes clause 3(1)(f): *"... the parties shall be taken as having agreed that the powers conferred upon the arbitral tribunal include the power to - ... (f) order the discovery and production of documents or materials within the possession or power of a party: ..."*

Of themselves these provisions give more comfort than guidance. The comfort for the arbitrator lies in knowing that, as long as he or she achieves the required standards of impartiality[13]; gives each side an opportunity to be heard[14]; ensures that the parties have advance notice of any hearing[15]; and sees that information that is

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[8] Within reason ?: see discussion in *Williams & Kahwaru*, supra, para's 11.3 and 11.5.
[9] On the fullest *Peruvian Guano* basis.
[10] In effect, standard discovery of the kind now contemplated by the new High Court Rules – see HCR 8.7.
[11] In essence, the approach of the IBA Rules.
[12] Section 6 of the Act.
[13] First Schedule, Art 12.
[14] First Schedule, Art 18.
[15] First Schedule, Art 24(2). Interestingly the Article reads *"The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents."* This is of course a reference to inspection of documents by the arbitral tribunal, not the pre-hearing process of discovery and inspection between parties, and in which the arbitral tribunal would not usually be involved.

submitted to him or her, or is otherwise relied upon in reaching a decision is communicated to the parties[16]; then whatever he or she decides is appropriate for discovery in the case should survive judicial scrutiny. But none of those things solve the problem of what the discovery orders should be.

There is perhaps an underlying question as to whether the minimum standards of procedural fairness summarised above should be regarded as having in some way imported rules of court process into arbitration practice. The topic is discussed in detail in Williams & Kalderimis, *Arbitration – Contemporary Issues and Techniques.*[17] Although the authors focus on the particular topic of what evidence can be admitted, the recent changes to court rules of discovery at least open a possibility that the same question will be raised in relation to document discovery in future.

Proponents of the view that arbitrators ought to regard the new court rules of discovery as a 'default setting' for discovery may refer to cl 27 of the Second Schedule to the Act and point out that, if and when it becomes necessary for an arbitrator to ask the court for assistance in enforcing an order, then the court (be it the District Court, or the High Court) only has the same power as it would have in proceedings before it.[18] Of course orders for discovery in cases where the parties to the process are the only parties affected do not usually require court enforcement. But one wonders how enthusiastic the High Court might be (say) to assist in the enforcement of a non-party discovery order requiring full *Peruvian Guano* discovery, when it is clear that, had the problem come before the court within its own jurisdiction, a much less onerous discovery obligation would have been imposed?

The better view, however, is that none of the court rules of procedure applying to discovery govern an arbitrator's discretion to make such orders as he or she sees fit for the appropriate conduct of the arbitration at hand. In fact it is doubtful whether an arbitrator is even required to consider how the new Court rules might inform an order for discovery in an arbitration. As Williams and Kalderimis argue:

> *"Article 19 does not import any part of the High Court Rules. Its effect is general and clear – the parties are free to agree on the procedure to be followed by the arbitral tribunal and, failing such agreement, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate."*[19]

If that is correct, then there is no longer any obvious default setting for the arbitrator who is confronted with a dispute about what the extent of discovery should be.

To be clear: the point is not that the new High Court (or District Court Rules, for that matter) are a 'bad thing'. Far from it. The point is just that the old survey pegs have been moved, and there is no legal or procedural reason for arbitrators to consider themselves obliged to work within the new boundaries that have been set for the courts. Nor is there any reason not to do so, if that is what the arbitrator considers to be appropriate for the particular case.

At a practical level:

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[16] First Schedule, Art 24(3). This list comes from *Methanex v Motunui Ltd v Spellman* [2004] 1 NZLR 95 at para 44 (per Fisher J).

[17] DAR Williams QC & D Kalderimis, *Arbitration – Contemporary Issues and Techniques*, NZLS CLE Seminar September 2011, at pp.27 to 29 '*Is a New Zealand arbitral tribunal bound to apply New Zealand evidence, court procedure or limitation rules?*. See also *Williams & Kawharu*, supra note 6 at para 11.17.10 and footnote 112.

[18] Second Schedule, cl 27(2)(c)(i).

[19] Williams & Kalderimis supra note 16, at p.29.

- In arbitration, just as in any other area of litigation, there will always be cases where justice requires a 'no stone unturned' approach to discovery. In fact in some matters where there are very few documents involved, *Peruvian Guano* can still be a sensible starting point. Realistically, however, cases of these kinds will likely be the exception rather than the rule now;

- Unless the parties have agreed what the extent of their discovery obligations will be, in future it is unlikely that it will be sufficient for an arbitrator simply to order that discovery and inspection will be completed by a given date. The content of the obligation will now have to be addressed on a case by case basis, even if only to find out what has been agreed (if anything) and to record that;

- In bigger cases where what is at stake justifies detailed attention to discovery, the likelihood is that there will be a reasonable level of agreement between counsel as to what should be done. Any issues that the arbitrator is left to decide are more likely to be focussed and particular;

- In more modest matters, however, an arbitrator may well have to be a pro-active in raising and then managing these issues.[20] An award on substantive issues after there has been a fundamental misunderstanding or miscommunication about the extent of the parties' discovery obligations might conceivably even be open to challenge for that reason;

- On the positive side, arbitrators dealing with domestic matters will find that the IBA Rules provide an approach that is pragmatic and appropriate: look for the IBA Rules to be referred to and relied on more and more in domestic matters.

- As long as the fundamental requirements for enforceability of any award are met, arbitrators continue to have very considerable scope to make orders to meet the needs of individual cases.

[20] It would be unfortunate if, after weeks of preparation, it emerges for the first time that one side has been working to *Peruvian Guano*, while the other side is anticipating only adverse documents need to be discovered.