

HEURISTICA DISCLOSURE RULES FOR CONSTRUCTION ARBITRATION

RULE ONE: PRESERVE RELEVANT ESI

The parties have an obligation to make reasonable and good faith efforts to preserve relevant ESI (electronically stored information), in a manner that preserves its integrity.

RULE TWO: AGREE ON A DISCOVERY PLAN

Parties must file a joint discovery plan with the arbitrator / tribunal. There are five minimum requirements to the plan:

1. Define the scope of disclosure
2. Describe how each party will locate and identify ESI to be disclosed
3. Describe classes of ESI that will not be disclosed
4. Specify dates for the exchange of ESI
5. Specify format protocols for exchanging ESI. Exchange must be made in a meaningful and accessible format. This includes native production with metadata.

RULE THREE: SCOPE OF DISCLOSURE

The scope of disclosure is limited to non-privileged ESI which is necessary to resolve the dispute. Parties should consider the following methods to reduce cost and improve efficiency of the disclosures:

1. Analyze ESI repository structures prior to processing
2. Consider sharing access to a single repository esp. for communications between the parties (as opposed to processing and producing large volumes of duplicative ESI)
3. Agree on search and review methodology
4. Consider inclusions and exclusions - for example do parties need to produce draft versions or near duplicates
5. Cooperate with respect to relevant acronyms, abbreviations, accounting or parts codes, project code names and the like

RULE FOUR: PROPORTIONALITY FACTORS

The proportionality principle allows the arbitrator/tribunal to take into account six factors when determining whether ESI should be produced:

1. nature and scope of the arbitration
2. importance and complexity of the issues or interests at stake
3. amounts in controversy
4. relative financial position of the parties
5. materiality of the ESI in question
6. accessibility of the ESI in question

DISPUTE RESOLUTION

In the event that parties are having difficulties with establishing or agreeing on a plan, Heuristica is uniquely equipped to provide the services of our Discovery Referee Martin Felsky, PhD, JD.

SAMPLE REDFERN DISCLOSURE SCHEDULE

Recommendations:

1. Exchange Redfern Schedules before any exchange of productions. Limit the initial Schedule to 25 requests if possible, without prejudice to a supplementary request after the first tranche of ESI has been exchanged.
2. Early consultation with clients and experts regarding document production is important to help frame expectations. A meeting with opposing parties (on a without-prejudice basis) with the objective of achieving a sample Redfern disclosure schedule is important.

#	ESI Requested	Basis for Request	Objection	Tribunal’s Decision
01	All internal email conversations between AB and CD from November 12, 2018 through May 15, 2019.	AB and CD were the key project managers at Respondent in the relevant timeframe.	AB and CD had conversations outside the scope of the Project in question. We propose providing only those emails relating to the Project.	Respondent shall produce emails requested but only those related to the Project. Other conversations may be helpful to Claimant but are not necessary to resolve the dispute and may also contain a large volume of sensitive and irrelevant business information. Search terms proposed to narrow scope are to be agreed by the parties.
02	Draft Blueprints for the Resolve Warehouse Project Phase III	Evolving design choices illustrate how deficiencies arose.	We have already produced final approved copies. All drafts are in printed form only. It is too costly to scan dozens of blueprints that are essentially duplicative.	Draft blueprints are necessary to resolve the dispute. However, the cost of scanning all drafts would be burdensome on Respondent. Claimant may inspect originals and have all or a selection of draft blueprints scanned at its own expense.