



DISCOVERY AND THE ARBITRATION PROCESS PRACTICAL GUIDANCE

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This article looks at some of the practical implications of the discovery process to an arbitration reference held in a Gulf Co-operation Council (GCC) country.

By way of clarification, discovery is the stage in the arbitration process where one party discloses to another the existence of documents relevant to the issues in the action which are or have been in the parties' possession, custody or power.

Discovery is not the production of the visible document itself. Production of the documents is inspection. It is effectively a list and once completed, the party receiving the list will be entitled to inspect the documents on it apart from those in which some form of privilege is claimed.

The main purpose of discovery is to enable the parties to evaluate the strength of their case in advance of the trial and so encourage settlement and savings of costs; many actions settle once discovery has taken place. Discovery also ensures that the parties are not taken by surprise at the trial, and that the Tribunal has all relevant information in order to do justice to the case.

In construction disputes, discovery encompasses the whole range of project documents not least due to the fact most construction contracts require that, notwithstanding a reference to arbitration or even a stated intent to do so, the work must be completed. There can therefore be a consequential "stacking-up" of claims, with issues ranging from variations to delay and expense, while the work progresses towards completion.

The parties can agree the procedure to be followed in any arbitration reference but such procedure must be implemented in accordance with the law of the State in which the arbitration takes place.

Accordingly the parties can choose their own approaches to discovery but it will be subject to the relevant GCC State's Laws of Evidence.

There are two key approaches to discovery:

Common law and civil law approaches

Under common law legal systems such as in America, UK, Australia, Canada and other countries, the court applies a general obligation on the parties to disclose all