

# Kluwer Arbitration Blog

## The Armesto Schedule: a Step Further to a More Efficient Document Production

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Many will shy away from this article on account of its mere title. This is understandable considering that document production tends to be seen as a nightmarish phase in arbitration for junior, senior lawyers and arbitrators alike. This is because, if not handled properly, document production can turn into a very costly and time-consuming exercise.

In an attempt to render document production more efficient and fair for the parties, international arbitrator Juan Fernández-Armesto and his team at [Armesto & Asociados](#) have designed a tool which consists in a collaborative table that systematizes the standards of the [IBA Rules on the Taking of Evidence in International Arbitration](#) (“**IBA Rules**”) and a procedural order that provides, from the outset, clear criteria and instructions on document production.

\* \* \*

Document production is one of the most controversial procedural issues in international arbitration; it is the apotheosis of the clash between Common law and Civil law: the gathering and marshalling of evidence vary widely between these two legal traditions. Common law favours a broad discovery phase in pursuit of the “truth”, and no party can withhold any information or document which may be relevant to establish such truth. Whereas Civil law adopts a limited approach to document production, where a party can only ask for documents if it knows they exist and are necessary to prove its case; it is for the claimant to prove the facts with whichever evidence it controls and the defendant has no duty to reveal all their documents.

At the intersection between these two traditions, international arbitration had to find a third way: the IBA Rules which represent the arbitral community’s attempt to find a middle-ground. This set of rules is intended to provide an efficient, economical and fair process for the taking of evidence, particularly between parties belonging to different legal backgrounds.

Yet, the standards defined by the IBA Rules are fairly broad and leave room for interpretation when it comes to the production of documents. What does a “narrow and specific category of documents” mean? Or what kind of document can be considered “relevant and material for the case”? The fluid character of these concepts can lead to a complex arbitration phase, moreover, when lawyers from different cultures come together. This translates into lengthy, costly and ultimately inefficient document production procedures.

In nearly 90% of the international arbitrations at Armesto & Asociados, be it under [ICC](#), [ICSID](#) or [UNCITRAL Rules](#), the parties request a document production phase. In order to simplify and limit this procedure, we have designed the “Armesto Schedule”. Our team has been using it for four years now, but it remains a work in progress, constantly subject to improvements and modifications based on our experiences, with the aim of making document production a slightly more friendly exercise for all those involved.

## 1. What is the Armesto Schedule?

Inspired by the classic [Redfern Schedule](#), the Armesto Schedule is a user-friendly collaborative table in which the requesting party describes the requested document, the requested party agrees or objects to this request and the tribunal decides on the admissibility of such request.

Based on the above description, one may wonder whether there is any difference between the so-called Redfern Schedule and the proposed Armesto Schedule. Below, we outline the two main distinctions.

### A. *Format-wise*

The Armesto Schedule is a vertical table, instead of a horizontal one, with three columns and several rows (also referred to as “Document Production Schedule”) (see, [Annex I](#)). Each page corresponds to a single document request. The pink areas are for the requesting party to complete, while the blue ones belong to the requested party. The white areas are left to the arbitral tribunal.

Each of the parties files its own Document Production Schedule requesting a number of documents or categories of documents.

### B. *Requirements & Objections*

The Armesto Schedule integrates the standards of the IBA Rules under three requirements (R1 to R3) and six objections (O1 to O6). The requesting party must demonstrate that each of the requested documents or categories of documents meets the following three requirements, set out in Art. 3.3 of the IBA Rules:

- R1: The requesting party must identify a document or a narrow and specific category of documents.<sup>1)</sup>
- R2: The requesting party must prove that the document is relevant and material to the case.<sup>2)</sup>
- R3: The requesting party must demonstrate that the document is not in its possession, custody or control.<sup>3)</sup>

These requirements have to be met cumulatively. If a single one is not satisfied, the tribunal will automatically dismiss the request.

After filling in the three requirements, the requesting party sends the Schedule to the requested party, without copying the arbitral tribunal. The requested party has the opportunity (i) to deliver the documents voluntarily, (ii) to challenge any or all of the three requirements and/or (iii) to raise one or more of the following six objections:<sup>4)</sup>

- O1: The document is subject to legal or settlement privilege.<sup>5)</sup>
- O2: Production would be unreasonably burdensome.<sup>6)</sup>
- O3: The document has been lost, destroyed or does not exist.<sup>7)</sup>
- O4: The document is subject to technical or commercial confidentiality.<sup>8)</sup>
- O5: The document has special political or institutional sensitivity.<sup>9)</sup>
- O6: Production would affect the fairness or equality of the procedure.<sup>10)</sup>

Thereafter, the requested party returns the Schedule to the requesting party, without copying the arbitral tribunal. If any objections have been raised, the requesting party is entitled to reply to them, but must refrain from making any further submission regarding the three requirements.

Finally, the arbitral tribunal must decide if each of the requirements is met and if any objections have been raised, whether they are applicable. This leads to a final decision by which the tribunal solves whether the document should be produced.

If at the outset of the proceedings the parties choose to have a document production phase, the above rules are discussed and defined in the first procedural order, together with the applicable procedural calendar. If each of the parties needs one week to prepare its requests, one week to submit a response to the counterparty's schedule and a further week to present a reply, while the tribunal takes a final week to make its decision, the document production phase can be over in a month (without taking into account the deadline for the parties to produce the documents).

## **2. What are the advantages of the Armesto Schedule?**

We submit that the Armesto Schedule has three main advantages: it systematizes the standards, it clearly defines the criteria which will be used by the tribunal when making its decision, and it limits document production.

### **A. Systematization**

The Armesto Schedule systematizes the IBA Rules requirements and objections in a user-friendly format, which is visually easy to follow.

The Schedule forces the parties to ensure that their requests meet all the necessary requirements. It further makes it simple for the counterparty to reply to a request, by either saying that one or several of the requirements are not met or by raising an objection.

Finally, it allows the tribunal to visualize the position of the parties on each of the requirements and objections, leading to a more straight-forward solution. If the requesting party fails to meet a

single requirement, the request will be automatically dismissed by the arbitral tribunal, without the need to examine whether the remaining requirements are fulfilled. The Schedule also helps the tribunal to identify the objections to a document request.

In sum, the Armesto Schedule organizes the information that is generally condensed under a single row of a normal Redfern Schedule, and this allows the parties and the tribunal to quickly identify the specific issue, whether it is the absence of a requirement (R1 to R3) or the existence of an objection (O1 to O6).

## ***B. Definition of criteria***

The rules governing the Armesto Schedule are contained in a [Procedural Order Model](#) (the “PO”) agreed with the parties which defines, from the outset, the criteria that the tribunal will be applying when taking its decision. This provides the parties with certainty: the parties not only have clear instructions to present their requests but also know what to expect from the tribunal.

The PO defines and sets forth the tribunal’s understanding of each of the requirements and objections. For instance, in the case of requirement R2 (relevance and materiality of documents), the requesting party must prove that the documents are relevant and material to the resolution of the case. In order to facilitate this, the tribunal compels the requesting party to identify the paragraph in the written submissions for which proof by way of document production is required.

The Schedule goes on to establish that the following documents will, as a general rule, be considered relevant and material:

- Documents referred to in other documents which are already on the file,
- Documents mentioned in witness statements, legal opinions and/or expert reports,
- Documents used by experts to prepare their opinions/reports (excluding their working documents, such as drafts and others).

Furthermore, the Schedule provides that it is not for a requesting party to disprove, by way of document requests directed to the counterparty, allegations for which the counterparty bears the burden of proof, since failure to discharge such burden will by itself lead to dismissal. Thus, parties know that production with the purpose of disproving the counterparty’s allegations will only be ordered in exceptional circumstances.

The PO sets out similarly detailed instructions for each remaining requirements and objections.

The definition of criteria gives less room for different interpretations, while ensuring that the parties are on the same page.

## ***C. Limitation of Document Production***

The final advantage of the Armesto Schedule is that it limits the document production exercise.

First, it curtails so-called “fishing expeditions”. For instance, in the case of requirement R1

(identification of a document or description of a narrow and specific category of documents) the requesting party knows that if it wants to request a category of documents, it must comply with the following additional requirements:

- Provide a clear and well-defined characterization of the narrow and specific category;
- Marshal circumstantial evidence of the putative existence of the category;
- Provide the name of the person, authority or entity which has issued the category of documents;
- Identify the initial and final date of the period during which the documents belonging to the category were issued (there is a specific row for this in the Armesto Schedule).

The PO goes as far as to give specific examples of what shall not be considered a narrow and defined category of documents. This is crucial to avoid fishing expeditions. In the event that the requesting party still attempts to make one, at least it knows that the tribunal will end up dismissing the request.

Second, all the parties' allegations must be contained in the Schedule, *i.e.* no further pleadings are allowed. This avoids endless discussions on the extent of document production.

Third, the parties are requested to adhere to the word limit defined for each cell of the Schedule.

Finally, the PO also gives the parties the possibility to agree on limiting the number of document requests.

In sum, the Armesto Schedule incites the parties to be concise in their document production requests and avoids petty fighting over the extent of voluntary production.

### 3. What makes the Armesto Schedule unique?

The Armesto Schedule contains two unique features, which are rarely seen in traditional document production procedures: the use of affidavits and the imposition of specific costs for the document production phase. The aim of these two tools is to avoid spurious document production requests.

#### A. Affidavits

Common law discovery is based on the assumption that parties and their counsel will comply truthfully with document production requests by delivering all responsive documents that are in the party's custody or possession. This is all "fun and games" when the parties and their counsel come from a legal tradition in which this is the norm.

However, in most Civil law countries, parties do not file and protect their documents in expectation of a potential litigation. Similarly, there is no culture of delivering documents that are detrimental to one's case.

This clash of cultures is particularly poignant in international arbitration where lawyers do not necessarily feel under a deontological duty to comply with their document production obligations. How can we ensure that there is a level playing field in production and that all involved parties are

indeed delivering all responsive documents?

The Armesto Schedule has tried to come up with a solution in the form of two affidavits:

- The first is a declaration by the Chief Legal Officer of the requested party (or similar rank, or in the case of an individual, his/her own declaration) (see, [Annex III](#)) that the requested party (i) has not destroyed any document, (ii) has carried out a reasonable search for the Documents, and (iii) has produced all requested documents.
- The second affidavit is a declaration by the External Legal Counsel of the requested party (if applicable) (see, [Annex IV](#)) that he/she (i) has explained to the client the obligation not to destroy any document, (ii) has advised the requested party to carry out a reasonable search and to produce all ordered documents (except those that are subject to a privilege or confidentiality exception).

These affidavits are aimed at making the parties take responsibility for the document production from the outset. There is no point in engaging in such a time and cost-intensive exercise if the parties do not feel compelled to truthfully comply with the tribunal's decision.

### **B. Allocation of costs**

Additionally, the Armesto Schedule makes a specific provision for the allocation of costs derived from the document production phase.

The PO provides that the tribunal will take into consideration the reasonableness of the requests and objections, each party's willingness to produce the documents under its control and the relative success of each party. It further establishes that the parties shall identify in their statements of costs, the charges incurred in preparing their document production requests and responses, and the costs incurred in the search and delivery of the requested documents.

The purpose of this provision is to dissuade parties from making unfounded document requests or launching fishing expeditions. It also encourages parties to cooperate and deliver documents voluntarily.

## **4. Final considerations**

Many argue against the use of document production, alleging that it is a cost and time-consuming procedure, where effort and costs are not matched by results.<sup>11)</sup> This is partly based on poor user experience, which frequently is the result of insufficient or improper regulation.

That said, document production is a very useful tool for parties when properly regulated and used: it permits parties to access documents which would otherwise be inaccessible to the requested party who is looking to prove its case.

In order to try to make the document production process more efficient, the Armesto Schedule uses a friendly design, with clearly defined criteria and instructions, which are proposed by the tribunal and agreed by the parties at the outset of the proceedings.

The Schedule is an evolving mechanism that looks to adapt and meet the expectations of parties and arbitral tribunals.

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### References

- ?1 Based on Art. 3.3(a)(i) and (ii) IBA Rules.
- ?2 Based on Arts. 3.3(b) and 9.2(a) IBA Rules.
- ?3 Based on Art. 3.3(c)(i) and (ii) IBA Rules.
- ?4 Based on Art. 3.5 IBA Rules.
- ?5 Based on Art. 9.2(b) IBA Rules.
- ?6 Based on Art. 9.2(c) IBA Rules.
- ?7 Based on Art. 9.2(d) IBA Rules.
- ?8 Based on Art. 9.2(e) IBA Rules.
- ?9 Based on Art. 9.2(f) IBA Rules.

**?10** Based on Art. 9.2(g) IBA Rules.

Notably, the [Rules on the Efficient Conduct of Proceedings in International Arbitration](#) (“**Prague ?11 Rules**”) encourage tribunals and parties to avoid any form of document production (Art. 4.2 Prague Rules).

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