



**Report on the Ciarb Brazil Meeting on Documentary Evidence  
Second Meeting on Documentary Evidence held by Ciarb Brazil (Joint Venture with Ciarb  
Iberian Chapter)**

**Date:** April 15, 2026

**Location:** Madrid, during the ICCA 2026

<b>Summary.....</b>	<b>1</b>
<b>I. Key takeaways.....</b>	<b>2</b>
<b>II. Initial steps.....</b>	<b>3</b>
<b>III. Document Production: Between Common and Civil Law Traditions.....</b>	<b>3</b>
A. The Limits of Document Production: Relevance and Materiality.....	4
1. Taming the "beast" of Excessive Disclosure.....	4
2. Differentiating Relevance and Materiality.....	4
3. The Role of Arbitral Authority.....	5
B. Compelling Confidentiality and Privileges.....	6
1. Confidentiality as a Civil Law Barrier.....	6
2. Managing Inequality of Treatment.....	6
3. Historical Context and Complexity of Privilege.....	7
<b>IV. Document Production and Expert Evidence: Different Sides of the Same Coin?.....</b>	<b>7</b>
A. Sequencing and the Need for a Stable Factual Platform.....	7
B. The Role of Early Expert Engagement.....	8
1. Early Advice vs. Formal Reporting.....	9
2. Alignment and Overriding Duty.....	9
3. Empirical Support for Change.....	10
<b>V. Procedural Matters: How to Avoid an Arbitration within the Arbitration.....</b>	<b>10</b>
A. Strategies for Tribunal Control and Capping.....	11
1. Imposing Caps on Requests.....	11
2. Utilizing Terms of Reference and Procedural Orders.....	11
3. Structuring the Schedule and early Case Management Conference.....	12
<b>VI. Promoting Cooperation and Advocacy.....</b>	<b>12</b>
1. Involving Party Representatives and Lead Advocates.....	12
2. Addressing Legal Backgrounds and Timing.....	13
3. Responsibility of Stakeholders.....	13
<b>VII. Conclusion.....</b>	<b>14</b>

# ciarb.

## Brazil Branch

### Official report

1. The working table, a joint venture between the Ciarb Brazil branch and the Iberian chapter, was convened to identify and address the growing complexity and volume of document production in international arbitration, a practice often perceived as akin to discovery used in common law jurisdictions and inconsistent with civil law traditions. The discussion was structured according to the conceptual framework previously shared with participants, focusing on the doctrinal limits of disclosure, the impact on expert evidence, and pragmatic strategies to prevent document production from becoming an "arbitration within the arbitration".

#### I. Key takeaways

2. The key takeaways from the discussion included:
  - **Focus on Materiality:** A consensus emerged that tribunals should place a clear emphasis on **materiality** rather than mere relevance, often achieved through capping the number of document requests to force parties to focus on decisive issues.
  - **Tribunal Rigor and Early Intervention:** Tribunals have a critical responsibility to exercise greater rigor and proactively regulate the disclosure process from the first Procedural Order. This may include Case Management Conferences early on and between the first and second round of submissions.
  - **Sequencing Expert Evidence:** The traditional sequencing (memorials/expert reports first, then document production) may be detrimental, as experts often lack a **stable factual platform** to form independent opinions, leading to increased costs and qualified reports.

# ciarb.

## Brazil Branch

- **Role of Confidentiality:** While common law focuses on privilege, civil law jurisdictions, like Brazil, frequently raise confidentiality (e.g., NDA obligations) as a barrier to disclosure, highlighting the need to address this conflict of legal traditions.
- **Procedural Tools:** Practical solutions discussed include incorporating specific language into Terms of Reference, scheduling midstream CMCs for request refinement, and ensuring lead advocates (head of the teams) and party representatives engage early to narrow the scope of disputes.

### II. Initial steps

3. This working table is part of a bigger project of Ciarb Brazil Branch related to the organization and development of evidence production in domestic and international arbitration. It began with a two year [project](#) (2024-2026) regarding written statements of factual witnesses that culminated in this [Toolkit](#). The project then moved to the study of [document production \(2026-2028\)](#). A [first work meeting](#) was held in March 2026 (São Paulo) and this second meeting was scheduled as a side event at ICCA 2026. This document is the report of such a second meeting.
4. This second meeting was presented and organized in [this paper](#). A detailed agenda of the event can be found in it. In the annex of such a document, it can be found the result of a basic research done with the participants in matters related to document production.

### III. Document Production: Between Common and Civil Law Traditions

5. The session was introduced as a working table, intended for discussion and identification of problems rather than immediate conclusions, focusing on the increasing complexity of document production in international arbitration, which is not typical in civil law countries such as Brazil.

6. The discussion opened by posing a central question to the panel: should the concept of "relevance" be an admissibility concept identified in a **broad** way—to encompass common law ideas like "**leveling the field**" or "**cards on the table**"—or should it be built in a **strict** way, focused on the civil law concept of **burden of proof**? The consequences of this choice are substantial, determining whether production resembles wide-ranging discovery or remains a narrow, residual process

*A. The Limits of Document Production: Relevance and Materiality*

7. The debate surrounding the interpretation of the criteria for documentary evidence, particularly those in Article 9.2(a) of the IBA Rules on the Taking of Evidence, formed the core of the initial discussion.

*1. Taming the "beast" of Excessive Disclosure*

8. A practitioner acknowledged that while document production was originally intended to ensure parties had access to documents to support their positions, it has since become an "instrument of destruction" in international arbitration, characterized by a "flood" rather than a "guided stream" of information. Users are exceedingly concerned about the use of document production, which has grown into a "monster" requiring new rules and adding time and cost to the process.

*2. Differentiating Relevance and Materiality*

9. Several participants agreed that the focus should shift decisively from mere relevance to materiality.

10. One speaker noted that international arbitration rules, including the IBA Rules, have adopted a dual criteria of relevance and materiality to create a higher threshold and avoid burdensome disclosure processes. The party requesting the document must identify how it relates to their arguments and show that it is material to the outcome of the dispute.
11. A panelist offered a pragmatic distinction between the two concepts:
  - **Relevance** means completing the factual matrix and dealing with claims—it is relevant to the case.
  - **Materiality** means the document is decisive in turning the decision one way or the other—it is material to the outcome.
12. Another key proposition was that the party should only request documents to prove their own claim or defend against the opposing claim, not to assist the other party in proving their case (using it to argue that, in fact, the other party lacks grounds for its pleadings).
13. The participants also concluded that restricting requests to material information forces parties to focus on core issues and achieve efficiency.

### *3. The Role of Arbitral Authority*

14. It was stressed that the authority of the arbitral tribunal must be exercised rigorously from the start, specifically in the first procedural order (PO1), or what was termed the "honeymoon phase". This is the best moment to set principles for document production, especially since civil law traditions have very limited document production, typically restricted to documents required by law, related to contractual rights, or previously referred to but not produced.

*B. Compelling Confidentiality and Privileges*

15. The discussion then turned to the limits on document production, specifically addressing the differing treatments of privilege and confidentiality across legal traditions, noting the complexity that arises when international arbitration attempts to harmonize these approaches.

*1. Confidentiality as a Civil Law Barrier*

16. A key point raised was the difference between the common law focus on **privilege** as a limit to admissibility, and the Brazilian perspective, where **confidentiality** (such as obligations under an NDA) is often used as a major issue for limiting document production.
17. A participant noted that civil lawyers, particularly from Latin American jurisdictions, often have a very narrow perspective on showing and requesting documents based on their legal background. They might even invoke a constitutional right against being obliged to disclose everything. Civil lawyers may be "disappointed" if required to present confidential documents unless specifically requested by the tribunal.

*2. Managing Inequality of Treatment*

18. The differences in legal systems can result in inequality of treatment between parties:
- One speaker recalled a case where the opposing party's French in-house counsel was not covered by privilege, while their client's in-house correspondence was protected under the client's jurisdiction. This disparity forces arbitrators to deal with a situation where parties are submitted to legally different obligations based on their local regimes.

- The discretion of the tribunal to order document production, even when a party feels it is producing evidence against itself, is critical in managing these issues.

*3. Historical Context and Complexity of Privilege*

19. A speaker offered historical context, noting that the modern concept of "discovery" was originally designed for fairness in jury trials in English law but was later abandoned by English courts and kept in the U.S.
20. The attempt to handle document production issues, especially qualitative issues like privilege, at the very early stage of arbitration (CMC or PO1) was criticized as unrealistic because it opens a "Pandora box" of fundamentally different rules across jurisdictions. These differences include not only rules of privilege but also varying lawyer duties (e.g., the New York lawyer's duty of candor versus French practice). While the quantity of requests can be contained early, the qualitative issues are far more complex.

**IV. Document Production and Expert Evidence: Different Sides of the Same Coin?**

21. The second part of the meeting began with a remote presentation from an expert speaker (Michael John Tonkin), focused on how the sequencing of procedural steps, particularly document production, directly impacts the utility and quality of expert evidence.

*A. Sequencing and the Need for a Stable Factual Platform*

22. The memorial style procedure, often exemplified by the ICC model—which dictates the submission of memorials, documents, witness evidence and party-appointed expert reports before the document production phase—was challenged as to whether this consistently produces the kind of expert evidence tribunals say they actually want to

# ciarb.

## Brazil Branch

receive: evidence that is stable, comparable, and grounded in the full factual record, particularly in large, document intensive disputes.

23. The expert speaker argued that this sequence is detrimental to expert evidence because experts are often compelled to form and express opinions when they lack a **stable factual platform**. When experts operate on a partial record and an evolving pleaded case, their reports become heavily qualified, difficult for the tribunal to evaluate side-by-side, and subject to later revision, which inevitably increases costs.
24. Instead of following a default procedure, sequencing must be framed as a conscious case management judgment.
25. Tribunals should consciously ask:
  - At what point will evidence other than expert genuinely stabilize?
  - When is document production likely to materially change the expert picture?
26. The expert pointed out that while memorial submissions are favored for enhancing "tribunal efficiency and decisional legitimacy," this focus often overlooks whether they actually improve the quality of expert evidence. When evidence is advanced before the document production process is complete, the resulting "provisional clarity" simply defers complexity and cost, requiring tribunals to evaluate opinions that are "settled in form but remain unsettled in substance".

### ***B. The Role of Early Expert Engagement***

27. The discussion explored strategies for mitigating these sequencing problems, emphasizing early engagement with experts.

*1. Early Advice vs. Formal Reporting*

28. A critical distinction was made between a party receiving early expert advice and the expert formally issuing a report to the tribunal. In document-heavy cases, early expert advice on technical issues is invaluable for working with counsel and informing the case strategy. However, the formal report should only be issued when the expert can operate from a stable, complete evidentiary platform.

*2. Alignment and Overriding Duty*

29. A practitioner emphasized two essential prerequisites for effective early expert engagement:
- **Aligned Instructions:** The tribunal must ensure the experts' instructions are aligned; otherwise, unaligned instructions can make their work incompatible even if they are working from the same data set.
  - **Defining the Expert's Duty:** The tribunal, parties, and counsel must understand the expert's role: are they there to assist the tribunal (with an overriding duty) or are they simply providing an additional layer of pleadings for the counsel team?
30. If the expert has an overriding duty to the tribunal, then early engagement between experts to identify areas of agreement and disagreement ought not involve the lawyers in the meeting. The reason cited is that lawyers have duties to their clients that might constrain the experts, whereas an expert should be independent. Experts should engage with each other from day one to discuss methodology and narrow down the necessary documents for production, thus preventing the phase from being completely overloaded.

*3. Empirical Support for Change*

31. The discussion referenced the Ciarb Project 2026 report, which captures the experiences of tribunals, in-house counsel, external counsel, and expert witnesses. The data shows strong support across all user groups for:

- Clearer sequencing.
- More structured early expert engagement by and with the tribunal.
- Active tribunal case management.

32. Specifically, around 91% of respondents expected and recommended that tribunals should put written questions to the experts after their first report is issued, ahead of the evidentiary hearing. The report suggests that expert evidence rarely fails because of a lack of competence, but rather because the procedure fails to give it a fair opportunity to succeed.

**V. Procedural Matters: How to Avoid an Arbitration within the Arbitration**

33. Part of the discussions were focused on proactive procedural strategies for managing document production effectively, moving beyond the theoretical constraints and into practical tools for case management. It was generally agreed that document production itself is not the problem, but rather the way it is handled by the stakeholders.

*A. Strategies for Tribunal Control and Capping*

34. The prevailing view was that the arbitral tribunal must exercise greater rigor, particularly during the early stages, to regulate the process and avoid the process spiraling into a dispute over documents.

*1. Imposing Caps on Requests*

35. **Capping the number of document production requests** was highlighted as an effective solution to force parties to be reasonable and focus on materiality.

- One arbitrator shared a successful practice of routinely placing document production on the agenda of the first CMC, securing party agreement on a specific number of requests to prevent a "fishing expedition". This approach was implemented after receiving one case with 850 pages of requests, deemed "nonsense". Capping the number of words was also cited as an incentive for conciseness.
- A panelist argued that the tribunal's role is to help parties commit when they are not willing to do so. A claimant will be reluctant to admit an inability to cap requests, and while a respondent might claim they are not ready, it is "very unlikely that they will tell you, 'We do not have or are unable to give a rough idea'". It was suggested that exceeding 50 to 75 requests is unusual in most normal cases.

*2. Utilizing Terms of Reference and Procedural Orders*

36. It was proposed that incorporating specific **language into the Terms of Reference** could be key to facilitating tribunal work and embedding best practices regarding document production. The first Procedural Order (PO1) is deemed the "best place" to decide on these matters to ensure efficiency.

*3. Structuring the Schedule and early Case Management Conference*

37. To prevent document production schedules from becoming "mini-pleadings," a more structured process was recommended:
- Using an Armesto schedule limits the word count in responses and requires the requesting party to focus its replies solely on the objections raised by the counterparty, rather than reopening discussions on relevance and materiality.
  - The tribunal can impose a need for cooperation and foresee a follow-up CMC on document production after the first round of memorials, allowing parties to trim their requests once the pleaded issues are established.

**VI. Promoting Cooperation and Advocacy**

38. Strategies to increase buy-in from parties and their advocates were also discussed as central to procedural efficiency.

*1. Involving Party Representatives and Lead Advocates*

39. One practitioner found it helpful to involve party representatives (clients), not just legal counsel, at the first CMC, noting that schedules become "much more efficient if the actual parties attend as well".
40. It was also suggested that scheduling a midstream CMC specifically for document production encourages lead advocates (the "strategists" of the case) to confer beforehand and review voluminous requests. This leverages the advocates' superior case knowledge

to narrow requests, a task difficult for a tribunal to perform without that same background.

*2. Addressing Legal Backgrounds and Timing*

41. A concern was raised regarding the requirement for parties to be prepared for in-depth document production discussions at the very early stage of arbitration (PO1), especially for those from different legal traditions. This is particularly relevant when the client is a government institution in Latin America, where procurement restrictions might lead them to agree to constraints (like page limits) without full knowledge, which the tribunal should consider.
42. A participant cautioned against generalizing principles based on exceptional cases, a tendency that can lead to catastrophic consequences for practice.

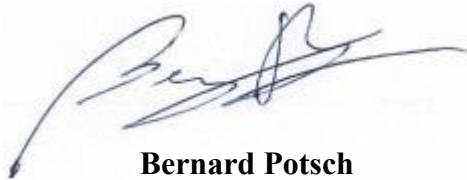
*3. Responsibility of Stakeholders*

43. It was argued that lawyers and clients contribute to the prolongation of arbitration by delaying evidence discussions. Lawyers often fail to communicate the importance of having the case almost ready from the beginning, sometimes due to competitive billing practices that underestimate the necessary work hours.
44. The arbitrator's role must be more active from the start; they must avoid the position that evidence production is solely a party responsibility, as the arbitrator is the "destinatory of the evidence".

**VII. Conclusion**

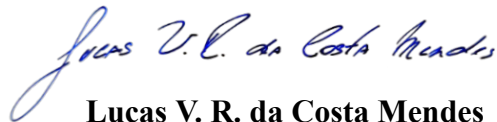
45. The meeting concluded with an acknowledgment that the rich discussion had generated many new ideas and perspectives on how to manage documentary evidence in international arbitration. The outcome of document production is ultimately dependent on the arbitrators' ability to resolve disputes when parties disagree, regardless of where they sit. The project will continue in subsequent settings to further gauge different ideas from various jurisdictions and legal practices.

**Representation of Ciarb Brazil Branch**



**Bernard Potsch**

Chair



**Lucas V. R. da Costa Mendes**

Vice-chair