

“Discovery” in International Arbitration

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As international arbitration extends its reach to become the standard form of dispute resolution for cross-border commercial disputes, it inevitably brings differing legal cultures and norms into contact with each other. As with the meeting of continental plates, the lines of contact can be discerned long after the tectonic fusion has taken place and are represented both by the highest points of elevation and by areas of instability. The practice with respect to “discovery” as it is known in North America is one of those points of contact between differing cultures in international arbitration.

What I would like to talk about today, is not so much the issue of discovery itself but rather the way in which it is discussed by arbitration experts. Unfortunately much of the discussion is infused with partisan special pleading and rhetorical devices designed to bias the discussion in favour of one view or the other. Some of this is unconscious and simply a feature of all human dialogue. However, some of it seems to be motivated by a conscious desire to promote a particular brand of arbitration with which the speaker is associated. The latter, I suggest, is inimical to the growth and development of the institution of international arbitration and should be resisted.

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Many of the points I will make in these short remarks are based on an explosion of over 100 e-mails which were exchanged on the list-serve of the IBA Arbitration Committee when someone was so adventurous as to circulate an article he had written about e-discovery in litigation with the suggestion that many of the same issues arose in international arbitration. The immediate response was that e-discovery was completely irrelevant to international arbitration because the term “discovery” is completely irrelevant to international arbitration and belongs to a dispute resolution construct known only in North America. This opened the floodgates to wave after wave of opinions in which many of the great and the good in arbitration took part. It must be said that the majority opinion seemed to come down rather heavily against discovery in general and electronic discovery in particular.

One comment that occurred fairly early in the list-serve discussion was the observation that the basic problem with the word “discovery” is that it has no clear or settled meaning. With respect, the word discovery in the North American litigation context means exactly the same thing as it means in any other context: the process by which we find out something we did not know before. The process of discovery varies with the information being sought and where it is most likely to be found. Trying to find out whether a peanut is edible involves only removing the shell. To discover what happens when two subatomic particles collide it may be necessary to build a particle accelerator at a cost of several billion dollars and involving the cooperation of several different countries. Most facts that need to be discovered in litigation lie somewhere in between

these extremes! Although it must be said that there seems to be an irresistible urge on the part of common law lawyers to approach their cases more like the construction of a particle collider than the shelling of a peanut.

In litigation, the threshold question is whether a party to a dispute should be entitled to discover **any** information he, she or it did not know before the litigation started. In many legal cultures, the basic answer to this question is “no”. The right of a party to keep its own information private is not lost when it is sued. In the United States and Canada the premise is that all information that is legally relevant, or that might be legally relevant, or that might lead to the discovery of legally relevant information ought to be disclosed. The scope of this culture of disclosure is even more breathtaking when one understands that the boundaries of relevance themselves are poorly marked out because relevance is defined by the substantive law that applies to the dispute and, in the best common law tradition, that law can change during the case, and even because of the case.

It is important to understand that this culture of disclosure was not conceived as a make work project for lawyers, although it may seem that way today. Disclosure rules originate in part in a political conception that litigation plays a role in leveling the playing field between disputants who have power (such as governments and large corporations) and resources and those who do not (such as consumers and small businesses). Large corporations have many ways of discovering information they require. They can carry out investigations, retain experts, insert contractual provisions for access to information and so on. Arguably, these are resources which individuals and small businesses lack, or

possess to a much lesser degree. In this sense, a resistance to broader rights of disclosure can be seen generically as an approach which favours established business interests to the disadvantage of less powerful elements of society who tend to be the information seekers rather than the information providers.

Another reason for discovery in litigation is not the issue of **whether** information will be made available, but **when** it will be made available. Information that is made available for the first time at trial is less subject to critical examination and rebuttal: thus the need for disclosure, before trial, of evidence that will be led at trial. Again, this need is enhanced by another distinctive feature of the common law system: namely the concept that the whole dispute must be resolved at a single, concentrated, continuous event known as a trial. As Professor Peter Schlosser once observed, the main difference between the common law system and the civil law system in this regard is not that the civil law system does not have pre-trial disclosure but that the civil law system does not have a trial. However, in this respect international arbitration is closer to common law procedures in that the schedules of busy tribunal members from different countries dictate, in most cases, that a single, evidentiary hearing be held.

Applying these observations to the debate about discovery in the international arbitration context, a few thoughts may be developed.

First, it does not seem that any credible commentator is currently advancing the view that arbitrations should be conducted with only the benefit of whatever information a party is

able to obtain without the cooperation of the other side. It is clearly recognized that there can be legitimate requests for information which is required to properly adjudicate either issues of liability or damages. The debate is about how extensive the requests for disclosure should be and what measures of enforcement are appropriate. Equally, there is no credible commentator who suggests that US Federal Rules of Civil Procedure are an appropriate standard for discovery in international commercial arbitration. The debate is about how to achieve a clear and consistent standard of disclosure that is compatible with the goals of arbitration to produce expeditious, cost effect and business like resolutions to business disputes. In this regard, reasonable people can differ.

It is unfortunate and unhelpful in the discussion, that anyone who advocates anything beyond the procedures for document disclosure and exchange of witness statements, expressly contemplated by the IBA Rules on the Taking of Evidence in International Arbitration, is accused of attempting to “Americanize” international arbitration. This is an *ad hominem* argument that has no proper place in the discussion. The issues should be discussed only in terms of what does or does not contribute to an efficient and just determination of the dispute.

The arguments that need to be answered in any ongoing debate about discovery in international arbitration are as follows:

- 1) If we accept the premise that arbitrators should in certain circumstances order the exchange of information because justice requires that be done, should it make any

difference if that information is stored in documents, in hard drives or in the memory of key employees of a party? If so, does the difference relate to whether the information is provided at all or does it relate to the reasonable means by which that information is obtained and provided, so as not to defeat the main benefits of the arbitration process? I note for example, that the English Arbitration Act provides that among other things the tribunal may decide:

s. 34 (2)

(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage; [and]

(e) whether and if so what questions should be put to and answered by the respective parties and when and in what form this should be done.

It seems to me that this goes beyond the IBA Rules of Evidence in explicitly recognizing that documentary production may not be enough. The same may be said of the Chartered Institute of Arbitrators Guidelines on E-Discovery and the ICDR Guidelines on Information Exchanges.

- 2) Another legitimate issue for debate is the silence of the IBA Rules of Evidence, and for that matter the rules of certain arbitral institutions such as the ICC, on broader forms of discovery that go beyond document disclosure. Each side of the discovery debate argues that the silence favours its position. However, each side also attempts to adhere to the mantra of arbitration as a flexible form of dispute resolution. Among those who favour limiting discovery in arbitration to

document disclosure as explicitly laid out in the IBA Rules of Evidence, these positions are reconciled by saying the flexibility on discovery comes into play not at the stage when the arbitrators rule on discovery issues but at the stage when the parties enter into their arbitration agreement. The argument then proceeds that the failure to provide for any other form of discovery than document disclosure in the arbitration agreement itself means that the right will not exist. This limitation on the advertised flexibility of arbitration is problematic in a number of respects. It creates a presumptively preclusive effect for the IBA Rules of Evidence and, for example, the ICC Rules which those documents do not claim for themselves. It also forces the parties to address discovery issues at a stage when it is not known what if any dispute will arise and what their information needs might be with respect to that dispute. (My experience is that attempts by parties to deal with procedural issues in pre-dispute arbitration agreements are generally a disaster.) This approach also ties the hands of the tribunal in terms of doing what it perceives to be justice in a given case. Finally, it represents a trap for an unwary party from a jurisdiction in which discovery, beyond the exchange of documents is available. By contrast, a rule which provides flexibility at the stage at which the tribunal decides on the discovery request does not have any of these disadvantages. The only advantage of a rule that limits flexibility on discovery issues to the agreement stage is that it can be used to shut down any discussion among members of a tribunal about the need to order additional discovery.

- 3) The third and last area on which I will make a few comments is a discussion about the relationship between the purpose for which information is sought in a

dispute and the scope of permissible discovery. It seems to me that this is a key to developing a consensus on the issue. One should not avoid confronting the fact that discovery practices can be reflective of fundamentally different conceptions of justice between different legal cultures. For example, it seems to me that civil law systems tend to judge the performance by a party of its legal obligations in a more objective manner, in some instances going so far as to exclude self serving evidence by a party or its employees. The common law system, particularly in North America seems to go to the other extreme and often attempts to judge a party based on its own subjective views of its own conduct, with particular emphasis on the most damning comments any party or one of its employees have made about its own conduct in any of its internal documents. Most so called “smoking guns” which North American litigators spend so much time and money looking for are documents of this character. These are the documents that will be used to persuade courts that a fiduciary duty has been breached, or to persuade juries to overlook more relevant evidence or upon which to base claims for large sums of money as punitive damages. These are documents which would in many European countries be found to be irrelevant to any objective determination of the rights and obligations of the parties. It is fair to say that many businesses look to arbitration to save themselves from these excesses.

Ultimately, the success of international arbitration will be judged by its ability to save business from the North American legal system while still preserving the flexibility to do justice in the individual case. It is vital that arbitration experts confront this

challenge by engaging in open and constructive discussions about how to achieve this objective.