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The Limitations on American-Style Discovery in International Arbitration

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Introduction[1]

An American business involved in a complex and high-stakes international arbitration case may be concerned by the unavailability of the expansive discovery practices that are the very essence of our federal and state procedural rules. The domestic discovery procedures developed by our court system, which are common in domestic arbitrations, are not embraced in international arbitration. As opposed to "discovery," the process for obtaining facts in the possession of another disputant in international arbitration is referred to as the "exchange of information." The rejection of American-style discovery by international arbitral institutions reflects the practices of civil law and other common law jurisdictions around the world. It is also motivated by policies seeking to realize cost reductions and efficiencies.

This chapter discusses in broad terms different strategies that counsel accustomed to American court procedures can pursue in confronting the limitations on discovery in international arbitration and in achieving the best possible preparation for arbitral hearings.

The Exchange of Information in International Arbitration

International arbitration organizations, such as the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA), seek to establish proceedings that are more efficient and less costly than courtroom alternatives.[2] The scope of discovery permitted by US courts is often referred to as the broadest possible: litigants may engage in reasonably unfettered discovery of any non-privileged matter that is relevant to the claims or defenses.[3] Moreover, although less

[1] Carlos A. Maycotte, an associate at Sally & Fitch LLP, provided helpful insights and assistance in writing this chapter.

[2] The policies and procedures of the ICDR with respect to discovery are similar to those of the International Bar Association (IBA), the International Court of Arbitration (ICA) of the International Chamber of Commerce and other leading international arbitral institutions. The ICDR rules and guidelines are specifically referred to in this article, but they are illustrative of generally recognized norms in international arbitration.

[3] *See* Hickman v. Taylor, 329 U.S. 495, 500 (1947) ("The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.") and Rule 26(b) of the Federal Rules of Civil Procedure, the policies of which have been substantially adopted by most state courts.

expansive than court rules, the domestic arbitration rules permit reasonable discovery but offer means of curtailing it, particularly where the parties cannot agree on appropriate limitations.[4] In large, complex commercial arbitration cases, the discovery phase is more often than not intensive and far ranging.

The exchange of information permitted in international arbitration is designed to be much narrower than that of US courtroom and domestic arbitration discovery procedures. This policy reflects in part considerations of cost and efficiency. Consider this statement of the AAA's policy in its ICDR Guidelines for Arbitrators Concerning Exchanges of Information, (the ICDR Guidelines): "The American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution® (ICDR) are committed to the principle that commercial arbitration, *and particularly international commercial arbitration*, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts." (Emphasis added.)

International arbitration procedures vest the arbitrator or arbitral panel with broad discretion in the management of arbitration, including the scope of the exchange of information. Article 16.1 of the International Arbitration Rules of the ICDR (ICDR Rules) provides that, "the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." Notably, the ICDR Rules are largely silent on the permissible tools of discovery, but they do specifically provide that the panel may "order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate." Article 19.3. There is no reference in the ICDR Rules regarding depositions, interrogatories, requests for admission, or any of the other "traditional" discovery mechanisms from American-style practice. However, the ICDR Guidelines state flatly: *"Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for*

[4] See, for instance, the Procedures for Large, Complex Commercial Disputes the American Arbitration Association, (www.adr.org/sp.asp?id=22114), and JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases, (www.jamsadr.com/arbitration-discovery-protocols/).

obtaining information in international arbitration."[5] The ICDR Guidelines in part reflect the judgment that, "[o]ne of the factors contributing to complexity, expense and delay (in international arbitration) in recent years has been the migration from court systems into arbitration of procedural devices that allow one party... access to information in the possession of the other."

The ICDR Guidelines, which were adopted only in May 2008, thus expand on the ICDR Rules and provide statements of values to be expressed in the discretionary decision-making of its panel members.[6] The Introduction of the ICDR Guidelines states that arbitrators "have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process." The ICDR Guidelines list a number of limitations that arbitral panels should enforce with the view that, "The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly." (Guideline 1(a.)) The guidelines provide detail concerning the procedures and limitations on the exchange of documents: parties are required to produce the documents on which they intend to rely (Guideline 2), and are entitled to request relevant documents at the arbitrator's discretion (Guideline 3(a)). Unlike the American court tradition where a party can request documents on its own initiative, the guidelines require that requests be made by application and be subject to the approval of the arbitral panel. The ICDR Guidelines also provide for discovery of documents maintained in

[5] The American court procedures referred to in the Guidelines are those of the United States, as opposed to the diverse court procedures in the common law and civil law jurisdictions of the Americas. For clarity, the term is used in the same sense in this article.

[6] The introduction of ICDR Guidelines cautions that guidelines do not yet have quite the status of the organization's rules: "Unless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases. They will be reflected in amendments incorporated into the next revision of the International Arbitration Rules. They may be adopted in arbitration clauses or by agreement at any time in any other arbitration administered by the AAA."

electronic form and provide that the responding party "may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form," (Guideline 4).

The Significance of the Discovery Limitations

Commercial litigators accustomed to practice in the United States may find it virtually impossible to adequately prepare for a hearing in a large and complex international arbitration without the benefit of deposition discovery. Many practitioners view depositions as the most effective and efficient discovery tools available. Depositions enable the examiner to discover the relevant information possessed by a witness and, through that witness, sources of other relevant information. Depositions are also among the most effective means for obtaining admissions from hostile witnesses, experts and opposing parties. It is far easier to design and conduct a short, targeted and effective cross-examination of a witness when one is holding a transcript of her prior, sworn testimony. Furthermore, depositions preserve the testimony of witnesses who may not be available to testify at a hearing. For these and other reasons, deposition practice remains a dominant discovery activity in both US court proceedings and in complex domestic arbitration cases.

The inability to conduct depositions is thus the limitation that is most likely to be of concern to American litigators in high stakes cases, where it would be difficult to persuade some that the costs of depositions outweigh their perceived benefits.[7] The ICDR Guidelines and like-minded international discovery rules do not disfavor deposition practice based solely on cost-benefit concerns. Depositions are not common in court systems throughout the world and thus their use in international arbitration raises issues of fairness, where the traditions of all parties are considered. As the Introduction of the ICDR Guidelines note, "While arbitration must be a

[7] It is doubtful that many view the inability to use interrogatories or requests to admit as a substantial obstacle. International arbitrators commonly require the parties to submit meaningful stipulations and to make extensive pre-hearing disclosures, including in the form of exhibit books, witness lists, the disclosure of the expected testimony and relevance of lay witnesses, the expected testimony and qualifications of expert witnesses.

fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious."

Finally, there are certainly cases where even the most ardent practitioner of American-style discovery will believe that her client is distinctly *advantaged* by the inability of either party to take depositions. Apart from considerations of cost savings, counsel may reasonably conclude that she has more to lose than gain from deposition practice. For instance, if one does not believe that a deposition is at all necessary to present his or her case, then why expose a client to the inherent risks of deposition examination, including overly broad inquiry, surprise, and poorly formulated answers?

Accomplishing Discovery Objectives within the Limitations

If deprived of the ability to conduct depositions in large and complex international arbitrations, how should one adapt? Of course, one should take the fullest advantage of what is permissible. Contrary to American courtroom rules, written witness statements and affidavits are a favored form of evidence that may be affirmatively used in international arbitration proceedings.[8] Counsel should therefore develop pre-hearing strategies to obtain statements from witnesses that can be used to supplement or support oral testimony at the hearing. When dealing with an international dispute, it is of course not uncommon for witnesses to be located in a number of different countries. In the course of field interviews, lawyer-investigators may be able to accomplish more discovery than would otherwise occur in a deposition. They may well be engaging with a witness that is unlikely to appear at a hearing, and therefore the interview presents a unique opportunity for capturing and preserving evidence for later use.

The aim of a successful interview is to obtain a highly focused, relevant, and persuasive written statement or affidavit. Consideration should be given to

[8] Article 20.5 of the ICDR Rules provides: "Evidence of witnesses may also be presented in the form of written statements signed by them."

taking hand-written statements, on oath, during the interview when the preparation of a more formal appearing, word-processed document may be more awkward or cumbersome. The evidentiary value of such a statement or affidavit may far exceed that of the gems buried within a thick deposition transcript -- and bring counsel that much closer to winning her case.

The inability to conduct depositions of opposing parties and their employees is unquestionably problematic for large and complex international arbitration cases. Commercial litigators must forage elsewhere to attempt uncovering the admissions of party-opponents that are so important to pinning the other side down and proving a fact at issue. The discovery of electronically stored information (ESI) is expressly permissible under the ICDR Guidelines and is a highly effective way to uncover incriminating "words from the mouths" of the key witnesses of opposing parties. Of course, requests for the discovery of ESI are limited by the underlying policies of the Guidelines.[9] Such requests must be made through the tribunal, with the proviso that: "Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search." (Guideline 4)

It should also be noted that neither the ICDR Rules nor Guidelines contain a flat prohibition of depositions or other discovery procedures. Counsel may negotiate parameters for permissible deposition practice and seek the approval of the panel for any agreement reached. Though depositions are disfavored, it is not likely that a panel would prohibit their use in the face of the parties' agreement to the contrary.[10]

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[9] One of the drafters of the Guidelines states that more detailed provisions regarding the exchange of ESI were ruled out because, "…the fact that such specific provision had been made could be said to be indicative of an acknowledgement that the general standard imposed by the Guidelines should not necessarily be applied to electronic disclosure." John Beechey, *The ICDR Guidelines for Information Exchanges in International Arbitration: An Important Addition to the Arbitral Toolkit*, AAA Handbook on International Arbitration Practice 246, (Juris, 2010).

[10] *See, e.g.*, ICDR Guideline 1(b): "The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard. To the extent that the Parties wish to depart from this standard, they may do so only on the basis of an express agreement among all of them in writing and in consultation with the tribunal."

Planning for Discovery in International Arbitration

Businesses engaged in international commerce should regularly review the dispute resolution clauses of existing agreements. In my own practice, I have been surprised by how frequently I discover poorly drafted and out of date mandatory arbitration clauses. In reviewing an agreement, a lawyer may discover that the sins and omissions of a single contract have been repeated in multiple other agreements currently in effect. Common deficiencies of mandatory arbitration clauses include insufficient reference to: the international arbitral organization(s) where a claim must be brought; the governing procedural rules; the governing law of the arbitration; the place of arbitration; the language of the arbitration; and, the number of arbitrators. A poorly drafted clause risks foreclosing the ability to arbitrate an international dispute altogether, which in turn might well deprive your client of the only realistic means for enforcing its contractual rights in a foreign jurisdiction.[11]

By way of addressing directly the concerns raised in this article, I suggest that arbitration clauses should specify the scope of discovery and the discovery procedures that the parties agree will apply to any arbitration proceeding. Of course, no one has the benefit of a crystal ball that will predict all of the qualities of a dispute that might arise under an agreement. However, when negotiating the terms of an arbitration clause, it is good practice to anticipate the ordinary and reasonable discovery needs that accompany most large and complex commercial disputes. Accordingly, an agreement might state that it is the parties' intention that, in any arbitration proceeding and notwithstanding the governing rules of the arbitral body, each shall have the right to conduct reasonably broad discovery and specifically to conduct depositions of lay and expert witnesses. Such language may place a limit on the number of depositions each party may

[11] A primary benefit of engaging in international arbitration is that arbitral awards are recognized and enforceable in 146 countries that have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, sometimes referred to as the New York Convention. The United States is not a party to any treaty for the recognition and enforcement by foreign courts of judgments rendered in this country. "Many countries are quite restrictive when it comes to respecting foreign judgments, and some countries are particularly hostile to recognition or enforcement of US judgments." Linda Silberman, *Transnational Litigation: Is There A "Field"? A Tribute to Hal Maier,* 39 VAND. J. TRANSNAT'L L. 1427, 1435 (2006)

take. Alternatively, a party might negotiate a term requiring use of a specific set of rules with broader discovery provisions, such as the Procedures for Large, Complex Commercial Disputes of the Commercial Arbitration Rules of the American Arbitration Association.

If the parties to a commercial agreement postpone consideration of the issue of permissible discovery until the international arbitration case is filed and its dimensions are known, they may well then disagree as to what mechanisms best suit their needs. "As discovery is often perceived as such an important issue, especially by common-law lawyers... it can be one of the most hard-fought and difficult of the issues that arbitral tribunals have to address in international commercial arbitration." Peter Ashford, *Documentary Discovery and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 89, 90 (2006). In the worst case scenario, a party that is aggrieved by the outcome of a discovery dispute might contest the enforcement of the arbitral award, arguing that the discovery mechanism used in the arbitration was unfair and did not allow for a full and just presentation of its case. This new dispute will cost money and time.

If a party fails to include language permitting broad discovery in an international arbitration proceeding, the contract may well be presumed to have incorporated the opposite intention. A commentator has suggested that, "when the parties decide to include an arbitration agreement in their contract without expressly specifying broad discovery, or in the absence of a later agreement ordering arbitrators to allow broad discovery, parties' intention should be interpreted as a pre-commitment not to use discovery in the same way that it would be used before a court." Giacomo Rojas Elgueta, *Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators*, 16 HARV. NEGOT. L. REV. 165, 173 (2011). The presumption in favor of limited discovery is strong under the ICDR Guidelines, which state, "Unless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases."

Provision in an arbitration clause for the allowance of broad discovery and the ability to conduct lay and expert depositions thus supplies flexibility for parties in the event a dispute arises. Of course, there is a risk that a dispute

will arise where a party wishes that it had not agreed to expanded discovery rights. That risk must simply be weighed in the context of the nature of the agreement and the possible consequences of limited discovery in the event of a complex and high stakes dispute.

Conclusion

The process for the exchange of information in international arbitration is not modeled on the American-style system of pretrial discovery rules as established both in the courts and in domestic arbitrations. The exchange of information is a flexible process that is managed by the international arbitration panel, the parties, and their counsel. That process is appropriately designed to accommodate the practices and sensibilities of parties from both common law and civil law jurisdictions. Domestic businesses as disputants in a high stakes and complex international arbitration case may feel disadvantaged by the limited scope of discovery, the inability to conduct pre-hearing depositions and the unavailability of other procedures permitted in the American-style system.

Businesses engaged in international transactions should negotiate arbitration clauses that specify the scope of discovery and the discovery procedures that will apply to any arbitration proceeding. If the agreement at issue has any potential to devolve into a high-stakes and complex matter, the arbitration clause should indicate the parties' intention that they will be permitted broad discovery and the ability to conduct lay witness and expert witness depositions in any proceeding. If such an intention is not stated, there is a risk that the disputants in arbitration will not agree on discovery matters and that the panel will permit only a limited scope of information exchange.

Key Takeaways

- The exchange of information in international arbitration proceedings is limited in comparison to the discovery permitted in American courtroom procedures and domestic arbitrations. Depositions, for instance, are generally not considered appropriate.
- Because written witness statements and affidavits are favored in international arbitration proceedings, make sure to develop pre-hearing strategies to obtain statements from witnesses to supplement

or support oral testimony. This is especially useful when witnesses are located in different countries. Try to take advantage of the ability to accomplish extra discovery in the course of field interviews.

- Regularly review the dispute resolution clauses of existing agreements in international commerce. This will uncover the existence of outdated clauses or poorly drafted agreements before they are needed, and possibly block the ability to arbitrate a dispute. If this precaution is not taken, errors in one contract can be repeated in multiple agreements. Look for errors in references to the international arbitral organization where a claim must be brought, governing procedural rules or law of the arbitration, the place or language of arbitration, and the number of arbitrators.
- Be careful to ensure the arbitration clauses specify the scope of discovery and the discovery procedures to apply to any arbitration proceeding. Always try to anticipate the ordinary and reasonable discovery needs of most large and complex commercial disputes. Specify the rights to discovery, how broad discovery can be, and how depositions can be conducted. Other details to anticipate can include limiting the number of depositions or requiring a specific set of rules that allow for the provisions the parties will want to use.
- Because international arbitration rules favor limited discovery, consider arbitration clauses specifying that broad discovery is permitted. The lack of such a provision may be interpreted as evidence of intent that broad discovery should not be permitted.

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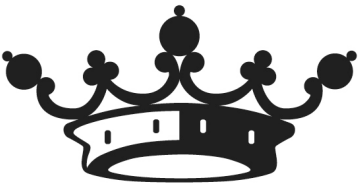

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