"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 address 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.

Many of the points I will make in this article 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.[2] 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 and resources (such as governments and large corporations) 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 of the University of Munich 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, analogous to a trial, 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 that 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 (or, for that matter, Canadian rules) 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. Indeed, I suggest that both the original and the new IBA Rules on the Taking of Evidence which came into effect in May 2010, have gone a long way to recognizing that disclosure orders may need to go beyond simply avoiding the element of surprise at the final hearing or ordering the production of documents identified in "narrow and specific" categories. Specific provisions are made in the IBA rules for ob-

taining evidence from non-parties to the proceedings or requiring a party to produce for examination at the hearing a witness who that party did not intend to call[3]. Although provision is not made in the IBA Rules for pre-hearing examinations without the attendance of the tribunal, as would occur in depositions or examinations for discovery, this limitation is one which affects the tactics and cost of seeking disclosure more than the substance.

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[4] 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 he 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 recognizes that documentary production may not be enough. Similarly, Article 20 of the Arbitration Rules of the International Chamber of Commerce provides that the tribunal shall: "establish the facts of the case by all appropriate means" and may "summon any party to provide additional evidence".

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 pre-hearing disclosure 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 pre-hearing 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 pre-hearing 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 on the Taking of Evidence and, for example, the ICC Rules, which those documents do not claim for themselves.[5] It also forces the parties to address discovery issues at a stage when it is often 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 the party's own subjective views of its own conduct, with particular emphasis on the most damnifying 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 determi-

nation 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. In my view, the desired approach is succinctly and wisely stated in the Rule 11 of the Rules for Non-Administered Arbitration promulgated by the Centre for Public Resources in the United States which provides:

> The Tribunal may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making disclosure expeditious and cost-effective.

Ultimately, the success of international arbitration will be judged by its ability to save business from the North American litigation process while still preserving the flexibility to do justice in the individual case. In this sense the Guidelines for Arbitrators Concerning the Exchanges of Information which have been published by the American Arbitration Association and its international arm the International Centre for Dispute resolution correctly express a consensus view (at least from a North American perspective):

a. Arbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.
b. Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

[Emphasis added.]

It is vital that arbitration experts confront the challenge of discovery by engaging in open and constructive discussions about how to achieve the objective of establishing the facts that are needed to achieve a just result while maintaining the efficiencies that distinguish arbitration from litigation before the courts.

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[2] For a discussion of this exchange see "Spoliation in International Arbitration: Is it Time toReconsider the 'Dirty Wars' of the International Arbitral Process?" by Steven A. ammond, IBA Dispute Resolution International March 2009.

[3] See the new Rules IBA Rules of Evidence: Article 3(9) and Article 4(9) and (10).

[4] It is noteworthy that the new IBA Rules on the Taking of Evidence in International Arbitration now explicitly recognize that "documents" are no less subject to production because they are in electronic form. Article 3(12)(b) provides: "Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise." While, apparently for ongoing political reasons, this continues to be represented by influential commentators as an attitude of "agnosticism" towards e-discovery (see Andre de Albuquerque Cavalcanti Abbud, The IBA Rules on the Taking of Evidence in International Arbitration: a presentation of the 2010 revised text.) it is submitted that the equation of electronic documents to other forms of documents resolves the issue of principle in favour of disclosure and limits on-going discussion to a question of the means most appropriate to the electronic storage and retrieval of documents.

[5] See the Preamble to the IBA Rules of Evidence which state in part: "The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration." [Emphasis added.]

L'utilisation de la *Discovery* dans l'arbitrage international

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À mesure que l'arbitrage international étend son champ d'action et se généralise en tant que méthode de résolution des différends commerciaux transfrontaliers, il met forcément en contact des cultures et des normes juridiques différentes. Comme dans le cas de la collision entre les plaques continentales, les points de contact demeurent visibles longtemps après la fusion des plaques tectoniques , comme en témoignent les hautes chaînes de montagne et les zones d'instabilité. En arbitrage international, la pratique connue en Amérique du Nord sous le nom de *Discovery* (que nous appellerons ici la « communication de la preuve ») représente l'un de ces points de contact entre cultures différentes.

La question que j'aimerais aborder n'est pas tant la communication de la preuve en tant que telle, mais bien la façon dont elle est traitée par les experts en arbitrage. Malheureusement, une grande part du débat est imprégnée de plaidoiries partisanes et de machinations rhétoriques dont le seul but est de faire dévier la discussion en faveur de l'un ou de l'autre point de vue. Il s'agit, en partie, d'un phénomène inconscient, intrinsèque à tout dialogue entre êtres humains en général. Mais une autre partie de cette pratique semble motivée par un désir conscient de privilégier un système d'arbitrage en particulier, celui auquel l'orateur est associé. Selon moi, cette dérive va à l'encontre de la croissance et du développement de cette institution qu'est l'arbitrage international et doit en être exclue.

Un grand nombre des points que j'aborderai dans le présent article se fondent sur les questions soulevées dans la centaine de courriels échangés sur le serveur de liste de l'IBA Arbitration Committee, à la suite d'un article que son auteur a eu la hardiesse de faire circuler sur l'utilisation de la preuve électronique pendant le procès et dans lequel il affirmait qu'une grande partie des questions qu'il abordait se posaient également en arbitrage international. La réaction immédiate fut d'affirmer que l'administration de la preuve électronique ne présentait aucune pertinence pour l'arbitrage international puisque le terme « discovery » n'a absolument rien à voir avec l'arbitrage international et appartient à un système de règlement des litiges exclusif à l'Amérique du Nord.[2] Cette discussion a ouvert les vannes à un véritable déluge d'opinions, dont celles de nombreux « grands noms » de l'arbitrage. Il convient de préciser que l'opinion majoritaire s'est prononcée plutôt massivement contre la communication de la preuve en général, et de la preuve électronique en particulier.

Au nombre des premiers commentaires formulés sur le serveur de liste, il y a lieu de mentionner le suivant : à la base du problème réside le fait qu'il n'existe aucune définition claire ou unanimement reconnue du terme *discovery*. En effet, dans le contexte judiciaire nord-américain, le terme