

THOUGHTS ON DISCOVERY IN INTERNATIONAL ARBITRATION

Delivered at the THE COMMERCIAL BAR ASSOCIATION (COMBAR)

North American Meeting 2006

St Regis Grand Hotel, Rome

June 2, 2006

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Introduction

It is more than arguable that arbitration has become the most efficient means of resolving international commercial disputes. However, its effectiveness depends on the rules that control the process. These rules are established on the basis of party autonomy, a principle that has been endorsed by national arbitration laws as well as international arbitration institutions and organizations. In the exercise of their autonomy, parties to an arbitration may confer upon the arbitral tribunal the procedural regime, and the power to implement it, that they consider appropriate to their specific dispute. An arbitration can be structured in many different ways, ranging from formal to informal, from court-like to unstructured. From an evidentiary perspective, perhaps the most important decision is what the parties wish to do with respect to the scope of discovery and documentary production. This will depend on the circumstances of the particular case and to the parties' regard for the utility of pre-hearing disclosure, which in turn derives from their respective backgrounds and experiences.

As is universally known, the American concept of "discovery", meaning the pre-hearing gathering of documentary and oral evidence, is the broadest of such processes of any Western judicial system. The U.S. system captures documentary and oral evidence not only from the representatives of the parties, but also from what often seems to the uninitiated to be an unlimited number of non-parties. It is natural that American parties expect the discovery rights they enjoy in domestic litigation to be available in arbitration proceedings. However, in

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international arbitrations, expectations often clash when not all the parties and/or decision-makers are from a U.S. background. For example, parties from civil law systems may not be used to the distinction between prehearing or discovery evidence, and evidence which is to be used at the hearing itself. One of the areas in which the disparity in expectations is most apparent is in the right to obtain prehearing information from non-parties to the arbitration.

International Arbitration: The Framework

In the international context, unless the parties have made direct reference to a procedural law in the arbitration clause or other specific agreement relating to procedure, the powers of arbitral tribunals to establish procedural rules and to make procedural rulings are wide.² The only constraints placed upon arbitral tribunals are the rules established by the administering institution, or the law of the seat of arbitration. There is therefore a wide scope for the arbitral tribunal to establish its own rules for discovery. But the first question that needs to be posed is discovery of what? What is meant by the word “discovery”?

Discovery is an ambiguous concept whose meaning varies according to our legal jurisdiction or tradition. For American and Canadian lawyers, discovery embraces both the production of all documents with a semblance of relevance and oral prehearing examinations. Such discovery can include, in many North American jurisdictions, production of documents by, and oral examination of, non-parties.

For those from other common law jurisdictions, the word “discovery” connotes production of relevant documents alone and does not include prehearing examinations, especially examinations of, and production of documents by, non-parties. By contrast, in civil law systems

² Nathan D. O’Malley and Shawn Conway, *Document Discovery in International Arbitration – Getting the Documents You Need* (2005), 18 *Transnational Law* 371 at 372.

the concept of discovery has little meaning. Members of this tradition are accustomed to production of only the documents relied upon. Additionally, the trier of fact, including the arbitral tribunal, is largely responsible for the functions performed by discovery in the common law systems. It must also be said that oral discovery of representatives of parties is generally not available and prehearing examinations of non-parties are rare in international commercial arbitration.

There is no practice of automatic documentary or oral discovery in international commercial arbitration. This is evidenced by the fact that the rules of the various international arbitration institutions and organizations are either silent on discovery procedures or provide little guidance on how to obtain prehearing oral evidence or document production. The International Chamber of Commerce (ICC),³ London Court of International Arbitration (LCIA),⁴ American Arbitration Association (AAA)⁵ and United Nations Commission on International Trade Law (UNCITRAL)⁶ rules do allow for discovery-type procedures to occur, but only set out a broad framework rather than the detail that common law practitioners are accustomed to in their rules of court. For example, the Rules of the International Centre for Dispute Resolution of the American Arbitration Association (ICDR) give the tribunal the mandate to conduct the arbitral proceedings in a way that treats the parties equally and grants them a fair opportunity to present their case. Any documents or information provided must be given to the tribunal and to the other party, and the tribunal may order a party to produce a summary of documents and evidence upon which it plans to rely. The UNCITRAL Rules give the tribunal power to order

³ See ICC Rules of Arbitration, Articles 15, 20, 35, available at <<http://www.iccwbo.org/court/english/arbitration/rules.asp>>.

⁴ See LCIA Arbitration Rules, Articles 14, 22, available at <<http://www.lcia.org>>.

⁵ See International Dispute Resolution Procedures, Articles 19, 20, available at <<http://www.adr.org/sp.asp?id=28144>>.

⁶ See the UNCITRAL Model Law on International Commercial Arbitration, Articles 19, 24, 27, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

the production of documents or other evidence. The ICC Rules provide that a party must supply the documents or information that are relied upon to establish his or her case. Similarly, in an LCIA arbitration, the parties must submit written statements and documents relied upon within set time frames.⁷

In 1999, the International Bar Association adopted its Rules on the Taking of Evidence in International Commercial Arbitration. The IBA Rules have been described as utilizing the strengths of both the common law and civil systems, while recognizing that arbitration is meant to be swifter and less costly than litigation.⁸ With respect to documentary production, the IBA Rules require each party to make a list of relevant documents in its possession, power or control and deliver the list to the other party and the arbitrator. If a document is not listed, it cannot be introduced at the hearing without the arbitrator's consent. These rules provide a basis upon which parties produce documents relevant to their case, but also allow them to resist production where the information is commercially sensitive or for other enumerated reasons. Article 9 sets out with some particularity the grounds upon which refusal to produce documents can be upheld by the arbitral tribunal. In addition, the parties must deliver witness statements and direct oral testimony can only be given if an "oral evidence notice" is delivered or if the arbitrator orders it.⁹ This procedure is an efficient "hybrid" of some of the more extensive procedural rights of the common law system and the more restrained and focused civil law procedures.

⁷ George A. Lehner, "The Discovery Process in International Arbitration" (2001), 16-1 Mealey's Intl. Arb. Rep. 13.

⁸ John W. Hinchey and Beth T. Baer, "Discovery in International Arbitration" (Paper Presented to the Salzburg Conference on International Commercial and Construction Arbitration of the Centre for International Legal Studies, June 15-18, 2000) at 5, online: King & Spalding LLP <<http://www.kslaw.com/library/pdf/DiscoveryinInternationalArbitration.pdf>>.

⁹ Mahir Jalili, "Evidence before International Arbitral Tribunals: Supplementing Arbitration Rules with IBA Rules of Evidence" (1994), 9-8 Mealey's Int. Arb. Rep. 16.

Importantly, in Article 3.8, the IBA Rules also deal with production of documents from non-parties:

If a Party wishes to obtain the production of documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested documents. The Party shall identify the documents in sufficient detail and state why such documents are relevant and material to the outcome of the case. The Arbitral Tribunal shall decide on this request and shall take the necessary steps if in its discretion it determines that the documents would be relevant and material.

Regardless of which rules the parties may have chosen to govern the international arbitration, where a non-party's evidence or documents are desired by a party, that party's request will be determined in large part by the law in the jurisdiction where the non-party is located. For example, where an arbitration is held in the U.S. involving only American parties and arbitrators, evidence may need to be gathered from a non-party in a civil law jurisdiction such as France. In such a case, the local courts where the non-party is located will be asked to assist. All of the institutional international arbitration rules permit the tribunal to hold hearings where it chooses, either for the main hearing or in advance of the hearing on the merits, as an evidence-gathering measure. This may be particularly helpful where the prospect of obtaining documents is doubtful; for example, where a non-party who has evidence relevant to the dispute is located in a jurisdiction where documentary production is limited. In such cases, the law of the jurisdiction in which the evidence-gathering occurs will be central to the parties' or tribunal's ability to obtain documents or testimony from non-parties present in that country. Article 27 of the UNCITRAL Model Law may be of great use in this connection as it empowers the tribunal to request the court's assistance in taking evidence; however, it again refers to the competence and

rules of evidence of the domestic court, which will define the limits of the domestic court's order.

The issue of whether and to what extent discovery of relevant documents and oral examinations will be permitted in an international commercial arbitration has always been a vexed one, particularly when the parties and/or the arbitrators come from different legal traditions. The resolution of the issue usually is a compromise involving the granting of some limited form of discovery. It may be of interest therefore to briefly survey the discovery practices, including non-party discovery, of important industrial nations. In that vein, the following is a brief summary of the practices in the G7 nations other than the United States.

Canada

The Canadian common law provinces follow a broad practice for documentary discovery, in which the parties to an action must disclose all documents which are relevant to the issues in the action (unless they are exempt from disclosure by reason of privilege). With regard to non-parties, disclosure of documents may be obtained if it can be demonstrated that the documents are material, that it would be inequitable to proceed to a hearing without them and that the requesting party is not engaged in a "fishing expedition".¹⁰ Québec, although a civil law jurisdiction, has been influenced by the common law in its procedure, and offers fairly extensive pre-trial procedures including discovery from non-parties.¹¹

A Canadian appellate court very recently supported an arbitral tribunal's order, relying on Article 27 of the Model Law on International Commercial Arbitration, for the oral

¹⁰ Gordon D. Cudmore, *Choate on Discovery*, Second Edition (Toronto: Thomson Canada Limited, 1993) at 3.1, 3.8(j).

¹¹ See in particular article 402 of the *Code of Civil Procedure of Québec*, R.S.Q.,c. C-25.

examination of non-parties. In *Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc.*,¹² Western was a party to an arbitration with a number of insurance underwriters under the Alberta *International Commercial Arbitration Act* (which incorporates the UNCITRAL Model Law); the underwriters took the position they were entitled to void Western's policy based on misrepresentations by Western's insurance broker, Jardine. Prior to the arbitration, Western and Jardine entered into a standstill agreement, a clause of which provided that the terms of the agreement would not be disclosed to any third party without Jardine's consent. The insurers sought an order from the arbitration tribunal requiring production of the standstill agreement and discovery of certain employees of Jardine.

Although the lower court held that the tribunal did not have jurisdiction to order Jardine, as a non-party to the arbitration, to produce the agreement or to compel the attendance of employees of Jardine to attend discoveries, the Alberta Court of Appeal overturned this decision. The court, holding that arbitration is not a “lesser form of litigation”, stated that Article 27 of the Model Law allows the parties to exclude certain rules of evidence or procedure, but where this is not done, the tribunal may adopt its own rules by reference to the rules of court. Accordingly, the tribunal was permitted to seek the assistance of the court in taking evidence from non-parties in accordance with those rules.

This decision indicates that at least some Canadian courts will defer to the arbitral tribunal's choice of procedure and permit it to utilize the rules of court to compel non-party discovery. According to this court's view, the UNCITRAL Model Law simply provides a general framework which can be supplemented with regard to the parties' wishes and the customs of the relevant jurisdiction. In so holding, the Canadian court has taken a different view

¹² 2006 ABCA 18.

from other nations' courts in relation to Article 27 of the Model Law. Other jurisdictions have determined that this provision does not empower the courts to order oral discovery of non-parties to the arbitration. Jardine's application for leave to appeal to the Supreme Court of Canada is currently pending. Consequently, it is still an open question whether non-parties can be compelled to give discovery in private arbitrations in Canada.

England

In the English system, parties are required to disclose documents on which they rely, which adversely affect any party's case, and/or which support another party's case.¹³ Third parties resident in England will only be required to provide documents that are relevant, admissible, specifically identified and reasonably believed to exist, and where the requested disclosure is necessary to dispose of the claim or to save costs.¹⁴

In the realm of arbitration, the English Arbitration Act 1996, s. 43 provides for an equivalent of the UNCITRAL Model Law in relation to evidentiary matters:

43. - (1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.

(2) This may only be done with the permission of the tribunal or the agreement of the other parties.

(3) The court procedures may only be used if-

(a) the witness is in the United Kingdom, and

(b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

¹³ Halsbury's Laws of England, Volume 37, Fourth Edition, "Practice and Procedure" at para. 555.

¹⁴ Thomas H. Webster, "Obtaining Evidence from Third Parties in International Arbitration" (2001) 17 *Arbitration International* 143 at 153, online <<http://www.kluwerarbitration.com>>; Halsbury's, *ibid.* at para. 562.

(4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.

This provision allows a party to an arbitration, once the consent of the tribunal and/or the other parties is given, to issue a subpoena to a non-party to produce documents relevant to an arbitration.¹⁵ However, English courts have recently dismissed applications for prehearing discovery from non-parties on the basis that the arbitration statute and the Model Law do not apply to prehearing evidence-gathering. The case law suggests that an application for document disclosure from a non-party might only be considered where it is targeted to specific documents which are required to be adduced in evidence at the arbitral hearing; otherwise, the issue of prehearing disclosure is within the province of the arbitrators, not the courts.¹⁶ Therefore, the English regime will prevent parties from using the courts to enable “fishing expeditions” for documents in the hands of non-parties.

Although the wording of the statute might suggest otherwise, it seems that the English courts have discretion to apply the powers contained in section 43(1) if the seat of the arbitration is outside England but hearings are taking place in England.¹⁷ This may provide an incentive for parties to request that an evidence-gathering hearing be held in England if they wish to secure documents or evidence from non-parties present in that jurisdiction.

Civil Law Countries

Arbitration of cross-border commercial disputes has long been well established in Europe as the preferred means of resolution by an impartial and knowledgeable decision-

¹⁵ Halsbury's Laws of England, Volume 2(3), Fourth Edition, “Arbitration” at para. 51.

¹⁶ O'Malley and Conway, *supra* note 2 at 377; *BNP Paribas v. Deloitte and Touche LLP*, [2004] 1 Lloyd's Rep 233 (Q.B. Comm.); *Tajik Aluminum Plant v. Hydro Aluminum*, [2006] 1 Lloyd's Rep 155 (C.A.).

¹⁷ Webster, *supra* note 14 at 153.

maker.¹⁸ However, evidence-gathering procedures in Europe are vastly different from those in the common law systems. In the civil law systems, the general rules of pre-trial procedure require each party to disclose those documents and written statements upon which reliance is placed in support of the claim or defence.¹⁹ A party is supposed to volunteer any piece of evidence it holds in order to support its case.²⁰

Discovery of documents in the common-law sense is seen as antithetical to privacy rights; it is only available in criminal cases where the public interest supports fuller disclosure. Documentation is submitted in stages which allows for each party to meet new issues as they arise²¹ - in other words, "litigation by instalments".²² Unlike in the common law systems, the judge in the civil law system plays a significant role in gathering evidence during the period prior to the hearing. The judge may hear witnesses and substantially controls the investigation process, which may be closed when the case is ready for resolution.²³

The civil and common law systems also differ considerably in the role judges take in questioning witnesses. In the civil law systems, generally speaking, when witnesses are called to give oral testimony, neither parties nor their lawyers can examine or even speak to the witness. They can only ask the judge to ask the witness a question or questions.²⁴ Instead of defaulting to the parties' inquiries, the judge plays a more active and inquisitorial role in determining the facts of the case through the asking of questions. Judges are responsible for verifying facts themselves

¹⁸ John B. Pinney, "Comparisons Between Domestic Arbitration and International Arbitration in the United States" (Paper presented at the 2005 ABA Annual Meeting, Section of Litigation, August 4-7, 2005) at 3.

¹⁹ See for example *Martindale-Hubbell International Law Digest* (Chicago: Lexis Nexis Martindale Hubbell, 2005) at FRA-14.

²⁰ Stephen Cromie, *International Commercial Litigation*, Second edition (London: Butterworths, 1997) at 167.

²¹ Bernardo M. Cremades, "Managing discovery in international arbitration" (Nov. 2002-Jan. 2003), *Dispute Resolution Journal* at 2, online: <<http://www.findarticles.com>>.

²² Hinchey and Baer, *supra* note 8 at 2.

²³ See for example the discussion of French procedure in Cromie, *supra* note 20 at 169.

²⁴ *Ibid.*

and they have a wholly discretionary power to appoint an expert witness to provide testimony, to require an investigation, or to summons parties to appear before them. It is this tradition that has a profound impact on arbitrations in civil law jurisdictions with respect to discovery of documents and prehearing oral evidence-taking. Arbitrators rarely make direct document production orders; however, they will draw adverse inferences from the refusal to disclose a document which is identified with reasonable particularity.²⁵

Civil Law Examples

(a) France

A particularly stark example of the different approach taken in civil law as compared with common law jurisdictions is provided by French procedures, where the courts give little assistance in obtaining documents from non-parties. Orders for document production are not routine and where non-party documents are at issue, the court may appoint an expert at the request of a party to review all the evidence, including evidence under the control of non-parties.²⁶ In proceedings before the French commercial courts, parties are generally only required to disclose materials necessary to prove their case. The judge, however, may order the disclosure of material from the parties to proceedings or non-parties but this power appears to be restricted to identified documents rather than broad, vague requests.²⁷ In France, the procedural law gives judges the responsibility to obtain evidence and the idea of delegating that responsibility to partisan advocates is repugnant.²⁸ French law restricts the gathering of

²⁵ Lucy Reed and Jonathan Sutcliffe, “The ‘Americanization’ of International Arbitration?” (2001), 16-4 Mealey’s Intl. Arb. Rep. 11.

²⁶ Webster, *supra* note 14 at 145, 158.

²⁷ Donnadh Woods, “The Growth of Private Rights of Action outside the U.S.: Private Enforcement of Antitrust Rules - Modernization of the EU Rules and the Road Ahead” (2004), 16 Loy. Consumer L. Rev. 431 at 443.

²⁸ Geoffrey C. Hazard, Jr., “Discovery and the Role of the Judge in Civil Law Jurisdictions” (1998), 73 Notre Dame L. Rev. 1017 at 1027-1028.

evidence in France for foreign judicial or administrative proceedings and French judges have the power, on various grounds, to refuse to comply with letters rogatory from foreign states.²⁹

In international arbitrations held under French practices, the parties are free to decide on the extent of prehearing discovery, in the absence of which the arbitrator may determine whether and how much discovery will take place. The courts' role in relation to arbitration is minimal, but a judge may be asked to order investigative measures to preserve or establish facts as a pre-arbitration procedure, or make a preservation order in relation to evidence in the possession of a non-party.³⁰ It is, however, safe to say that from a North American perspective, discovery is very limited in international commercial arbitrations held under French rules.

(b) Germany

As in other civil law systems, the courts in Germany mainly conduct the interrogation of witnesses, leaving little questioning to be done by counsel for the parties. There is no single "trial" but rather a series of conferences before the judge until the matter is finally adjudicated.³¹ Fact-gathering is done in a sequence established by the court and under its supervision.

Judicial control over evidence-gathering is seen in the German system as a component of judicial responsibility for the upholding of the democratic constitution.³² Production of documents is only available where a party has already referred to the documents

²⁹ Cromie, *supra* note 20 at 411.

³⁰ Pierre Raoul-Duval and Carole Malinvaud, "Country Q&A France" in *Dispute Resolution Handbook 2005/06*, Fourth Edition (London: Practical Law Company Ltd., 2005) 73 at 76.

³¹ Hein Klotz, "Civil Justice Systems in Europe and the United States" (2003), 13 *Duke J. Comp. & Int'l L.* 61.

³² Geoffrey C. Hazard, Jr., "Discovery and the Role of the Judge in Civil Law Jurisdictions" (1998), 73 *Notre Dame L. Rev.* 1017 at 1026.

for the purpose of providing evidence. Therefore, German authorities will generally restrict attempts to obtain evidence for proceedings abroad.³³ While the law of civil procedure generally does not provide for prehearing discovery or disclosure, the parties in international cases may agree to such measures. Arbitration proceedings allow a fair amount of flexibility for the tribunal in terms of procedure and admissibility of evidence, including discretion to order prehearing disclosure if the parties have not agreed on the extent of such disclosure. It would appear that the prehearing examination of a non-party would be rare in German procedure. However, the arbitral tribunal may request court assistance in taking evidence and performing other judicial acts that the tribunal lacks the power to do itself. The arbitrators are entitled to ask questions of witnesses summoned to give evidence before the courts.³⁴

(c) Italy

In keeping with the general nature of civil law jurisdictions, the rules of discovery and disclosure in Italy are relatively narrow. In Italy, a party does not have to disclose documents that would be harmful to its case. A party can apply for disclosure of specific documents but if the other party refuses to produce them the court cannot force it to do so; it can merely draw conclusions from the refusal to cooperate.³⁵

According to UNCITRAL, Italy has not adopted legislation based upon the Model Law; rather, the Italian Code of Civil Procedure regulates international arbitration.³⁶ There is no official mechanism for prehearing disclosure of documents or oral discovery in arbitration, and parties are free to set out the rules of the arbitration before the proceedings. Arbitrators often do

³³ Cromie, *supra* note 20 at 412.

³⁴ Michael Veltins, “Country Q&A Germany” in *Dispute Resolution Handbook 2005/06*, *supra* note 30 at 80-81.

³⁵ Astolfo di Amato, “Country Q&A Italy”, *ibid.* 114 at 115.

³⁶ *Martindale-Hubble International Law Digest*, *supra* note 19 at ITL-9.

not lay out any specific rules but follow the general rules of civil procedure of the courts.³⁷ Arbitrators cannot compel a party to disclose documents or give testimony and, furthermore, local courts will not intervene to enforce the orders of an arbitrator.³⁸

Japan

Japan is something of a hybrid, with roots in both the European and Anglo-American systems.³⁹ Its rules of civil litigation allow for limited documentary discovery.⁴⁰ Each party must produce all documents requested before trial unless they fall into one of the categories of protected documents.⁴¹ Parties may also ask the court to request that the holder of a document produce the document before the party commences court proceedings.⁴²

The Code of Civil Procedure regulates international arbitration in Japan.⁴³ Although arbitration has not traditionally been used in Japan, it is becoming increasingly popular, especially in international commercial disputes.⁴⁴ The adoption of the New Model Law in March 2004, based almost entirely on the UNCITRAL Model Law, is helping to promote its growth as a dispute resolution mechanism.⁴⁵

The new law does not contain any detailed rules of evidence. It allows for the court to play a significant role in this area of arbitration if so inclined, although the law has not

³⁷ “Country Q&A Italy”, *supra* note 35. at 117.

³⁸ *Ibid.*

³⁹ Makoto Ibusuki, “Update to Japanese Law via the Internet”, online: <http://www.llrx.com/features/japan2.htm>, published 15 February 2002.

⁴⁰ Hiroyuki Tezuka and Masako Yajima, “Country Q&A Japan” in *Dispute Resolution Handbook 2005/06*, *supra* note 30, 121 at 124.

⁴¹ *Ibid.* p. 122.

⁴² *Ibid.* at 121.

⁴³ *Martindale-Hubble International Law Digest*, *supra* note 19 at JPN-9.

⁴⁴ *Supra* note 40 at 121.

⁴⁵ *Ibid.*

been in place for a sufficient period of time to observe whether this will in fact become the norm.⁴⁶ The law contains a provision which allows an arbitral tribunal to seek the court's assistance in taking evidence which presumably is to be done through Japanese rules of procedure.⁴⁷ The relevant article reads as follows:

Article 35. (Court Assistance in Taking Evidence)

(1) The arbitral tribunal or a party may apply to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary as entrustment of investigation, examination of witnesses, expert testimony, investigation of documentary evidence (excluding documents that the parties may produce in person) or inspection (excluding that of objects the parties may produce in person) prescribed in the Code of Civil Procedure. Provided, this shall not apply in the case where the parties have agreed not to apply for all or some of these means.

(2) In making the application described in the preceding paragraph, the party shall obtain the approval of the arbitral tribunal.

(3) Notwithstanding the provisions of article 5, paragraph (1), only the following courts have jurisdiction over cases relating to the application described in paragraph (1): (i) the court described in article 5, paragraph (1), item (ii);

(ii) the district court having jurisdiction over the domicile or place of residence of the person to be examined or the person holding the relevant documents, or the location of the object for inspection; or

(iii) the district court having jurisdiction over the general forum of the applicant or the counterparty (only if there is no court described in the preceding two items).

(4) An immediate appeal may be made against the decision regarding the application in paragraph (1).

(5) When the court carries out the examination of evidence based on the application in paragraph (1), the arbitrators may peruse the documents, inspect the objects and, with the approval of the

⁴⁶ Haig Oghigan, "Japan's New Arbitration Law" (2006), 21-2 Mealey's Intl. Arb. Rep. 15.

⁴⁷ *Ibid.*

presiding judge, put questions to the witness or expert (as prescribed in article 213 of the Code of Civil Procedure).

(6) The court clerk shall enter in the record the matters concerning the examination of evidence carried out by the court following the application prescribed in paragraph (1).⁴⁸

While parties are permitted to elect their own evidentiary rules for arbitrations, in practical terms, where the tribunal consists of Japanese lawyers, the rules tend to reflect the procedure of the Japanese litigation system.⁴⁹ However, in recent years where non-Japanese arbitrators have been involved in international arbitration cases in Japan, the arbitral tribunal has ordered a broader scope of production of documents. At the same time, pre-hearing oral discovery remains extremely rare and arbitral tribunals cannot compel discovery.⁵⁰

A request for testimony from Japan for use in a proceedings outside of Japan is only available through letters rogatory where the letter is sent to the Japanese courts through official diplomatic channels with a full Japanese translation.⁵¹

Implications of Cultural Differences and Expectations

Given the significant differences noted above, the potential for disagreement is obvious, particularly where a mixture of common and civil law actors are present at an international arbitration, either as parties or members. As noted by Redfern and Hunter, while parties in common law countries accept the risk of having to produce relevant documents, including internal correspondence, parties in civil systems are very frequently appalled at the range and extent of documents required to be produced in a common-law influenced

⁴⁸ *Arbitration Law (Law No.138 of 2003)*, trans. by The Arbitration Law Follow-up Research Group, online: The Japan Commercial Arbitration Association <<http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/kaiketsu-e/civil.html#5>>.

⁴⁹ *Supra* note 40 at 124.

⁵⁰ *Ibid.*

⁵¹ *Martindale-Hubble International Law Digest*, *supra* note 19 at JPN-8.

arbitration.⁵² Allegations of bad faith and improper behaviour are not uncommon when the vastly different expectations of civil and common law parties meet in the arbitral process.⁵³ One does not, however, have to look to the most drastic examples in order to conclude that less fundamental differences can still cause great difficulty for the participants in an international arbitration. Consider, for example, a mixture of participants from the U.S., U.K. and Canada – all common law countries which expect at least some form of discovery to take place. While, in my experience, where both counsel and arbitrators come from some combination of these traditions, compromise seems usually to be reached without great difficulty, bigger challenges present themselves when all counsel are from one jurisdiction and the arbitrators are from disparate legal traditions. In order to bridge the expectation gap, international arbitration tribunals often adopt a hybrid approach which focuses on the production of the documents which are most relevant and useful. This accommodates common-law lawyers' desire for due process by disclosure of the key documents, while minimizing the distress civil lawyers may feel at being compelled to produce their clients' sensitive or private information.

It has been said that unless the parties' contract provides otherwise or agreement is reached, in international arbitration it is usual that only specifically identified documents, rather than entire categories of documents, will be ordered produced.⁵⁴ However, in the present day, this is by no means universal practice and all too often arbitral procedures degrade into what has been called "boxcar production". In terms of oral discovery, experience shows that participants in international arbitrations can be persuaded, with some difficulty, that pre-hearing

⁵² Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Fourth Edition (London: Sweet & Maxwell, 2004) at 300.

⁵³ Cremades, *supra* note 21 at 4.

⁵⁴ Paul Friedland, "A Standard Procedure for Presenting Evidence in International Arbitration" (1996), 11-4 Mealey's Intl. Arb. Rep. 10.

evidence is unnecessary or that oral discovery should be limited to one or two day sessions, particularly if all the relevant documents have been made available.

As one commentator has noted, it is important to give the arbitrator the benefit of the doubt when it comes to evidentiary matters. The “search for truth” in arbitration is different from that which applies in court as the purpose of the hearing is usually to find out what the parties’ expectations were at the time a contract was entered into, an inquiry which may not lend itself to resolution if the strict rules of evidence are followed.⁵⁵ For example, if a tribunal were to adhere unflinchingly to the parol evidence rule preventing the parties from leading oral evidence supplementing and explaining the written documents in a case, the arbitrators might not be able to reach a just result in the international sense. Similarly, allowing arbitrators to take a more active role in examining witnesses or requesting information and documents, in the spirit of the inquisitorial system, may ensure that the arbitrators are not left with unanswered questions.

Although reconciling differences among parties and arbitrators from different backgrounds is not an easy task, it is easy to understand why the kind of full documentary and oral discovery available in common law litigation simply cannot be imported into the international arbitration process. To do so would defeat the kind of efficient dispute resolution that is sensitive to the needs of commercial actors which is needed as an alternative to the costly, lengthy, procedure-laden court process that is the norm in today’s society.

Conclusion

In summary, although the rules governing any given international arbitration are important, in terms of prehearing discovery rights the rules will only be controversial to the

⁵⁵ William W. Park, “Arbitration’s Discontents: Of Elephants and Pornography” (2002), 17-2 Mealey’s Intl. Arb. Rep. 11.

extent that they contradict the procedures that parties and arbitrators have come to expect by reason of their judicial and cultural preconceptions and expectations. Fortunately, international commercial arbitrations are flexible proceedings and arbitrators are often able to reach acceptable compromises which result in adequate fact-finding and a just result.