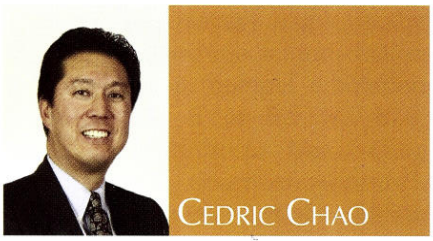
Planning for Discovery in International Arbitration

This article discusses the choices that parties to international arbitration may make with regard to discovery (disclosure) requirements, with particular regard to the influence of the choice of procedural law, choice of situs and choice of the arbitral tribunal on this matter. The authors strongly recommend that due consideration should be given to discovery requirements at the pre-dispute stage wherever possible.



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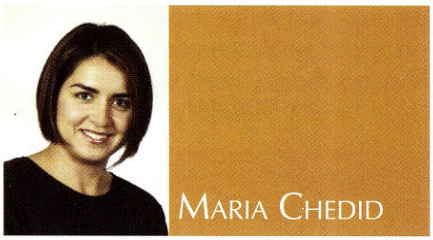

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Introduction

As a creature of contract, arbitration offers parties the opportunity to design the mechanics of dispute resolution to suit their unique needs and transactions. Parties should, at the time of contracting, take advantage of this opportunity by thinking about the arbitral structure and procedure that would best serve their interests in the event of a dispute. One important but often overlooked matter in this regard is discovery. Incorporating the specifics of discovery into an arbitration clause is particularly important in international arbitration, which brings together parties from different countries, often from very different legal traditions, including both civil and common law. Since such parties and their counsel may differ in their views of the customary scope and methods of discovery, it would be advisable to negotiate the particulars in advance in order to avoid the attendant cost and delay of post-dispute discovery conflicts.

Although it may be difficult to anticipate at the time of contracting what will best serve the parties in the event of a dispute, a number of considerations may determine whether more or less discovery is desirable, and in what form. These considerations include: (i) the type and value of the claims that are likely to arise; (ii) which party is more likely to be claimant or respondent; (iii) who will have custody of relevant documents and where the documents will be located; (iv) the need for witness testimony and the location of witnesses; and (v) whether confidentiality and proprietary issues will arise. To the extent that these considerations point towards extensive discovery, parties should also keep in mind the benefits that may have resulted in the decision to choose arbitration over litigation in the first instance, such as greater speed and less expense.

Three choices to be made by the parties will most significantly impact upon the scope and methods of arbitral discovery: (i) choice of law or rules governing discovery (or 'disclosure'); (ii) choice of location (or 'situs') of the arbitration; and (iii) choice of arbitrators.

Choice of governing law or rules

Parties can most directly control the scope and type of discovery permitted in arbitration by their choice of governing discovery laws or rules. At one end of the spectrum is discovery under the United States legal system. Although such discovery shares some core features with other common law jurisdictions, it is unique in its breadth and scope. The US Federal Rules of Civil Procedure, for example, permit parties to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party," and to choose from a wide array of discovery devices, including written and oral depositions, interrogatories, document requests, requests for admission, requests for inspection of tangible and real property, and physical and mental examinations[1].

Proponents believe that broad discovery discourages gamesmanship, prevents trial by ambush, promotes settlement by enabling parties to make a more accurate evaluation of the strengths and weaknesses of their case through early access to evidence, promotes efficient use of trial time by enabling the parties and courts to narrow the issues, and promotes justice by requiring the parties to disclose unfavorable as well as favorable evidence[2].

These advantages contributed to the decision of two parties to one recent high-profile US arbitration — a Californian bioscience company and a Swiss pharmaceutical company — to specify in the dispute resolution clause of their licensing agreement that the Federal Rules of Civil Procedure would govern discovery, although the arbitration would otherwise proceed under the American Arbitration

Association International Centre for Dispute Resolution (AAA-ICDR) International Arbitration Rules. The Californian party found that broad discovery was necessary to the fact-finding process and ultimately contributed to negotiation of an early settlement of the dispute[3].

Opponents of such broad discovery, by contrast, point out that it can be overly intrusive, time-consuming, expensive and susceptible to abuse by the parties[4].

At the other end of the spectrum is the traditional international arbitration approach to discovery, which vests the arbitral tribunal with significant discretion to control procedure and generally takes a much narrower view of the process[5]. Pre-trial discovery in international commercial arbitration typically focuses on document exchanges, where the requesting party must justify to the tribunal its need for requested documents. Limited interrogatories might be used in rare circumstances, but oral depositions are typically disallowed.

Under the traditional arbitration approach, the risk of trial by ambush is minimized to a large extent because many tribunals require the parties to make detailed written submissions of evidence and arguments before the hearing on the merits. This includes signed witness statements setting forth direct testimony, all documentary evidence on which each side intends to rely, and 'memorials' summarizing the arguments of each side, with references to the written evidence. Thus, a party cannot ambush the other side by presenting entirely new witness testimony at trial, unless there are exceptional circumstances justifying such new testimony. Some arbitral panels, however, do not require the submission of written witness statements and instead allow witnesses to attend and testify for the first time at the hearing.

The International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration (1999) ('IBA Rules') represent an effort to balance US-style discovery and the traditional international arbitration approach. Although the IBA Rules have not been formally incorporated into the rules of any major arbitral organization, it is becoming increasingly common for parties and/or arbitrators to look to them for guidance. The IBA Rules do not diverge significantly from the current norms of international arbitration practice. However, they do make a notable concession to US discovery practice by providing detailed procedures for document requests that are broader than typical practice in arbitration[6]. This broadening is balanced by the further requirement that the requests be sufficiently detailed, narrow, and specific[7].

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The IBA Rules proved helpful in a recent AAA international arbitration between Bermuda and Swiss companies. At the tribunal's suggestion, it was agreed that the IBA Rules would serve to guide discovery. Relying on the "possession, custody, or control" language in article 3(4) of the IBA Rules, the authors requested that the Tribunal compel production of certain documents of which the opposing party denied 'possession' but had demonstrated 'control'. The tribunal granted the request to compel production, pursuant to that provision.

Choice of arbitral situs

Given that discovery practice can vary significantly from country to country, and even from jurisdiction to jurisdiction within the same country, choosing where to hold arbitral proceedings is often a critical decision. To the extent that disputed discovery particulars are not addressed in the arbitration clause or selected institutional rules, they will be governed by the law of the arbitral situs as they are matters of procedure[8]. The law of the arbitral situs governs procedural matters even where the parties have expressly chosen a different law to govern the merits of the underlying dispute[9].

Furthermore, parties sometimes need the assistance of local courts in enforcing arbitral discovery orders and obtaining discovery from non-parties, over whom the arbitral panel has no jurisdiction. Courts in some countries — but not all — are empowered to assist arbitral tribunals in obtaining documentary and other evidence[10].

Choice of arbitrators

Finally, parties seeking to exercise some control over discovery in international arbitration can further that goal by ensuring that the presiding arbitrators are conversant with and receptive to the approach that is desired. Although most international arbitration proceedings today involve some discovery — at a minimum, an exchange of relevant documents — arbitrators who come from civil law jurisdictions will likely be less inclined to allow broad discovery absent unambiguous agreement of the parties. Parties who wish to limit discovery, therefore, might decide to limit their arbitrators to those with civil law experience by specifying in the arbitration clause required arbitrator nationalities or background. Similarly, parties who have decided they would benefit from more extensive discovery might specify that the arbitrators or the chair of the arbitral panel shall be a practitioner from the common law tradition. For example, in the first AAA international arbitration noted above, in addition to specifying that the

US Federal Rules of Civil Procedure would apply, the parties agreed in their arbitration clause that the entire arbitral panel would comprise retired US federal judges.

Conclusion

Much can be done to minimize uncertainty and conflict with respect to discovery in international arbitration. With explicit, clear, and unequivocal language, parties can custom design their arbitration clause to incorporate the rules, location, and arbitral panel that they anticipate will best serve their needs. Given the wide range of existing approaches to discovery and the critical importance of documentary and other evidence to the outcome of arbitration, planning and negotiation of these particulars at the time of pre-dispute contracting is strongly advised.

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1 See rules 26(b)(1), 27 and 33-36.
2 See, for example, *Hickman v Taylor*, 329 US 495, 501 (1947); *United States v Proctor & Gamble Co*, 356 US 677, 682 (1958); *Krause v Rhodes*, 671 F 2d 212, 214 (6th Cir, 1981) (certiorari denied, 459 US 823 (1982)).
3 The authors of this article were counsel to the Californian party.
4 See, for example, *Intel Corp v Advance Micro Devices Inc*, 542 US 241, 268 (2004) (Breyer J dissenting); *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547, 609 (House of Lords, UK); D J T Adler *et al*, 'Setting Reasonable Limits in the Digital Era', in *Current Developments in Federal Civil Practice 2006* (2006, New York: Practising Law Institute) 173, 192.
5 See, for example, the AAA-ICDR International Arbitration Rules (2007 Edn), Arts 16, 19; ICC Rules of Arbitration (1998 Edn), Art. 20; UNCITRAL Arbitration Rules (1976 Edn), Arts. 24, 25, 27; LCIA Rules (1998 Edn), Arts 15, 22.
6 See IBA Rules, Art 3.
7 *Ibid*.
8 See, for example, *Re Hainan Import and Export Machinery Corp v Donald & McCarthy Pte Ltd* [1996] 1 SLR 34 (High Court, Singapore); *Bank Mellat v Helliniki Techniki SA* [1983] 3 All ER 428 (Court of Appeal, England).
9 See, for example, *Bank Mellat v Helliniki Techniki SA* (note 8 above); Interim Award of 16 July 1986 in ICC case no 5029, (1986) 3 ICLR 473-476.
10 See, for example, the US Federal Arbitration Act 1925 (9 USC), §7; Singapore International Arbitration Act (Cap 143A), §§ 12(1)(b), 12(6), 12(7).
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