THE SCOPE OF DISCOVERY IN INTERNATIONAL ARBITRAL PROCEEDINGS

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I. INTRODUCTION

Efficient arbitration proceedings require a balance between procedural flexibility and certainty in the discovery process. The flexible nature of arbitrations facilitates a process of faster, less expensive dispute resolution than public judicial proceedings. Greater certainty during the early stages of the arbitration streamlines the crucial process of entering into arbitration itself. For this reason, contracting parties must understand how preliminary matters such as the scope of discovery, terms of reference, confidentiality, and the place of arbitration, may impact the arbitral proceedings as a whole. Once apprised of these matters, parties can address them directly in the arbitral contract; or indirectly by including various arbitration rules.[1] Alternatively, matters may be left for negotiation during a pre-hearing conference, or left to the discretion of the arbitrator.

The following discussion of discovery is limited to discovery of documents. I will not address other forms of discovery, such as depositions or written interrogatories because for the purposes of

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1. *See, e.g.*, UNITED NATIONS, COMM'N ON INT'L TRADE LAW, ARB. R., Dec. 15, 1976, I.E.L. VIII-E-1 [hereinafter UNCITRAL RULES]; INT'L CHAMBER OF COM. ARB. R., Jan 1, 1988, 28 I.L.M. 235 [hereinafter ICC RULES]; LONDON CT. OF INT'L ARB. REV. R., Jan. 1, 1985, 24 I.L.M. 1137; AM. ARB. ASS'N INT'L ARB. R., Mar. 1, 1991, I.E.L. VIII E-5.

international arbitration the most important questions concern document production.

The rules governing discovery for international arbitrations are unclear. It is difficult to determine whether discovery will be minimal or extensive. Expectations differ with respect to the proper scope of discovery among arbitrators, parties to arbitration, and counsel representing such parties. On the one hand, international arbitration has followed the European civil law model of restricting or denying discovery. On the other hand, recent trends indicate a growing acceptance of widespread discovery in international arbitrations.

I. DISCOVERY

The rules do not clarify the scope of discovery. For example, the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules) state only: "At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within such a period of time as the tribunal shall determine."[2] This rule leaves the scope of discovery in the proceedings to the arbitrator's discretion. Since arbitrators' decisions may turn on their personal views and preferences, parties cannot always predict the extent of the scope of discovery based on the history and tradition of the practice, or even new trends in the field.

Therefore, the rules only provide that arbitrators may order production, but the extent of such production remains unknown. Additionally, the International Chamber of Commerce Arbitration Rules (ICC Rules) provide that where the arbitral agreement is vague or silent, the arbitrator may be called upon to supply the missing rules.[3] Since the scope of discovery can impact the fairness, expense, and strategy employed in the arbitral proceedings, contracting parties must understand how best to utilize the unknown scope of discovery to their advantage.

The Federal Rules of Civil Procedure (Federal Rules) allow for broad discovery. With such extensive knowledge, parties often settle instead of going forward with the expense of litigation. By contrast, the limited discovery allowed under the ICC Rules leaves the potential

2. UNCITRAL RULES, *supra* note 1, art. 24, I.E.L. VIII-E-1.

3. "The rules governing the proceedings before the arbitrator shall be those resulting from these Rules, and where the rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle. . . ." ICC RULES, *supra* note 1, art. 11, 28 I.L.M. 231, 239.

outcome of a trial ambiguous and, therefore, decreases the likelihood of settlement.

Arguably, extensive discovery better enables the arbitrator to render a fair and just decision. Broad discovery also better enables the opposing parties to objectivity evaluate the relative strengths and weaknesses of each other's case. Indeed, settlement statistics suggest a correlation between an increase in information acquired through discovery and an increase in the rate of cases settled. The vast majority of all cases (approximately ninety percent) filed in United States district courts are eventually settled, while only slightly more than half of all cases filed at the ICC are settled. Extensive discovery provided by the Federal Rules is one of the contributing factors to the high settlement rate among the district court cases. Under the Federal Rules, parties may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."[4] The Federal Rules do not even require admissibility of the evidence sought, as long as it "appears reasonably calculated to lead to the discovery of admissible evidence."[5] By contrast, the ICC Rules require a more restrictive discovery process whereby the parties must provide "such documentation or information as will serve clearly to establish the circumstances of the case."[6]

II. EXPENSE CONSIDERATIONS

Unlike ordinary litigation in public courts, parties to an arbitration proceeding must pay for the decision-making judge. Extensive discovery is more expensive because, in addition to the cost of gathering information, parties must also pay the arbitrator to review it. Extensive discovery can, therefore, undermine the primary advantages of international arbitration, savings in time and money. Discovery under the ICC Rules is less expensive and less time consuming than discovery under the Federal Rules. Hence, although extensive discovery may increase the arbitrators' ability to render a fair decision and may also

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4. FED. R. CIV. P. 26(b)(1). *Cf.* FED. R. CIV. P. 29 ("Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner. . . ."); FED. R. CIV. P. 30(A)(1) (a party may take testimony of any person, including a party, by deposition upon oral examination without leave of court except under limited circumstances such as imprisonment, where it results in more than ten depositions being taken under this rule or Rule 31, or where the person to be examined has already been deposed).

5. FED. R. CIV. P. 26(b)(1).

6. ICC RULES, *supra* note 1, art. 3, 28 I.L.M. 231, 238.

reassure counsel of its thoroughness, the increase in cost may prove commercially impractical.

III. STRATEGY

Where a significant disparity exists in available resources between the contracting parties, so too exists the possibility of abusing extensive discovery proceedings to the prejudice of weaker parties. That is, wealthy contracting parties can overwhelm smaller parties with weighty discovery demands. Parties of modest means may, therefore, wish to limit the potential scope of discovery to ensure affordable arbitration proceedings. Similarly, contracting parties who are subject to public litigation in the United States may opt for arbitration in order to avoid abuse of the extensive discovery provided for under the Federal Rules.[7] Thus, parties should consider the potential amount in controversy and their relative resources when they define discovery in their arbitration clause.

IV. DISCOVERY CLAUSE

Perhaps the simplest and most predictable way for each party to ensure that discovery proceedings comport with their relative needs and resources is to include a discovery clause in the arbitration agreement that delimits the breadth of rights for demanding document production. Such clauses that require discovery under the Federal Rules are unusual, but not unknown.[8] The IBA rule, which provides the right to demand documents that can be identified with reasonable particularity,[9] provides an alternative to the broad discovery allowed under the Federal Rules.

In the absence of a discovery clause in the arbitration agreement, parties can address this issue in a pre-hearing conference. Such a meeting ensures that the arbitration is organized efficiently. The arbitrators can help the parties to define terms of reference in the discovery clause, determine the schedules for discovery, or even draft a discovery clause from scratch. The pre-hearing conference can also be used to address

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7. For example, FED. R. CIV. P. 26(b)(2) provides that the court may limit discovery where the information sought is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."

8. "The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity." FED. R. CIV. P. 34(b).

9. "A party may by Notice to Produce a Document request any other party to provide him with any document relevant to the dispute between the parties and not listed, provided such document is identified with reasonable particularity and provided further that it passed to or from such other party from or to a third party who is not a party to the arbitration." INT'L BAR ASS'N R. EVID., app. D, art. 4(4).

other ancillary discovery issues, such as the authenticity of documents or the handling of interrogatories and depositions.

V. DEFINING TERMS OF REFERENCE

The ICC Rules require that "[b]efore proceeding with the preparation of the case, the arbitrator shall draw up . . . a document defining [the] Terms of Reference."[10] These terms include a summary of the parties' claims, and a definition of issues to be determined.[11] The benefits conferred by establishing terms of reference are akin to the benefits of defining the scope of discovery; by limiting the number of issues in contention, the arbitrators and the parties are better able to focus on the central issues of the case. Therefore, defining terms of reference during the pre-hearing conference better ensures predictability in the arbitration proceedings.

Like pretrial orders in the United States, stipulations of fact and law can also be made through the terms of reference. Such stipulations help not only to reduce the number of issues to be arbitrated, but also to categorize, limit, or even preclude later amendments to a claim, defense, or counterclaim that might otherwise arise during the course of the proceedings. Where an arbitral decision does not address specific and important issues, the potential exists for a court to reverse the arbitral decision.

Establishing terms of reference may also ensure efficiency. In particular, dividing the case into several questions allows the arbitrator to settle threshold issues first. For example, the parties may wish to decide jurisdiction or questions of liability first. This discussion may even induce a settlement between the parties.

However, defining the terms of reference does not guarantee effective decision-making. Consequently, the benefits of providing terms of reference must be weighed against the costs of undertaking the exercise in the first place. Indeed, while many parties precisely draft the terms of reference and narrowly define the issues, others may be able to thwart the process by drafting terms with broad or vague language, thereby nullifying the potential benefits, and avoiding otherwise needless costs.

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10. ICC RULES, *supra* note 1, art. 13, 28 I.L.M. 231, 239.
11. *See id.*

VI. CONFIDENTIALITY

Confidentiality is an appealing aspect of arbitration. However the various rules of arbitration,[12] national laws, and the parties themselves may differ in their interpretation of the proper scope of confidentiality. Parties should consider in the pre-hearing conference which of the following types of information, inter alia, should remain confidential: the award, evidence, written pleadings, identity of the parties, identity of the arbitrators, and even the fact of the arbitration.

Parties should be aware that even the most stringent efforts to ensure confidentiality can be defeated when the arbitration award requires enforcement via a public judicial system. When parties enter a court, the confidentiality surrounding discovery is lost as such information enters the public record, unless the judge decides otherwise.

VII. CONCLUSION

Extensive discovery tends to improve the outcome of arbitral proceedings, but it also increases the cost. The scope of discovery is, therefore, an important consideration of parties to arbitration agreements.

Cross-cultural arbitrations give rise to differences in approaches to discovery. While European civil law recognizes a limited scope of discovery, common law countries (America in particular) provide for liberal discovery. Parties should agree upon the scope of discovery in their arbitration agreement in order to minimize conflicts in the event of an arbitration.

Factors to consider when drafting the discovery clause include the relative resources of each party and the expense associated with documentation and arbitral review. While extensive discovery may enhance the quality of the arbitral decision, the costs of gathering such documentation may negate the benefits. Therefore, parties should weigh the costs and advantages of extensive discovery before finalizing their arbitral agreement.

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12. "Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator." AM. ARB. ASS'N INT'L ARB. R., *supra* note 1, art. 35, I.E.L. VIII E-5; *cf.* ICC RULES, *supra* note 1, app. II(2), 28 I.L.M. 231, 242 ("The work of the Court of Arbitration is of a confidential character which must be respected by everyone who participates in that work in whatever capacity."); UNCITRAL RULES, *supra* note 1, art. 32, I.E.L. VIII-E-1 ("The award may be made public only with the consent of both parties.").