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Obtaining Discovery in International Arbitral Proceedings: The European v American Mentality

By

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Obtaining Discovery in International Arbitral Proceedings: The European v American Mentality

by R.A. OLIVER BOLTHAUSEN and PETER H. ACKER

1. INTRODUCTION

For many lawyers worldwide arbitration is, and has been since its inception, one of the most successful and flexible forms of dispute resolution. One of the reasons arbitration has become so enticing is because arbitration allows lawyers to choose the location of dispute resolution, the adjudicative bodies, and substantive and procedural bodies of law to apply to future potential conflicts.

However, along with these benefits come significant potential pitfalls. Often one of the most unexpected and often shocking perils for lawyers remains the differences in legal systems and mentalities concerning the disclosure and collection of evidence during arbitration proceedings. This article explores the differences in the mentalities and expectations concerning the collection of evidence between European civil law systems and the American common law system and hopefully provides insight to lawyers considering arbitration in either of these forums.

2. EUROPEAN ARBITRATION AND PROCEDURAL RULES

Obtaining evidence in European arbitration proceedings: The European mentality

The combination of inquisitorial and adversarial mentalities in institutional rules becomes mainly apparent at the stage of taking evidence. Under most common arbitration rules each party has the burden to produce those documents upon which their respective submissions and pleadings rely. In most cases there is no pre-trial discovery as such is known in the Anglo-Saxon world.¹ Instead the scope of prehearing discovery lies within the discretion of the arbitrators and its bounds are based in large part upon the rules of the arbitration provision (if such exists), the internal rules of the arbitration organisation hearing the case, or upon the mandatory provisions of the seat of arbitration. An order for discovery not based on the underlying agreement of the parties would, from a European mentality and the civil law system, most likely be seen as a violation of due process.²

As to witness testimony, European continental arbitrators rely on written pleadings and documentation. However, as Europe comprises Great Britain as well as the continental nations, two approaches exist: the continental European civil law approach, and the Anglo-Saxon common law approach. The European mentality, say for the Anglo-Saxon approach as seen in the United Kingdom, is more familiar with the questioning of witnesses. Under the European Anglo-Saxon approach, arbitrators like judges can question the witness themselves and have other powers including the limitation of questioning, as they would in litigation. It is also more and more common in day-to-day international arbitration practice to see continental European arbitrators allow the typical cross-examination of witnesses. Nevertheless, observing experienced international arbitrators from a continental European background, one quite often notices a much more active role in the direct examination and

¹ P.C. Schlosser, *Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit*, 2nd edn (Heidelberg: Verlag Recht und Wirtschaft, 1989).

² F.-B. Weigand, *Practitioners Handbook on International Arbitration* (München: C.H. Beck), p.81.

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cross-examination of witnesses. It is common now to expect active and intense evidence hearings often imposing restrictions on certain questions or styles of questioning. There are further limitations on the scope and time for questioning witnesses and therefore it is necessary for the parties to convene beforehand with the tribunal to determine how witnesses will be examined during the hearing.

Concerning the appointment and qualifications of expert witnesses, unlike the common law approach, under the continental approach and European mentality an expert appointed by a judge or arbitrator is not subject to cross-examination. Nor can experts appointed by arbitrators be impeached by a party-appointed expert. The continental approach to avoid costs and a battle of expert witnesses is, for example, incorporated in the ICC rules (Art.20 s.4 as well as in s.27.2 of the DIS rules).

Discrepancies among Member States and arbitral organisations

For historical reasons, the differences between continental Europe and Anglo-American approaches are obvious. There is a general reluctance to accept disclosure, or permit compulsory production of documents or testimony from third parties. Testimony from witnesses outside a hearing is also frowned upon.

This reluctance is only partly reflected in the different arbitration rules. These rules do not create detailed procedures for taking evidence, but are based more upon providing discretion to the tribunal to enforce measures necessary to ensure fairness to both sides. However, the extent of discovery depends a lot on the tribunal selected, which decides how the rules will be executed and used in the arbitration. Thus the choice of tribunal, the choice of arbitrators and their cultural background are important in predicting the scope of discovery in European arbitration. Nevertheless, it must be noted that despite this fact, many international arbitrations have become somewhat “Americanised”, at least as to the witness hearings, which have recently displayed almost Anglo-American cross-examination style questioning.

For example, the ICC Arbitration Rules have no express discovery provision at all. Nor have the SCC rules. In most of the other common rules there is a wide discretion for the tribunal to call for the production of documents, to establish the facts, e.g. in the LCIA Rules; in the WIPO Rules; the Rules of the Zurich Chamber of Commerce; and the DIS Rules.³

Arbitration laws do not deal in depth with the taking of evidence. As a result, planning for disputes and questions concerning the scope of discovery is necessary for everyone dealing with international arbitration. The choice of manner of production of evidence and its admissibility and interpretation or assessment are to be dealt with by the tribunal. Further, the tribunal is not bound to follow the rules of the seat of the arbitration. It has a wide discretion to determine the scope of discovery in the absence of an agreement between the parties. For example, the German arbitration rules make clear that included in the tribunal’s discretion are the determination of admissibility, relevance, materiality and weight.⁴

Parties are increasingly submitting disputes arising out of international issues and contracts to arbitration. The most common reasons for doing this, from a procedural outlook, are the desire to keep a dispute, and its resolution, confidential. Especially in highly sensitive areas—such as investments, joint ventures, research and development projects—disputes in open litigation would draw unwanted interest from competitors, the press, or others who might then have access to public hearings or public records containing highly sensitive information. The privacy of arbitral proceedings, unlike court proceedings, remains a prime procedural advantage to the parties. This said, there is a general understanding that, unless specifically agreed upon, the parties themselves are not obliged to maintain confidentiality. Absent an agreement to the contrary, they remain free to communicate the

³ J.F. Poudret and Sebastian Besson, *Comparative Law of International Arbitration* (London: Sweet & Maxwell, 2007), p.554.

⁴ See ZPO para.1042(4).

existence and details of the arbitration proceedings. Further, corporate laws and security laws might also require companies to disclose certain information.

Procedural advantages of European arbitration as compared to litigation

Flexibility

Litigation in national courts is governed by procedural rules which over time have become detailed, strict and inflexible, to the extent that they become a burden to comply with and often create time management conflicts. In contrast, the parties to an international arbitration are free to choose the tribunal and process which suits their preferences. The arbitrators remain free to determine the most efficient and appropriate process within the limits of the parties' agreement, the applicable rules and the mandatory requirements of the seat of arbitration. Consequently, from a procedural standpoint, arbitration proceedings can be more efficient, simpler and more flexible than litigation. On the other hand one has to recognise the potential for insecurity in how the rules will actually be enforced. This is part and parcel of the flexibility of the process.

Limited discovery

The issue of limited discovery can be seen either way and has to be evaluated from the perspective of the party involved. Nevertheless it can be a clear advantage, especially concerning time and costs, in that, contrary to the American litigation approach, discovery is generally limited, if not excluded to some extent. On the other hand, in international arbitrations, even the most imposing discovery restrictions in continental Europe will be somewhat diluted and in most cases the tribunal has discretion to permit discovery.

No appeal

In most countries international awards cannot be appealed. Nevertheless, limited judicial review is allowed to set aside an award or oppose execution of judgment. Countries which have ratified the New York Convention have limited the scope of judicial review.

Other advantages include the speed of the arbitration, the costs of the arbitration, the knowledgeable and party-chosen arbitrators and enforceability as well as the right to determine the language and seat of the arbitration. The tribunal is also limited in its powers to execute certain orders (*lex imperium*), join third parties, or consolidate actions.

3. AMERICAN ARBITRATION AND PROCEDURAL RULES

Introduction and backdrop

The process, rules and expectations in American arbitral proceedings can be shockingly open-ended to foreigners unaccustomed to the American legal system. American attorneys, judges and arbitrators will generally expect both parties to turn over more evidence upon request from opposing counsel than under civil law systems. This forthcoming and demanding expectation of American lawyers and judges comes from their experience and reliance on American civil procedure. While the different rules of the different arbitration organisational forums differ in their scope and nature, one must keep in mind the mentality behind the rules in order to know what to expect.

American civil procedure

One first has to understand the American procedural background and backdrop in order to comprehend the likely environment to be faced when arbitrating a claim in the United States. At the federal level, civil procedure is governed by the Federal Rules of Civil Procedure (FRCP) which have become the uniform standard not only at the federal but also at the state



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level. Every law student during either their first or second year is drilled nearly to exhaustion into understanding the FRCP and the scope of collection of evidence, called “discovery”. Because these rules are learned at the very beginning as part of the basis of legal education, almost all American lawyers base their discovery expectations on the FRCP. Understanding this background is vital to understanding the American mentality.

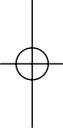
One gets a forewarning of the expansiveness of evidence production under American civil procedure simply by glancing at the first section relating to discovery. Rule 26(a)(1) first requires both parties, without the necessity of a request to do so, to provide to the other party⁵:

“[T]he name address, and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses and identify the subjects of the information—unless that individual is to be used solely for impeachment of an opposing witness;

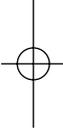
a copy of, or description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the party may use to support its claims or defenses, unless solely for impeachment;

a computation of any category of damages claimed by the disclosing party, making available for inspection and copying... the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.”

Yet, if this is a surprising forewarning to foreigners considering practice in the United States, then s.26(b)(1) continues to drive the idea of “anything is game” home to those unsuspecting lawyers by laying out the full and awesome scope of obtainable information under American discovery⁶:



“In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”



Foreign practitioners should take particular heed of the last sentence explaining that information demanded need not even be admissible at trial, and that such can be demanded as long as it appears *reasonably calculated to lead to the discovery of admissible evidence*.

The American mentality in regard to what evidence one can expect to be able to obtain boils down to a four-part analysis. First, an American lawyer determines whether the material sought is relevant or reasonably calculated to lead to the discovery of admissible evidence. The inquiry then turns on whether such information is privileged. In the United States the only privileges are the doctor–patient privilege, the attorney–client privilege, and the work product and thought processes of an attorney—all other information must be handed over upon request by opposing counsel. Next, the American jurist asks whether the information sought is proper for the legal device used to obtain the evidence (interrogatories, depositions, document requests, property inspections, mental health evaluations, and third-party subpoenas are all normally available to the American attorney). Finally, the American lawyer considers how to enforce evidentiary demands if objections are made. The tools available are equally awesome, with contempt of court motions, construing the refusal against the party failing to provide, and even sanctions and possible dismissal of opposing counsel.

⁵ Federal Rules of Civil Procedure 26(a)(1) (2006); the Federal Rules have been revised. The revisions come into effect as of January, 2008. However, for the purposes of this article the changes are immaterial.

⁶ (2006) Fed. R. Civ. P. 26(b).

American jurists learn that in court proceedings almost everything is open to discovery and scrutiny by the opposing party. Because of the painstaking and time-consuming process of discovery in litigation, arbitration has arisen to dampen the beleaguering effects of the civil process. However, despite the constricted language of arbitral discovery rules, it is vital for the foreign practitioner to keep in mind the background and surrounding mentality of the American civil process which inevitably also seeps into arbitral proceedings.

4. DISCOVERY IN AMERICAN ARBITRATION PROCEEDINGS: THE AMERICAN MENTALITY

While the idea of resolving a legal conflict by way of arbitration in the relaxing climate of California, the sunny beaches of Florida, or the attractions of New York may seem appealing to many foreigners, one should keep in mind the mentality and expectations of American jurists explained above. Arbitration is a preferred route in the American corporate climate primarily because of its limitation on the time of the case, the limited extent of discovery of evidence, and its procedural flexibility.⁷ However, the process and extent of discovery in arbitral proceedings in the United States still carry the background traits of the open-ended and demanding American discovery mentality. The level and extent of discovery proceedings in American arbitral proceedings turns on the terms of the contracts in dispute and consequently the organisation and body of procedural law chosen by the parties.⁸

Federal, organisational and state discrepancies

The first thing for the foreign arbitration practitioner in the United States to recognise is the differences in the procedural rules between the various bodies of law and different arbitral organisations. For purposes of simplicity, state law will not be addressed, although it is important for any foreign practitioner to learn the applicable laws of the state in which the arbitration is to be held. This is important because some states allow for even greater discovery than the federal law and various arbitral bodies.⁹

The Federal Arbitration Act

In any maritime dispute or contract involving interstate commerce, the US Code 9, known as the Federal Arbitration Act (FAA), confers upon parties the right to agree in writing to arbitrate any claims arising out of such a contract.¹⁰ The FAA further governs all maritime and interstate contract arbitration proceedings where the parties have not agreed otherwise.

FAA s.7 provides that a tribunal under federal law shall have the power to:

“[S]ummon in writing any person to attend before them as a witness and in proper case to bring with him any book, record, document, or paper which may be deemed material as evidence in the case.”

While this may bring a sigh of relief to foreign practitioners thinking that the American system is not so different from that of Europe, that relief would be short lived. What one has

⁷ S.T. Carnathan, “Discovery in Arbitration? Well, it depends...” (2001) *Business Law Today* March/April 22 *et seq.*

⁸ Carnathan, “Discovery in Arbitration? Well, it depends...” (2001) *Business Law Today* March/April 22 *et seq.*

⁹ N.D. O’Malley and S.C. Conway, “Document Discovery in International Arbitration—Getting the Documents You Need” (2005) 18 *The Transnational Lawyer* 371.

¹⁰ US Code 9 2007 s.2.

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to consider is that unless the parties have stipulated for foreign arbitrators to sit, the tribunal will probably be comprised of American lawyers educated and trained under the American discovery system, who will allow greater evidence and document discovery than civil law based tribunals.

American Arbitration Association and the International Bar Association

Yet, as one may glean from the statutes above, parties to a contract are also free to adopt the procedural rules of other arbitral bodies. One of the largest and best known is the American Arbitration Association (AAA).

Rule 21, entitled “Exchange of Information”, deals with discovery in arbitral proceedings under the AAA. Rule 21(b) states that, at least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.¹¹ So, unlike the FAA, the AAA demands at least that all parties submit the information on which they intend to rely to the other parties. Beyond that, r.21(a) states that, at the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct the production of documents and other information, and the identification of any witnesses to be called.¹² Like the FAA, this confers power on the tribunal to direct discovery. However, AAA r.21(a) clearly encourages the exercise of the rights of parties to request the tribunal to order discovery of certain information. Ultimately, under r.21(c) it remains within the power of the tribunal to grant or deny the discovery request.¹³ While this is a much longer and more closely scrutinised route to obtain evidence as compared to litigation, because of the background and closer familiarity with American evidence, AAA tribunals remain more likely to grant discovery requests than those in civil law jurisdictions where each party is expected to produce its own evidence.

The International Bar Association’s Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) provide an additional reference point to the extent of discovery in international arbitration proceedings in the United States. Even where the parties themselves have not expressly agreed to be bound by the IBA Rules, international arbitral tribunals and the parties refer to them as relevant guidelines for the conduct of proceedings.¹⁴ Even in the preamble to the IBA Rules the open ended American mentality is clearly present. Preamble 4 states that:

“The taking of evidence shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other Parties rely.”

The language used in the rules confirms the openness hinted at in the Preamble. Article 3(1) states that:

“[W]ithin the time ordered by the Arbitral Tribunal each party shall submit to the Arbitral Tribunal and to the other parties all documents available to it on which it relies, including public documents and those in public domain, except for any documents that have already been submitted by another party.”¹⁵

¹¹ AAA 2007 r.21(b).

¹² AAA r.21(a).

¹³ AAA Commercial Rules r.21(c).

¹⁴ D.W. Rivkin and D.F. Donovan, *Arbitration World: Jurisdictional Comparisons, United States, Evidence Gathering* (London: The European Lawyer, 2006), p.403.

¹⁵ IBA Rules on the Taking of Evidence in International Commercial Arbitration 2007Art.3(1).

Still, a request to produce documents under the IBA Rules must be more detailed than an American litigation document request.¹⁶ It must contain a discussion of a requested document sufficient to identify it or a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist. The IBA Rules also require a requesting party to include in its request certain additional information including a description of how the documents requested are relevant and material to the outcome of the case; a statement that the documents are not within the possession, custody, or control of the requesting party; and why the requesting party believes the requested documents are within the other party's possession. Yet, even when discovery requests are narrowly and properly framed, they still may require a party to review and to produce thousands of email exchanges.

To be fair, Art.9 of the IBA Rules allows for numerous objections including those based on lack of sufficient relevance and materiality, privilege as deemed by the tribunal, the unreasonable burden of producing the requested evidence, loss or destruction of the document that has reasonably been shown to have occurred, commercial or technical confidentiality as deemed by the tribunal, grounds of special political or institutional sensitivity as deemed such by the tribunal, and considerations of fairness and equality.¹⁷ However, the broader document discovery combined with the numerous objections available under the IBA seem to leave open the debate on exactly what time advantage there is to arbitration in America—especially since some courts keep stricter docket schedules than arbitral tribunals.¹⁸ In any case, in contrast to its European counterpart, one can expect an American tribunal to require at least some discovery, regardless of the body of law or arbitral rules followed.

5. PROCEDURAL ADVANTAGES OF AMERICAN ARBITRATION AS COMPARED TO LITIGATION

Still, in terms of time, expense, and privacy, arbitration in America is normally preferred to litigation in commercial disputes. Perhaps one of the most important aspects remains the obligations apparent in the language used in arbitral statutes as opposed to the FRCP, which require the parties to turn over documents and evidence that the other party requests (and sometimes without request), even without a ruling from the court.¹⁹ In contrast, the FAA and AAA Rules clearly indicate that a ruling from the tribunal is required.²⁰ Even the IBA Rules require an order from the tribunal before discovery may be had.²¹ Thus the primary advantage of arbitration as opposed to litigation in the United States is the lesser requirement of production of documents.

Since the scope of discovery in arbitration is constricted, the time frame of discovery in arbitration in the United States is also considerably shorter, although there are some arguments to the contrary.²² Indeed, as one court has declared²³:

“Full scale discovery is not automatically available in arbitration, as it is in litigation. Everyone knows that is so; thus the unavailability of the full panoply of discovery devices, with their attendant burdens of time and expense, maybe fairly regarded as one of the bargained-for benefits (or burdens, depending on one's subsequent point of view) of arbitration.”

¹⁶ D.W. Rivkin, F.T. Davis and C.K. Tahbaz, *Trends in US and International Arbitration* (New York: Arbitration Review of the Americas, 2007).

¹⁷ IBA Rules on the Taking of Evidence in International Commercial Arbitration 2007 Art.9(2).

¹⁸ E.C. Mengel, *Arbitration v Litigation In Court: Which To Choose If You Have The Choice* (FindLaw, Thomson Legal, 1999).

¹⁹ Fed. R. Civ. P. 26(a)–(b).

²⁰ See US Code 9 2007 s.7; see also AAA Commercial Rules r.21.

²¹ IBA Rules on the Taking of Evidence in International Commercial Arbitration Art.3(1).

²² Mengel, *Arbitration v Litigation In Court*.

²³ *Integrity Ins Co (In Liquidation) v American Centennial Ins Co* (1995) 885 F. Supp. 69, SDNY.



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Furthermore, because the procedural and evidentiary rules of arbitration are much simpler than the rules of civil procedure, hostility between parties and the disruption of ongoing business can be kept at a minimum in arbitration as compared to litigation.²⁴ Because of the limited scope of discovery as compared to litigation and the simplicity and flexibility of the rules of arbitral bodies (as well as the rights of the parties to agree on the rules to be enforced) arbitration in the United States is often preferred to litigation.

6. WHAT A PRACTITIONER CAN EXPECT WHEN OBTAINING EVIDENCE

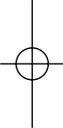
In Europe

So what can a practitioner gathering evidence for arbitration proceedings in Europe expect with respect to the location of the proceeding? The following is a general overview of certain arbitral rules throughout Europe.

Austria

In arbitrations under the Vienna Rules,²⁵ the tribunal may, if it considers it necessary, collect evidence on its own initiative. It may question witnesses and may request the parties to submit documents or other evidence. It can also call experts. It has the power to make decisions regarding the admissibility of the taking of evidence, to conduct such taking of evidence and to freely evaluate the results of such evidence.

France



Under French law, a tribunal may order fact-finding investigation and expert hearings. However, it has no duty to facilitate the case for any party. Article 1460 of the Nouveau Code de Procedure Civile (NCPC) provides that “if a party has evidence in its possession, the arbitral tribunal may also direct that party to produce it”. Arbitrators are usually free to determine the rules and scope of the proceedings including the production of evidence. As is common under the civil law approach, there is a tendency to avoid US style discovery and to have witnesses, if such are needed, appointed by the tribunal.



Germany

The tribunal is generally entitled to freely determine the admissibility of taking evidence—including its assessment.²⁶ The tribunal’s discretion includes the procedure of witness hearings, expert hearings, production of documents and inspection. Further, in contrast to the German rules of civil procedure governing litigation, German arbitral rules allow party officers like managing directors (*Geschäftsführer*) or members of the management board (*Vorstände*) to be witnesses. Due to the traditional civil law mentality, German international arbitration tribunals have a tendency to appoint expert witnesses themselves and to limit the scope of discovery.

Ireland

Unless the parties have agreed otherwise, arbitrators in Ireland are bound by the same rules of evidence as in court. Each party must be allowed a reasonable opportunity to present evidence. Witnesses and expert evidence can be submitted either orally or in writing. Deriving

²⁴ *National Broadcasting Co Inc v Bear Stearns & Co Inc* (1999) 165 F.3d 184, 2d Cir. (Cabranas J.).

²⁵ See Vienna Rules r.599.

²⁶ ZPO s.1042.

from the common law background, there is a tendency to allow party-appointed experts. There is also a tendency to admit evidence in writing by allowing submitted statements first and then allowing cross-examination by the opposing side followed by re-examination by the party calling the witness. The tribunal is likewise allowed to question the witness.

Italy

In Italy, the burden lies with the parties to provide their own evidence of their claims. Tribunals enjoy limited powers of inquiry, site inspection, orders of exhibition of documents, requests for information, and expert witness appointment. As a general rule, tribunals are bound by the same rules regarding the collection of evidence as courts.

The Netherlands

Pursuant to Art.1039(5), a tribunal has great discretion with respect to the application of the rules of evidence, unless otherwise agreed by the parties. Unlike in litigation, witness statements not under oath may be admitted. Furthermore, the procedure and rules of evidence are at the discretion of the tribunal. There is a tendency in the Netherlands, as in Germany, for the parties to agree to follow the IBA rules on the gathering of evidence in international commercial arbitration. The authority of the tribunal includes the power to request the parties to produce documents.²⁷

Portugal

In Portugal, collecting evidence is the same as in civil procedure. The rules of evidence are free for the parties to determine so long as they remain in accord with the limitations of the mandatory rules of evidence under the Portuguese Civil Code. The tribunal may allow cross-examination; and party-appointed experts are becoming more frequent. Interestingly, the parties themselves may not testify except when the tribunal or the opposing party requests party statements. There is no specific rule regarding the production of documents.

Spain

In Spain, the tribunal is generally free to use all the same means for production of evidence as in litigation.

Sweden

Save for agreement by the parties, all kinds of evidence are admitted in Sweden and the arbitrators may freely access all evidence. Also officers of parties and party representatives may testify as witnesses. There is also a tendency to require compliance with the IBA rules on the taking of evidence in international commercial arbitration. The arbitrators may inspect objects and order documents or objects for inspection similar to the IBA rules.

Switzerland

Where the parties themselves have not determined the procedure, the tribunal has a discretion. There are no restrictions as to the admissible types of evidence in international arbitration as to documents or expert witnesses (whether called by a party, appointed, or directed by the tribunal). Although, under the Swiss rules of international arbitration, Art.18 imposes a duty on the claimant to produce all documents deemed relevant, the tribunal may at any time order the production of documents at its own initiative or at the parties' request according to Art.24.3. This wide discretion derives from the tribunal's discretion to conduct the arbitration

²⁷ See Art.1039(4) DCCP.



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in such manner as it considers appropriate under Art.15.1 of the rules. Article 25 states that the tribunal is free to determine the manner in which witnesses are examined, be it by signed witness statements, cross-examination, or other means. Interestingly, while tribunals in Great Britain and the United States are authorised to administer oaths, tribunals in many civil law countries like Germany are generally prohibited from doing so. In Switzerland there is no strict rule but generally one refrains from administering oaths.

England and Wales

In England and Wales a tribunal has a wide discretion to agree on all evidentiary matters in accordance with the Arbitration Act 1996 s.34. This includes the power to decide whether to apply strict rules of evidence as to the admissibility, relevance, or weight of any material tendered to the tribunal and the manner in which such material should be exchanged or presented. Deadlines are to be fixed by the tribunal. The tribunal has the right to determine the documents that should be disclosed by the parties. Accordingly, this often results in limited document production in international arbitrations in England. The use of the IBA rules on the taking of evidence in international commercial arbitrations ensures that the parties may only request specific documents that are in the possession, custody, or control of the other party. Witness statements and, depending on the case, expert reports are often included in the submissions to the tribunal. Officers or representatives of the parties may also testify.

Overview



These brief overviews on the taking of evidence in the national European arbitration rules underline the aforementioned flexibility in the handling of the taking of evidence and the important role of the arbitrators. Nevertheless, putting aside the debate on the question of whether the adversarial or inquisitorial system is the right approach, the use of widely accepted procedural principles and rules of conduct have developed in the practice of international arbitration.²⁸

On examining the practice of international arbitration and how widespread discretion of the arbitrators is, different procedural philosophies seem to coexist, which result in a somewhat harmonised process for taking evidence. Arbitral practice has responded favourably to the search for practical compromise solutions. A *modus vivendi* has emerged and the approaches of the common law and civil law are often flexibly mixed in practice.

In the United States

Document requests

In the United States foreign practitioners can expect far more numerous document requests to be demanded and granted if they are reasonably relevant. Yet they have many devices with which to object, which may be effective in keeping American-style “discovery” to a minimum.

Interrogatories and requests to admit

Interrogatories and requests to admit, as allowed under the FRCP are not currently allowed in any major US arbitral forum.²⁹

²⁸ L.W. Newman and R.D. Hill, *The Leading Arbitrators’ Guide to International Arbitration* (Huntington: Juris Publishing, 2004), p.271.

²⁹ J.D. Rievman, *How the Creep of United States Litigation-Style Discovery and Appellate Rights Affects the Efficiency and Cost Efficiency of Arbitration in the United States* (New York: Hoguet Newman & Regal LLP, 2005).

Depositions

Depositions are generally allowed in US arbitral forums but are greatly restricted and in any case are left to the discretion of the tribunal. The FRCP have been used to obtain depositions in arbitration within the United States. Rule 27 provides for discovery in anticipation of any action being filed which is “cognizable in any court of the United States”, and has most commonly been used by parties seeking to conduct depositions in anticipation of a federal court case.³⁰ However, because the enforcement of an award could potentially involve a federal court, this rule has been bent to allow for document discovery even in international maritime arbitration pending in the United States.³¹

Recent trends in arbitration point to two different methods of presenting witness testimony: direct written testimony and confrontation testimony. The former is testimony drafted by the parties (or more often their attorneys); the latter is live confrontation of the witnesses before the tribunal.³²

This allowing of depositions in arbitral proceedings in the United States has prompted at least one author and attorney to ask what difference remains between American-style litigation and arbitration.³³ Nonetheless, the current arbitral norms in America suggest that the foreign practitioner should be prepared for arbitrators to allow such requests, whether via the production of direct written testimony or confrontation testimony.

Third-party subpoenas

The ability to force a third party to submit to discovery requests remains a hot and controversial topic. Federal courts have interpreted the FAA as conferring on arbitrators the power to summon any party to appear before them and bring any book, record, document, or paper which may be deemed relevant.³⁴ Thus under federal law arbitrators operating under the FAA seem to have the authority to order discovery from third parties,³⁵ although one should be aware that there is a minority opinion, illustrated in two cases, both from the Fourth Circuit, explaining that one can only obtain information from a non-party upon showing substantial need.³⁶ Generally, courts hold that arbitrators have the power to compel non-parties to produce documents prior to a hearing,³⁷ though some suggest that this position may now be in flux.³⁸

The AAA Rules state that an arbitrator or other person authorised by law to subpoena witnesses or documents may do so upon the request of any party or independently.³⁹ Rule 23 states that arbitrators may determine the propriety of the attendance of any other person

³⁰ O'Malley and Conway, “Document Discovery in International Arbitration” (2005) 18 *The Transnational Lawyer* 371.

³¹ O'Malley and Conway, “Document Discovery in International Arbitration” (2005) 18 *The Transnational Lawyer* 371 citing *Deiulemar Compagnia S.p.A M/V v Allegra* (1999) 198 F.3d 473, 9th Cir.

³² Rivkin, Davis and Tahbaz, *Trends in US and International Arbitration*, pp.1–3.

³³ Rievman, *How the Creep of United States Litigation-Style Discovery and Appellate Rights Affects the Efficiency and Cost Efficiency of Arbitration in the United States*. pp.3, 9.

³⁴ US Code 9 2007 s.7.

³⁵ Teresa Snider, “The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act” (1998) 35 *Tort & Ins. L.J.* 101; see also *American Federation of Television and Radio Artists AFL-CIO v WJBK-TV* (1999) 164 F.3d 1004, 1009, 6th Cir.

³⁶ See *Deiulemar v Compagnia Di Navigazione* (2000) 198 F.3d 473, 4th Cir.; *Comsat Corp v National Science Foundation* (1999) 190 F.3d 269, 278, 4th Cir.

³⁷ Snider, “The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act” (1998) 35 *Tort & Ins. L.J.* 9, 13.

³⁸ O'Malley and Conway, “Document Discovery in International Arbitration” (2005) 18 *The Transnational Lawyer* 371, 372.

³⁹ AAA Commercial Rules r.31(d).



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other than a party and its representatives.⁴⁰ Thus the AAA supports third-party discovery to the extent allowed under law.

Although the process is more detailed, the IBA Rules also allow for third party discovery. Article 3(8) allows the parties to submit a detailed request to the tribunal to compel the production of documents from third parties and then allows the tribunal to take the “necessary steps” if it decides that the documents would be relevant and material.⁴¹

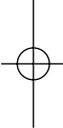
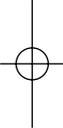
In any case, arbitrators, apart from those in the Fourth Circuit, retain the power to compel discovery of third-party documents.⁴² The most controversial topic remaining is whether they can do so outside their territorial jurisdiction. In any case, foreign practitioners should prepare for the advantages and complexities arising from this American discovery mechanism.

7. CONCLUSION

There are a number of similarities between the systems and arbitral bodies, and many advantages in arbitration over litigation. However, foreign attorneys should be well aware of the more open-ended expectations of US lawyers, who in turn must take into consideration the rules and mentalities of their European counterparts.

Under US arbitral systems a foreign practitioner can expect greatly expanded evidence collection and discovery rules regardless of the forum. Although the scope of discovery is narrower in arbitration than litigation, it can still be surprisingly open-ended in comparison to European proceedings. The expectation of greater discovery in US arbitration derives mainly from US attorneys’ legal education and familiarity with the US civil process.

Ultimately, the scope of discovery in US arbitration is going to turn on factors such as the place of arbitration and the body of procedural law adopted in the agreement. However, foreigners should be well prepared for the broad battlefield of discovery and collection of evidence whenever they consider arbitration in the United States. Likewise, Americans should be prepared to experience more restrictions on discovery when arbitrating in Europe or before European arbitral bodies and should not assume the availability of evidence. Those considering arbitration in Europe should instead focus more on the place of arbitration and choosing the right arbitral bodies and organisations.



⁴⁰ AAA Commercial Rules r.23.

⁴¹ IBA Rules on the Taking of Evidence in International Commercial Arbitration Art.3(8).

⁴² Snider, “The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act” (1998) 35 Tort & Ins. L.J. 9.