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Discovery of experts in international arbitration: a Canadian perspective

Generally speaking, in international arbitration, there are no formalised rules setting out international standards for the discoverability of experts' work product, their draft reports, or their communications with counsel. After all, international arbitrations, by definition, are not confined by any particular jurisdictional or national rules of evidence or procedure. The general trend in international arbitration, however, has been to limit access by opposing parties to the draft work product of experts and experts' communication with counsel.

There is little doubt, however, that most major international arbitration rules, as well as the widely used IBA Rules on the Taking of Evidence in International Commercial Arbitration, give arbitrators sufficient power to order discovery of experts' work product and communications with lawyers if they deem it appropriate in the circumstances.

For example, Article 22.1(v) of the London Court of International Arbitration Rules provides that an arbitral tribunal may,'order any party to produce to the Arbitral Tribunal, and to the other party's documents… which the Arbitral Tribunal decides to be relevant.' Article 22.1(vi) is even more explicit: arbitrators may 'decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material… on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal.'

How then can parties anticipate what rules will apply to their arbitration, once started? Particularly in the context of international arbitration, where parties may be coming from different legal traditions, or otherwise divergent legal backgrounds, this unknown and potential area of conflict can be a source of trepidation for clients. Notwithstanding the wide disparity in practice across jurisdictions, it is possible to identify trends within international arbitration practice, and, for Canadians, recent court decisions fit compatibly within those trends.

Recently in Canada, Ontario courts have clarified the law with respect to the propriety of communications between counsel and experts and the extent to which privilege attaches to draft expert reports and foundational documents informing those reports. In *Moore v Getahun*,[1] the Ontario Court of Appeal held that it is not only appropriate but essential for counsel to consult and collaborate with expert witnesses in the preparation of expert reports. Counsel must explain to experts their duties to the court, clarify the relevant legal issues, and assist experts in 'framing their reports in a

way that is comprehensible and responsive to the pertinent legal issues in a case.' The court also held that the law currently imposes no routine obligation to produce draft expert reports. Production of an expert's notes and drafts may only be ordered if there is reasonable suspicion that counsel has improperly influenced the expert. (*Bruell Contracting Ltd v J & P Leveque Bros. Haulage Ltd* 2015 ONCA 273; *Nikolakakos v Hoque* 2016 ONSC 4738; *St Onge v St Onge* 2017 ONCJ 156.) The decision is a welcome clarification for Ontario litigators and has brought Ontario litigation practice into closer line with contemporary international arbitration norms.

In the civil law context, the issues addressed by the *Moore* decision would never arise in the first place. In French proceedings, for example, an expert is appointed by the court, not by the parties, and must be chosen from a list of 'approved' experts, such that all experts have already been recognised as experts in their field by the relevant jurisdiction. In France, parties would provide relevant information to the expert and the expert would then decide what is necessary or important to his or her opinion. Thus, the issue of lawyer-expert communications is largely circumscribed, and the risk of apprehension of bias (at least initially) is much lower because the expert owes their appointment to the court, not any one party. Moreover, in France, the practice of 'cross-examining' an expert witness – on his report, the origins and evolution of his opinions, or impeaching his credibility – simply does not exist.

Common law practice, with its heavy reliance on oral testimony and cross-examination, requires a completely different approach by lawyers, and makes certain information and considerations relevant that would not otherwise be relevant in the civil law context; however, even among broader common law jurisdictions, like Canada and the United States, there are divergent approaches to expert evidence.

Chief among those differences is the routine discovery of experts in the US, a practice which is almost never done in Canada. Prior to revisions to Rule 26 of the Federal Rules of Civil Procedure in December 2010, litigants in the US operated under the assumption that *all* materials provided to an expert by a lawyer, whether or not relied upon or even considered by the expert, were discoverable. This included communications between the lawyer and expert, the lawyer's comments on draft reports, as well as all draft reports themselves: obviously, an extremely wide net of discoverability.

The effect on American practice prior to 2010 was that lawyers imposed strict, cumbersome protocols on their experts to avoid generating any written notes during meetings and other discussions, and only drafting single-version, final reports. In addition, wealthy litigants were incurring the expense of retaining two experts – one as a 'consultant' and one to testify at trial – to avoid discovery issues, since communication with and work product of non-testifying witnesses is not discoverable in the US.

The Revised Rule 26 of the Federal Rules of Civil Procedure added explicit protection of draft reports and lawyer-expert communication, subject to the following three exceptions: (1) information related to compensation for the expert's work; (2) facts and data provided by a lawyer to an expert that was *considered* by the expert in forming his opinions; and (3) disclosure of the assumptions provided by a lawyer to an expert and *relied upon* by the expert in forming his opinion.

Thus, the outcome in *Moore* marks a move toward discovery rules and trial practice in the US, though they are by no means identical. Rule 26 in the US clearly protects draft reports and communication, but what about other documents seen, but not relied on, by an expert or other expert work product that is not clearly a 'draft report'? In Canadian litigation, after the *Moore* decision, an expert's entire 'file' enjoys protection from discovery, barring some reasonable factual foundation for suspected bias. This presumably includes the expert's notes, markups, and other work product. In the US, however, such documents do not fall within Rule 26's protection.

American courts have read Rule 26 narrowly: unless a document falls clearly into a category identified in the Rule (ie, a draft report or non-excepted lawyer-expert communication), it must be produced. According to the Ninth Circuit, in *Republic of Ecuador v Mackay,* 'the driving purpose of the 2010 amendments was to protect *opinion work product* – ie *attorney* mental impressions, conclusions, opinions, or legal theories – from discovery' [emphasis added][2]. Thus <u>all</u> documents or information provided to an expert, whether considered or not considered by that expert is producible. In a related

case, *Republic of Equador v Hinchee*, the appeals court held that a testifying expert's 'personal notes' were also discoverable[3]. Because the notes reflected only the expert's theories and mental impressions, not those of counsel, they were discoverable.

The 11th Circuit Court also held that documents 'considered' by the experts were discoverable and that this category was wider than just those documents 'relied' on by the expert. In the US, in contrast to Canada, the prevailing notion appears to be that 'there is no reason to prevent an opposing party from finding out how an expert arrived at his or her conclusions, including discovering the thought processes which led the expert there.'[4]

According to a recent survey, there is an overall presumption of non-discoverability of lawyer-expert communications in international arbitration.[5] Even for the purpose of evaluating an expert's credibility, such documents are very rarely sought or ordered to be produced. According to Friedland and Brown de Vejar, and analogous to the rule articulated in *Moore*, 'a production request of this nature would and should demonstrate that a certain communication exists and that there is a particular reason to conclude that it would be relevant and material to the arbitrators' determination of the case.'

Just as lawyer-expert communications are generally protected in international arbitrations, the scope of discovery of other documents is similarly narrow, much more in line with *Moore* than American trial practice, discussed above. To begin with, wide discovery as practiced in American or even Canadian litigation is by no means guaranteed in international arbitration, and trends indicate it is granted less and less. Instead, we see parties more frequently relying on narrower document production rules like those set out in the IBA Rules, or the use of Redfern Requests, in which parties must make a request for specific documents, and justify in writing why they are material, relevant and necessary to be produced.

Where discovery is granted, the trend in international arbitration parallels *Moore* much more so than it does Rule 26 in the US. Documents included in the list of materials relied upon by an expert would be discoverable, but documents merely reviewed by an expert but not relied on are likely not discoverable.

There seems to be consensus in international arbitration circles that lawyer's assisting experts in the drafting of their reports is more beneficial than not. To the extent lawyers overplay their hand, most experienced arbitration counsel, according to Friedland and Brown de Vejar, are confident that effective cross-examination will reveal any undue influence to the substantial prejudice of the expert's credibility. Moreover, arbitrators should be experienced enough to identify 'hired guns' and keep parties honest – perhaps still a genuine concern in US trial litigation, where many high profile cases are still decided by lay juries.

Notes

1. 2015 ONCA 443.
2. 742 f 3d 860 (9th Circ 2014).
3. 741 f 3d 1185 (11th Circ 2013).
4. *Wenk v O'Reilly* 2014 US Dist LEXIS 36735 (S D Ohio 2014).
5. Paul Friedland and Kate Brown de Vejar, 'Discoverability of Communications between Counsel and Party – Appointed Experts in International Arbitration' (2012) Arbitration International 28(1).