Discovery of Experts in International Arbitration

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Generally speaking, there are no formalized 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.

There is little doubt, however, that most major international arbitration rules (e.g. the Rules of Arbitration of the International Chamber of Commerce, UNCITRAL Arbitration Rules, London Court of International Arbitration Rules, among others) 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 LCIA Rules provides that an arbitral tribunal may "order any party to produce to the Arbitral Tribunal, and to the other parties documents… which the Arbitral Tribunal decides to be relevant." Article 22.1(vi) of the LCIA Rules 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, (e.g., common vs. civil law) or otherwise divergent legal backgrounds (e.g., Canadian vs. American trial practice), 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.

In the civil law context, the issues addressed by the Ontario Court of Appeal in *Moore v. Getahun* 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 recognized as experts in their field by the relevant jurisdiction. 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 simply does not exist.

Obviously 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 amongst broader common law jurisdictions, like Canada and the U.S., there are divergent approaches to expert evidence.

Chief among those differences is the routine discovery of experts in the U.S., a practice which is almost never done in Canada. Prior to revisions to the Federal Rules of Civil Procedure in December 2010, litigants in the U.S. 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 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 U.S.

The Revised 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 were 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* in Canada marks a move toward American style discovery rules and trial practice, though they are by no means identical. After *Moore*, 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 U.S., however, such documents are not protected.

American courts have read Federal Rules of Civil Procedure narrowly and held that all documents or information provided to an expert, whether considered or not by that expert, as well as the testifying expert's "personal notes", are producible.

Documents "considered" by the experts are also discoverable, and this category is wider than just those documents "relied" on by the expert. In the U.S., in contrast to Canada, the prevailing notion seems 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."

There is an overall presumption of non-discoverability of lawyer-expert communications in international arbitration.[1] 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."

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[1] Paul Friendland and Kate Brown de Vejar, "Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration," *Arbitration International*, Vol 28 No. 1, 2012.

Just as lawyer-expert communications are generally protected in international arbitrations, the scope of discovery of other documents is similarly narrow, closer to *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 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 practice in the U.S. Documents included in the list of materials relied upon by an expert are discoverable, but documents merely reviewed by an expert but not relied on are likely not discoverable.[2]

There seems to be consensus in international arbitration circles that lawyers assisting experts in preparing their reports is more beneficial than not. To the extent lawyers overplay their hand, most experienced arbitration counsel are confident that effective cross-examination will reveal any undue influence to the substantial prejudice of the expert's credibility.

As Friedland and Brown de Vejar point out, the expectation of absolute objectivity in a party appointed expert is simply unrealistic, and rules to artificially achieve the appearance of objectivity primarily result in extra costs (in the form of consultant experts, increased document production costs, etc.) for marginal, if any, benefit. Moreover, arbitrators should be experienced enough to identify "hired guns" and keep parties honest –a genuine concern in the U.S. trial litigation, where many high profile cases are still decided by lay-juries.

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[2] Paul Friendland and Kate Brown de Vejar, *ibid*.