REPORT TO THE CCIAG
FROM THE DISCOVERY WORKING GROUP
30 OCTOBER 2009

MEMBERS

Mr.Wolf von Kumberg
Mr.Bruce Whitney
Mr. Max Koebke
Ms. Veronique Chapuis-Thuault
Ms. Isabelle Hautot
Mr. John Gilbert

This document is non-confidential and reflects general opinions of CCIAG members. It is intended to be shared among CCIAG members and to contribute to the CCIAG users voice on such matter of interest.

Table of content

A. FOREWORD

This study of the CCIAG working group on discovery has circulated among CCIAG members and is now published on the CCIAG website. Although it might seem outdated now, especially considering the boom of e-discovery and the multiplication of rules seeking to limit the scope of discovery, it gives a fair overview of the users' concerns as to how discovery is used in practice and as to how it should be approached by corporate counsels.

Now, the CCIAG working group is undertaking a new comparative study on discovery set to start by the second semester of 2013. The study will be comparing the results of the 2009 study with current data.

B. BACKGROUND

As a user organisation, the CCIAG has taken upon itself the task to examine the state of the international arbitral process today, to determine what works, what does not work and how it might be improved. Modern arbitration when first conceived by traders in the 19th Century was meant to be a simple, informal and expeditious process. It was meant to remove commercial disputes from the rigidity and complexity of state court litigation and to permit a business solution to be found.

In the 21st Century, Articles such as Thomas Stipanowich's "Arbitration: The "New Litigation", Gerald Phillips' "Is Creeping Legalism Infecting Arbitration?" or Christopher Drahozal's "Disenchanted? Business Satisfaction with International Arbitration", all point in the direction of something being wrong. What has caused this growing swell of discontentment with the arbitral process and are there concerns which can be identified that are contributing to this movement?

The CCIAG, itself a user organisation founded for the purpose of providing a voice of commercial users of the arbitral process, has conducted its own survey of members to gather their opinion. The survey has found that users are concerned with the delay and cost associated with international arbitration. One of the concerns associated with both is "excessive discovery/document disclosure". Of those surveyed 60% strongly agreed that this was a cause for increased costs and delay, while 40% agreed that it was a cause for inflation of counsel fees. These in themselves are remarkable numbers. This supports the statement by Alan Redfern in "Stemming the Tide of Judicialisation in International Arbitration" that "warehouse discovery" is imported into international arbitration without sufficient consideration of the need for such measures and their overall effect on the international arbitral process itself.

The Discovery working group of the CCIAG has been tasked to look into the use of Discovery/Disclosure in international arbitration, determine its applicability to the process and suggest ways that the perceived issues arising from it might be modified, reduced or eliminated. The Report that follows has attempted to take into consideration the views of the working group members and therefore contains several views for some of the points covered. It is hoped thereby to make a meaningful contribution to the overall project initiated by the CCIAG.

C. THE KEY CONCERNS

- What is meant by discovery/disclosure?

The very question gives rise to difference in procedural approaches in various jurisdictions and parts of the world. In particular, it gives rise to perceived differences between the common law and civil law legal systems concerning how a dispute is to be formalised and eventually disposed of.

- Put in its simplest form, discovery in a common law context can be:

(a) documentary and/or
(b) oral

The documents and/or oral evidence gathered are used by a party to support or disprove the positions put forward by each party. Thereby it is hoped that the Trier of fact will be able to establish the facts and render a decision on the issues in question.

The range of what might potentially be discovered is broad. Generally the scope of discovery is limited to those documents or that oral evidence that is relevant to the issues in dispute between the parties, but it includes documents in possession of a party, to those in control of a party, to those in the hands of a third party, not party to the dispute. All of this enlarges de facto the initial scope. Determining what is in fact relevant and even what the issues in dispute are is not always a straight forward process. This in itself leads to lengthy debate and motions between the parties before the Trier of fact.

A similar process exists under French law for example (article 145 Code de Procédure Civile) giving broad powers to the judge to provide for production of documents. In practice however, the common law discovery process is more onerous, complex and difficult to manage than the French civil law process.
The opposite approach, or that perhaps equated with the civil law system, is that parties to a dispute only produce those documents which are necessary to evidence sufficiently all the facts they need to prove their claim and support their arguments.. In addition, they will bring forward all opposing evidence necessary to disprove the evidence, the opponent brought in front of the Trier of fact. It is often left to the parties to determine what to introduce as evidence and how to demonstrate the veracity thereof though the judge may organise that production following the request of a party. A party can not be compelled to produce documents that are not in support of its case. Only in limited cases will the Trier of fact force disclosure of a particular document that has relevance to the dispute. Certainly documents in the possession of non parties will not be compelled.

The rules of procedure that every State court has in place will determine the breadth and extent of discovery. This will be based on the history and legal culture of that State.

This same formal procedural context does not exist in the world of international arbitration, which is a strength (flexibility) and a weaknesses (lack of universal procedural rules) of the arbitral process. Therein lies the crux of the problem.

How does one take a universal process and make its procedure palatable to all users or at least acceptable to all who seek to use it to resolve their disputes? If one agrees to the use of a State Court dispute mechanism, one has voluntarily agreed to its method of discovery. This is not, however, the case in international arbitration. In general, one must wait for the process to begin before knowing what the nature and the extent of discovery one will have to face.

The CCIAG working group agrees that the key concern raised by Discovery is "uncertainty".

Uncertainty in relation to discovery is a particularly acute concern for the civil law party. Common law parties are more prepared for discovery and understand the concept and the consequences. As a result, a civil law party may have to spend more resources to comply with common law style discovery. Should common law style discovery be adopted, civil law user would be exposed to the risk of unfair results. For the common law party, a civil law party's approach to discovery may also be perceived to lead to unfair results as the civil law party may not undertake the detailed search that a common law party would expect.

D. THE ISSUES

The issues that this key concern raises are varied and affect both the speed of the arbitral process and the costs that arise from it.

- The questions raised by and debated by the working group were the following:

1. Should there be any discovery at all and by whom and how should this be determined?
2. If not, how does one deal with the documentary evidence in each case?
3. If yes, what should the role of discovery be?
    (a) limited to documentary or also oral discovery
    (b) what is the scope of the discovery? who should control the process,
    (c) what are the tools for limiting the process,
    (d) what are the sanctions if the process is not followed?

Perhaps one can agree that in international arbitration no single process fits all. It is precisely this flexibility that is often seen as the major advantage of international arbitration. Each dispute, together with the parties that form part of it, will have its own particular needs and requirements. For the CCIAG working group, It is without debate that the arbitral process must indeed remain flexible and that a solution to the concern must be found within the existing framework of the arbitral process. The goal must be to maintain the flexibility and autonomy of the parties to choose the best procedure to resolve their disputes, which is a fundamental principle of international arbitration.

- Can this general procedural approach, however, deal with the concerns raised by discovery?

Discovery becomes a procedural issue for various reasons:

(a) the inability of parties to agree once a dispute has arisen;
(b) the reluctance of the Tribunal to get involved in procedural disputes at an early stage;
(c) the lack of clear guidelines in institutional rules respecting the form or extent of permissible discovery;
(d) the varying expectations of the parties and the tribunal based on background, culture and experience.

There are also practical issues faced in relation to discovery. For example:

i) it may be very difficult to segregate documents strictly relevant to the claim from others;
ii) confidentiality obligations may exist with third parties leading to consequences which can be detrimental to the user;
iii) companies which are not used to common law discovery may see the procedure as a nightmare in term of organisation and of disclosure of business information;
iv) the whole process can be very expensive and time consuming.

E. RESULTING CONCLUSIONS OF THE WORKING GROUP

What the user wants is the following:

- **an efficient and predictable (and not too expensive) means to resolve their dispute.**

Although fairly straightforward in theory, satisfying these needs can become a complex process.

- The working group identifies the following possible approaches:

1. If both parties want to have discovery, it is the self-understood result of the procedural rights of the parties to request such discovery. In other cases, the arbitral tribunal should not simply grant an application of one party, if the other party refuses.

2. Discovery should only be used if both parties expressly agree to it or there are express Institutional Rules that permit it and set out the scope and requirements. In that way parties choosing those Rules know what they are getting.

3. Use the IBA Rules for taking evidence as the standard framework where parties have agreed to discovery.

4 Consider an opt in approach. Parties must expressly opt in to discovery (i.e. the IBA Rules) otherwise there is no discovery.

5. An alternative view to D. 4. is that where the parties have not specified discovery the Tribunal should only order limited discovery based on a party reasonably demonstrating the need for specific documents relevant to an issue in the case and in the care and custody of a party.

6. E-Discovery should be limited to the same procedure as outlined in D.4. and D. 5. above.

F. POTENTIAL SOLUTIONS - RECOMMENDATIONS

How does one lessen or eliminate the impact on speed and cost caused by the introduction of discovery into the arbitral process? How do you get to where the user wants to be? Below are some suggestions made by the working group.

1. Eliminating or putting a boundary around discovery in the contractual disputes clause (see suggested clauses in Appendix).
2. Lobbying the arbitral institutions to put more stringent discovery procedures in their Rules, thereby avoiding the debate at the conflict stage.
3. Relying on the IBA Rules on the Taking of Evidence in International Commercial Arbitration.
4. Introducing to the Tribunal ICC Publication 843 – Techniques for Controlling Time and Costs in Arbitration.
5. Having the Tribunal decide what form and scope the discovery should take based on the process outlined in D.4., D. 5. and D.6. above. based on the express wishes of the parties or failing this requiring a common approach (i.e. IBA Rules).
6. Having a clear agreement between the parties as to the form and scope of discovery enforced by the Tribunal, with severe cost consequences for transgressions.
7. Proposed Pledge Suggested Discovery Clause

   Some members of the working group have proposed that CCIAG members enter into a pledge to use the proposed Discovery clause. Others simply put the clause forward as a suggestion.

G. CONCLUSION

The working group has attempted to find consensus in making recommendations. It is recognised that flexibility, with parties being free to determine if they want discovery and the extent thereof must be permitted. There must however be certainty in the process and that is what the recommendations herein have attempted to achieve. The challenge is to balance the desire to maintain flexibility with the (perhaps competing) desire for greater certainty. There must be ways to limit the extent and breadth of Discovery before the process begins in order to deal with the uncertainty it creates. The suggestions made in this report are aimed at assisting parties to achieve the aim of limiting the extent and breadth of Discovery in an efficient and fair way.

APPENDIX 1: PROTOCOL ON DISCOVERY

1) Members of the CCIAG, who are 'Signatories' of this Protocol, agree that the overall goal in any arbitration proceedings amongst Signatories is to manage those proceedings in such a way as to promote expeditious, cost-effective and fair dispute resolution.

2) To assist in achieving that goal, Signatories support the use of the attached 'Disclosure Clause' which addresses disclosure of documents prior to any arbitration hearing when commercial agreements between the Signatories include an arbitration clause.[1]

3) Even if particular commercial negotiations result in agreements which do not include guidance as to which "Mode of Disclosure" is to govern the arbitration proceedings, Signatories agree to manage their legal representatives to avoid unnecessarily broad disclosure requests. Signatories also agree that broad disclosure requests must be supported by extraordinary circumstances which, absent a broad disclosure, might jeopardize the fundamental fairness of the proceedings. In such a setting, the Signatories agree that the Tribunal shall only grant such broad disclosure upon the the condition that the requesting party pay the reasonable costs of responding to such broad disclosure, including reasonable attorney fees incurred.

4) Signatories also agree to consider a multi-step dispute resolution procedure which includes as the first step use of mediation before any arbitration or judicial action is commenced.

[1] This suggestion is put forward by several of the working group members similar to the CPR Pledge to arbitrate. Other working group members believe only the clause should be considered to insert in the Disputes Clause.

APPENDIX 2: CCIAG MODEL MODE OF DOCUMENT DISCLOSURE CLAUSE

"The parties agree that disclosure of documents shall be implemented by the arbitral tribunal consistently with Mode [1,2,3 or 4 - which must be selected] of the attached Mode of Disclosure Schedule which shall govern disclosure of documents in any arbitration commenced by either party to this Agreement. Only upon mutual agreement of the parties may the selected Mode of Disclosure be changed upon initiation of any arbitration proceeding."

APPENDIX 3: MODES OF DOCUMENT DISCLOSURE SCHEDULE

"1) There shall be no disclosure of documents other than the disclosure, prior to hearing, of documents that each side will present in support of its case. The party which initiated the arbitration shall first produce its documents, no later than [.....] weeks in advance of any hearing. With 30 days after receipt of such documents, the responding party shall produce documents it will present in support of its case.

2) Disclosure as provided by Mode 1, together with the pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated an extraordinary need. The requesting party, if such request is granted, shall pay the reasonable cost of response, including reasonable legal costs so incurred.

3) Disclosure as provided by Modes 1 and 2, together with disclosure, prior to the hearing, of documents relating to issues in the case that are in the possession of third parties referred to as witnesses by the party requested to provide disclosure.

4) Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden when weighed against the probative value of such documents requested. It shall be insufficient that the requested documents are merely relevant to the subject manager of the dispute. They must have probative value as to the parties' claims and defenses. "

APPENDIX 4: CCIAG MODEL MODE OF DISCLOSURE FOR ELECTRONIC INFORMATION

The parties agree that disclosure of electronic information shall be implemented by the tribunal consistently with Mode [Select Mode]selected from the Electronic Modes of Disclosure Schedule which shall govern disclosure of electronic information in any arbitration commenced by either party to this Agreement. Regardless of Mode selected, the parties to this Agreement agree to meet and confer, prior to an initial scheduling conference with the tribunal to discuss specific forms of production and timetable for disclosure in agreed form. If no agreement can be reached, the parties agree to present the dispute to the tribunal for early resolution.

APPENDIX 5: MODES OF ELECTRONIC DISCLOSURE SCHEDULES

1) Disclosure by each party limited to copies of electronic information to be presented in support of that party's case, in print-out or other reasonably usable form.

2) Disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] designated custodians. Such electronic information shall only include that which was created between the date of the signing of the Agreement that is the subject of the dispute and the date of the filing of the request for arbitration. Further, the electronic information shall only be that which is accessible from reasonably accessible active data, not including any electronic information from back up servers or back up tapes and not to include information from cell phones, personal digital assistants (PDA's), voice mails or instant messaging.

3) Same as Mode 2, but covering a larger number of custodians [specify number] and a wider time period [to be specified]. Additionally, upon showing of relevance and extraordinary need, deleted information or metadata difficult to obtain.

4) Disclosure of any and all electronic information which is relevant to any party's claim or defense, limited by balancing the degree of burden in producing such electronic information against the relevance and materiality of the electronic information requested.