

# Inherent Tensions in International Arbitration Discovery

*B. Ted Howes<sup>1</sup>*  
*McDermott Will & Emery LLP*  
*New York, New York, United States*

## **Introduction**

Discovery is something of an obsession with most common law attorneys, but particularly with American attorneys. Anyone who has experienced American-style litigation knows that it comes with a huge and varied bagful of discovery gimmicks: from pages upon pages of requests for wide categories of documents; to painstakingly-detailed “interrogatories” drafted in multiple subparts and sub-subparts; to “requests for admissions” constructed to catch the other side; to that all-American institution known simply as “the deposition”. In the United States, lawyers are inculcated early on about the purported benefits of extensive pre-trial discovery. Discovery, they say, is the only way to find the truth. Discovery, they say, leads to a critical evaluation of the evidence and an early resolution of cases that, otherwise, would lead to trial. Discovery, they say, is the only proven method to force liars into the light. Discovery is enshrined in the United States Federal Rules of Civil Procedure and, therefore, must be the right thing to do.

Thus, it should come as no surprise that, to this day, many American attorneys are scared, or at least disdainful, of international arbitration precisely because of its lack of wide-ranging discovery. Many American lawyers (not to over-generalize) cannot even conceptualize dispute resolution without extensive discovery. They need to know everything about the other side’s case before entering the final trial arena. Massive document requests are habitual. Depositions are relied on like a crutch.

Over the past two decades or so, as the American Bar has become increasingly involved in international arbitration, the result has been predictable: discovery has become a far more prevalent part of the international arbitration process. Naturally, United States attorneys (and other common-law attorneys) have sought to impose their own style of taking discovery — and their own view of the importance of discovery — on the more civil-law minded model of arbitration that had existed for decades prior. Inevitably, this has caused

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<sup>1</sup> Partner, McDermott Will & Emery LLP, New York.

tensions. European lawyers, in particular, have decried the “Americanization” of the international arbitration process. The traditional model of a speedy, gentlemanly arbitration has buckled under, and given ground, to more and more aggressive demands for more and more pre-hearing discovery. The process has grown longer and more expensive.

The tensions inherent in “international arbitration discovery” are, reflected perfectly in the three papers submitted by the author’s co-panelists.<sup>2</sup> Although each of these papers covers a very different topic related to “international arbitration discovery”, they all illustrate the problems raised by the clash of United States-style discovery techniques and the arbitration process.

### **Analysis of Co-Panelists’ Papers**

In “Electronic Discovery and Its Implications for International Arbitration”, John B. Tieder tackles the topical issue of the production of e-mails and other electronic discovery, or, namely, “e-discovery”. E-discovery has become a significant problem in United States litigation. “In its bluntest form”, John writes that e-discovery has become “a means of subjecting one’s opponent to tremendous expense and expenditure of time”. Indeed, anyone who has ever had to inform a client that it needs to hire an expensive computer consultant to comb through all of its employees’ computers in search of e-mails related to a particular set of discovery requests knows full well the extraordinary burdens, and stress, caused by e-discovery.

If e-discovery is a problem in United States litigation, where far-reaching discovery is the norm, it is an even greater problem in international arbitration. How do international arbitrators reconcile the inherently burdensome requests for electronic discovery (often voiced by American attorneys) with the traditional lack of extensive discovery in international arbitration? How can arbitrators deny requests for e-discovery when, as it must be acknowledged, so many important communications in today’s business world take place through the computer? In short: how much should e-discovery be allowed in international arbitration? The tension is obvious.

In “Confidentiality and the Protection of Trade Secrets in International Arbitration”, Patrick Schindler addresses the other side of the discovery coin: when should discovery requests be *denied* in the interest of protecting trade secrets and other such confidentiality information? Of course, the concepts of privacy and confidentiality are deeply ingrained in the historic international arbitration model; they are also more deeply engrained in European society than American society. Thus, again, the tension arises: to what extent should international arbitrators require parties to produce documents and information that they deem to be “confidential”? Should they adopt the more open, lay-your-cards-on-the-table American approach? Or should they respect the more traditionally European notions of confidentiality?

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<sup>2</sup> The author refers to the papers submitted by Tieder, Schindler and Woolhouse.

Finally, in “Disclosure in International Investment Treaty Arbitration”, Sarita Woolhouse addresses the issue of discovery in arbitrations conducted pursuant to Bilateral Investment Treaties (BITs). As the number of BIT arbitrations have exploded in recent years, the discovery issues are also quickly becoming apparent. Sarita hits on the biggest issue: to what extent should states and state actors be required to produce documents, including documents viewed as state secrets subject to the public interest immunity? The BIT arbitration thus raises its own array of discovery issues which, no doubt, will lead to its own unique set of tensions between common law and civil law advocates.

### **Practical Suggestions**

Just because there are tensions does not mean these tensions are unhealthy. Despite the frequent complaints about the “Americanization” of international arbitration — and despite the resulting increase in the time and expense of international arbitration — the author believes that the attitudes and discovery methods brought by United States attorneys have, on balance, improved the international arbitration process. The process has become more open, more honest, more exacting and less subject to whim.

On the other hand, the international arbitration process has also improved the United States attorneys who have ventured into the field. It has made them less aggressive, less dependent on discovery, less insensitive to other cultural dispute resolution practices, and more focused on the key facts that are really important to their case. In this sense, the interaction of the American Bar and the traditional international arbitration model has actually been a dialectic, with each fighting against — and, in the process, improving — the other.

Thus, it may be said to American attorneys: do not fear the international arbitration process! Their knowledge of, and experience with, American-style discovery techniques give them, in some ways, a significant advantage over European counterparts. The trick is knowing when to stop asking for more discovery or, put differently, where to draw the line between:

- The zealous pursuit of facts in support of the client’s case; and
- The need not to turn off the arbitrators who will decide the client’s case.

This is not easy, but here are a few practical suggestions learned from experience.

### **Get over the Deposition Fix**

Unless the arbitration clause specifically provides for depositions, which is rare, do not ask an international arbitration tribunal for depositions. Depositions are simply not taken in international arbitration, and any request to depose a witness will almost certainly be denied. It may also offend, or at the very least irritate, the tribunal. In any event, not having the right to take depositions should not be a cause for alarm. Remember that the other side also is not entitled to take depositions. Thus, the playing field is level, which is all that justice ultimately requires.

### **Narrow your Document Requests, both in Number and Substance**

Requests for “any and all” documents relating to expansive subject areas are frowned upon in international arbitration. Likewise, propounding hundreds of separately-numbered document requests on your opponent will do you more harm than good in the eyes of the international arbitration tribunal. International arbitrators will, generally speaking, not order a party to respond to the types of “fishing expedition” document requests tolerated in United States litigation.

As strong as the urge to be comprehensive and exhaustive may be, it is wise to resist that urge and propound a relatively short list of narrowly-tailored document requests. This will earn you good will with the tribunal. It may also force you to think harder about what documents you actually need to prove up your case.

### **Pick your Discovery Battles Wisely**

There is nothing that European arbitrators dislike more than a whiny, tattletale approach to discovery. The mere fact that your opponent may not have produced something that you think they should have produced is not grounds, by itself, to run to the tribunal and lodge a complaint. Ask yourself: is the document or witness withheld by the other side critical to your case? If the answer is no, it may be wise to simply move on and wait for a more important discovery battle.

Unlike United States judges, who often refer all discovery disputes out to a Magistrate Judge who will have no input in deciding the ultimate case on the merits, the international arbitration tribunal is in place to decide all disputes that arise in an arbitration. Thus, constantly badgering a tribunal with an endless stream of discovery disputes may, in the end, cause significant damage to your credibility when the time comes for the tribunal to decide the most important dispute of all, ie, who wins and who loses the case.

### **Seek “Adverse Inferences” Rather than Sanctions**

The concept of sanctions is essentially not heard of in international arbitration. Depending on the particular arbitration rules and particular arbitration clause that govern a proceeding, an international arbitration tribunal is generally empowered to award attorneys’ fees and costs, in whatever proportion they deem just, at the end of the arbitration. Thus, the mere fact that your opponent may be stonewalling on discovery should not prompt you to seek legal fees or other such sanctions from the arbitrators. The arbitrators have the power to punish, through the imposition of legal fees and costs, in their final award.

Rather than seeking sanctions, the far better tact in international arbitration is to seek an “adverse inference”, ie, a ruling by the tribunal that your opponent’s failure to produce a particular document or witness will be viewed by the tribunal as an inference that the document or witness, if produced, would be adverse to your opponent’s case. For example, in one London-based ICC arbitration in which the authors participated, the opponent refused to make its Chief Executive Officer available for examination at the final hearing,

explaining that she was “extremely busy” and that business demanded she remain in the United States during the dates of the hearing. Upon my application, the Chairman of the Tribunal rather solemnly informed my adversary that the C.E.O.’s failure to appear would be looked upon as an “adverse inference” that her testimony would be damaging to the opponent’s case. Sure enough, the C.E.O was on a plane to London the next day.

### **Do Not Count on Third-Party Discovery**

One cannot expect to obtain third-party discovery in international arbitration. Whether or not a tribunal has the power to subpoena third parties to testify or produce documents in aid of an arbitration usually depends on where (ie, which country) the tribunal is sitting. Many countries simply do not allow parties to arbitration to compel any third-party witnesses to appear and give evidence. This right is even limited in the United States. For example, in the recent case of *Dynergy v Trammochem*,<sup>3</sup> the United States Court for Appeal for the Second Circuit ruled, in effect, that only third-party witnesses located within 100 miles of where an arbitration tribunal is sitting can be subpoenaed to give evidence at the arbitration hearing.

In short, it is wise to plan an international arbitration case strategy based on the assumption that third parties will not be available to testify or produce documents in support of your client’s case. If you are then able to subpoena a third-party witness or, even better, convince a third party witness to appear and give evidence voluntarily, that will be an unexpected bonus. But, by all means, do not count on it.

### **Conclusion**

The five guidelines set forth above are not all one needs to know in order to successfully approach the discovery process in international arbitration. But they are a good head start for those American practitioners who are new to the field. United States attorneys are, by nature, a tenacious lot, and they will almost certainly continue to struggle to advance their view of discovery in the international arbitration process. But this struggle should be pursued carefully, with an understanding of the tensions and pitfalls beneath the surface.

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<sup>3</sup> *Dynergy v Trammochem*, 2006 U.S. App. LEXIS 14631 (2d Cir. June 13, 2006).