Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration

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I. Introduction

It is common for parties in international arbitration to engage and present experts to testify on technical matters, industry custom and legal issues.[1] It is also common and generally accepted that a party's counsel will work closely with a party-appointed expert, discussing substantive points of an expert's opinion, and providing comments on drafts of an expert's report, at least as to format, language and style.[2]

Cautious counsel in international arbitration wonder whether their written communications with an expert, including drafts and markups of the expert's report, may be subject to production to the other side and to the arbitrators. To answer this question, we reviewed the disclosure practice in numerous unreported cases and we submitted questions to a broad range of international

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1 This practice is a departure from the usual civil law approach where courts appoint their own experts to provide objective, technical guidance. Giorgio Bernini, *The Civil Law Approach to Discovery: A Comparative Overview of the Taking of Evidence in the Anglo-American and Continental Arbitration Systems*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 265, 286 n.42 (Lawrence W. Newman & Richard D. Hill eds., 2008). In France, for example, the judge typically appoints an *expert judiciaire*. *See* French Code of Civil Procedure, Articles 232-248, 264-272. *See also* Brazilian Code of Civil Procedure, Articles 420-439.

2 Rachel Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, 4:3 TRANSNAT'L DISPUTE MGMT., at 4 (2007), *available at* http://www.transnational-dispute-management.com/. *See also* Christopher Newmark, *Expert Evidence*, *in* INTERNATIONAL ARBITRATION CHECKLISTS 107, 119-20 (Lawrence W. Newman & Grant Hanessian eds., 2004) ("*However, it is inevitable in complex cases that there will be discussion between experts and lawyers as to the form and content of an expert's report and it is entirely appropriate for lawyers and their clients to suggest changes, additions and rephrasing of a draft report, provided that the expert only adopts those proposals with which he agrees and provided that the final report remains one which expresses his own opinion.*") (Emphasis in original.); George Ruttinger & Joe Meadows, *Using Experts in Arbitration*, 62 DISP. RESOL. J. 46, 49 (2007) ("*If necessary, counsel should participate in drafting expert reports to make them persuasive and less subject to attack on cross-examination.*"); Dana H. Freyer, *Assessing Expert Evidence*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 429, 431 (Lawrence W. Newman & Richard D. Hill eds., 2008) ("*expert testimony and reports may be the result of extensive collaboration*").

arbitration practitioners and arbitrators from varying legal backgrounds and regions.[3] We also reviewed written authority on the issue. In this Article, we seek to distill these sources into a summary of the prevailing practice and to offer guidance to practitioners. We also examine the trend that has led some common law jurisdictions to permit more extensive discovery of counsel-expert communications in the context of domestic litigation, and consider whether such an approach is desirable in international arbitration. We conclude that it is not.

II. The Prevailing Practice in International Arbitration

A. The Presumption of Non-Discoverability of Counsel-Expert Communications

Formal international guidelines on the discoverability of counsel-expert communications are rare.[4] National rules applicable to national court proceedings, where they exist,[5] vary widely and are, in any case, inapposite to international arbitration.[6] Our experience and our survey

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[3] In addition to surveying the collective experience of the White & Case International Arbitration Group, the authors contacted eighteen of the most prominent international arbitrators with extensive experience of international cases (both commercial and investment): eight in Continental Europe, two in Canada, four in the United States, two in the United Kingdom, one in Latin America and one in Asia.

[4] The issue is not dealt with in any of the rules of major arbitral institutions. For instance, Article 20 of the Rules of Arbitration of the International Chamber of Commerce (the "**ICC**") refers only to the tribunal's authority to "*establish the facts of the case by all appropriate means*," and to "*summon any party to provide additional evidence*"; Article 22.1(e) of the London Court of International Arbitration (the "**LCIA**") Rules merely authorizes the arbitral tribunal to "*order any party to produce to the Arbitral Tribunal, and to the other Parties for inspection … any documents or classes of documents … which the Arbitral Tribunal determines to be relevant*"; Article 19 of the International Arbitration Rules of the American Arbitration Association (the "**AAA**") empowers the arbitral tribunal to "*order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate*." Neither the International Bar Association's (the "**IBA**"'s) 1999 Rules on the Taking of Evidence in International Commercial Arbitration nor the UNCITRAL Notes on Organizing Arbitral Proceedings provide guidance on the subject. Only the Chartered Institute of Arbitrators has addressed the issue, with the 2007 publication of its Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (the "**CIArb Protocol**"). For a commentary on the CIArb Protocol, *see generally* Doug Jones, *Party Appointed Expert Witness in International Arbitration: A Protocol at Last*, 24:1 ARB. INT'L 137, 152-53 (2008). We examine the approach adopted in the CIArb Protocol below, Section II.B.2.

[5] In civil law countries, experts are ordinarily appointed by the court and pre-trial document disclosure is minimal or non-existent. *See* Giorgio Bernini, *The Civil Law Approach to Discovery: A Comparative Overview of the Taking of Evidence in the Anglo-American and Continental Arbitration Systems*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 265, 273-74, 286 n.42 (Lawrence W. Newman & Richard D. Hill eds., 2008).

[6] The separateness of international arbitration from the evidentiary/procedural regime governing national court litigation is reflected in the laws of major arbitral jurisdictions. In the United States, it is well-established that arbitrators are not constrained by formal rules of procedure or evidence. *See, e.g., Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 n.4 (1956) (where the Supreme Court noted that "*[a]rbitrators are not bound by the rules of evidence*"). In England, the Arbitration Act 1996 confers a wide discretion on the arbitral tribunal to decide issues of procedure and evidence. Section 34 thus provides that "*[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter*" and defines "*procedural and evidential matters*" as including "*whether to apply strict rules of evidence (or any other rules)….*" In Hong Kong, a tribunal may not order disclosure of documents privileged under Hong Kong

nonetheless show shared expectations about the discoverability of counsel-expert communications in international arbitration. An overall presumption of non-discoverability, with certain common exceptions, can be discerned.[7] Production of documents reflecting such communications is rarely sought – almost all of the arbitrators questioned on the subject replied that they had *never* faced the question – and the overwhelming view among experienced international arbitrators is that, in the ordinary situation, production would not be warranted.[8] This view is shared by both civil law and common law arbitrators and, among the latter group, even by arbitrators from jurisdictions where mandatory production of counsel-expert communications is the rule in domestic litigation.[9]

Commentators support the view that, regardless of the rules applicable to domestic litigation, the practice in international arbitration is not to require disclosure of counsel-expert communications.[10] Christopher Newmark explains:

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law. Hong Kong Arbitration Ordinance, Chapter 341, Section 2GB(8). *See also* Article 19(2) of the UNCITRAL Model Law, which provides in relevant part that "*the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*" Although issues of evidentiary privilege may, at their limit, touch on public policy concerns, questions as to which documents are subject to mandatory production and which are privileged have generally (and properly) been considered to fall within the arbitrators' overall procedural discretion. *See* Henri Alvarez, *Evidentiary Privileges in International Arbitration*, *in* ICCA CONGRESS SERIES NO. 13, Montréal 2006, 662, 674-75 (2007) (noting the "*increasing recognition that rules of privilege are more than merely procedural in nature and, in fact, are substantive rules which reflect public policy*."). *See generally infra*, note 14.

7 As Craig, Park and Paulsson explain, a result of the often cosmopolitan makeup of international arbitral tribunals is that "*procedural questions arising in the arbitration are resolved pragmatically rather than dogmatically*." Hence, "*[t]he prevailing rule is that of professional common sense, and good sense in this context tends to reflect an amalgam of three jurists' legal culture*." W. Laurence Craig, William W. Park & Jan Paulsson, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, § 23.04 (2000).

8 Of the eighteen international arbitrators – all with extensive experience – polled by the authors, only one expressed a willingness, "*in the right circumstances*," to order disclosure of drafts and counsel-expert communications. (Confidential communication on file with the authors.)

9 None of the four very experienced United States-based international arbitrators polled by the authors considered that disclosure of counsel-expert communications was appropriate in the general case, and this even though such disclosure is available in domestic litigation in the United States. *See* below Section II.A.1.

10 Rachel Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, 4:3 TRANSNAT'L DISPUTE MGMT., at 2 (2007), *available at* http://www.transnational-dispute-management.com/ ("*By contrast, in international arbitration proceedings, expert witnesses are subject to far less discovery, and will rarely, if ever, be asked about their conversations with counsel.*"); George Ruttinger & Joe Meadows, *Using Experts in Arbitration*, 62 DISP. RESOL. J. 46, 49 (2007) ("*Since counsel's thoughts, impressions, and work product can be exchanged with experts without having to be produced to the adversary, counsel should take an active role when it comes to drafting expert reports and preparing experts for depositions or the actual hearing.*"); Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 307 (2004) ("*The obvious concern arises, however, as to whether such communications between counsel and witness would be subject to disclosure. … [I]it is doubtful that many arbitral tribunals would be willing to permit such questioning [about counsel-witness communications].*").

> "*In most international arbitration scenarios, communications between the party and the expert will be treated as privileged, and disclosure of those communications (including any draft expert reports) will not be required*."[11]

On this basis, Dana Freyer advises that "*[b]ecause communications between a party and its expert remain undisclosed, expert testimony and reports may be the result of extensive collaboration*."[12]

The Chartered Institute of Arbitrators' 2007 Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (the "**CIArb Protocol**") offers additional support for this view. By providing for a limited waiver of privilege in respect of "*instructions to, and any terms of appointment of, an expert*" (a topic explored further below), Article 5 of the CIArb Protocol presumes that counsel-expert communications as a general matter are privileged and therefore not subject to production. The CIArb Protocol also confirms the consensus that drafts and other expert work product are not discoverable. Article 5.2 reads:

> "*Drafts, working papers or any other documentation created by an expert for the purpose of providing expert evidence in the Arbitration shall be privileged from production and shall not be discloseable in the Arbitration*."

It is doubtful that the apparent consensus about the non-discoverability of counsel-expert communications in international arbitration reflects a shared understanding among arbitration practitioners of the rules governing evidentiary privileges.[13] Given the diversity of rules (if any) governing document production, privilege and waiver of such privilege across different jurisdictions, a consensus about privilege cannot be identified[14] and a consensus therefore cannot

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[11] Christopher Newmark, *Expert Evidence*, *in* INTERNATIONAL ARBITRATION CHECKLISTS 107, 117 (Lawrence W. Newman & Grant Hanessian eds., 2004).

[12] Dana H. Freyer, *Assessing Expert Evidence*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 429, 431 (Lawrence W. Newman & Richard D. Hill eds., 2008). With respect to counsel-witness communications more generally, *see* Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 307 (2004).

[13] *Cf.* Christopher Newmark, *Expert Evidence*, *in* INTERNATIONAL ARBITRATION CHECKLISTS 107, 117 (Lawrence W. Newman & Grant Hanessian eds., 2004) ("*In most international arbitration scenarios, communications between the party and the expert will be treated as privileged.…*").

[14] *See generally* Henri C. Alvarez, *Evidentiary Privileges in International Arbitration*, *in* ICCA CONGRESS SERIES NO. 13, Montréal 2006 (2007); Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 306 (2004) ("*There are no established rules to govern the nature or scope of the attorney-client privilege in international arbitration*."); *Id*. at 307 ("*There is thus a great deal of uncertainty over what sorts of communications between an attorney and a client are immune from discovery in international arbitrations – uncertainty further compounded by the absence of any established choice-of-law rules to determine which law will govern the existence and scope of the privilege, and the extent to which the privilege can be waived*."); Christopher Newmark, *Expert Evidence*, *in* INTERNATIONAL ARBITRATION CHECKLISTS 107, 112 (Lawrence W. Newman & Grant Hanessian eds., 2004) ("*In England for example, the Civil Procedure Rules contain extensive provisions governing the circumstances in which expert evidence will be allowed … This entire framework is missing from the world of international arbitration*.").

be the explanation. Rather, the consensus is better understood as reflecting the broad view that, as a general matter, the production of counsel-expert communications and drafts is not ordered because these documents are not considered sufficiently relevant – let alone material – to the outcome of the case.[15] This view of what matters in a case must explain why arbitrators from legal cultures with widely diverging approaches to evidentiary privileges are in agreement about the non-discoverability of counsel-expert communications in the ordinary course.[16]

While counsel-expert communications may be relevant to a case to the extent that they assist in evaluating the credibility and independence of an expert, it would be highly unusual for an arbitral tribunal to grant production of communications between counsel and expert on the mere chance that some such communications might shed light upon the expert's independence. Rather, 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. This brings us to the following topic: the exceptions to the general prohibition against disclosure of counsel-expert communications.

B. The Potential Exceptions

Three potential exceptions to the non-discoverability of counsel-expert communications can be discerned. The first potential exception relates to materials relied upon, referenced by, or reviewed by an expert, the second to communications between counsel and expert regarding the scope of an expert's engagement, and the third to cases of abuse.

1. Counsel-Expert Communications Relied upon, Referenced by or Reviewed by an Expert

There are three categories of documents which can be said to be used by an expert: documents *relied upon* by an expert in forming his or her opinions; documents *referenced* by an expert in his or her report; and documents *reviewed* by an expert, although not necessarily relied upon or referenced. The first two categories (which in practice overlap to a significant extent) are considered together below. The third category – documents *reviewed* by an expert – is, plainly, the broadest of the three. We conclude that the first two categories are subject to production, and that documents in the third category usually are not.

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[15] This is the standard required for an order for production of documents under the IBA Rules on the Taking of Evidence in International Commercial Arbitration 1999, Article 3.3(b). *See also* Bernard Hanotiau, *Document Production in International Arbitration: A Tentative Definition of 'Best Practices'*, *in* ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN: DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION 113, 116 (2006) ("*Relevance and materiality are two related criteria which the arbitral tribunal will use when deciding whether or not to grant a document production request*.").

[16] To cite but one example among many, a prominent Swiss arbitrator has explained that, in the one case where he faced the issue, the request for production of counsel-expert communications was rejected, irrespective of any privilege, because the requesting party could not establish the relevance of the communications. (Confidential communication on file with the authors.)

a. Documents relied upon or referenced by an expert

A competent expert report will usually attach as exhibits to the report all documents relied upon in forming his or her opinions. This practice is based on the principle of equality of arms, which requires that the opposing party be given an opportunity to review the same documents as the other party's expert. It is also necessary to permit an arbitral tribunal to evaluate properly the opinions and credibility of an expert. As a matter of practice, therefore, the first two categories of documents used by an expert overlap to a significant extent, and are usefully considered together.

The survey of practitioners and arbitrators shows a broad consensus among arbitration practitioners that counsel-expert communications, which would ordinarily benefit from a presumption against disclosure, become subject to production once relied upon by an expert, and in particular when referenced by an expert in his or her report.[17]

The authors' recent experience is consistent with this consensus. In a New York-based ICC arbitration in 2008, a party sought production of drafts of an expert report which had been shown to a second expert engaged by the same party. The document was inadvertently included in a list of documents attached to the second expert's report. The arbitral tribunal, comprised of three U.S.-trained attorneys, ordered production of the drafts, with no discussion of what law governed the question of privilege and whether the draft was ever in fact privileged.

In a 2009 ICC arbitration in Stockholm, a party had produced an expert report that referenced certain preliminary opinion reports which the expert had prepared during the parties' negotiations, before the filing of the request for arbitration. When the opposing party requested production of these preliminary reports, the party proffering the expert report argued that these documents were privileged because they were mere drafts of the expert's final opinion, and because they were created in contemplation of litigation. The tribunal, composed of civil law lawyers, ordered production of the preliminary reports. The tribunal buttressed its decision by noting that the party resisting production had indicated a willingness to produce the document before the initiation of the arbitration.

These two examples demonstrate a clear principle: documents included in the list of materials relied upon by an expert are discoverable. This exception to the principle of non-discoverability of counsel-expert communications also has its basis in the relevance-and-materiality test for production of documents. That is, documents that would ordinarily not be relevant and material to the outcome of the case become so when an expert references them as bases for the opinions in his or her report.

In the first of the two cases described, the absence of any discussion as to whether the draft reports in question were subject to any attorney work-product privilege indicates that, in the view

[17] None of the eighteen arbitrators surveyed questioned the applicability of this exception.

of the tribunal, applicable privileges (if any) were waived or overridden by the expert's reference to the document. Similarly, in the second example, the tribunal appears to have been of the view that the claimed litigation privilege attaching to the expert's preliminary reports was waived or overridden by the fact that the expert had referenced those documents in the final report. This suggests that the obligation to produce documents referenced by an expert would apply equally to documents prepared by counsel in contemplation of litigation and potentially covered by the attorney work-product doctrine. On this basis, if counsel provides an expert with notes of an interview with a key witness and these constitute part of the referenced factual underpinning for that expert's report, there is little doubt that the notes would be considered relevant and that that expert's reliance on them would suffice to waive any work-product protection, thus justifying disclosure.

A further question is whether the obligation to produce documents relied upon or referenced by an expert applies when such documents contain or reveal client confidences. Such documents might potentially be protected from disclosure by some form of attorney-client privilege or *secret professionnel*, a protection that is often regarded as more fundamental than that offered by the work-product doctrine,[18] and which can usually be waived only by the client. We see no blanket solution to this question; resolution of such a document production request would depend upon the circumstances. A tribunal faced with this issue would first need to understand properly the nature of the client information which would be revealed by production of the document (an *in camera* review of the document may assist). A tribunal may also need to consider the public policy implications of its ruling, and any applicable provisions of mandatory law. Given the strong consensus that documents relied upon or referenced by an expert should be produced, there is a reasonable prospect that an international arbitral tribunal would order production of such documents irrespective of any applicable attorney-client privilege or *secret professionnel* obligation.[19]

b. Documents reviewed by an expert

We now consider whether production can be expected not only of documents *relied upon* or *referenced* by an expert but also, more broadly, of all documents *reviewed* by an expert. The argument in favor of requiring production of this broader category of documents – including, potentially, counsel-expert communications – is that limiting disclosure to documents *relied*

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[18] *See, e.g., Blank v. Canada (Minister of Justice)*, 2006 SCC 39, ¶¶ 24-28. *See also Three Rivers District Council v. Governor and Co. of the Bank of England*, [2004] U.K.H.L. 48 (H.L.), ¶ 34.

[19] The Hong Kong Court of First Instance explained the rationale for finding that reliance on a document by an expert waives privilege in that document: "*Any material identified by the expert as having been considered by him in the formulation of his opinion must also be disclosed by him. It cannot be protected by a claim of legal professional privilege since the vehicle in which such an opinion has been expressed, has itself ceased to have that protection. It would of course constitute a nonsense if, a party seeking to adduce an expert's opinion, were to argue along the lines 'you have to admit and evaluate that opinion without being entitled to see all the material on which it is based.'*" *Chan Mun Kui v. Lau Yuk Lai* (1999) HCPI 301/98, ¶ 8.

upon or *referenced* by an expert accords the expert too much discretion. An unscrupulous expert could always decide that he or she did not *rely* upon documents which, although relevant, upon review did not support his or her opinion.[20] At least one commentator argues that disclosure of all document reviewed by an expert is desirable in order to permit an arbitral tribunal to evaluate properly that expert's report.[21]

Experience shows that arbitral tribunals are reluctant, and rightly so, to order production of documents merely *reviewed* by an expert. For example, in a 2008 ICC arbitration in New York, the chairman, a U.S.-trained lawyer, refused to grant a party's request for all documents *reviewed* by the other party's expert, even though such an order would have been consistent with the Federal Rules of Civil Procedure applicable to domestic U.S. litigation.[22] Rather, the chairman ordered production only of those documents that the expert had *relied upon*. Such an approach is justified for two reasons. First, the concern that an expert may deliberately conceal damaging documents can be addressed by cross-examination: what materials an expert reviewed (or failed to review), or listed in the report (or failed to list in the report), often constitutes the first line of questioning at a hearing. An expert who pretends not to have reviewed documents *potentially* damaging to his party does so at peril to his or her credibility, and to the party's case as a whole. Second, if a party is able to show that certain documents were reviewed by an expert, but not referenced, and that such documents are relevant and material to the outcome of the case (*i.e.*, that they go to the issues on which the expert was asked to opine), that party may be able to obtain production of such documents by requesting them *specifically*. A blanket request for all documents *reviewed* by, or *provided* to, an expert is overbroad and unlikely to be granted by an arbitral tribunal.

2. Counsel-Expert Communications Regarding the Scope of an Expert's Engagement

A second potential exception to the presumption of non-discoverability of counsel-expert communications comprises those communications which have as their subject the scope of an expert's engagement, including directives received from counsel.

Expert reports can be difficult to understand, weigh and compare in the absence of information as to the scope of each expert's engagement, including the issues that an expert was asked to

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[20] As explained below, for this reason, in the United States the Federal Rules of Civil Procedure require disclosure of "*the data or other information considered by the witness in forming*" his or her opinions. (Emphasis added.) *See* Section III.A.1.

[21] John Tackaberry, *Practical Considerations for Conducting the Hearing*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION 155, 182 (Rufus v. Rhoades, Daniel M. Kolkey & Richard Chernick eds., 2007) ("*An international panel, in all likelihood, would be unwilling to regard as privileged any of the documents reviewed by the expert (even though some might characterise those as communications between lawyer and witness) since the panel may not be able to evaluate the meaning of, and the weight to be given to the report, without sight of what the expert has relied upon*.").

[22] FED. R. CIV. P. 26(a)(2).

consider (or not).[23] There is an expectation that expert reports in international arbitration will include a statement summarizing the issues on which that expert was asked to opine and other material directives received from counsel. Expert reports may also include a statement of the financial terms of that expert's engagement (though this is not a common practice). There is broad agreement that a party should voluntarily disclose to the other party, and to the arbitral tribunal, the substance of the instructions provided to an expert.

The expectation that experts will voluntarily disclose the nature of their instructions does not answer the question whether information pertaining to an expert's instructions, beyond that voluntarily disclosed in that expert's report, can be obtained. The choices are, either, by cross-examination of the expert, or by an order for the production of the underlying document containing an expert's instructions. Requests to produce documents regarding the scope of an expert's engagement are rare in international arbitration, and, when faced with such a request, arbitrators are reluctant to order production.

John Tackaberry has written that "*[i]ncreasingly, panels will expect to see the instructions that were given to the expert that led to the report*…."[24] However, our experience does not support this expectation, and several of the arbitrators surveyed for the purpose of this Article expressed hesitation at the idea that production of documents might be ordered on the topic of instructions, while emphasizing that cross-examination about the scope of an expert's engagement was allowed as a matter of course.

In a recent ICC case, a party submitted an expert report that did not specify the instructions that that expert had received from counsel. The other side requested production of the documents that reflected the terms and scope of the expert's engagement. The arbitral tribunal, composed of civil law arbitrators, refused to order production of the documents setting out such instructions.[25]

In summary, while cross-examination on the issue of an expert's instructions is always permissible, production of the documents containing an expert's instructions is *not* ordinarily an exception to the presumption of non-discoverability of counsel-expert communications.

The CIArb Protocol lends support to this view. Its Article 4 recommends that an expert's report should include "*a statement setting out all instructions the expert has received from the*

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[23] For the same reasons, the Woolf Report in England (*Access to Justice: Final Report by the Right Honourable the Lord Woolf*. London: H.M. Stationery Office, 1996, *available at* http://www.dca.gov.uk/civil/final/index.htm) recommended that expert reports be required to include a statement of material "*instructions*" received from counsel and that such instructions be discoverable. *Id.*, Chapter 13, ¶ 32.

[24] John Tackaberry, *Practical Considerations for Conducting the Hearing*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION 155, 182 (Rufus v. Rhoades, Daniel M. Kolkey & Richard Chernick eds., 2007).

[25] As of the date of this writing, no hearing had been held in that case, and it cannot be known whether the tribunal will allow questioning.

appointing Party and the basis of remuneration of the expert," which recommendation the authors understand contemplates a description by an expert in his/her report of the directives received from counsel. Article 5.1 of the CIArb Protocol further provides:

> "*1. All instructions to, and any terms of appointment of, an expert shall not be privileged against disclosure in the arbitration, but the Arbitral Tribunal shall not, in relation to the instructions or terms of appointment:*
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> *(a) order disclosure of the instructions or appointment or any document relating thereto; or*
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> *(b) permit any questioning of the expert about such instructions or appointment*
>
> *unless it is satisfied that there is good cause*."

Despite the emphasis in Article 4 on the importance of voluntary disclosure of instructions, Article 5.1(b) of the CIArb Protocol precludes questioning of an expert regarding his or her instructions unless the tribunal is satisfied that there is good cause. In this respect, the CIArb Protocol is more restrictive than the prevailing practice in international arbitration.

While Articles 4 and 5 of the CIArb Protocol can be read to take a pro-disclosure stance with respect to an expert's instructions, the emphasis is on the importance of *voluntary* disclosure in an expert's report. Article 5 of the CIArb Protocol says that an arbitral tribunal is not to order production of the underlying documents containing the instructions to an expert absent "*good cause*." Although "*good cause*" is not defined in the Protocol, this concept was likely imported from the Civil Procedure Rules in England.[26] If English practice is a guide, "*good cause*" would include the situation where there are reasonable grounds to find that an expert's statement of his instructions is "*inaccurate or incomplete*."[27]

A word of caution is needed regarding this brief discussion of the purpose and scope of Articles 4 and 5 of the CIArb Protocol. We have assumed that the term "*instructions*" refers to that particular set of counsel-expert communications which set out the scope of an expert's engagement, and any other directives received from counsel. However, English courts, interpreting the English Civil Procedure Rules from which Article 5 of the CIArb Protocol was derived, have construed the term "*instructions*" widely to include all "*the information being*

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[26] Peter J. Rees, *From Hired Gun to Lone Ranger – The Evolving Role of the Party-Appointed Expert Witness*, at 13, 2008, *available at* http://www.transnational-dispute-management.com/ ("*In England, under the [Civil Procedure Rules] the instructions to experts are discloseable, but draft reports are considered not to be and that compromise is what the Protocol has largely incorporated in Article 5.*").

[27] The English Civil Procedure Rules specify that an expert must give a statement of all material instructions received from counsel, that such instructions are not privileged and that questioning or document disclosure in respect of such instructions may be ordered if the court is "*satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.*" Civil Procedure Rules 35.10(4).

supplied by the claimant and all the material which a solicitor places in front of the expert in order to gain advice."[28] As such, under English law, the line between counsel-expert communications and "*instructions*" may be very faint.[29] Importing an expansive understanding of "*instructions*" into Article 5 of the CIArb Protocol could result in requests for disclosure of the whole range of counsel-expert communications, which would run against the basic expectations of arbitration practitioners outlined above.

3. Abuse

A third potential exception to the presumption of non-discoverability of counsel-expert communications arises in circumstances of abuse by counsel (and by the expert insofar as he or she allows such conduct). Although it is accepted practice that counsel may assist an expert in writing his or her report, overly intrusive style is frowned upon, and counsel who exert excessive influence over the content of an expert report do so at the risk of their expert's, and their own, credibility. As a noted arbitrator commented in response to a question posed for the purposes of this Article, "*lawyerly ghostwriting*" tends to annoy tribunals and may attract pointed questions by arbitrators about the precise circumstances of the genesis of an expert's report. The practice, though, is to deal with this abuse through questioning rather than through document production. While the concern that gives rise to questioning about abuse would logically lead to document production orders, that has not been the practice to date. The absence of known instances of document production orders arising from overly intrusive counsel is not, though, an argument that such orders would or should not be granted where warranted.

III. Comment on the Rationale for Discoverability of Counsel-Expert Communications in International Arbitration

In recent years, there has been growing concern in common law countries where party-appointed experts are used in domestic litigation that such experts tend to overlook their duty of independence to the court[30] and instead act as "*hired guns*" advocating for the party that retained

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[28] Under English law, the only real guidance on this issue is that the term "*instructions*" has been construed widely to include all *"the information being supplied by the claimant and all the material which a solicitor places in front of the expert in order to gain advice*." *Lucas v. Barking, Havering and Redbridge Hospitals NHS Trust* [2003] 4 All ER 72 (CA), [2003] EWCA Civ. 1102, at ¶¶ 30-31. Therefore, potentially, an English court satisfied that there is good cause, may order wide discovery of counsel-expert communications.

[29] Despite this, even interpreting the term "*instructions*" in Article 5 of the CIArb Protocol in light of English case law on the English Civil Procedure Rules, in the opinion of the authors the distinction between "*instructions*" (which are not privileged but which enjoy a strong presumption against disclosure absent "*good cause*") and other counsel-expert communications (which are subject to a privilege which may be waived) may not be material as a practical matter. Circumstances amounting to "*good cause*" may also constitute waiver of privilege. Indeed, the very same English case which proposed a wide interpretation of the term "*instructions*" in the Civil Procedure Rules also clarified that the presumption against disclosure of "*instructions*" absent good cause was "*designed primarily to give protection to a party who would otherwise have waived privilege by being compelled to set out matters in an expert's report*." *Lucas*, ¶ 31.

[30] As a general matter, common law countries recognize that a party-appointed expert owes a duty to the court or tribunal to give an objective opinion, independent of any influence by the party which appointed him or her. In

them with little or no objectivity.[31] This concern has led several common law jurisdictions to allow broader discovery of counsel-expert communications in an effort to promote greater independence and objectivity on the part of experts and to limit lawyer influence over the content of expert testimony.

As in common law jurisdictions, in international arbitration the role of party-appointed experts is to provide objective testimony aimed at assisting the arbitral tribunal,[32] and the problem of "*hired guns*" has led to calls for increased disclosure of counsel-expert communications.[33] Doug Jones explains:

> "*It is likely that a court or arbitral tribunal would benefit from greater transparency as to how experts came to develop their opinion. This would enable the court or arbitral tribunal to make a fully informed determination and to better weigh the evidence of opposing experts. Moreover, ensuring that all*

1981, Lord Wilberforce stated that expert evidence presented in court should be, and be seen to be, "*the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation*." *Whitehouse v. Jordan*, [1981] 1 WLR 246, 256-57. Similarly, in the much-cited 1993 English case, *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Tld. (The Ikarian Reefer)*, [1993] 2 Lloyd's Rep. 68, the English Commercial Court, Queen's Bench Division, developed this statement into a set of seven principles which have come to be regarded as a classic statement of good practice for experts. Of particular import in the context of this Article is the second principle: "*2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion relating to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate*." *Id.*, 81.

[31] *See Lord Abinger v. Ashton*, [1873] 17 L.R. Eq. 358, 373-74 ("*[I]n matters of opinion, I very much distrust expert evidence … Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. … [I]t is natural that his mind … should be biassed in favour of the person employing him, and accordingly we do find such bias*."); *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd.*, [1995] F.S.R. 818, 843-44 ("*The whole basis of Mr Goodall's approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. … That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. … An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill*."); *Great Eastern Hotel Co. Ltd. v. John Laing Constr. Ltd.*, [2005] EWHC 181 (TCC), ¶ 111 ("*I reject the expert evidence of Mr Celetka as to the performance of Laing as contract manager … He has demonstrated himself to be lacking in thoroughness in his research and unreliable by reason of his uncritical acceptance of the favourable accounts put forward by Laing*.").

[32] *See* Article 4 of the CIArb Protocol, which provides that "*[a]n expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party*" and that "*[a]n expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced*." *See also* Kap-You & John Bang, *Commentary on Using Legal Experts in International Arbitration*, 13 ICCA CONGRESS SERIES 779, 781 (2006).

[33] Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT'L. L.J. 359, 399 (2008) ("*additional mandatory disclosures would promote greater neutrality, transparency, and objectivity as well as allow the parties and arbitrators to better prepare for the experts' meetings and cross-examinations. These additional mandatory disclosures, which would be established early in the arbitration process, should include: the expert's entire file including draft reports, correspondence, data, documents, and notes used in the evaluation of the issues within his or her expertise …*").

communications between him or herself and the party by whom he or she is appointed are made available may be a good way to remind the expert that their overriding duty is to the court or tribunal and not to that party."[34]

Some U.S. practitioners likewise argue in favor of *full* discoverability of counsel-expert communications in international arbitration in order to promote greater "*neutrality, transparency and objectivity*" in the use of party-appointed experts.[35]

In the remainder of this Article, we survey the evidence of a trend towards greater discoverability of counsel-expert communications in domestic litigation. We then explain why the use of discovery as a means to promote greater independence and objectivity on the part of party-appointed experts should be resisted in international arbitration.

A. The Use of Discovery to Promote Experts' Independence and Objectivity in Domestic Litigation

1. United States

The trend towards greater discoverability of counsel-expert communications in litigation has been most evident in the United States. The Federal Rules of Civil Procedure[36] were amended in 1993 to broaden the disclosure obligations of party-appointed testifying experts.[37] Testifying experts must now disclose "*the data or other information considered by the witness in forming*" their opinions.[38] A narrower formulation requiring disclosure of those materials "*relied upon*" by the expert was rejected due to concern that experts might deliberately conceal relevant but adverse information by determining that they had not relied upon it.[39] The duty to disclose under the U.S. Federal Rules of Civil Procedure extends to anything a testifying expert "*generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected*"[40] and includes counsel-expert communications

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[34] Doug Jones, *Party Appointed Expert Witness in International Arbitration: A Protocol at Last*, 24:1 ARB. INT'L 137, 152-53 (2008).

[35] *See supra* note 33.

[36] Each State also has its own particular rules regarding the discovery obligations of expert witnesses in State court litigation. However, a survey of the laws across the United States is beyond the scope of this Article.

[37] The extensive disclosure requirements apply only to testifying experts, not to mere consultants. Adam Bain, *Working with Expert Witnesses in the Age of Electronic Discovery*, 56 THE UNITED STATES ATTORNEYS' BULLETIN 35, 40 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5603.pdf.

[38] FED. R. CIV. P. 26(a)(2). (Emphasis added.)

[39] Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 103-104 (1996).

[40] *Synthes Spine Co., L.P. v. Walden*, 232 F.R.D. 460, 463 (E.D.Pa. 2005). *See also Schwab v. Phillip Morris USA, Inc*., No. 04-CV-1945 (JBW), 2006 WL 721368, at *2 (E.D.N.Y. Mar. 20, 2006); *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 635 (N.D. Ind. 1996).

and draft expert reports.[41] A testifying expert's duty to disclose any materials "*considered*" overrides the attorney work-product doctrine and other forms of privilege.[42] Litigation counsel in the United States can and do seek discovery of documents showing interactions between opposing counsel and their experts, including any exchanges of drafts. Counsel scrutinize changes in successive iterations of a testifying expert's report and cross-examine experts in connection with such changes in order to draw out any evidence of bias or undue attorney influence.[43]

The practical consequence of this broad discovery mandate is not that U.S. litigation counsel distance themselves from the expert report drafting process. Rather, attorneys litigating in the United States know that that all materials considered by an expert, including communications with counsel, are discoverable,[44] and take steps to avoid generating discoverable communications.

2. Other Common Law Jurisdictions

The trend toward greater discoverability of counsel-expert communications is also perceptible in Australia, where measures to address the issue of partisan experts, including additional disclosure requirements, were adopted in the late 1990s.[45] The trend went the furthest in the

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41 *See, e.g.*, *Bro-Tech Corp. v. Thermax, Inc.*, No. 05-2330, 2008 WL 356928, at *1-2 (E.D. Pa. Feb. 7, 2008); *Varga v. Stanwood-Camano Sch. Dist.*, No. C-06-0178P, 2007 WL 1847201, at *1 (W.D. Wash. Jun. 26, 2007); *Univ. of Pittsburgh v. Townsend*, No. 3:04-cv-291, 2007 WL 1002317, at *2-5 (E.D. Tenn. Mar. 30, 2007).

42 *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 714, 717 (6th Cir. 2006) (reviewing a compilation of cases and finding that the general work-product doctrine in Federal Civil Procedure Rule 26(b)(3) must yield to the more specific expert disclosure requirement in Rule 26(a)(2)). *See also Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 635-41 (N.D. Ind. 1996) (finding that Rule 26(a)(2) creates a "*bright-line*" requirement of disclosure); *TV-3, Inc. v. Royal Ins. Co. of Am.*, 194 F.R.D. 585, 588 (S.D. Miss. 2000) (requiring full disclosure of information that an expert considered is necessary for effective cross-examination of experts, which is sufficient reason to override the attorney work-produce doctrine). Adam Bain notes that this interpretation is supported by the Advisory Committee's note to the 1993 amendment, which states that "*litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions-whether or not ultimately relied upon by the expert-are privileged or other wise protected from disclosure when such persons are testifying or being deposed*." Adam Bain, *Working with Expert Witnesses in the Age of Electronic Discovery*, 56 THE UNITED STATES ATTORNEYS' BULLETIN 35, 36 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5603.pdf. *See also Notes of Advisory Committee on 1993 Amendments to Rules* (1993), *available at* http://www.law.cornell.edu/rules/frcp/ACRule26.htm.

43 Adam Bain, *Working with Expert Witnesses in the Age of Electronic Discovery*, 56 THE UNITED STATES ATTORNEYS' BULLETIN 35, 36, 41 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5603.pdf.

44 *Id.*, at 38.

45 A catalyst for the reforms was the publication of an empirical study carried out by the Australian Institute of Judicial Administration which showed that one of the major concerns among the Australian judiciary was a perception of bias on the part of expert witnesses. *See* Ian Freckelton, Prasuna Reddy & Hugh Selby, AUSTRALIAN JUDICIAL PERSPECTIVES ON EXPERT EVIDENCE: AN EMPIRICAL STUDY, 1999. With respect to disclosure requirements, *Australian Federal Court Practice Note CM 7*, *Expert Witnesses in Proceedings in the Federal Court of Australia* (2009), *available at* http://www.fedcourt.gov.au/how/practice_notes_cm7.html, now requires at ¶ 2.7 that "*[t]here should be included in or attached to the report: (i) a statement of the questions or*

State of Queensland. While counsels' instructions to an expert remain privileged,[46] the Queensland Uniform Civil Procedure Rules (the "**UCPR**") provide that "*[a] document consisting of a statement or report of an expert is not privileged from disclosure*."[47] The UCPR then define a "*report*" widely to mean "*a document giving an expert's opinion on an issue arising in the proceeding*."[48] This broad definition has been interpreted to include written reports of an expert who is not called as a witness[49] as well as drafts, working papers, source materials and documents collated and copied by an expert in order to prepare a report.[50]

As Doug Jones points out, "*[the Queensland approach] has potentially significant implications for the parties to a proceeding, as draft reports may contain differing opinions to those finally developed by the expert*."[51] The discoverability of an expert's working papers means that an expert may be confronted on cross-examination with his or her own early notes and questioned as to how and why his or her early positions changed.

Similarly, in Canada some discovery of counsel-expert communications is allowed in certain common law provinces. The trend started in the late 1980s when British Columbia allowed full disclosure of an expert's "*file*" in an effort to promote experts' independence and impartiality. Ontario has now followed suit.[52]

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issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials that the expert has been instructed to consider."

46 *Greenhill Nominees Pty. Ltd. v. Aircraft Technicians of Australia Pty Ltd*., [2001] QSC 7, ¶ 20 ("*instructions given by lawyers to an expert for the purpose of preparing an expert report were protected by legal professional privilege. The position has not been changed by the Uniform Civil Procedure Rules*," citing *Interchase Corp. Ltd. (in liq) v. Grosvenor Hill (Queensland) Pty. Ltd. (No. 1)*, [1999] 1QdR 141, 156.).

47 Uniform Civil Procedure Rules (Queensland), Rule 212(2).

48 *Id.*, Rule 425.

49 Andrew Kitchin, *The Expert Evidence Rules Under the UCPR – A General Outline, and Some Comments on the Practical Application of Parts of the Expert Evidence Rules*, paper delivered on November 23, 2005 at the request of Australian Insurance Law Association, ¶ 9, *available at* http://www.aila.com.au/speakersPapers/downloads/05-10-31_Andrew_Kitchin.pdf.

50 *See Mitchell Contractors Pty. Ltd. v. Townsville-Thuringowa Water Supply Joint Bd.*, [2004] QSC 329; *Interchase Corp. Ltd. (in liq) v. Grosvenor Hill (Queensland) Pty. Ltd.*, [1999] 1QdR 141, 150. However, *oral* opinions or reports are not covered by the UCPR disclosure requirements. Andrew Kitchin, *The Expert Evidence Rules Under The UCPR – A General Outline, and Some Comments on the Practical Application of Parts of the Expert Evidence Rules*, paper delivered on November 23, 2005 at the request of Australian Insurance Law Association, ¶ 9(c), *available at* http://www.aila.com.au/speakersPapers/downloads/05-10-31_Andrew_Kitchin.pdf ("*The consultation draft for the UCPR included a sub-rule that in effect provided that if a party obtained oral advice from an expert about the proposed contents of a report/draft report or a finding or conclusion of the expert, then the party must record the advice in writing and disclose it – that sub rule never found its way into the UCPR as we know them*.").

51 Doug Jones, *Use of Experts in Arbitration; Independent Experts – The Common Law Approach*, 2:5 TRANSNAT'L DISPUTE MGMT., at 12 (2005), *available at* http://www.transnational-dispute-management.com/.

52 *See* Basile Chiasson, *Litigation Privilege and Disclosure of Expert's File*, 56 U.N.B.L.J. 208, 242-49 (2007).

B. The Case against Using Discovery to Promote Experts' Independence and Objectivity in International Arbitration

The authors are unaware of any international arbitration proceedings where disclosure of counsel-expert communications was ordered. Several of the practitioners surveyed commented that a move towards wide disclosure of counsel-expert communications would be an undesirable "*Americanization*" of international arbitration procedure. In the opinion of the authors, there are at least five reasons why the trend towards greater discoverability of counsel-expert communications should be resisted in international arbitration.

First, in contrast to U.S. domestic litigation, where experts often find themselves in front of juries, international arbitrators are sophisticated fact finders, adept at discerning the truth. As Johnny Veeder remarked with respect to witness statements:

> "*It is perhaps surprising that many sophisticated practitioners have not yet understood that their massive efforts at reshaping the testimony of their client's factual witnesses is not only ineffective but often counter-productive. Most arbitrators have been or remain practitioners, and they can usually detect the 'wood-shedding' of a witness.*"[53]

Therefore, increased disclosure of counsel-expert communications is ordinarily unnecessary. Arbitral tribunals are usually well capable of determining when an expert has failed to examine an issue with an objective eye.

Second, anyone who has read an unedited expert report understands that counsel often play an important role in shaping the scope, form, and internal consistency of an expert's report. An expert's trade is rarely drafting, and counsel may and should ensure that the report is clear, focused and free of unnecessary repetition and irrelevant material. Unrestrained communications between counsel and experts are also necessary to enable counsel and expert to explore theories of the case and to avoid factual misconceptions. The threat of disclosure of counsel-expert communications is likely to hamper counsel's efforts to strategize, theorize and fully develop the client's case. Were counsel-expert communications subject to production, an expert's ability to get to the bottom of the issues in the case, and to test various theories in conjunction with counsel, would be constrained to the detriment of both the client and the tribunal's fact-finding mission.[54]

Third, document production tends to increase the cost of a case. While document production requests could, in theory, be tailored to seek production of only a few specified documents, this

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[53] V.V. Veeder Q.C., *The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith*, 18 ARB. INT'L 431, 445 (2002).

[54] Diane Sumosky, *ABA Recommends Exempting Draft Expert Reports and Certain Attorney-Expert Communications from Discovery*, 3 EXPERT ALERT, SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION 1, 4-5 (2007).

has not been the result in practice. By opening up counsel-expert communications to document production requests, document production overall would increase in cost.

Fourth, as the U.S. experience reveals, increased discoverability of counsel-expert communications rarely makes counsel-expert communications more transparent or experts more neutral. Instead, such discovery tends to result only in additional costs and inefficiencies. Faced with the threat of discovery of their communications with their experts, U.S. litigation counsel have been forced to become shrewder, and have become accustomed to minimizing any interaction with testifying experts that might create a paper trail. U.S. litigation counsel and testifying experts rarely exchange edited drafts,[55] and confine their discussions regarding possible edits to in-person meetings or marathon conference calls. Counsel also seek to evade the temporal reach of a production order by discussing an expert's theories and opinions well in advance of the drafting of any report and sometimes even before an expert is retained.[56] Because the strict disclosure requirements under the U.S. Federal Rules of Civil Procedure apply only to testifying experts, parties with sufficient resources also frequently retain a second expert, who acts as a consultant with whom counsel can freely communicate.[57] This use of "*shadow experts*" is also widespread in other jurisdictions that allow broad discovery of counsel-expert communications.[58] Finally, counsel in the United States often agree with opposing counsel that draft expert reports and counsel-expert communications are protected from discovery,[59] thereby evading the effect of the broad discovery rules.

Fifth, if the objective is absolute expert impartiality, *party*-appointed experts are, by definition, problematic. There are many areas of technical and legal expertise where divergent opinions can validly be held.[60] It is natural for a party to appoint an expert whose opinions fit the party's theory of the case. In this context, the subtle benefit of enhanced independence that may be occasioned by the discoverability of counsel-expert communications is outweighed by the cost

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55 Rachel Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, 4:3 TRANSNAT'L DISPUTE MGMT., at 4 (2007), *available at* http://www.transnational-dispute-management.com/.

56 Adam Bain, *Working with Expert Witnesses in the Age of Electronic Discovery*, 56 THE UNITED STATES ATTORNEYS' BULLETIN 35, 42 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5603.pdf.

57 Rachel Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, 4:3 TRANSNAT'L DISPUTE MGMT., at 2 (2007), *available at* http://www.transnational-dispute-management.com/.

58 BC Justice Review Task Force, *Effective and Affordable Civil Justice*, 33 (2006), *available at* http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf.

59 Adam Bain, *Working with Expert Witnesses in the Age of Electronic Discovery*, 56 THE UNITED STATES ATTORNEYS' BULLETIN 35, 43 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5603.pdf.

60 Elizabeth Birch, *The Widening Role of Experts in the Changing Fields of Arbitration and ADR*, 2:1 TRANSNAT'L DISPUTE MGMT., at 2 (2005), *available at* http://www.transnational-dispute-management.com/ ("*In the context of experts, I believe that it is often forgotten that there is seldom one truth and this applies not only in factual situations, but in relation to expert evidence as well. Equally eminent experts from the same field may hold different opinions, each validly held*.").

and harm to the process that arises when counsel-expert communications are constrained by fear of discovery.

The rules allowing extended disclosure of counsel-expert communications are now being rolled back in some jurisdictions because of the difficulties and costs discussed above. In the United States, the American Bar Association (the "**ABA**") has recommended that the U.S. Federal Rules of Civil Procedure be amended "*to protect from discovery draft expert reports and communications between an attorney and a testifying expert relating to an expert's report*." The amendment is currently being considered by the U.S. Supreme Court.[61] The ABA also recommended that, pending such amendment, counsel enter voluntary stipulations protecting from discovery draft reports and counsel-expert communications.[62] Similarly, in the Canadian province of British Columbia, a judicial reform task force has recommend narrowing the rules regarding discovery of counsel-expert communications because of the widespread use of "*shadow experts*" (*i.e.*, consultants with whom counsel can freely discuss the case) alongside testifying experts, and the costs associated with such practice.[63] In England, although Lord Woolf, commissioned to draft a report on Access to Justice in the 1990s, initially recommended that all counsel-expert communications be discoverable to "*prevent the suppression of relevant opinions or factual material which did not support the case put forward by the party instructing the expert*," Lord Woolf's final report ultimately rejected wide-ranging disclosure of counsel-expert communications on the basis of similar concerns.[64]

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[61] The amendment would take effect as of December 1, 2010, unless the U.S. Congress acts to prevent its implementation. Editor, *Proposed Amendment to Fed. R. Civ. P. 26 Would Change Expert Witness Disclosure And Discovery Requirements*, FEDERAL EVIDENCE REVIEW, Oct. 30, 2009, *available at* http://federalevidence.com/print/554.

[62] ABA, *Resolution 120A*, *Discoverability of Expert Reports*, Adopted by the House of Delegates August 7-8, 2006, *available at* http://www.abanet.org/litigation/standards/docs/120a_policy.pdf.

[63] The BC Justice Review Task Force thus explained: "*Parties need access to the facts upon which the expert's opinion is based, but we believe that the benefits to be gained from full disclosure of an expert's file are outweighed by the cost of the resulting incentive to hire a second consulting expert. We therefore recommend that experts whose reports are served must disclose only the facts, including test results, upon which the expert has relied in forming his or her opinion*." BC Justice Review Task Force, *Effective and Affordable Civil Justice*, 33 (2006), *available at* http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf. The New Rules of the Supreme Court of British Columbia will take effect on 1 July 2010.

[64] *Access to Justice: Final Report by the Right Honourable the Lord Woolf*. London: H.M. Stationery Office, 1996, Chapter 13, ¶ 31, *available at* http://www.dca.gov.uk/civil/final/index.htm ("*The point has been made that experts must be free to submit drafts to clients and their legal advisers, so that factual misconceptions can be corrected. A further objection is that a great deal of time could be wasted if all these documents were disclosable, because the opposing party would have to comb through the various versions of a report to identify any changes, the reasons for which would not always be clear in any event. Another possibility is that lawyers and experts might begin to subvert the system by avoiding written communication in favour of off the record conversations*."). *See also Access to Justice: Interim Report by the Right Honourable the Lord Woolf*. London: H.M. Stationery Office, 1995, *available at* http://www.dca.gov.uk/civil/interim/woolf.htm.

IV. Conclusion

Counsel in international arbitration can feel free to communicate with their party's experts unconstrained by fear that, in the ordinary circumstance, their communications will be subject to production to the other side and to the arbitrators. There are exceptions to this rule, for documents referenced or relied upon by an expert, and (potentially) for documents pertaining to the scope of an expert's engagement. International arbitrators also retain discretion to require production if there is an adequate basis to find that the counsel-expert relationship has been abused and that a production order is needed. Experienced international arbitrators and practitioners remain, however, broadly opposed to the production of counsel-expert communications.

Opposition to production of counsel-expert communications is justified by the importance of unconstrained collaboration between counsel and experts, as such collaboration affects both the quality of the representation provided to the client and the quality and accessibility of the expert evidence submitted to the arbitral tribunal. Counsel activism in the expert report drafting process does not mean that the work product generated by a collaborative effort belongs to the counsel rather than to the expert, or that the expert will inevitably become an advocate for the party. An arbitral tribunal will quickly lose patience with expert evidence that is so tainted. Rather, counsel's assistance is often needed to edit and reformulate an expert draft in order to make the report of use to the arbitral tribunal. The suggestion that increased discoverability of counsel-expert communications promotes expert independence and neutrality is belied by the experience of those national jurisdictions which, having implemented broader expert disclosure requirements, are now rolling back those rules because of the associated costs and inefficiency.

Were counsel-expert communications subject to broad production in international arbitration, the consequences would be less refined expert evidence and increased cost and inefficiency, but not enhanced independence or neutrality on the part of experts.