



NEW YORK STATE BAR ASSOCIATION

REPORT BY ARBITRATION COMMITTEE OF DISPUTE RESOLUTION SECTION:

ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES

Unanimously Approved by
NYSBA Executive Committee and
House of Delegates
April 2009

Guidance for Arbitrators in finding the Balance between
Fairness and Efficiency

**NEW YORK STATE BAR ASSOCIATION
DISPUTE RESOLUTION SECTION
ARBITRATION COMMITTEE**

REPORT ON ARBITRATION DISCOVERY

IN DOMESTIC COMMERCIAL CASES

Introduction

Arbitration has been in use for millennia,¹ and has long been on the scene in the United States. George Washington's will had an arbitration clause,² and some labor disputes made use of arbitration beginning in the early 1800s.³ Over the years, arbitration has been viewed as a vehicle for the rapid resolution of disputes. In addition to the ability to select a decision maker with expertise in the pertinent field, a chief attraction of arbitration was that it dispensed with many of the expensive and time-consuming characteristics of litigation while at the same time permitting an expeditious but fair, and final, result.

More recently, as discovery proceedings have exploded in civil actions in the United States, there has been a trend to inject into arbitration expensive elements that had traditionally been reserved for litigation — interrogatories; requests to admit; dispositive motions; lengthy depositions; and massive requests for documents, including electronic data. This has particularly been the case as the use of arbitration has grown for the largest, most complex commercial cases. To an extent, this trend is understandable, since the arbitration of large commercial cases must include enough discovery to permit a fair result in a complex setting. At present, however, discovery in too many commercial arbitrations has gone far beyond a desirable expansion to accommodate increased complexity. In some cases, it has spiraled out of control and has reached a point where some users of arbitration feel that there is little difference between arbitration and litigation. Because of this, some question the need for arbitration's continued existence.

In the context of this history of arbitration as an expeditious proceeding and the recent development of complex discovery on the domestic, large case, commercial arbitration scene, advocates and parties, at times, are faced with uncertainty. Some feel stymied by an "old school" arbitrator who denies expected discovery, while others drown in full blown federal rules discovery where a more truncated proceeding is sought. This perceived need for greater predictability and for enhancement of the handling of discovery in arbitration prompted New York State Bar Association's President, Bernice Leber, to encourage the Association's new Dispute Resolution Section to undertake a study of this issue, and, perhaps, develop some guidelines of use to counsel and arbitrators.

In charging the Section with this task, President Leber recognized that, despite the problem with discovery, arbitration can still offer many benefits: for example, confidentiality and party control not available in court and generally, a less costly, speedier, and more efficient process. Beyond this, arbitration holds great promise for the future. It represents parties' freedom of

¹ Some date arbitration back to the Phoenician merchants. Alexander the Great's father, Phillip the Second, used arbitration as a means for resolving border disputes. Barrett & Barrett, *A History of Alternate Dispute Resolution: The story of a political, social and cultural movement* (Jossey-Bass) San Francisco, 2004. Elkouri & Elkouri, "How Arbitration Works," Fifth Edition. 1999; Bales, Richard C. "Compulsory Arbitration: The Grand Experiment in Employment." 1997. The English used arbitration for commercial disputes as early as 1224. Hill, Marvin F., Sinicropi, Anthony V., "Improving the Arbitration Process: A Primer for Advocates." 1991.

² Bales, *supra*.

³ Nellse, The First American Labor Case. 41 Yale L.J. 165. 1931.

contract, the freedom to design a resolution process that fits their needs and expectations, that balances their notions of due process with efficiency, and that selects a decision maker who they believe will best understand their custom and practice and apply the norms and standards of their field to arrive at a wise, fair, and equitable determination of their dispute.

Pursuing the goal of improving arbitration discovery, in the summer of 2008, the New York State Bar Association's Dispute Resolution Section Chair, Simeon Baum, presented this task to the Section's Arbitration Committee, which, in turn formed a subcommittee (the "Subcommittee") to study arbitration discovery in domestic commercial cases. The Subcommittee is chaired by John Wilkinson, Carroll Neesemann and Sherman Kahn. The Subcommittee recognized that different norms and expectations might apply in the international arbitration context, in the handling of labor disputes, in small claims arbitrations, and in a wide array of other areas for arbitral resolution of disputes. Thus, it bears noting that the Subcommittee limited the scope of its study and comments to the field of domestic commercial arbitration.

In the course of its study, the Subcommittee conducted in-depth interviews with numerous leaders of the New York arbitration bar, including advocates, arbitrators, in-house counsel, and representatives of administering organizations, who brought significantly different perspectives to bear on the question of arbitration discovery. These interviews took the form of a series of in person meetings between Subcommittee members and well known arbitration practitioners and, in addition, Subcommittee members spoke with many other knowledgeable and respected individuals in a more informal manner. The Subcommittee also studied work done by other organizations on the subject of arbitration discovery, including JAMS; the International Centre for Dispute Resolution/American Arbitration Association; the Chartered Institute of Arbitrators; the CPR International Institute for Conflict Prevention and Resolution; the American College of Trial Lawyers; the International Bar Association; and the College of Commercial Arbitrators. The Subcommittee additionally engaged in legal research on a number of topics which related to arbitration discovery, and it reviewed numerous articles and treatises which also were relevant. Emerging from this effort was a group of Precepts which are set forth below and which, if followed, will hopefully help arbitrators effectively handle discovery in domestic, commercial cases in a manner which is both cost-effective and fair, and that – with due regard to freedom of contract – is consistent with the expectations of the counsel and parties who selected the arbitration process.

ARBITRATION DISCOVERY PRECEPTS

The Key Element – Good Judgment of the Arbitrator

While some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, arbitration discovery must be adapted to meet the unique characteristics of the particular case, and there is no set of objective rules which, if followed, would result in one "correct" approach for all commercial cases.

The experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the arbitrator's background, applicable rules, the custom and practice for arbitrations in the industry in question, and the expectations and preferences of the parties and their counsel. Arbitrators must exercise that judgment wisely, to produce a discovery regimen that is specific and appropriate to the given case, to ensure enough discovery and evidence to permit a fair result, balanced against the need for a less expensive and more efficient process than would have occurred if the case had gone to trial.

Attached as Exhibit A is a list of factors which, if taken into consideration by an arbitrator when addressing the type and breadth of arbitration discovery, should assist the arbitrator in exercising judgment in a way that will limit discovery to the extent possible while taking into account all relevant factors.

Early Attention to Discovery by the Arbitrator

It is important that the ground rules governing an arbitration be clearly established in the period immediately following the initiation of the arbitration. Therefore, following appointment, the arbitrator should promptly study the facts and the issues and be fully prepared to preside effectively over the early, formative stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

The type and breadth of the discovery regime in an arbitration is subject to applicable rules, which vary significantly with different administering organizations but lack the specificity that one finds, for example, in the Federal Rules of Civil Procedure. That being so, it is imperative for the arbitrator to avoid uncertainty and surprise by ensuring that the parties understand at an early stage what the basic ground rules for discovery are going to be. Early attention to the scope of discovery increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in concrete discovery disputes.

The type and breadth of arbitration discovery should be high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, an early, formative discussion about discovery should be attended by in-house counsel or other party representatives, as well as by

outside counsel. If practicable, it may also increase the likelihood of an early, meaningful understanding about discovery if the first pre-hearing conference is an in-person meeting, as opposed to a conference call.

The arbitrator will enhance the chances for limited, efficient discovery if, at the first pre-hearing conference, he/she sets ambitious hearing dates and aggressive interim deadlines which, the parties are told, will be strictly enforced, and which, in fact, are thereafter strictly enforced.

Where appropriate, the arbitrator should explain at the first pre-hearing conference that document requests:

should be limited to documents which are directly relevant to significant issues in the case or to the case's outcome.

should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and

should not include broad phraseology such as “all documents directly or indirectly related to.”

Party Preferences

Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion which is commonly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, the arbitrator must respect that decision, since arbitration is governed by the agreement of the parties. In such circumstances, however, the arbitrator should ensure that the parties have knowingly agreed to such broad discovery and that they have intentionally withheld from the arbitrator the power to limit discovery in any fashion. The arbitrator should also make sure that the parties understand the impact of an agreement for broad discovery by discussing the cost of the course on which the parties propose to embark and the benefit or negative consequences likely to be derived therefrom. The arbitrator should endeavor to have these communications with in-house counsel or other party representatives, as well as with outside counsel, to ensure that the parties, themselves, fully understand the discovery decision.

If, after discussion with the arbitrator, the parties still wish to engage in expansive discovery, the arbitrator should, nonetheless, pursue agreement on limitations such as the number and length of depositions, and the total time period in which depositions and other forms of discovery are to be conducted.

Where one side wants broad arbitration discovery and the other wants narrow discovery, the setting is ideal for the arbitrator to set meaningful limitations since the arbitrator has far more latitude in such circumstances than when all parties have agreed on broad, encompassing discovery.

E-Discovery

The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process.

To be able appropriately to address issues pertaining to e-discovery, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the format in which documents are produced, and the availability and need (or lack thereof) for production of "metadata." A basic understanding by the arbitrator of e-discovery technology and terminology can help the arbitrator reduce discovery costs for the parties.

While there can be no objective standard for the appropriate scope of e-discovery in all cases, an early order containing language along the following lines can be an important first step in limiting such discovery in a large number of cases:

There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.

Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata with the exception of header fields for email correspondence.

Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to further allocation of costs in the final award.

Legal Considerations

Section 10 of the Federal Arbitration Act provides that one of the very few ways an arbitration award can be vacated is "where the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy." Some arbitrators tend to grant extensive discovery out of concern that any other approach might lead to a vacated award under Section 10. The Subcommittee believes, however, that this concern is greatly overstated and that very few arbitration awards are vacated because the arbitrator put strict limits on discovery in the interests of efficiency and cost-effectiveness.

Some advocates fear malpractice claims if they fail to pursue scorched earth tactics in connection with arbitration discovery. Such a concern ignores the possibility that the mindless pursuit of marginal discovery or the failure to seek reasonable limits on discovery could also lead to a claim for malpractice. In any case, there should be candid communication between attorney and

client in the early stages of an arbitration with respect to the scope of discovery that is to be pursued.

Arbitrator Tools

While arbitrators are expected to act in a deliberate and judicious fashion, always affording the parties due process, it is also essential for the arbitrator to maintain control of the proceedings and to move the case forward to an orderly and timely conclusion. The arbitrator has many tools that can be used both to ensure the fairness of the proceedings and to prevent disruption in the rare case where one side may withhold its cooperation. Those tools may include, for example, the making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue, the preclusion of proof, and/or the allocation of costs. Depending upon the applicable institutional rules and arbitration law, it may be possible to award attorneys' fees and, in extreme cases, other monetary sanctions against an obstructing party, Superadio Ltd. P'ship v. Winstar Radio Productions, 446 Mass. 330 (2006) (discovery abuse in AAA arbitration); Goldman Sachs & Co. v. Patel, 1999 N.Y. Misc. LEXIS 681* 17-23 (S. Ct. N.Y. Co.) (NASD arbitration), and possibly even against obstructing counsel. On the last point, see Polin v. Kellwood Co., 103 F. Supp.2d 238 (S.D.N.Y. 2000) (monetary award against counsel affirmed), aff'd, 34 Appx. 406 (2d Cir.), cert denied, 537 U.S. 1003 (2002). But see In re Interchem Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG, 378 F. Supp.2d 347, 355-57 (S.S.N.Y. 2005) (monetary award against counsel vacated); see also Millmaker v. Bruso, 2008 U.S. Dist. LEXIS 5548 (S.D. Tex. 2008).

Sanctions may even include the resolution of a claim or defense against a party. See First Preservation Capital, inc. v. Smith Barney, Harris Upham & Co., 939 F. Supp.1559 (S.D. Fla. 1996) (NASD arbitration); Patel, supra (NASD arbitration; failure to pay monetary sanction and failure to obey arbitrator orders).

Despite some disagreement as to the outer limits of the arbitrator's authority to impose sanctions, and the paucity of cases on the subject, the cases that do exist demonstrate the courts' generally deferential approach to review of such awards.

Artfully Drafted

Arbitration Clauses

There is significant potential for dealing with time and other limitations on discovery in the arbitration clauses of commercial contracts. An advantage of such drafting is that it is much easier for parties to agree on such limitations before a dispute has arisen. A drawback, however, is the difficulty of rationally providing for how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses may be most productive in circumstances in which parties have a good idea from the outset as to the nature and scope of disputes that might thereafter arise.

In order for rational time and other discovery limitations to be effectively included in an arbitration clause, it is necessary that an attorney with a good understanding of arbitration be involved in the drafting process.

Depositions

Because depositions have traditionally not been a major part of the arbitration process, the best exercise of an arbitrator's judgment might be to direct no depositions or the minimum number of depositions in instances, for example, where the parties' positions are already well known or are fully reflected in surrounding documents.

However, the size and complexity of commercial arbitrations have now grown to a point where one or more depositions can serve a real purpose in many instances. In fact, at times, the absence of any depositions in a complex arbitration can significantly lengthen the cross-examination of key witnesses and unnecessarily extend the completion of the hearing on the merits. So too, a limited deposition in advance of document requests might serve to focus and restrict the scope of document discovery and/or reduce the risk that the other party is hiding relevant evidence.

If not carefully regulated, deposition discovery in arbitration can get out of control and become extremely expensive, wasteful and time-consuming. In determining whether and what scope of depositions may be appropriate in a given case, an arbitrator should balance these considerations, consider the factors set forth in Exhibit A, and confer with counsel for the parties. If an arbitrator determines that it is appropriate to permit depositions, it may make sense for an arbitrator to solicit agreement at the first pre-hearing conference on language such as the following

Each side may take #* discovery depositions. Each side's depositions are to consume no more than a total of #* hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed #* weeks.⁴

Discovery Disputes

It is essential that arbitration discovery disputes be resolved promptly and efficiently since exhaustive discovery motions can unduly extend the discovery period and significantly add to the cost of the arbitration. In addressing discovery disputes, the arbitrator should consider the following practices which can increase the speed and cost-effectiveness of the arbitration:

Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone. While the designated panel member may still wish to consult the other arbitrators on matters of importance, the choice of a single arbitrator to decide discovery issues can nonetheless avert scheduling difficulties and avoid the expense and delay of three people separately engaging in the laborious tasks related to resolving discovery issues.

⁴ The asterisked numbers can of course be changed to comport with the particular circumstances of each case.

Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.

The parties should be required to negotiate discovery differences in good faith before presenting any remaining issues for the arbitrator's decision.

The existence of discovery issues should not impede the progress of discovery in other areas where there is no dispute.

Discovery & Other Procedural Aspects of Arbitration

Other aspects of arbitration have interplay with, and impact on, discovery in arbitration, as discussed below.

1. Requests for Adjournments

Where parties encounter discovery difficulties, this circumstance often leads to a request for adjournment and the possible delay of the hearing. While the arbitrator may not reject a joint application of all parties to adjourn the hearing, the fact is that such adjournments can cause inordinate disruption and delay by needlessly extending unnecessary discovery and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further discovery (as opposed to personal considerations), the arbitrator should ensure that the parties understand the implications of the adjournment they seek and, if possible and except for exceptional circumstances, the arbitrator should try to dissuade them from the adjournment in a way that would still accommodate their perceived needs. The arbitrator may request that the represented parties attend any conference to discuss these subjects if, in the arbitrator's judgment, the presence of clients may facilitate the adoption of a practical solution.

If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Particularly with busy arbitrators and advocates, such requests can cause long delays. In general, courts are well aware that a core goal of arbitration is speed and cost-effectiveness and will not disturb an arbitrator's rejection of an unpersuasive request for an adjournment. However, the arbitrator should carefully consider the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and any earlier requests for adjournments.

Last minute requests for adjournments sometimes come as a complete surprise to the arbitrator who assumed all was going well because he/she had not heard from the parties for months. In such circumstances, the arbitrator may be at least in part responsible for the breakdown of the process since the arbitrator should have scheduled periodic conference calls throughout the pre-hearing phase. When the arbitrator does this, he/she will likely get an early sense of problems in maintaining the pre-hearing schedule and will be in a much better position to deal with such problems at a relatively early stage rather than at the eleventh hour.

2. Written Witness Statements

The use of written witness statements in lieu of direct testimony (“Witness Statements”) has certain benefits. Witness Statements can save considerable time at the hearing. From a discovery perspective, they can avoid or lessen the need for depositions since the cross-examining party has detailed advanced notice of the witness’ direct testimony. The effectiveness of witness statements as a discovery tool is greatly increased if they are produced relatively early in the proceedings.

The use of witness statements also has drawbacks, *i.e.*: (i) they are written by lawyers and often do not reflect how the witness would actually have said something; (ii) being written by lawyers, the Witness Statements can be very expensive; (iii) the witness often trusts the lawyer too much and only cursorily reviews the Witness Statement before signing it; and (iv) oral direct testimony can be a good time for an arbitrator to assess credibility from a perspective other than cross-examination.

Thus, use of Witness Statements should be considered on a case by case basis, particularly in connection with secondary witnesses.

3. Discovery and Dispositive Motions

In arbitration, “dispositive” motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances an appropriately framed dispositive motion can eliminate the need for expensive and time consuming discovery. On balance, the arbitrator should consider the following procedure with regard to dispositive motions:

Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Exhibit A

Relevant Factors In Determining The Appropriate Scope Of Arbitration Discovery

Nature of The Dispute

The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.

The amount in controversy.

The complexity of the factual issues.

The number of parties and diversity of their interests.

Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

Whether there are public policy or ethical issues that give rise to the need for an in depth probe through relatively comprehensive discovery.

Whether it might be productive to initially address a potentially dispositive issue which does not require extensive discovery.

Agreement of The Parties

Agreement of the parties, if any, with respect to the scope of discovery.

Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.

The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

Relevance and Reasonable Need For Requested Discovery

Relevance of the requested discovery to the material issues in dispute or the outcome of the case.

Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.

Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.

Whether denial of the requested discovery would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.

Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.

To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.

Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.

The time and expense that would be required for a comprehensive discovery program.

Whether all or most of the information relevant to the determination of the merits is in the possession of one side.

Whether the party seeking expansive discovery is willing to advance the other side's reasonable costs and attorneys' fees in connection with furnishing the requested materials and information.

Whether a limited deposition program would be likely to: (i) streamline the hearing and make it more cost-effective; (ii) lead to the disclosure of important documents not otherwise available; or (iii) result in expense and delay without assisting in the determination of the merits.

Privilege and Confidentiality

Whether the requested discovery is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.

Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

Characteristics and Needs of The Parties

The financial and human resources the parties have at their disposal to support discovery, viewed both in absolute terms and relative to one another.

The financial burden that would be imposed by a broad discovery program and whether the extent of the burden outweighs the likely benefit of the discovery.

Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.

The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.