Discovery in Commercial Arbitration: *How Arbitrators Think*

Discovery in arbitration is different from the virtually unlimited discovery process used in litigation. The reason is that the arbitrator's job is to deliver a faster and less expensive process. This article discusses how arbitrators handle discovery in arbitration and the considerations they take into account when deciding how much and what type of discovery to allow. It also discusses the approaches to discovery taken in arbitration rules and the Revised Uniform Arbitration Act.

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When a case has been filed in federal or state court, litigators generally have a good idea of what discovery will be allowed. Federal and state rules of civil procedure set forth the standards for discovery in litigation, and a large body of case law elaborates on these standards.

Do we have anything similar in arbitration? Can counsel and the parties know with reasonable certainty how much discovery will be allowed in their commercial arbitration? What kind of discovery is typically permitted? Are the answers to these questions entirely within the discretion of the arbitrator? Is there a governing standard?

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Given the confidentiality of arbitration, there are generally no published arbitral decisions on discovery questions in arbitration. So in this article I set forth some tentative answers to these questions in the context of domestic commercial arbitration based on my personal experience as an arbitrator in over 125 commercial cases, the varied experience of arbitrators with whom I have served. I also discuss the relevant rules of the American Arbitration Association (AAA) and other arbitration institutions, as well as the treatment of discovery in the Revised Uniform Arbitration Act (RUAA).

Rationale for Discovery in Arbitration

Arbitrators generally have three primary objectives in deciding discovery disputes in a commercial case: (1) a speedier disposition than in litigation; (2) a less expensive process than litigation; and (3) a fair opportunity for both sides to prepare and try the case. Satisfying each of these objectives depends in large measure on the amount of discovery allowed in the arbitration. To obtain a speedier and less costly disposition, discovery, which consumes the bulk of time and attorney fees in litigation, needs to be more limited than in litigation. Yet the parties must have the discovery they need for a fair hearing.

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As a result, the discovery that is automatic and often virtually unlimited in litigation is subject to close scrutiny in arbitration. The arbitration goals cited above cause arbitrators to require the parties to *justify* the discovery they seek. There is a bedrock amount of discovery in arbitration, particularly the reasonable disclosure of the parties' claims and defenses and the exchange of relevant documents. But beyond that, parties are generally only allowed to take depositions and serve interrogatories if they can demonstrate a real need for them. Of course, the parties' counsel may agree to more extensive discovery, although that can compromise the two main benefits of arbitration.

Discovery in Commercial Litigation

The discovery phase in a multi-million dollar commercial litigation typically takes years, not months. First counsel for the parties prepare and serve very broadly worded document discovery requests that ask to see all documents "in connection with or relating to" one subject or another. They also invariably prepare lengthy interrogatories and sometimes "requests to admit." They have to review and number their client's documents for document production purposes. Often, each side files objections to the other side's document requests, which could include claims of attorney-client privilege or attorney work product. The parties could end up in protracted motion practice fighting about these documents. Meanwhile, each side serves deposition notices on the other. It is not unusual to receive a dozen or even dozens of such notices. Attorneys for the parties commonly seek to depose everyone who may have relevant information, even if the testimony is likely to be cumulative or redundant. They don't want to leave any stone unturned.

Litigators hate surprises and they generally find it unacceptable to wait until trial to take the testimony of important witnesses who are not under their control. They typically seek to depose every witness who could possibly show up at trial, even those who are fully on the record in documents and hence whose testimony is readily subject to cross-examination.

Although depositions are scheduled for months down the road, they rarely take place as scheduled because the attorneys or the witnesses are busy that day. It is common to defer depositions multiple times. A year could go by and they still have not been taken. Finally one party may get fed up and seek an order compelling the completion of discovery. If not, the judge may see that this case is not moving forward and will take matters into his or her own hands. The process initially developed to foster fair trials by avoiding unfair surprise at trial has taken on a life of its own, one that eats up years of time and incurs huge expenses for each side, often without telling counsel much that they did not already know from the documents and their own witnesses.

When depositions are taken, the lawyer taking

them may make the session as long as possible in order to be sure to exhaust the deponent's knowledge. Sometimes, depositions result in disputes that have to go before a judge. This can occur when the deponent's counsel directs the witness not to answer or unilaterally cuts short the deposition.

Meanwhile, each side "responds" to the other's interrogatories and requests to admit, usually by giving the narrowest possible answer or no answer.

Discovery in Arbitration

This is all very different in commercial arbitration. Arbitrators usually want the hearing to be scheduled within three to eight months. It would be a rare arbitration, and a particularly large or complex one at that, in which the arbitrators would be happy with an expanded hearing schedule that exceeds eight months. Arbitrators on the panel of the American Arbitration Association (on which I serve) are trained to believe it is their job to deliver the expedited proceeding that arbitration promises and the parties bargained for.

Thus, arbitrators generally have a different perspective on discovery. They do not want the parties to engage in a fishing expedition of the kind that is typical of discovery in litigation. They want to allow just enough discovery to permit each side to prepare and try its case, but no more. Arbitrators have a strong belief that witnesses should testify only once, and that is at the hearing. So there is no need to incur the expense of earlier (and generally protracted) depositions.

If a party reasonably needs to examine a person under the control of the adversary and asks the arbitrator to order this witness to be produced, the arbitrator will usually obtain the adversary's agreement to produce the witness at the hearing. Similarly, when the exigencies of a case require the testimony of a non-party witness who reside within subpoena-range of the hearing, the arbitrator will subpoena the witness but generally only for purposes of the hearing (i.e., not for a deposition).

When non-party witnesses reside beyond subpoena range, they could still agree to testify, and when they do agree, arbitrators prefer to have them testify live at the hearing. When it is difficult getting them there in person, video-conference technology makes it possible to have them virtually present at the hearing. Testimony by telephone, which involves little expense, is also possible and frequently used where it makes sense in the context of the particular case.

This does not mean that depositions are never allowed in arbitration. That is not the case. If the parties make a convincing case that a reasonable number of depositions of limited duration seem necessary, arbitrators will generally permit them.

Despite their penchant for deposing every witness, litigators who arbitrate have learned that they have the skills to capably cross-examine the other side's witnesses without depositions. To conduct the cross, they use the information they have learned from their informal investigation of the facts of the case, documents, witness lists and expert reports exchanged before the hearing. The huge number of depositions typically taken in litigation is not as important as litigators have come to believe.

What Is Reasonable?

The amount of discovery reasonably needed to arbitrate a particular case depends on the facts and circumstances. It is reasonable to need documents specifically related to the dispute. It is also reasonable to need to know the particulars of the other side's claims, defenses, purported damages and the like. If requested, arbitrators will generally direct that such information be provided.

Arbitrators typically establish the idea at the preliminary hearing that they expect counsel to work out any discovery issues that arise. When the parties' attorneys cannot resolve these issues by themselves, arbitrators are prepared to direct them if necessary.

The Size of the Case

Parties are increasingly submitting huge commercial cases to arbitration. Cases in the tens and hundreds of millions of dollars and more are not uncommon. Some general counsel prefer to arbitrate cases of all sizes for the opportunity it gives them to pick a highly experienced arbitrator (or panel of arbitrators) with knowledge of the subject matter who can be selected with eyes open, rather than take a chance on the spin of the wheel in the court clerk's office.

Some general counsels at large corporations have stressed the importance of preserving the speed and economy in arbitration. Yet some cases have so much at stake that both parties may agree that they want the "no stone unturned" approach to discovery in arbitration. This is their right since arbitration is a process that belongs to the parties.

In large cases involving multiple issues, arbitrators will generally recognize the need for more substantial document exchanges, and possibly more than a couple of depositions and a limited number of targeted interrogatories. But they nonetheless try to keep the cases moving more expeditiously than would typically happen in court.

The Easy Case

Discovery is easiest when the parties' arbitration clause specifies the scope of discovery. Occasionally the parties provide in their arbitration clause that the federal or state rules of procedure shall apply to discovery in arbitration, resulting essentially in pseudo-litigation before a private judge. In my experience, this is relatively rare (I would say anecdotally that it occurs in fewer than 5% of cases).

Arbitrators will apply the procedures specified in the parties' arbitration agreement. However, they are not prevented from trying to "jawbone" the parties' counsel into agreeing that what they actually need is more limited discovery, not more. ("Jawboning" is the term I use for the practice many arbitrators follow of probing for consensus on pre-hearing issues before ruling on them.) Arbitrators who educate themselves about the case can engage in a meaningful dialogue with the attorneys about what discovery is reasonably necessary (as distinguished from what they have stated is needed) and then build on that foundation to create consensus on a reasonable discovery plan.

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To do this effectively, arbitrators try to develop an early understanding of the case. This is one of the reasons arbitrators invite counsel to discuss the case at the preliminary conference and at interim conferences throughout the discovery period. It is in counsels' interest to project their case as fully as possible whenever the opportunity arises.

The Most Typical Case

Although the parties could include the scope of discovery in their arbitration agreement, they rarely do. Usually the arbitration clause is silent as to the scope of discovery. However, if the agreement calls for arbitration by a particular arbitration institution or provides for arbitration under specific institutional rules, the institution's rules will be incorporated by reference, including the discovery provisions. (For example, an arbitration clause may provide for AAA arbitration or arbitration under the AAA Commercial Arbitration Rules.)

Discovery is normally one of the issues on the table at the first preliminary conference, which, in most instances, is conducted via a conference call. In a commercial case, counsel for the parties usually decide on the scope of discovery before the call is scheduled and advise the arbitrator of their agreement during the course of the conference call. The attorneys commonly agree to exchange relevant documents and to depose two or three of the adversary's witnesses.

Until a dispute arises, arbitrators generally will not get involved in document production issues. The attorneys know their case and if they can agree on document discovery, great.[1]

As to depositions, arbitrators will consider whether their use is really needed. Why depose a witness who lives within subpoena-range of the hearing or a witness under the control of the adversary? Counsel may need to be reminded that arbitration is different from litigation and has economy and efficiency as two of its goals. Often counsel will respond to this by agreeing that depositions are not necessary. Should this lead to concern that they are merely being deferential to the person who will resolve the dispute? Theoretically that is possible. But as a practical matter it should not be a concern if the attorneys understand that the arbitration process is supposed to be different from litigation, the arbitration involves a dispute between parties who are familiar with the matters in contention, and the relevant documents and witnesses will be available at the hearing.

When Both Sides Want Depositions

When cajoling by the arbitrator does not work and both sides want to depose multiple witnesses, the arbitrator must step back and accept the idea that there will be more, rather than fewer, depositions in the case. But the arbitrator can continue to try to limit their number and duration.

In the unusual case where this does not work, arbitrators generally will respect counsels' agreement on the subject and allow the depositions to be taken, after warning them of the effect on the time and cost of the arbitration.

When One Side Does Not Want Depositions

What if one side wants depositions and other discovery and the other side objects? In that situation, there is a discovery dispute on which the arbitrator must rule. The arbitrator will generally decide based on what he or she thinks is fair, con-

sidering the need for an expeditious and economical process.

Some arbitrators will decide discovery disputes based on the parties' briefs. Others will hold a conference with the attorneys for both sides after the briefs are submitted, at which point the arbitrator will have a serious talk with counsel as they go through each disputed item one by one. I think this approach yields more enlightened rulings. Often, it is only necessary for the arbitrator to go through a few disputed items or types of items to establish guidelines, whereupon the attorneys work out the rest. Notwithstanding positions taken in party briefs, the attorneys tend to move towards consensus when the arbitrator suggests restraint on both sides in the service of figuring out what discovery would provide the requesting party with information it reasonably needs while protecting the objecting party's interests. When a sensible accommodation of each side's rights and interests is reached, the arbitrator will incorporate it in a ruling.

Where no consensus is reached, the arbitrator will have to go it alone, deciding the dispute based on the goals of arbitration and the interests and needs of both sides. The ruling will often bear a striking resemblance to the approaches the arbitrator suggested in the conference with the parties on the discovery dispute.

AAA Rules

Decision making by arbitrators on discovery questions is not typically based on rules. This is because most arbitration rules give wide discretion to the arbitrator to determine the scope of discovery. Attorneys rarely argue for or against discovery based on an institution's arbitration rules. Yet it is interesting to see that the "expeditious/economical/fair" mantra that arbitrators generally use to decide discovery disputes reflects principles in the arbitration rules of leading arbitration organizations.

The AAA Commercial Arbitration Rules focus on information exchanges.[2] Rule 21(a) provides that the arbitrator, "consistent with the expedited nature of arbitration," may direct "the production of documents *and other information*." (Emphasis added) Rule 21(c) provides that the arbitrator "is authorized to resolve any disputes concerning the exchange of information." Thus, this rule places discovery issues in the discretion of the arbitrator, subject to the need for an expeditious proceeding.

The AAA Procedures for Large, Complex Commercial Disputes (which are included in the AAA Commercial Arbitration Rules) recognize the goals of having "a just, speedy and cost-effective resolution." Rule L-4(a) provides that "[a]rbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution...." These rules also recognize the discretion of arbitrators in discovery matters. Rule L-4(c) provides: "The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate." The rule contemplates that if the parties cannot agree on discovery, "the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery."[3] Interestingly, Rule L-4(c) gives the arbitrator the discretion, in the interests of an expedited process, to override even the parties' agreement as to discovery.

Rule L-4(d) also explicitly addresses the issue of depositions and interrogatories. They may be permitted "in the discretion of the arbitration(s) and upon good cause shown …consistent with the expedited nature of arbitration" if the person to whom they are addressed has information "determined by the arbitrator to be necessary to determination of the matter."

Finally, Rule L-4(g) authorizes the arbitrator to resolve any discovery disputes.

The AAA's Employment Arbitration Rules use different language but are the same in principle. Rule 9 authorizes the arbitrator to order "discovery, by way of deposition, interrogatory, document production or otherwise" if the arbitrator "considers it necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."[4]

Other Providers and the RUAA

Rule 17 of the JAMS Arbitration Rules is comparable to the AAA Rules, except that it contemplates one deposition per side, while leaving additional depositions to the discretion of the arbitrator based on "the reasonable need" for the information, the availability of other discovery options, and the burdensomeness of the request."[5]

Rule 11 of the Rules for Non-Administered Arbitration promulgated by the International Institute for Conflict Prevention and Resolution's provides that arbitrators may permit such discovery as they deem appropriate, "taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."[6]

The RUAA's[7] discovery provisions are similar to the provider rules above. The arbitrator's authority as to discovery is in Section 17(c). It pro-

vides: "An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." This provision covers discovery depositions.

Comment 3 to Section 17 states in the first paragraph that the approach to discovery in subsection (c) "follows the majority approach" under the case law involving the Federal Arbitration Act (FAA) and the 1955 Uniform Arbitration Act, which is that "unless the contract specifies to the contrary, discretion rests with the arbitrators whether to allow discovery." The second paragraph notes that, although Section 17(c) allows an arbitrator to permit discovery so that the parties can obtain necessary information, "the intent of the language is to limit that discovery by considerations of fairness, efficiency, and cost."

Depositions for purposes of the hearing are addressed in Section 17(b). This section states: "In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing." This provision goes on to say that "[t]he arbitrator shall determine the conditions under which the deposition is taken."

Non-Party Witnesses

The above focuses on party discovery. Complex and largely unsettled issues arise when information is needed from non-party witnesses who are beyond subpoena-range of the site of the arbitration.[8] These issues include the extent to which, under the FAA[9] and other laws, a non-party witness may be compelled to produce documents or give testimony at a deposition or in a formal "hearing session" where he or she is located, and the related question of whether the arbitrators (or one member of a panel) may preside over the taking of this witness's testimony at that locale. These issues are beyond the scope of this article. However, it is worth noting again that non-party witnesses who are outside the jurisdiction of an arbitrator's subpoena are frequently willing to testify by teleconference or telephone conference at a time convenient to them in response to an informally transmitted subpoena, even though they could challenge the subpoena in court, or even ignore it and await enforcement proceedings. Some witnesses agree because of the potential time and expense of contesting the subpoena. Others do so out of a spirit of cooperation or respect for the arbitration process.

Conclusion

The principles for resolving discovery-related issues in arbitration are clear, sensible and workable. The vast majority of party discovery disputes in commercial cases are worked out among counsel. When counsel cannot agree, arbitrators will rule on the discovery issues by balancing the arbitration objectives of providing an expeditious and economical yet fair proceeding. Parties may provide for more expanded discovery in their arbitration agreements or they may subsequently agree to such discovery before the hearing. ■

ENDNOTES

[1] The subject of electronic discovery is beyond the scope of this article. Parties in arbitrations are often willing to limit electronic discovery in the interests of having an expeditious and economical proceeding, although there will increasingly be cases where it will be important. See, e.g., Irene C. Warshauer, "Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence," 61(4) *Disp. Res. J.* (Nov. 2006/Jan. 2007).

[2] The AAA rules are available at www.adr.org.

[3] The extent of an arbitrator's power to order sanctions against parties for discovery abuse is addressed in Philip D. O'Neill, "The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse," 60(3) *Disp. Resol. J.* (Nov. 2005/Jan. 2006); Philip D. O'Neill, "Update: Mass. Allows Arbitrators to Award $$ Sanctions to Remedy Discovery Abuse," 60(2) *Disp. Resol. J.* (May-July 2006).

Section 17(d) of the RUAA provides, that the arbitrator may "take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state." The RUAA is available at www.nccusl.org.

[4] The AAA Employment Arbitration Rules are available at www.adr.org.

[5] JAMS Comprehensive Arbitration Rules and Procedures are available at www. jamsadr.com.

[6] CPR's rules are available at www.cpradr.org.

[7] See n. 5.

[8] See, e.g., Leslie Trager, "The Use of Subpoenas in Arbitration," 62(4) *Disp. Resol. J.* (Nov. 2007/ Jan. 2008).

[9] 9 U.S.C. § 7.