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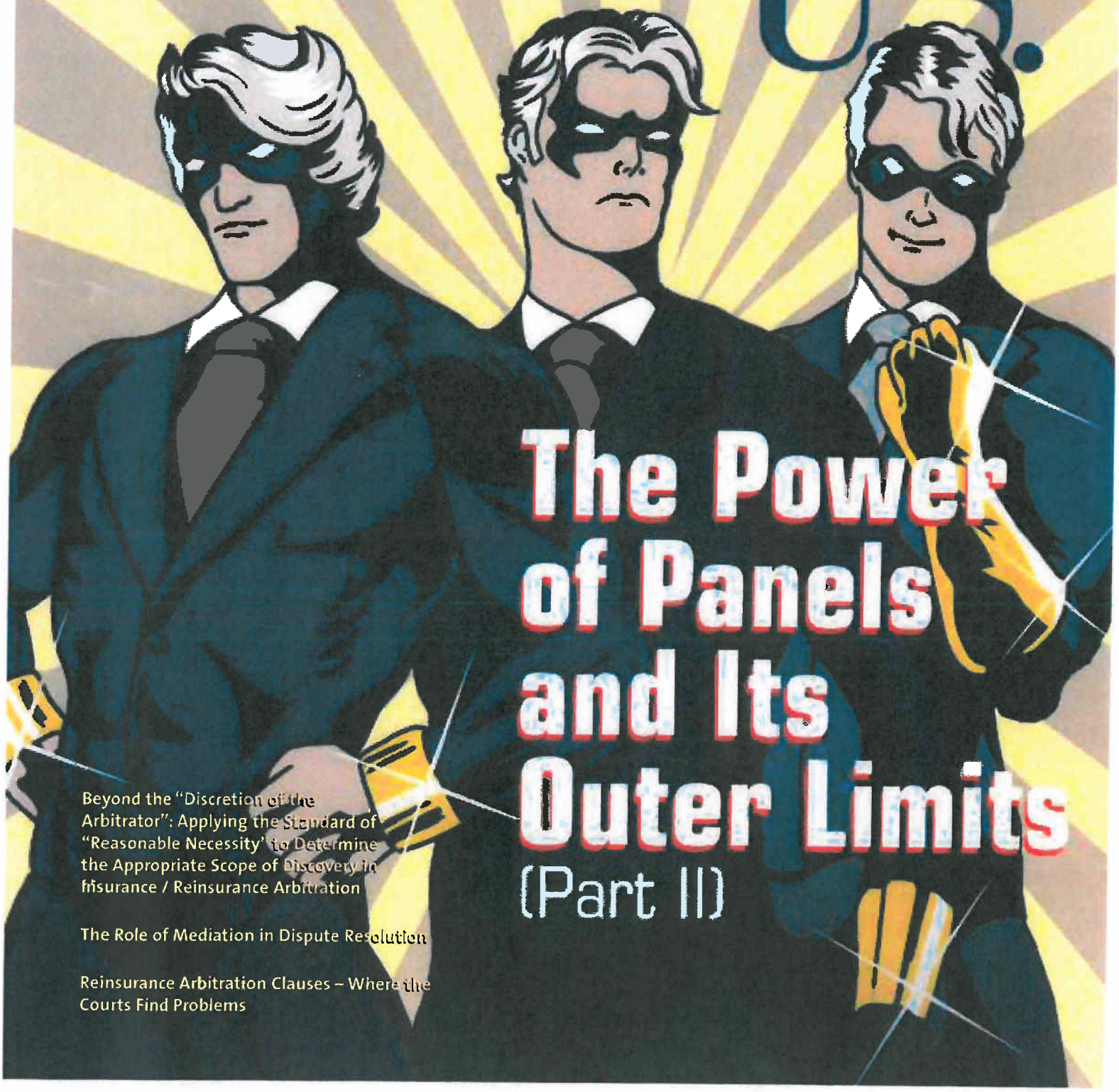

The Power of Panels and Its Outer Limits (Part II)

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feature

Beyond the "Discretion of the Arbitrator": Applying the Standard of "Reasonable Necessity" to Determine the Appropriate Scope of Discovery in Insurance/Reinsurance Arbitration

Charles J. Moxley, Jr.

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The concern of stakeholders in insurance and reinsurance arbitration about the morphing of arbitration into full-blown litigation with unbridled discovery seems to be growing. The fact that it is largely self-inflicted (we certainly have the ability to influence if not control the process) is cold comfort. Insurers and reinsurers alike feel trapped between the Scylla of open-ended expense and delay and the Charybdis of losing a case because of evidence not unearthed.

Is arbitration capable of providing parties with adequate discovery to investigate and prepare their case without opening the floodgates of unbridled court style discovery?

The answer is emphatically "Yes!" Arbitration provides both a process for achieving this and a standard whereby it may be achieved.

In-house counsel expect ingenuity and flexibility from arbitrators in administering cases in such a way as to achieve the arbitration goals of expedition and economy while providing a fair process. Unless arbitrators are able to satisfy this need, arbitration will become the same dinosaur that litigation has become.

ARBITRATION'S PROCESS FOR ACHIEVING EXPEDITIOUS DISCOVERY

Arbitrators in insurance and reinsurance arbitrations are generally expert in the subject matter of the case and are expected to familiarize themselves with the facts of the case early on. By the time of the Organizational Meeting and later follow-up conferences on discovery issues, the arbitrators can put themselves in a position to understand what discovery is reasonably necessary in light of the factual and legal issues in the case. Based on their expertise and experience, arbitrators are able to see beyond counsels' statements of position to what truly needs to be disclosed in light of such issues and how it may be discovered most efficiently.

This requires the panel's getting heavily involved with counsel in framing the issues, specifically with reference to understanding each side's lines of argument as to the matters in contention. It also involves the panel's exploring with counsel what types of evidence will be needed at the hearing and hence may be the subject of discovery—so that discovery can be streamlined, avoiding the litigation-style fishing expedition.[2] This active engagement by the panel in streamlining discovery should continue throughout the case, with regular status conferences.

The panel's proactive role in framing the issues and formulating and overseeing discovery makes all the difference. In not one case in a hundred do judges engage in such a process.[3] Because of caseloads and judicial standards as to discovery, as well as the overall judicial attitude to discovery matters, judges generally determine discovery disputes from on-high, based on the issues broadly construed, as presented by counsel, without getting down and dirty. A court decision in a heavily-contested discovery dispute is typically rooted far more in case law than in a penetrating analysis of the discovery needs of the particular case.

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Is arbitration capable of providing parties with adequate discovery to investigate and prepare their case without opening the floodgates of unbridled court style discovery?

Charles J. Moxley, Jr. is a litigator, arbitrator, and mediator, specializing in complex insurance industry and other disputes. (See biography on page 39.)

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But the process is a demanding one, requiring a radical mindshift. Lawyers serving as advocates and arbitrators today grew up in the world of unbridled federal court discovery, as did many of our client representatives. One's instinct, absent a client or judge reining the process in, is to go for the discovery. The no-stone-unturned mindset feels correct and appropriate; it feels like the standard of care. No one — neither outside counsel nor party-appointed arbitrators nor in-house attorneys nor claims, underwriting or other party representatives — wants to be in the position, after losing a case, of being on the receiving end of the question, "Why didn't you get access to document X or depose witness Y?"

The key insight is that we can achieve this revolution in approach through the arbitration process we already have. The very nature of insurance and reinsurance arbitration means that one needs less evidence to present or defend one's case than would be necessary were the matter being litigated. The arbitrators' familiarity with insurance and reinsurance matters narrows the need for fact and expert testimony. The inapplicability of the rules of evidence broadens the scope of admissible evidence. The self-authenticating nature of most documents in arbitration curtails the need for discovery as to foundations for their admission into evidence. Arbitrators can greatly expedite some cases by bifurcating or hearing certain issues early on that will, if they are decided one way, avoid some or all the rest of the case or narrow its scope. Examples might be deciding early on whether parole evidence will be permitted as to an agreement or whether a case is time barred or whether consequential damages may be recovered (where other damages are relatively small). Cumulatively, these arbitration advantages can substantially curtail the scope of necessary discovery in a case.[4]

So, while parties should, by design, end up getting less discovery in arbitration than in court, that does not mean that, in arbitration, they get less of what they need to be able to prepare and try their case.

ARBITRATION'S STANDARD FOR ACHIEVING EXPEDITIOUS DISCOVERY

Is there a standard that determines the appropriate scope of discovery in insurance, reinsurance and other commercial arbitrations, a principled basis for the arbitrators' determination as to what discovery should or should not be permitted?

Over and again, in discussions of the topic, we hear and read that "Discovery is in the discretion of the arbitrator," as if that were an answer. Virtually never does the discussion go to the next level: On what basis are arbitrators supposed to — do they — exercise this discretion?

The answer, in my view, is that there is such a standard. Based on my experience as an arbitrator in many cases over a 30 year period and review of applicable law and of the guidelines and rules of organizations such as ARIAS•U.S., the Reinsurance Association of America (RAA), the Task Force on Insurance and Reinsurance Disputes, the American Arbitration Association (AAA), JAMS, the International Institute for Conflict Prevention and Resolution (CPR), and others, there is a well-established and broadly understood standard for discovery in arbitration, a standard that a party in an arbitration may confidently present to arbitrators as being the governing standard by which they should be guided.

It is as follows: Absent their having established some other standard, parties in domestic arbitrations are entitled *to whatever discovery, including document production, depositions, and interrogatories, they reasonably need to prepare and present their claims or defenses, but no more.* Parties have a threshold right to reasonable particularization of the claims or defenses asserted against them and to the basic documents, but, beyond that, there is *no presumption of discovery.* Parties must show *actual need.* Discovery, beyond a certain minimum, should be reasonably proportional to the scope of the case. If, as is often the case, information as to a particular issue is available in various ways, parties should develop it in the most economical way practicable. Redundancy should be avoided, as should discovery on matters not in dispute or subject to stipulation or the like. I refer to this as the "reasonably necessary" standard or the standard of "reasonable necessity."

Limiting parties to discovery that they rea-

sonably need requires, as suggested above, that the arbitrators and counsel start focusing on the real issues in the case at the Organizational Meeting.

This standard for discovery is far narrower than that applicable in court cases. Parties in arbitration are generally *not* entitled to discovery of all evidence "reasonably calculated to lead to the discovery of admissible evidence" or even of all evidence relevant to the dispute.[5]

The different standard for discovery in arbitration derives from the nature and objectives of arbitration. Arbitration by definition is intended to be less *expensive* and *more* expeditious than litigation. These characteristics are more than descriptive; they are determinative of the arbitration process. The central reason for the explosive growth in arbitration in recent decades is the huge cost of discovery in litigation and resultant delays.

Arbitration is intended to avoid the unbridled discovery of litigation. *Yet the requirements of expedition and economy in arbitration are subject to the overriding right of a party to have a fair opportunity to prepare and present its claims or defenses.* Arbitrations need to be done expeditiously, but they also need to be done right. The objectives of expedition and economy are to be pursued *in light of* the reasonable discovery needs of the case.

The fact that the "reasonably necessary" standard is judgmental does not detract from its value. The standard supplies the basis for the dialogue between the parties and the arbitrators and for the arbitrators' exercise of their discretion. Arbitrators' deciding what discovery is reasonably necessary in a case based on a standard to that effect is a far cry from their deciding the scope of discovery based solely on personal predilection.

There are corollaries to the "reasonably necessary" standard. As a general proposition, witnesses should not have to testify twice, first at a deposition and then at the hearing.[6] Absent agreement by the parties to the contrary or the need in a particular case to do it differently, each witness should testify only once, preferably live at the hearing. Absent special circumstances, a witness who is controlled by a party and can be brought to the hearing or is within subpoena range of the locale of the hearing should generally not be deposed.[7]

Where, however, few or no depositions are taken and parties will be going into the hearing with a limited sense of the evidence that may emerge, it will often make sense to permit the parties to submit their primary briefing of the case on a post-hearing basis after the facts are in, limiting the pre-hearing briefs to issues that are already more developed.

When necessary, depositions, including videotaped depositions, may be taken and presented at the hearing, but arbitrators' preference for live testimony is generally so strong that teleconferenced real-time testimony is preferred if the witness is not available to appear in person. Indeed, in many instances testimony by telephone will be preferred over even videotaped depositions, where the parties are comfortable with it.

It should not be of concern that arbitrators' decisions on discovery matters will rarely be overturned. Even in litigation, that is generally the case.[8] In addition, finality is one of the prized objectives of arbitration. One selects skilled and trusted arbitrators and they resolve the matter.

In my experience experienced arbitrators generally have an intuitive understanding of the need to resolve discovery disputes based on according parties the discovery they reasonably need, but no more, thereby balancing the goals of fairness, expedition, and economy[9] Yet it is interesting to note that this standard is implicit — and, at times, explicit — in the guidelines and rules of leading arbitration organizations.

I will first review how, as a matter of practice, arbitrators, in my experience, generally handle discovery questions at the various phases of a case and then will analyze the matter in light of applicable guidelines and rules of arbitration organizations, and then in light of applicable law and commentary.

The Parties' Formal Agreement as to the Scope of Discovery

Arbitration is obviously a creature of contract. Parties go into arbitration because they choose to, whether by pre-dispute or post-dispute agreement. They certainly may, by their arbitration agreement, specify what discovery shall be permitted in any arbitration arising under the agreement.

Occasionally I have seen arbitration clauses specifying that a particular body of discovery

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When the parties' agreement does not specify the scope of discovery and counsel are in disagreement on the matter, arbitrators generally require counsel to justify the need for whatever discovery they seek. Counsel need to be prepared to do so with specificity in terms of the applicable contractual or legal standards or custom and usage or the like giving rise to the need for the information in question.

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rules shall apply, such as those set forth in the Federal Rules of Civil Procedure or in a state's procedural rules. This, of course, has the advantage of providing specific rules, reinforced by a robust body of case law, but the disadvantage of importing the costs and delays of litigation discovery into arbitration. Nonetheless, there are cases in which, for various reasons, the parties are primarily interested not in the expedition and economy goals of arbitration but rather in the opportunity to choose their own finders of fact.

Where this is what they want, they should get it. Certainly one of the main and most important benefits arbitration can provide is the determination of disputes by decision-makers familiar with the underlying subject matter and related custom, practices, and law. In many complex high stakes insurance/reinsurance disputes this benefit of arbitration may be more important to the parties than expedition and economy.

In the vast majority of cases, in my experience, discovery is not specifically addressed in the parties' arbitration clause. Quite often, however, arbitration clauses designate rules of some arbitration organization, such as the American Arbitration Association, to be applicable to any arbitration arising under the contract. Such designations obviously have the effect of rendering the discovery portions of such rules applicable to ensuing arbitrations.

Where parties do specify the scope of discovery, arbitrators generally understand that such agreements are enforceable and binding. If the scope of discovery specified by the parties' agreement seems overly broad to the arbitrators, they may try to talk the parties into narrowing it to foster the arbitration goals of expedition and economy. But, if the parties are adamant, arbitrators will generally honor the parties' agreement. Indeed, they are presumptively required to do so since the parties' agreement is the basis of arbitrators' jurisdiction.

Agreements as to Discovery Following Commencement of the Arbitration

Much more typically, counsel reach at least preliminary agreement as to discovery once the arbitration has been started, generally in preparation for the Organizational Meeting.

This process does not have much, if anything, to do with any body of rules as to the permissible scope of discovery in arbitration. It is simply counsel working the matter out among themselves on a pragmatic basis, assuring they get discovery they want by giving the other side discovery it wants.

The scope of what counsel will agree to varies greatly from case to case. If counsel are litigators who only occasionally do arbitrations, they typically agree on a broad scope of discovery, including numerous depositions—not only of non-party witnesses outside the jurisdiction, but also of party and other witnesses whose presence can be compelled at the hearing.

On the other hand, if counsel are frequent arbitration practitioners, they are more likely to bring a proposed schedule to the Organizational Meeting that reflects a more limited scope of discovery, although even then it is likely to be fairly broad given litigators' propensity to turn over every rock and to avoid putting themselves in the position of having to seek leave to increase the amount of discovery later.

In my experience, arbitrators generally tend to accept whatever agreement counsel reach as to document production. However, in large cases, document production, particularly e-discovery,[10] has become a huge problem over which panels may increasingly need to exercise oversight. Large corporate entities in many cases now consider unbridled document demands as perhaps more of a problem even than depositions.[11] In-house counsel at large companies have told me they expect arbitrators to impose reasonable restrains in this area.

When counsel agree to a number or duration of depositions that seems excessive, most arbitrators tend to push back, at least initially, in an effort to get the parties to curtail the depositions in the interests of expedition and economy, particularly depositions of witnesses who can be available to testify live at the hearing or whose testimony may be redundant or otherwise unnecessary.

In insurance and reinsurance arbitration often the umpire will initiate this process, first with the party appointed arbitrators and then with counsel. The process does not need to be heavy-handed or overtly judgmental. Rather, it's along the lines of, "Let's review whether we really need all these depositions, etc.", or whether we can devise a more limited program that still gets everybody the discovery they need on the matters really in contention. Again, it has been my experience that, when

arbitrators push back like this, counsel often back off from pressing for the full discovery program initially proposed in favor of a more tailored approach. They know the discovery needs to be limited, but feel compelled to take a run at unbridled discovery.

Arbitrators, as noted, will also typically try to get counsel to consider alternatives to discovery where available, such as live testimony at the trial via video-conferencing or, where counsel are comfortable with it, by telephone.[12] Often even non-party witnesses outside subpoena range of the locale of the arbitration will agree to appear in such informal ways to suit their personal convenience and avoid the expense of motion practice as to a subpoena.

Arbitrators will also often urge the parties to proceed with their depositions in phases, only going forward to the next layer of depositions when such depositions seem necessary and non-redundant.

Where there is perhaps an underlying redundancy or inevitability as to the testimony of witnesses sought to be made the subject of depositions, counsel will sometimes agree to stipulate, for hearing purposes, as to what the witness would have said if she had testified.

If, notwithstanding the arbitrators' entreaties, counsel persist in their agreement as to numerous and extended depositions, arbitrators are generally prone to respect that agreement and let the depositions go forward. After all, it is the parties' process and counsel presumably know their case better than the arbitrators at the discovery phase.

When Counsel Disagree as to Discovery

When the parties' agreement does not specify the scope of discovery and counsel are in disagreement on the matter, arbitrators generally require counsel to justify the need for whatever discovery they seek. Counsel need to be prepared to do so with specificity in terms of the applicable contractual or legal standards or custom and usage or the like giving rise to the need for the information in question.

There remain some arbitrators at both ends of the spectrum: those who believe there is not supposed to be much, if any, discovery in arbitration and those still imbued with the broad discovery of our litigation system.

In my experience as an arbitrator in over 125 cases, most arbitrators determine discovery disputes by applying the above-described balancing test, weighing the interests of 1) expedition, 2) economy, and 3) fair opportunity of a party to prepare and present its case. It is, however, my sense that, in insurance/reinsurance and other arbitrations where each side selects one of the arbitrators, the issue as to the scope of discovery at times becomes somewhat "politicized," with each party-appointed arbitrator, at that early phase of the case, tending to push for however broad a scope of discovery his or her party wants.

Robert M. Hall and Debra J. Hall have noted this issue in writing about the Task Force Procedures:[13]

> Perhaps the threshold issue is whether the party arbitrator system is a contributing element to problems identified with the arbitration process e.g. arbitrations which are too long and expensive with too much discovery and contentiousness. Does some degree of identification with a party by party arbitrators prevent a panel from acting decisively to avoid these problems? A growing number of experienced practitioners advocate all neutral panels as a better alternative.

Access to Records Clauses

The presence of an access to records clause in an insurance/reinsurance agreement is relevant, but not necessarily dispositive, to the arbitrators' consideration of discovery issues in a case arising under the agreement.

The existence of the clause means that the party whose records are the subject of the clause understood that its records would be open to review.[14] Nonetheless, once the arbitration proceeding is commenced and the panel constituted, the panel becomes responsible to resolve discovery issues. While the access to records clause will typically cover broad areas of the parties' relationship, not all such areas will necessarily be in dispute in the case. It remains to be worked out in each case what documentary production is appropriate on the facts of the case.

Source of the Arbitrator's Power to Determine Discovery Matters

Obviously where the arbitration clause or arbitration rules the parties have adopted address the scope of discovery, the source of the arbitrator's power in the area is evident. What is the source of this power where the parties have not addressed the matter?

The overriding answer is that the parties' selection of the arbitrators to conduct the proceeding accords them the power to take the procedural and other steps necessary to do so, including as to discovery.[15]

RULES AND GUIDELINES AS TO DISCOVERY IN ARBITRATION

The guidelines and rules of arbitration organizations are generally consistent with the "reasonably necessary" standard postulated above.

The ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure 2004

Chapter 4.1 of the Practical Guide addressing discovery specifically contemplates depositions. Comment D states, "ARIAS•U.S. Sample Form 4.1 [the "Comprehensive Arbitration Scheduling Order"] anticipates that the parties will want, and the Panel will permit, depositions of persons whom the parties identify as their fact witnesses at the hearing."[16]

The Comprehensive Arbitration Scheduling Order contains the following provisions:[17]

> Date VI Each party will identify individuals it wants to depose. A party may depose anywitness on the other party's(ies') witness list(s) and only such other persons as the parties may agree or the

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However, the ARIAS•U.S. Practical Guide goes on to note that the scope of discovery is *subject to the arbitration interests of avoiding undue burden, expense and delay*. Comment D in Chapter 4.1 also cautions that "the parties and the Panel should not presume that depositions are necessary or appropriate in all instances or that each side needs the same number of depositions as the other side to fairly present its case."

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> Panel may order upon a showing of good cause...
>
> * * *
>
> Date IX Expert witness depositions will be completed.

Comment B in Chapter 4.1 also contemplates that, in some instances, it may be appropriate for the Panel, in the absence of dispute as to the matter, to leave discovery to the parties, only getting involved on the issue if the parties reach impasse.[18]

The ARIAS•U.S. Agenda for the Organizational Meeting similarly contemplates depositions and other discovery, including interrogatories, bills of particular, and audits.[19]

All of this appears quite broadly to contemplate depositions and other discovery. Standing alone, these provisions would support a threshold expectation of parties in insurance/reinsurance arbitrations being conducted pursuant to the Practical Guide that they would have access to a broad range of discovery.

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Comment E goes on to make it clear that the Panel has "considerable discretion" in discovery matters and should exercise that discretion "to give each party a *fair and reasonable opportunity to develop and present its case without imposing undue burden, expense or delay* on the other party(ies)."[21]

Comment E specifically states the matter in terms of the "appropriate balance" between according each party the discovery it needs while protecting the arbitration interests of expedition and economy:[22]

> In resolving disputes, the Panel should exercise its discretion and *strike the appropriate balance for the given case between enabling the parties to obtain relevant discovery necessary to their respective cases, and protecting the streamlined, cost-effective intent of the arbitration process.*

In describing how the Panel should go about resolving discovery disputes, Comment G restates this same balancing test, pointing, again, to the contemplated nature of the arbitration process as "streamlined" and "cost-effective:"[23]

> The Panel should adopt a procedure to resolve discovery disputes that takes into account the parties' interests in *fairly resolving the disputes and their interest in maintaining the streamlined, cost-effective nature of the arbitration process.*

The Reinsurance Association of America's Manual for the Resolution of Insurance/Reinsurance Disputes

The RAA Manual first characterizes discovery as "the area in which arbitrators tend to deviate enormously from any particular pattern, and in which the panel's exercise of its discretion is at its greatest latitude."[24]

The RAA Manual, however, then goes on to suggest the need for a balance, stating, "A given panel quickly develops its own sense of what constitutes relevance, and each panel decides what constitutes the proper balance between legitimate document production and disruption and time-stalling tactics."[25]

While stating that "[t]here are no set rules to guide or restrain a panel,"[26] the RAA Manual then goes on quite pointedly to recommend that arbitrators balance the interests of fairness, expedition, and economy:[27]

> Recommendation: The panel should determine the scope of discovery based on the complexity of the claims and defenses presented. *The goal should be to strike a proper balance between the need to allow the parties to present sufficient evidence to ensure a just resolution of the dispute, and the need to avoid the delay (and costs) associated with the parties and their attorneys producing and/or reviewing the materials (as well as the cost of paying the arbitrators to consider the supporting documents.)*

As to the preference for live testimony and the disadvantages of depositions in this regard, the RAA Manual states, "Panels must bear in mind that testimony is best when it is live — when the arbitrators can judge witness credibility and probe the witness."[28]

The RAA Manual specifically notes that panels may appropriately require that parties show the "need" for depositions.[29]

Task Force Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes

The RAA Manual, in its discussion of the scope of discovery in insurance/reinsurance arbitration, references the Insurance and Reinsurance Dispute Resolution Task Force's "Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes" (Regular and Neutral Panel Versions April 2004) (the "Task Force Procedures"). The Task Force Procedures provide that arbitration panels may permit such depositions as they find "*reasonably necessary*" and such document production, beyond the parties' voluntary exchanges, as they consider "*necessary for the proper resolution of the dispute.*"[30]

An analysis of the Task Force's approach as to discovery states:[31]

> The Task Force chose not to limit and regularize the discovery process by adopting one or more of the specific rules that have been proposed in recent years (e.g., to confine discovery to the contract at issue or to limit the number and length of depositions). Perhaps this is as it should be, in that the scope and duration of discovery must be tailored to the circumstances of each case. But the Procedures' broad guidelines may do little to stem the discovery disputes that occur all too often.

American Arbitration Association, Supplementary Procedures for the Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes

The American Arbitration Association's Supplementary Procedures for the Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes [the "AAA Insurance/Reinsurance Rules"] provide in R-21 that "consistent with the expedited nature of arbitration" an arbitrator may direct "(i) the production of documents and other information."[32]

AAA Insurance/Reinsurance Rule L-4(a) establishes what looks very much like the above-postulated "reasonably necessary" standard:

> Arbitrator(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 of Large, Complex Commercial Cases.[33]

Reinforcing the standard as to the balance between justice, speed and economy, AAA Insurance/Reinsurance Rule L-4(b) provides,

> Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.

Interestingly, the AAA Insurance/Reinsurance rules recognize the arbitrator's power to limit discovery even in the face of agreement by the parties. 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.* If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.[34]

Reinforcing the point that the rules applicable to insurance/reinsurance arbitrations are generally the same in principle as those applicable generally to commercial arbitration, it is noteworthy that the AAA's above Insurance/Reinsurance rules are *identical* with its corresponding commercial rules.[35]

American Arbitration Association Employment Rules

The AAA's Employment Rules similarly provide that the arbitrator may permit such discovery, by way of deposition, interrogatory, document production, or otherwise, "as the arbitrator considers *necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.*"[36]

JAMS

The JAMS Rules introduce the subject of discovery in their discussion of the preliminary hearing, stating that among the matters to be addressed at the hearing are the exchange of information and the schedule for discovery "as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law."[37]

Defining relevance as the standard for discovery, JAMS Rule 17(a) provides for the parties' voluntary exchange of "all non-privileged documents and other information relevant to the dispute or claim immediately after commencement of the Arbitration."[38]

JAMS Rule 17(b) provides that each party may take a deposition of an opposing party or of one individual under the control of the opposing party, and specifies a reasonable need standard for the Arbitrator's determination as to whether additional depositions may be permitted. The Rule provides,

> The necessity of additional depositions shall be determined by the Arbitrator based upon the *reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.*[39]

CPR

CPR in its Rules recognizes the same standard of balancing the "needs" of the parties and the interests of expedition and economy in arbitration, stating that, "The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties

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and the desirability of making discovery expeditious and cost-effective."[40]

INTERNATIONAL ARBITRATION—THE WORLD OF MORE LIMITED DISCOVERY

While the focus of this article is on domestic arbitration, it is interesting to note that international arbitration is thriving, notwithstanding the substantial limitations on discovery in such cases.

Such limitations are notably reflected in the discovery Guidelines (the "ICDR Guidelines") recently promulgated by the International Centre for Dispute Resolution (the "ICDR"), the international branch of the American Arbitration Association. The ICDR Guidelines start by noting that arbitrators

> have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.[41]

While allowing for discovery of documents upon which parties intend to rely at trial and, further, of documents "that are reasonably believed to exist and to be relevant and material to the outcome of the case,"[42] the ICDR Guidelines set forth a strikingly stringent limitation as to depositions and other discovery,

> Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.[43]

While the question may be raised as to whether an approach quite so stringent makes sense as to international insurance/reinsurance arbitrations, given the extent to which important factual information in such cases is often held exclusively by one side or the other on key issues, nonetheless, the fact of this authoritative promulgation of such a restrictive standard is sobering as to the need for the extensive discovery parties routinely seek and get in insurance/reinsurance cases.

DISPUTE RESOLUTION OUTCOMES WHEN DISCOVERY IS LIMITED

Given the narrower scope of discovery in international arbitrations, the question arises whether parties perceive themselves as getting less justice in such cases. While this would be an interesting matter to survey on a broader basis, my sense, anecdotally, is that U.S. parties and their counsel generally feel they fare roughly as well in international as in domestic arbitrations, with no significant loss from the lessened discovery.

Disputes where both sides essentially start out with most of the facts obviously require less discovery than disputes involving issues as to subjective knowledge, parole evidence, fraud, and the like, but international arbitration, the civil law systems, and the roots of arbitration itself suggest that our innate sense as to the need for broad discovery to obtain fair results may be overblown.

APPLICABLE LAW

The Revised Uniform Arbitration Act (RUAA) and Case Law

The RUAA's provisions as to discovery are similar to the above guidelines and rules of ARIAS•U.S., the RAA, the Task Force, the AAA, JAMS, and CPR, focusing, as did such rules, upon the balance of the "needs" of the parties and the interests of expedition and economy. RUAA §17(c) provides: [44]

> 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.

The Comments to §17 note that discovery is not a presumptive right in arbitration and is not supposed to be as broad as in litigation. They emphasize that the arbitrator's standard in deciding discovery disputes is the balance of "fairness, efficiency, and cost."[45] They further note that courts typically view extensive discovery as inconsistent with the supposed benefits of arbitration and leave such matters to the discretion of arbitrators.[46]

RUAA Section 17(b) also permits depositions intended for trial, as opposed to for discovery, subjecting such depositions to the same test of making the proceedings fair, expeditious, and cost effective.[47]

Discovery from Non-Parties/the FAA

The Federal Arbitration Act ("FAA"), which is generally applicable to insurance/reinsurance disputes since they involve interstate and foreign commerce, does not cover the subject of the scope of discovery in arbitration, but rather, in the discovery area, focuses on the subpoena power of arbitrators, including subpoena power to compel hearing testimony and, in the view of some courts, discovery from non-parties.[48]

COMMENTATORS

Thomas H. Oehmke, in his treatise on commercial arbitration, similarly concludes that the test for discovery in arbitration is "necessity" not "convenience."[49] Oehmke notes that, while liberal discovery is favored in court, in arbitration "the presumption is reversed and a convincing case must be made that the information sought is essential."[50] He states the overall rule that "[d]iscovery should be available to permit a party to obtain the information necessary to prosecute or defend against a claim."[51] He adds that, "lacking a discovery mandate in the parties' contract or adopted rules, a court will not enforce discovery except where the lack of discovery would result in a fundamentally unfair hearing."[52]

Domke in his treatise on commercial arbitration similarly describes the reluctance of courts to get involved in overseeing discovery in arbitrations.[53]

Weinstein, Korn & Miller note that New York State case law strongly discourages applications to the court for disclosure in

arbitrations because "such devices would tend to frustrate the major advantages of arbitration, speed and simplicity."[54] The authors point out that, "because of the different place occupied by discovery in arbitration ... courts will not order disclosure 'except under extraordinary circumstances.'"[55]

CONCLUSION[56]

Arbitration is expected to provide parties with a fair process, speed and economy. Absent their having established some other standard, the parties to an insurance/reinsurance arbitration are generally entitled to whatever discovery they reasonably need to enable them to prepare and present their claims and defenses—but that should be the limit of it, lest speed and economy be compromised.

This standard is a broad and judgmental one, but one that experienced arbitrators knowledgeable about insurance and reinsurance can readily and reliably apply. It provides guidance to, parties, counsel, and arbitrators as to the appropriate boundaries and should accord in-house counsel reasonable predictability as to scope and expense.

The "reasonably necessary" standard is evident from the practice of experienced arbitrators and supported by the guidelines and rules of ARIAS•U.S., the RAA, the Task Force for Insurance and Reinsurance Disputes, the AAA, JAMS, and CPR, and by the RUAA.

By actively engaging themselves in the refining of the issues and the tailoring and oversight of discovery, arbitrators can contribute to the realization of arbitration's promise of fairness, speed, and economy.▼

1 Charles J. Moxley, Jr. is a litigator, arbitrator, and mediator, specializing in complex insurance industry and other disputes. He is an ARIAS•U.S. Certified Arbitrator and a member of panels of the American Arbitration Association, the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, and Supreme Court, New York County. He is Of Counsel to Kaplan Fox & Kilsheimer LLP, an Adjunct Professor at Fordham Law School, and Co-Chair of the Legislation Committee of the Dispute Resolution Section of the New York State Bar Association. He can be reached at cmoxley@kaplanfox.com.

2 See the interesting discussion by Robert M. Hall of steps the panel can take at the Organizational Meeting "in shaping and prioritizing the issues in the dispute" and requiring counsel to reveal the "substantive reasons for non-performance of either side," resulting in a discovery plan tied to the specific issues in the case. Robert M. Hall, *"How Reinsurance Arbitrations Can Be Faster, Cheaper and Better,"* ARIAS•U.S. Quarterly, pp. 33, 34 (Third Quarter 2004).

3 An interesting analysis of this advantage of arbitration is set forth in an article by an attorney who had two similar construction cases at the same time, one of which was being arbitrated and the other litigated, resulting in what he described as an "unintended experiment." Reporting that the case in arbitration ended up being handled more efficiently and expeditiously, the author attributed the difference to the arbitrators' involving themselves heavily in managing discovery in the case and tailoring it to the needs of the case. *See* Jeffrey R. Cruz, *"Arbitration vs. Litigation: An Unintentional Experiment,"* American Arbitration Association, Disp. Res. J. (Nov. 2005), *available at* http://www.adr.org/sp.asp?id=29193.

4 In-house counsel in large companies have complained to me that the reluctance of many arbitrators to seriously consider summary judgment or other pre-hearing motions or to limit testimony at hearings (instead taking virtually every thing "for what it is worth") frustrate the purposes of arbitration, inclining them to return to litigation.

5 *See, e.g.*, USCS Fed. Rules Civ. Proc. R 26(b)(1); N.Y. CPLR 3101(a) for representative standards as to the breadth of discovery in court cases.

6 The examination at the hearing of an adverse witness who has not been deposed presents the challenge of pure cross-examination. *See generally*, Richard C. Mason, *"Cross-Examination Without a Comfort Blanket,"* ARIAS•U.S. Quarterly, p. 14 (Third Quarter 2008). In my experience, this is a challenge to which counsel regularly rise.

7 Obviously, there are circumstances where more extensive discovery is necessary to enable a party to prepare or to streamline the hearing.

8 While many efforts to appeal arbitral decisions are made, they are rarely successful. It is also noteworthy that the lack of appeal, as a general matter, from discovery decisions in arbitration is not that different from the situation in litigation, although the court standard for appeal is generally broader. It is rare that a court decision as to discovery is overturned on appeal or is a basis for reversal of a decision on the merits. At the same time, as discussed hereinafter, there is at least the theoretical possibility that even an arbitral decision could be overturned if the denial of discovery rendered the arbitration proceeding "fundamentally unfair." *See* Thomas H. Oehmke, 3 Commercial Arbitration §§ 89:6; 90:1.

9 Achieving the proper balance between these considerations is obviously important with respect to the arbitration objective of finality, since an arbitral decision unreasonably limiting discovery to a party would likely result in a challenge by the party if it received an adverse decision, leading to expense and delay, notwithstanding the low likelihood of success of the challenge.

10 Electronic discovery raises extensive issues of increasing concern in arbitration. Parties in arbitrations are often willing to limit electronic discovery in the interests of expedition and economy. *See, e.g.*, Rick H. Rosenblum and McLean Jordan, *"Electronic Discovery and Reinsurance Arbitration: An Update,"* ARIAS•U.S. Quarterly, p. 11 (First Quarter 2008); Peter R. Chaffetz and Andreas A. Frischknecht, *"Electronic Discovery in Arbitration,"* ARIAS•U.S. Quarterly, p. 2 (Fourth Quarter 2006); Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, Disp. Res. J., Nov. 2006/Jan. 2007 *available at* http://www.mediate.com/warshauer/docs/ediscovery%20article%20final%20printed%20AAA%20dispute.pdf.

11 Issues as to privilege and sanctions are also of concern to in-house counsel. For a discussion of issues as to attorney/client privilege and work product with respect to documents, *see, e.g.*, Robert M. Hall, *"Discovery from Intermediaries: Winning the Peace,"* ARIAS•U.S. Quarterly, p. 22 (Fourth Quarter 2006); P. J. Wilker, *"The Production of Documents in Reinsurance Arbitration Proceeding,"* ARIAS•U.S. Quarterly, p. 18 (Fourth Quarter 2002).
For a discussion of sanctions against parties for discovery abuses, *see* Nick DiGiovanni and Teresa Duckett, *"Sanctions and Punitive Damages in Arbitration,"* ARIAS•U.S. Quarterly, p. 5 (First Quarter 2004); Daniel L. FitzMaurice and Daniel J. Foster, *"Discovery in Reinsurance Arbitration,"* ARIAS•U.S. Quarterly, pp. 2, 5 (Fourth Quarter 2004). For a discussion of the appointment of special audit masters to oversee discovery, *see* Gregory H. Horowitz and Carmela Cannistraci, *"The Appointment and Use "Special Audit Masters" in Reinsurance Arbitrations,"* ARIAS•U.S. Quarterly, p. 11 (Second Quarter 2008).

12 Section 14.6 of the Task Force Procedures, for example, provide, subject to certain conditions, that arbitrators may permit testimony by telephone, affidavit, transcript, videotape, or other means. *See* Insurance and Reinsurance Dispute Resolution Task Force's "Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes" (Regular and Neutral Panel Versions April 2004) (the "Task Force Procedures"), at Reinsurance Association of America, Manual for the Resolution of Reinsurance Disputes, at Procedural Guidelines, pp. PG1-PG43, *available at* www.ArbitrationTaskForce.org.

13 *See* Robert M. Hall and Debra J. Hall, "Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes," p. 3, http://www.arbitrationtaskforce.org/images/HallandHallArticle.pdf. *See* discussion of the Task Force Procedures *infra* at text accompanying n. 30.

14 For a discussion of the extent to which Access to Records clauses constitute a waiver by cedents of attorney/client privilege, *see* Michele L. Jacobson, Robert Lewin, and Royce F. Cohen, *"The Access to Records and Claims Cooperation Clauses: Their Impact on Discovery in Arbitration Proceedings,"* ARIAS•U.S. Quarterly, p. 2 (Third Quarter 2006).

15 See the interesting discussion of this matter in Robert A. Knuti and T. Monique Jones, *"The Legal Power of Arbitrators to Grant and Limit Discovery,"* ARIAS•U.S. Quarterly, pp. 6, 7 (Fourth Quarter 2002).

16 ARIAS•US, PRACTICAL GUIDE, Ch. 4.1, cmt. d, available at http://www.arias-us.org/index.cfm?a=41.

17 http://www.arias-us.org/index.cfm?a=41

18 ARIAS•US, PRACTICAL GUIDE, Ch. 4.1, cmt. b, *available at* http://www.arias-us.org/index.cfm?a=41.

19 http://www.arias-us.org/index.cfm?a=40.

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20 *Id.* at cmt. D.
21 *Id.* at cmt. E (Emphasis supplied).
22 *Id.* (Emphasis supplied).
23 *Id.* at cmt. G (Emphasis supplied).
24 MANUAL FOR THE RESOLUTION OF REINSURANCE DISPUTES § IV (R.A.A. 2007).
25 *Id.*
26 *Id.*
27 *Id.* (Emphasis supplied).
28 *Id.*
29 *Id.*
30 Task Force Procedures at §11 ("DISCOVERY"), §§ 11.2; 11.3.
31 Alan J. Sorkowitz and Navneet K. Dhaliwal, "An Analysis of the 2004 Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes," Sidley Austin Brown & Wood LLP, Reinsurance Law Report 14, *available at* http://www.arbitrationtaskforce.org/images/SorkowitzArticle.pdf.
32 Insurance/Reinsurance Rules, Rule R-21, AAA (amended and effective September 15, 2005) *available at* http://www.adr.org/sp.asp?id=22126.
33 *Id.* at Rule L-4(a).
34 *Id.* at Rule L-4(c) (Emphasis supplied).
35 *Compare* Commercial Arbitration Rules, Rules R-21 and L-4, AAA (amended and effective September 1, 2007) *available at* http://www.adr.org/sp.asp?id=22440 with Insurance/Reinsurance Rules, Rules R-21 and L-4, AAA (amended and effective September 15, 2005) *available* at http://www.adr.org/sp.asp?id=22126.
36 Employment Arbitration Rules, Rule 9, AAA (effective July 1, 2006) *available at* http://www.adr.org/sp.asp?id=32904#9 (Emphasis supplied).
37 Comprehensive Arbitration Rules and Procedures, Rule 16, JAMS (revised March 26, 2007) *available at* http://www.jamsadr.com/rules/comprehensive.asp#Rule%2016.
38 *Id.* at Rule 17.
39 *Id.* (Emphasis supplied).
40 Rules for Non-Administered Arbitration, Rule 11, CPR (effective November 1, 2007) *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx. (Emphasis supplied). *See also, id.*, at General Commentary—Salient Features of the Rules. The CPR Rules note that they are suitable for insurance as well as other disputes. *See id.*, at General Commentary – Types of Disputes.
41 International Centre for Dispute Resolution, ICDR Guidelines for Arbitrators Concerning Exchanges of Information, *available* at http://www.adr.org/si.asp?id=5288, at "Introduction," p. 1.
42 *Id.* at Section 3(a).
43 *Id.* at Section 6(b).
44 [Revised] Unif. Arb. Act (2000) at § 17(c). The RUAA has been enacted by 12 states, Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington, along with the District of Columbia. See generally, The National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Arbitration Act* [2000], http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp. The RUAA has been approved by the American Bar Association and endorsed by the American Arbitration Association, the National Academy of Arbitrators and the National Arbitration Forum. *Id.*
The RUAA's predecessor, the Uniform Arbitration Act ("UAA"), was adopted by 35 states, with an additional 14 states adopting substantially similar legislation. [Revised] Unif. Arb. Act (2000) at "Prefatory Note", *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf.
45 *Id.* at §17, cmt. 3.
46 *Id.* at §17, cmts. 2 and 3. Courts have treated attacks on discovery limitations in arbitration as "an attack on the character of arbitration itself." *Guyden v. Aetna*, Inc., 2008 U.S. App. Lexis 20783, *24 (2nd Cir. 2008) *citing Iberia Credit Bureau, Inc v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004). "Courts generally treat arguments relating to discovery provisions as 'procedural in nature, and therefore left for an arbitrator to resolve.'" *Id. citing Kristian v. Comcast Corp.*, 446 F.3d 25, 43 (1st Cir. 2006); *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002).
47 *Id.* at §17(b).
48 For a discussion of the legal bases for compelling document production and testimony from such non-party witnesses as reinsurance intermediaries, *see* generally Robert M. Hall, "*Discovery from Intermediaries: Interim Report on Developments in Regulation and Case Law*," ARIAS•U.S. Quarterly, p. 2 (Second Quarter 2006), and Michele L. Jacobson, Robert Lewin, Royce F. Cohen and Andrew S. Lewner, "*Obtaining Discovery from Reinsurance Intermediaries and Other Non-Parties – Updated Case Law and Commentary*," ARIAS•U.S. Quarterly, p. 2 (Third Quarter 2005); *see also*, Leslie Trager, *The Use of Subpoenas in Arbitration*, Disp. Res. J., Nov. 2007/Jan. 2008 available at http://www.aaauonline.org/upload/The%20Use%20of%20Subpoenas%20in%20Arbitration.pdf.
49 Thomas H. Oehmke, 2 Commercial Arbitration, § 89:3 (Footnotes omitted).
50 *Id.*
51 Thomas H. Oehmke, 4 Commercial Arbitration, § 152.11 (Footnotes omitted).
52 Thomas H. Oehmke, 2 Commercial Arbitration, § 89:3 (Footnotes omitted).
53 1 Domke on Commercial Arbitration, § 32:1 (Footnotes omitted).
54 13-75 New York Civil Practice: CPLR ¶ 7505.06.
55 *Id., citing International Components Corp. v. Klaiber*, 54 A.D.2d 550, 387 N.Y.S. 2d 253 (1st Dep't 1976); *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 406, 362 N.Y.S.2d 843, 847 (1974).
56 The within analysis of guidelines, rules and considerations applicable to the scope of discovery in insurance/reinsurance arbitration is not intended to prejudge the facts or the appropriate scope of discovery of any particular case. Discovery issues are case-specific and cannot be evaluated in advance or in the abstract.