Scope of Discovery in Commercial Arbitration

By Charles J. Moxley, Jr.

With a case in federal or state court, litigators generally have a good idea of what discovery will be allowed. The Federal Rules of Civil Procedure, the New York Civil Practice Law and Rules, and other such rules set forth the standards for discovery, and a large body of case law elaborates on such standards.

Do we have anything similar in arbitration? Is there any way of knowing with reasonable certainty what discovery will be allowed in a commercial arbitration? Is the scope of discovery entirely within the discretion of the arbitrator? Is there a governing standard? What discovery is typically permitted?

In what follows, I will set forth some tentative answers to these questions, based on my experience as an arbitrator in more than 125 commercial cases over many years. While, given the confidentiality of arbitration, there are generally no reported decisions on discovery questions in arbitrations (or even informal decisions), I will also draw upon the experience of many fellow arbitrators with whom I have served on panels, based on the general views, experience, and practices expressed in our consideration of discovery questions. While I will focus primarily on arbitrator practice as to discovery, I will also reference some of the applicable rules of arbitration providers such as the American Arbitration Association (AAA), JAMS, and the International Institute for Conflict Prevention and Resolution (CPR), and the treatment of the matter by the Revised Uniform Arbitration Act. My focus is on domestic arbitrations.

Overriding Rationale as to Discovery in Arbitration

In theory and in practice, the primary governing considerations for arbitrators are essentially threefold:

(1) Arbitration should be quicker than litigation, and hence discovery, which consumes substantial time, should be more limited than in litigation.

(2) Arbitration should be less expensive than litigation, and, for that reason too, discovery, which accounts for the bulk of the huge attorneys fees in litigation, should be more limited than in litigation.

(3) Parties are entitled to discovery sufficient to prepare and try their case.

There is a certain bedrock of discovery in every arbitration, including the exchange of relevant documents. The above balancing test essentially comes down to the standard that parties to an arbitration only get depositions and other further discovery *if they can demonstrate a real need for it*. The arbitration goals of expedition and economy generally cause arbitrators to require parties to justify more extensive discovery in light of the needs of the case. Parties may, of course, agree to more extensive discovery.

Expedition

The discovery phase in a complex commercial litigation typically takes years. Not so with a commercial arbitration. Arbitrators typically want to get to the hearing, depending on the case, within some three to eight months. It would be a rare arbitration and a particularly large or complex one where, absent special circumstances, arbitrators would be happy with a more extended schedule. Arbitrators generally feel it is part of their job to deliver the expedition that arbitration promises. Depositions can cause substantial delays.

Economy

Discovery is widely regarded as a major problem with U.S. litigation. Complex commercial litigations with millions of dollars at stake typically involve many depositions, sometimes dozens or more. The practice is widespread to depose everyone who may have relevant information, even where the testimony is likely to be cumulative or redundant. No stone is left unturned. Every witness is deposed who could possibly show up at trial, no matter how subject to cross-examination he may be based on the documents. Every deposition is extended as long as possible to make sure the witness' knowledge is exhausted. While "fishing expedition" is a pejorative term in motion practice as to discovery, counsel on both sides of a litigation typically seek to probe every imaginable line of attack or defense. A litigator in a substantial commercial matter would generally find it unimaginable to wait until trial to take the testimony of a witness of any importance not under his or her control.

Arbitrators generally have a different perspective on these matters: They want to avoid the expense of discovery to the maximum extent consistent with allowing each side reasonable opportunity to prepare and try their case. Arbitrators' strong preference is generally to have a witness testify only once. Witnesses should testify live at trial; the expense of that earlier and generally more protracted testimony at deposition should be avoided. Subject to the exigencies of the particular case, a witness within subpoena range of the hearing or under the control of a party should testify at the hearing and not be deposed first.

Of course, some witnesses are beyond subpoena range of the site of the arbitration and not under the

control of a party. Even with such witnesses, arbitrators generally prefer to have them testify live at the hearing, if only by video-conference or telephone, rather than by deposition.

Litigators are often apprehensive about going into hearings without having deposed key witnesses, but generally find themselves well able to cross-examine the other side's witnesses effectively based on the documents, informal investigation, and general trial skills. Perhaps depositions, or at least the extent of them, are not as important as we have come to assume.

Fair Opportunity to Parties to Prepare and Try Their Case

Arbitrators understand that the level of discovery reasonably needed in a particular case depends on the facts and circumstances of the case. In most commercial arbitrations, the parties will need to exchange documents, sometimes a substantial number of them, specifically relating to the dispute. Counsel will conduct their investigations and serve subpoenas for the hearing and will then be ready to go to hearing, subject to disclosures as to experts, if any, and pre-hearing briefs and identification of witnesses and documents.

Where more is necessary, it is generally worked out without difficulty. Arbitrators typically set the tone at the preliminary hearing that they expect counsel to work such things out, but are prepared to direct them if necessary.

If a party reasonably needs particularization of the other side's claims, defenses, purported damages, or the like, arbitrators, if requested, will generally direct that such information be provided.

If a party reasonably needs to examine at the hearing someone under the control of the other side, arbitrators, if requested, will typically obtain the other side's agreement to produce the witness, whether in person or by video conference or telephone.

If a reasonable number of limited depositions seems necessary, arbitrators, if requested, will generally permit them.

Parties are increasingly submitting huge commercial cases to arbitration. Cases in the tens and hundreds of millions of dollars and more are not uncommon. In some such cases, parties and their general counsels, while desirous of speed and economy, are perhaps more interested in getting the right decision-maker. They prefer arbitration for the opportunity it gives them to pick a highly experienced and effective arbitrator or panel of arbitrators, who can be selected eyes open, rather than take their chance on the spin of the wheel in the court clerk's office.

Such very large cases often require substantial document production, numerous depositions, and some interrogatories, as well as extensive pre-hearing motions. Arbitrators will generally be open to more expansive discovery in such cases, subject nonetheless to trying to keep it far more limited and moving the cases along far more expeditiously than would typically happen in court. Arbitrators also understand that some cases have so much at stake that general counsels and other party representatives may reasonably—and mutually—want the "no-stone-unturned" approach to discovery even in arbitration, and indeed can provide for same in their arbitration agreements.

What Actually Happens in Arbitrations

The Easy Case: The Parties' Arbitration Agreement Specifies the Scope of Discovery

The easiest case is where the parties' arbitration clause specifies the scope of discovery. Occasionally parties provide in their arbitration clause that the Federal Rules of Civil Procedure or a particular state's rules of procedure shall apply to discovery in a dispute. In my experience, this is relatively rare (I would say, anecdotally, that it occurs in less than 5 percent of cases).

Where this happens, arbitrators will generally administer discovery pursuant to the specified rules of procedure, subject, where appropriate, to challenging counsel somewhat as to what discovery is really needed and trying to jawbone them down to a more limited scope of discovery.

The Power of Arbitrator "Jawboning"

"Jawboning," whereby an arbitrator probes for consensus among counsel on pre-hearing issues before ruling on them, can be particularly effective in resolving discovery disputes. Arbitrators, who are often chosen because of their decades of experience as litigators in similar types of cases, draw upon their ability to distinguish between the positions litigators take and what they reasonably need.

By educating themselves about the case and engaging counsel in meaningful dialogue, arbitrators are often able to penetrate to what is really at stake, determine what discovery is reasonably necessary as a result, and build on that foundation to create consensus on the matter.

Arbitrators, to be able to help the parties in such matters, generally try to get an understanding of the case as early as possible. This is one of the reasons arbitrators generally invite counsel to discuss the case at the preliminary conference and welcome the parties' elaboration of the case as it unfolds. It is in counsels' interest to project their case as fully as possible when such opportunities arise.

The Most Typical Situation: Counsel Agree to Over-Broad Discovery

Usually the arbitration clause is silent as to the scope of discovery, except insofar as it implicitly adopts the discovery practices contemplated by the rules of the

particular arbitration association under which the matter is proceeding. (Arbitration clauses typically provide for disputes arising between the parties to be arbitrated under specified arbitration rules of a particular organization, such as the AAA.)

The most typical situation is that, at the preliminary conference, counsel for the parties will substantially agree as to what discovery should take place in the case. They will indicate that they have agreed to exchange relevant documents and will often agree that each side may take a limited number of depositions.

Arbitrators generally leave counsel's agreement as to documents alone. The attorneys know their case and, if they can agree on document discovery, great.[1] Until a dispute arises, arbitrators generally will not get involved in document production.

As to depositions, arbitrators will typically remind counsel of arbitration's objectives of expedition and economy and probe as to the depositions counsel have in mind. If the depositions involve witnesses within subpoena range of the locale of the hearing or under the control of a party, arbitrators will generally jawbone the matter, questioning the need for the depositions.

Oftentimes counsel will respond by agreeing that they are able to prepare and try the case without the depositions. Part of this may be in deference to the arbitrator, but counsel also generally understand that arbitration is supposed to be different and realize they may not really need the depositions.

How Arbitrators Decide the Matter When Both Sides Want to Proceed with Depositions

When the arbitrators' cajoling does not work and both sides want to continue with the depositions, arbitrators typically take a step back and accept the idea of depositions, but try to limit them as to number and duration.

This effort is generally successful. In the unusual case where it is not, arbitrators are prone, within reason, to bow to the parties' agreement on the subject and let the depositions or other discovery proceed.

How Arbitrators Decide Disputed Issues as to Discovery

Where the parties do not agree as to discovery, the arbitrators obviously have to rule on the matter.

The ruling essentially comes down to what the arbitrators think is reasonable under the circumstances, given the applicable considerations as to expedition, economy and fair opportunity to prepare and try the case.

Here, arbitrators' practices differ. Some resolve discovery disputes based on counsels' papers on the matter. Others, and I think this approach yields more enlightened rulings, hold a conference with counsel, once the dispute is briefed, and go through, to the extent necessary, the disputed items one by one, dialoguing and jawboning them. Often, it is only necessary to go through a sampling of the disputed items and establish some guidelines, whereupon counsel can work out the rest.

Whatever they feel they need to argue in their papers, counsel in the conferences tend to move towards consensus when the arbitrator, in connection with suggesting comparable restraints on both sides, figures out what discovery is reasonably necessary in the particular situation. If the arbitrator is able to grasp and propose limitations on the objected-to discovery that protect the objector's interests while according the other side what it reasonably needs, the jawboning will be successful (the arbitrator, of course, will be figuring the matter out, as the discussion unfolds, learning, among other things, from counsel's reactions to the various possibilities). Consensus will have emerged, which, while the arbitrator will likely write it up as a ruling, will represent a sensible accommodation of each side's rights and interests.

Where no such agreement emerges, the arbitrator will rule, generally based on the above considerations. The rulings will often bear a striking resemblance to the approaches suggested by the arbitrator in the conferencing of the matter.

Applicable Arbitration Association Rules

Decision-making by arbitrators on discovery questions is not typically a heavily rules-based matter. Counsel generally recognize a wide range of discretion in the arbitrator as to the scope of discovery and only rarely argue their case for or against discovery based on the discovery rules of the organization under which the arbitration is being held. Experienced arbitrators generally have internalized the expedition/economy/fairness standard and rarely find themselves analyzing discovery matters with reference to specific provisions of applicable arbitration rules.

Yet not surprisingly, arbitration practice, as described above, is generally reflective of the arbitration rules of leading arbitration organizations. Following are some examples.

The AAA, in its Commercial Arbitration Rules, places discovery in the discretion of the arbitrator, subject to the expedited nature of arbitration. Rule 21(a) on "Exchange of Information" provides that the arbitrator, "consistent with the expedited nature of arbitration," may direct "the production of documents and other information."[2] Rule 21(c) provides that the arbitrator "is authorized to resolve any disputes concerning the exchange of information."[3]

The AAA further recognizes the discretion of arbitrators in discovery matters in the portion of its Commercial

Arbitration Rules consisting of Procedures for Large, Complex Commercial Disputes. Rule L-4 on "Management of Proceedings" sets forth the standard for arbitrators' permitting depositions: "good cause shown . . . consistent with the expedited nature of arbitration."

Rule L-4 provides:[4]

> (a) 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.
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> (b) 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.
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> (c) 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.
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> (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.
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> (g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
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Rule 9 ("Discovery") of the AAA's Employment Arbitration Rules provides:[5]

> The arbitrator shall have the authority to order 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.

The discovery rules of JAMS are comparable, except that they contemplate one deposition per side, while leaving additional depositions to the discretion of the arbitrator, based on "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."[6]

CPR in Rule 11 of its Rules for Non-Administered Arbitration similarly 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."[7]

While the Revised Uniform Arbitration Act (RUAA)[8] has not been adopted in New York, it is interesting to note that the RUAA's provisions as to discovery are similar to the above rules of the AAA, JAMS, and CPR.

As to the arbitrator's authority as to discovery, RUAA § 17(c) provides, "[a]n 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."[9]

Non-Party Out-of-Jurisdiction Witnesses

The above focuses on party discovery. Complex and largely unsettled issues are presented as to compelling discovery from non-party witnesses who are outside subpoena reach of the place of the arbitration.[10] Such issues include the extent to which, under the Federal Arbitration Act[11] and other law, such foreign non-party witnesses may be compelled to submit themselves to a deposition or formal hearing testimony and produce documents where they are located and whether the arbitrators (or one of the members of a panel) may conduct a session in the locale where the witness is located for purposes of taking the witness' testimony either on a pre-hearing/deposition basis or as formal hearing testimony.

While such matters are beyond the scope of this article, it is noteworthy that the arbitrators' practice of jawboning is potentially as helpful here as with party discovery. Not infrequently, distant non-party witnesses, in response to an informally transmitted subpoena of litigable enforceability (or other informal approach), will be willing to appear by teleconference or telephone at a time convenient to them, if they can thereby avoid having to deal with potential court procedures for the enforcement of a subpoena; some witnesses even agree to appear out of respect for the process.

Conclusion

The established rules and practices for party discovery in arbitration are clear, sensible and workable. The vast majority of party discovery disputes in commercial arbitrations are worked out among counsel, either on their own or with the aid of the arbitrator. When counsel cannot agree as to discovery matters, arbitrators will decide them based on balancing the arbitration objectives of expedition, economy and fair disclosure. Parties may provide for more expanded discovery in their arbitration agreements or by subsequent agreement of counsel.

Endnotes

1. The subject of electronic discovery is beyond the scope of this article. Parties in arbitrations are often willing to limit it in the interests of expedition and economy, 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*, Disp. Res. J., Nov. 2006/Jan. 2007 *available at* http://www.mediate.com/warshauer/docs/ediscovery%20article%20final%20printed%20AAA%20dispute.pdf.
2. Commercial Arbitration Rules, Rule R-21, AAA (effective September 1, 2007) *available at* http://www.adr.org/sp.asp?id=22440#R21.
3. *Id.*
4. *Id. at* Rule L-4 *available at* http://www.adr.org/sp.asp?id=22440#L4.
5. Employment Arbitration Rules, Rule 9, AAA (effective July 1, 2006) *available at* http://www.adr.org/sp.asp?id=32904#9.
6. Comprehensive Arbitration Rules and Procedures, Rule 17, JAMS (revised March 26, 2007) *available at* http://www.jamsadr.com/rules/comprehensive.asp#Rule%2017.
7. Rules for Non-Administered Arbitration, Rule 11, CPR (effective November 1, 2007) *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx
8. Revised Unif. Arb. Act (2000).
9. *Id.* at § 17(c).
10. *See, e.g.*, 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.*
11. Fed. Arb. Act, 9 U.S.C. §§ 7 *et seq.*

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