

Discovery in Arbitration

By Joseph L. Forstadt

INTRODUCTION

This article is designed to aid the practitioner in understanding the availability of discovery in arbitration. Few practicing attorneys understand the scope and or limitations on the availability of discovery in advance of or in aid of arbitration, leading many lawyers to fear arbitration as a form of litigation without adequate discovery. By clarifying the availability of discovery, attorneys and their clients will be informed of the choices they may make to avail themselves of arbitration or proceed with traditional litigation.

There are a number of benefits to arbitration. Although cost and speed are certainly among them, perhaps the greatest benefit, not as greatly appreciated by the client, is that the results of arbitration are almost always final. This means that a client can quickly put disputes behind it. Attorneys, however, often fear the finality of the arbitrators' decision, particularly if it means that all relevant evidence is not considered. Understanding what discovery is available may alleviate such fears

and enable attorneys to use the unique characteristics of arbitration to the advantage of their clients.

One of the primary ways in which arbitration is less costly, both in terms of time and money, is that it normally has less extensive discovery than traditional litigation. However, arbitration under virtually all institutional arbitration rules, permits enough discovery for parties to ensure a just result from the arbitrator.¹

This article will discuss discovery in arbitration proceedings. Part I will discuss discovery in advance of arbitration under the commercial rules of the American Arbitration Association ("AAA"). Part II will discuss discovery under the Federal Arbitration Act ("FAA"). Finally, Part III will discuss the limited situations in which courts may become involved with the discovery process in arbitration.

I. Discovery in Advance of Arbitration

Parties may specify in their contract that any (or certain specified types of) disputes will be arbitrated. They may also designate the rules that will apply

should an arbitrable dispute arise. They may choose from any number of existing arbitration rules.² They may also select the procedural law that will apply to their arbitration (for example, the law of a particular state³). They may even agree that the Federal Rules of Civil Procedure will apply, despite the fact that doing so would be inconsistent with the nature of arbitration.⁴ The FAA will apply if the parties' agreement is one "involving commerce," or if the parties have elected another law that is preempted by the FAA.⁵

The source of information as to how extensive the discovery process will be in any particular arbitration is the arbitration agreement itself. The U.S. Supreme Court has explained that the "liberal federal policy favoring arbitration agreements' . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements."⁶ As such, assuming equal bargaining position or, at least, an informed judgment, courts will enforce any contract stipulations regarding discovery, given the policy of enforcing arbitration agreements by their terms.⁷ This assumes, of course, that the agreement is not a creation of fraud, duress, coercion or the like.⁸ This policy of applying principles of contract interpretation to interpretation of arbitration agreements⁹ highlights the need for parties and their attorneys to draft the arbitration clause in a thoughtful and conscientious manner.

A. Discovery Under the AAA Commercial Rules

Discovery under the AAA commercial rules is termed an "Exchange of Information" and is governed by Rule 21.¹⁰ This rule allows the arbitrator to direct discovery "[a]t the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration."¹¹ Thus all discovery requests must be approved by the arbitrator, who has a great deal of discretion in the scope of discovery.¹² The arbitrator must direct discovery consistently "with the expedited nature of

arbitration," but there are few checks on the use of this power.¹³ The determination of the arbitrator is final, unless a court later finds a significant abuse of power.¹⁴

The arbitrator, if authorized by law to do so, may subpoena witnesses or documents at the request of a party or independently.¹⁵ Under the AAA commercial rules, an arbitrator or "person who is authorized by law to subpoena witnesses or documents may sign a subpoena in an arbitration."¹⁶ If there is an arbitration panel, decisions on whether to issue a subpoena will be made by a majority of the panel, unless the law or the parties' agreement is to the contrary.¹⁷ For example, the parties may agree to authorize the chair of the panel to rule on this issue. Although an arbitrator may refuse to sign a subpoena, the AAA encourages arbitrators to first obtain more information from the party as to the need for the subpoena(s) or even to reserve decision until the preliminary hearing (if one is requested), so that the parties may make oral arguments in advance of proceeding with their case.¹⁸

The parties are responsible for preparing the subpoena, serving it and having it enforced.¹⁹ The enforcement of a subpoena is governed not by the rules that the party has chosen for the arbitration, but by an appropriate court of competent jurisdiction.²⁰ Issues of territorial jurisdiction may result, which will be governed by that court's jurisdiction. For example, if the subpoena is to be enforced by a federal court, the Federal Rules of Civil Procedure will apply and Rule 45(b) will restrict the ability of the court to subpoena an individual to appear at the arbitration.²¹ In the state courts, the enforcement will be governed by that state's territorial jurisdictional limits. For example, in New York, the enforcement of the subpoena will be governed by Article 3 of the Civil Practice Law and Rules.²² If the subpoena applies to a person who is outside the jurisdiction of the court, the party will be unable to enforce the subpoena.

B. AAA Expedited Procedures

The AAA's Commercial Rules also contain Expedited Procedures²³ that apply to smaller disputes—generally when no claim or counterclaim exceeds \$75,000.²⁴ The parties must exchange copies of all exhibits they intend to submit at the hearing.²⁵ Parties may also agree to have the claim resolved by submission of the documents rather than an oral hearing, particularly if neither party's claim exceeds \$10,000.²⁶ Rule E-6 states that, “the arbitrator shall establish a fair and equitable procedure for the submission of documents.”²⁷ Hence, just as under the AAA commercial rules, the arbitrator has a great deal of control and discretion regarding discovery, subject to the parties' advance agreement.

C. AAA Procedures for Large, Complex Commercial Disputes

Larger disputes (i.e., those involving \$75,000 or more) may be arbitrated under the AAA's Procedures for Large, Complex Commercial (LCC) Disputes.²⁸ These procedures require a preliminary hearing soon after the selection of the arbitrators.²⁹ In addition to discussing claims, damages and the like, the matters to be considered at the preliminary conference should include:

- “the extent to which discovery shall be conducted”³⁰
- “exchange and premarking of those documents which each party believes may be offered at the hearing”³¹
- “whether, and the extent to which, any sworn statements and/or depositions may be introduced”³² and
- “the procedure for the issuance of subpoenas.”³³

Thus, this preliminary hearing requirement provides for extensive case-management by the arbitrators.

Included in the case-management function is the task of determining an appropriate amount of discovery for a complex dispute so that the arbitrators can come to a correct award, without bogging down the process in protracted discovery. Once again, the AAA gives a great deal of control to the arbitrator.

The rules regarding discovery are more extensive in the LCC Procedures than they are in the commercial rules. LCC Rule L-4 states that the 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.”³⁴ This same rule explains that 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.” It goes on to say 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.”³⁵ Furthermore, the LCC rules explicitly allow the arbitrators to order depositions of, or the propounding of interrogatories to, “persons who may possess information determined by the arbitrators to be necessary to determination of the matter.”³⁶ As such, the procedures applicable to LCC disputes encourage more extensive discovery. This seems appropriate, given the greater size and complexity of these cases.

II. DISCOVERY UNDER THE FEDERAL ARBITRATION ACT

The FAA may apply to an arbitration because the parties so specified in their agreement. It may also apply if they did not specify the applicable law and their contract (1) involved commerce³⁷ and (2) did not implicate one of the exclusions in FAA § 1,

namely “seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.”³⁸ Within the FAA, § 7 governs discovery.³⁹ This section also allows arbitrators to punish the failure to obey a discovery directive.⁴⁰

The FAA does not allow a party to subpoena third parties to appear at depositions during pre-hearing discovery. FAA § 7 states that the arbitrator (or a majority of arbitrators) “may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”⁴¹ Courts have held that this only applies to testimony given at the arbitration hearing and not to pre-hearing depositions.⁴² In one case, however, the District Court of the Southern District of New York held that it could not compel the attendance of certain witnesses at a deposition for reasons of territorial jurisdiction.⁴³ Here, the arbitrator was entitled to draw a negative inference from the witnesses’ refusal to appear, given that they were employees of one of the parties.⁴⁴

A circuit split exists as to whether arbitrators have the power to subpoena documents without also summoning the custodian of the documents to testify. The language of § 7 of the FAA states that the arbitrators “may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case.”⁴⁵ The Eight Circuit held that implicit in the power granted to arbitrators under this section is the power to order the production of relevant documents for review by a party prior to a hearing.⁴⁶ A recent case from the Third Circuit disagreed with this interpretation of § 7, however, and held that the plain meaning of the FAA does not permit arbitrators to subpoena documentary evidence without summoning that non-party to appear as a witness.⁴⁷

III. ROLE OF THE COURT: DISCOVERY ORDERS IN AID OF ARBITRATION

Courts generally take a “hands-off” approach when it comes to discovery conducted in an arbitration.⁴⁸ They do not want to interfere with the arbitration proceeding and the role of the arbitrator in controlling discovery.⁴⁹ Sometimes a court will interpret a party’s use of the court for discovery purposes as a waiver of the right to arbitrate the dispute.⁵⁰ Therefore, it is rare that a party to an arbitration will find relief from the court when it is unhappy with the arbitrators’ decision regarding discovery.

There are times, however, when a court will interfere in a discovery dispute that is part of an arbitration. The federal courts will do so only in “extraordinary circumstances,” such as when the evidence will likely be lost if discovery does not occur right away.⁵¹ The “extraordinary circumstances” test is difficult to meet, however, and the federal courts generally maintain their policy of not interfering with arbitration.⁵²

State courts in New York⁵³ and New Jersey⁵⁴ have adopted the “extraordinary circumstances” test as well. Section 3102(c)⁵⁵ of New York’s Civil Practice Law and Rules provides for court-ordered discovery in aid of arbitration, but New York courts have held that these orders should only be granted in exceptional circumstances.⁵⁶ In *Commonwealth Insurance Co v. Beneficial Corp.*,⁵⁷ the District Court of the Southern District of New York, applying New York law, explained that although the “extraordinary circumstances” test sounds “highly restrictive,” the test is actually more relaxed, being “one of necessity and not of convenience.”⁵⁸ New Jersey amended its Rules of Court to allow for the extension of discovery period in arbitration for “extraordinary circumstances.”⁵⁹

California law is somewhat less clear in the area of court-ordered discovery in aid of arbitration.⁶⁰ In one case, an appellate court held that discovery matters should be handled by the arbitrator and only go to the court after a final decision has been made, except in extraordinary circumstances.⁶¹ However, no other courts have cited this decision for this proposition.

Courts in Florida, Michigan and Texas will not interfere in arbitration at all and require all discovery to be conducted through the arbitrator. The Florida Arbitration Code, for example, “does not permit discovery within the arbitration itself, even apart from the judicial proceedings.”⁶² In Michigan, an appellate court upheld a trial court’s denial of a motion to compel discovery. The court explained that although several federal courts have allowed discovery in aid of arbitration upon a showing of special need, other courts have held that a litigant in arbitration has no right to discovery so the trial court did not err in denying the motion to compel.⁶³ A Texas appellate court, interpreting the Texas General Arbitration Act, held that a court’s interference with the arbitration process through discovery orders would interfere with the Act’s provisions.⁶⁵ This case law makes it clear that discovery is by and large under the control of the arbitrator and that courts seldom become involved in discovery disputes in arbitrations.

IV. COURT’S POWER TO REVIEW DISCOVERY RULINGS

Given that the grounds to vacate an arbitration award are so narrow, it is important for an attorney in an arbitration to make sure that all pertinent evidence has been presented to the arbitrators. Indeed, the parties will usually have only one opportunity to put forth their evidence and arguments to vindicate their respective positions. For this reason, discovery becomes highly significant. If evidence is not forthcoming so that it can be introduced at the hearing, the evidence is

unlikely ever to be heard, therefore, it is of utmost importance for counsel to understand discovery in arbitration and how to use it effectively.

CONCLUSION

The use of arbitration as an alternative to traditional civil litigation continues to increase.⁶⁶ Accordingly, it is important that practitioners familiarize themselves with the practice and procedures of arbitration. With exceptions, depending on applicable state law or under the Federal Arbitration Act, arbitrations are governed by fairly common rules affecting discovery. Although discovery is available, it may be more limited than that available in a plenary action. Importantly, discovery is typically under the control of the arbitrator, although, in extreme cases, parties may turn to the courts to obtain discovery. Once practitioners thoroughly understand these practices in the relevant jurisdictions, they can make a more informed judgment as to whether arbitration is an inviting alternative to traditional civil litigation. Once arbitration is agreed upon as a way to resolve a dispute, the arbitration clause of the contract should be carefully drafted to broaden or limit the scope of discovery as desired.

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1. For a thorough discussion on whether discovery in arbitration allows for too much or too little discovery, compare Edward Brunet, [Questioning the Quality of Alternative Dispute Resolution](#), 62 TUL. L. REV. 1, 34

- (1987) (arguing that the emphasis in arbitration has too often been speed and not accuracy and that “quality dispute resolution needs procedures that facilitate ‘accurate’ results”), with Wendy Ho, Discovery in Commercial Arbitration Proceedings, 34 HOUS. L. REV. 199, 205 (1997) (arguing that the availability of discovery in arbitration has been too great, which undermines the overall objective of arbitration, which is “to avoid the delays, complicated procedures, and extensive discovery processes that are inherent in the civil litigation system”). This author submits that, so long as the attorneys are educated as to the discovery devices available to them, arbitration does provide an attractive alternative to litigation. Further, this author argues that the overall objective of arbitration cannot be defined as merely a way to escape the time commitment of traditional civil litigation, but rather that arbitration has a myriad of objectives, paramount one of which is finality of result.
2. See, e.g., Fueling Advanced Techs. v. Ford Motor Co., 1997 WL 733897 (N.D. Ill. Nov. 14, 1997).
 3. See, e.g., Commonwealth Ins. Co. v. Beneficial Corp., 1987 WL 17951 (S.D.N.Y. Sept. 29, 1987) at *5 (applying New York law to a dispute where the arbitration agreement provided that “unless ‘otherwise mutually agreed upon, all arbitration shall take place in the City of New York’”).
 4. See, e.g., Amgen Inc. v. Kidney Ctr. of Del., 879 F. Supp. 878, 883 (N.D. Ill. 1995).
 5. Federal Arbitration Act, 9 U.S.C. § 1-14 (1947). Note that in Allied-Bruce Terminix Cos., v. Dobson, 513 U.S. 265, 273-278 (1995), the U.S. Supreme Court interpreted the language “involving commerce” broadly, so that the FAA will often be applicable if no other set of rules is agreed upon by the parties.
 6. Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).
 7. See, Volt Info. Science. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989) (explaining that the FAA was “designed to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate . . . and place such agreements upon the same footing as other contracts” (external citations omitted)).
 8. See, e.g., Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 N.Y.2d 173, 182 (1995) (listing the established grounds for setting aside a contractual provision as “fraud, duress, coercion or unconscionability”). See also 9 U.S.C. § 2, which states that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
 9. Volt Info. Science, 489 U.S. at 475-6.
 10. See Rules: Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes) (hereinafter “AAA Commercial Rules”), R-21, at <http://www.adr.org>.
 11. Id.
 12. See, id., See, e.g., Fueling Advanced Technologies v. Ford Motor Co., No. 97-C-6479, 1997 WL 733897, at *2 (N.D. Ill. Nov. 14, 1997).
 13. AAA Commercial Rules, supra note 10, at R-21.
 14. See discussion infra Part III.
 15. AAA Commercial Rules, at R-31.
 16. At <http://www.adr.org>. See Topics of Interest: Subpoenas (hereinafter “AAA Subpoenas”).
 17. Id.
 18. Id.
 19. Id.
 20. AAA Subpoenas.
 21. FED. R. CIV. P. 45(b). See, e.g., In re Commercial Solvents Corp. v. L.A. Liquid Fertilizer Co., 20 FR.D. 359, 362 (S.D.N.Y. 1957).
 22. N.Y. C.P.L.R. § 301-328 (1963).
 23. See AAA Commercial Rules at E-1 – E-10.
 24. See AAA Commercial Rules at E-2.
 25. See AAA Commercial Rules at E-5.
 26. See AAA Commercial Rules at E-6.
 27. Id.
 28. See AAA Commercial Rules at L-1 – L-4.
 29. AAA Commercial Rules at L-3.
 30. AAA Commercial Rules at L-3(c).
 31. AAA Commercial Rules at L-3(d).
 32. AAA Commercial Rules at L-3(f).
 33. AAA Commercial Rules at L-3(j).
 34. AAA Commercial Rules at L-4(b).
 35. AAA Commercial Rules at L-4(c).
 36. AAA Commercial Rules at L-4(d).
 37. 9 U.S.C. § 1.
 38. 9 U.S.C. § § 1, 2.
 39. 9 U.S.C. § 7. For a thorough discussion of the need for balance between efficiency and correctness of result under the FAA, see Gabriel Herrmann, Discovering Policy Under the Federal Arbitration Act, 99 CORNELL L. REV. 779, 791 (2003).
 40. Id.
 41. Id.
 42. Comstat Corp. v. Nat’l Sci. Found., 190 F.3d 269, 275 (1999); Integrity Ins. v. American Centennial Co., 885 F. Supp. 69, 71 (S.D.N.Y. 1995).
 43. Commercial Solvents Corp. v. L.A. Liquid Fertilizer Co., 20 FR.D. 359, 362 (S.D.N.Y. 1957).
 44. Id.
 45. 9 U.S.C. § 7.
 46. In re Security Life Insurance Co. of America, 228 F.3d

- 865, 870-71 (8th Cir. 2000). See also *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D.Tenn. 1994); *Stanton v. Paine Webber, Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988).
47. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3rd Cir. 2004).
48. See, e.g., *Fueling Advanced Technologies v. Ford Motor Co.*, 1997 WL 733897 (N.D.Ill.) (holding that there is no basis for compelling the parties to engaged in pre-arbitration discovery above and beyond the discovery already provided under the AAA rules agreed to by the parties).
49. See *Thompson v. Zavin*, 607 F. Supp. 780, 783 (C.D. Cal. 1984) (holding that once there is a stay of proceeding pending arbitration, the court will not interfere with arbitrators' decisions, except that a court will enforce subpoenas and, once an award is made, it may confirm, vacate or modify the award).
50. *Graig Shipping Co. v. Midland Overseas Shipping Corp.*, 259 F. Supp. 929, 931 (S.D.N.Y. 1966).
51. See *Koch Fuel Int'l v. M/V S. Star*, 118 F.R.D. 319, 320 (E.D.N.Y. 1987) (allowing depositions of crew members on a ship that was scheduled to leave the country as the crew members would not be available to testify in the future); *In re Deiuemar Comagnia di Navigazione*, 153 F.R.D. 592, 593 (E.D. La. 1994). See also *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y. 1973) (allowing discovery, although not using the "extraordinary circumstances" language; instead explaining that: (1) discovery is particularly necessary in a case where the claim is for payment for work done and virtually completed, and the nature of any defense is unknown; (2) the amounts involved are so substantial that any expense in taking depositions is relatively small; (3) the action has proceeded to such a point that the taking of depositions can probably be accomplished without delaying the arbitration; and (4) only one of five defendants has joined motion to stay the trial).
52. See, e.g., *Cotter v. Shearson*, 126 F.R.D. 19, 21 (S.D.N.Y. 1989); *Ortlip v. George Hyman Construction Co.*, 126 F.R.D. 494, 497 (E.D. Pa. 1989); *Oriental Commercial & Shipping Co. v. Rossel*, 125 F.R.D. 398, 401 (S.D.N.Y. 1989).
53. See, e.g., *State Farm Mut. Auto. Ins. v. Wernick*, 90 A.D.2d 519, 519 (1982) (citing *In re Katz*, 64 A.D.2d 900 (1978)).
54. See, e.g., *Montiel v. Ingersoll*, 789 A.2d 190, 191 (2001).
55. N.Y. C.P.L.R. § 3102(c) (1994).
56. See, e.g., *Wernick*, 90 A.D. at 519; *Katz*, 64 A.D.2d at 900; *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 406 (N.Y. 1974); *In re Frenkel*, 398 N.Y.S.2d 816, 818 (1977).
57. *Commonwealth Ins. Co. v. Beneficial Corp.*, 1987 WL 17951 (S.D.N.Y. Sept. 29, 1987) at *5.
58. *Id.* (citing *Wernick*, 90 A.D. at 519).
59. See, e.g., *Montiel v. Ingersoll*, 347 N.J. Super. 246, 248 (2001) (explaining the amendments to R. 4:24-1).
60. See, e.g., *Long v. Hauser*, 125 Cal. Rptr. 125, 125 (1975).
61. *Id.* at 127 (citing *Pac. Tel. & Tel. Co. v. Superior Court*, 465 P.2d 854, 859-62 (1970) and analogizing the California Supreme Court's holding, which the *Long* court describes as providing that "except in extraordinary circumstances, discovery matters should remain at the trial level until the completion of the trial" to the idea that discovery matters in an arbitration should remain with the arbitrator until there is a final arbitral award).
62. *Greenstein v. Baxas Howell Mobley, Inc.*, 583 So.2d 402, 403 (1991) (holding that the denial of a motion for an order of protection "impermissibly granted discovery," when no discovery should have been conducted).
63. *City of Dearborn v. Freeman-Darling, Inc.*, 326 N.W. 2d 831, 833-34 (1982).
64. Texas General Arbitration Act, Tex. Rev. Civ. Stat. Ann. art. 224, et. seq. (Vernon 1973; Vernon Supp. 2003).
65. *Transwestern Pipeline Co. v. Blackburn*, 831 S.W.2d 72, 74 (1992).
66. See Gabriel Herrmann, *Discovering Policy Under the Federal Arbitration Act*, 99 CORNELL L. REV. 779, n.3 (2003) (citing Katherine V.W. Stone, *Private Justice: The Law of Alternative Dispute Resolution 4-5* (2000)) .

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