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"Discovery" in Arbitration: You Can Almost Always Get the Information You Need

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One of the canards I hear frequently about arbitration – always as a reason not to use it – is that discovery is not available in arbitration. Having served as an arbitrator in commercial cases for over 20 years, and as a lawyer trying cases for clients engaged in arbitration over that period as well, I strenuously disagree. That said, it is important to understand that, except for disputes subject to Mandatory Arbitration under the Washington Superior Court MARs,[1] arbitration is a creature of contract, and if the parties' arbitration agreement restricts (or grants) discovery the arbitrator is obligated to follow their agreement. Moreover, in most arbitration contexts the wide-ranging (some would say oppressive and costly) discovery commonly available in court litigation (in the federal arena, at least prior to the December 2015 amendments to the Federal Rules of Civil Procedure) is not generally available in arbitration. However, the rules of most arbitration provider organizations provide for some "discovery" as of right and good arbitrators are open to party requests for additional "information" from each other and not only grant such requests, encourage them. Wise counsel will bear in mind their clients' discovery needs when drafting a pre-dispute contractual arbitration agreement or, post-dispute, in drafting an agreement to submit a dispute to arbitration.[2]

Litigants' (your clients) general complaint about discovery in court litigation is that it is the single most expensive litigation cost.[3] That may be because the general touchstone in discovery in the court context has for years been whether the discovery sought may "reasonably lead to the discovery of admissible evidence," a standard that accommodates if not encourages "turn over every stone" discovery. The December 2015 amendments to the Federal Rules jettison that standard in favor of "proportionality." Over time, it may be that state court rules will be amended to reflect a similar approach.

Good arbitrators have for years followed the proportionality rule in evaluating parties' discovery requests or proposals: what discovery is necessary and appropriate given (1) the legal and/or factual complexity of the case, (2) the amount in controversy, and (3) the impact of the discovery on expense and delay.[4] Moreover, the Washington Uniform Arbitration Act (WUAA, RCW Chapter 7.04A, particularly RCW 7.04A.170 and .170(3)) and the rules of most arbitration provider organizations contemplate some discovery and vest the arbitrator with substantial

authority to order needed discovery (*e.g.,* AAA Commercial Rule R-22).[5] In the securities field, most customer-broker disputes are handled by the Financial Industry Regulatory Authority (FINRA); FINRA's rules not only mandate the production of "core" documents (*e.g.,* Rule 12506 and the "Discovery Guide" (www.finra.org, search for "discovery guide")) provide that certain party-held documents are presumptively discoverable; further, Rule 12514 requires that the parties, at least 20 days prior to the evidentiary hearing, identify witnesses who may testify and produce documents to be used at the hearing. FINRA Rules also grant the arbitrator the authority to order additional appropriate discovery (*e.g.*, FINRA Rules 12507, 12512, 12513 and 12514).

In AAA, JAMS and FINRA cases, shortly after confirmation of her appointment the arbitrator schedules an initial preliminary hearing to discuss a variety of subjects important to efficient management of the case (*see, e.g.,* AAA Commercial Rules R-21 and P-1 and P-2; FINRA Rule 12500) and good arbitrators in any case will schedule such a hearing. Counsel should discuss their discovery needs with each other prior to that conference and then raise those issues with the arbitrator at the conference. Most arbitrators are receptive to, and will approve, party-proposed discovery plans as long as they are appropriately tailored to the case. Many commercial arbitrators use Article 21 of the AAA/ICDR International Dispute Resolution Procedures (July 1, 2016) (www.adr.org, click on "Rules & Forms") as a guide when evaluating party discovery requests and any disputes concerning them.

Notwithstanding the general availability of discovery in arbitration, there are important qualifications:

Depositions. While it is certainly within the arbitrator's authority to permit depositions under the WUAA, the statute does not grant parties the right to take depositions. The same is true under most arbitration-provider rules. The key to obtaining the arbitrator's blessing for depositions is to identify (and get agreement) on only the most important depositions; one can always return for additional depositions if an appropriate showing of necessity is made. Depositions are strongly discouraged in FINRA cases (FINRA Rule 12510), which unfortunately sometimes makes the evidentiary hearing unduly lengthy.

Interrogatories are not generally available as of right under either the WUAA or most provider-organization rules and most arbitrators discourage the use of interrogatories except as a means of discovering the whereabouts of relevant documents and the identity of persons with knowledge or information about the issues in dispute. Most arbitrators will require the parties to produce, shortly after the initial preliminary hearing, documents on which they rely and, on a similar schedule, to identify key witnesses (*see, e.g.,* AAA Commercial Rule R-21(b)). In FINRA cases, the arbitrator may approve properly framed "requests for information" (FINRA Rule 12507(a)).

Documents. Carefully tailored requests for production are almost always permitted by arbitrators (*see, e.g.,* AAA Commercial Rule R-21(b)), and are essential in most commercial cases. As noted above, in customer-broker securities cases FINRA Rule 12506 and the "Discovery Guide" require the production of core documents in a party's possession and FINRA Rule 12514 permits the arbitrator to order that additional documents be produced.

Requests for Inspection. A request for a site-visit or inspection of other "things" is uncommon in most commercial cases, but counsel should consider making such a request in the appropriate case. Providing the request is legitimate and not burdensome, an arbitrator is likely to permit it even over the objection of the other party.

e-Discovery is normally available by agreement or by order of the arbitrator under the rules and statutory provisions previously cited. Arbitrators will, however – like courts – consider appropriateness and burden. Look to case law and papers like those published by the Sedona Conference for guidance. *See also* AAA Commercial Rule 22(b)(iv).

Third-party discovery is available by subpoena, authorized by the arbitrator, in the appropriate case (*see* RCW 7.04A.170; however, *see* FINRA Rule 12512 for customer-broker securities cases). However, arbitrators commonly scrutinize an application for a subpoena to a third-party so as to minimize the intrusive effect and burden on the third-party. Arbitrators will commonly entertain an application by the third-party if that party objects to the subpoena. In order to assist if the third-party balks at compliance, ask the arbitrator to summarize the reasons for permitting the third-party discovery. A subpoena is ordinarily enforceable by the court where the subpoena recipient is located, even if the arbitration is pending in another state. See RCW 7.04A.170. An arbitrator generally has no power to enforce her own subpoena unless it is to a party. However, for the rare case governed only by the FAA, counsel should be aware that there is a split of authority among the circuits concerning the appropriateness of discovery subpoenas to third-parties (whether for depositions or documents).

Sanctions. Both the WUAA and the rules of most provider-organizations authorize the arbitrator to sanction a party for discovery abuse or non-compliance with discovery orders. *See* RCW 7.04A.170(4); AAA Commercial Rule R-23(d) and (e); FINRA Rule 12511.

In short, parties in arbitration can almost always get the discovery needed to prepare and present their case. The key is for counsel to be organized and diligent in tailoring requested discovery to that necessary given the issues in the case. Use of cookie-cutter discovery requests from court cases will ordinarily not be successful.

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[1] This article will focus on arbitration, principally commercial arbitration, in contexts other than the MARs. Prior to the assignment of a case to an MAR arbitrator, all of the discovery vehicles available under the CRs may be used in the case. However, after assignment of a case to the arbitrator, available discovery is quite limited: "A party may demand a specification of damages under RCW 4.28.360, may request from the arbitrator an examination under CR 35, may request admissions . . . under CR 36, and may take the deposition of another party, unless the arbitrator orders otherwise. No additional discovery shall be allowed, except as the parties may stipulate or as the arbitrator may order. The arbitrator will allow discovery only when reasonably necessary. . . ." MAR 4.2. When a case is likely to require arbitration under the MARs, counsel would be well-advised to identify early-on what information is needed to prepare the case for trial and promptly serve needed discovery requests (or depose non-parties) so that when the case is assigned to an arbitrator needed information has been obtained and further litigation about the scope of discovery is avoided.

[2] There are many sources for suggested language for arbitration clauses. One such source is the American Arbitration Association's "ClauseBuilder® Tool" (www.adr.org and click on "ClauseBuilder® Tool" to the right on the first page, or search for that on the website).

[3] Sadly, over the last several years litigants in arbitration have begun to "litigation-ize" arbitrations, frequently by stipulating (or inserting a similar provision in their arbitration agreement) that discovery in arbitration will be conducted with reference to federal- or state-court discovery rules. Largely to deal with this development, and the concomitant increase in expense and delay in arbitrations, in 2009 the College of Commercial Arbitrators convened a "National Summit on Business-to-Business Arbitration to identify the chief causes of the problem and explore concrete, practical steps . . . to remedy them," co-sponsored by the five of the principal organizations involved in commercial arbitration (the ABA's Section of Dispute Resolution, the AAA, JAMS, CPR and the Chartered Institute of Arbitrators. Following the Summit, the College of Commercial Arbitrators published "Protocols for Expeditious, Cost-Effective Commercial Arbitration." The Protocols are available on the CCA's website (www.thecca.net, now under redevelopment) and, with the permission of the CCA, on the author's website (www.cutleradr.com)

[4] The training and experience of arbitrator candidates in efficient and effective case management is of obvious importance and counsel and their clients will be well-served by selecting an a arbitrator or panel of arbitrators with these skills.

[5] While the Federal Arbitration Act (FAA, 9 U.S.C. §1 *et seq.)* applies generally to arbitration of cases involving interstate and maritime commerce, it is largely silent on discovery matters. For discovery, look to state arbitration law (which applies and offers guidance, providing it is not in conflict with the FAA) and provider-organization rules.