Managing Discovery in Arbitration

By Gilda R. Turitz

Pretrial discovery is widely understood to be the most expensive phase of litigation, often more so than trial. That cost factor often drives many contracting parties—whether in the commercial, employment, or consumer context—to opt for arbitration clauses to resolve future disputes. In addition to wanting other perceived benefits of arbitrating such as speed and finality, parties expect discovery in arbitration to be more limited and, therefore, to get them more quickly to the end result and at less cost than in litigation.

In reality, such expectations about discovery in arbitration are not always met. Nor are such expectations always consistent with the desires of counsel and their clients once a dispute arises. At that point in time, it is not uncommon for the parties to want the same broad range of discovery that is provided as a matter of course in litigation. But such broad discovery is not available as a matter of right in arbitration. Especially in cases with complex issues or high dollars at stake, the restrictions on discovery in arbitration can make the parties and attorneys feel hamstrung in their ability to prove their claim or defense.

Therefore, from the outset of representation counsel must manage expectations about discovery. Counsel should address with their client the discovery challenges the case will present, as well as the client's priorities, including the resources and expense to be devoted to pursuing discovery. Four factors generally govern discovery in an arbitration—the arbitration clause at issue; the rules of the administering tribunal; any applicable laws incorporated into the parties' contract; and the discretion of the arbitrators—and these can result in a wide spectrum of what is permitted.

Arbitration Clauses and Provider Rules

The arbitration clause often will be silent on discovery, but it may specifically address one or more aspects, such as a prohibition on interrogatories, or a limit on the number of depositions allowed. An arbitration clause is most likely to refer to or incorporate rules of a particular tribunal, which vary widely in permitting discovery and will govern the arbitrators in establishing its boundaries. The parties' arbitration clause may also make specific reference to the Federal Arbitration Act (FAA), the arbitration statutes of a particular state, or the Federal Rules of Civil Procedure or state analogs. If so, specific allowances or restrictions on discovery in such statutes or civil rules may be used to argue in favor of, or against, certain discovery. For example, under California's arbitration act, except in a wrongful death or personal injury case, depositions may not be taken for discovery purposes, but they may be allowed for evidentiary purposes (such as testimony of an out-of-state witness who cannot be compelled to appear at a hearing in California). Such rules may also provide guidance to the arbitrators, even if the governing arbitration clause does not specifically refer to them.

Discovery of Documents and Electronically Stored Information

Discovery is not usually self-executing in arbitration, in that parties generally do not have the

right to commence discovery and propound whatever they choose until at least the prehearing conference with the arbitrators. Generally, arbitration rules provide for an exchange of documents as a matter of right, but arbitrators may impose limitations on the number of document requests. As provider rules are being updated and, recently, enhanced on a more regular basis, accessing the current rules, which are generally available on the providers' websites, is critical.

Counsel should be particularly attentive to e-discovery issues in arbitration. With the proliferation of electronically stored information (ESI), especially email as the principal means of communication in business, surprisingly few arbitration providers' rules specifically address discovery of ESI in a comprehensive way, although more are developing protocols. If not kept in check, e-discovery in arbitration can be as burdensome and costly as it is in court cases. Before discussing the matter with opposing counsel or at the prehearing conference, attorneys should become educated by their client, including their client's IT managers, about the types of ESI that they have, their retention and back-up systems, destruction policies, and other technical matters. Counsel should be able to advise the client respecting the limitations on production of ESI considering such factors as the number of designated custodians whose records would be searched, time period limitations, and identification of sources for production such as primary and back-up servers, back-up tapes, mobile devices, voicemails, text messages, and the like.

Depositions

Arbitration rules may not expressly address depositions. If they do, they may limit the number (such as JAMS' rules, which allow each side one deposition of the opposing party), or they may leave the issue to the arbitrators' discretion. Because depositions are expensive, arbitrators are often reluctant to allow them over the objection of the opposing party. In the absence of parties' stipulations for depositions, counsel seeking permission for a deposition must be prepared to make a showing of materiality and need for deposition testimony of a particular witness. In the case of an important third-party witness over whom a party has no control, arbitrators may be more amenable to allowing a deposition to proceed. Arbitrators who allow depositions may impose time limitations; as a guideline, the federal court's seven-hour limit for a deposition, recently also adopted for California state courts, may be used if the parties do not agree on a deposition protocol. Counsel may be able to justify the cost of deposition in arbitration for important witnesses to cut down on hearing time in the same way that discovery depositions in litigation often substantially shorten the amount of time the witness spends on the stand at trial. Such depositions may ultimately save the parties time and money by not having to pay arbitrators to listen to lengthy testimony of marginal relevance.

Written Discovery Requests and Alternatives

Counsel should assume in most arbitrations that written discovery, other than document requests, will not be allowed, unless an arbitration clause or rules permit it. Therefore, counsel should expect that they cannot propound contention discovery through interrogatories and requests for admission, absent stipulation of counsel. However, it is still possible for attorneys to gather written factual information about claims and defenses in arbitration—and perhaps even more

efficiently than they would through such traditional civil discovery methods. Attorneys should request that the opposing party be required to provide, by a specific date: items such as a more factually detailed statement of claim, counterclaim or defense; specific damages information, including the nature and elements of the claimed damages, and calculations; or early identification of potential witnesses.

Other Inspections or Examinations
Site inspections, inspections of damaged or unique personal property, certain forensic examinations, or independent medical examinations (IMEs) should be requested in cases where they are relevant. These matters are usually not covered in general rules but may be provided for in specialized rules (e.g., site inspections in construction arbitration rules). Such discovery may be necessary for expert opinion testimony on which a party will rely in the arbitration.

Expert Witnesses
Expert witness testimony at arbitration requires a protocol for prehearing discovery including disclosure of experts, exchange of reports, if any, and disclosure of rebuttal experts. Counsel should manage the expert discovery process by negotiating an agreement with opposing counsel to the extent possible, before raising the issues with the arbitrators. Most arbitration clauses and rules either do not address experts or lack the details that guide litigators in civil cases concerning disclosures, so such matters are left to the arbitrators' discretion. Unless the arbitrators have a particular protocol they like to follow for all cases, they are likely to approve a negotiated stipulation between counsel. Counsel should tread carefully in adopting established court rules as a default without studying their effect; for example, in an arbitration the Federal Rules of Civil Procedure's requirements for preparation of written reports and timing of the exchange may be both a very costly exercise and one that puts counsel in difficult time constraints. Another issue is whether expert depositions will be allowed, or limited only to those experts who do not prepare written reports, as such depositions are not necessarily permitted as a matter of right in arbitration.

While litigators must adapt to preparing a case for arbitration with limitations on discovery, they can position themselves strategically, level the playing field, and have the opportunity for a cost-effective result by focusing on early identification of the key issues, obtaining the most relevant documents and ESI, working with their clients and opposing counsel to agree on the scope of other discovery, and making the best possible case to the arbitrators to allow broader discovery within the arbitrators' discretion and the tribunal's rules.

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