THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

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Message from the Section Chair

by Joan D. Hogarth

Discord in Dispute Resolution: There are two sides to every story

Greetings ADR Practitioners:

As ADR professionals, we have come to learn that there are two sides to every story, whether it is in the facilitated negotiations of a mediation session or in the hearing of an arbitration case. My message in this edition of *The Resolver,* is focused on the very heated dispute between the defense bar and pro-arbitration proponents on the one hand and the plaintiffs' bar and anti-arbitration supporters on the other. As ADR practitioners, we know to listen and understand the words, positions and feelings of both story tellers in order to make our work value-added in the process. Even if you are an advocate, there is a requirement to know both sides

CHAIR *continued on page 20*

Message from the Editor

by Alexander J. Zimmer

We are very pleased to present the Spring 2017 edition of *The Resolver*, the newsletter of the Alternative Dispute Resolution (ADR) section of the Federal Bar Association. Our contributors represent ADR practitioners from across the country, and their articles remind us that ADR touches a wide range of substantive legal areas and demands special interpersonal skills and situational awareness. This issue addresses topics in the fields of labor law; veteran's affairs; civilian workers and the Department of Defense; healthcare delivery; and intellectual property. We also offer articles on practical skills used in the conduct of ADR, and the first of a two-part article on the evolution of information exchange in arbitration.

As ADR has grown in acceptance and use, practice and the courts set the stage for a mechanism that strives for fairness in the resolution of conflicts ranging from straightforward to complex. Bob Merring takes us back to ADR's roots in Part 1 of his two-part discussion of Discovery in Arbitration.

Two of our contributors report on recent Federal circuit court cases involving ADR, the military and our military servicemen and women. In *U.S. Dep't of the Air Force, Luke Air Force Base (AZ) v. Federal Labor Relations Auth.*, **Paul Freehling** analyzes the D.C. Circuit Court's treatment of the scope of arbitration in disputes between unionized civilian

EDITOR *continued on page 4*

WINTER 2017

Into The Briar Patch: Discovery In Arbitrations[1]

by Robert A. Merring

"What do you mean I can't serve interrogatories or take a deposition in an arbitration proceeding?" Even experienced litigators have expressed incredulity over the guiding -principle in arbitrations that there generally is no "right" to conduct discovery. Part 1 of this article explores the historical bases for the traditional rule and how the courts and alternative dispute resolution providers have modified that position in recent years. Part 2 will be published in the Fall 2017 issue of *The Resolver* and will examine: the increasingly important role that preliminary hearings and mandatory prehearing "Exchange of Information" provisions have come to play in arbitration proceedings; what the parties to an arbitration agreement can do to ensure that they have provided for a level of discovery adequate to meet their needs; and, finally, briefly addresses the special issues which arise in international arbitrations.

The Historical Context of Discovery in Arbitration Proceedings

Two of the traditional hallmarks of arbitration have been its relative speed and economy in comparison with most judicial proceedings. Historically, most cases were resolved within six months of the time that an arbitrator was appointed, and the costs of resolving a dispute were often considerably less than in court proceedings. Generally, there was—and still is—no unilateral right to conduct pre-hearing discovery unless permitted by the parties' agreement to arbitrate or by the applicable rules of the chosen arbitration provider.

An arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these is the right to pre-trial discovery. While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege.[2]

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, (the "FAA") does not even mention discovery. While section 7 of the FAA, 9 U.S.C. § 7, clearly grants arbitrators the authority to subpoena both parties and non-parties to appear and produce documents at an arbitration hearing, there is a substantial question as to whether this section also grants arbitrators the power to order pre-trial discovery; and, if so, what should be the extent of this power. The reported decisions are widely split on these issues with a slim majority concluding that under the FAA an arbitrator simply lacks the authority to order participation in pre-hearing discovery. This is particularly the case with respect to non-party depositions.[3]

Even when an arbitrator does allow pre-hearing discovery, a related concern may also arise: What are the territorial limits of an arbitrator's subpoena powers? This issue can become particularly nettlesome since "[a] petition to enforce subpoenas issued by arbitrators must be brought in the district in which such arbitrators are sitting."[4] Once again, the federal courts have widely divergent opinions as to whether the jurisdictional limits of Fed. R. Civ. Proc. 45(b)(2) apply or there is "nationwide jurisdiction" in arbitrations.[5]

The reach of the FAA is extremely broad. It applies to any written "maritime transaction or a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising," 9 U.S.C. § 2. It "'creates a body of federal **substantive** law'. . . applicable in state and federal court" and "forecloses state legislative attempts to undercut the enforceability of arbitration agreements."[6] However, state or international law may supplement--or even supplant--the FAA in many instances. For example, when the state courts have concurrent jurisdiction or the arbitration agreement contains a valid choice-of-law provision, the arbitration laws of the forum state will generally govern. Thus, in *Volt Information Sciences v. Board of Trustees,* Chief Justice Rehnquist observed:

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration--rules which are designated to encourage resort to the arbitral process--simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.[7]

The Expanding Scope of Discovery in Arbitration Proceedings

During the past few decades, the historic aversion to discovery has been challenged by two significant developments. First, there has been an explosive growth in the number and complexity of "big stakes" matters which are being referred to arbitration, and arbitration has become increasingly prevalent as an alternative to litigation in such highly sophisticated fields as patent and reinsurance matters. "In complex disputes or those involving substantial sums, it borders of the absurd to arbitrate unless some modicum of prehearing discovery is available."[8] In many cases, the parties to such disputes

are now simply demanding that there should be a "right" to prehearing discovery even when there is no express statutory or contractual provision which so provides. The major ADR providers have responded to these calls.[9]

Second, the scope and nature of arbitrations have expanded exponentially from their roots in resolving relatively simple contractual disputes between businesses with roughly equal bargaining power to the point that arbitration provisions now directly affect virtually all adult Americans. Millions of employees, credit card and bank customers, franchisees and anyone who operates an Internet site have all been added to the rolls of those who are subject to mandatory ADR provisions.

One of the few times that the courts will intervene and refuse to enforce a mandatory arbitration agreement is when the arbitration provisions are so one-sided or devoid of procedural fairness as to offend contemporary notions of due process or when they strip a party of substantive rights. These concerns are heightened when the claimant has an inferior bargaining position, such as in most employment cases. "Arbitration of statutory claims. . . is the proverbial 'new kid on the block'. . .for it is not only a new idea, but it comes in no clear form, and it has many detractors."[10] "Mere inequality in bargaining rights, however, is not a sufficient reason to hold that arbitration agreements are never enforceable. . ."[11] Rather, *Gilmer v. Interstate/Johnson Lane Corp.* directs that mandatory arbitration provisions should be enforced so "long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum."[12] The *Cole v. Burns Int'l Sec. Servs.,* court formulated five minimum requirements for the lawful arbitration of such rights. One of these requirements is that the mandatory employment agreement must provide "for more than minimum discovery."[13]

Gilmer opened the floodgates not only for the increasing use of mandatory arbitration mechanisms but also for the formulation by the AAA, ABA and affected interested parties of a series of new "due process protocols" to ensure compliance with its mandates. Most notably, in 1995, representatives from AAA, ABA. National Employment Lawyers Association, ACLU and others formed a Task Force on Alternative Dispute Resolution in Employment and developed a "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" (the "Employment Protocol"). Paragraph B-3 of the Employment Protocol directs: "Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims."

Implementing the Employment Protocol, Rule 7 of the AAA's National Rules for the Resolution of Employment Disputes now provides: "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." JAMS Employment Rule 15 is similar.

In sum, it can no longer be flatly stated that there is no "right" to discovery in arbitration proceedings. Part 2 will explore how ADR providers have implemented this brave new world of discovery in arbitration and how the parties themselves can control their own destiny in the matter.

Robert A. Merring is a solo practitioner, arbitrator and mediator in Costa Mesa. He has been a member of the San Diego-Orange County Panel of Commercial Arbitrators of the American Arbitration Association since 1993. He is also an arbitrator for the NASD and the Orange County Superior Court. He may be reached at rmerring@merringlaw.com

Endnotes

[1]This work was based on an article that originally appeared in the *Orange County Lawyer,* and has been substantially changed. Discovery in Contractual Arbitrations: "What do you mean I can't serve interrogatories?", Robert A. Merring, Orange County Lawyer, June 2006 (Vol. 48 No.6), p.18.

[2]*Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) (citations omitted).

[3]*Compare Ins.Co. of Am.v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870-71 (8th Cir. 2000)("implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing")*with Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3rd Cir. 2004)("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery") and *COMSAT Corp. v. National Science Found.* , 190 F.3d 269, 275 (4th Cir. 1999).

[4]Martin Domke, Gabriel Wilner & Larry E. Edmonson, 2 Domke on Commercial Arbitration § 29.12 (3d ed. 2015).

[5]In *Dynegy Midstream Serv.s, LP v. Trammochem*, 451 F.3d 89, 94-95 (2nd Cir. 2006), the Second Circuit held that the federal jurisdictional limits do apply to arbitrations, while also acknowledging a gap in FAA § 7 by which arbitrators may issue subpoenas that no court can enforce. In *Festus & Helen Stacy Found.v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 432 F. Supp. 2d 1375(N.D. Ga. 2006), the court found that they do not. It reasoned that Rule 45 applies only to subpoenas issued by a court, not to those by an arbitration panel. *Id.* at 1378. It also

BRIAR *continued on page 23*

as trustworthy and fair. We should make it our responsibility to continue to emphasize the advantages of arbitration and especially now for consumers who are caught up in the throes of this dispute. We need to engage plaintiff's counsel to provide education and awareness of the process. We need to go directly to the consumers to provide that same education and awareness that has become more of a natural part of the business community. Be proactive and not necessarily reactive to articles that sully arbitration. Yes, we certainly should respond but we should not wait for those types of articles to be first. Our community should participate in rulemaking by providing comments, where appropriate. Our community should participate in the legislative process should the lawmakers revive the fairness in arbitration efforts.

In other words, as ADR practitioners, we are in the best seat to observe the stories of the two sides. How can we leverage that to ensure that the advantages of the process are felt by both sides of the dispute? I challenge you to think about the areas that you could impact and to develop other ideas around—(i) education and awareness of both sides of the dispute, including the attorneys (where applicable), (ii) integrity in our own practice as neutrals, (iii) laws and regulations requesting input. What can the ADR section of the FBA do to further the use of arbitration even in the midst of the concerns today? Join the Section and become actively involved in an area of practice you love. Contact us at fedbaradr@gmail.com

And may you thrive in your practice of this exciting work.

Joan D. Hogarth is an attorney, arbitrator and mediator with substantive law experience in healthcare and in assisting seniors to navigate the multiple legal issues that may affect them. Hogarth has arbitrated over 200 consumer and securities cases and approximately 55 mediations to include Storm Sandy cases. She sits on several arbitration and mediation panels: Eastern District Courts of New York, NYC Civil Courts, American Health Lawyers Association (AHLA), FINRA and BBB. Her professional affiliations include, in addition to being Chair of the FBA's ADR Section, Editor of the Section's newsletter, The Resolver, *active roles on the NYSBA, member of the New York City Bar, AHLA, NY and NJ LERA. Hogarth is a proud recipient of the AAA's Higginbotham Fellowship. She is a graduate of the George Washington University Law School and may be reached at jayhogarth12@gmail.com*

BRIAR *continued from page 19*

endorsed a course charted by the Eighth Circuit that "'a subpoena for the production of documents need not comply with Rule 45(b)(2)'s territorial limit 'because the burden of producing documents need not increase appreciably with an increase in the distance that those documents might travel.'" *Id.* (quoting *In Re Sec. Life Ins. Co. v. Duncanson & Holt, Inc.,* 228 F.3d 865, 872 (8th Cir. 2000)).

In sharp contrast, section 17(g) of the Revised Uniform Arbitration Act expressly authorizes a court to "enforce a subpoena or discovery-related order issued by an arbitrator. . . in another state." For a thoughtful comparative analysis on obtaining and enforcing arbitration subpoenas under the FAA and under the Revised Uniform Arbitration Act, *see* Robert E. Benson, *Alternative Dispute Resolution: Discovery to Nonparties in Colorado Arbitrations,* 45 Colo. Law. 25 (2016).

[6]*Southland Corp. v. Keating,* 465 U.S. 1, 12, 16 (citations omitted) (emphasis added).

[7]489 U.S. 468, 476 (1989), (footnote omitted) (examining *Moses H. Cone Mem'l Hosp. v. Mercury Constr.Corp.,* 460 U.S. 1 (1983)).

[8]2 Thomas H. Oemke, Commercial Arbitration § 89.2 (3d ed. 1995).

[9]*See, e.g.,* AAA Rule L-3; JAMS Rule 17(b).

[10]*Cole v. Burns Int'l Sec. Servs.,* 105 F.3d 1465, 1473 (D.C. Cir. 1997).

[11]*Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 29, 33 (1991) (citation omitted).

[12]*Gilmer, supra,* 500 U.S. at 33 (1991).

[13]*Cole, supra,* 105 F.3d at 1482.