THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

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Message from the Section Chair

by Joan D. Hogarth

Congratulations to *The Resolver*, the recipient of the FBA's Outstanding Newsletter Award for 2017. This award is the result of the tenacity and hard work of our intrepid editor - Alex Zimmer. Thank you Alex, 15 articles and two newsletters later, the quality of your work shows. If you have read these articles, you will agree that they are edifying and thought-provoking touching on familiar subjects with yet a different slant and covering the areas of negotiation, mediation, arbitration and early neutral evaluation. Visit the Section's webpage for archived issues. Of course, the newsletter would not be possible without your contribution. Additionally, we hope that contributors benefited from having their work published for members throughout to country. We hope to see more of your and your colleague's work in the upcoming term. We need you to keep this newsletter and certainly this

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Message from the Editor

by Alexander J. Zimmer

We are pleased to present the Fall 2017 edition of The Resolver, the newsletter of the Alternative Dispute Resolution (ADR) section of the Federal Bar Association. Once again, our contributors are ADR practitioners from across the country. This Issue's articles remind us that the successful use of ADR requires attention to the practical application of ADR related statutes as well as public and private regulatory schemes and rules. We have also selected articles that invite the reader to pause and take the time to consider the broader possibilities of mediation and negotiation perspectives. Another of our offerings illustrates the benefits of applying that broader perspective by utilizing creative mediation or neutral evaluations to intellectual property disputes. Returning readers will be happy to be lead *Out of the Thicket* in the second of a two-part article on the evolution of information exchange in arbitration.

As you may know, we were pleased to receive the FBA's Outstanding Newsletter Award for 2017. We would like to thank all our contributors whose hard and thoughtful work has provided such a range of information, analysis, and commentary on so many facets of ADR today. And, of course we are grateful to the FBA staff for their part in publishing *The Resolver*. In this issue, we continue to pursue our goal to provide useful information and thought for the ADR practitioner and for those interested in the work we do.

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FALL 2017

Out of the Thicket: Discovery in Arbitrations (Part II)[1]

by Robert A. Merring

In the Winter 2017 issue of The Resolver, Part I of this article explored the traditional antipathy of courts and arbitrators toward the use of discovery in arbitrations and how that position has been modified in recent years. This second and final part will: (1) examine the increasingly important role that preliminary hearings and the mandatory prehearing exchange of information have come to play in arbitration proceedings; (2) describe 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 (3) address some of the special issues that arise in international arbitrations.

Preliminary Hearings and the Prehearing Exchange of Information

There is nothing quite so destructive to the smooth operation of an arbitration hearing as for the parties to wait until the first day of hearing before exchanging the documents they intend to use as exhibits, or producing documents that the other side has subpoenaed to be produced at the hearing. However, there has been a strong trend among alternative dispute resolution providers to control the prehearing process and mandate the exchange of documents and the identification of witnesses prior to the arbitration hearing.

While preliminary hearings are at least nominally optional at the request of a party or at the direction of the arbitrator,[2] their use has proliferated in recent years. As a practical matter, there is now almost always a telephonic prehearing conference held in AAA arbitrations even in consumer cases under $25,000.[3] Many other ADR providers, whether expressly or not, have taken a similar viewpoint. As Martha Stewart would say: "It's a good thing." Preliminary hearings and conferences provide an ideal opportunity for the arbitrator and counsel to address scheduling matters, discovery issues, and the prehearing exchange of documents and other information at an early stage in the proceedings.

Preliminary hearings can be especially valuable when the parties have not made any express provision in their arbitration agreement for discovery. Discovery in arbitration involves a much more collaborative process than in court proceedings. Indeed, when there is no express right to discovery under an ADR provider's rules or even an outright proscription against discovery, any discovery the parties voluntarily agree to during a preliminary hearing will normally be permitted by an arbitrator. In other words, an arbitrator will intervene only when there is a disagreement among the parties whether discovery should be allowed, or the appropriate scope or manner of discovery. Even then, most arbitrators will effectively try to negotiate a just resolution among the parties without being forced to make a binding determination.

Another mechanism that most of the major ADR providers have now adopted is some procedure for the exchange of exhibits and the identification of witnesses to be called at the arbitration hearing.[4] JAMS mandates an even earlier exchange. Somewhat reminiscent of Federal Rule of Civil Procedure 26, the "Exchange of Information" provisions under both JAMS' "Streamlined" and "Comprehensive" Arbitration Rules direct that the parties complete a "voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ('ESI')) relevant to the dispute" and the names of potential witnesses within 14 and 21 days, respectively, after all the pleadings have been received.[5]

FINRA (formerly NASD Dispute Resolution) takes the self-executing process even further.[6] In its Discovery Guide and Document Production Lists, FINRA has promulgated a comprehensive inventory of documents that are "presumptively discoverable" and required to be produced in customer arbitrations within 60 days after the answer is due.[7] For example, Document Production List 1 requires a member firm to produce not only all records relating to the customer's account[8] but also all "[r]ecords of disciplinary action taken against the associated person by any regulator (state, federal or self-regulatory organization) or employer for all sales practices or conduct similar to the conduct alleged in the Statement of Claim."[9]

Through these and similar procedural devices,[10] ADR providers have taken great strides in recent years to ensure that all parties to an arbitration are provided with information sufficient to allow all sides to prepare adequately for the hearing and that the hearing itself goes as smoothly and expeditiously as possible. Nevertheless, the extent and scope of "traditional" discovery in arbitration proceedings remain severely limited. Ultimately, it is largely up to the parties themselves to craft what they deem to be the proper scope and extent of discovery. It is to this subject that I now turn.

Working with Each Other and the Arbitrator to Ensure an Appropriate Level of Discovery

The thrust of Part I of this article was largely focused on what "right" to conduct discovery, if any, a party has in arbitration proceedings. However, it cannot be emphasized strongly enough that discovery provisions under the Federal Arbitration Act or state law are essentially "default" rules and merely establish the minimum levels of discovery to which a party is entitled. Provided that the minimum due process and "conscionability" standards are met, any discovery procedures which are agreed upon among the parties either before or after a dispute has arisen will generally override these default rules and be enforced. These include not only adopting by reference the rules of a given ADR provider, but also modifying those rules to suit the

parties' specific discovery preferences. In other words, the parties can craft a "right" to prehearing discovery by including such provisions in their arbitration agreement. By doing so, they may largely dictate the manner and scope of discovery themselves.

For example, if the parties want to be able to propound interrogatories to one another, then they are free to agree upon a provision in their arbitration agreement expressly indicating that interrogatories will be permitted and even specifying how many and what types of interrogatories will be acceptable. Indeed, most ADR providers expressly acknowledge this flexibility in their respective rules. For example, AAA Commercial Rule R-1 states: "The parties, by written agreement, may vary the procedures set forth in these rules." Rule 2(a) of JAMS's "Streamlined" and "Comprehensive" Rules similarly provide that parties "may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies. . .."

Some ADR providers also have tiered sets of arbitration procedures which variously apply depending upon the amount in controversy or the number of parties involved. Yet, the parties can normally stipulate to have an alternative set of rules apply that provide for a greater level of discovery regardless of the amount in controversy.[11] To illustrate, in construction industry disputes, AAA's "Fast Track Procedures" apply by default to all two-party disputes that do not exceed $100,000. They provide that there is no right to discovery "except as ordered by the arbitrator in exceptional cases."[12] Conversely, when the amount in controversy exceeds $1 million, AAA's Procedures for Large, Complex Construction Disputes instruct that the "parties may conduct such discovery as may be agreed to by all the parties, provided, however, that the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate.."[13] By agreeing to apply the Large, Complex Construction Dispute Procedures in their arbitration agreement or at the time the initial claims are filed, the parties can thereby effectively agree in advance to allow the whole panoply of discovery mechanisms subject only to the oversight of the arbitrator to keep the proceedings under control.

Finally, after you have determined what your mandatory discovery obligations are under the existing law, which set of discovery rules of your chosen ADR provider apply to your specific controversy, and what modifications to these rules the parties have (or can) mutually agree upon, perhaps the most important consideration of all is the selection of the arbitrator. For in the final analysis, it is in his or her experience, integrity, and discretion that your ability to conduct the level of discovery your case deserves will ultimately depend.

Discovery in International Arbitrations: No Longer a Stranger?

In 1995, one learned international law arbitrator and litigator wryly observed:

> It is difficult to overstate the horror with which parties and counsel outside the United States view the prospect of American-style discovery, with parties able to serve upon one another sweeping requests for production of documents and other information relevant to the litigation, and to obtain oral deposition testimony of witnesses in advance of trial. In civil law countries, such discovery is rarely permitted, and is viewed by many as an affront to the expectations of privacy and confidentiality that private parties have in their business information. Foreign parties doing business in the United States often insist on arbitration clauses in their agreements precisely to avoid the prospect of discovery and the other risks of litigation in the United States.[14]

In large measure, this abhorrence to discovery stems from fundamental differences in the legal process and "trial" procedures in civil law countries. In the civil law tradition, "at the outset of the proceeding, parties submit favorable documentary evidence along with the factual allegations on which they rely to meet their burden of proof. Without a specific court order, there is no obligation to submit an unfavorable document. Unlike in the United States, in civil law systems a party is not expected to disclose to its adversary all of the relevant documents in its possession, especially detrimental ones."[15] "Nor, in most cases, is there any single event that the common-law lawyer would recognize as a trial. Instead, a civil-law civil action is a continuing series of meetings, hearings, and written communications through which evidence is introduced and evaluated, testimony is taken, and motions are made and decided."[16] In a word, discovery was--and still is--a procedural device "alien" to the civil law judicial tradition.[17]

However, over the years, two developments have at least opened the doors to discovery in international commercial arbitrations. First, formerly international arbitrations were rare in the United States. However, in 1970, the United States ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). "As parties and counsel from the United States and United Kingdom have increasingly participated in the international arbitral system, the system has evolved to incorporate elements of both the civil and common law traditions. . . and also appears to be evolving more in a common law direction that tends to favor counsel trained in the adversarial process."[18]

Second, the major international arbitration providers have come to accept at least limited discovery. While their rules seldom mention discovery, "the arbitral tribunal is given the broad power to determine whether, and to what extent, discovery will be permitted."[19] A few go further and mandate the prehearing exchange of documents and/or the witness statements the parties intend to introduce at the evidentiary hearing.[20] But even the AAA's International Dispute Resolution Procedures take a much more parsimonious view on discovery than do its domestic rules: "Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an

arbitration under these Rules."[21]

Finally, "mandatory limitations upon the freedom of parties (or the arbitral tribunal) to conduct arbitration proceedings are extremely uncommon. Instead, parties' freedom to agree upon the arbitral procedures is a common feature in international commercial regulations. Article V(1)(d) of the New York Convention. . . contemplates, among other reasons, setting aside an arbitral award in cases where an arbitral procedure was not in accordance with theagreement of the parties."[22]

In sum, although discovery is now permitted to a certain extent in international arbitrations, it is largely limited to the disclosure of documents that can be identified with particularity and accompanied with an adequate description of their relevancy and materiality to the pending action. On the other hand, if you do not expect the arbitrator to allow you to propound interrogatories, requests for admissions or take depositions, you probably will not be disappointed. However, as is largely the same in domestic arbitrations, if the parties work together and agree to fuller discovery, ask and ye may receive; don't ask, and ye surely will not.

Robert A. Merring has been an arbitrator with the American Arbitration Association for over 25 years and is the principal of Merring ADR in Costa Mesa, California. He is a mediator with the AAA, U.S. District Court for the Central District of California and AMP Mediation in Irvine, California. He also serves as an arbitrator and mediator for the American Health Lawyers Association and the Orange County Superior Court.

Endnotes

[1]This work was based on an article that originally appeared in the Orange County Lawyer, and has been substantially changed. Discovery in Commercial 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]*See, e.g.,* JAMS Comprehensive Arb. Rules 16 (2014); AAA Com. Rules R-21, P-1 & P-2 (2013).

[3]AAA Com. Rules P-1(a); AAA Consumer Rules R-10 (2014).

[4]*See, e.g.,* AAA Com. Rules R-22 & P-2 ("Checklist").

[5]JAMS Streamlined Rules 13; JAMS Comprehensive Rules 20.

[6]Code of Arb. Proc. for Customer Disputes, FINRA Rules 12000-905 (2017).

[7]FINRA Discovery Guide (2013), https://www.finra.org/sites/default/files/ ArbMed/p394527.pdf.

[8]*See generally id.*at List 1.

[9]FINRA, Discovery Guide, List 1, ¶ 15.

[10]Some other recent procedural devices, such as "due process protocols," are explored in Part I of this article. Robert A Merring, *Into the Briar Patch: Discovery in Arb.,* The Resolver 18-19 (Winter 2017)(Fed. Bar. Ass'n, Arlington, Va.),

[11]For example, the "Regular Track Procedures" of the AAA's Construction Industry Rules (2015) state: "Parties may, by agreement, apply the Fast Track Procedures, the Procedures for Large, Complex Construction Disputes or Procedures for the Resolution of Disputes through Document Submission (Section D of these Rules) to any dispute." Id. at R-1(d).

[12]*Id*. at R-1(b)(emphasis added)

[13]*Id*. at Rule L-4(d).

[14]Javier H. Rubenstein, *Int'l Com. Arb.: Reflections at the Crossroads of the Common Law & Civil Law Traditions*, 5 Chicago J. Int'l L. 303. 304 (2004), http://chicagounbound.uchicago.edu.edu/cjil/vol5/iss1/20

[15]Giacomo Rojas Elgueta, *Understanding Discovery in Int'l Com. Arb. Through Behavioral Law & Econ.: A Journey Inside the Minds of Parties & Arb.,* 16 Harvard Negot. L. Rev. 165, 171 (2011)(footnote omitted),http://www.hnlr.org/wp-content/uploads/2012/04/ UNDERSTANDING_DISCOVERY_IN_ INTERNATIONAL_ COMMERCIAL_ARBITRATION_THROUGH_BEHAVIOR.doc

[16]James G. Apple & Robert P. Deyling, A Primer on the Civil-Law System 26-27 (Fed'l Jud. Ctr. 1995), https://www.fjc.gov/sites/default/files/2012/Civil Law.

[17]Elgueta, *supra,* at 171.

[18]Rubenstein, *supra,* at 304.

[19]*Id. See also, e.g.,* UNCITRAL Arb. Rules 17.1 ("the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate"); London Ct. of Int'l Arb. Rules ("The Arbitral Tribunal shall have the widest discretion to discharge [its] general duties. . . ."); Int'l Chamber of Com. Arb. Rules 22.2 ("the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided they are not contrary to any agreement of the parties.")

[20]See, e.g., In'tl Bar Ass'n Rules on the Taking of Evidence in Int'l Arb. arts. 3 & 4 (2010); Int'l Ctr. for dispute resolution ("ICDR") & AAA, int'l Dispute Resolution Rules (Including Mediation & Arb. Rules) art. 21 (Exchange of Information) & 23.

[21]ICDR at art. 21 (10).

[22]Elgueta, *supra,* at 167-68 (footnotes omitted).