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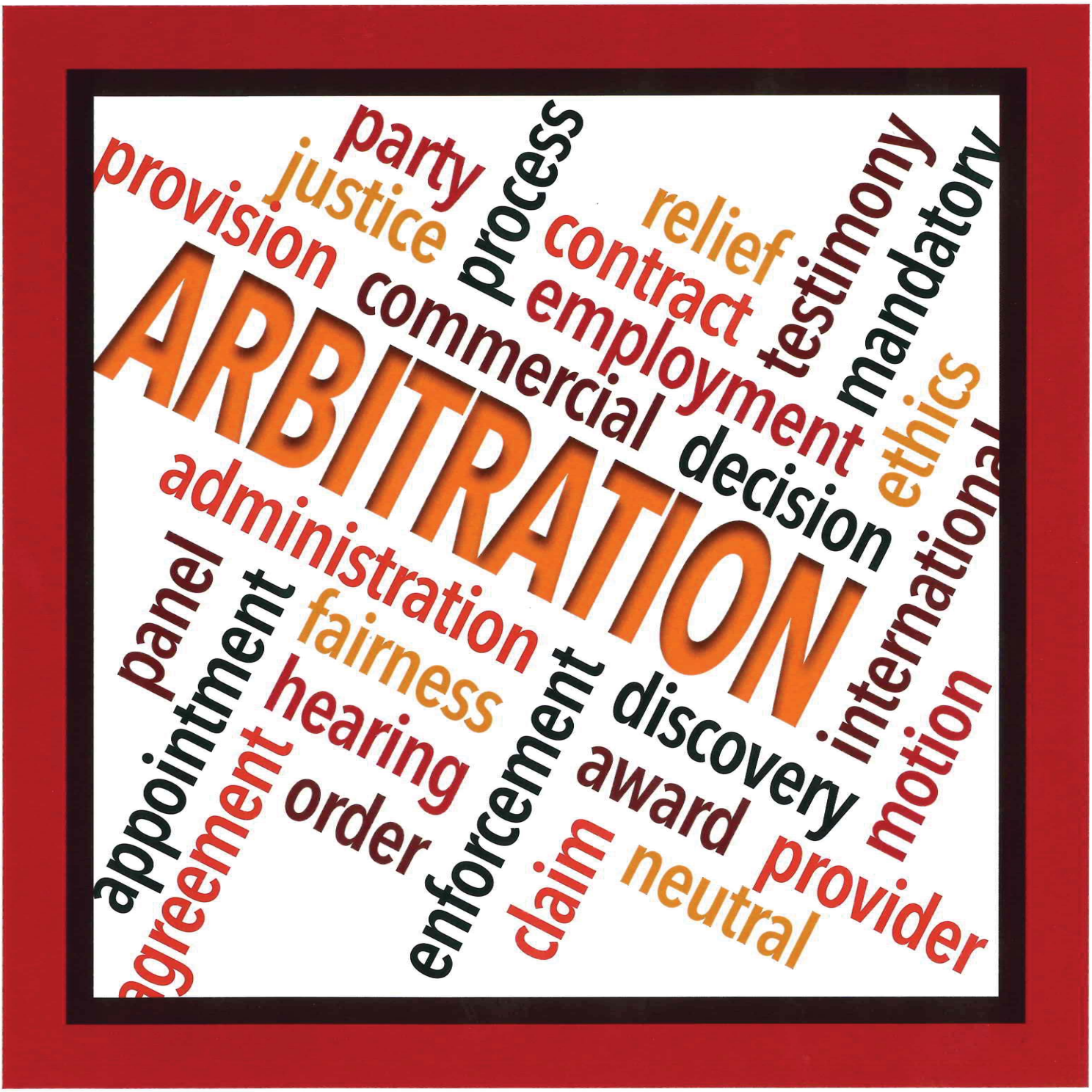

Arbitration Discovery

Getting It Right

By John Wilkinson

When I started practicing as an arbitrator, the scope of discovery in arbitration was not an issue. Arbitrated cases were relatively small, and arbitrating parties typically were content with a swift dose of rough justice without any discovery at all. More recently, however, the size of cases has increased dramatically, to the point where arbitrations involving millions of dollars are almost commonplace.

As the amounts at stake in these cases have increased, there has been an effort to include in arbitration many of the expensive, time-consuming elements of cases litigated in court such as interrogatories, broadly worded document requests, extensive depositions, dispositive motions, and even appeals. This is understandable, since a multi-million-dollar corporate dispute clearly requires more intense preparation than has historically been available in arbitration. The problem, however, is that: (i) arbitration must still be significantly faster and more cost-effective than litigation since otherwise, arbitration will lose much of its value; and (ii) contrary to this core principle, a few arbitrators have taken expanded arbitration discovery to an extreme and have opened the floodgates by permitting oppressive, expensive, and unnecessary discovery. While these instances are relatively rare, they get more than their share of publicity. Such publicity is misleading, though, because statistics furnished by the largest arbitration providers indicate that the average time from commencement of a domestic commercial arbitration to issuance of a final award ranges from 7 to 7.3 months. By contrast, the median length of time in 2011 from the filing of a civil case in district court to the disposition of appeal by the US Circuit Courts of Appeal was 30.8 months – and in some of the busier courts, considerably longer.[1]

Statistics aside, criticism of the time and cost of commercial arbitration persists, with the result that many constructive, remedial measures have been introduced. The American Arbitration Association and other arbitration providers, for example, have adopted rules aimed at maintaining the speed and cost-effectiveness of arbitration while at the same time allowing for sufficiently broad discovery to permit a fair result in a complex case.[2] After months of exhaustive study, the New York State Bar Association issued *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations* (*NY Guidelines*).[3] And subsequent to the *NY Guidelines*, the College of Commercial Arbitrators released its *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, which address arbitration discovery issues from the varying perspectives of business users, in-house counsel, arbitration providers, outside counsel, and arbitrators.

The purpose of this brief article is to present in summary form some of the more important practices that help achieve limited, cost-effective, and sufficiently comprehensive discovery in arbitration.[4]

First Preliminary Conference

Shortly after appointment of the arbitrator[5] in a commercial dispute, the arbitrator typically convenes a conference with the parties for the purpose of planning the entire case. This conference is the single most important event in an arbitration; it is the engine that makes the process run and can be the foundation for a limited, cost-effective discovery program. Following the conference, the arbitrator typically drafts and circulates a procedural order that sets forth dates for everything that needs to be done between the conference and the hearing on the merit and establishes the dates for the actual hearing. Equally as important, the procedural order will, in most cases, set forth rules and guidelines for the cost-effective conduct of discovery.

The Occasional Problem of Comprehensive Discovery

Occasionally, both sides come to the first preliminary conference in agreement that there will be comprehensive discovery in accordance with the Federal Rules of Civil Procedure. If the parties persist with this approach, there is little the arbitrator can do, since he or she has no power other than what is conferred by agreement of the parties. In these situations, I recommend that the arbitrator make a concerted effort to dissuade the parties from following the Federal Rules – an effort I have found to be successful in a surprising number of instances. Outside counsel, for example, often want all-encompassing discovery; if the arbitrator is able to include in-house counsel (who pay the bills) in the arbitration planning process, the approach to discovery often can be significantly reduced from what outside counsel initially proposed.[6]

First Procedural Order

Assuming both sides are receptive to limiting arbitration discovery in a reasonable way, a number of measures can be included in the first procedural order to help accomplish this. Some of the more important ones are discussed below.

Scope of Document Requests

The scope of document discovery should always be discussed at the first preliminary conference. In many cases, the parties are able to devise their own reasonable standard for inclusion in the procedural order. In other cases, the parties might adopt the limited document discovery suggested in the *NY Guidelines*[7] or in the International Centre for Dispute Resolution *Guidelines for Arbitrators Concerning Exchanges of Information* (*ICDR Guidelines*).[8] (See an excerpt from the *ICDR Guidelines* on the right of this page.)

***ICDR Guidelines* on the Scope of Document Requests**

> . . . the tribunal may, upon application, require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

When the parties adopt a reasonable standard for document production at the start of an arbitration, the arbitrator is well on the way to achieving the goal of an expeditious, cost-effective, and fair proceeding.

eDiscovery

By far the most expensive and time-consuming aspect of discovery in both arbitration and litigation arises from the recent growth of electronically stored information ESI (See the article by Susan H. Nycum on page 15 of the magazine.) The delay and increased cost arising from ESI is attributable to the following, among other things:

1. Unlike paper files, ESI is typically located in a wide variety of storage media such as company servers, clouds, personal computers, smartphones, iPads and other tablets, and social media.
2. ESI can be stored in many different formats, some of which may not be readable by humans.
3. To locate and present ESI in forms readable by human beings, many different information technology mechanisms are often required.
4. ESI is often widely disseminated, which means electronic documents may have many custodians. This can lead to expensive, time-consuming redundancies if all or most potential sources of electronic documents are searched.
5. Most electronically stored documents are accompanied by metadata, which tell the history of the document. When significant amounts of metadata are included in the eDiscovery process, discovery's time and cost increase dramatically.[9]

While it is unrealistic to expect arbitrators to be experts in the enormously complex technology of eDiscovery, they should at least familiarize themselves generally with the kinds of technological questions that might arise. Having done that, they should ask the parties to look carefully at eDiscovery issues that might potentially be in dispute and to be prepared to discuss

them (perhaps including a technological expert) at the first preliminary conference.

When discussing eDiscovery at the first preliminary conference, the goals of the arbitrator should include the following:

- Limit the custodians of data whose hard drives must be searched.
- Restrict the scope of eDiscovery to matters that are directly relevant and material to the outcome of the case.
- Narrow the number of storage devices to be searched.
- Define a reasonable time period to be covered by the search.
- Reduce to the extent possible the number of search terms to be used when scanning the ESI for relevant data.

The procedural order following the first preliminary conference should encourage the parties to finalize limits on eDiscovery along the above lines. In addition, the *NY Guidelines* suggest that the order contain language such as the following with respect to other aspects of eDiscovery (see the shaded box below).

New York Guidelines eDiscovery Recommendations

There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.

Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata with the exception of header fields for email correspondence.

When the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance of the materials requested, the arbitrator shall either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to further allocation of costs in the final award.

Discovery Disputes

If there are no ground rules at the outset concerning presentation and resolution of discovery disputes, an arbitration can grind to a halt as the participants attempt to deal with voluminous discovery motions accompanied by lengthy briefs, affidavits, and hours of oral argument. To avoid such a result, the first preliminary conference should include discussion of possible disputes over discovery, and the first procedural order should contain guidelines such as the following:

- In cases involving a three-arbitrator panel, any discovery disputes should be decided by one of the three. This should be done with agreement of the parties and with the understanding that the deciding arbitrator can consult with the other panel members if an issue appears particularly important. This approach avoids the time and expense of having three arbitrators plod through and come to agreement on every objection to every document request. And if there is to be argument, the single-arbitrator approach avoids the scheduling delays that can typically occur with three busy arbitrators.
- Objections to document requests should be exchanged on a date certain, after which the parties should be required to engage promptly in a good-faith "meet and confer" to resolve any objections.
- If all objections are not resolved at the meet and confer, on a specified date shortly after that gathering, the parties should submit four- or five-page letter briefs succinctly explaining their discovery differences and why they think their respective positions are correct.
- Following receipt of the letter briefs, the tribunal should render a prompt decision on the basis of the letters or quickly convene a telephonic conference for the purpose of addressing the discovery issues. Only in extraordinary circumstances should the tribunal take more than two weeks from the time of receipt of the letter briefs to decide the issues presented.
- Following resolution of the discovery issues, the parties should promptly produce documents responsive to requests as to which objections were overruled. This production should be on an expedited basis, generally not later than two or three weeks following the tribunal's decision, and
- In no event should resolution of discovery objections delay compliance with document requests as to which there was no objection.[10]

Depositions

Traditionally, depositions have not been a part of arbitration, and that is one of the distinctions drawn as to why arbitration is so much more cost-effective and efficient than litigation. But as the use of arbitration has mushroomed and as general counsel have put increasingly complex matters into arbitration, we have seen increased use of depositions in arbitration. If kept in control, this is not a bad development. Absent depositions, cross-examination at arbitration hearings can slog aimlessly through one fruitless area after another as the questioner gropes for even a tidbit of helpful information. Thus the arbitration can sometimes resemble a discovery deposition, and when it does, the testimony can go on for much too long on issues that are largely unimportant.

While depositions no doubt have a place in complex, commercial arbitrations, they must never approach the scope of deposition discovery in court. In light of this, the procedural order following the first preliminary conference in a commercial arbitration must place meaningful limits on any depositions. For example, each side might be allocated 10, 15, or 20 hours of depositions to be taken over a four- or five-week period. Or each side might be allowed a few two-hour depositions – again, over a limited period. Either way, speaking objections should not be permitted because the lawyer defending the deposition could use up most of the allotted deposition time with objections.[11]

Final Analysis

Arbitrators and parties must strike a delicate balance in commercial arbitrations, especially in complex cases, working to ensure that the discovery will allow the case to be resolved more quickly and less expensively than it would be in litigation while at the same time providing sufficient discovery to allow for a truly fair resolution.

Achieving such a balance is no doubt challenging, but as participants have become increasingly knowledgeable and focused on the need to attain this goal, effective and efficient arbitration discovery has more and more become a reality that parties have a right to expect. ◆

Endnotes

1 ABA Section of Dispute Resolution, Benefits of Arbitration for Commercial Disputes.

2 *See* The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration 144 (James M. Gaitis et al. eds., 3rd ed. 2013) (hereinafter CCA Best Practices Guide) (citing International Institute for Conflict Prevention & Resolution [CPR], Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/ProtocolonDisclosureofDocumentsPresentationofWitnessesinCommercialArbitration.aspx).

3 The New York State Bar Association has also issued similar Guidelines for the Conduct of the Pre-Hearing Phase of International Arbitrations.

4 Thomas Stipanowich has compiled what many different institutions have done to enhance arbitration efficiency. *See* Thomas J. Stipanowich, *Soft Law in the Organization and General Conduct of Arbitration Proceedings*, *in* Soft Law in International Arbitration 73 (Lawrence W. Newman & Michael J. Radine eds., 2014).

5 For the sake of simplicity, this article will refer to "arbitrator" in the singular, although many cases involve a panel of three arbitrators.

6 *See* CCA Best Practices Guide, *supra* note 2, at 140, 141; *See also* New York State Bar Association, Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations at 15, 16 (hereinafter NY Guidelines).

7 NY Guidelines, *supra* note 6, at 8.

8 The International Centre for Dispute Resolution ("ICDR") is the international arm of the American Arbitration Association.

9 See CCA Best Practices Guide, *supra* note 2, at 160-161 for a discussion of the various problems that are generated by eDiscovery.

10 *See* NY Guidelines, *supra* note 6, at 15.

11 *See* John Wilkinson, *Streamlining Arbitration of the Complex Case*, 55 Disp.Resol. J., no. 3, Aug.-Oct. 2000, at 8; *See also*, NY Guidelines, *supra* note 6, at 13-14.

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