Discovery in Arbitration: Agreement, Plan, and Fairness – One Arbitrator's View

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The Agreement Controls

Discovery in arbitration, like the arbitration process itself, starts with the parties' agreement. The basic arbitration concept stems from contractual parties who have anticipated potential problems and designated arbitration as their chosen dispute resolution process. As a result, I, like most arbitrators, look first to the parties' contract for guidance. If the parties have specified the types and quantity of discovery permissible in the arbitration clause, then the contract controls. As the arbitrator, my job at that point is to fairly and objectively enforce the parties' agreement, not to superimpose what I think best or what one side now wishes they had included in the contract.

But what if the contract is silent? Perhaps, as is often the case, the parties identified binding arbitration, the applicable forum, and the governing rules, but neglected to mention discovery. If the contract is silent on the issue, then I still focus on party agreement. Have the parties met and conferred and orally agreed upon the discovery parameters they would like to follow in the arbitration? If so, then again, my job as the arbitrator is to fairly and objectively enforce the parties' discovery agreement. If not, perhaps with my nudging, they wish to create a discovery plan now. Instead of an "order," I give the parties time to meet and confer and craft a sensible, cost-effective discovery plan.

The Forum's Rules

We also look to the governing arbitration rules. If the arbitration clause provides for a specific forum's rules, then we will follow the rules' guidance, if any. Many arbitral fora have a list of presumptively discoverable documents, depending on the type of arbitration case. For example, the American Arbitration Association (AAA) maintains its "Initial Discovery Protocols for Employment Arbitration Cases" which lists both required production and recommended parameters. Similarly, the Financial Industry Regulatory Authority (FINRA) has a "Discovery Guide" which sets out a list of presumptively producible documents for mutual exchange

between the parties in all of its consumer cases. Typically, the arbitrator and/or the parties can modify these guidelines but the chosen forum's rules is an excellent starting point and resource. Indeed, in some fora, the discovery rules are mandatory and must be incorporated into the case's discovery plan, unless the arbitration contract provides otherwise.

Crafting a Sensible Cost-Effective Discovery Plan

Often, however, the parties have contractually agreed to arbitration but have not discussed – much less agreed upon – their discovery preferences and now are so acrimonious that they cannot agree upon hearing dates – let alone discovery parameters. Now what? Well, it is time to roll up our sleeves at the case management conference and craft one together. I start by asking each side what they believe they need to prove their case. Each side is also invited to comment on the other side's "wish list." We then hash out a plan together.

- *Documentary Discovery*

Fishing expeditions and burdensome requests are quickly shutdown, but legitimate documentary needs are always granted. An early exchange of the key documents in the case often leads to settlement or the removal of some issues from the dispute. We set date parameters so the documents to be produced do not span irrelevant timeframes but instead are tightly narrowed to the dispute. I usually start with a three-year presumption for relevant documents, but the case particulars may dictate a shorter or longer timeframe.

We also discuss the need for and craft, as appropriate, a confidentiality agreement and protective order. We discuss the early production, organization, and labeling of the document production. No one wants or gets to produce a disorganized data dump! Fair and reasonable document production only will be allowed.

We specifically address electronic documents and data, the burden of IT production, the need for metadata, if any, and email chains. I will limit the number of custodians whose hard drives must be searched to the most relevant players and witnesses. The parties and I will also work out an agreed-upon, limited number of search terms for e-discovery. Absent a showing of compelling

need, I usually do not permit metadata production except for email information fields.

- *Deposition Discovery*

Traditionally, depositions have not been part of the arbitration process. However, as arbitration cases increase in number, some parties and counsel have imported deposition discovery into the arbitration process. Accordingly, we will discuss the need, if any, for depositions at the initial case management conference.

I start with a presumption against depositions as they are one of the costliest discovery tools but always grant them if the parties agree to them or a party has demonstrated a need for them. Fairness is the key. Each side will get the same discovery access. If one side needs a single day deposition, then the other side will get one as well, if it wants it. We also discuss creative ways to breakdown deposition time. Perhaps, each side gets 4 hours of deposition time to spend however they wish as long as multiple witnesses can be scheduled in a single session to lower the costs of multiple court reporter and counsel appearances.

I also invite the parties to stipulate to undisputed background facts, qualifications, authentication, and other "basic" facts to limit the need for or time of deposition discovery. Declarations can also sometimes substitute for a deposition, particularly those of custodians and most knowledgeable persons.

- *Expert Discovery*

If the case merits, we discuss expert discovery. Typically, an expert report exchange is sufficient, but occasionally expert depositions are desirable and/or necessary. We will set time and subject matter limits on the deposition. If experts are out of town, we can agree upon depositions by videoconference, Skype, or other means to cut down costs.

- *No Formal Discovery Requests*

There is no need for formal discovery requests – no interrogatories, no document requests, no deposition notices, no requests for admissions – none of the costly paperwork generated in classic courtroom litigation. Instead, either the parties

have already or we will agree upon a discovery plan together in our first case management conference with deadlines, due dates, response times, and specific content. No one needs to file an objection because the parties have already voiced, and I have already ruled upon, any objections during the conference. The case management order then captures the agreed-upon discovery plan in both a substantive, narrative format and as part of a larger case calendar.

A typical case calendar in an expedited case might look like this:

Due date	Time	Activity
9/24/18	5 pm	LD to submit list of requested essential documents
9/25/18	5 pm	LD to submit objections to requested essential documents
9/28/18	5 pm	LD for respondent to file dispositive motion showing
10/3/18	5 pm	LD to amend claim, specify claim, file answer, or file counterclaim
10/5/18	5 pm	LD to produce discovery documents
10/16/18	9 am	Second Case Management Conference Call
10/26/18	5 pm	LD to designate and identify experts
11/5/18	5 pm	LD to complete all depositions
11/5/18	5 pm	LD to request hearing postponement
11/6/18	9 am	LD to exchange exhibit lists
11/6/18	9 am	LD to exchange witness lists
11/6/18	9 am	Proposed stipulations due to opposing party
11/6/18	9 am	LD to produce exhibits
11/6/18	TBA	Parties must meet and confer in preparation for the final pre-hearing conference call
11/9/18	5 pm	LD to email objections to exhibits with challenged documents to Arbitrator
11/12/18	5 pm	Parties simultaneously exchange pre-hearing briefs and serve on Arbitrator
11/13/18	9 am	Parties submit stipulations
11/13/18	9 am	Final Case Management Call and pre-hearing conference
11/17/18	5 pm	LD to respond to any specified or amended pleading
11/19/18	9 to 5	Hearing
11/19/18	9 am	Draft award due
11/19/18	9 am	Attorneys' fees and costs requests due
11/19/18	9 am	Joint Exhibits due
11/19/18	9 am	Each parties' separate exhibits, if any, due
11/20/18	9 – 5	Hearing
11/21/18	9 – 5	Hearing
11/26/18	9 am	Objections, if any, to attorneys' fees and costs requests due
11/26/18	9 – 5	Hearing
11/27/18	9 – 5	Hearing

- *No Motion Practice*

Abolishing discovery motion practice is another important cost-saving arbitration tool. Instead of formal motion practice, I permit the parties, after exhausting meet and confer obligations, to email a summary of their discovery dispute in a paragraph. The other side presents their position, and then I either email a ruling or call for a short discovery conference call if I need further input from the parties before ruling. Either way, no one files any motions to compel, motions to quash, or other costly paper practice. Instead, the dispute is resolved typically within 24 hours.

Fairness Governs

Ultimately, fairness governs the discovery process in arbitration. As the arbitrator, I am bound by the parties' agreement, the applicable arbitration rules, the jurisdiction's law, and the needs of the case and the parties. Fairness, neutrality, and cost-effectiveness guide all arbitration discovery decision-making.

Janice L. Sperow is a full-time arbitrator and mediator specializing in commercial, employment, intellectual property, expedited, mass claims, and consumer cases. Ms. Sperow serves as an arbitrator for CPR, the American Arbitration Association (AAA), the Financial Industry Regulatory Authority (FINRA), the World Intellectual Property Organization (WIPO), the National Futures Association (NFA), Rose Intellectual Property Arbitration, the Better Business Bureau (BBB), and the National Association of Arbitrators & Mediators (NAM). She is also a mediator and arbitrator for the San Diego Superior Court Civil Mediation Panel and a Judge *Pro Tem* for the San Diego Superior Court.