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Arbitration Tools

Increasing Efficiency Through Discovery Protocols

BY JOHN WILKINSON

In recent years, criticism has mounted that arbitration in the United States is taking so long and has become so expensive that the distinction between arbitration and litigation has sometimes become blurred. In Spring 2009, JAMS decided to take a serious look at these concerns in order to help arbitrators and attorneys better manage their arbitrations and control related costs.

As its starting point, JAMS formed a task force, which focused on the New York State Bar Association's April 2009 Report on Arbitration Discovery in Domestic, Commercial Cases. The report contains many helpful suggestions for making arbitration discovery more cost-effective. The task force then turned to adapting that report for particular use in JAMS arbitrations, in the specific context of the following basic principles on which the task force agreed:

1. There are many different types of arbitration—such as consumer, labor, employment, international, maritime and commercial—all of which are very different and cannot possibly be covered by a single umbrella. Thus, the task force quickly decided to focus its work on domestic commercial arbitration since this was the area where problems with excessive discovery appeared to be most prevalent.
2. To an extent, the recent trend toward arbitrating larger and larger commercial disputes has required the expansion of arbitration discovery in order to assure a full inquiry and a fair result in such cases. The task force did not seek to prevent such expanded discovery in larger arbitrations but, rather, sought a mechanism to keep it under better control.
3. Arbitrators do not have specific rules to guide them in their discovery decisions. As a result, they often apply radically different approaches. This means that
   - some arbitrators are prone to slashing the discovery, refusing to allow any inquiry into large segments of proof and, basically, shortening the case significantly by being invasive and peremptory.
   - at the other end of the spectrum, some arbitrators simply open the flood gates and permit mountains of pointless discovery and evidence, all in the interest of following the safe approach of permitting overly comprehensive discovery, often followed by unnecessarily lengthy, exhaustive hearing.
4. In light of the unpredictability of the scope of arbitration discovery, what was most needed were guidelines that hopefully could help arbitrators strike a good balance and exercise good judgment in furtherance of a more uniform approach to arbitration discovery. More specifically, the JAMS task force concluded that what it really needed to facilitate and encourage was:
   - Arbitrators who are sufficiently assertive to ensure that the case will be resolved much less expensively and in much less time than if it had been litigated in court and, *at the same time,*
   - Arbitrators who are sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result in a complex, commercial setting.

The author serves on the JAMS arbitration and mediation panels in New York City. He is co-chair of the Arbitration Committee of the New York State Bar Association's Dispute Resolution Section. Last year, he coauthored the New York State Bar Association's "Report on Arbitration Discovery in Domestic, Commercial Cases," which is discussed in this article.

THE PROTOCOLS

On Jan. 6, JAMS adopted its "Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases" which, together with an executive summary, can be found on the JAMS website at /www.jamsadr.com (direct link: www.jamsadr.com/arbitration-discovery-protocols/). Some of the protocols' highlights include:

- The protocols emphasize that effective control of arbitration discovery must be based on the exercise of good judgment by the arbitrator and, in furtherance of that goal, the protocols set forth a list of 27 factors an arbitrator might take into account when shaping the scope of discovery in a particular arbitration.
- The protocols emphasize the importance of the arbitrator's involvement at an early point, and quickly setting strict deadlines, as well as discovery ground rules which will avoid surprise and loss of control by the arbitrator as the proceeding progresses.
- The protocols encourage the arbitrator to consider limiting document requests so that they are:
  - confined to documents that are directly relevant to significant issues in the case or to the case's outcome.
  - restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and
  - do not include broad phraseology such as "all documents directly or indirectly related to."
- As to E-discovery, the protocols suggest in the absence of compelling need that

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Arbitration Tools *continued*

(continued from 75)

- there should be production of electronic documents only from sources used in the ordinary course of business, and
- the production should 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."

- The protocols recognize that in some circumstances, depositions in a complex arbitration can significantly shorten cross examination and the length of the hearing on the merits. Unless carefully controlled, however, depositions in arbitration can become extremely expensive, wasteful and time-consuming. The protocols therefore provide that absent agreement by the parties to the contrary, there should be realistic, efficient limits on the number and length of depositions, as well as the time frame in which they occur. The protocols go on to suggest language which an arbitrator might use to accomplish this result.
- The protocols encourage the consensual resolution of discovery disputes. They call for strict limits on the length of briefs or other submissions concerning such disputes, and they provide for prompt resolution of such disputes so as not to delay the scheduled progress of the arbitration.
- The protocols recognize that dispositive motions can expedite an arbitration if directed to discrete legal issues but that, on many occasions, such motions are unnecessarily time-consuming and expensive since they raise obvious factual issues and, on their face, have no chance of success in the context of arbitration. Thus, the protocols contain suggestions for distinguishing between potentially productive motions and wasteful motions and for spending meaningful time of the parties and arbitrator only on potentially productive motions.
- Finally, the protocols recognize that despite all of their aspirational goals for arbitrators and arbitration efficiency, the fact remains that arbitration is a creature of contract and if the parties, for example, agree on full-blown discovery under the Federal Rules of Civil Procedure, it is not within the province of the arbitrator to implement something other than what the parties jointly want.

* * *

In the end, one will not find bright lines in the protocols. And one will not find hard and fast rules, either. But what one will find is a product that will help arbitrators strike a good balance when making arbitration discovery decisions.

* * *

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Arbitration Law *continued*

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The employee did not dispute that the parties clearly and unmistakably submitted arbitrability issues to the arbitrator. And he did not contend that the parties' agreement to arbitrate arbitrability was in any way unfair.

The district court agreed with the employer, holding that the agreement "clearly and unmistakenly [sic] provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable" and that "'the question of arbitrability is for the arbitrator.'" 581 F.3d at 915 (quoting district court).

The district court also held that, even were it to decide the merits of the unconscionability challenge, the employee had not shown the cost-sharing provision to be substantively unconscionable. But the district court did not address whether the claims-covered and discovery provisions were substantively unconscionable, or whether any of the provisions were procedurally unconscionable.

THE NINTH REVERSES

The Ninth Circuit reversed, and remanded to the district court to determine whether the claim coverage and discovery provisions of the agreement were substantively unconscionable.

On the "who" question, the appellate panel held that "where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court."

The Ninth Circuit said that the employee's unconscionability challenge concerned not what the arbitration agreement said, but whether he assented to it in the first place. Id. at 517 (quotations omitted).

Noting that the employer argued that the court should limit its inquiry to the contract language, the Court said that was not what the Supreme Court had in mind in *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1995).

First Options, said the Court, "did not suggest . . . that where arbitration provisions—unlike other contractual provisions—are concerned, clear contractual language is enforceable per se." The court read *First Options* as ruling "that as a threshold matter the court must decide—by applying 'ordinary state-law principles'—whether the parties agreed to arbitrate arbitrability." at 917.

On the merits, the court noted that while there was apparently no dispute that the agreement was procedurally unconscionable—it was nonnegotiable—the district court considered and rejected only one of the employee's three arguments concerning substantive unconscionability. While the Ninth Circuit affirmed this finding, it remanded to the district court to determine whether the claims coverage and discovery provisions were substantively unconscionable.

Senior Circuit Judge Cynthia Holcomb Hall dissented. Hall wrote that "what we have . . . is an arbitration agreement more favorable than most and unconscionability allegations that are thinner than most."

According to the dissent, "the majority's opinion will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation

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