DISCOVERY ISSUES IN ARBITRATION PROCEEDINGS

KARL BAYER
and Rob Hargrove
Bayer & Hargrove
8911 N. Capital of Texas Highway
Suite 2120
Austin, Texas 78759
www.bayerhargrove.com

State Bar of Texas
21st ANNUAL ADVANCED EVIDENCE AND DISCOVERY COURSE
April 24-25, 2008 – Houston, Texas
May 22-23, 2008 – San Antonio, Texas

CHAPTER 18

I. INTRODUCTION

As our larger and more general paper on arbitration seeks to explain[1], recent Texas law, both at the State and Federal levels, overwhelmingly demonstrates a judicial deference to arbitration. More and more types of cases seem to become arbitrable (that is, subject to binding arbitration at the expense of a jury trial) each day, and arbitral awards seem to become more and more insulated from judicial scrutiny each day. A general sense also seems to be emerging, among some at least, that the arbitration tidal wave may be going too far, and a legislative movement at the Federal level has emerged that promotes the so-called Arbitration Fairness Act, which, if ever passed, would limit the use of binding arbitration in consumer cases.

All of that said, please accept as the context for this paper a judicial climate in which a case is likely arbitrable if an arbitration clause is anywhere near the dispute, and in which the arbitrator's final decision, that is the arbitral award, will likely be un-appealable. Once you accept this version of the world, the next logical question becomes: what now?

While numerous reported cases explain parties' potential rights and applicable standards of review both before and after the arbitration proceeding[2], we get much more limited guidance from the Courts with respect to how the arbitration itself is conducted, and what to do if we do not think it's been conducted appropriately. This paper discusses an issue that is absolutely central to most litigation but historically anathema to arbitration: discovery.

In 1991, the United States Supreme Court decided that age discrimination claims under the ADEA could be subject to binding arbitration; in other words, nothing about the nature of the claims themselves (i.e. that they involved allegations of depravations of statutory rights) meant that employees could not waive the right to pursue those claims in courts by way of arbitration agreements. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991). The underlying plaintiffs in that case had argued, unsuccessfully, that one reason ADEA claims ought not be arbitable was the limited availability of discovery in arbitral proceedings. *Id.*, at 31, 1654-55. As the argument went, since discovery is limited in arbitration proceedings, plaintiffs in those proceedings do not have the same tools at their disposal that they would have in court, and therefore the claims ought not be arbitrable at all, since arbitration by its nature would deprive claimants of their full ability to pursue the claims. *Id.*

The Supreme Court rejected this argument, and the basis for the rejection, although fairly terse, is an important framework within which to discuss discovery in arbitration. First, the Court notes that discovery in some fashion was in fact available in the *Gilmer* case under the arbitral rules that would apply (the New York Stock Exchange and NASD rules, in this case). *Id.* This is the case with virtually every mainstream and major provider of arbitration administration (like the AAA – more on this later).

Second, the Court reflected that even though the parties could, in all fairness, expect some limitations on their ability to conduct discovery in the arbitration process, those limitations are a trade-off the parties made in exchange for "the simplicity, informality, and expedition of arbitration."[3] *Id.*, at 31, 1655, *quoting Misubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346 (1985). In other words, some discovery is to be expected in arbitration, if not even required, but some limitations on discovery are part of the policy rationale for favoring arbitration in the first place.

The Fifth Circuit, somewhat more recently, followed *Gilmer* in its rejection of an argument against arbitration made on the basis of arbitration's assumed limitations on the discovery process. *Carter, et al. v. Countrywide Home Loans, Inc.*, 362 F.3d 294, 298-99 (5th Cir. 2004).

All of this means that arbitration participants typically go into the process assuming that discovery is either not really permitted or ought to be rather dramatically limited, that is, ought not be as broad or deep as it would be in the court setting. In reality, however, parties to arbitration ought to seek discovery

---

[1] Call us and we'll email you a copy. Or, download a copy from our website: http://www.bayerhargrove.com.

[2] And more come down all the time. We try to keep up-to-speed on developments during the periods between paper updates on our blog, *Disputing*. *See* http://www.bayerhargrove.com/blog.

[3] This begs several questions beyond the scope of this paper, but worth mentioning, such as: Can employment dispute plaintiffs in Texas really be said to bargain for the arbitration process? Is arbitration actually simple, informal and expeditious? I will leave it for your own experience and biases to answer these questions, but U.S. arbitration policy rests on an assumption that the answers are "yes."

as they feel reasonable and appropriate, and they have remedies at their disposal in the event that discovery is resisted.

II. IS DISCOVERY PERMITTED IN THE FIRST PLACE?

There is nothing in either the Federal Arbitration Act ("FAA"), the Texas General Arbitration Act ("TAA") or the Texas International Arbitration Act ("TIAA") that precludes discovery in the arbitration process; indeed, as discussed in Section III, below, those statutes provide a basis for parties in arbitration proceedings to seek court intervention to enforce arbitral orders compelling discovery. However, Section III presupposes that an arbitral order compelling discovery exists. Whether or not an arbitrator will issue such an order is another question, and frankly a more important question.

It is quite well-settled that arbitration is a creature of contract between parties, and that contract, the arbitration clause, can also set out the administrative rules that will govern the arbitration. Most familiar would be rules promulgated by the American Arbitration Association. Other organizations exist, however, that provide arbitration administration services, and it is also permissible for parties to craft their own procedural rules. Almost all of these rules, however, allow for the potential for discovery, at the arbitrator's discretion.

A. Various Discovery Rules from the Major Rule Books

(i). American Arbitration Association:

The American Arbitration Association ("AAA") promulgates several different sets of rules. This paper will set out their discovery rules in the major rule-sets. The AAA's Rules for Commercial Arbitrations are commonly used. That set of rules includes the following:

> **R-21. Exchange of Information**
>
> (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct
>
> > i) the production of documents and other information, and
> >
> > ii) the identification of any witnesses to be called.
>
> (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
>
> (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

AAA Rules for Commercial Arbitration, Rule R-21. The Rule is silent on the availability of depositions. We take the position that there is nothing that precludes depositions, but again their availability will be up to the arbitrator.

The AAA Rules for Commercial Arbitrations that apply to complex cases (defined by AAA as cases where the claim is in excess of $500,000.00 exclusive of interest and attorneys' fees) specifically mention the possibility of depositions but also leave their availability up to the arbitrator:

> **L-4. Management of Proceedings**
>
> (a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.
>
> (b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.
>
> (c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.
>
> (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s)

may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.

(f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

AAA Rules for Commercial Arbitration, Rule L-4. Again, AAA writes into its rules the idea that arbitration has as a goal "just, speedy and cost-effective resolution of . . . Large, Complex Commercial Case[s]," and it codifies the notion that things like depositions are contrary to the achievement of the goal. That being the case, we certainly acknowledge that seeking such discovery could be met with some resistance, but it really does depend on the arbitrator. None of these rules precludes discovery; they simply tacitly discourage it. Presumably, in a Large, Complex Commercial Case experienced counsel and their client representatives will see the benefit of some pre-trial discovery. In our experience, it has not been difficult to obtain discovery in arbitration, but admittedly the rules do not allow it as a matter of right.

AAA also promulgates commonly-used Rules for Construction Arbitration. The Construction Rules differ from the Commercial Rules on this point:

R-22. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

(i) the production of documents and other information, and

(ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(d) There shall be no other discovery, except as indicated herein or as ordered by the arbitrator in extraordinary cases when the demands of justice require it.

AAA Rules for Construction Arbitration, Rule R-22 (emphasis added). In the Construction Rules, therefore, you cannot conduct depositions unless you can convince the arbitrator that yours is an extraordinary case, and that the demands of justice require the depositions.

Like the Commercial Rules, the Construction Rules provide a different framework in Large, Complex Cases:

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Construction Cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost effective resolution of a Large, Complex Construction Case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot

> agree on production of document and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.
>
> (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to such persons who may possess information determined by the arbitrator(s) to be necessary to a determination of the matter.
>
> (e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.
>
> (f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.
>
> (g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
>
> (h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

AAA Rules for Construction Arbitration, Rule R-22 (emphasis added). In a case where more than $500,000.00 is at stake, therefore, depositions are available even if not required by the demands of justice.

Finally, in the employment context, the AAA Rules suggest that even more discovery is potentially appropriate:

> **9. Discovery**
>
> 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.
>
> The AAA does not require notice of discovery related matters and communications unless a dispute arises. At that time, the parties should notify the AAA of the dispute so that it may be presented to the arbitrator for determination.

AAA Employment Arbitration Rules, Rule 9. In the employment context, at least, AAA feels that the Arbitrator should have the discretion to order whatever discovery he or she "considers necessary to a full and fair exploration of the issues in dispute." *Id.* Does this mean that AAA takes the position that arbitrators in Commercial or Construction disputes do not have the authority to order such discovery?

(ii). NAF

The National Arbitration Forum ("NAF") has a discovery rule that is a bit more detailed than the AAA's rule. It basically specifically allows the arbitrator to order written discovery or depositions, and it allows the arbitrator to "draw an unfavorable, adverse inference or presumption from the failure of a Party to provide discovery." *NAF Code of Procedures, Rule 29.* The Rule itself is lengthy, so we will not re-print it here.[4] It simply provides a bit more structure for a discovery dispute, stating that parties are of course to attempt to conduct discovery informally first, but then setting out a briefing schedule for taking discovery disputes to the Arbitrator.

(iii). NASD (FINRA)

In July 2007, the National Association of Securities Dealers ("NASD") and the arbitration functions of the New York Stock Exchange ("NYSE") consolidated to form the Financial Industry Regulatory Authority ("FINRA"). FINRA is now the entity that conducts securities arbitration pursuant to what we used to refer to as the NASD Code of Arbitration Procedure.

FINRA continues to enforce NASD arbitration rules, and two rule-sets exist: one for customer disputes (that is, a dispute between a customer and licensed securities professional, like a broker), and one for industry disputes (that is, disputes between licensed securities professionals or firms).

[4] NAF rules can be found on its website: http://www.arb-forum.com/.

In FINRA arbitration of customer disputes, some discovery, particularly document exchange, is permitted and expected. *FINRA (NASD) Code of Arbitration Procedures for Customer Disputes,* Rules 12505, 12506 and 12507. However, the NASD Code also specifically and strongly discourages depositions:

> Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including:
> • To preserve the testimony of ill or dying witnesses;
> • To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
> • To expedite large or complex cases; and
> • If the panel determines that extraordinary circumstances exist.

Id., at Rule 12510. In other words, an NASD arbitrator has the discretion under the Code to permit depositions, but the Code on its face seeks to limit that discretion.

The FINRA/NASD Code of Arbitration Procedure for Industry Disputes is largely the same as the Code for Customer Disputes, with one significant exception. In Customer Arbitration, certain documents are presumed discoverable and must be automatically produced in every case. *Id.*, at Rule 12506. No corresponding Rule exists in the NASD Code of Arbitration Procedure for Industry Disputes.

(iv). Non-Administered Arbitration

The AAA and the NAF are corporations that administer arbitrations. That is, they not only promulgate rules and sample arbitration clauses (which in turn require the use of their rules and services), but they also administer the arbitration, acting as a go-between between counsel for the parties and the arbitrator(s). Parties "file" pleadings by faxing or emailing them to AAA, and AAA in turn provides them to the arbitrator. The procedure is cumbersome and, in our experience, rife with opportunity for administrative error. The procedure is also quite expensive.

The International Institute for Conflict Prevention and Resolution ("CPR")[5] also promulgates rules and sample clauses, but it advocates non-administered or ad-hoc arbitration, wherein the parties decide how the case will be arbitrated and the arbitrator self-administrates. The only administration CPR is willing to perform is to help parties select an arbitrator or arbitrators if they are unable to do so.

CPR Promulgates a set of Rules for Non-Administered Arbitration, and its rule on discovery is predictably deferential to the arbitrator's discretion:

> Rule 11: Discovery
>
> The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and costeffective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.

CPR Rules for Non-Administered Arbitration, Rule 11.

(v). ICC

The International Chamber of Commerce ("ICC") maintains a Court of Arbitration which administers international arbitration and is commonly used in that context. ICC promulgates its own set of Rules as well. These Rules do not address the issue of discovery. The Rules do, however, allow the Arbitrator to revert to the procedural rules of the national law that applies to the arbitration in question in the event an issue is raised that the Rules do not address:

> **Article 15**
> **Rules Governing the Proceedings**
> 1
> The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.
> 2
> In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure

[5] http://www.cpradr.org

that each party has a reasonable opportunity to present its case.

ICC Rules of Arbitration, Article 15. In other words, if the arbitrator(s) in an international case administered by the ICC decide to apply U.S. law, then in the absence of a contrary agreement between the parties one could argue that the federal rules of civil procedure ought to apply, which in turn would provide for relatively robust discovery, given the general anti-discovery prejudice that is part of the arbitration process.

B. What if the Arbitrator Will Not Permit Discovery

Arbitral discretion, of course, is the key. In Section III, we explain how one can take an order compelling discovery issued by an arbitrator and ask a court to enforce it with all the enforcement mechanisms available to the court. There is not, however, a corresponding mechanism to request immediate relief from an arbitrator's decision to deny a motion to compel. Indeed, while the Texas Arbitration Act, as set out below, empowers courts to enforce arbitral orders and empowers arbitrators to order discovery, it does not allow courts to order discovery in arbitrations in the absence of an arbitral order for the same relief. *See also Transwestern Pipeline Co. v. Blackburn*, 831 S.W.2d 72, 78 (Tex. App. – Amarillo 1992, orig. proceeding). Parties have to ask the arbitrator for the discovery first, and if the arbitrator says no then the buck almost always will stop there.

As a last resort, both the TAA and the FAA allow parties, after an arbitration award has been issued, to ask a court to vacate the award on the basis that the arbitrator refused to hear evidence material to the controversy. TEX. CIV. PRAC. & REM. CODE §171.088(a)(3)(C); 9 U.S.C. §10(a)(3). A party not permitted to conduct basic discovery could argue that he or she had not been allowed to put forth material evidence, but it is always difficult to demonstrate the materiality of evidence a party has not been allowed to discover, and the cases on vacatur of arbitral awards require courts to interpret these statutory provisions with a strong eye towards enforcement of arbitral awards.[6]

III. WHAT CAN I DO WITH ARBITRAL ORDER COMPELLING DISCOVERY?

A. The Legal Basis for Court Enforcement of Arbitral Orders Compelling Discovery

In Texas, a party to an arbitration is authorized by the TAA to apply for a court order "to require compliance by an adverse party or any witness with an order made under this chapter by the arbitrators during the arbitration." TEX. CIV. PRAC. & REM. CODE §171.086(b)(2). The TAA also provides arbitrators with the authority to order depositions and to issue subpoenas to require either the attendance of witnesses or the production of documents or other evidence. TEX. CIV. PRAC. & REM. CODE §§171.050 and 171.051.

In other words, once a party asks for and receives an arbitral order compelling discovery, the Texas Arbitration Act provides that party with a basis by which the party can ask for court enforcement of the order.

The FAA is less specific than the TAA in terms of what it explicitly authorizes arbitrators to do, but Section 7, which authorizes arbitrators to order the attendance of witnesses and the production of documents, has for the most part also been interpreted to allow arbitrators to order discovery. 9 U.S.C. §7; *see, for example, Recognition Equip., Inc. v. NCR Corp.*, 532 F.Supp. 271, 273-74 (N. Dist. TX 1981).

If a case arises, however, where a party tries to take the position that the FAA does not specifically authorize arbitral depositions, so long as the arbitration is pending in Texas one could argue that the TAA authorizes the depositions, because the FAA does not always or necessarily preempt the TAA.

As a threshold matter, a party seeking to compel arbitral discovery should consider whether or not the FAA or the TAA applies to his, her or its case. The first place to look, as in any arbitration question, is the arbitration clause itself. Parties are free to specify which statute should apply in an arbitration clause. However, if the arbitration clause is silent as to which statute applies, the clause can be said to potentially invoke both federal and state law. *In re: D. Wilson Construction Co.*, 196 S.W.3d 774, 779 (Tex. 2006). In order to determine if the FAA can apply in a state-court proceeding, Texas courts look to the relationship between the parties, and extend the FAA "to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach." *In re: Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005), *quoting In re: L&L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 127 (Tex. 1999); *citing*

[6] This subject is discussed at length in our longer paper on the standards of review that apply to arbitral awards, which is available for free on our website.

Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003).

In other words, the FAA can be said to apply to many disputes, given the state of current Commerce Clause jurisprudence. In the *Nexion* case, for example, the Texas Supreme Court found the FAA to apply to a Texas medical malpractice case brought by a Texan against Texans in a Texas state court for torts committed in Texas because Medicare had paid for some of the plaintiff's medical expenses. *Nexion*, 173 S.W.3d at 69.

However, the simple fact that the FAA can be said to apply to a dispute does not deprive a Texas Court of TAA jurisprudence. The TAA and the FAA can simultaneously apply to a dispute, and the FAA only preempts the TAA in cases where the TAA is inconsistent with the FAA. *Wilson*, 196 S.W.3d at 779-780. In other words, most Texas litigants will be able to choose which statute they wish to apply, whether or not the federal courts have jurisdiction over the claim, since the FAA is designed to be enforceable and enforced in state courts. Indeed, the FAA itself does not confer federal question jurisdiction; in order to be brought in federal court, a petition under the FAA to compel arbitration must have some independent basis for federal court jurisdiction. 9 U.S.C. §4.

All of this means that since the FAA does not specifically preclude discovery, including depositions (and, indeed, most courts have found that Section 7 specifically allows for discovery), the fairly general Section 7 should not preempt the more specific but not inconsistent TAA. There is no case on this, of course, of which we are aware, but the argument should be in line with the current caselaw in these areas.

Finally, in the world of international arbitration, the Texas International Arbitration Act ("TIAA" – Chapter 172 of the Civil Practice and Remedies Code), like the TAA, allows arbitrators to issue interim awards and allows parties to ask district courts to enforce those awards. TEX. CIV. PRAC. & REM. CODE §§172.083 and 172.175. Additionally, the TIAA specifically adopts Section 171.051 of the TAA which in turn specifically empowers the arbitrator to issue subpoenas for documents or witnesses. TEX. CIV. PRAC. & REM. CODE §172.105. Interestingly, the TIAA does not adopt Section 171.050 of the TAA, which specifically empowers arbitrators to order depositions. However, other portions of the TIAA give arbitrators broad swath to fashion procedural rules for arbitrations within the confines of the arbitration agreement itself. TEX. CIV. PRAC. & REM. CODE §172.103. That being the case, if a party to an international arbitration which is taking place in Texas obtains an arbital order compelling a deposition, that party ought to be able to seek an order from a Texas court enforcing the arbitral order under the TIAA.

B. What You Might Do if the Arbitrator Orders Discovery that you Strongly Oppose

There is very little one can do if an arbitrator orders discovery against the strong wishes of a party. If the discovery sought is clearly inconsistent with the rules governing that particular arbitration, the party may later argue that the arbitrator exceeded his or her authority when ordering the discovery, which in turn is a basis for opposing entry of the arbitral award as a judgment under either the TAA or the FAA. TEX. CIV. PRAC. & REM. CODE §171.088(a)(3); 9 U.S.C. §10(a)(4). Again, though, any party seeking to prevent the entry of an arbitral award as a judgment faces a remarkably steep burden, as arbitral awards are for the most part un-appealable in Texas.

The various statutory mechanisms set out above to seek Court intervention for enforcement of arbitral awards do, by their nature, take time, so a party theoretically could at least seek to delay complying with the arbitral order compelling discovery, but at some point that party needs to consider the wisdom of such a tactic. The same arbitrator who issued the order will be the arbitrator who will be deciding the case, and that arbitrator is given spectacular flexibility in weighing the evidence and making his or her decision by the applicable statutory and case law. The final decision will be, for the most part, impossible to appeal. Irritating or agitating the arbitrator, even if the arbitrator is wrong, is not advisable. In litigation in Texas, as a last resort, a party can seek mandamus help in the face of an overly onerous discovery order; no such remedy exists in the arbitral setting. So, while it may be more difficult for a party to an arbitration to get an order compelling discovery, once the order is obtained that party may well be in a stronger position than the party would be at the courthouse.

IV. CONCLUSION

Like many aspects of the law governing arbitration, the rules governing discovery are intentionally vague. Like all aspects of the law governing arbitration, to answer a specific question about discovery in a specific arbitration, the parties must look at 1) the arbitration clause itself; 2) the rules governing the arbitration itself, which may be the AAA rules or some similar administrator's rules; and then 3) whatever statute governs the arbitration, knowing that both the TAA and the FAA might simultaneously apply to a Texas arbitration. That said, none of these rules will matter nearly as much as what

the arbitrator thinks. The bottom line, of course, is that all the legal mechanisms are set up to give the arbitrator broad latitude and to give the party that is on the winning side of an arbitral decision broad power to enforce that decision. And all of this is in the context of a system in which there is limited, if any, meaningful appeal. So, this paper, to the extent it seeks to be practical, could have effectively been a single rule: use common sense and do not aggravate the arbitrator.