



**PAUL BENNETT MARROW** (pbmarrow@optonline.net) is an attorney and arbitrator. He practices in Chappaqua, N.Y. He is a member of panels for the AAA, ADR Systems, NAF, NAM, and FINRA. He is a Fellow (FCIArb) of the Charter Institute of Arbitrators, London, England.

## When Discovery Seems Unavailable, It's Probably Available

Many attorneys believe that arbitration and discovery are simply incompatible. Others believe that discovery isn't available in arbitration or that arbitrators will refuse to order it. So it may come as a surprise that reasonable discovery is almost always available for the asking and that even in those situations where an arbitrator is uncooperative, a myriad of techniques and options are available to overcome that obstacle. This article reviews those options and techniques, the rules of the major providers (American Arbitration Association (AAA, Commercial Rules), JAMS, International Institute for Conflict Prevention and Resolution (CPR), National Arbitration Forum (NAF) and statutory mandates (CPLR Article 75 and the Federal Arbitration Act (FAA)) and some less likely to be spotted by those not familiar with the subtleties of an arbitration practice. The takeaway is that even when discovery seems to be beyond your grasp, all is not lost.

### The Starting Point: Rules of the Providers

Neither the CPLR nor the FAA authorizes disclosure. Both speak only to the power of an arbitrator to compel witnesses to appear at a hearing by the issuance of a subpoena and the empowering of an arbitrator to administer an oath.<sup>1</sup> So the arbitration agreement and the rules agreed to by the parties establish the basic foundation for discovery rights.

The rules of all the providers speak to discovery in one form or another.

With the possible exception of the rules of the AAA,<sup>2</sup> two levels of discovery can be anticipated:

1. *General* discovery that includes an opportunity to employ sophisticated techniques, and
2. *Limited* discovery in the form of an exchange of documents to be used at a hearing and witness lists.

The distinction between the two levels involves more than just an itemization of the tools for discovery. General discovery *requires an application to an arbitrator for an order of authorization* whereas limited discovery rights *can be invoked without any such application but are still subject to an order of an arbitrator denying the right.*

The rules for discovery vary greatly. So at the outset it is important to decide if discovery is likely to be an issue in any subsequent dispute and, if so, to compare all the rules. While parties can always agree to variations of the rules on an ad hoc basis, it probably isn't realistic to assume that after a dispute arises your adversary will willingly consent to a rules change favoring your right to discovery.

Let's take a look at what the rules of the above-mentioned four providers say with respect to these two levels of discovery.

### General Discovery

The four providers' rules involving general discovery can be classified as follows:

1. Mechanisms not specified, arbitrator's discretion governs.
  - CPR Rule 11.
  - AAA Commercial Rules R-21.

2. Some mechanisms specified, arbitrator's discretion governs.

- AAA Commercial Rules for Complex and Large Cases L-4.

3. Detailed rights with mechanisms specified, arbitrator's discretion governs.

- JAMS: Right to specific types of discovery – depositions, exchange of documents, witness lists – arbitrator's discretion governs, disputes resolved by a special master – Rule 17.
- NAF: Qualified right to specific types of discovery – written questions, exchange of information, depositions, arbitrator has discretion – Rule 29.

The right to sophisticated supplemental discovery techniques (depositions, interrogatories) is for the most part limited. CPR Rule 11 merely authorizes such discovery "as is appropriate to the circumstances." The standard for evaluating any request is "the needs of the parties and the desirability of making discovery expeditious and cost effective," which suggests that the arbitrator has authority to order depositions and interrogatories. AAA Rule 21, applicable to all commercial matters not deemed large and complex, authorizes the arbitrator to direct the discovery "consistent with the expedited nature of arbitration." AAA Rule L-4(d), applicable to large and complex commercial matters, specifically mentions depositions and interrogatories available "upon good cause shown and consistent with the expedited nature of arbitration."

JAMS Rule 17(b) grants each party the right to one deposition and gives

the arbitrator the discretion to order more “based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.”

NAF Rule 29(B)(1) allows a party to seek without limitation the disclosure of documents,<sup>25</sup> written interrogatories and “one or more depositions.” In addition, Rule 29(B)(3) authorizes the use of Requests for Admissions and Requests for Physical or Mental Examinations subject to the standard of relevance, reliability and the informative nature of the information being sought, as well as the reasonableness, burdensome nature and expense of the request.

Keep in mind that, without exception, the rules of all providers allow the parties to tailor an arbitration clause so as to either increase or decrease the scope and detail of the rules provided. Such modifications must be consistent with applicable law and the policies of the provider and must be mutually agreed to in writing.

### Limited Discovery

The purpose of discovery is to help the parties with understanding one another’s case and reduce the possibilities for surprise. To this end, many of the providers have rules that create a nearly absolute right for the exchange of documents and witness lists, rights that are in place unless the arbitrator intercedes.

By way of example, AAA Rule L-4 subsections (e) and (f) require that unless the arbitrator rules otherwise, at least 10 days prior to the hearing, the parties must “exchange copies of all exhibits they intend to submit at the hearing.”

CPR Rule 12.1 doesn’t specifically require an exchange of documents or witness lists. However, the rule does require of each party a pre-hearing memorandum containing a statement of

- the facts;
- each claim;
- the applicable law and authorities upon which the party relies;

- the relief requested, including the basis for any damages claimed; and
- the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses being called and an estimate of the time required for each witness’s direct testimony.

JAMS Rule 17(a) requires parties to exchange all relevant and non-privileged documents to be relied upon at the hearing; witness lists, including the names of experts to be called; and any expert reports to be used at a hearing.

NAF Rule 31 requires that, prior to the hearing, the parties must exchange witness lists, exhibit lists, copies of all documents and property to be used at the hearing, and an affidavit of authenticity of any document to be introduced at the hearing.

### Looking in Other Places

It’s a good idea to also consider options that go beyond the four corners of the rules of a given provider.

One mechanism that can serve as a proxy for discovery is a motion for summary judgment. Only JAMS’s rules specifically allow for such a motion.<sup>3</sup> The rules of all the other providers allow for applications to an arbitrator for determinations concerning the management and regulation of any phase of the arbitration proceeding. This standard should accommodate such a motion. Strategically, the mere making of the motion requires that the motion be answered in sufficient detail so as to

assure that the motion will be denied.<sup>4</sup> The end result is that an opportunity is created to view in some detail what the opposition’s case will look like and how it will be presented.

Another technique often overlooked is the issuance of a subpoena seeking production of something thought to exist but that is otherwise unavailable.

The FAA authorizes an arbitrator to issue a subpoena to “any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”<sup>5</sup> The CPLR provides that “[a]n arbitrator . . . in the arbitration proceeding has the power to issue subpoenas.”<sup>6</sup> The CPLR also authorizes an attorney to issue a subpoena in an arbitration proceeding;<sup>7</sup> the FAA appears to be more restrictive.<sup>8</sup>

Two providers have rules regarding the issuance of a subpoena. JAMS Rule 21 is broad in scope, allowing the arbitrator to issue subpoenas if the subpoena is in accordance with applicable law. Significantly, there is no provision

in the rule allowing an attorney for a party to issue a subpoena.<sup>9</sup> NAF Rule 30 is similar in that an arbitrator is authorized to issue a subpoena ordering a non-party or “other person permitted by law” to produce documents or property or “ordering a witness to testify.” Unlike JAMS Rule 21, Rule 30 subsections (D) and (K) specifically prohibit the issuance of a subpoena by a party or a party’s lawyer and renders any attempt unenforceable. It is not clear as to whether this rule takes precedence over CPLR 7505.

The rules of the AAA and CPR are silent with respect to the issuance of a subpoena by either an arbitrator or an attorney appearing on a party’s behalf. The rules of CPR, however, unlike those of the AAA, require an arbitrator to apply “substantive law” when making any determination involving a matter and permit an arbitrator to grant any relief allowed by the agreement of the parties and by applicable law.<sup>10</sup>

### Summing It All Up

Arbitration and discovery do indeed coexist. The key is to try to tailor your needs to the rules that govern. This can take some effort, but it’s well worth it in the long run. Arbitration is about getting a result in a very timely fashion. Arbitration is about efficiency. And arbitration is about fairness. Discovery is important and discovery is available. Getting the most out of arbitration and the rules of discovery that apply is a function of careful planning. ■

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1. *De Sapro v. Kohlmeyer*, 35 N.Y. 2d 402, 406, 362 N.Y.S.2d 843 (1974); *Kahn v. N.Y. Times Co.*, 122 A.D.2d 655, 503 N.Y.S.2d 561 (1st Dep’t 1986). See 9 U.S.C. § 7: “The arbitrators selected either as prescribed in this title [9 U.S.C. §§ 1 *et seq.*] or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” CPLR 7505: “An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths.”

2. Rules 21(b) and L-4(e) merely provide for an exchange of documents to be used at the hearing. No mention is made of any requirement that the parties exchange witness lists. As a practical matter, most arbitrators as a matter of course and good practice include in the scheduling and procedure order mandates concerning both.

3. Rule 18.

4. See discussion, Paul Bennett Marrow, *Motion Practice and Arbitration Proceedings From the Perspective of the Arbitrator*, N.Y. St. B. J. (Sept. 2007), p. 50.

5. 9 U.S.C. § 7.

6. CPLR 7505.

7. *Id.*; see also CPLR 2302(a).

8. Federal Rule of Civil Procedure 45(a)(3) provides:

An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

9. Inasmuch as local law is said to govern the subpoena process, presumably an attorney could issue a subpoena under the authority of CPLR 7505.

10. Rule 10: Applicable Law(s) and Remedies.