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Navigating the Discovery and Evidence Roadmap in Arbitration

by

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I. Discovery Questions

A. Limits on Discovery in the Arbitration Agreement

Some arbitration agreements contain tight limits on discovery, such as one or two depositions and limited document discovery.

If the case is an employer-mandated arbitration agreement and covered by the AAA Employment Rules, the rules trump any conflicting provisions in the employer's agreement. If it is an individually-negotiated agreement *or* is covered by the JAMS rules, the agreement may trump the rules.

However, JAMS has issued the "JAMS Policy on Employment Arbitration / Minimum Standards of Procedural Fairness," effective July 15, 2009. The policy governs which employment arbitration agreements JAMS will agree to administer. Standard 4 refers to the exchange of information, and the Comment to Standard 4 says there should be a pre-arbitration exchange of core information, including one deposition per side and core documents, with the arbitrator having discretion to order further discovery. It is unclear to me what force JAMS arbitrators give to the comment to a standard in a policy.

Advocates should be aware that parties can agree to use the rules of either AAA or JAMS without having the AAA or JAMS administer the arbitrations. If parties agree to use the JAMS rules without JAMS administration, there is a serious question whether the comment to Standard 4 in the JAMS Policy would apply.

In either situation, a showing of very good cause may be enough to justify additional discovery. Practitioners should focus their arguments on the functional reasons why they need the additional discovery in the case at bar, and the reasons why the burden of responding is justifiable. Legal arguments should be focused on showcasing the importance of the information, and how courts have balanced burden against need.

B. Make Sure the Arbitrator Knows What the Case is About, on Both Sides

The demand for arbitration is often very summary, and does not provide critical information about the case. The respondent's response is also often very summary.

In considering discovery disputes, the arbitrator has to make judgments and exercise discretion. That is very hard to do well if the arbitrator does not know what the contentions on each side are, or what the actual field of contention will be.

Claimants should always submit a detailed statement, citing any statutes governing your claim and explaining what it is about. Respondents should always submit a response explaining their view. Advocates should not waive the opportunity, and should not waive the opportunity to get more details from the other side, unless the stakes are so small that the parties would prefer the arbitrator to be flying blind.

Jacquelin Drucker, a very highly regarded arbitrator, said at a March 4, 2016 conference that it is important to include in every motion—even in an emergency motion requiring quick

action—an introductory paragraph reminding the arbitrator what the case is about. The arbitrator will have a number of cases, and may have to consider and rule on the motion without having the case file handy. That is very good advice.

C. Make Sure the Arbitrator Knows the Relief Sought and the Defenses to Relief

Sometimes, the relief sought and the defenses to the relief will inform the discovery the parties want to take, and should inform the arbitrator's decision on any dispute.

Unfortunately, it is not unusual for claimants to fail to identify the relief they are seeking, and it is not unusual for respondents to fail to identify their defenses to the relief.

Unless the stakes are so small that the parties would prefer the arbitrator to be flying blind, they should submit a statement of the relief sought and of any defenses to the relief.

D. Be Prepared to Discuss Discovery at the Case Management Conference

The Case Management Conference should set the roadmap for discovery, which will be set out in the Case Management Order ("CMO"). The parties should confer in advance and try to present an agreed plan, like the mandatory counsel meet-and-confer under Fed.R.Civ.Pro. 26(f) in advance of the Rule 16 scheduling conference with the court.

In the absence of such a conference, each side should think in advance of what they really need, and be able to explain why "X" number of depositions and "Y" (or open-ended) document requests are important, and how long this should take, and either submit it to the arbitrator and other side in advance or be able to articulate them orally at the Conference.

One possibility advocates should keep in mind is suggesting to the arbitrator that the CMO include a second discovery tier, where the parties and the arbitrator have a second hearing halfway through, to see if the limits should be adjusted.

In my experience, advocates frequently fail to confer, occasionally fail to plan, and "wing it" at the CMO. This is not the best way to handle an arbitration.

E. What About Arbitration Agreements Restricting Discovery?

Some arbitration agreements explicitly limit discovery. This is not necessarily a bar to the enforceability of the arbitration agreement:

> Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination. It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims. Moreover, there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas … will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims. Although those procedures might not be

> as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, *supra*, at 628. Indeed, an important counterweight to the reduced discovery in NYSE arbitration is that arbitrators are not bound by the rules of evidence. …

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (U.S. 1991).

Some restrictions on discovery and evidence, however, are so strict they can violate due process. Where one party frames the rules of discovery, it must observe the implied covenant of good faith and fair dealing. The promulgation of too one-sided a set of rules may lead to the invalidation of the agreement:

> We hold that the promulgation of so many biased rules -- especially the scheme whereby one party to the proceeding so controls the arbitral panel -- breaches the contract entered into by the parties. The parties agreed to submit their claims to arbitration -- a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.

Hooters of America, Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999).

However, the Eighth Circuit had held that the mere lack of subpoena power under a set of rules is not enough by itself to invalidate a longstanding commercial arbitration process between grain buyers and grain sellers. *Hoffman v. Cargill Inc.*, 236 F.3d 458, 463 (8th Cir. 2001, stated:

> If a “fundamental unfairness” standard exists, it must apply to arbitration schemes so deeply flawed as to preclude the possibility of a fair outcome. Such is not the case in this matter. The NGFA has been formally arbitrating cases since 1901 and the record does not sustain the charge that it systematically favors buyers over sellers. In drafting the FAA, Congress specifically chose to not empower arbitration parties with an enforceable subpoena, precisely to avoid the costs and delays of full-blown litigation. Finally, the NGFA's choice to provide an appellate proceeding, not required by statute, should not be grounds for attacking its form. The district court's ruling merely imported the very elements of litigation that arbitration seeks to avoid. Nothing compels us to conclude that this process was fundamentally unfair.

1. Rules of Arbitration Service Providers

a. Commercial Rules

Many AAA arbitrators believe that a contrary provision in the arbitration agreement will prevail over these rules, possibly subject to what they believe is necessary for a fair resolution of the dispute. Advocates with an agreement restricting discovery should seek information on potential arbitrators’ approach to discovery.

AAA Commercial Rule 22 governs discovery.

R-22. Pre-Hearing Exchange and Production of Information

(a) Authority of arbitrator. The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) Documents. The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

JAMS arbitrations are different. JAMS Comprehensive Rule 2 (Party Self-Determination and Emergency Relief Procedures) provides that parties may specify their own procedures in lieu of the JAMS rules. JAMS Comprehensive Rule 17(b) provides that each party may take a minimum of one deposition, and that the arbitrator can exercise discretion to allow more.

b. <u>Employment Rules</u>

AAA Employment Rule 9 gives the arbitrator control over the scope and extent of 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.

The AAA Employment Rules override any inconsistent provisions in the arbitration agreement or the employer's rules.

JAMS Employment Rule 17(b); like its Comprehensive Rules, provides that each party may take a minimum of one deposition, and that the arbitrator can exercise discretion to allow more. However, JAMS explicitly allows agreements to override anything in the JAMS employment rules. See JAMS Employment Rule 2 (Party Self-Determination). As noted above, however, the JAMS Policy on Employment Arbitration / Minimum Standards of Procedural Fairness has a comment to Standard 4, which has an unclear effect.

F. Should There Be External Rules, and Which Ones?

Parties to an arbitration proceeding have the freedom to decide whether particular rules should apply to discovery. In my experience, most choose the Federal discovery rules as to everything but the limits on numbers of requests. Some choose State rules. Some prefer to leave everything up to the arbitrator's discretion.

If rules are chosen, they are often chosen as a guide, and not as something to be applied strictly, in order to preserve the informality and discretion of arbitration.

I believe it is useful to the parties and the arbitrator alike to have a standard that can be referenced in briefing or opposing a motion, and on which there are useful court decisions offering guidance.

That said, every set of discovery rules I have seen provides substantial scope for the tribunal's exercise of discretion. This is even more true in arbitration. In arguing discovery matters, both sides should take care to be pragmatic, explaining the functional reasons why the discovery in question is or is not appropriate.

The informality of submission of a discovery motion to an arbitrator should never be used as an excuse to overlook the need to explain why the grant of denial of discovery is important to the party.

G. The Effect of Failing to Waive the Right to File a Dispositive Motion

1. Background

Litigators in Federal court are used to trying their cases on a cold paper record, in the context of Fed.R.Civ.Pro. 56 motions. Federal courts conduct extremely few trials on the merits. According to the Administrative Office of the U.S. Courts, in the twelve months ending June 30, 2015, the average Federal judge had 626 pending civil and criminal cases, 520 weighted civil and criminal new cases filed, *and conducted only 17 civil or criminal trials*. See the tables downloaded from http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30-3, downloaded March 5, 2016.

Federal judges resolve by trial only 3% of the civil and criminal matters filed each year. Even allowing for the cases settled, that is an alarming statistic suggesting systemic problems. Federal judges have by and large forgotten what arbitrators have always kept in mind: the importance of judging credibility and weighing evidence in light of the tone and demeanor of witnesses. "The court that can see the witnesses, hear their statements, observe their demeanor, and compare their degree of intelligence, is better able than an appellate tribunal to reconcile differences in testimony, or, if that be not possible, to ascertain the real nature of the transaction." *The Quickstep*, 76 U.S. 665, 669 (1869). "The occurrence of events, the reasons why these events took place, and the motives of the men who participated in them are drawn in question. The issue of credibility is of great importance. The District Judge had the opportunity to observe the demeanor of the witnesses and to judge their credibility at first hand." *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 646 (1957). One of the leading justifications for the rule against hearsay is that the factfinder cannot assess the demeanor of the declarant. *Donnelly v. United States*, 228 U.S. 243, 273 (1913).

This is the gold standard for decisions on the merits. Unfortunately, motions for summary judgment and grants of such motions have become the norm, few involve disputes over legal questions, most involve disputed views of the facts, and few cases are now decided with an opportunity to observe the demeanor of witnesses.

The predictable result of resolving the vast majority of civil cases on summary judgment is that the parties have an enormous incentive to depose every available witness and obtain every possible document. If the parties believe they will not be able to cross-examine witnesses at a live hearing—as was the case before trials on paper replaced real trials—they have no choice but to take the most expansive discovery they can.

Commentators and Federal judges often observe that discovery is the great driver of litigation costs and delays, but fail to recognize that the prevalence of adjudication by summary judgment is the great driver of discovery.

One of the strongest arguments in favor of arbitration is that litigants normally get a live hearing on the merits, at which they can testify and can cross-examine opposing witnesses, and the arbitrator can observe the tone and demeanor of witnesses in judging credibility.

2. Arbitration Rules Give Arbitrators Discretion Whether to Permit the Filing of a Dispositive Motion

Arbitration providers are aware of this advantage over litigation in Federal court. Arbitration rules tend to discourage reflexive summary-judgment motions that would make arbitration mimic the dysfunctional summary-judgment practices of Federal courts, and require the arbitrator to act as a gatekeeper for such motions. AAA Commercial Rule 33, for example, states:

> The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

AAA Employment Rule 27 similarly states:

> The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

JAMS Comprehensive Rule 18 and JAMS Employment Rule 18 state the same concept.

3. Cost-Saving Recommendation

Parties that wish to enjoy the promised benefits of "faster, better, cheaper" resolution of disputes should at the Case Management Conference promise not to seek to file dispositive motions on the merits of the claims, while preserving the right to seek to file dispositive motions on legal questions or on specific gateway questions independent of the merits, such as the defenses of failure to exhaust administrative remedies or expiration of the statute of limitations.

The certainty of being able to cross-examine witnesses at the hearing should reduce the number of depositions needed to prepare for the hearing. In the early days of employment discrimination litigation, before the summary-judgment trilogy, it was fairly routine for both sides to try cases without depositions of the other sides' witnesses. Where there were depositions, they tended to be short and very narrowly focused; I once deposed seven department overseers in a single day, starting at 10:00 A.M., with a long lunch break, finishing before 4:00 P.M., and with much of the time in between spent chatting with defense counsel as we waited for the next witness to arrive. Each actual deposition took about twenty minutes.

While we often had extensive records at these trials, we did not need everything in advance. We often filed mid-trial subpoenas for additional documents made necessary by the testimony of an adverse witness or cross-examination of a friendly witness, and held the witness over until we had gotten the documents. Litigation then was oriented to the justice of the result, not the formalities of process, and arbitration remains informal and oriented to the justice of the result.

It seems to me relying on the strengths of arbitration—and waiving the opportunity to seek the filing of a motion for summary disposition—is a great way to cut costs.

H. Arbitrators' Subpoenas for Testimony or Documents

1. Sec. 7 of the FAA

Sec. 7 of the FAA, 9 U.S.C. § 7, states:

> The arbitrators selected either as prescribed in this title 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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse

> or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

2. <u>What: Documents Only?</u>

a. <u>Circuits Enforcing the Subpoenas</u>

In re Sec. Life Ins. Co. of America, 228 F.3d 865, 870-71 (8th Cir. 2000), held that arbitrators have the power to order the production of documents without the attendance of a witness.

b. <u>Circuits Refusing to Enforce the Subpoenas</u>

In an opinion by then-Judge Alito, the Third Circuit has held that document-only subpoenas are not enforceable under the FAA. *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004), discussed § 7 of the FAA and continued:

> This language speaks unambiguously to the issue before us. The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party "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." 9 U.S.C. § 7(emphasis added). The power to require a non-party "to bring" items "with him" clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition, the use of the word "and" makes it clear that a non-party may be compelled "to bring" items "with him" only when the non-party is summoned "to attend before [the arbitrator] as a witness." Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.

(Emphases in original; footnote omitted). The court suggested that this would discourage the issuance of large discovery requests, which would otherwise be cost-free to the parties.

3. <u>When: Discovery?</u>

a. <u>Circuits Enforcing the Subpoenas</u>

Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Commc'ns of Detroit, Inc.), 164 F.3d 1004, 1009 (6th Cir. 1999), reasoned by analogy to § 7 of the FAA in holding that labor arbitrators have the power to enforce document subpoenas to be produced before the hearing on the merits. The court reserved the question whether a nonparty witness could be subpoenaed to provide testimony at a prehearing deposition. *Id.* at 109 n.7.

In re Sec. Life Ins. Co. of America, 228 F.3d 865, 870-71 (8th Cir. 2000), held that arbitrators have implicit power to order the production of documents prior to a hearing:

> Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.

b. Circuits Enforcing the Subpoenas Only in Special Cases

COMSAT Corp. v. Nat'l Science Foundation, 190 F.3d 269, 275 (4th Cir. 1999), held that, generally, nonparties cannot be subpoenaed to provide prehearing discovery:

> Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them;" that is, to compel testimony by non-parties at the arbitration hearing. …

However, the court explained its rationale, and held open the possibility that a showing of special need might justify an exception:

> The rationale for constraining an arbitrator's subpoena power is clear. Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes. *See Burton v. Bush,* 614 F.2d 389, 390–91 (4th Cir.1980) ("When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial."). A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process. *See id.* at 391 (concluding that limitations on discovery promote the "policy underpinnings of arbitration [which are] speed, efficiency, and reduction of litigation expenses."). Consequently, because COMSAT and AUI have elected to enter arbitration, neither may reasonably expect to obtain full-blown discovery from the other or from third parties.
>
> Yet COMSAT argues quite persuasively that in a complex case such as this one, the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing. For this reason, in *Burton* we contemplated that a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship. 614 F.2d at 391.
>
> We do not now attempt to define "special need," except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable. COMSAT did not attempt to make such a showing before the district court,

> and we infer from the record that no such showing would be possible. As COMSAT acknowledged, many if not all of the documents it sought were obtainable from AUI or with a FOIA request. In fact, the record indicates that prior to filing its petition to compel, COMSAT obtained hundreds of responsive documents from NSF via the FOIA process, continuing up to the point when COMSAT abandoned its FOIA request by ceasing to pay photocopying charges. Likewise, COMSAT has *277 not attempted to show that any information it might obtain from Van Horn and Dickman, both employees of non-party NSF, is otherwise unavailable from opposing party AUI.

Id. at 276-77.

c. Circuits Refusing to Enforce the Subpoenas

Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 216-17 (2d Cir. 2008), refused to enforce a subpoena to a third party for production of documents before the hearing:

> The language of section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness. The FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted. The fact that the Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so. There may be valid reasons to empower arbitrators to subpoena documents from third parties,9 but we must interpret a statute as it is, not as it might be, since "courts must presume that a legislature says in a statute what it means and means in a statute what it says...." … A statute's clear language does not morph into something more just because courts think it makes sense for it to do so. Thus, we join the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings.

(Citation omitted.)

4. Where: Outside the Subpoena Power of Courts Where the Arbitrator Sits?

a. Circuits Enforcing the Subpoenas

Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc., 11 F. App'x 926, 927 (9th Cir. 2001), held that a party to an arbitration can be held in contempt for playing fast and loose with a subpoena, designating a Rule 30(b)(6) deponent, failing to appear, and belatedly announcing the deponent was outside the subpoena power:

> Rule 30(b)(6) and Rule 45 do not allow a corporate entity to avoid compliance with a subpoena by announcing—after it has refused to appear, and the deposition date has passed—that the employee it had designated for the deposition is outside the territorial limits of the subpoena.

b. Circuits Refusing to Enforce the Subpoenas

Dynegy Midstream Servs. v. Trammochem, 451 F.3d 89, 96 (2d Cir. 2006), reversed an order of the Southern District of New York compelling compliance with an arbitral subpoena requiring the Houston petitioner, not a party to the arbitration, to produce documents in Houston, with respect to an arbitration that would take place in New York. The court held that the FAA did not authorize the nationwide service of process, and that the subpoena was unenforceable:

> Appellees argue that this holding will create the absurd result that FAA Section 7 authorizes the issuance of some subpoenas that cannot be enforced. They ask us either to adopt the compromise position created in *Amgen, Inc. v. Kidney Center of Delaware County,* 879 F.Supp. 878, 882–83 (N.D.Ill.1995), where the district court enforced an arbitration subpoena against a distant non-party by permitting an attorney for a party to the arbitration to issue a subpoena that would be enforced by the district court in the district where the non-party resided, or to suggest another method to get around this gap in enforceability. We decline to do so. We see no textual basis in the FAA for the *Amgen* compromise. Indeed, we have already held that Section 7 "explicitly confers authority only upon *arbitrators;* by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents or witnesses." *NBC v. Bear Stearns & Co.,* 165 F.3d 184, 187 (2d Cir.1999). Moreover, we see no reason to come up with an alternate method to close a gap that may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law. The parties to the arbitration here chose to arbitrate in New York even though the underlying contract and all of the activities giving rise to the arbitration had nothing to do with New York; they could easily have chosen to arbitrate in Texas, where DMS would have been subject to an arbitration subpoena and a Texas district court's enforcement of it. Having made one choice for their own convenience, the parties should not be permitted to stretch the law beyond the text of Section 7 and Rule 45 to inconvenience witnesses. As we have recently stated, "[w]hile the FAA expresses a strong federal policy in favor of arbitration, the purpose of Congress in enacting the FAA was to make arbitration agreements as enforceable as other contracts, but not more so." *JLM Indus., Inc. v. Stolt–Nielsen SA,* 387 F.3d 163, 171 (2d Cir.2004) (citations, internal quotation marks, and emphasis omitted). DMS is not a party to the contract, and not even the strong federal policy favoring arbitration can lead to jurisdiction over a non-party without some basis in federal law.

5. What's a Poor Advocate to Do?

Even if discovery depositions have been barred, the arbitrator(s) can hold an evidentiary hearing in advance of the hearing on the merits, at a location allowing enforcement of a subpoena, to receive the testimony in question. This has been specifically approved by the Second Circuit in *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577-81 (2d Cir. 2005).

> Stolt does not dispute the power of arbitrators to subpoena non-parties for testimony and documents at what Stolt calls a "trial-like arbitration hearing on the

merits." What fuels Stolt's objection, and what Stolt devotes its entire brief to arguing, is that Section 7 does not empower arbitrators to summon non-parties for the purpose of compelling testimonial and documentary discovery in advance of a "merits hearing," and that the subpoenas in question were "a thinly disguised effort to obtain pre-hearing discovery." … In sum, Stolt alleges that Claimants and the arbitration panel have conspired to "circumvent Section 7's limitations through the contrivance of conducting its discovery in the presence of the arbitrators."

Like the District Court, we are not persuaded that the December 21 hearing was the ruse Stolt claims it to be. Therefore, we have no occasion to rule on the authority of arbitrators to order non-parties to participate in discovery. Any rule there may be against compelling non-parties to participate in discovery cannot apply to situations, as presented here, in which the non-party is "summon[ed] in writing ... to attend before [the arbitrators] or any of them as a witness and ... to bring with him ... [documents] which may be deemed material as evidence in the case." 9 U.S.C. § 7.

Several factors convince us that the subpoenas were well within the authority provided arbitrators under Section 7, although we hasten to add that we do not suggest that all of these factors need be present in every case in order to justify arbitration subpoenas under Section 7. First, the custodians and Mr. O'Brien were not ordered to appear for depositions. Depositions usually take place outside the presence of the decision maker, and they are designed to allow parties to prepare for the eventual presentation of evidence or examination of witnesses before the decision maker at trial or a hearing. *See Black's Law Dictionary* 451 (7th ed.1999) (defining "deposition" as "[a] witness's *out-of-court* testimony that is reduced to writing ... for later use in court or for discovery purposes" (emphasis added)). Here, by contrast, the custodians and Mr. O'Brien were directed to appear at a hearing before the arbitrators, and all three arbitrators were present at that hearing. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 407 (3d Cir. 2004) (noting that while Section 7 does not permit a subpoena to compel production from a non-party in absence of a hearing, it does permit subpoenas in which "the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time").

Second, the arbitrators heard testimony directly from Mr. O'Brien, and unlike a deposition, the panel ruled at the hearing on evidentiary issues such as admissibility and privilege and reserved on other evidentiary issues. Indeed, the hearing transcript reveals that the hearing was primarily devoted to resolving evidentiary issues, especially the issue of whether and to what extent attorney-client privilege foreclosed Mr. O'Brien's testimony. While the custodians were not required to testify, that was the result of a consensual agreement between Stolt and Claimants and not a function of the arbitration subpoena or the hearing process itself.

Third, the testimony provided at the hearing became part of the arbitration record, to be used by the arbitrators in their determination of the dispute before them. Finally, we note that if Judge Rakoff had been of the view that the arbitrators and Claimants were attempting by artifice to undermine his prior order forbidding the use of Section 7 to take discovery of non-parties, there is every reason to believe he would have so found. But, in

> fact, he concluded based upon the record before him and the representations of the parties that the December 21 hearing was convened by the arbitrators in good faith and that it complied with Section 7, as well as the spirit and terms of his prior ruling. Section 7 does not deny arbitrators the power to summon witnesses to a hearing under such circumstances.

Id. at 577-78.

I. Discovery, in a Subsequent Dispute, of Confidential Materials in An Arbitration To Which the Discovering Entity Was Not a Party

Just as materials filed under seal in prior litigation may be subject to discovery in a subsequent dispute even if the discovering entity was not a party to the earlier dispute, a third-party litigant may obtain discovery of materials in an earlier confidential arbitration.

> We affirm the district court's decision, for two reasons. First, ¶ 6 of the agreement between Health Grades and Hewitt Associates provides that materials from the arbitration may be disclosed in response to a subpoena. Second, even if the agreement had purported to block disclosure, such a provision would be ineffectual. Contracts bind only the parties. No one can "agree" with someone else that a stranger's resort to discovery under the Federal Rules of Civil Procedure will be cut off. We applied this principle in *Jepson, Inc. v. Makita Electric Works, Ltd.,* 30 F.3d 854 (7th Cir.1994), to confidentiality agreements reached during litigation. That conclusion is equally applicable to confidentiality agreements that accompany arbitration. Indeed, we have stated more broadly that a person's desire for confidentiality is not honored in litigation. Trade secrets, privileges, and statutes or rules requiring confidentiality must be respected, see Fed.R.Civ.P. 45(c)(3)(A)(iii), but litigants' preference for secrecy does not create a legal bar to disclosure. See *Baxter International, Inc. v. Abbott Laboratories,* 297 F.3d 544 (7th Cir.2002); *United States v. Foster,* 564 F.3d 852 (7th Cir.2009) (Easterbrook, C.J., in chambers).

Gotham Holdings, LP v. Health Grades, Inc., 580 F.3d 664, 665 (7th Cir. 2009).

II. Evidence

A. The Federal Arbitration Act Limits Refusals to Consider Evidence

Sec. 10(a)(3) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(3), states:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> * * *
>
> 3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> * * *

Where the parties—or one of them—have paid considerable sums to have an arbitral resolution of their dispute, it is incumbent on the arbitrator to avoid making a mistake as to the reception of evidence that would justify a vacatur of the award and the waste of the parties' time and money. In addition, it will do nothing good for the arbitrator to have a hotly contested and expensive result overturned because of a refusal to consider evidence. Unlike a judge who has bene reversed after a trial because of evidentiary errors, and who will still have the same number of cases assigned by the Clerk to her or him afterwards, an arbitrator who has wasted everyone's time and money should expect to see a sharp decline in business. And that is right and proper.

The result of this situation is that arbitrators are often trained to accept virtually everything in evidence, overruling even the strongest of objections and considering it "for what it is worth." This is an easy way to protect an award from a motion for vacatur.

B. The Effect of the Form of the Award on Evidentiary Questions

In commercial arbitrations, the parties can choose to have a simple, one-sentence award, a reasoned award, or findings of fact and conclusions of law.

AAA Commercial Rule 46(b) states: "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." The AAA default is for a simple statement of result, and the parties must ask for a reasoned award if they want one. JAMS Comprehensive Rule 24(h) states that the parties will receive a reasoned award unless they state that they do not want one. The JAMS default rule is the opposite of the AAA default rule, which might be explained by the greater prevalence of retired judges among JAMS arbitrators.

AAA Employment Rule 39(c) states that awards will be reasoned awards unless the parties agree otherwise, changing the default from that of the Commercial Rules. JAMS Employment Rule 24(h) requires a statement of reasons including essential findings and conclusions, with a statement that the parties can agree to any other type of award unless the arbitration is based on an agreement that is a condition of employment.

JAMS rules have more extensive default requirements than AAA rules, but both sets require more extensive default forms of awards for employment cases than for commercial cases.

Obviously, it takes more time for the arbitrator to write more. What is just as true, but not so obvious, is that the more an arbitrator has to write, the more evidence the parties will need to introduce to make the longer award possible. This can also affect the scope of discovery that will be appropriate. There are thus three ways in which longer award add to the expense and delay of arbitration.

My personal take is that the traditional one-sentence awards, along with the secrecy of the proceedings, are important parts of the reasons many distrust arbitration.

As with criminal prosecutions in high-tension situations, it is important not only that the results be fair and in compliance with the law, but also that they be seen to be fair and in compliance with the law. Arbitration awards need to include enough reasoning to show they are not arbitrary; the Delphic approach does not work.

This does not apply to sophisticated commercial parties, who are sometimes interested in the least expensive resolution possible, and neither care about the reasoning nor want to pay for its resolution. It also does not apply if the parties want to mend their relationship and want an award that does not point fingers at either side. They simply want to have a dispute settled quickly, either way, so they can move on.

It is very important for advocates to think about the types of awards they would like, and why, so they are prepared to discuss this at the Case Management Conference.

C. <u>In Practice, Are Arbitrators Required to Admit Everything?</u>

No. The First Circuit summed up the law in *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 39-40 (1st Cir. 1985), a case involving a labor arbitration challenged under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1982):

> … The arbitrator is not bound to hear all of the evidence tendered by the parties; however, he must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments. *National Post Office, Mailhandlers, Watchmen, Messengers and Group Leaders Division, Laborers International Union of North America v. United States Postal Service,* 751 F.2d 834, 841 (6th Cir. 1985); *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.,* 607 F.2d 649, 651 (5th Cir. 1979); *Bell Aerospace Company Division of Textron, Inc. v. Local 516, International Union, United Automobile Workers of America,* 500 F.2d 921, 923 (2nd Cir. 1974). The arbitrator must then determine "the truth respecting material matters in controversy, as he believes it to be, based upon a full and fair consideration of the entire evidence and after he has accorded each witness and each piece of documentary evidence, the weight, if any, to which he honestly believes it to be entitled". F. Elkouri & E. Elkouri, How Arbitration Works 273–74 (3d ed. 1973). Absent exceptional circumstances, therefore, a reviewing court may not overturn an arbitration award based on the arbitrator's determination of the relevancy or persuasiveness of the evidence submitted by the parties.

This rule applies to arbitrations under the FAA as well. *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1023 (5th Cir. 1990); *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992).[1]

The D.C. Circuit also summarized the law in *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816-17 (D.C. Cir. 2007):

> Lessin contends that the arbitration panel engaged in misconduct by refusing to hear pertinent and material evidence from one of his designated expert witnesses. In considering this contention, the court is mindful of the fact that "[i]n making evidentiary

[1] *Robbins* was disapproved of by *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995), on the different issue of the standard of review of a district court decision granting or denying vacatur.

> determinations, an arbitrator 'need not follow all the niceties observed by the federal courts.'" *Tempo Shain Corp. v. Bertek, Inc.,* 120 F.3d 16, 20 (2d Cir. 1997) (quoting *Bell Aerospace Co. Div. of Textron v. Local 516, UAW,* 500 F.2d 921, 923 (2d Cir. 1974)). The arbitrator "need only grant the parties a fundamentally fair hearing." *Bell Aerospace,* 500 F.2d at 923; *accord Sheldon v. Vermonty,* 269 F.3d 1202, 1206 (10th Cir. 2001); *see Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901,* 763 F.2d 34, 39 (1st Cir. 1985); *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.,* 751 F.2d 834, 841 (6th Cir. 1985); *Totem Marine Tug & Barge v. N. Am. Towing,* 607 F.2d 649, 651 (5th Cir. 1979); *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.,* 397 F.2d 594, 599 (3rd Cir. 1968). It is well within an arbitrator's authority to refuse to hear evidence that is cumulative, *see, e.g., Hoteles Condado Beach,* 763 F.2d at 40; *Nat'l Post Office Mailhandlers,* 751 F.2d at 841, or of little relevance, *see, e.g., Hoteles Condado Beach,* 763 F.2d at 40; *Grahams Serv. Inc. v. Teamsters Local 975,* 700 F.2d 420, 422-23 (8th Cir. 1982); *see also* Sec. Indus. Conference On Arbitration, The Arbitrator's Manual 26 (May 2005)

Similarly, the Fifth Circuit has upheld an arbitrator's decision to exclude cumulative evidence:

> MCI makes no headway on this point because arbitrators' evidentiary decisions should be reviewed with unusual deference. Because the arbitrator could have easily found that the tapes were merely cumulative of testimony already before him, it was not an abuse of his discretion to exclude them from evidence.

Gateway Techs., Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 997 n.4 (5th Cir. 1995), *disapproved on other grounds by Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583 n.5 (2008).

Courts tend to accept exclusions from evidence based on reasons for which they would also exclude the evidence, particularly when the reason involves legal privilege, ensuring the fairness of proceedings by preventing one party from sandbagging the other, and managing the hearing by avoiding truly cumulative evidence. Since the latter involves a judgment call, judges may more willing to substitute their judgments for those of the arbitrator.

In all these situations, it is important for the arbitrator to include her or his full rationale in the award, in terms a court can recognize and understand. The failure to do so, or the use of reasoning a court cannot follow, may lead to vacatur. *E.g.*, *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997):

> We find that there was no reasonable basis for the arbitration panel to determine that Pollock's omitted testimony would be cumulative with regard to the fraudulent inducement claims. Said differently, the panel excluded evidence plainly "pertinent and material to the controversy," 9 U.S.C. § 10(a)(3). The panel did not indicate in what respects Pollock's testimony would be cumulative, but stated that there were "a number of letters in the file" and that Pollock was "speaking through the letters [he wrote], and the reports he[ ] received." These letters and reports were not specifically identified by the arbitration panel. … The reports, like the letters, addressed discrete problems and

> possible courses of action. While the letters and reports might have been sufficient to represent what Pollock would have testified to in rebuttal of Neptune's breach of contract claims, which we do not decide, there is nothing to suggest that Pollock's intended testimony concerning appellees' fraudulent inducement claim and Bertek's counterclaim for fraudulent inducement was addressed by the documents admitted into evidence.

One of my touchstones is that I will not allow a party to be sandbagged by evidence that should have been provided in discovery, but was not, or that violates representations the party seeking its admission gave to the adverse party, or that was produced too late to make effective use of it. To protect the award from challenge under the FAA, my award will explain in detail why I refused to admit the evidence.

No one escapes the duty of supplementation, or the requirements of fair play, simply because the case is in arbitration.

D. Problems With Saying That Evidence Will Be Considered "For What It Is Worth"

Both sides are placed in some difficulty when a colorable objection to evidence is denied, and the evidence is admitted with the statement that it will be considered "for what it is worth." The party offering the evidence does not know whether further evidence needs to be introduced in case the evidence in question is not given much weight, and the party objecting to the evidence does not know whether to introduce evidence in opposition.

To fulfill the promise of arbitration as being "quicker, faster, and better," more clarity would be useful. Advocates should talk with the arbitrator about this in the Case Management Conference or one of the prehearing conferences.

E. Should There Be Rules of Evidence, and Which Ones?

Parties to an arbitration proceeding have the freedom to decide whether particular rules should apply to the reception of evidence. The Supreme Court commented on this freedom in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015):

> As the Court of Appeal noted, the Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver. 225 Cal. App. 4th, at 342-343, 170 Cal. Rptr. 3d, at 194. In principle, they might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the Discover Bank rule and irrespective of that rule's invalidation in Concepcion. The Court of Appeal decided that, as a matter of contract law, the parties did mean the phrase "law of your state" to refer to this last possibility. Since the interpretation of a contract is ordinarily a matter of state law to which we defer … we must decide not whether its decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.

In my experience, most parties prefer to use the Federal Rules of Evidence as a guide, not to be strictly applied. Some prefer to use the State rules of evidence with which they may be more familiar. And as with discovery rules, some parties prefer to leave it to the arbitrator's discretion.

F. Rules? Doesn't Anything Go In, in Arbitration?

No.

1. Common Sense

Arbitration originated in specialized settings in commercial contracts and labor contracts, with many arbitrators having specialized knowledge in the field of the arbitration, but not admitted to the bar.

Mastery of the rules of evidence is not always easy for attorneys—if in doubt of that point, try writing down all exceptions to the hearsay rule without checking anything first—and would be impossible to expect of nonlawyers.

Common sense is at least equally available to nonlawyers as to lawyers, and many of us suspect it is more available to those who have not had to retrain their thinking along legal lines. Many, if not all, of the State and Federal rules of evidence have a strong basis in common sense, because they relate to the reliability of the evidence, and thus to the weight it should be accorded.

Even if the parties do not agree to use any rules of evidence, even as a guide, evidentiary objections can still be very useful in alerting the arbitrator to problems with the reliability of evidence. If a timely objection would alert the opposing party to a problem that can be cured, it also makes sense to place a burden on the objecting party to make the objection timely, on pain of waiver.

2. Commercial Rules

AAA Commercial Rule 34 states:

R-34. Evidence

> (a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.
>
> (b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

JAMS Comprehensive Rule 22(d) is similar.

3. Employment Rules

AAA Employment Rule 30 also vests in the arbitrator the authority to determine whether evidence should be admitted:

30. Evidence

The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party or arbitrator is absent, in default, or has waived the right to be present, however "presence" should not be construed to mandate that the parties and arbitrators must be physically present in the same location.

An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. The arbitrator may in his or her discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party is absent, in default, or has waived the right to be present.

If the parties agree or the arbitrator directs that documents or other evidence may be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator, unless the parties agree to a different method of distribution. All parties shall be afforded an opportunity to examine such documents or other evidence and to lodge appropriate objections, if any.

JAMS Employment Rule 22(d) is similar.

G. Evidence on Motions

1. Formality vs. Informality

Everything in this section may be handled differently by different arbitrators, and advocates are well advised to seek the views on these matters of the arbitrators in their cases, at their Case Management Conferences or subsequently.

Many motions have a factual predicate, and arbitrators are often comfortable relying on documents or other factual matters submitted in connection with a motion, as long as the opposing party does not question the foundation, accuracy, or reliability of the factual information. Only if there is a challenge will the moving party need to make a more formal presentation, as would be required in court.

2. The Need for Some Evidence

It is unfortunately not uncommon for parties to arbitration to submit motions or oppositions that make bare factual assertions that may or may not be correct, but which are unaccompanied by any evidentiary materials from which the arbitrator may determine if the asserted matter is correct or incorrect.

For example, suppose an arbitration agreement says that the arbitration will be conducted in a certain city, and the claimant wants to change the location. We can imagine two cases.

In the first, the claimant simply says it will be expensive to hold the hearing in that location, and the respondent disagrees. Since the claimant has the burden and no one has submitted any facts, I believe most arbitrators would reject the assertion.

In the second, the claimant lists the witnesses who would have to travel from the location in which the events occurred to a distant location, shows the large scale of the expenses required, and shows that he or she would be unable to subpoena the attendance of key witnesses at the location specified in the agreement. I believe that many arbitrators would either grant the motion or bifurcate the hearing and hold one in the location of those witnesses and one in the originally specific location.

Since these outcomes are fairly easy to predict, why do so many attorneys make motions without showing any evidence supporting their points?