EVIDENCE AND DISCOVERY IN ARBITRATION

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CHAPTER 18

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In the legal field, Mr. Bayer has worked as a trial lawyer, in a wide range of cases including personal injury, business, intellectual property and land use. Mr. Bayer has been a guest lecturer at the University of Monterrey Law School and Anahuac Law School in Mexico City in international negotiations and alternative dispute resolution. He is a Fellow at the Center for Public Policy Dispute Resolution and a guest lecturer at The University of Texas School of Law in alternative dispute resolution, trial tactics, negotiation, and professional responsibility. Mr. Bayer received the 1998 Community Peacemaker Award from the Travis Country Dispute Resolution Center. His primary focus these days is on mediation and arbitration.

Mr. Bayer has been a frequent CLE presenter and also writes the popular legal blog ***Disputing: Conversations about Dispute Resolution.*** The blog just celebrated its 4th anniversary and has been cited by the Wall Street Journal and law review articles. At *Disputing*, Mr. Bayer discusses articles, court cases, legislation, and news relating to alternative dispute resolution. *Disputing* also features commentary from leading practitioners and scholars. You may visit *Disputing* at www.karlbayer.com/blog. Mr. Bayer's complete resume is at www.karlbayer.com/KBres.pdf.

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EVIDENCE AND DISCOVERY IN ARBITRATION

I. INTRODUCTION

Although arbitration was intended to keep disputes out of court, collateral lawsuits about arbitration remain an active area of litigation in American courts.[1] This past term, the United States Supreme Court decided several arbitration cases, which included: *Vaden v. Discover Bank*,[2] *Arthur Anderson LLP v. Carlisle*, [3] and *14 Penn Plaza LLC v. Pyett*.[4] The case law 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.[5]

On the other hand, a general sense 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 of 2009[6], which, if passed, would limit the use of binding arbitration in consumer, employment, franchise, and civil rights disputes. For recent developments in the area of dispute resolution, we invite you to read our legal blog *Disputing* at http://www.karlbayer.com/blog.

With 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, including non-parties to the arbitration agreement 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, 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. Part II presents a set of rules governing discovery including some issues a party might encounter in the context of arbitration. The authors would like to note that this section is an update on a paper presented on that topic. Part III outlines general evidence rules that might apply in an arbitration hearing and examines recent developments on vacatur cases related to evidence; that is, how one can have an arbitral award vacated. Finally, Part IV concludes the paper.

II. DISCOVERY IN ARBITRATION

In 1991, the United States Supreme Court decided in *Gilmer v. Interstate/Johnson Lane Corp*. that age discrimination claims under the Age Discrimination in Employment Act (ADEA) could be subject to binding arbitration. [7] 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. The underlying plaintiffs in that case had argued, unsuccessfully, that one reason ADEA claims ought not to be arbitrable was the limited availability of discovery in arbitral proceedings.[8] Since discovery is limited in arbitration proceedings, the argument went, 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

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[1] *See generally* Donald Philbin, *Trends in Litigating Arbitration: Using Motions to Compel Arbitration and Motions to Vacate Arbitration Awards*, 76 DEF. COUNS. J. 338 (2009), *available at* http://adrtoolbox.com/docs/Trends_in_Litigating_Arbitration.pdf (discussing arbitration litigation trends); *see also Litigating Alternative Dispute Resolution in the Fifth Circuit*, 41 TEX. TECH L. REV. 739 (2009) *available at* http://adrtoolbox.com/docs/Litigating_in_the_Fifth_Circuit_2009.pdf (discussing noteworthy arbitration cases decided by the Fifth Circuit Court of Appeals).

[2] *See* Vaden v. Discover Bank, 129 S.Ct. 1262 (2009) (federal court may look through a petition to compel arbitration to determine whether it has jurisdiction).

[3] *See* Arthur Anderson LLP v. Carlisle, 129 S.Ct. 1896 (2009) (third party to arbitration agreement could invoke stay provision if state contract law allowed him to enforce agreement).

[4] *See* 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (2009) (collective bargaining agreement that clearly and unmistakably required union members to arbitrate ADEA claims was enforceable as a matter of federal law).

[5] *See* The Honorable Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen In America?* 40 ST.MARYY'S L.J. 795 (2009) (discussing factors and studies that point out to the decrease of jury trials in the U.S.).

[6] *See* H.R. 1020; S. 931, 111st Cong. (2010). In addition to the Arbitration Fairness Act, several alternative dispute resolution bills are currently pending in Congress, *see* Victoria VanBuren, *U.S. Arbitration and Mediation Legislative Update*, http://www.karlbayer.com/blog/?p=8068 (Feb. 25, 2010).

[7] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991); *see also supra* note 4.

[8] *Id*. at 31, 1654-55.

at all, since arbitration by its nature would deprive claimants of their full ability to pursue the claims. [9]

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).[10] 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."[11] 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. In 2004, the Fifth Circuit followed *Gilmer* in its rejection of an argument against arbitration made on the basis of arbitration's assumed limitations on the discovery process. [12]

There is nothing in 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.[13] Indeed, as discussed in Section B below, those statutes provide a basis for parties in arbitration proceedings to seek court intervention to enforce arbitral orders compelling discovery. However, Section C 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.

A. Is Discovery Permitted in the First Place?

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 (AAA). 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.

1. American Arbitration Association

The 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.[14]

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. Rule 22, however, states that in a preliminary hearing, an arbitrator may establish "the extent of and schedule for the production of relevant

[9] *Id.*

[10] *Id.*

[11] *Id.*, at 31, 1655 (quoting Misubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346 (1985)). 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? We 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."

[12] *See* Carter, et al. v. Countrywide Home Loans, Inc., 362 F.3d 294, 298-99 (5th Cir. 2004) (holding that the employees failed to meet their burden of overcoming the "strong presumption" in favor of arbitration necessary to invalidate the arbitration agreements).

[13] *See* Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*; Texas General Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 *et seq*.; Texas International Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.001 *et seq*.

[14] *AAA Commercial Arbitration Rules and Mediation Procedures* (amended and effective June 1, 2009), *available at* http://www.adr.org/sp.asp?id=22440.

documents and other information."[15] Some arbitrators interpret the "other information" language to include the power to order depositions.

The AAA Rules for Commercial Arbitrations that apply to complex cases, defined by the AAA as cases where the claim is in excess of $500,000.00 exclusive of interest and attorneys' fees. The Rules 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.[16]

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. [17] 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.

2. Judicial Arbitration and Mediation Services

The Judicial Arbitration and Mediation Services (JAMS) Rule 17 of the JAMS Comprehensive Arbitration Rules and Procedures governs discovery procedures in a matter arbitrated using this group of neutrals.[18] If the parties hold a preliminary conference, they may at that point address exchange of information in accordance with Rule 17 and the schedule for the exchange. [19] Rule 17 sets forth the procedures the exchange of information, as follows:

RULE 17. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary, prompt and informal exchange of all non-privileged documents and other information relevant to the dispute or claim immediately after commencement of the Arbitration.
(b) The Parties shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, names of individuals whom they

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *JAMS Comprehensive Arbitration Rules and Procedures* (effective July 15, 2009), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

[19] *Id.*

may call as witnesses at the Arbitration Hearing, and names of all experts who may be called to testify at the Arbitration Hearing, together with each expert's report that may be introduced at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(c) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition, and if the Parties do not agree these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator 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.

(d) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, nonprivileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that have not been previously exchanged, or witnesses and experts not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(e) The Parties shall promptly notify JAMS when an unresolved dispute exists regarding discovery issues. JAMS shall arrange a conference with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute. [20]

3. Financial Industry Regulatory Authority

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). [21]

In FINRA arbitration of customer disputes, some discovery, particularly document exchange, is permitted and expected. [22] 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.[23]

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. [24] No corresponding Rule

[20] *Id.*

[21] *See FINRA Code of Arbitration Procedures* (FINRA Manual), *available at* http://www.finra.org/ArbitrationMediation/Rules/CodeofArbitrationProcedure/.

[22] *See FINRA (NASD) Code of Arbitration Procedures for Customer Disputes* (effective April 16, 2009), Rules 12505, 12506 and 12507, *available at* http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbrul/documents/arbmed/p117546.pdf.

[23] *Id.* at Rule 12510.

[24] *Id*, at Rule 12506.

exists in the NASD Code of Arbitration Procedure for Industry Disputes.

4. National Arbitration Forum

The National Arbitration Forum (NAF) has a discovery rule that is a bit more detailed than the AAA's rule. [25] NAF's discovery rule 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."[26] The Rule itself is lengthy, so we will not re-print it here. 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.

5. International Chamber of Commerce

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 that each party has a reasonable opportunity to present its case.[27]

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.

6. International Bar Association

Article 3 of the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration states, in part: "Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another Party. [A]ny Party may submit to the Arbitral Tribunal a Request to Produce. [28]

7. 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) 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-

[25] NAF Rules can be found on its website: http://www.arb-forum.com/. On a related note, the summer of 2009 NAF, — then the country's largest administrator of credit card and consumer collections arbitrations— agreed on to step aside from the credit card and consumer debt arbitration business. *See* Victoria VanBuren, *National Arbitration Forum Settles with Minnesota's Attorney General*, July 20, 2009, *available at* http://www.karlbayer.com/blog/?p=3682. This agreement came only a few days after Minnesota's Attorney General sued NAF on July14 alleging consumer, deceptive trade practices, and false advertisement. The Complaint and press releases can be found at www.karlbayer.com/blog/?p=3448.

[26] *NAF Code of Procedures* (effective August 1, 2008), Rule 29, *available at* http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf.

[27] *ICC Rules of Arbitration* (effective January 1, 2008), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf .

[28] *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (adopted June 1, 1999), *available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.*

administrates. [29] 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 cost effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.[30]

B. What if the Arbitrator Will Not Permit Discovery?

Arbitral discretion, of course, is the key. In Section C, we will 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 TAA, 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. [31] 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.[32]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.[33] We will discuss vacating awards in Part III of this paper.

C. What Can I Do with an Arbitral Order Compelling Discovery?

1. 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." [34] 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.[35] 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

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[29] *CPR Rules for Non-Administered Arbitration* (effective November 1, 2007), *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#11.

[30] *Id*.

[31] *See* Transwestern Pipeline Co. v. Blackburn, 831 S.W.2d 72, 78 (Tex. App. – Amarillo 1992, orig. proceeding) (discussing that discovery is allowed only at the discretion of the arbitrator).

[32] *See* TEX. CIV. PRAC. & REM. CODE §171.088(a)(3)(C); 9 U.S.C. §10(a)(3).

[33] 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.

[34] TEX. CIV. PRAC. & REM. CODE §171.086(b)(2). Recently, the Texas Supreme Court decided whether the trial court abused its discretion by permitting discovery on damage calculations and other potential defendants, instead of ruling on the motion to compel arbitration. *See* In re Houston Pipe Line Co., No. 08-0800, 2009 Tex. LEXIS 468 (Texas 2009). Pre-arbitration discovery is authorized under the Texas Arbitration Act, the court noted, when a court lacks sufficient information on the scope of the arbitration provision, and therefore, cannot make a decision on the motion to compel arbitration. *Id*. However, the court concluded that this is not the case because determinations of liability must be answered by the arbitrator. *Id*. The court pointed out that a party cannot avoid arbitration by merely alleging that there may be other potential defendants. *Id*. Accordingly, the court directed the trial court to vacate the discovery order and rule on the motion to compel arbitration. *Id.*

[35] *See* TEX. CIV. PRAC. & REM. CODE §§171.050 and 171.051. The Texas General Arbitration Act has no provision for interrogatories or requests for admissions. Courts have reasoned that limited discovery in arbitration make arbitration under the TAA "an inexpensive, rapid alternative to traditional litigation." Glazer's Wholesale Distributors, Inc. v. Heineken USA, Inc., 95 S.W.3d 286, 295-96 (Tex. App.—Dallas 2001, pet. dism'd by agrm't) (citing Prudential Securities, Inc. v.Marshall, 909 S.W.2d 896, 900 (Tex. 1995) (orig. proceeding)).

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.[36] 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.[37] 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." [38]

In other words, the FAA can be said to apply to many disputes, given the state of current Commerce Clause jurisprudence. In *Nexion*, 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.[39]

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.[40] 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. [41]

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 case law in these areas.

Finally, in the world of international arbitration, the TIAA, Chapter 172 of the Texas 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.[42] 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.[43] 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.[44] That being the case, if a party to an international arbitration which is taking place in Texas obtains an arbitral 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.

2. <u>What You Might Do if the Arbitrator Orders Discovery that you Strongly Oppose</u>

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

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[36] 9 U.S.C. §7; *see e.g.*, Recognition Equip., Inc. v. NCR Corp., 532 F.Supp. 271, 273-74 (N. Dist. TX 1981).

[37] In re D. Wilson Construction Co., 196 S.W.3d 774, 779 (Tex. 2006) ("Contracts that reference neither the Federal Arbitration Act, 9 U.S.C.S. §§ 1-16, nor the Texas Arbitration Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-171.098, but merely note that the contracts shall be governed by the law of the place where the project is located, invoke federal and state law.").

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

[39] *Nexion*, 173 S.W.3d at 69.

[40] *Wilson*, 196 S.W.3d at 779-780.

[41] 9 U.S.C. §4.

[42] TEX. CIV. PRAC. & REM. CODE §§172.083 and 172.175.

[43] TEX. CIV. PRAC. & REM. CODE §172.105.

[44] TEX. CIV. PRAC. & REM. CODE §172.103.

judgment under either the TAA or the FAA.[45]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.

3. Can the Arbitrator Compel Discovery from Non-Parties?

a) Federal Arbitration Act

The question of when one party to the arbitration may acquire the necessary evidence from a third party (a non-party to the arbitration) has become a common theme in arbitration. Over the past decade, courts have begun to establish limitations on arbitral powers within the context of discovery on third parties. [46]

Section 7 of the FAA states that the arbitrators: "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." [47] The summons issued by arbitrators "shall be served in the same manner as subpoenas to appear and testify before the court" and shall be enforced "upon petition [to] the United States district court for the district in which such arbitrators, or a majority of them, are sitting" whereby the district court "may compel the attendance of" or "punish said person or persons for contempt in the same manner provided by law . . . in the courts of the United States."[48]

The FAA is unclear as to the scope of the discovery it authorizes. While Section 7 has been interpreted by most courts to empower arbitrators to subpoena non-parties to produce documents at an arbitration **hearing**,[49] some courts have disagreed as to whether Section 7 grants an arbitrator authority to compel a non-party to attend a **prehearing** deposition.[50] Currently, a circuit split exists with regard to the arbitrators' authority to compel discovery from non-parties under the FAA.

In *Am. Fed'n of Television and Radio Artists, AFL-CIO v. WJBK-TV*, [51] citing analogous cases interpreting Section 7 of the FAA, the Sixth Circuit Court of Appeals held that under Section 301 of the Labor Management Relations Act of 1947 an arbitrator has the power to compel a non-party to produce material records either before or during an arbitration hearing.

In 1999, the Fourth Circuit Court of Appeals held in *COMSAT Corp. v. National Science Foundation*[52] that an arbitrator may not compel a third party to

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[45] TEX. CIV. PRAC. & REM. CODE §171.088(a)(3); 9 U.S.C. §10(a)(4).

[46] For an article providing an excellent review of arbitration discovery and non-parties, *see* Rau, Alan Scott Rau, *Evidence and Discovery in American Arbitration: The Problem of 'Third Parties'. American Review of International Arbitration*, Fall 2009; U of Texas Law, Public Law Research Paper No. 146, *available at* http://ssrn.com/abstract=1397617.

[47] 9 U.S.C. § 7.

[48] *Id.*

[49] *See e.g.*, In re Sec. Life Ins. Co. of Am., 228 F. 3d 865, 870 (8th Cir. 2000) (acknowledging "an arbitration panel's power [under the FAA] to subpoena relevant documents for production at a hearing"); Festus & Helen Stacy Found. v. Merrill Lynch, Pierce Fenner & Smith Inc., 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (holding that the district court has jurisdiction to order non-party private equity firm to comply with subpoenas issued under the Federal Arbitration Act); Amgen Inc. v. Kidney Ctr. of Del. County, Ltd., 879 F. Supp. 878, 883 (N.D. Ill. 1995) (a district court in the Northern District of Illinois held that an arbitrator's subpoena duces tecum, issued to a third person not party to the arbitration proceeding and located outside the district in which the arbitrator sat or beyond 100 miles of the site of the arbitration, was valid and enforceable); Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (stating that "[T]he power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing.").

[50] Rau, *supra* note 46.

[51] In Am. Fed'n of Television and Radio Artists, AFL-CIO v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999).

[52] Comsat Corp. v. Nat'l Sci. Found., 190 F.3d 269, 275 (4th Cir. 1999).

comply with an arbitral subpoena for prehearing discovery **unless** there is a there is a "special need" for the documents. The court did not define "special need" except to say that "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." The court reasoned that the "hallmark of arbitration - and a necessary precursor to its efficient operation - is a limited discovery process." The court made no distinctions between depositions and document production.

On the other hand, in 2000, the Eight Circuit Court of Appeals held in *Arbitration Between Security Life Insurance Company of America and Duncanson & Holt, Inc.*, [53] that an arbitrator impliedly has the power under section 7 of the FAA to compel pre-hearing discovery from non-parties because the FAA authorizes arbitrators to subpoena non-parties to bring documents to the arbitration in conjunction with their testimony.

Perhaps the narrowest interpretation of Section 7 comes from the Third Circuit Court of Appeals. In 2004, in *Hay Group, Inc. v. E.B.S. Acquisition Corp*., [54] 2004, the Third Circuit stated that pursuant to the "unambiguous" language of section 7 of the FAA, an arbitrator's subpoena power is limited 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."[55] The court held that an arbitrator lacks authority to compel **prehearing** discovery from nonparties, whether it be deposition testimony or document production.

In 2008, the Second Circuit Court of Appeals joined the Third Circuit and held that Section 7 does not authorize an arbitrator to compel pre-hearing document discovery from non-parties to the arbitration. In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,[56] the court, citing Section 7, explained that arbitrators may "order 'any person' to produce documents so long as that person is called as a witness at a hearing." The court also noted that a non- party could be subpoenaed to produce documents at a preliminary hearing on non-merits issues before one or more arbitrators. [57]

b) International Arbitration

Under 28 U.S.C. Section 1782 (Assistance to Foreign and International Tribunals and to Litigants Before such Tribunals), a federal court has authority to compel discovery for many types of proceedings conducted outside the United States:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal \investigations conducted before formal accusation. [58]

The statute does not define the term "foreign or international tribunal." In 1999, the Second[59] and Fifth[60] Circuits held that "foreign or international tribunals" **do not include** private arbitration panels. In 2004, the U.S. Supreme Court interpreted the language of Section 1782 in *Intel Corp. v. Advances Microdevices, Inc.* [61] The Court, however, did not reach the question of arbitral tribunals. [62]

In 2009, the Fifth Circuit, in the unpublished opinion *El Paso Corporation v. La Comision Ejecutiva*, reaffirmed *Republic of Kazakhstan* and held that Section 1782 does not apply for a discovery motion for use in a private international arbitration.[63]La Comision Ejecutiva Hidroelectrica Del Rio Lempa (CEL) is a state-owned utility company in El Salvador and Nejapa Power Company (NPC) is a utility

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[53] Arbitration Between Security Life Insurance Company of America and Duncanson & Holt, Inc., 228 F.3d 865 (8th Cir. 2000).

[54] Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F. 3d 404 (3rd Cir. 2004).

[55] *Id.* at 407.

[56] Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F3d 210 (2d Cic. 2008).

[57] *See Id*. More recently, a federal district court from Dallas followed the approach of the Second and Third Circuit holding that the FAA does not allow non-party subpoenas for pre-hearing document discovery, but only permits such subpoenas if they require the non-party to appear at an arbitration hearing and to bring the documents to the hearing. Empire Financial Group, Inc. v. Penson Financial Services, Inc., 2010 U.S. Dist. LEXIS 18782 (N.D. Tex. Mar. 3, 2010).

[58] 28 U.S.C. § 1782(a) (2000).

[59] Nat'l Broad. Co. v. Bear Stearns & Co., 165 F3d 184 (2d Cir. 1999).

[60] Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).

[61] Intel Corp. v. Advanced Micro Devices, Inc, 542 U.S. 241(2004).

[62] *See* Jessica Weekley, *Comment: Discovering Discretion: Applying Intel to § 1782 Requests for Discovery in Arbitration*, CASE W. RES. 535 (2009); Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L. L. 597, 615-19 (1990).

[63] El Paso Corporation v. La Comision Ejecutiva, No. 08-20771, 2009 U.S. App. LEXIS 17596 (5th Cir. 2009).

company related to El Paso Corporation (El Paso), an energy corporation based in Houston, Texas. [64] CEL and NPC are arbitrating a contract dispute in Geneva, Switzerland, under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), El Salvadoran substantive law, and Swiss procedural law.[65] CEL sued to obtain discovery (production of documents and depositions) from El Paso, (a non- party to the arbitration) to use it in its international private arbitration proceeding with NPC, pursuant to 28 U.S.C. Section 1782 (Assistance to Foreign and International Tribunals and to Litigants Before such Tribunals).[66]

The Texas District Court denied CEL's request for discovery and held that Section 1782 did not apply to discovery for use in a *private* international arbitration. [67] The court also held that, even if it did have the authority under Section 1782, "it would not [grant the application], out of respect for the efficient administration of the Swiss arbitration." [68] The court granted the Rule 60(b) motion for relief from a judgment or order, vacated its ex parte order, and quashed the outstanding discovery requests.[69] CEL appealed.[70]

The Fifth Circuit first considered El Paso's argument that CEL's appeal was moot.[71] Because the evidentiary hearing for the arbitration has concluded and the panel has closed the evidence, El Paso argues that "there is no longer a live case or controversy." [72] The court noted that under UNCITRAL arbitration rules, an arbitral tribunal may reopen the hearings at any time before the award is made. [73] So, if CEL discovered new evidence with a Section 1782 application, the court reasoned, that evidence could still be considered if the tribunal reopen the evidentiary hearing. [74] The court concluded that a live controversy still exists and proceeded to address the merits of the appeal.[75]

Next, the Fifth Circuit reviewed the granting of the Rule 60(b) motion. [76] The court stated that "[s]uch a motion can be granted for a number of reasons, including mistake, inadvertence, surprise, or excusable neglect" and "any other reason that justifies relief. [77] The law of this circuit permits a trial judge, in his discretion, to reopen a judgment on the basis of an error of law." [78] The court noted that in *Republic of Kazakhstan*, the court held that "a 'tribunal' within the meaning of Section 1782 did not include a private international arbitral tribunal, and thus Section 1782 did not apply to discovery sought for use in such a tribunal."[79] CEL argued that *Republic of Kazakhstan* is no longer controlling in light of the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices.*[80] However, the Fifth Circuit was not persuaded by CEL's argument.[81] The court concluded that the issue of whether a private international arbitration tribunal qualifies as a "tribunal" under § 1782 was not before the U.S. Supreme Court in *Intel.* [82]

In addition, the court, citing *Republic of Kazakhstan*, explained that "empowering parties in international arbitrations to seek ancillary discovery through federal courts could destroy arbitration's principal advantage as a speedy, economical, and effective means of dispute resolution if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration." [83]Accordingly, the court denied El Paso's motion to dismiss the appeal as moot and affirmed the district court's grant of the Rule 60(b) motion. [84]

D. Guidelines on Discovery in Arbitration

The Dispute Resolution Section of the New York State Bar Association recently issued a report on Arbitration Discovery in Domestic Commercial Cases." [85] The objective of the report was to issue

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[64] *Id.* at *2.

[65] *Id*.

[66] *Id*.

[67] *Id.* at *4.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*. at *4-*5.

[72] *Id*.

[73] *Id*. at *5-*6.

[74] *Id*.

[75] *Id*. at *6.

[76] *Id*.

[77] *Id*.

[78] *Id*.

[79] *Id*. at *7 citing Republic of Kazakhstan v. Biedermann International, 168 F.3d 880 (5th Cir. 1999).

[80] *Id*. citing Intel Corp. v. Advanced Micro Devices, Inc, 542 U.S. 241, 258 (2004).

[81] *Id*. at *8-*9.

[82] *Id*.

[83] *Id*.

[84] *Id*. at *9.

[85] New York State Bar Association Dispute Resolution Section Arbitration Committee, *Report on Arbitration Discovery in Domestic Commercial Cases* (2009), *available*

some guidelines of use to counsel and arbitrators to best handle the unpredictability issue of discovery proceedings in arbitration.[86] The report provides ten precepts to help enable arbitrators to control the discovery process: (1) Good Judgment of the Arbitrator, (2) Early Attention to Discovery by the Arbitrator, (3) Party Preferences, (4) E-discovery, (5) Legal Considerations, (6) Arbitrator Tools (7) Artfully Drafted Arbitration Clauses, (8) Depositions, (9) Discovery Disputes, and (10) Discovery & Other Procedural Aspects of Arbitration.[87]

In addition, the report includes an exhibit with advice on relevant factors for arbitrators to determine the appropriate scope of arbitration discovery:

Nature of the Dispute

The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.

The amount in controversy.
The complexity of the factual issues.
The number of parties and diversity of their interests.

Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

Whether there are public policy or ethical issues that give rise to the need for an in depth probe through relatively comprehensive discovery.

Whether it might be productive to initially address a potentially dispositive issue which does not require extensive discovery.

Agreement of the Parties

Agreement of the parties, if any, with respect to the scope of discovery.

Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.

The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

Relevance and Reasonable Need for Requested Discovery

Relevance of the requested discovery to the material issues in dispute or the outcome of the case.

Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.

Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.

Whether denial of the requested discovery would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.

Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.

To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.

Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.

The time and expense that would be required for a comprehensive discovery program.

Whether all or most of the information relevant to the determination of the merits is in the possession of one side.

Whether the party seeking expansive discovery is willing to advance the other side's reasonable costs and attorneys' fees in connection with furnishing the requested materials and information.

Whether a limited deposition program would be likely to: (i) streamline the hearing and make it more cost-effective; (ii) lead to the disclosure of important documents not otherwise available; or (iii) result in expense and delay without assisting in the determination of the merits.

Privilege and Confidentiality

Whether the requested discovery is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.

Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

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at http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPrecepts Report.pdf.

[86] *Id*.

[87] *Id*.

Characteristics and Needs of the Parties

The financial and human resources the parties have at their disposal to support discovery, viewed both in absolute terms and relative to one another.

The financial burden that would be imposed by a broad discovery program and whether the extent of the burden outweighs the likely benefit of the discovery.

Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.

The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties. [88]

Based on the New York report, the Los Angeles Bar published the following seven recommendations for a more effective discovery:

1) Draft or select arbitration clauses that limit discovery and that provide arbitrators with the ability to exercise their judgment to control the process. Do not incorporate the Code of Civil Procedure and broad discovery. An arbitrator can advise against invoking these rules but lacks the authority to control the process. The arbitration clause you draft will determine the arbitration you get.
2) Designate an arbitration provider that uses rules that are compatible with your goal of an efficient, cost-effective arbitration, and allow high-quality arbitrators to actively manage it from start to finish.
3) Focus document production requests narrowly with respect to relevant date ranges, number of custodians, and material evidence. Eliminate common boilerplate language such as wide-ranging demands for "all documents that refer to...."
4) The parties should cooperate in producing documents in a convenient and usable (i.e., searchable) format.
5) Agree upon search terms and use sampling to confirm the effectiveness of the terms. Cooperate in agreeing to the clawback of inadvertently produced privileged documents, eliminating the necessity for extensive and detailed review of all the electronic files being produced. Document review is incredibly expensive and often accomplishes little if the search terms have been properly defined.
6) Institute cost shifting if a requesting party demands broad and expensive production. Grant the arbitrator the authority to allocate costs after the usefulness of the production has been determined.
7) Balance need and burden, and give the arbitrator the ability to do so. Educate your client on the benefits of cost-effective arbitration and how it differs from litigation. [89]

In response to criticism that arbitration has become as time consuming and costly as litigation, several institutions have published arbitration guidelines recently. The International Chamber of Commerce (ICC) Commission on Arbitration has published a report entitled "Techniques for Controlling Time and Costs in Arbitration." The report covers guidelines for the creation of the arbitration agreement, selection of arbitrator, preliminary procedural issues, as well as subsequent procedural issues. [90]

Similarly, the International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association has promulgated its "ICDR Guidelines for Arbitrators Concerning Exchanges of Information."[91] The Guidelines provide that "while arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive, and more expeditious." [92] Under the Guidelines, the only documents to be exchanged are those on which a party relies. [93] The Guidelines address electronic documents, and state:

> When documents to be exchanged are in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most

[88] *Id*.

[89] Kenneth C. Gibbs and Barbara Reeves Neal, *Closing Argument: It's Time to Fix Arbitration Discovery*, 32 LOS ANGELES LAWYER 48, January, 2010.

[90] *See* ICC, *Techniques for Controlling Time and Costs in Arbitration*, *available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

[91] *See ICDR Guidelines for Arbitrator Concerning Exchanges of Information*, *available at* http://www.adr.org/si.asp?id=5288.

[92] *Id.*

[93] *Id.*

> convenient and economical for it, unless the tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in an electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search. [94]

Finally, the CPR International Institute for Conflict Prevention & Resolution has also issued its "Global Rules for Accelerated Commercial Arbitration" which when agreed by the parties, provides for one neutral with significant new powers to control discovery and requires rendering the award within six (6) months of the selection of the Arbitral Tribunal. [95]

III. EVIDENCE IN ARBITRATION

A. Which Rules of Evidence Apply?

Do the formal rules of evidence have a place in the arbitration context? The answer is that it depends on the arbitrator.

1. Federal Arbitration Act

The FAA only mentions 'evidence' in section 10(c), where it states that an award may be vacated where arbitrators refused "to hear evidence pertinent and material to the controversy." [96] Case law supports the proposition that "the arbitrator is the judge of the relevance and admissibility of evidence introduced in an arbitration proceeding." [97] The principles which may be deduced from these cases are:

- Arbitrators are the judges of relevance and materiality;
- Arbitrators may reject even relevant and material evidence in order to streamline the process; and
- Arbitrators' decisions on these subjects are final and may not be overturned unless they amount to a failure to provide a fundamentally fair hearing. [98]

2. Texas Rules of Evidence

The Texas Rules of evidence apply only in court proceedings. [99] "It is an established principle of arbitration law that the arbitrator is the judge of the relevance and admissibility of evidence introduced in an arbitration proceeding." [100] Thus, arbitrators have a great deal of discretion to exclude evidence as redundant or otherwise unnecessary to the decision-making process.[101]

3. Texas International Arbitration Act

The TIAA provides that "[t]he power of the arbitration tribunal under Section 172.103(b) includes the power to determine the admissibility, relevance,

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[94] *Id.*

[95] *See Global Rules for Accelerated Arbitration* (effective August 20, 2009), *available at* http://www.cpradr.org/ClausesRules/GlobalArbitrationRules/tabid/422/Default.aspx

[96] *See* 9 U.S.C. § 10(3).

[97] *See* Bruce A. McAlister & Amy Bloom, *Use of Evidence in Admiralty Proceedings: Evidence in Arbitration*, 34 J. MAR. L. & COM. 35, 35 (2003) citing Castleman v. AFC Enterprises, Inc., 995 F. Supp. 649, 653 (N.D. Tex. 1997). *See, e.g.*, Robbins v. Day, 954 F.2d 679, 685 (11th Cir. 1992); Forsythe Int'l SA v. Gibbs Oil Co., 915 F.2d 1017 (5th Cir. 1990) (misconduct by counsel in stone-walling discovery not basis for overturning award); Sunshine Mining Co. v. United Steelworkers, 823 F.2d 1289 (9th Cir. 1987); Legion Ins. Co. v. Ins. Gen. Agency, Inc., 822 F.2d 541, 543 (5th Cir. 1987) (arbitration requires "expeditious and summary hearing, with only restricted inquiry into factual issues"); Grahams Service, Inc. v. Teamsters Local 975, 700 F.2d 420 (8th Cir. 1982) (exclusion of evidence not improper); Bell Aerospace Co. v. Local 516, 500 F.2d 921 (2d Cir. 1974) (exclusion of affidavit not improper); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268 (2d Cir. 1971); Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir.) (refusal to investigate witnesses' refusal to testify not improper); Warth Line, Ltd. v. Merinda Marine Co., 778 F. Supp. 158, 1992 AMC 1406 (S.D.N.Y. 1991) Essex Cement Co. v. Italmare SpA, 763 F. Supp. 55, 1991 AMC 2406 (S.D.N.Y. 1991); Ohio Center for Dance Columbus Festival Ballet v. BLO Prod., Inc., 760 F. Supp. 677 (S.D. Ohio 1991); Fairchild & Co. v. Richmond, Fredericksburg & Potomac R.R. Co., 516 F. Supp. 1305 (D.D.C. 1981) ("arbitrators are charged with the duty of determining what evidence is relevant"); Cobec Brazilian Trading & Warehousing Corp. v. Isbrandtsen, 524 F. Supp. 7, 10, 1982 AMC 1355, 1357-58 (S.D.N.Y, 1980) (no denial of opportunity to present evidence). But see Hoteles Condado Beach v. Union of Tranquistes Local 901, 763 F.2d 34 (1st Cir. 1985) (exclusion of evidence improper).

[98] *See* McAlister, *supra* note 97 at 38.

[99] *See* Castleman v. AFC Enters., Inc., 995 F. Supp. 649, 653-54 (N.D. Tex. 1997) (holding that arbitration proceedings are not governed by formal rules of evidence).

[100] *See Id.* at 653 (citing Cordis Corp. v. C.R. Bard, Inc., 1993 U.S. Dist. LEXIS 20445, 1993 WL 723844 *3, No. H-92-1623 (S.D. Tex Mar. 11, 1993)).

[101] *See Id.* (citing Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979)).

materiality, and weight of any evidence." [102] The TIAA also mentions the power of the arbitral tribunal to appoint experts:

§ 172.116. Appointed Expert

(a) Except as agreed by the parties, the arbitration tribunal may:
  (1) appoint an expert to report to it on a specific issue to be determined by the tribunal; and
  (2) require a party to:
    (A) give the expert relevant information; or
    (B) produce or provide access to relevant documents, goods, or other property.

(b) Except as agreed by the parties, if a party requests or if the arbitration tribunal considers it necessary, the expert shall, after delivery of a written or oral report, participate in an oral hearing at which each party may:
  (1) question the expert; and
  (2) present an expert witness on the issue.[103]

4. American Arbitration Association

The AAA's Rules for Commercial Arbitrations includes the following rules of evidence:

R-31. 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. [104]

R-32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.
(b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence. [105]

In addition, the AAA International Rules contain the following provision regarding experts:

Article 22. Experts

1. The tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the tribunal and communicated to the parties.
2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.
3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion on the report. A party may examine

[102] TEX. CIV. PRAC. & REM. CODE ANN. § 172.104.

[103] *Id.*

[104] *AAA Commercial Arbitration Rules and Mediation Procedures (*amended and effective June 1, 2009), *available at http://www.adr.org/sp.asp?id=22440.*

[105] *Id.*

any document on which the expert has relied in such a report.

4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue. [106]

5. Judicial Arbitration and Mediation Services

JAMS Rule 22 sets forth the rules concerning evidence in the arbitration hearing, as follows:

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as the Arbitrator deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence. [107]

6. International Chamber of Commerce

ICC Article 20, concerning establishing the facts of the case, states:

1. The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.
2. After studying the written submissions of the parties and all documents relied upon, the Arbitral Tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.
3. The Arbitral Tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.
4. The Arbitral Tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert appointed by the Tribunal.
5. At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.
6. The Arbitral Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.
7. The Arbitral Tribunal may take measures for protecting trade secrets and confidential information.[108]

7. International Bar Association

Article 9 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration states the following, regarding the admissibility and assessment of evidence:

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document,

[106] *AAA International Arbitration Rules* (amended and effective June 1, 2009), *available at* http://www.adr.org/sp.asp?id=33994.

[107] *JAMS Comprehensive Arbitration Rules and Procedures* (effective July 15, 2009), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

[108] *ICC Rules of Arbitration* (effective January 1, 2008), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

statement, oral testimony or inspection for any of the following reasons:

(a) lack of sufficient relevance or materiality;
(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
(c) unreasonable burden to produce the requested evidence;
(d) loss or destruction of the document that has been reasonably shown to have occurred;
(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
(g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be considered subject to suitable confidentiality protection. [109]

Additional IBA Articles of interest within this set of rules are: Documents (Art. 3), Witnesses of Fact (Art. 4), Party Appointed Experts (Art. 5), Tribunal-Appointed Experts (Art. 6), On Site Inspection (Art. 7), and Evidentiary Hearing (Art. 8).[110]

B. How Can I Have an Arbitration Award Vacated?

The criteria a court relies on to vacate an arbitrator's award differ depending on the character of the arbitration itself: if the arbitration is between Texans and does not involve interstate commerce, the court looks to the TAA for its guidance; if the arbitration brushes up against the Commerce Clause, then the Federal Arbitration Act is the starting point; and if the arbitration is "international," which does not necessarily require that at least one party be foreign, then the reviewing court should break out its copy of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the "New York Convention" after the city in which it was enacted). Each of these starting points invokes a slightly different set of rules and interpreting case law and, potentially, standard of review. In this section, we will focus on recent developments on vacatur cases related to evidence.

1. Federal Arbitration Act

Arbitration provides a final and binding decision that is very difficult to successfully appeal in court. The FAA Sections 10 and 11 provide the bases for vacatur and modification of arbitration awards. [111] Under the FAA, an award may be vacated "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."[112]

The general standard of review a court in the Fifth Circuit employs when considering a motion to vacate an award under the FAA is well-established and severe: "[w]e review de novo an order vacating an arbitration award. Our review of the award itself, however, is exceedingly deferential. We can permit vacatur of an arbitration award only on very narrow grounds." [113] While courts describe the standard of review under the FAA as de novo, the review of the award itself (as theoretically opposed to the decision to vacate the award, but the two seem to always conflate) requires a much restricted version of de novo review, and "normal" do novo review of an award is in fact grounds for reversal of a vacatur. [114]

The Fifth Circuit provided clear precedent on the kind of arbitrator misconduct which will support vacatur under FAA Section 10(a)(3) when it affirmed a district court vacatur of an award on the ground that "the arbitrator misled Exxon into believing that evidence was admitted, and then refused to consider that evidence." [115]

In *Gulf Coast*, Exxon attempted to discharge a union worker for just cause when a substance found in

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[109] *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (adopted June 1, 1999), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[110] *See Id*.

[111] 9 U.S.C. § 10 and §11.

[112] 9 U.S.C. § 10(3).

[113] *Brabham*, 376 F.3d at 380 (citations omitted); *see also* Prescott v. Northlake Christian School, 369 F.3d 491 (5th Cir. 2004) ("the district court's review of an arbitration award, under the [FAA], is 'extraordinarily narrow'").

[114] *See* Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 357 (5th Cir. 2004).

[115] Gulf Coast Indus. Workers Union v. Exxon Co., *USA*, 70 F.3d 847, 848 (5th Cir. 1995).

her vehicle tested positive for marijuana, which would have violated Exxon's policy with respect to controlled substance misuse.[116] At the arbitration, Exxon's attorney began to prove up the "DLR test" which had identified the substance found as marijuana, but the arbitrator stopped him.[117] The arbitrator specifically ruled that the test had been admitted into evidence and that arbitral time did not need to be spent establishing it as a business record.[118] The court cites references to the arbitration record, which includes both a transcript of the proceedings and a stipulation between the parties as to the DLR tests' accuracy and reliability.[119] In the end, however, the arbitrator ruled against Exxon on the basis that Exxon had not proven that the substance found was in fact marijuana, since the DLR test was inadmissible hearsay.[120] "[t]he arbitrator then spent five pages of his decision in a diatribe on the unreliability of hearsay."[121] Relying on Section 10(a)(3) of the FAA, the Fifth Circuit found that the arbitrator in this case misled Exxon's attorney into not adequately proving up the DLR test, and therefore triggered vacatur under the FAA.[122]

Of course, *Gulf Coast* must be considered within a larger context of great deference to arbitral awards. The general rule is that arbitrators are given significant leeway on evidentiary issues: "arbitrators are not bound to hear all of the evidence tendered by the parties; however, they must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments."[123] In other words, it would seem that an arbitrator must pro-actively lure a party into evidentiary hot water for 10(a)(3) to apply. Given many arbitrators' willingness to simply admit all evidence, 10(a)(3) may, as a practical matter, be a rather rare ground for vacatur (one wonders if the Gulf Coast result would have differed had the arbitrator admitted the DLR test result into evidence but, perhaps even without cogent explanation, ruled against Exxon anyway - such a result would have been much more difficult for Exxon to overcome it would seem).

In 2009, the Fifth Circuit provided further guidance concerning FAA Section 10(a)(3) in *The Householder Group v. Caughran*.[124] The court rejected appellant's argument that he did not receive a fair hearing because the panel did not allow him to introduce certain evidence. The court stated:

> 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 argument. An evidentiary error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.[125]

2. Texas General Arbitration Act

The TAA sets forth several independent grounds under which a court must vacate an arbitral award.[126] This enumerated list of grounds for vacatur is nearly identical to that contained in Section 10 of the FAA. Under the TAA, upon proper application by a party, a court must vacate an award if the arbitrator exceeded his or her powers, refused to postpone the hearing after a showing of sufficient cause for the postponement, or refused to hear evidence material to the controversy.[127] Determining whether or not an arbitrator has exceeded his or her power requires at the outset an examination of the arbitration clause itself: "the authority of an arbitrator derives from the arbitration agreement and is limited to a decision of the matters submitted therein."[128] This means establishing that the arbitrator made rulings specifically outside the scope of the arbitration clause; it is not enough that the arbitrator decided matters within his or her purview wrongly or haphazardly. In *Action Box*, for example, the party seeking vacatur alleged that the "arbitrator exceeded his powers by misinterpreting the operative agreement and erroneously admitting parol evidence to construe it even though it was unambiguous."[129] The court found that even if those allegations were proven, they would not amount to the arbitrator's exceeding his or her

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[116] *Id.* at 848-49.

[117] *Id*. at 849.

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id*. at 850.

[123] *Prestige Ford*, 324 F.3d at 395.

[124] Householder Group v. Caughran , 2009 U.S. App. LEXIS 25507 (5th Cir. Tex. Nov. 20, 2009) (unpublished decision).

[125] *Id*.

[126] *See* TEX. CIV. PRAC. & REM. CODE §171.088.

[127] TEX. CIV. PRAC. & REM. CODE §171.088(a)(3).

[128] Action Box Co., Inc. v. Panel Prints, Inc., 130 S.W.3d 249, 252 (Tex. App. - Houston [14th Dist.] 2004, no pet.) (citing Gulf Oil Co. v. Guidry, 160 Tex. 139, 327 S.W.2d 406, 408 (Tex. 1959).

[129] *Id*.

power, and so they cannot support vacatur.[130] Put another way, it is well within an arbitrator's power to decide an issue incorrectly.

What's more, when courts read arbitration clauses to determine whether an arbitrator's ruling was within the scope of his or her power, they read them broadly: "every presumption will be indulged to uphold the arbitrators' decision, and none is indulged against it." [131] The *J.J. Gregory* court held that, in a case with a broad form arbitration clause (like the standard clauses promulgated by all the major arbitration providing organizations), an arbitrator has authority to decide any issue that the clause does not specifically take out of his scope. [132] In other words, the clause need not specifically give the arbitrator authority to act; it must simply not specifically prevent the arbitrator from acting. [133]

The San Antonio Court of Appeals, however, reversed a trial court's judgment confirming an arbitral award to the extent the trial court confirmed an improperly modified award. [134] The court ruled that since arbitral awards are treated "very deferentially" under Texas law, an arbitrator exceeds his or her powers by modifying his or her award absent a finding that statutory grounds for modification exist under the TAA. [135] Once the arbitrator made his or her final decision, the merits of the arbitration were no longer before him or her, except as allowed by the narrow guidelines of Section 171.054(a) of the TAA. The trial court, therefore, was required to vacate the modification as it exceeded the arbitrator's power.

At least one Texas Court of Appeals has analyzed a party's claim that an arbitrator's failure to postpone an arbitration required vacatur.[136] In that case, the court applied analysis similar to that a court would use in the context of a trial court's refusal to grant a continuance in determining that the failure to postpone in the face of sufficient notice did not warrant vacatur. [137] Other recent Texas cases attempting to vacate an arbitral award on the grounds that the arbitrator excluded or limited material evidence have not succeeded. [138]

The end result of Texas law interpreting the TAA in this area is that, in most cases and in the "default" cases where a party uses a form or standard arbitration clause, there is no opportunity for meaningful appeal of an arbitral decision on the basis that the arbitrator was obviously wrong on the facts, the evidence, or the law. Indeed, since the Supreme Court's opinion in *CVS*

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[130] *Id*.

[131] J.J. Gregory Gourmet Services, Inc. v. Antone's Import Co., 927 S.W.2d 31, 36 (Tex. App. - Houston [1st Dist] 1995, no writ).

[132] *Id*.

[133] *See also* Hisaw & Assocs. Gen. Contractors, Inc. v. Cornerstone Concrete Sys., Inc., 115 S.W.3d 16, 20 (Tex. App. - Fort Worth 2003, no pet.) ("The Texas Supreme Court has stated that "the authority of arbitrators is derived from the arbitration agreement and is limited to a decision of the matters submitted therein either expressly or by necessary implication." citing Gulf Oil Corp. v. Guidry, 160 Tex. 139, 327 S.W.2d 406, 408, 2 Tex. Sup. Ct. J. 416 (Tex. 1959)).

[134] Barsness v. Scott, 126 S.W.3d 232, 241-42 (Tex. App. - San Antonio 2003, pet. denied).

[135] *Id*.

[136] *See* Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C., 63 S.W.3d 807, 811 (Tex. App. - Houston [14th Dist.] 2001, no pet.).

[137] *See Id*. *See also* Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 432 (Tex. App. - Dallas 2004, pet. denied) (court refused, with no analysis, to require vacatur when party did not ask for postponement until six days before arbitral hearing).

[138] *See e.g.* Kosty v. S. Shore Harbour Cmty. Ass'n, 226 S.W.3d 459 (Tex. App. Houston 1st Dist. 2006) (Assuming that the homeowners could have asserted defenses under the Texas Property Code, those defenses were no longer applicable to the disagreement over the breach of the settlement agreement; the arbitrator did not err, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(3)(C) by excluding evidence of defenses that might have been asserted in the underlying dispute because they were not material to the matters before the arbitrator); Whiteside v. Carr, Hunt & Joy, L.L.P., 2007 Tex. App. LEXIS 409 (Tex. App. Amarillo Jan. 23 2007) (In view of the parties' express agreement limiting the evidence to be considered by the arbitrator, a trial court did not err in declining to vacate the arbitrator's award on the grounds that he exceeded his powers or refused to hear material evidence by giving effect to the agreement); Affiliated Pathologists, P.A. v. McKee, 261 S.W.3d 874, 2008 (Tex. App. Dallas 2008) (In an employment dispute, there was no error in a failure to an arbitration award in favor of a former employee based on an alleged exclusion of material evidence because an employment addendum agreement was not ambiguous; therefore, extrinsic evidence concerning the parties' intent should not have been heard during the arbitration proceedings. Moreover, the evidence at issue was admitted, but it did not persuade the arbitrators); Graham-Rutledge & Co. v. Nadia Corp., 281 S.W.3d 683 (Tex. App. Dallas 2009) (For purposes of Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(2)(C), the record did not reveal such misconduct or willful misbehavior in the arbitrator's decision to limit a lessee's evidence to rebuttal evidence; the lessee waived any error by agreeing to the procedure utilized in the hearing).

Group v. Delgado, courts treat any attempt to appeal an arbitration as an affront to jurisprudential efficiency. However, since arbitration is a creature of contract, it is possible for parties to build some sort of appeal, either in limited or full common-law form, into the clause.

C. Guidelines on Evidence in Arbitration

Alfred G. Feliu, an experienced arbitrator and mediator, wrote an excellent paper discussing evidence in arbitration. [139] In the paper, Mr. Feliu provides the following guidelines for litigators to strengthen their evidentiary arguments before an arbitrator:

> **1. Mere relevance is not enough; evidence should be both relevant and material.** Arbitration is intended to be an expeditious and inexpensive method of resolving legal disputes. The notion that all relevant evidence, that is not cumulative, is admissible in arbitration is not fully in keeping with this goal. Evidence that is relevant is not always material; in contrast, material evidence is always relevant. The relevance standard is too loose a concept and too wide a door to be the sole measure for the admissibility of evidence in arbitration. Arbitrators who admit all evidence, even if only tangentially material, and litigators who go overboard with their offers of evidence, both act contrary to arbitration's companion goals of expedition and cost-effectiveness.
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> To be material, the evidence offered must be probative of a substantial issue in the case. Put another way, if the proof addresses an issue that is not likely to have an impact on the arbitrator's decision, it is not material. Immaterial evidence, however, may be admissible for other purposes, for example, to impeach a witness. Consequently, advocates should be prepared to respond to the arbitrator's question as to the relevance of this evidence or risk a ruling of inadmissibility.
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> Take, for example, the evidence offered in an age discrimination case in which the claimant seeks to offer into evidence the ages of employees previously terminated in his department. This evidence is clearly relevant in an age discrimination case. If the employer shows, however, that the previous termination decisions were made by another manager applying different performance criteria, the evidence might not be material to claimant's case. In sum, the requirement of materiality serves to limit the scope of admissible evidence, and produce a more efficient and focused hearing.
>
> **2. Focus less on the admissibility and more on reliability of the evidence.** Arbitrators serve as both judge and jury. They tend to care less about the issue of admissibility of any particular evidence and more about the reliability and weight to be given to it. Long battles over admissibility seem beside the point to most arbitrators and, consequently, they tend to be more willing to admit evidence, even if it has little probative value and will be given little weight. Arbitrators are likely to admit evidence, even if the FRE argues for its exclusion, if the arbitrator determines that the evidence is of some probative value.
>
> **3. Focus on the probative value of admitted evidence, and seek to convince the arbitrator that it should be given greater or lesser weight.** Now that the question of admissibility is behind you, remind the arbitrator that not all evidence was created equal. Point out that certain key evidence in the case will be more reliable and convincing than other evidence. In doing so, look for and emphasize for the arbitrator indicia of reliability or unreliability of the evidence.
>
> Address such questions as: (i) should the event at issue have been memorable to the witness at the time it occurred? (ii) what were the interests of the witness in testifying, i.e., does the witness have anything to gain by the result of the arbitration; (iii) was the testimony corroborated? (iv) how probable or improbable is it that individuals, in the circumstances described, would act in the manner testified to by the witness?; and (v) is the testimony of the witness internally consistent? By doing so, you will be indirectly turning the simple issue of admissibility into an opportunity to argue the merits of your case to the arbitrator.
>
> **4. Remember at all times that the rules of evidence are not ends in themselves but rather means for eliciting reliable evidence at the hearing**. Litigators are skilled in the nuances of practicing before the courts. Even though the rules of litigation may not be imported fully into the arbitration setting, the skills of a litigator are. The packaging and selling of evidence to a fact-finder is just as essential in arbitration as it is in

[139] *See* Alf Alfred G. Feliu, *Evidence in Arbitration: A Guide for Litigators*, NEW YORK LAW JOURNAL, March 4, 1999, at 3, *available at* http://www.vanfeliu.com/publications/EVIDENCE%20IN%20ARBITRATION1.doc.

> litigation. What is different are the rules of the game and the expectations of the finder of facts. Recognize at all times that arbitration is designed to reach the merits of the dispute with the least amount of resistance. A successful litigator in this setting is one who uses his or her persuasive skills rather than procedural prowess to present evidentiary arguments to an arbitrator in a winning way.[140]

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.

With that said, none of the rules presented in this paper 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.

[140] *Id.*