If we had a nickel for every time we have heard a lawyer in an arbitration talk about the depositions he needs and intends to take—well, gosh, we would have an awful lot of nickels. And we would like to use that money to help pay for continuing legal education for those misguided folks who believe that pretrial depositions are God-given rights. You already know, of course, that different discovery rules apply in arbitration, but look around. Some of your colleagues do not have a clue about just how different arbitration rules can be. And as alternative dispute resolution becomes more common, we are going to have to be well versed in the differences.

Serving as arbitrators recently, we asked Croc O’Shea, a litigator with 30 years of experience and an equal number of associates working the case, “what discovery do you contemplate?” “Well,” Croc crooned, “this is a very complicated case and I will need to take at least 12 depositions.” Counsel for the respondents, Milt Oast, chimed in “well, I’m not sure we need to take any depositions, but I’m sure we can work out a schedule.”

OK, timeout. O’Shea simply announced his plans to take 12 depositions, as though it was his perfect right. Oast did not have the wits to say “depositions? We don’t need no stinkin’ depositions.” Put aside for a moment that those 12 depositions will cost Oast’s client about $60,000 in legal fees. What if O’Shea wasn’t simply churning his bill but actually needs those depositions to develop the evidence to prove his claim? What if those depositions made the difference between Oast’s client winning or losing? Why did Oast agree to depositions? Probably because he did not know the rules.

**Arbitration: It’s a Matter of Contract**

Arbitration is a matter of contract, so the arbitrators will generally accept whatever the parties agree upon with respect to discovery. The parties are free to agree to apply the Federal Rules or the Kansas rules or the Koran. So, when O’Shea announced his intention to take 12 depositions—and Oast agreed—the arbitrators restrained their laugh reflex and let Oast hoist himself on O’Shea’s petard.

“The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness—characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure.” National Broadcasting Co., Inc. vs. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999). We mean no disrespect to the federal rules. They are great rules. But they are rules designed for contests in which the defendants are unwilling participants and where the litigants often have disproportionate resources. By definition, participants in arbitrations are contracting parties who have agreed in advance to set streamlined rules for their potential disputes.

So most arbitration forums have streamlined rules. The American Arbitration Association Commercial Rules make no provision for interrogatories or depositions except in large, complex matters (claims over $500,000), where the arbitrator may exercise discretion “upon good cause shown consistent with the expedited nature of arbitration.” (Rule L-4). Judicial Arbitration and Mediation Services (JAMS) Rules allow each party to take one deposition of the opposing party, with additional depositions at the discretion of the arbitrators. The NASD Rules provide that “necessary pre-hearing depositions consistent with the expedited nature of arbitration shall be available.” (Rule 10213 (a)). The International Chamber Of Commerce Rules make no provision at all for depositions.

And even when the parties agree or the arbitrator is persuaded to order depositions, don’t assume that you can compel non-parties to give discovery. You can take discovery of a non-party under the Federal Rules, because the Rules apply by law to all persons whether or not they are litigants. But non-parties have not agreed to follow arbitration rules.

The Federal Arbitration Act (FAA), 9 U.S.C. § 7, empowers arbitrators to summon “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 indicates.”

“Any person,” not simply parties. But “attend before” the arbitrators, not pre-hearing discovery. Well, no problem; “the power of the panel to compel production of documents from third-parties for the purposes of the hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to hearing.” In the Matter of Arbitration between Security Life Insurance Company of America et al., 228 F.3d 865, 870 (8th Cir. 2000) (“implicit in an arbitration panel’s power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.”).

But there is a difference between depositions and pre-hearing document production. “Documents are produced only once, whether it is at the arbitration or prior to it. Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The non-party may be required to appear twice – once for deposition and again and the hearing. . . . An arbitrator may not compel attendance of a non-party at a pre-hearing deposition.” In the Matter of the Arbitration between Integrity Insurance Co. v. American Centennial Insurance Co., 885 F. Supp. 69, 73 (S.D.N.Y. 1995).

And while the 8th Circuit believes that the FAA authorizes pre-hearing document production, the 4th Circuit does not. The “subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA” and “nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand non-parties provide the litigating parties with documents during pre-hearing discovery.” Comsat Corp. v. National Science Foundation, 190 F.3d 269 (4th Cir. 1999). Well, not entirely. Comsat offered up a little dictum to flavor its opinion: “a party might, under unusual circumstances, petition the District Court to compel pre-arbitration discovery upon a showing of special need or hardship.” Id. at 276. With all due respect to the 4th Circuit, Huh? Arbitrators don’t have the power to order discovery, but the parties can petition a Court – which is not hearing the underlying case – to compel it anyway? Well, that is practical if not entirely logical. In Hay Group, Inc. v. E.B.S., Acquisition Corp., 2003 U.S. Dist. Lexis 4909 (E.D. Pa. 2003), the court noted that if the 4th Circuit were right, if the FAA “is flexible enough to allow for pre-hearing production in a ‘special need’ situation, it is flexible enough to allow for pre-hearing production of documents when the arbitrators believe that it is appropriate without the federal court holding a hearing to determine ‘special need . . . .’” So no need to go to court; the arbitrators have the power to order discovery.

**Some Courts Divide The Baby, Some Don’t**

And while some courts have divided the discovery baby between document production and depositions, others have made no such distinction, finding that the FAA grants the implicit power to compel both testimony and documents prior to hearing. Amgen Inc. v. Kidney Center of Delaware County, Ltd., 879 F. Supp. 878, 880 (N.D. Ill.1995).

OK, let’s move on. Even if you convince your opponent and/or your arbitrator to issue a subpoena to a non-party, how do you enforce it? Well first, bluff. Serve the subpoena; act as though compliance is expected, resistance is, as the Borg would say, futile. But what if your subpoena-ee tells you to obtain a hammer and hit sand?

A witness has no obligation to move to quash an arbitrator issued subpoena, since the FAA imposes no such requirement. See Comsat Corp. v. National Science Foundation, 190 F.3d 269, 276 (4th Cir. 1999). If the witness simply ignores the subpoena, you have to find a court to enforce it.

The FAA designates the court in which the arbitration is pending as the sole court with the power to enforce an arbitrator’s subpoena. So if your arbitration is pending in Chicago, and you want to depose a non-party in Pennsylvania, you have to go to the Northern District of Illinois. Uh, huh. But the Chicago court can only enforce subpoenas to the same extent as under the Federal Rules–100 miles. Hmm. In Amgen Inc. v. Kidney Center of Delaware County, Ltd., 879 F. Supp. 878 (N.D. Ill.1995), on exactly that conundrum, Judge Gettleman came up with an elegant solution. Since Fed. R. Civ. P. 45(a)(3)(B) authorizes an attorney practicing in the court in which the trial is being held to issue a subpoena on behalf of the court for district in which a deposition is to take place, the attorney could issue a subpoena in Pennsylvania which could then be enforced by the court there.

One little problem. When the case got up to the 7th Cir., it was dismissed for lack of subject matter jurisdiction. The FAA grants the federal courts powers to assist arbitration only where the District Court would have jurisdiction over the underlying dispute. Amgen Inc. v. Kidney Center of Delaware County, Ltd., 95 F.3d 562 (7th Cir.1996).

What? We made you wade through all of this stuff about the FAA only to tell you that the FAA may be irrelevant? Forgive us. A
lot of commercial arbitration cases are going to meet federal jurisdictional standards; if they don’t, more than 35 states have adopted the Uniform Arbitration Act and many which have not have not have their own statutes, all of which provide more or less corollary provisions so that a court, complete with gavels, bailiffs, sheriffs and other methods of enforcement, are provided unto you to enforce a subpoena if it is otherwise valid. See, e.g., 710 ILCS 5/7.

Nothing about pre-hearing discovery in arbitration is quite so clear as the Croc O’Shea’s of the world would have you believe. Don’t be afraid to resist discovery in an arbitration; and don’t assume, if it is you trying to take the discovery, that it will be easy.

Contacts:

JEROLD S. SOLOVY
Chairman of the Firm
Office: (312) 923-2671
Fax: (312) 840-7671
Email: jsolovy@jenner.com

ROBERT L. BYMAN
Partner
Office: (312) 923-2679
Fax: (312) 840-7679
Email: rbyman@jenner.com