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Understanding the proper role of discovery in arbitration

By Charles H. Dick Jr.

Contracting parties increasingly are choosing arbitration as a preferred method for resolving disputes that arise out of commercial agreements. Those parties rationalize their choice with the expectation arbitration will be a more expeditious and less expensive route to a final disposition of claims. A common criticism, however, is that arbitration can be just as expensive as courtroom litigation; bills for an arbitrator and counsel's case preparation can mount up fast. Is there really an advantage to arbitration?

Understanding how litigation has evolved in the United States helps explain why case preparation in arbitration has become unnecessarily expensive. Eighty-plus years ago, promulgation of the Federal Rules of Civil Procedure initiated a "rules reform" movement that swept the country. While state courts experimented with variations on the Federal Rules, lawyers came to accept the premise that the purpose of courtroom litigation was to address controversies with a "just, speedy, and inexpensive determination" (e.g., Fed. R. Civ. P. 1). To achieve that, civil practice and procedure embraced a kit of tools designed to equip counsel with the means for efficient case preparation. The new rules allowed numerous motions and a variety of discovery modalities, the reformers believing their tool kit would be used sparingly and efficiently.

As the Supreme Court boldly stated in *Hickman v. Taylor*, "civil trials ... no longer need be carried on in the dark. The



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way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." 329 U.S. 495, 501 (1947). Who could argue with any of that?

Anyone familiar with courtroom litigation today realizes the discovery tools originally intended to avoid "trial by surprise" have become objects of excess. All too frequently, counsel act as if the default approach to every controversy is a sometimes rebuttable (but often conclusive) presumption that omnibus discovery is a must, and a "one size fits all" approach to case preparation has become normative. Full and complete discovery is the indicium of thorough preparation, and the hallmarks of lawyering excellence include comprehensive discovery and motion practice, using as many of the available tools as possible. It is almost as if there is a fear that a limited approach to discovery or a failure to move for summary disposition might fall below the standard of care.

Boundless discovery is not the

whole problem. A companion issue is the perception that volunteering information has come to be resisted at all cost. Even when voluntary disclosure is mandated, there is a reluctance to show more of one's cards than necessary. The result often is truculence and gamesmanship. "Zealous advocacy" has become a synonym for an "able lawyer," when in truth, vigorous and thorough advocacy is not compromised by cooperation (*see* 7th Cir. Electronic Discovery Comm., Principles Relating to the Discovery of Electronically Stored Information, Principle 1.02 (rev. Aug. 1, 2010)).

Discovery expense is cited as a principal reason for the "vanishing" civil trial (*see* Am. College of Trial Lawyers, The "Vanishing Trial: The College, The Profession, The Civil Justice System" 15-18 (2004)), and innumerable studies of discovery abuse have suggested the need for further rule reform (e.g., C. Gerety, Inst. For the Advancement of the Am. Legal Sys., Excess & Access Consensus on the American Civil Justice Land-

scape 9-12 (2011)). The federal rules themselves recently have been redesigned, and "proportionality" now is urged as a reasonable limitation on discovery. Rule changes notwithstanding, learned observers have seen "we do not have a 'culture of proportionality' in discovery, and until we focus on the culture itself, it is unlikely that any changes in the language of the rules will have the desired outcome." R. Kourlis and B. Kauffman, *The Case For Real Reform*, 24 Kan. J.L. & Pub. Pol'y 493, 512 (2014).

Arbitration is not just another piece of litigation, and if arbitration is to achieve the parties' desired cost-effectiveness and efficiency, then advocates need to rethink their entire approach to case preparation. What are the real purposes of discovery anyway? In a notice pleading environment, discovering important evidentiary facts can be important. Discovery enables a determination whether a claim or defense must be amended, perhaps with new liability theories or affirmative defenses. In some instances, counsel can obtain information for cross-examination or assess an opponent's credibility. Identifying the strength and weaknesses of an opponent's position assists in formulating case strategies, and reassessing the relative strength of claims and defenses may motivate settlement. But just because discovery tools exist does not mean they must be used, and they are not a muscle-flexing exercise. When discovery is deployed, its use should be rigorously tailored to the needs of the case.

Case preparation always should begin by assembling a proof matrix, listing the el-

ements needed to establish a claim or defense and matching those points with the evidence one already has available. If one does this up front, rather than waiting until months of expensive discovery have already been consumed, it will be apparent in most cases that counsel already possesses most of the critical evidence required for presentation of the case. This approach allows one to concentrate on holes in the evidence and prompts inquiring “what is the most expedient way to gather the missing information?” The answer often will lead to independent investigation that is far more efficient than depositions or exhaustive document discovery.

Each case presents its own needs, but the point is most cases can be prepared thoroughly without resorting to omnibus discovery. Instead, early use of a proof matrix facilitates the development of a thoughtful, tailored discovery plan that often can be completed in weeks, not months. The resultant cost

savings will be significant. And if counsel sit down with clients and discuss the rationale for a narrowly constructed discovery plan before launching mindless boilerplate, one wonders how many happier customers there would be.

The inefficacy of knee-jerk discovery is one reason the procedural rules of most ADR institutions vests the arbitrator with discretion to determine what discovery is needed. The guidelines of the Chartered Institute of Arbitrators instruct arbitrators to encourage agreement among the parties on documentary disclosure. The International Bar Association rule requires document production be limited not only to what is relevant, but also to what is material; it also is incumbent on a requesting party to state that a copy of the documents being sought is not already in the requester’s possession. While JAMS Rule 17(b) contemplates a party will be allowed at least one deposition, the underlying philosophy is that the parties will

cooperate and make a voluntary, informal disclosure of information relevant to the dispute. Similarly, the AAA and ICDR rules expect voluntary disclosures will suffice, and whether any deposition testimony will be permitted is within the arbitrator’s discretion (AAA Rules 22 and 23; ICDR Article 21). Why such constraints? Because experience has taught arbitrators that broad form discovery has limited utility and can be an unnecessary burden on the entire process.

Counsel in arbitration should acknowledge their clients have intentionally chosen to expedite a final resolution of the controversy without unreasonable expense and delay. That can be achieved when one subscribes to the notion discovery is not the purpose of litigation; it is no more than a means to an end. See Am. College of Trial Lawyers and Inst. For the Advancement of the Am. Legal Sys., Final Report at 7 (2009). A carefully designed discovery plan will be limited to learning those things that must

be ascertained; it will expedite case preparation and hasten a final resolution. The attendant reduction of expense surely will ingratiate counsel with a satisfied client, and it will help build a lawyer’s reputation for skill as an advocate in arbitration.

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