New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
JUNE 2, 2021

Discovery by Design: Strategies for Efficient International Arbitration

By HON. ARIEL E. BELEN (RET.)

Address and Respond to Concerns of Excessive, "U.S.-Style" Discovery'

The potential for prolonged, overly burdensome and expensive discovery in both domestic and international arbitration seated in the United States has been a major concern among commercial entities and their counsel for many years. International parties often ask why they should accept lesser evidentiary standards in an arbitration and give up the right to appeal if they will potentially spend as much money, time and resources as one would in court. Why, as foreign firms accustomed to litigation with little or no discovery, would they voluntarily submit to an arbitral tribunal seated in the United States that may include retired U.S. judges accustomed to ordering voluminous document production, expensive e-discovery and a multitude of depositions?

Although these are legitimate concerns, the responses are probably more nuanced than expected. Most U.S. arbitrators, including retired state and federal judges, adhere to the fundamental principles that arbitration is first and foremost a creature of contract and that parties are free to chart their own process, including how little or how much discovery should be allowed. Experienced arbitrators from all jurisdictions, well aware of these principles, will guide the arbitral process as efficiently as possible, even where the parties are seeking and have agreed to broad discovery.

Proactively Bridge the Civil Law v. Common Law Discovery Divide

Typically, attorneys in civil law jurisdictions expect little to no discovery in their disputes. The common law discovery process, on the other hand, depending on the scope of the evidence, can be time-consuming and expensive. Many civil law attorneys consider traditional common law discovery to be overly burdensome and intrusive, while common law lawyers often consider broad discovery to be an absolute necessity in order to achieve requisite transparency and maximize the possibility of success.

One preventive measure that can impede an overly extensive disclosure process is to carefully draft an arbitration clause that includes provisions limiting discovery. **Article 19 of the United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration** (UNCITRAL Model Law), provides parties with wide discretion to set forth the procedures of an arbitral proceeding. The UNCITRAL Model Law makes it clear that if an arbitration agreement fails to specify procedures to be followed, then the arbitral tribunal may decide them for the parties. By proactively agreeing to a clear process, parties can tailor their discovery parameters and avoid the risk of the tribunal deciding what is appropriate.

Select Rules and an Administrative Body That Support Streamlined Discovery

Crafting a dispute resolution clause that identifies the right administrative body, or administrative rules in an ad hoc proceeding, and fully understanding how the applicable rules will govern a potential arbitration are vital in preventing excessive and costly discovery. For example, the **JAMS Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations** (JAMS Guidelines) state:

"In JAMS international arbitrations, the prevailing practice is that depositions are not permitted. Provision of written direct testimony in advance of the witness' appearance at an arbitration hearing can go far in substituting for the deposition procedure, and the parties are encouraged to agree on that procedure. In JAMS international arbitrations, there is a strong presumption against use of the U.S. discovery devices of interrogatories and requests to admit."

Short of denying fundamental fairness, U.S. courts have signaled that arbitrators enjoy significant latitude with regard to limiting discovery. Indeed, arbitrators enjoy significant discretion in this matter and can often benefit from the support of applicable rules and guidelines that encourage them to direct parties to a more efficient discovery process that provides due process and path to an award that is both fair and expeditious.

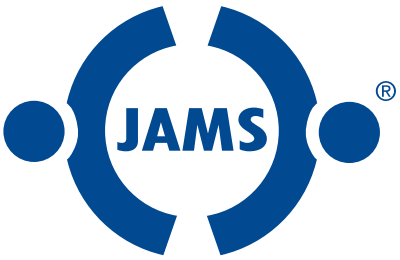
Consider Arbitrators' Styles, Backgrounds and Cultural Competency When Appointing Tribunals

Frequently, parties and their counsel find themselves in a battle with a contract and dispute resolution clause that was not thoughtfully drafted. When clear language designed to prohibit or tailor discovery to a reasonable scope and scale are not in place, and rules are absent or silent regarding discovery, much depends on the arbitral tribunal. In these instances, understanding each neutral's background, experience, reputation, skills and cultural competencies is essential in adapting the best selection strategy.

Because New York is both a global crossroads and a particularly sophisticated legal market, many experienced international arbitrators and practitioners boast multicultural, multilinguistic and multijurisdictional talents. This diversity can be beneficial when selecting a neutral or neutrals who will understand that venuing a matter in the U.S. does not necessitate overburdensome discovery. Instead of reverting to a particular national style or common law discovery proceedings, careful selection can help to ensure tribunal members will study resources that articulate global norms, such as the **International Bar Association Rules on the Taking of Evidence in International Arbitration**, which fosters both arbitral discretion and a very focused document discovery process.

Although parties and counsel may naturally be apprehensive about engaging in an arbitration with a tribunal seemingly steeped in common law tradition, there is nothing to fear. U.S.-based international arbitrators are well aware of applicable e-guidelines and rules allowing for more limited discovery and, at the same time, empowering arbitrators to structure discovery processes to accommodate parties' demands and best resolve their cross-border disputes.

Hon. Ariel E. Belen (Ret.) *serves as a JAMS arbitrator, mediator and special master in complex domestic and international disputes spanning a wide array of practice areas. He can be reached at abelen@jamsadr.com.*



Reprinted and slightly modified with permission from Sponsored Content in the June 2, 2021 online edition of NEW YORK LAW JOURNAL © 2021 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-256-2472 or reprints@alm.com # NYLJ-06032021-494359