



Discovery in an Arbitration Proceeding and Appealing an Award Under the Federal Arbitration Act: It's Not That Simple (And What You Do Not Know Can Hurt You)

By George E. Lieberman

Discovery in Arbitration

The subject of discovery in an arbitration proceeding usually generates modest interest, at best, because the parties hold the mistaken belief that a party to an arbitration is entitled to the same or virtually the same type and extent of discovery authorized by the federal discovery rules (or similar state rules). Nothing would be further from the truth. It is critically important to be aware of the potential limitations on discovery in the context of an arbitration proceeding. Attention to this point is important, because a party may find itself in a position in which the case cannot be proven as a result of the inability to obtain the information needed for the hearing.

Section 7 of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (FAA), pertains to compelling evidence (witnesses and documents) to be produced or made available at (and perhaps before) an arbitration hearing. The right to discovery and—assuming there is such a right—the extent of discovery remains in much dispute.¹ Section 7 of the FAA provides, in relevant part, 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. *** Said summons shall issue in the name of the arbitrator or arbitrators ... and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court.

*** if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators ... are sitting may compel the attendance of such person or persons before said arbitrator ... in the same manner provided by law for securing the attendance of witnesses ... for neglect or refusal to attend in the courts of the United States.

It is important to recall that arbitration is a matter of contract. Consequently, the parties may contract to provide for expansive discovery (written discovery and depositions), limited discovery (restricted written discovery and depositions), or no discovery. Assuming no overreaching by the party with greater bargaining power, the courts will respect what the parties contracted for in terms of discovery. *Conti-*

mental Airlines Inc. v. Mason, 87 F.3d 1318 (9th Cir. 1996). In this regard, if you draft or are confronted with an arbitration agreement that incorporates arbitration rules (American Arbitration Association Rules, for example), you need determine (1) which of the AAA rules apply (such as those dealing with commercial matters, the construction industry, employment, the real estate industry, and so forth) and (2) what those rules provide. For example, the AAA Construction Industry Rules do *not* provide for depositions, except in “extraordinary cases.” *AAA Construction Industry Rules*, ¶ 22.

Furthermore, even if the selected arbitration rules are found to give the arbitrator the power to order discovery (limited as it may be), the arbitrator only has the discretion to order discovery to be conducted and is not compelled to do so, and the courts will usually sustain an arbitrator’s decision about discovery.² The same caveat applies to the National Association of Securities Dealers and International Chamber of Commerce Arbitration Rules, among others. See Robert A. Weiner and B. Ted Haines, *Dispute Resolution Magazine* 30 (Summer 1999). The importance of providing the nature and scope of permissible discovery in the arbitration agreement will become apparent as cases addressing discovery in the arbitration setting are reviewed below.

The courts have recognized that full-blown discovery akin to what the federal rules require is inconsistent with the “speedy, inexpensive and informal” virtues arbitration is supposed to offer.³ Moreover, assuming that you have the contractual right to obtain discovery—and the arbitrator chooses to respect that right—that does not necessarily mean that you will be able to obtain discovery from both parties and nonparties to the case alike. Although § 7 refers to compelling persons (thus including nonparties) to attend an arbitration hearing and perhaps being ordered to bring records to the hearing, the section does not include any language setting forth any right to any discovery as to nonparties. When in court, the Federal Rules of Civil Procedure apply to *all* persons—both parties and nonparties to the case. However, in arbitration, nonparties to your arbitration agreement have not consented to be bound by any such agreement,⁴ and they may well be exempt from arbitration discovery requests (that is, pre-hearing requests) directed to them.

Some courts take the position that, because an arbitrator has the power to compel document production at a hearing, he or she has the power to order production before a hearing, sometimes distinguishing whether the discovery is directed to a party or a nonparty.⁵ Some courts ignore—at least in dictum—the distinction between document discovery and deposition discovery and suggest that the FAA grants the implicit power to arbitrators to order pre-hearing depositions and document discovery.⁶

The Fourth Circuit Court of Appeals is not so magnanimous in its view of discovery under the Federal Arbitration Act, holding that the FAA does not invest arbitrators with the power to order depositions from nonparties or even to order them to provide documents in a pre-hearing setting. *Comsat Corp. v. National Science Foundation*, 885 F. Supp. 69 (S.D.N.Y. 1995), 190 F.3d 269, 275–276 885 (4th Cir. 1999).⁷ In *Integrity Ins. Co. v. American Centennial Co.*, the court

ruled that the FAA does not give the arbitrator the power to order pre-hearing depositions of nonparties. The *Integrity* court ruled that pre-hearing document production from a nonparty is acceptable, but pre-hearing depositions of nonparties are not because of the burden upon a nonparty, the potential for “harassing or abusive discovery” at the deposition in the absence of the presence of the arbitrator, which forces the court “to become enmeshed in the merits of the matter being arbitrated.” 885 F. Supp. at 73.

The next hurdle when it comes to discovery in arbitration proceedings is enforcing a subpoena issued to a nonparty. A nonparty witness may choose to ignore the subpoena because the FAA does not contain a Federal Rule of Civil Procedure 45 objection/protective order requirement. *Comsat Corp.*, 190 F.3d at 276. The FAA does permit a party to seek enforcement of a subpoena from a federal court in which the arbitration is pending. But what if the witness is located in Houston and your arbitration proceeding is taking place in Chicago? The district court’s power to enforce a subpoena is limited to the Rule 45(b)(2) 100-mile bulge.⁸ But perhaps one could have recourse to Federal Rule of Civil Procedure 45(a)(3)(B). *Amgen Inc. v. Kidney Center of Delaware County Ltd.*, 879 F. Supp. 878, 882–883 (N.D. Ill. 1995). (Under § 7, the Pennsylvania court could not enforce a subpoena issued in Illinois, and the Illinois court could not compel the deposition to be taken in Pennsylvania under Rule 45(b)(2). The Illinois district court directed Amgen’s attorney to employ Rule 45(a)(3)(B) and issue a Pennsylvania subpoena bearing the name and number of the Illinois case.) It is important to note that, in *Amgen*, the parties had agreed to use the Federal Rules of Civil Procedure, but *Amgen* is not controlling in a situation where there is no agreement to employ the federal civil procedural rules. Moreover, lack of jurisdiction might prevent a party from having a federal court even entertain a discovery motion.

Case rulings concerning discovery in arbitration proceedings are conflicting. Therefore, much attention needs be directed to the issue of discovery in the arbitration agreement. When drafting an arbitration agreement, it would be wise to determine what discovery your client wants or needs and then employ the appropriate language in the agreement. The following language might be helpful if you want discovery that is similar to that required by the federal rules: “The parties have the right and are entitled to conduct discovery between themselves and also as to non-parties to the full extent permitted under the Federal Rules of Civil Procedure (‘Rules’) and have the right to seek court intervention to compel such discovery as if the matter were pending in a federal court and they agree that the Rules as to discovery apply and are to be employed in the conduct of the arbitration.”

Appeals: Sections 8 and 16 of the Federal Arbitration Act

An important aspect of the FAA is a party’s right to appeal. It is critical to understand under what circumstances an appeal is permitted, the difference between a stay order and a dismissal order, and how the perceived differences in those orders may affect the right or need to appeal and the danger of waiving a right to appeal.⁹

The general framework regarding appeals as provided in the § 16 of the FAA is that orders staying court proceedings and enforcing arbitrations cannot be appealed, but orders denying stays or enforcements can be appealed. The policy underlying the rules governing appeals of arbitration orders under the FAA is to achieve the FAA's goals of a speedy and inexpensive resolution of a dispute. The rules governing appeals may be simply stated as follows: orders favoring arbitration are not considered final for purposes of appeal and not immediately appealable; orders unfavorable to arbitrations are considered final for purposes of appeal and immediately appealable.

An order granting a motion to stay under § 3 is not final for purposes of appeal and thus is not appealable.¹⁰ An order refusing a stay under § 3 is final for purposes of appeal and is immediately appealable.¹¹ An order compelling arbitration under § 4 is not final for purposes of appeal; an order denying a petition to compel arbitration under § 4 is final for purposes of appeal and is immediately appealable. A "final decision" with respect to arbitration subject to the FAA is immediately appealable.¹² Although the rules regarding appealability of FAA orders are simple to state, they are not as easy to apply, as the cases below illustrate.

An order dismissing a case is appealable as a final order under § 16(a)(3), even if the court enters an order enforcing arbitration. *Seacoast Motors of Salisbury v. Daimler Chrysler Motors Corp.*, 271 F.3d 6, 9 (1st Cir. 2001); *Lloyd v. Hovensa LLC*, 369 F.3d at 268 (3d Cir. 2004). This is so even if the order is without prejudice and the case is subject to reinstatement. *Hill v. Rent-A-Center*, 398 F.3d 1286 (11th Cir. 2005); *Salim Oleochemicals v. MN Shropshire*, 278 F.3d 90 (2nd Cir. 2002). A dismissal with prejudice or without prejudice is considered a § 16(a)(3) final order and is immediately appealable, even though the orders are pro-arbitration. *Lloyd*.

However, a § 3 stay order that closes (but does not dismiss) a case pending arbitration and makes the case subject to be reopened is not a final order for purposes of appeal. *ATAC Corp. v. Arthur Treacher's Inc.*, 280 F.3d 1091 (6th Cir. 2002). However, the *ATAC* court, in dictum, stated that a summary judgment order compelling arbitration would be considered a final order for purposes of appeal. *Id.* at 1098. (In *ATAC*, no motion to enforce arbitration was made. Thus, the action was stayed without an order compelling arbitration, a tactic sometimes employed by parties who are interested in staying a lawsuit but are not anxious to have arbitration proceed.)

If a party wishes to stay an action and enforce arbitration, but not become involved in an appeal, the party may seek to stay (§ 3) and enforce (§ 4), but may *not* move to dismiss the action. If a party requests that the action be stayed and enforced, is the court required to grant a stay and not dismiss the action? In *Lloyd*, 369 F.3d at 268–270, the Court of Appeals for the Third Circuit found that the court had to do so. The appellate court made it mandatory for a district court to honor a stay request. The Third Circuit's rationale was that, even if arbitration is ordered, the trial court has a role to play under the FAA—for example, appointing an arbitrator or filling an arbitrator va-

cancy; addressing discovery issues; or vacating, modifying, confirming, and entering judgment on arbitration award. Moreover, staying an action and avoiding what may turn out to be a needless appeal is consistent with achieving the less-expensive and less-burdensome advantages offered by arbitrations. Finally, the appellate court opined that a trial court should not have the power to "confer" a right of appeal that would not otherwise exist.

In *Choice Hotels International Inc. v. BSR Tropicana Resort Inc.*, 252 F.3d 707 (4th Cir. 2001), the appellate court equated a denial of a motion to dismiss (a motion that was premised on the position that the matter was subject to arbitration) with an order denying a § 3 request to stay the action and, thus, a final order for purposes of appeal under the FAA. The question that arises in this case is: If the motion had been granted, would the court have reasoned that it was a grant of a § 3 stay request and thus not appealable? It is perhaps prudent to seek specifically a stay order and not a dismissal order for at least two reasons: (1) the denial of a stay order is appealable under § 3, whereas a denial of a dismissal motion may not be; and (2) a grant of a stay order does not give the losing party the right to appeal.

Colin v. R.K. Gracie & Gracie & Co., 358 F.3d 1 (1st Cir. 2003), concerns the issue of whether a party that is confronted with an order denying arbitration must appeal. Section 16(a)(1)(B) authorizes an appeal, but does not mandate that an appeal be taken. The First Circuit Court of Appeals noted that at least three appellate courts have held that the failure to appeal promptly may foreclose an appeal from such an order denying arbitration (§ 4). The First Circuit explained that it is wasteful to have a full trial and then have a later determination that the matter should have been arbitrated, not litigated in court. Although the First Circuit stated that it was "sympathetic to the approach" the three circuits took concerning waiver and foreclosure, the First Circuit declined "to employ a mechanical forfeiture rule." In *Colin*, for example, the trial court denied the arbitration request only after the trial had started and all the evidence had been presented.¹³

Other avenues for appealing arbitration orders are § 1292(b) certification and the doctrine of pendent jurisdiction. *Salim Oleochemicals*, 278 F.3d at 91–93; *National Railroad Passenger Corp. v. Express Track*, 330 F.3d 523 (D.C. Cir. 2003). In *National Railroad*, the trial court had ordered arbitration concerning a lease, ordered the parties to continue to perform under the lease pending arbitration, and confirmed an interim arbitration order. The order was appealed, and the appellate court observed that it had jurisdiction over the trial court's injunction order, 28 U.S.C. § 1292(a)(1), and confirmation order, FAA § 16(a)(1)(D). The appellate court observed that, in order to review the injunction and confirmation orders, it had to determine the correctness of the arbitration order. Accordingly, the court found that it had pendent jurisdiction because, when the issue of the "arbitrability of [a] dispute is inextricably intertwined with other orders over which [an appellate court has] ... jurisdiction ... [the appellate court has] pendent appellate jurisdiction to resolve issue of arbitrability." 330 F.3d at 529.

In *FitTech Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1st Cir. 2004), the court addressed appellate issues involving the Federal Arbitration Act. *FitTech Inc.* concerned two agreements—a purchase agreement and employment agreement (for former officers and shareholders of the acquired company)—each of which contained a provision for alternative dispute resolution (ADR). The purchase agreement contained a provision for ADR related to accounting disputes, and the employment agreement contained a provision for traditional arbitration. In its motion for reconsideration, Bally requested reference of certain claims to an ongoing arbitration it had initiated in Chicago based on the ADR clause in the employment agreement. The court noted that Bally’s previous motion—a motion to dismiss the complaint on the basis of the ADR provision in the purchase agreement—had not included a reference to ADR based on the employment agreement. In considering whether Bally was foreclosed from pressing this request, the court chose not to decide that issue because the trial court had decided the reconsideration motion on the merits. The court’s comments signal a need to be careful when there are two contracts with different ADR clauses regarding how to preserve your rights under both clauses.

The court next addressed whether the request in the reconsideration motion was a § 4 request for an enforcement of arbitration order, and the court had no trouble concluding that it was. With this ruling, the court found that it had appellate jurisdiction over the denial order regarding the request under § 16(a)(1)(B) of the FAA. *Id.* at 5. The next issue, labeled by the court as the “more difficult” one, was whether Bally’s motion to dismiss the case on the basis of the ADR clause in the purchase agreement (related to accounting) could be considered a § 3 stay motion or § 4 arbitration enforcement motion. If not, then the trial court’s denial of the dismissal motion was not an adverse § 3 or § 4 order that could be appealed under the FAA and also could not be considered a final order under traditional analysis. If this were the case, then the appellate court lacked jurisdiction.

The court observed that certain trial courts had treated the request to dismiss the complaint as equivalent to a § 4 petition for an order compelling arbitration. Bally’s argument was that, under the purchase agreement, the accountant had the sole authority to resolve all issues; assuming Bally’s position were correct, the court explained that the proper remedy would have been a § 3 stay order and § 4 enforcement order. The court reasoned that Bally’s “request for an over-favorable remedy of dismissal ... can be treated as encompassing the lesser alternative remedy of a stay and reference.” But the court cautioned that, if Bally “had wanted a dismissal, but no decision by the arbitrator ... ,” it would not have entertained the appeal. The question that arises is: Could not Bally’s dismissal motion be considered a § 3 stay request, and, if so, did Bally have to seek a § 4 enforcement order? If the motion were considered a § 3 request, then the denial order should be appealable.

The court then examined whether the accountant remedy (the ADR clause in the purchase agreement) constituted arbitration. If it were not, then the remedies under the Federal Arbitration Act—including appeals of unfavorable or-

ders—would not be available. Concluding that federal law governs whether the ADR provision constituted an arbitration under the FAA (while noting contrary appellate court decisions), the court stated that the question is “how closely the specified procedure resembles classic arbitration and whether treating the procedure as arbitration serves the intuited purposes of Congress.” Finding that the purchase agreement made the accountant remedy final and that other common incidents of arbitration existed (independent adjudication, substantive standards, and an opportunity for parties to present their case), the court concluded that the procedure was arbitration, even though it was limited to the resolution of only the accounting issues. The remaining issues—the scope of the ADR provisions, the interplay between the two contracts and the relevance, if any, of the accountant ADR procedure to the employment contract and the arbitration provision in the employment contract to the purchase agreement and possible waiver (arising from the Chicago arbitration and the claims/defense asserted at the arbitration)—merit your consideration, particularly if you find yourself in a position of giving advice about ADR provisions in the rather common commercial transactions that involve a purchase agreement and one or more employment contracts.

Conclusion

A party to an arbitration agreement controlled by the Federal Arbitration Act must not assume that it is entitled to discovery, particularly of the type that is authorized under the Federal Rules of Civil Procedure and many analogous state procedural rules. In entering into an arbitration agreement, a great deal of thought needs to be given as to whether discovery is advantageous for your client, and, if so, how to best ensure that your client achieves that right. In addition, caution is the key in determining whether you may appeal a court order. Much depends on the nature of the order. A mistake as to whether the order is appealable can result in waiving your client’s appellate rights. To avoid an unfortunate result for your client, you need nothing less than a thorough and complete understanding of the FAA and the case law interpreting it as to these issues. **TFL**

George E. Lieberman is an attorney with Vetter and White in Providence, R.I., and handles complex commercial disputes and significant personal injury and product liability matters. He also serves as a FBA vice president for the First Circuit. © 2009 George Lieberman. All rights reserved.



Endnotes

¹*Corcoran v. Shearson American Exp. Inc.*, 596 F. Supp. 1113, 1117–1118 (N.D. Ga. 1984) (discovery under federal civil procedural rules was stayed when the matter was referred to arbitration); *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558, 563–567 (S.D. Miss. 1976) (no court-managed discovery on the merits when the matter was referred to arbitration); *Hires Parts Service Inc. v. NCR Corp.*, 859 F.

Supp. 349, 353–356 (N.D. Ind. 1994) (same).

²*Incorporated Village of Lynchburg, Ohio v. Douglas N. Higgins Inc.*, 822 F.2d 1088 (6th Cir. 1987).

³See *National Broadcasting v. Bear Stearns & Co. Inc.*, 165 F.3d 184, 190–191 (2nd Cir. 1999); *Burton v. Bush*, 614 F.2d 389, 390–391 (4th Cir. 1980); *Yasuda Fire & Marine Ins. Co. v. Continental Casualty Co.*, 840 F. Supp. 578, 579 n.4 (N.D. Ill. 1993); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 361 (S.D.N.Y. 1957).

⁴*Integrity Ins. Co. v. American Centennial Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995).

⁵*Security Life Ins. Co. of Am.*, 228 F.3d 865, 870–871 (8th Cir. 2000) (a nonparty must produce documents prior to the hearing). See also *Stanton v. Paine Webber Jackson & Curtis Inc.*, 685 F. Supp. 1241, 1242–1243 (S.D. Fla. 1988) (arbitrators may order nonparties to produce documents prior to the hearing: “arbitrators may order discovery as they find necessary”); *Meadow Indemnity Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (arbitrator has the power to compel a nonparty to produce documents prior to the hearing: “power of the panel to [order documents to be produced at hearing] ... implicitly authorizes the lesser power to compel [same] ... prior to a hearing”); *Burton*, 614 F.2d at 391.

⁶See, for example, *Amgen Inc. v. Kidney Center of Delaware County Ltd.*, 879 F. Supp. 878, 880 (N.D. Ill. 1995).

ACT continued from page 51

tion of authority between the courts and the arbitrators when doing business with U.S. entities to avoid the risk of lengthy and invasive discovery, jury trials, and/or punitive damages awards—all of which are not accepted in the domestic law of the countries in which these parties reside. U.S. parties engaged in international commerce may find themselves at a competitive disadvantage and increasingly forced to accept foreign law in contracts and non-U.S. court forums to resolve disputes as the United States becomes known to be hostile to arbitration. It is impossible to predict the full impact on commerce if Congress creates unprecedented uncertainty as to the ability of a business to rely on domestic and international arbitration remedies. Such a chilling effect is not necessary to achieve congressional objectives.

The Need to Avoid Unintended Consequences

Although the Arbitration Fairness Act aims to protect domestic consumers, employees, and franchisees, as drafted the legislation threatens to do far-reaching and significant damage to U.S. interests. Legislation can be crafted in a way that not only preserves commercial domestic and international arbitration but also affords protection to the designated classes. It is in the hands of all interested parties to work together to develop legislation outside § 1 of the Federal Arbitration Act and pay particular attention to avoiding the unintended consequences of any changes. **TFL**

Edna Sussman, an independent arbitrator and mediator, is the principal of SussmanADR LLC and a Distinguished ADR Practitioner in Residence at Fordham Law School. She can be contact-

⁷In *Comsat Corp.*, the appellate court suggested that a party may ask a court to order pre-hearing discovery upon a showing “of special need or hardship.” *Id.* at 276. The U.S. District Court for the Eastern District of Pennsylvania observed that, if the Fourth Circuit were correct, then an arbitrator also has the power to order discovery in those situations when the arbitrator believes discovery is “appropriate.” *Hay Group Inc. v. E.B.S. Acquisition Corp.*, 2003 U.S. Dist. LEXIS 4909 (E.D. Pa. Mar. 4, 2003).

⁸*Commercial Solvents Corp.*, 20 F.R.D. at 363 (court could not compel a Louisiana resident to comply with a subpoena issued in New York).

⁹As to grounds for an appeal, in *Hall Street Associates, LLC v. Mattel Inc.*, 128 S. Ct. 1396 (2008), the U.S. Supreme Court ruled that parties may not expand the limited grounds set forth in the FAA (§§ 10 and 11) for vacating an award.

¹⁰FAA, § 16(b)(1); *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 268–270 (3d Cir. 2004).

¹¹FAA, § 16(a)(1)(A); *Lloyd*, 369 F.3d at 268–270.

¹²FAA, §§ 16(b)(2), 16(a)(1)(B); § 16(a)(3); *Lloyd*, 369 F.3d at 268–270.

¹³See also *Cozza v. Network Associates Inc.*, 362 F.3d 12, 15 n.1 (1st Cir. 2003) (court again notes it expressed sympathy for the foreclosure of the appeal because of a belated appeal of nonfavorable arbitration orders).

ed at esussman@sussmanADR.com. The author thanks Mark Friedman and Floriane Lavaud for their review and comments. © 2009 Edna Sussman. All rights reserved.

Author's Update

On April 29, 2009, as this article was going to press, the Arbitration Fairness Act of 2009 was introduced in the Senate. Hearing the voices of those concerned about the impact of the bill as previously drafted, most of the unintended consequences of the bill described in this article and which are found in the current House of Representatives version of the bill have been addressed and corrected.

Endnotes

¹See Edna Sussman, *The Proposed U.S. Arbitration Fairness Act: A Threat to U.S. Business*, 18 AM. REV. OF INTL. ARB. 455 (2009); Mark Kantor, *Legislative Proposals Could Significantly Alter Arbitration in the United States*, 74 ARB. 444–452 (2008).

²Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894–904 (1936).

³*Report of the Committee on the Federal Courts of the New York County Lawyers Association on the AFA of 2007* (April 15, 2008), available at www.nycla.org.

⁴Congressional Research Service, Report to Congress, *Federal Civil Rights Statutes: A Primer* (October 2008).

⁵Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38r.

⁶See, for example, Emmanuel Gaillard, *International Arbitration Law*, N.Y.L.J. (April 4, 2008).