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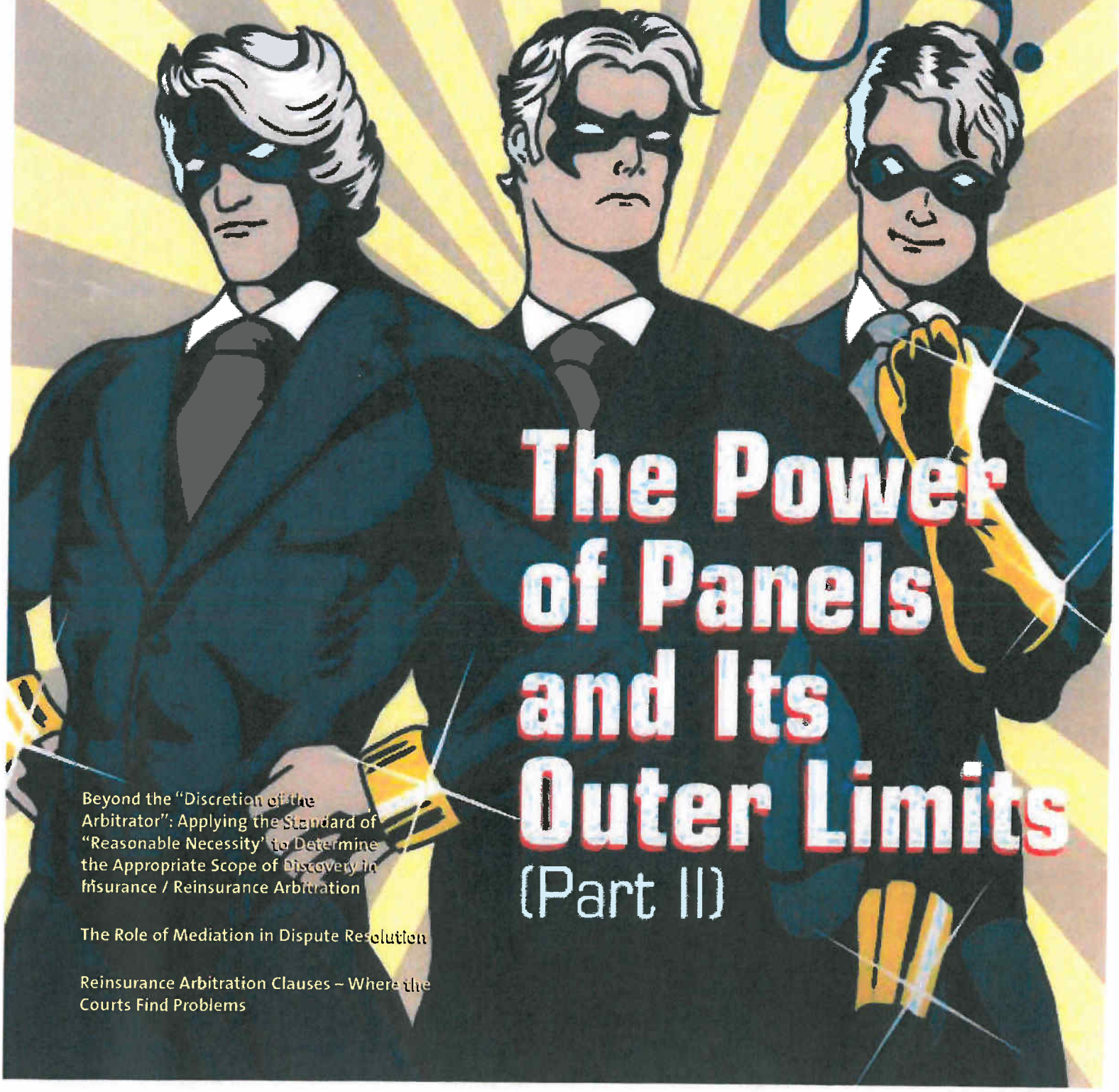

The Power of Panels and Its Outer Limits (Part II)

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feature

Beyond the "Discretion of the Arbitrator": Applying the Standard of "Reasonable Necessity" to Determine the Appropriate Scope of Discovery in Insurance/Reinsurance Arbitration

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The concern of stakeholders in insurance and reinsurance arbitration about the morphing of arbitration into full-blown litigation with unbridled discovery seems to be growing. The fact that it is largely self-inflicted (we certainly have the ability to influence if not control the process) is cold comfort. Insurers and reinsurers alike feel trapped between the Scylla of open-ended expense and delay and the Charybdis of losing a case because of evidence not unearthed.

Is arbitration capable of providing parties with adequate discovery to investigate and prepare their case without opening the floodgates of unbridled court style discovery?

The answer is emphatically "Yes!" Arbitration provides both a process for achieving this and a standard whereby it may be achieved.

In-house counsel expect ingenuity and flexibility from arbitrators in administering cases in such a way as to achieve the arbitration goals of expedition and economy while providing a fair process. Unless arbitrators are able to satisfy this need, arbitration will become the same dinosaur that litigation has become.

ARBITRATION'S PROCESS FOR ACHIEVING EXPEDITIOUS DISCOVERY

Arbitrators in insurance and reinsurance arbitrations are generally expert in the subject matter of the case and are expected to familiarize themselves with the facts of the case early on. By the time of the Organizational Meeting and later follow-up conferences on discovery issues, the arbitrators can put themselves in a position to understand what discovery is reasonably necessary in light of the factual and legal issues in the case. Based on their expertise and experience, arbitrators are able to see beyond counsels' statements of position to what truly needs to be disclosed in light of such issues and how it may be discovered most efficiently.

This requires the panel's getting heavily involved with counsel in framing the issues, specifically with reference to understanding each side's lines of argument as to the matters in contention. It also involves the panel's exploring with counsel what types of evidence will be needed at the hearing and hence may be the subject of discovery—so that discovery can be streamlined, avoiding the litigation-style fishing expedition.[2] This active engagement by the panel in streamlining discovery should continue throughout the case, with regular status conferences.

The panel's proactive role in framing the issues and formulating and overseeing discovery makes all the difference. In not one case in a hundred do judges engage in such a process.[3] Because of caseloads and judicial standards as to discovery, as well as the overall judicial attitude to discovery matters, judges generally determine discovery disputes from on-high, based on the issues broadly construed, as presented by counsel, without getting down and dirty. A court decision in a heavily-contested discovery dispute is typically rooted far more in case law than in a penetrating analysis of the discovery needs of the particular case.

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But the process is a demanding one, requiring a radical mindshift. Lawyers serving as advocates and arbitrators today grew up in the world of unbridled federal court discovery, as did many of our client representatives. One's instinct, absent a client or judge reining the process in, is to go for the discovery. The no-stone-unturned mindset feels correct and appropriate; it feels like the standard of care. No one — neither outside counsel nor party-appointed arbitrators nor in-house attorneys nor claims, underwriting or other party representatives — wants to be in the position, after losing a case, of being on the receiving end of the question, "Why didn't you get access to document X or depose witness Y?"

The key insight is that we can achieve this revolution in approach through the arbitration process we already have. The very nature of insurance and reinsurance arbitration means that one needs less evidence to present or defend one's case than would be necessary were the matter being litigated. The arbitrators' familiarity with insurance and reinsurance matters narrows the need for fact and expert testimony. The inapplicability of the rules of evidence broadens the scope of admissible evidence. The self-authenticating nature of most documents in arbitration curtails the need for discovery as to foundations for their admission into evidence. Arbitrators can greatly expedite some cases by bifurcating or hearing certain issues early on that will, if they are decided one way, avoid some or all the rest of the case or narrow its scope. Examples might be deciding early on whether parole evidence will be permitted as to an agreement or whether a case is time barred or whether consequential damages may be recovered (where other damages are relatively small). Cumulatively, these arbitration advantages can substantially curtail the scope of necessary discovery in a case.[4]

So, while parties should, by design, end up getting less discovery in arbitration than in court, that does not mean that, in arbitration, they get less of what they need to be able to prepare and try their case.

ARBITRATION'S STANDARD FOR ACHIEVING EXPEDITIOUS DISCOVERY

Is there a standard that determines the appropriate scope of discovery in insurance, reinsurance and other commercial arbitrations, a principled basis for the arbitrators' determination as to what discovery should or should not be permitted?

Over and again, in discussions of the topic, we hear and read that "Discovery is in the discretion of the arbitrator," as if that were an answer. Virtually never does the discussion go to the next level: On what basis are arbitrators supposed to — do they — exercise this discretion?

The answer, in my view, is that there is such a standard. Based on my experience as an arbitrator in many cases over a 30 year period and review of applicable law and of the guidelines and rules of organizations such as ARIAS•U.S., the Reinsurance Association of America (RAA), the Task Force on Insurance and Reinsurance Disputes, the American Arbitration Association (AAA), JAMS, the International Institute for Conflict Prevention and Resolution (CPR), and others, there is a well-established and broadly understood standard for discovery in arbitration, a standard that a party in an arbitration may confidently present to arbitrators as being the governing standard by which they should be guided.

It is as follows: Absent their having established some other standard, parties in domestic arbitrations are entitled *to whatever discovery, including document production, depositions, and interrogatories, they reasonably need to prepare and present their claims or defenses, but no more.* Parties have a threshold right to reasonable particularization of the claims or defenses asserted against them and to the basic documents, but, beyond that, there is *no presumption of discovery.* Parties must show *actual need.* Discovery, beyond a certain minimum, should be reasonably proportional to the scope of the case. If, as is often the case, information as to a particular issue is available in various ways, parties should develop it in the most economical way practicable. Redundancy should be avoided, as should discovery on matters not in dispute or subject to stipulation or the like. I refer to this as the "reasonably necessary" standard or the standard of "reasonable necessity."

Limiting parties to discovery that they rea-

sonably need requires, as suggested above, that the arbitrators and counsel start focusing on the real issues in the case at the Organizational Meeting.

This standard for discovery is far narrower than that applicable in court cases. Parties in arbitration are generally *not* entitled to discovery of all evidence "reasonably calculated to lead to the discovery of admissible evidence" or even of all evidence relevant to the dispute.[5]

The different standard for discovery in arbitration derives from the nature and objectives of arbitration. Arbitration by definition is intended to be less *expensive* and *more* expeditious than litigation. These characteristics are more than descriptive; they are determinative of the arbitration process. The central reason for the explosive growth in arbitration in recent decades is the huge cost of discovery in litigation and resultant delays.

Arbitration is intended to avoid the unbridled discovery of litigation. *Yet the requirements of expedition and economy in arbitration are subject to the overriding right of a party to have a fair opportunity to prepare and present its claims or defenses.* Arbitrations need to be done expeditiously, but they also need to be done right. The objectives of expedition and economy are to be pursued *in light of* the reasonable discovery needs of the case.

The fact that the "reasonably necessary" standard is judgmental does not detract from its value. The standard supplies the basis for the dialogue between the parties and the arbitrators and for the arbitrators' exercise of their discretion. Arbitrators' deciding what discovery is reasonably necessary in a case based on a standard to that effect is a far cry from their deciding the scope of discovery based solely on personal predilection.

There are corollaries to the "reasonably necessary" standard. As a general proposition, witnesses should not have to testify twice, first at a deposition and then at the hearing.[6] Absent agreement by the parties to the contrary or the need in a particular case to do it differently, each witness should testify only once, preferably live at the hearing. Absent special circumstances, a witness who is controlled by a party and can be brought to the hearing or is within subpoena range of the locale of the hearing should generally not be deposed.[7]

Where, however, few or no depositions are taken and parties will be going into the hearing with a limited sense of the evidence that may emerge, it will often make sense to permit the parties to submit their primary briefing of the case on a post-hearing basis after the facts are in, limiting the pre-hearing briefs to issues that are already more developed.

When necessary, depositions, including videotaped depositions, may be taken and presented at the hearing, but arbitrators' preference for live testimony is generally so strong that teleconferenced real-time testimony is preferred if the witness is not available to appear in person. Indeed, in many instances testimony by telephone will be preferred over even videotaped depositions, where the parties are comfortable with it.

It should not be of concern that arbitrators' decisions on discovery matters will rarely be overturned. Even in litigation, that is generally the case.[8] In addition, finality is one of the prized objectives of arbitration. One selects skilled and trusted arbitrators and they resolve the matter.

In my experience experienced arbitrators generally have an intuitive understanding of the need to resolve discovery disputes based on according parties the discovery they reasonably need, but no more, thereby balancing the goals of fairness, expedition, and economy[9] Yet it is interesting to note that this standard is implicit — and, at times, explicit — in the guidelines and rules of leading arbitration organizations.

I will first review how, as a matter of practice, arbitrators, in my experience, generally handle discovery questions at the various phases of a case and then will analyze the matter in light of applicable guidelines and rules of arbitration organizations, and then in light of applicable law and commentary.

The Parties' Formal Agreement as to the Scope of Discovery

Arbitration is obviously a creature of contract. Parties go into arbitration because they choose to, whether by pre-dispute or post-dispute agreement. They certainly may, by their arbitration agreement, specify what discovery shall be permitted in any arbitration arising under the agreement.

Occasionally I have seen arbitration clauses specifying that a particular body of discovery

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When the parties' agreement does not specify the scope of discovery and counsel are in disagreement on the matter, arbitrators generally require counsel to justify the need for whatever discovery they seek. Counsel need to be prepared to do so with specificity in terms of the applicable contractual or legal standards or custom and usage or the like giving rise to the need for the information in question.

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rules shall apply, such as those set forth in the Federal Rules of Civil Procedure or in a state's procedural rules. This, of course, has the advantage of providing specific rules, reinforced by a robust body of case law, but the disadvantage of importing the costs and delays of litigation discovery into arbitration. Nonetheless, there are cases in which, for various reasons, the parties are primarily interested not in the expedition and economy goals of arbitration but rather in the opportunity to choose their own finders of fact.

Where this is what they want, they should get it. Certainly one of the main and most important benefits arbitration can provide is the determination of disputes by decision-makers familiar with the underlying subject matter and related custom, practices, and law. In many complex high stakes insurance/reinsurance disputes this benefit of arbitration may be more important to the parties than expedition and economy.

In the vast majority of cases, in my experience, discovery is not specifically addressed in the parties' arbitration clause. Quite often, however, arbitration clauses designate rules of some arbitration organization, such as the American Arbitration Association, to be applicable to any arbitration arising under the contract. Such designations obviously have the effect of rendering the discovery portions of such rules applicable to ensuing arbitrations.

Where parties do specify the scope of discovery, arbitrators generally understand that such agreements are enforceable and binding. If the scope of discovery specified by the parties' agreement seems overly broad to the arbitrators, they may try to talk the parties into narrowing it to foster the arbitration goals of expedition and economy. But, if the parties are adamant, arbitrators will generally honor the parties' agreement. Indeed, they are presumptively required to do so since the parties' agreement is the basis of arbitrators' jurisdiction.

Agreements as to Discovery Following Commencement of the Arbitration

Much more typically, counsel reach at least preliminary agreement as to discovery once the arbitration has been started, generally in preparation for the Organizational Meeting.

This process does not have much, if anything, to do with any body of rules as to the permissible scope of discovery in arbitration. It is simply counsel working the matter out among themselves on a pragmatic basis, assuring they get discovery they want by giving the other side discovery it wants.

The scope of what counsel will agree to varies greatly from case to case. If counsel are litigators who only occasionally do arbitrations, they typically agree on a broad scope of discovery, including numerous depositions—not only of non-party witnesses outside the jurisdiction, but also of party and other witnesses whose presence can be compelled at the hearing.

On the other hand, if counsel are frequent arbitration practitioners, they are more likely to bring a proposed schedule to the Organizational Meeting that reflects a more limited scope of discovery, although even then it is likely to be fairly broad given litigators' propensity to turn over every rock and to avoid putting themselves in the position of having to seek leave to increase the amount of discovery later.

In my experience, arbitrators generally tend to accept whatever agreement counsel reach as to document production. However, in large cases, document production, particularly e-discovery,[10] has become a huge problem over which panels may increasingly need to exercise oversight. Large corporate entities in many cases now consider unbridled document demands as perhaps more of a problem even than depositions.[11] In-house counsel at large companies have told me they expect arbitrators to impose reasonable restrains in this area.

When counsel agree to a number or duration of depositions that seems excessive, most arbitrators tend to push back, at least initially, in an effort to get the parties to curtail the depositions in the interests of expedition and economy, particularly depositions of witnesses who can be available to testify live at the hearing or whose testimony may be redundant or otherwise unnecessary.

In insurance and reinsurance arbitration often the umpire will initiate this process, first with the party appointed arbitrators and then with counsel. The process does not need to be heavy-handed or overtly judgmental. Rather, it's along the lines of, "Let's review whether we really need all these depositions, etc.", or whether we can devise a more limited program that still gets everybody the discovery they need on the matters really in contention. Again, it has been my experience that, when