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Third Party Discovery in Texas Arbitrations

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Little has been written about the ability of parties to obtain third party discovery in arbitrations conducted under Texas law. Many lawyers simply assume that, since they have the power to issue subpoenas, they have the power to compel third parties to produce documents or provide testimony in Texas arbitrations. This notion is bolstered by arbitration rules, which often permit any person authorized by law to subpoena witnesses or documents.[1] However, as one commentator has noted under New York law, an attorney who believes he has the power to compel third parties to deliver documents to that attorney's office or appear for a deposition simply by signing a paper titled "Subpoena" is sorely mistaken.[2] The same is true in Texas. As explained below, third parties have many protections against participating in a process to which they, unlike the parties themselves, never agreed.

This article first addresses the reason discovery has been historically limited in arbitration proceedings. Next, it addresses when the Texas Arbitration Act ("TAA") and Federal Arbitration Act ("FAA") apply and the different approaches each takes to third party discovery. Then, the key role of the court in adjudicating third party matters is discussed. Finally, the article analyzes factors courts should consider in determining whether, and to what extent, third party discovery should be permitted in any given arbitration proceeding.

Arbitration Discovery and the Benefit of the Bargain

Arbitration is supposed to be quicker and cheaper.[3] When parties agree to arbitrate, they understand they will not be entitled to the same type and amount of discovery permitted of civil litigants.[4] As one judge explained:

> [F]ull scale discovery is not automatically available in arbitration, as it is in litigation. Everyone knows that is so; thus the unavailability of the full panoply of discovery devices, with their attendant burdens of time and expense, may fairly be regarded as one of the bargained-for benefits (or burdens, depending on one's subsequent point of view) of arbitration.[5]

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[1] *See,* e.g., AAA Commercial Arbitration Rules ("AAA Rules") at Rule 31 ("An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.")

[2] *See* Seth E. Lipner, "Third Party Discovery and Subpoenas in Arbitration," Practicing Law Institute (2004).

[3] The American Arbitration Association publishes a booklet of advice "for CEOs and CFOs" from "40 experienced commercial arbitrators" titled "The Top 10 Ways to Make Arbitration Faster and More Cost Effective" (hereafter "AAA's Top Ten"). *See* http://go.adr.org/top10. As the Texas Supreme Court has noted, "[p]arties agree to arbitration for reasons other than speed and cost, such as flexibility, privacy, and in some instances, expertise." *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 94 (2011).

[4] *See, e.g., Comstat v. National Science Foundation*, 193 F.3d 269 (4th Cir. 1999) (explaining that parties in arbitration necessarily forego certain procedural rights, and such parties cannot "reasonably expect to obtain full-blown discovery from the other *or from third parties*") (emphasis added); *see also* AAA's Top Ten, p. 3 (noting that "arbitration should not be burdened with full blown litigation discovery").

[5] *Commonwealth Ins. Co. v. Beneficial Corp*., 1987 U.S. Dist. LEXIS 8828 at *12-13 (S.D.N.Y. 1987).

As alluded to by the court, one of the parties to an arbitration agreement often regrets the deal, wishing he could get to a judge, jury and the full scope of discovery allowed by the Texas Rules of Civil Procedure. As another judge noted:

> It is difficult for the Court to understand why sophisticated business entities—or anyone for that matter—would contract away their right to resolve their disputes in the courts in favor of having them resolved by persons not bound by the hallmarks of the judicial process, such as the rules of evidence and the right to appeal.[6]

Nonetheless, parties regularly enter into such agreements, and courts are required to enforce them.[7] Mere regret is no defense.[8]

Of course, parties are generally free to agree to structure their arbitrations in any manner they desire.[9] While parties typically select in advance a body of rules to govern their arbitration (such as one of the several sets issued by the American Arbitration Association, JAMS or CPR), they may agree to modify the discovery permitted by these rules as they see fit. While an arbitrator could attempt to reject the parties' agreement and say he is enforcing "the rules," he does so at his own peril.[10] Arbitration is premised on the parties' agreement, and with the stroke

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[6] *Michael Angelo's Gourmet Foods v. Nat'l Union Fire Ins.* Co., 2006 U.S. Dist. LEXIS 56540 at * 12 (W.D. Tex. Aug. 4, 2006). The Court went on to state that "[n]onetheless, in this case, we have two sophisticated business entities who obviously knew or should have known what they were doing. Having expressly agreed to arbitration in its contracts for insurance, [the party] must now reap what it has sown and submit its claim in that forum." *Id.* at *12-13.

[7] One of the reasons the Federal Arbitration Act was enacted was to put an end to judicial discrimination against arbitration agreements. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate."); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("The FAA was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.").

[8] Interestingly, the AAA suggests that the desire for full blown discovery, or even "stipulations for extensive discovery," are the result of "less experienced attorneys" who are "unfamiliar" with the arbitration process. *See* AAA's Top Ten, p. 3. One could just as easily argue (with anecdotes abounding) that it is the "less experienced" attorney who believes the amount and extent of discovery will not affect the ultimate adjudication of a claim.

[9] Some limitations do exist. For example, under federal law, parties may not expand the scope of judicial review of an arbitration award beyond that listed in the FAA. *See Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 578 (2008) (holding that the grounds for vacating or modifying an arbitration award under the Federal Arbitration Act (FAA) "are exclusive" and cannot be "supplemented by contract"). Texas law, on the other hand, allows agreements for expanded judicial review. *See Nafta Traders*, 339 S.W.3d at 97 (holding that the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error). Of course, parties cannot agree to a different standard of judicial review than the court would employ in a judicial proceeding involving the same subject matter. An arbitration agreement providing that a judge would review the award "by flipping a coin or studying the entrails of a dead fowl" would be unenforceable. *Id.* at 102.

[10] The AAA states that arbitrators may "place such limitations on the conduct of [agreed] discovery as the arbitrators shall deem appropriate." *See* AAA Procedures for Large, Complex Commercial Disputes ("AAA Procedures") at L-4(c). The CPR Rules state that arbitration panel "may require and facilitate such discovery as it shall determine is appropriate in the circumstances . . . ." *See* CPR Rules for Non-Administered Arbitration ("CPR

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