

Takeaways from New Discovery Rules to Employ in Arbitrations:

The Company, Arbitrator, and Counsel
Perspectives

Syed Ahmad

Royce F. Cohen

Andrew Maneval

Glenn Frankel

OVERVIEW

- ARIAS Arbitration Discovery Frustrations
- Amended Federal Rules Civil Procedure
- Typical discovery issues and factors to consider
- Key takeaways from the new FRCP (and other dispute resolution avenues) that may be applied to ARIAS arbitrations

ARIAS Arbitration Discovery Frustrations

- Delays
- Gamesmanship (and the Perception of Gamesmanship)
- Little Cooperation/Trust Between Parties/Counsel
- How much Discovery is Necessary, if any?

Who is Guiding The Process?

➤ The Proper Role of Arbitrators

- Large Role?
- Small Role?
- Merely to Correct Imbalances or Guarantee Fair Play?
- None → Exclusively the Role of the Attorneys and/or Business Leads?

Amended Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 1

Rule 1: Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Federal Rule of Civil Procedure 26(b)

Fed. R. Civ. P. 26 (b) Discovery Scope and Limits

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ***and proportional to the needs of the case.***

Proportionality determined by considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.



FEDERAL RULE OF CIVIL PROCEDURE 34(b)

Fed. R. Civ. P. 34(b)(2)(C) Objections

An objection must state whether any responsive materials are being withheld on the basis of that objection.

FEDERAL RULE OF CIVIL PROCEDURE 37(e)

Fed. R. Civ. P. 37 Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

- (e) ***Failure to Preserve Electronically Stored Information.*** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
 - (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.



Summary of the Amended FRCP

- Encourage greater cooperation;
- Focus discovery on what is truly needed to resolve cases;
- Engage judges in early and active case management; and
- Address serious problems associated with vast amounts of electronically stored information.

Frustrations Regarding the Old FRCP (and similarly frustrations with ARIAS Arbitrations):

- *Federal litigation* has become inefficient, too expensive, and fraught with too many uncertainties that have little or nothing to do with the merits of particular cases.
 - See Letter from Companies in support of the Proposed Amendments to the FCRP, February 14, 2014 (signatures included: Allstate Ins. Co.; AIG; CNA; Hanover Ins.; The Hartford; Liberty Mutual; Progressive; Property Casualty Insurers Association of America; State Farm; and Travelers).



How can ARIAS Arbitrations benefit from the Amended Federal Rules of Civil Procedure?

Typical Discovery Issues

- Demands for Documents that are Arguably “Not Responsive”
 - Documents regarding other reinsurers
 - Documents regarding other underlying claims, or the cessions of other underlying claims
 - Documents regarding reserves, reserve changes, take-downs, etc.
- When should these issues be addressed?
- What factors should be considered?

Typical Discovery Issues (cont.)

- Are these documents necessary?
 - Brokers'/Intermediaries' files
 - E-mails, generally
- When should these issues be addressed?
- What factors should be considered?

Typical Discovery Issues (cont.)

- Which discovery tools are necessary and/or useful?
- When should these issues be addressed?
- What factors should be considered?

Takeaways from the Amended FRCP

- Cooperation
- Proportionality
- Early Panel Involvement in Discovery Issues
- Limiting the Types of ESI

Takeaways from Other Sources

- Categorical Privilege Logs
- Joint Letters regarding Discovery Disputes
- Use of Claw-Back Agreements
- Cost Shifting

- Questions?