DISCOVERY IN BETH DIN AND OTHER ARBITRATION TRIBUNALS

Obtaining discovery in a Beth Din is quite a lot different than in court or in the more national, secular, arbitration tribunals. The Federal and State judiciary forums have developed extensive and comprehensive rules of exchanging documents in discovery and obtaining pretrial depositions in order to avoid trial by ambush before jury or the bench. This discovery process is subject to abuse and adds many months, if not years, onto a process before there can be a final resolution of the dispute.

Arbitration is often chosen to avoid the rigors of discovery in an effort to obtain some rough justice in a relatively short period of time. To that means, many arbitration tribunals like AAA, JAMS and FINRA discourage or outright prohibit pretrial depositions, yet at the same time they are open to a more broad scope exchange of documents. This is not to say that one cannot get pretrial depositions at the AAA, but it is more uncommon.

More typically in these secular arbitration forums, an "initial conference" is held on the telephone with the representatives of the parties and arbitrators chosen to conduct the hearing. The initial conference is held shortly after the arbitrators are confirmed, and it gives the parties an opportunity to set up a scheduling order for the exchange of documents. Sufficient time is given to complete this document discovery phase before the hearing. Invariably, this pretrial conference is held telephonically, thereby reducing the expense and legal time to participate and resolve some "housekeeping" matters. Even before the initial conference the parties have exchanged detailed Claims Letters and Answers. With this roadmap of the claim and a fixed time for the exchange of documents, the parties and their attorneys are able to move forward on document demand and discovery.

None of these rules is applicable in the Beth Din. Even knowing all the allegations of the dispute is often hard. A Beth Din case begins with the issuance of a *Hazmanna* which is translated usually as a summons. A *Hazmanna* is akin to a summons with notice. That means there is notice of the claim, but the details of the claim are clearly absent. There is no need to respond in writing or to make a response at all. At this early stage, the best that you can learn about the dispute is what your own client says he thinks the other side is suing about.

Also absent is the typical one hour telephonic pre-hearing. The vast majority of the more permanent and well-known *Battie Din* have no concept of a pre-conference telephone hearing. Beth Din of America, which is run slightly more formally and more in line with a typical secular arbitration does have in its rules at Section 8 a one paragraph statement about a preconference hearing. Even there, the preconference hearing is only at the request of the party and then at the discretion of the Av Beth Din. From my personal experience I have never had a preconference hearing in any Beth Din. Having one would, however, save money.

In *Beth Din* at the first session, which lasts four hours, a good amount of time is taken up with confirming that all parties have signed the arbitration agreement, *Shtar Berrurim*, with the appropriate *Kinyan* and introductory remarks about the case. Often times, one side may take advantage and that introduction could last as much as two hours. Somewhere toward the end of the first session, there will be a discussion of what documents are needed and who should provide those documents.

Usually, the *Av Beth Din* will order -- but that order is more like a suggestion -- that before the next hearing the parties should exchange documents. Legally, the arbiters do not have authority under New York law to order parties to produce documents. It "is firmly established that [u]nder the CPLR, arbiters do not have the power to direct the parties to engage in disclosure proceedings" (*Berg v. Berg,* 85 AD3d 950 [2011]). When parties proceed in secular arbitration forums that have more detailed rules of discovery, it is possible that the panel would sanction a non-complying party. In reality, I have seldom seen a FINRA panel actually sanction any party for noncompliance with discovery. They often seem to give just more time and more opportunities to comply. A Beth Din without any formalized rules of discovery is even more loath to hold someone in default for failing to provide discovery. The time lag between Beth Din sessions is often three to four weeks apart, so compliance with any discovery orders or suggestions is a time draining process.

In a large arbitration award, $20,000,000, which was confirmed in the Kings County Supreme Court, *Aish Hatorah New York v Fetman*, 45 Misc 3d 1203(A) one can see that the first session was on October 10, 2013 and there were still document disputes at the fourth session on December 9. In that case, probably because there was only one Dayan, who himself is well known and quite well respected throughout the United States, and because it appeared as if there was extensive fraud against a charitable institution, the Rabbi issued repeated directives for discovery. This *Aish Torah* case is unfortunately more of the exception than the rule when it comes to forcing the other side to provide discovery of documents in its possession.

During the time between the first and second session, the parties' representatives should be exchanging documentation but that seldom really occurs. The party with the documents that may be of benefit to the other side -- most often the defendant -- will just ignore the directives. Seldom do *Battie Din* take the time to make interim efforts to resolve discovery disputes. The Rabbis on the Beth Din only charge money when there is an official hearing. It is, therefore, hard to get their attention to focus on discovery issues other than at an actual hearing. A Beth Din is loath to hold someone in default and will give numerous opportunities for the custodian of the documents to produce documents. What happens is that there will have to be additional sessions just to discuss and complain about the lack of production of documents. Many times it will require a lot of argumentation to get minimum documents.

While is hard but not impossible to get documents from a recalcitrant party, the *Av Beth Din* has no legal power in New York to issue subpoenas to a third-party. No

arbitrator has authority in New York to issue subpoenas in connection with the arbitration, *De Sapio v. Kohlmeyer,* 35 N.Y.2d 402 1974]["[a]rbitrators do not have the power to direct disclosure]; *see, also, Sherrill v. Grayco Builders, Inc .,* 64 N.Y.2d 261 [1985], *N. Am. Foreign Trading Corp. v. Rosen,* 58 A.D.2d 527 [1977] ["The panel did, however, exceed its authority by directing pre-arbitration disclosure. Under the CPLR, arbitrators do not have the power to direct the parties to engage in disclosure proceedings"). A lawyer in New York, however, has the authority to issue a subpoena to third parties to get discovery. If that third-party or even the other party is not complying with that subpoena, then the attorney can resort to court. Instead it is "incumbent upon the petitioner to seek an order directing disclosure in the Supreme Court based upon a showing of extraordinary circumstances" (*Berg, supra,* citing *De Sapio, supra* ["courts will not order disclosure in arbitration except under extraordinary circumstances"]; *see,* § CPLR 3102[c]["Before an action is commenced, disclosure ... to aid in arbitration, may be obtained, but only by court order"]; *see, also, Hendler & Murray v. Lambert,* 147 A.D.2d 442 [1989], *Katz v. State Dept. of Correctional Services,* 64 A.D.2d 900 [1978]).

Seeking court intervention to aid a Beth Din arbitration is fraught with two problems, but it may be the only good recourse. First, to get a court to actually issue a subpoena, will need clear and convincing evidence of the absolute necessity of the documents. The other problem is that the *Beth Din* will frown upon a party going to court in aid of the arbitration. It will be incumbent upon the party to explain in detail to the Rabbis in the *Beth Din* why it is necessary to issue a subpoena for third-party documents. It would behoove the party to ask the Av Beth Din for permission for court intervention, a *Heter Arkaus*. Such a permission will deflect any bad feelings for going to secular court and it would give the court that extra edge to demonstrate the extraordinary circumstance to enforce a lawyer subpoena in eight of arbitration. If discovery is an issue, it is imperative for the party to bring this up at each session and not to participate begrudgingly and then moved to vacate the arbitration award after it is issued.

It is has been firmly established that "[o]nce a case is referred to arbitration, all questions of fact and of law are within the judicially unreviewable purview of the arbitrator' " (*Raisler Corp. v. New York City Hous. Auth.,* 32 N.Y.2d 274 [1973], quoting, *Matter of S & W Fine Foods [Office Employees Int. Union],* 8 A.D.2d 130 [1959]). It is true that a court may review the evidentiary record but only in order "to discern whether a colorable basis exists for the award" (*Roffler v. Spear, Leeds & Kellogg,* 13 AD3d 308 [2004], citing, *Wallace v. Buttar,* 378 F3d 182 [2d Cir.2004]). "[W]here the arbitrator refuses to hear or consider relevant evidence only because of his mistaken, but judicially unreviewable, interpretation of a rule of law which makes the evidence irrelevant, the award will not be set aside" (*Raisler Corp., supra*). Furthermore, New York courts have held that "[t]here is no review for manifest disregard of the evidence and the award must be confirmed if there is such a colorable justification even if it is based upon an error of fact or law" (*Roffler, supra*). So by continually participating in a Beth Din in which a party feels its discovery process is being thwarted by the other side will foreclose the party's ability to move to vacate the award based on the lack of evidence.

New York does offer the possibility of seeking evidence in aid of an arbitration prior to the commencement of the arbitration itself. CPLR 3102[c] states "Before an action is commenced, disclosure ... to aid in arbitration, may be obtained, but only by court order." There are few reported cases under the statute where the court actually did order pre-arbitration disclosure. Most of the cases stand for just the opposite, that except for extraordinary reasons, the court will not intervene in the arbitration process, even if it has not yet commenced.

© December 2017 by Alexander Novak, a member of Novak Juhase & Stern, www.njslaw.com; email novak@njslaw.com