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Relaxing the Standard for Court-Ordered Discovery in Aid of Commercial Arbitration

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RELAXING THE STANDARD FOR COURT-ORDERED DISCOVERY IN AID OF COMMERCIAL ARBITRATION

INTRODUCTION

Aware of the important role that discovery plays in pre-trial preparation, parties have requested courts to grant discovery in aid of commercial arbitration.[1] Most courts, however, fearful that pre-hearing disclosure will hamper the arbitral process, have imposed a test of strict necessity.[2] This test is satisfied when a party can demon-

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1. *See* Willenken, *The Often Overlooked Use of Discovery in Aid of Arbitration and the Spread of the New York Rule to Federal Common Law*, 35 Bus. Lawyer 173, 173 (1979) [hereinafter cited as Willenken I]; Page, *Pretrial Discovery and Arbitration*, N.Y.L.J., Jan. 15, 1975, at 1, col. 1. There are several ways for parties to an arbitration to obtain discovery. Ordinarily parties voluntarily exchange information before the hearing. Committee on Arbitration, *Committee Report, The Use of Discovery in Arbitration*, 33 Rec. 231, 235 n.X, (1978); Willenken, *Discovery in Aid of Arbitration*, 6 Litig. 16, 16 (1980). Parties also may provide for discovery rules in their arbitration agreement. Willenken, I, *supra*, at 184-86; *see, e.g.*, Mobil Oil Indonesia Inc. v. Asamera Oil Ltd., 43 N.Y.2d 276, 280-81, 372 N.E.2d 21, 22-23, 401 N.Y.S.2d 186, 187-88 (1977); Local 99, ILGWU v. Charise Sportswear Co., 44 Misc. 2d 913, 915, 255 N.Y.S.2d 282, 284 (Sup. Ct. 1964). In the absence of mutual agreement, a party must find other ways to compel an opponent to disclose needed material. To do this, he must apply either to the arbitrator or to the courts. Arbitrators, however, lack the common-law right to compel discovery, Tobey v. Bristol, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) (No. 14,065), and few states have statutes empowering arbitrators to order discovery. *See* Cal. Civ. Prod. Code § 1283.05(a) (West Supp. 1981); Kan. Stat. Ann. § 5-407(b) (1975); Tex. Stat. Ann. art. 230(B) (Vernon 1973). The final way to obtain discovery is by court order. In contrast to the arbitrator, courts do have the common-law right to compel pre-arbitral discovery. *See* Wheeling Steel Corp. v. American Rolling Mill Co., 82 F.2d 97, 98-99 (6th Cir. 1936); C.F. Simmonin's Sons, Inc. v. American Can Co., 22 F. Supp. 784, 786 (E.D. Pa. 1938); Puget Sound Nav. Co. v. Associated Oil Co., 56 F.2d 605, 606 (N.D. Wash. 1932); Lutz Eng'g Co. v. Sterling Eng'g & Constr.. Co., 112 R.I. 605, 609, 314 A.2d 8, 10 (1974). In some states the courts have the statutory power to grant discovery in aid of arbitration. *E.g.*, Conn. Gen. Stat. § 52-412 (1981); N.Y. Civ. Prac. Law § 3102(c) (McKinney 1970); 42 Pa. Cons. Stat. Ann. § 7309(a) (Purdon 1981).

2. *E.g.*, Burton v. Bush, 614 F.2d 389, 390-91 (4th Cir. 1980) (dictum); Coastal States Trading, Inc. v. Zenith Nav. S.A., 446 F. Supp. 330, 342 (S.D.N.Y. 1977); Levin v. Ripple Twist Mills, Inc., 416 F. Supp. 876, 880 (E.D. Pa. 1976); Bergen Shipping Co. v. Japan Marine Servs., Ltd., 386 F. Supp. 430, 435 n.8 (S.D.N.Y. 1974); Ferro Union Corp. v. SS Ionic Coast, 43 F.R.D. 11, 13-14 (S.D. Tex. 1967); Penn Tanker Co. v. C.H.Z. Rolimpex Warszawa, 199 F. Supp. 716, 718 (S.D.N.Y. 1961); Commerical Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 363 (S.D.N.Y. 1957); Cavanaugh v. McDonnell & Co., 357 Mass. 452, 455-56, 258 N.E.2d 561, 563-64 (1970); Katz v. Burkin, 3 A.D.2d 238, 239, 160 N.Y.S.2d 159, 160-61 (1957) (per curiam); Lutz Eng'g Co. v. Sterling Eng'g & Constr. Co., 112 R.I. 605, 607, 314 A.2d 8, 11 (1974); Balfour, Guthrie & Co. v. Commercial Metals Co., 93 Wash. 2d 199, 203-04, 607 P.2d 856, 858 (1980) (en banc).

strate "extraordinary circumstances,"[3] such as a danger that the information sought will no longer be available by the time the arbitral hearing begins.[4]

The restriction on the availability of discovery was intended to preserve arbitration as an alternative to court litigation.[5] Arbitration originated as an informal and voluntary forum,[6] designed to provide a

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3. *E.g.*, Coastal States Trading, Inc. v. Zenith Nav. S.A., 446 F. Supp. 330, 342 (S.D.N.Y. 1977); Bergen Shipping Co. v. Japan Marine Servs., Ltd., 386 F. Supp. 430, 435 & n.8 (S.D.N.Y. 1974); Ferro Union Corp. v. SS Ionic Coast, 43 F.R.D. 11, 13-14 (S.D. Tex. 1967); Penn Tanker Co. v. C.H.Z. Rolimpex, Warszawa, 199 F. Supp. 716, 718 (S.D.N.Y. 1961); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 363 (S.D.N.Y. 1957); Katz v. Burkin, 3 A.D.2d 238, 238-39, 160 N.Y.S.2d 159, 160-61 (1957) (per curiam); Balfour, Guthrie & Co. v. Commercial Metals Co., 93 Wash. 2d 199, 204, 607 P.2d 856, 858-59 (1980) (en banc).

4. *E.g.*, Coastal States Trading, Inc. v. Zenith Nav. S.A., 446 F. Supp. 330, 342 (S.D.N.Y. 1977); Bergen Shipping Co. v. Japan Marine Servs., Ltd., 386 F. Supp. 430, 435 n.8 (S.D.N.Y. 1974); Ferro Union Corp. v. SS Ionic Coast, 43 F.R.D. 11, 14 (S.D. Tex. 1967).

5. *E.g.*, Penn Tanker Co. v. C.H.Z. Rolimpex, Warszawa, 199 F. Supp. 716, 718 (S.D.N.Y. 1961); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 361 (S.D.N.Y. 1957); McRae v. Superior Court, 221 Cal. App. 2d 166, 169, 34 Cal. Rptr. 346, 349 (1963); St. Germain v. Motor Vehicle Accid. Indemnif. Corp., 20 A.D.2d 648, 649, 246 N.Y.S.2d 372, 373-74 (1964); Katz v. Burkin, 3 A.D.2d 238, 239, 160 N.Y.S.2d 159, 161 (1957) (per curiam); Stiller Fabrics v. Michael Saphier Assocs., 1 Misc. 2d 787, 787-88, 148 N.Y.S.2d 591, 592 (Sup. Ct. 1956).

6. *See* M. Domke, The Law and Practice of Commercial Arbitration, § 1.01, at 1 (1968); Boskey, *A History of Commercial Arbitration in New Jersey* (pt. I), 8 Rut.-Cam. L. Rev. 1, 1 (1976); Emerson, *History of Arbitration Practice and Law*, 19 Clev. St. L. Rev. 155, 157 (1970); Jones, *Blind Man's Buff and the Now-Problems of Apocrypha, Inc. and Local 711 - Discovery Procedures in Collective Bargaining Disputes*, 116 U. Pa. L. Rev. 571, 573 (1968) [hereinafter cited as Jones I]. To preserve its speed and economic efficiency, arbitration is unhampered by many of the formalities of litigation. For example, the rules of evidence do not apply to arbitral hearings. Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 n.4 (1956); Burchell v. Marsh, 58 U.S. 362, 370, 17 How. 344, 352 (1855); Harvey Alum. Inc. v. United Steelworkers, 263 F. Supp. 488, 491 (C.D. Cal. 1967). An arbitrator may consider hearsay and other incompetent testimony. Bell Aerospace Co. v. Local 516, Int'l Union, UAW, 500 F.2d 921, 923 (2d Cir. 1974); Petroleum Separating Co. v. Interamerican Ref. Corp., 296 F.2d 124, 124 (2d Cir. 1961) (per curiam); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362 (S.D.N.Y. 1957). Arbitrators need not disclose the reasons behind their awards. Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956); Wilko v. Swan, 346 U.S. 427, 436 (1953); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362 (S.D.N.Y. 1957); Shirley Silk Co. v. American Silk Mills, Inc., 257 A.D. 375, 377, 13 N.Y.S.2d 309, 311 (1939). Arbitrators may, in fact, draw on their own personal experience in making an award. American Almond Prods. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 450 (2d Cir. 1944); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362 (S.D.N.Y. 1957); Danneborg v. Strange & Co., 1 F. Supp. 380, 381 (S.D.N.Y. 1932). Arbitrators need not give written opinions. Interinsurance Exch. of the Auto Club v. Bailes, 219 Cal. App. 2d 830, 834, 33 Cal. Rptr. 533, 538 (1963); M. Domke, *supra*, § 29.06, at 286; Mentschikoff, *Commercial Arbitration*, 61 Colum. L. Rev. 846, 865 & n.32 (1961). A written

speedy and economical mechanism for resolving controversies.[7] Courts feared that by encroaching on arbitral procedure, they would be creating a hybrid forum, "part judicial and part arbitrational."[8] The separation of the two systems led courts to conclude that parties agreeing to arbitrate waived their right to all judicial procedures, including discovery.[9]

Commercial arbitration today, however, is a far cry from the genteel spar it was at English common law.[10] As its use has increased, it has evolved into a structured format for claim adjudication.[11] Most parties to arbitration hearings are now represented by counsel,[12] the financial stakes can be large,[13] complex issues can be presented,[14] and

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transcript of the proceedings is optional. Bernhardt v. Polygraphic Co., 350 U.S. 198, 204 n.4 (1956); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362 (S.D.N.Y. 1957); A.O. Andersen Trading Co. v. Brimberg, 119 Misc. 784, 784, 197 N.Y.S. 289, 290 (Sup. Ct. 1922). To ensure finality, an arbitration award is subject to being vacated only on very limited grounds. Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956); Wilko v. Swan, 346 U.S. 427, 436 (1953); Riverboat Casino, Inc. v. Local Joint Exec. Bd., 578 F.2d 250, 251 (9th Cir. 1978).

7. *See* Wilko v. Swan, 346 U.S. 427, 431 (1953); Burton v. Bush, 614 F.2d 389, 391 (4th Cir. 1980); Coastal States Trading, Inc. v. Zenith Nav. S.A., 446 F. Supp. 330, 342 (S.D.N.Y. 1977); Dickstein v. duPont, 320 F. Supp. 150, 154 (D. Mass. 1970), *aff'd*, 443 F.2d 783 (lst Cir. 1971); United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 114, 597 P.2d 290, 299, *cert. denied*, 444 U.S. 911 (1979);Mentschikoff, *supra* note 6, at 849. *But see* Costikyan, *Some Observations on Arbitration*, N.Y.L.J., Feb. 27, 1964, at 1, col. 4 (claiming that arbitration can be lengthy, costly and render unfair results).

8. Cavanaugh v. McDonnell & Co., 357 Mass. 452, 457, 258 N.E.2d 561, 564 (1970); *accord* Lutz Eng'g Co. v. Sterling Eng'g & Constr. Co., 112 R.I. 605, 610, 314 A.2d 8, 11 (1974).

9. Ferro Union Corp. v. SS Ionic Coast, 43 F.R.D. 11, 13 (S.D. Tex. 1967); Penn Tanker Co. v. C.H.Z. Rolimpex, Warszawa, 199 F. Supp. 716, 718 (S.D.N.Y. 1961); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 361-63 (S.D.N.Y. 1957); Katz v. Burkin, 3 A.D.2d 238, 239, 160 N.Y.S.2d 159, 161 (1957) (per curiam); Harleysville Mut. Casualty Co. v. Adair, 421 Pa. 141, 144, 218 A.2d 791, 794 (1966). The court in *Commercial Solvents* stated: "By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations." 20 F.R.D. at 361.

10. *See* Jones, *The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery*, 116 U. Pa. L. Rev. 830, 837 (1968) [hereinafter cited as Jones II].

11. *See* Commercial Arbitration Rules (1981) (Am. Arb. Ass'n); Mentschikoff, *supra* note 6, at 862-65.

12. Mentschikoff, *supra* note 6, at 859-60; *see* Commercial Arbitration Rules (1981) (Am. Arb. Ass'n).

13. *E.g.*, Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 918 (1st Cir.), *cert. denied*, 364 U.S. 911 (1960); Mississippi Power Co. v. Peabody Coal Co., 69 F.R.D. 558, 559 (S.D. Miss. 1976); United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 113, 597 P.2d 290, 298, *cert. denied*, 444 U.S. 911 (1979).

14. *E.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 396-97 (1967); Fallick v. Kehr, 369 F.2d 899, 901 (2d Cir. 1966); Levin v. Ripple Twist

hearings can be lengthy, even lasting years.[15] In applying the strict necessity test, modern courts fear that the delay and costs incident to discovery will undercut the speed and economy of arbitration.[16] This Note, in examining decisions on discovery in commercial arbitration, contends that the historical considerations are no longer valid and that the practical concerns are greatly exaggerated. It concludes that courts should discard the presumption against pre-arbitral discovery, lower the strict necessity standard, and engage in a true balancing of the benefits derived from discovery against any expenditures of time and money that it requires. Discovery does not necessarily defeat the speed and economy of arbitration and may, in fact, make it a more equitable process.

I. The Strict Necessity Test

The New York Appellate Division first formulated the strict necessity test in *Katz v. Burkin*.[17] The reason behind the adoption of the test was twofold. First, court interference was deemed incompatible with arbitration: "Arbitration is subject to its own rules and practices at variance with court procedures. It is supposed to be a complete proceeding, without resort to court facilities, for handling and disposing of a controversy."[18] Second, the court reasoned that because of the pronounced differences between the two systems, a party, by deliberately choosing to arbitrate, also committed himself to abide by arbitral procedure and thereby waived all access to the court forum.[19] Because arbitrators have no common-law right to order discovery,[20] this reasoning virtually eliminated the possibility of obtaining any pre-hearing discovery.[21]

Mills, Inc., 416 F. Supp. 876, 881 (E.D. Pa. 1976); United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 110, 597 P.2d 290, 295, *cert. denied*, 444 U.S. 911 (1979).

15. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 Wash. U.L.Q. 193, 193 (1956); *see, e.g.*, Nederlandse Erst-Tankersmaatschappij v. Isbrandtsen Co., 362 F.2d 205, 205 (2d Cir. 1966); Ballantine Books, Inc. v. Capital Distrib. Co., 302 F.2d 17, 18 (2d Cir. 1962).

16. *E.g.*, Burton v. Bush, 614 F.2d 389, 391 (4th Cir. 1980); Coastal States Trading, Inc. v. Zenith Nav. S.A., 446 F. Supp. 330, 342 (S.D.N.Y. 1977); Mississippi Power Co. v. Peabody Coal Co., 69 F.R.D. 558, 567 (S.D. Miss. 1976); Dickstein v. duPont, 320 F. Supp. 150, 154 (D. Mass. 1970), *aff'd*, 443 F.2d 783 (1st Cir. 1971).

17. 3 A.D.2d 238, 160 N.Y.S.2d 159 (1957) (per curiam). The court stated: "We are of the view that examinations before trial under court aegis should not be granted in [aid of arbitration] except under extraordinary circumstances . . . . Necessity rather than convenience should be the test." *Id.* at 238-39, 160 N.Y.S.2d at 160-61.

18. *Id.*, 160 N.Y.S.2d at 161.

19. *Id.*

20. Tobey v. Bristol, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) (No. 14,065); *In re* Sun-Ray Cloak Co., 256 A.D. 620, 623, 11 N.Y.S.2d 202, 205 (1939).

21. Few states give arbitrators the power to order discovery. *See, e.g.*, Cal. Civ. Proc. Code § 1283.05(a) (West Supp. 1981); Kan. Stat. Ann. § 5-407(b) (1975); Tex. Stat. Ann. art. 230(B) (Vernon 1973).

The historical bases for restricting discovery, however, bear little relationship to the realities of present day arbitration. Whereas at common law the judiciary exhibited hostility toward arbitration,[22] today there is a federal judicial policy favoring arbitration.[23] Although courts historically refused to enforce agreements to arbitrate future disputes[24] and pronounced broad arbitration agreements void as against public policy,[25] arbitration clauses are now interpreted more broadly.[26] Modern day courts do not lightly infer that a party has waived the right to arbitrate.[27] There also presently exists elaborate interplay between the two systems.[28] If arbitration is required,

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22. *See* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406-07 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942); M. Domke, *supra* note 6, § 3.01, at 17.

23. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974); Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968); Weight Watchers of Quebec Ltd. v. Weight Watchers Int'l, Inc., 398 F. Supp. 1057, 1058 (E.D.N.Y. 1975); Address by Chief Justice Burger, *Annual Report on the State of the Judiciary*, Midyear Meeting of the American Bar Association, Chicago, Illinois (Jan. 24, 1982), *reprinted in* 68 A.B.A. J. 274, 275 (Mar. 1982). In 1981, the American Arbitration Association reported 5,733 claims filed, up almost 200% from the 1,964 claims filed in 1961. Am. Arb. Ass'n, Office Circular, summary of arbitration claims filed (Nov. 1981). From 1957 to 1967, commercial claims jumped from 645 per year to 1,588 per year. M. Bernstein, Private Dispute Settlement 17 (1978) (quoting figures from Am. Arb. Ass'n, Arbitration News no. 2 (1968); Am. Arb. Ass'n, Arbitration News no. 3 (1967)).

24. Greason v. Keteltas, 14 N.Y. 491, 496 (1858); *see* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942); S.M. Wolff Co. v. Tulkoff, 9 N.Y.2d 356, 362, 214 N.Y.S.2d 374, 377 (1961). At common law, agreements to arbitrate future disputes were revocable at will. Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942); N.P. Sloan Co. v. Standard Chem. & Oil Co., 256 F. 451, 454 (5th Cir. 1918). The aggrieved party, however, could sue the revoking party for damages for breach of the agreement to arbitrate. Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolage Atlanten, 250 F. 935, 937 (2d Cir. 1918), *aff'd*, 252 U.S. 313 (1920); Munson v. Straits of Dover S.S. Co., 99 F. 787, 789 (S.D.N.Y. 1900).

25. *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942); United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008 (S.D.N.Y. 1915).

26. *E.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960); Fallick v. Kehr, 369 F.2d 899, 903-04 (2d Cir. 1966).

27. *E.g.*, Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 641 (7th Cir. 1981); Midwest Window Sys., Inc. v. Amcor Indus. Inc., 630 F.2d 535, 536 (7th Cir. 1980); Demsey & Assocs. v. S.S. Sea Star, 461 F.2d 1009, 1018 (2d Cir. 1972); General Guar. Ins. Co. v. New Orleans Gen. Agency, Inc., 427 F.2d 924, 930 (5th Cir. 1970); Hilti, Inc. v. Oldach, 392 F.2d 368, 371-72 (1st Cir. 1968); Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968); Cornell & Co. v. Barber & Ross Co., 360 F.2d 512, 513 (D.C. Cir. 1966) (per curiam); Clar Prod. Ltd. v. Isram Motion Picture Prod. Servs. Inc., 529 F. Supp. 381, 382-83 (S.D.N.Y. 1982).

28. Bigge Crane & Rigging Co. v. Docutel Corp., 371 F. Supp. 240, 246 (E.D.N.Y. 1973); *see* M. Domke, *supra* note 6, §§ 17.01-18.06, at 154-78.

courts are willing to lend their assistance in facilitating it. They grant provisional remedies,[29] compel arbitration,[30] consolidate arbitration claims[31] and appoint an arbitrator if the parties cannot agree on one.[32] Courts can also compel the attendance of witnesses and production of documents,[33] and give effect to arbitral decisions by confirming,[34] vacating,[35] modifying[36] and enforcing awards.[37] This in-

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29. *E.g.*, Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1051 (N.D. Cal. 1977) (prejudgment attachment); Coastal States Trading, Inc. v. Zenith Nav., S.A., 446 F. Supp. 330, 332-33 (S.D.N.Y. 1977)(same); EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating, Inc., 24 Ariz. App. 566, 568, 540 P.2d 185, 188 (1975) (mechanic's lien); A. Sangivanni & Sons v. F.M. Floryan & Co., 158 Conn. 467, 474, 262 A.2d 159, 163-64 (1969) (same); Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc., 274 Md. 307, 315, 334 A.2d 526, 531 (1975)(same); American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 327, 79 N.E.2d 425, 427 (1948)(attachment); American Eutectic Welding Alloys Sales Co. v. Flynn, 399 Pa. 617, 623, 161 A.2d 364, 367 (1960)(preliminary injunction).

30. *E.g.*, Mercury Constr. Co. v. Moses H. Cone Memorial Hosp., 656 F.2d 933, 941-42 (4th Cir. 1981)(en banc); McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980); Conticommodity Servs., Inc. v. Phillip & Lion, 613 F.2d 1222, 1227 (2d Cir. 1980); Louis Dreyfus Corp. v. Cook Indus., Inc., 505 F. Supp. 4, 6 (S.D.N.Y. 1980).

31. *E.g.*, Compania Espanola de Petroleos S.A. v. Nereus Shipping S.A., 527 F.2d 966, 972-75 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976); Robinson v. Warner, 370 F. Supp. 828, 829 (D.R.I. 1974); Vigo S.S. Corp. v. Marship Corp., 26 N.Y.2d 157, 162, 257 N.E.2d 624, 626, 309 N.Y.S.2d 165, 168, *cert. denied*, 400 U.S. 819 (1970); *see* M. Domke, *supra* note 6, § 27.02, at 272-74.

32. *E.g.*, Chattanooga Mailers Union v. Chattanooga News-Free Press Co., 524 F.2d 1305, 1315 (6th Cir. 1975); Bethlehem Mines Corp. v. United Mine Workers, 494 F.2d 726, 740 (3d Cir. 1974); Astra Footwear Indus. v. Harwyn Int'l Inc., 442 F. Supp. 907, 910-11 (S.D.N.Y.), *aff'd*, 578 F.2d 1366 (2d Cir. 1978); Zandman v. Nissenbaum, 53 A.D.2d 837, 838, 385 N.Y.S.2d 562, 563 (1976).

33. *E.g.*, Western Employers Ins. Co. v. Merit Ins. Co., 492 F. Supp. 53, 55 (N.D. Ill. 1979); Local Lodge 1746, Int'l Assoc. of Machinists v. Pratt & Whitney Div. of United Aircraft Corp., 329 F. Supp. 283, 286 (D. Conn. 1971).

34. *E.g.*, International Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 552 (2d Cir.), *cert. denied*, 101 S. Ct. 3006 (1981); John T. Brady & Co. v. Form-Eze Sys., Inc., 623 F.2d 261, 263 (2d Cir.), *cert. denied*, 449 U.S. 1062 (1980); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1278 (2d Cir. 1971); Smith v. La Cote Basque, 519 F. Supp. 663, 668 (S.D.N.Y. 1981); Puerto Rico Maritime Shipping Auth. v. Star Lines, Ltd., 496 F. Supp. 14, 16 (S.D.N.Y. 1979); Maidman v. O'Brien, 473 F. Supp. 25, 28-29 (S.D.N.Y. 1979).

35. Milwaukee Typographical Union v. Newspapers, Inc., 639 F.2d 386, 394 (7th Cir.), *cert. denied*, 102 S. Ct. 144 (1981); Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc., 607 F.2d 649, 653 (5th Cir. 1979); Desert Palace, Inc. v. Local Joint Exec. Bd., 486 F. Supp. 675, 684 (D. Nev. 1980). Arbitral awards may only be vacated on the grounds specified by statute. General Tel. Co. v. Communications Workers, 648 F.2d 452, 456 (6th Cir. 1981); Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110 (2d Cir. 1980). The Federal Arbitration Act specifies four grounds for vacating an award: "(a) Where the award was procured by corruption, fraud, or undue means. (b) Where there was evident partiality or corruption in the arbitrators, or either of them. (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear

terplay between the two systems has created a mutually dependent relationship. Courts legitimize arbitration,[38] and arbitration helps the court system by lightening its caseload.[39]

The historical distinction between the court and arbitral systems has therefore lost its vitality. Because the two systems are no longer separate and incompatible, the presumption that a party, in selecting one, waives the procedures of the other is unfounded.[40] That parties

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evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10 (1976). Similar grounds are set forth in state statutes. *See, e.g.*, N.Y. Civ. Prac. Law § 7511(b) (McKinney 1980); Unif. Arb. Act § 12(a), 7 U.L.A. 55 (1978). Similar grounds also exist at common law. *See* Salt Lake Pressmen, Local Union No. 28 v. Newspaper Agency Corp., 485 F. Supp. 511, 515 (D. Utah 1980). Courts are reluctant to find grounds for vacating arbitral awards. Gibbons v. United Transp. Union, 462 F. Supp. 838, 842 (N.D. Ill. 1978); *see, e.g.*, General Tel. Co. v. Communications Workers, 648 F.2d 452, 457 (6th Cir. 1981) (labor award upheld even though the remedy granted was not specifically authorized); Cobec Brazilian Trading & Warehousing Corp. v. Isbrandtsen, 524 F. Supp. 7, 9 (S.D.N.Y. 1980) (award not vacated even though arbitrator's opinion was clearly erroneous both in logic and in fact); Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 107-09 (N.D. Ill. 1980) (award upheld although there was no evidence to support it), *aff'd*, 653 F.2d 310 (7th Cir. 1981); Jarrell v. Wilson Warehouse Co., 490 F. Supp. 412, 417 (M.D. La. 1980) (award upheld although arbitrator exceeded his authority in deciding an issue).

36. *E.g.*, South E. Atl. Shipping Ltd. v. Garnac Grain Co., 356 F.2d 189, 193 (2d Cir. 1966); Ramonas v. Kerelis, 102 Ill. App. 2d 262, 275, 243 N.E.2d 711, 718 (1968); Weiss v. Metalsalts Corp., 15 A.D.2d 46, 48, 222 N.Y.S.2d 7, 8 (1961) (per curiam), *aff'd*, 11 N.Y.2d 1042, 183 N.E.2d 913, 230 N.Y.S.2d 32 (1962).

37. *E.g.*, Boston Shipping Assoc. v. International Longshoremen's Ass'n, 659 F.2d 1, 2 (1st Cir. 1981); New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455, 468 (5th Cir. 1980), *cert. granted sub nom.* Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 450 U.S. 1029 (1981); Jarrell v. Wilson Warehouse Co., 490 F. Supp. 412, 417 (M.D. La. 1980); Chillum-Adelphi Volunteer Fire Dep't v. Button & Goode, Inc., 242 Md. 509, 517-18, 219 A.2d 801, 806-07 (1966); Plein v. Charchat, 53 Misc. 2d 162, 164-65, 277 N.Y.S.2d 862, 864-65 (1966).

38. Mentschikoff, *supra* note 6, at 858; *see* M. Domke, *supra* note 6, § 37.01, at 325.

39. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960); Tepper Realty Co. v. Mosaic Tile Co., 259 F. Supp. 688, 693 (S.D.N.Y. 1966); United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 114, 597 P.2d 290, 299, *cert. denied*, 444 U.S. 911 (1979).

40. If a party availed himself of court procedures, he could be deemed to have waived the right to arbitrate. Courts, however, have been reluctant to find waiver. *See, e.g.*, Demsey & Assocs. v. S.S. Sea Star, 461 F.2d 1009, 1017-18 (2d Cir. 1972) (waiver found when a party participated fully in discovery, filed cross-claims and went to trial on the merits); Cornell & Co. v. Barber & Ross Co., 360 F.2d 512, 513 (D.C. Cir. 1966) (per curiam) (wavier found where a party moved to transfer venue, filed an answer and counterclaim, and participated in discovery); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 989 n.40 (2d Cir. 1942) (improper for a party to commence a court action and then request arbitration if it wants to

have signed an agreement to arbitrate does not necessarily indicate an affirmative decision to forego discovery. There may be another contractual provision, other legal duties of disclosure or statements made during negotiations that rebut the presumption of waiver.[41] But even when an arbitration agreement contains a discovery provision, some courts have disregarded it for fear that the time and costs of discovery will defeat the practical purposes of arbitration.[42]

II. Lowering the Strict Necessity Standard

In *Bigge Crane & Rigging Co. v. Docutel Corp.*,[43] the District Court for the Eastern District of New York shifted the focus from

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avail itself of the provisional remedies not available in arbitration). The court's hesitancy to find that a party has waived the right to arbitrate is not based on a desire to preserve the separation of court and arbitral forums. Instead, it is grounded in contract law. The federal policy favoring arbitration, *see supra* note 23 and accompanying text, dictates that when courts construe arbitration agreements, they resolve all doubts in favor of arbitration. Dickinson v. Heinold Secs., Inc., 661 F.2d 638, 643 (7th Cir. 1981); Hanes Corp. v. Millard, 531 F.2d 585, 598 (D.C. Cir. 1976); Controlled Sanitation Corp. v. District 128 of Int'l Ass'n of Machinists, 524 F.2d 1324, 1328 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976).

41. Jones II, *supra* note 10, at 835-36. Professor Jones has stated that the presumption of waiver begs four fundamental questions: "(a) Have the parties, by executing an arbitration agreement containing no reference to discovery procedures, necessarily demonstrated their intent never to be compelled to make disclosure through discovery in connection with disputes arising under the agreement? (b) During negotiations, were there situations foreseeable from which an inference might reasonably be drawn that they contemplated an obligation of disclosure? (c) Are there contractual provisions, aside from the arbitration provision, which lead to the conclusion that disclosure is an enforceable contractual commitment? (d) Are there obligations of disclosure imposed by law which warrant the conclusion that they are implicitly integrated as contractual commitments?" *Id.*

42. Motor Vehicle Accid. Indemnif. Corp. v. McCabe, 19 A.D.2d 349, 353, 243 N.Y.S.2d 495, 499 (1963) (Although arbitration agreement contained a discovery provision, the court stated that "[c]ourt action, having a tendency to interfere with the prerogatives of the arbitrators or to delay their proceedings is not justified except where shown to be absolutely necessary for the protection of the rights of a party."); Harleysville Mutual Casualty Co. v. Adair, 421 Pa. 141, 145, 218 A.2d 791, 794 (1966) (Although arbitration agreement contained a discovery provision, the court stated that "[t]o hold that all arbitration proceedings must be considered subject to [discovery rules] would eliminate, or at least severely curtail, arbitration as a means of facilitating the solution of disputes."). Other courts, however, have upheld discovery provisions in arbitration agreements. *See supra* note 1.

43. 371 F. Supp. 240 (E.D.N.Y. 1973). The dispute arose between a subcontractor and a general contractor who was to install a baggage-handling system at an airport terminal. The plaintiff-subcontractor had completed 99% of the work under one subcontract, and 100% of the work under another subcontract, but the defendants failed to pay money due to the plaintiff for work done and refused to provide a schedule for the completion of the work remaining. The plaintiff left the job site because of defendant's unexplained breaches and commenced a court action for damages. *Id.* at 242.

historical to practical concerns and looked to whether discovery could be had while still preserving the speed and economy that arbitration was intended to provide.[44] In *Bigge Crane*, the plaintiff subcontractor sued the defendant general contractor for payment due on work performed.[45] The plaintiff requested discovery, contending that he needed to know the basis of the general contractor's defense.[46] The court considered the strict necessity test in light of the federal policy favoring arbitration.[47] The need for the information sought was balanced against the practical considerations of time and cost. The court found that discovery could be had without delaying the arbitral process because months would elapse before the parties chose their arbitrators, and that the amount in controversy was so large that the costs of discovery would be slight by comparison.[48] In addition, the court stated that "discovery is particularly necessary in a case where the claim is for payment for work done and virtually completed, and the nature of any defense is unknown."[49] Because discovery would therefore assist arbitration in this case, it was viewed as consistent with the federal policy.

The necessity inquiry was thus reduced to one factor out of several in the analysis,[50] rather than being the focus as it was in *Katz*.[51] In addition, it is questionable whether the facts really indicate that discovery was "particularly necessary."[52] To prepare for arbitration the plaintiff only had to prove the satisfactory completion of the work and the contract terms.[53] Pre-trial discovery of the elements of the general contractor's defense, while helpful to the plaintiff, would not have been sufficiently crucial to the plaintiff's preparation of his case to satisfy the strict necessity test.[54] Because time and costs were not adversely affected, however, the standard of necessity was lowered.[55]

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44. *Id.* at 246.
45. *Id.* at 242.
46. *Id.* at 242-43.
47. *Id.*
48. *Id.*
49. *Id.* at 246.
50. *See id.*
51. *See* Katz v. Burkin, 3 A.D.2d 238, 239, 160 N.Y.S.2d 159, 161 (1957) (per curiam); *supra* notes 17-19 and accompanying text.
52. *See* Note, *Court May Permit Discovery on the Merits When it Will Not Delay Arbitration*, 44 U. Cinn. L. Rev. 151, 155-56 (1975) [hereinafter cited as *Discovery Will Not Delay Arbitration*].
53. *Id.*; *see* Bigge Crane & Rigging Co. v. Docutel Corp., 371 F. Supp. 240, 242 (E.D.N.Y. 1973).
54. *Discovery Will Not Delay Arbitration*, *supra* note 52, at 154-56. The Note points out the liberality of the *Bigge Crane* holding by analyzing each element of its test. First , since the action was for work completed and not compensated, it was unnecessary for plaintiff to know the nature of the general contractor's defense to prepare for the hearing. *Id.* at 155. Second, delay posed no considerable impediment because months would elapse between the time the party filed the arbitration claim

Commentators predicted that *Bigge Crane* would herald a new, more lenient attitude on the part of courts toward pre-arbitral discovery.[56] Yet most courts still apply the strict necessity test,[57] with some expressly adhering to the concern that discovery will defeat the speed and economy of arbitration.[58] The few courts that have cited *Bigge Crane* have either required or, although not expressly requiring, have found extraordinary circumstances.[59]

In *Vespe Contracting Co. v. Anvan Corp.*,[60] for example, the court ordered discovery because the defendant's activities would have made pertinent evidence unavailable before the action could be brought to arbitration.[61] In *Bergen Shipping Co. v. Japan Marine Services*,

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and the time the arbitrators were chosen. *Id.* In the meantime, discovery could proceed under court aegis without any resulting delay in the arbitral process. *Id.* Finally, the slight cost of discovery, compared with a large amount of money at stake, is another simple criterion to meet. Most commercial cases reaching the trial stage will involve large amounts of money. *See supra* note 13 and accompanying text. Discovery can be expensive, but rarely will it approximate the size of normal commercial claims. *Discovery Will Not Delay Arbitration*, *supra* note 52, at 155-56.

55. *Discovery Will Not Delay Arbitration*, *supra* note 52, at 155. The author equates the *Bigge Crane* test with the relevancy test for discoverable matters under Fed. R. Civ. P. 26(b)(1). *Discovery Will Not Delay Arbitration*, *supra* note 52, at 151.

56. Willenken I, *supra* note 1, at 179; *Discovery Will Not Delay Arbitration*, *supra* note 52, at 156.

57. *E.g.*, Burton v. Bush, 614 F.2d 389, 391 (4th Cir. 1980); Coastal States Trading, Inc. v. Zenith Nav. S.A., 446 F. Supp. 330, 342 (S.D.N.Y. 1977); Levin v. Ripple Twist Mills, Inc., 416 F. Supp. 876, 880-81 (E.D. Pa. 1976); Bergen Shipping Co. v. Japan Marine Servs., Ltd., 386 F. Supp. 430, 435 & n.8 (S.D.N.Y. 1974); De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 406, 321 N.E.2d 770, 773, 362 N.Y.S.2d 843, 847 (1974); International Components Corp. v. Klaiber, 54 A.D.2d 550, 551, 387 N.Y.S.2d 253, 255 (1976); Gelbfish v. Castellucci, 46 A.D.2d 863, 863, 361 N.Y.S.2d 672, 672 (1974) (per curiam); Lutz Eng'g Co. v. Sterling Eng'g & Constr. Co., 112 R.I. 605, 610, 314 A.2d 8, 11 (1974); Balfour, Guthrie & Co. v. Commercial Metals Co., 93 Wash. 2d 199, 204, 607 P.2d 856, 859 (1980) (en banc).

58. Burton v. Bush, 614 F.2d 389, 391 (4th Cir. 1980) (dictum); Coastal States Trading, Inc. v. Zenith Nav. S.A., 446 F. Supp. 330, 342 (S.D.N.Y. 1977).

59. E.C. Ernst, Inc. v. Potlatch Corp., 462 F. Supp. 694, 695 n.1 (S.D.N.Y. 1978) (cites *Bigge Crane* as requiring extraordinary circumstances); Levin v. Ripple Twist Mills, Inc., 416 F. Supp. 876, 880 (E.D. Pa. 1976) (same); Vespe Contracting Co. v. Anvan Corp., 399 F. Supp. 516, 522 (E.D. Pa. 1975) (facts of case reflect extraordinary circumstances); Bergen Shipping Co. v. Japan Marine Servs., Ltd., 386 F. Supp. 430, 435 n.8 (S.D.N.Y. 1974) (*Bigge Crane* requires exceptional circumstances). *But see* Leo Nash Steel Corp. v. D.M.C. Constr. Corp., N.Y.L.J., July 28, 1977, at 11, col. 6 (Sup. Ct.) (although not citing *Bigge Crane*, discovery ordered because of sizeable sums involved, complexity of claims and type of proof to be adduced).

60. 399 F. Supp. 516 (E.D. Pa. 1975).

61. *Id.* at 522. The court observed: "As progess continues at the construction site, evidence of Vespe's performance of the concrete work is 'disappearing' behind the hotel's interior and exterior wall coverings. For all practical purposes, Vespe's work product will be inaccessible for future inspections." *Id.*

Ltd.,[62] the court affirmed a discovery order because the crew members to be deposed were about to leave the United States and be reassigned to vessels in international commerce.[63] Although both courts cited *Bigge Crane*,[64] these holdings do not depart in substance from previous cases that granted discovery because of the "necessity" of seizing evidence that would soon be unavailable.[65] A closer examination of the effects of discovery in arbitration reveals that courts have failed to recognize the import of *Bigge Crane*'s holding. Extraordinary circumstances should not be arbitrarily required because only in the unusual case will discovery appreciably lengthen the arbitral process or significantly raise its costs.

There is no doubt that discovery takes up time in the pre-hearing, preparation phase of arbitration.[66] Attorneys need time to attend depositions, to draft and respond to interrogatories, and to request and produce documents.[67] Although discovery may initially lengthen the arbitral process, however, it clearly saves time at the hearing.

While in many states arbitrators have the power to subpoena documents and witnesses to appear at the hearing,[68] they cannot use this power to subpoena documents and witnesses for pre-hearing examination.[69] If a court does not order discovery, therefore, much time is wasted at the hearing as each side sifts through documents and examines witnesses for the first time,[70] groping for evidence that may not be

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62. 386 F. Supp. 430 (S.D.N.Y. 1974).

63. *Id.* at 435 n.8.

64. Vespe Contracting Co. v. Anvan Corp., 339 F. Supp. 516, 522 (E.D. Pa. 1975); Bergen Shipping Co. v. Japan Marine Servs., Ltd., 386 F. Supp. 430, 435 n.8 (S.D.N.Y. 1974).

65. *See supra* note 57 and accompanying text.

66. *See Developments in the Law - Discovery*, 74 Harv. L. Rev. 940, 943 (1961) [hereinafter cited as *Developments*]; *cf.* P. Connolly, E. Hollemann & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 54-55 (Federal Judicial Center 1978) (reporting the results of a six-district survey which found that an average of 176 days elapsed between the filing of the first discovery request and the conclusion of discovery when judges used strong controls over the process.)

67. *See* Mississippi Power Co. v. Peabody Coal Co., 69 F.R.D. 558, 567 (S.D. Miss. 1976); United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 117, 597 P.2d 290, 302, *cert. denied*, 444 U.S. 911 (1979); *Developments*, *supra* note 66, at 943.

68. *E.g.*, Cal. Civ. Proc. Code § 1282.6 (West 1972); N.Y. Civ. Prac. Law § 7505 (McKinney 1980); Unif. Arb. Act § 7, 7 U.L.A. 44 (1978). The Uniform Arbitration Act has been adopted by 25 states. 1 U.L.A. 1 (Supp. 1982). The Federal Arbitration Act also grants arbitrators subpoena power. 9 U.S.C. § 7 (1976).

69. De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 406, 321 N.E.2d 770, 773, 362 N.Y.S.2d 843, 847 (1974); North Am. Foreign Trading Co. v. Rosen, 58 A.D.2d 527, 527, 395 N.Y.S.2d 194, 195 (1977); 8 J. Weinstein, H. Korn, A. Miller, New York Civil Practice § 7505.06, at 75-128 (1981).

70. Costikyan, *supra* note 7, at 1; Kuffler, *New York Charter Arbitrations and Pre-Hearing Discovery: A Concept Whose Time Has Come*, Lloyd's Mar. & Com. Q, 557, 561 (Nov. 1978).

available.[71] Arbitrators have little incentive to limit this practice.[72] Parties to arbitration must be given the opportunity to present evidence material to the controversy.[73] In addition, an arbitration award may be vacated because of the arbitrator's refusal to grant a continuance to allow a party to counter surprising evidence.[74] To avoid the danger of having an award vacated, arbitrators often adjourn proceedings to allow parties to marshall more evidence, thus extending the hearing precisely because information was not made available in advance.[75]

Discovery serves several important functions that are consistent with the goal of reaching a speedy and inexpensive resolution of disputes.[76] First, discovery encourages settlement by disclosing each side's relative strengths and weaknesses.[77] Access to information prior to the hearing enables parties to narrow the issues by revealing areas of underlying agreement[78] and eliminating arguments unsupported by evidence.[79] A greater comprehension of the issues promotes effective attorney preparation,[80] which fosters a more thorough and organized presentation of evidence at the hearing.[81] Refined presentations

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71. Costikyan, *supra* note 7, at 1.

72. *See* M. Hill & A. Sinicropi, Evidence in Arbitration 7 (1980); Costikyan, *supra* note 7, at 1. "Unlike the judicial system, however, arbitrators rarely deny the parties the opportunity to present evidence on the basis that it is immaterial or irrelevant. Rather, arbitrators will generally admit the evidence 'for what it may be worth.' " M. Hill & A. Sinicropi, *supra*, at 7.

73. Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979); Citizens Bldg. of W. Palm Beach, Inc. v. Western Union Tel. Co., 120 F.2d 982, 984 (5th Cir. 1941); Seldner Corp. v. W.R. Grace & Co., 22 F. Supp. 388, 392 (D. Md. 1938).

74. *E.g.*, 9 U.S.C. § 10(c) (1976); Unif. Arb. Act § 12(a)(4), 7 U.L.A. 55 (1978).

75. M. Bernstein, *supra* note 23, at 142.

76. *See* Fed. R. Civ. p. 1 (1976). The purpose of the Federal Rules of Civil Procedure is "to secure the just, speedy, and inexpensive determination of every action." *Id.*

77. Jones I, *supra* note 6, at 572; *Developments*, *supra* note 66, at 945-46. In a recent state survey, 88% of attorneys surveyed stated that discovery encourages settlement. Lacy, *Discovery Costs in State Court Litigation*, 57 Ore. L. Rev. 289, 300 (1978).

78. *Developments*, *supra* note 66, at 944; *see* Hickman v. Taylor, 329 U.S. 495, 501 (1946); Nutt v. Black Hills Stage Lines, Inc., 452 F.2d 480, 483 (8th Cir. 1971); Roberson v. Great Am. Ins. Cos., 48 F.R.D. 404, 414 (N.D. Ga. 1969).

79. *Developments*, *supra* note 66, at 945.

80. *Id.* at 944; *see* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); Cine Forty-Second St. Theater Corp. v. Allied Artists Picture Corp., 602 F.2d 1062, 1063 (2d Cir. 1979).

81. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); Cine Forty-Second St. Theater Corp. v. Allied Artists Picture Corp., 602 F.2d 1062, 1063 (2d Cir. 1979); Harlem River Consumers Coop., Inc. v. Associated Grocers, 54 F.R.D. 551, 553 (S.D.N.Y. 1972). The Supreme Court, in *Procter & Gamble*, stated that "pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." 356

should help the arbitrators better comprehend the arguments, and should therefore expedite decision-making.[82] As a consequence, decisions should be fairer because they are based on a more thorough understanding of the relevant facts.[83]

That discovery will save time in arbitration is better understood when one considers the unique format of arbitral proceedings. Because arbitrators are professionals engaged in work outside of arbitration, hearings are scheduled for their convenience.[84] Arbitrators are not required to preside over a dispute for consecutive days until it is resolved.[85] They often adjourn hearings to accommodate their own schedules.[86] With each resumption, memories must be refreshed, so that each delay is amplified by the need to reconstruct what went before.[87]

When courts apply a strict necessity test for fear of prolonging the arbitral process, their concerns are exaggerated. Much of the time required by pre-arbitral discovery is offset by time saved at the hearing. Furthermore, courts should consider that by saving time at the hearing, advance discovery can also offset arbitration costs.

Discovery necessarily involves certain additional expenses. To conduct depositions, draft interrogatories and inspect an opponent's records and premises can be costly.[88] The Project for Effective Justice, a detailed national survey conducted by Columbia University,[89] revealed, however, that discovery costs are far more reasonable than is generally thought[90] and represent only about thirty percent of total litigation costs.[91] Although the total costs of arbitration will differ

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U.S. at 682. The court in *Cine* stated that the discovery rules transform "the sporting trial-by-surprise into a more reasoned search for truth." 602 F.2d at 1063.

82. *Developments*, *supra* note 66, at 945.

83. W. Glaser, Pretrial Discovery and the Adversary System 115 (1968); Lacy, *supra* note 77, at 290; *Developments*, *supra* note 66, at 942, 944; *see* Jones, *The Labor Board, the Courts, and Arbitration—A Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose*, 116 U. Pa. L. Rev. 1185, 1188 (1968) [hereinafter cited as Jones III].

84. *See* Commercial Arbitration Rules rule 21, at 7-8 (1981) (Am. Arb. Ass'n).

85. *See id.*; Costikyan, *supra* note 7, at 1.

86. Costikyan, *supra* note 7, at 1.

87. *Id.* The same problem occurs in the federal courts with interlocutory appeals. Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 351-52 (1961). "Since substantial time elapses before appellate determination, it would be necessary for the trial court to spend extra hours refamiliarizing itself with the case." *Id.* (footnote omitted); *see* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3907, at 431 (1976).

88. *See* W. Glaser, *supra* note 83, at 164-65; Lacy, *supra* note 77, at 295.

89. W. Glaser, *supra* note 83, at 42-44.

90. *Id.* at 162-68. Other studies have yielded similar conclusions, Lacy, *supra* note 77, at 293-300; Speck, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132, 1150 (1951).

91. W. Glaser, *supra* note 83, at 181. The survey revealed that plaintiffs spent 19% and defendants spent 23% of total litigation costs on conducting discovery.

from those of litigation,[92] this thirty percent figure does indicate that discovery costs are generally contained. In fact, over thirty percent of attorneys surveyed reported that discovery actually reduced litigation costs.[93] More significantly, the survey revealed that average discovery costs remain proportionate to the amount of recovery expected,[94] representing from two to five percent of expected return.[95]

Discovery expenses remain reasonable because most of the costs are borne by the party requesting it.[96] That party pays for the most expensive discovery device, the fees of depositions.[97] He must also bear the cost of his attorney's time in drafting written interrogatories[98] and requests for admissions.[99] In addition, the discovering party

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Plaintiffs spent 33% and defendants spent 36% of total litigation costs in both conducting and responding to discovery. *Id.*

92. For the components of litigation costs, see E. Johnson, *Access to Justice in the United States: The Economic Barriers and Some Promising Solutions*, in 1 Access to Justice Book 915, 920-25 (M. Cappelletti & B. Gordon eds. 1978); Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 Val. U. L. Rev. 21, 40-42 (1967). For the components of arbitration costs, see Commercial Arbitration Rules 15 (1981) (Am. Arb. Ass'n).

93. W. Glaser, *supra* note 83, at 178-79 (29% of defendants' attorneys and 39% of plaintiffs' attorneys reported that the net effect of discovery was to reduce total litigation costs); *see* Wright, Wegner & Richardson, *The Practicing Attorney's View of the Utility of Discovery*, 12 F.R.D. 97, 103 (1951) ("Depositions if well taken greatly reduce trial expense in most cases and often make trial unnecessary when otherwise absolutely imperative." (quoting an attorney surveyed)).

94. W. Glaser, *supra* note 83, at 171. Other studies have confirmed this. *E.g.*, Lacy, *supra* note 77, at 293-98; Wright, Wegner & Richardson, *supra* note 93, at 103. Most attorneys feel that the value of discovery is commensurate with its expense. *Id.*

95. W. Glaser, *supra* note 83, at 171. A later Oregon state survey reveals similar figures. Lacy, *supra* note 77, at 294-97.

96. *See* W. Glaser, *supra* note 83, at 168-69; Wright, Wegner & Richardson, *supra* note 93, at 102; *Developments*, *supra* note 66, at 972-73.

97. *Developments*, *supra* note 66, at 972-73. The greatest expenses in conducting depositions are attorney's fees, travel expenses, attendance fees of the presiding officer and of the stenographic reporter, and transcript fees. *Id.* at 972. Traditionally, the costs of the deposition are borne by the party requesting it. *Id.* at 972-73. But courts do have the discretion to allocate expenses otherwise. Gibson v. International Freighting Corp., 8 F.R.D. 487, 488 (E.D. Pa. 1947) (per curiam), *aff'd*, 173 F.2d 591 (3d Cir. 1949). Courts exercise this discretion when one party is abusing the process or other circumstances exist which make it equitable for the deponent to pay the costs. *E.g.*, Robbins v. Abrams, 79 F.R.D. 600, 603 (S.D.N.Y. 1978); National Acceptance Co. v. Doede, 78 F.R.D. 333, 337 (W.D. Wis. 1978); Haymes v. Smith, 73 F.R.D. 572, 575 (W.D.N.Y. 1976); Terry v. Modern Woodmen, 57 F.R.D. 141, 144 (W.D. Mo. 1972).

98. *See* Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16, 25-26 (S.D.N.Y. 1966); New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp., 16 F.R.D. 203, 207 (S.D.N.Y. 1954). It is within the court's discretion to award counsel fees incurred in answering interrogatories. *E.g.*, Brulotte v. Regimbal, 368 F.2d 1003, 1004 (9th Cir. 1966) (per curiam); Crosley Radio Corp. v. Heib, 40 F. Supp. 261, 263 (S.D. Iowa 1941).

99. *Cf.* Fed. R. Civ. P. 37(c) (If a party fails to make an admission requested under Fed. R. Civ. P. 36, and the requesting party later proves the truth of the

shares the expense of the actual production of documents, assuming the costs of copying and transportation.[100] As a rule, the discovered party will have to bear only the expense of producing the original documents for inspection and for his attorney's assistance in answering written interrogatories and requests for admission.[101] Because the discovering party pays more, it would be illogical for him to initiate unnecessary discovery.

Of course, if one party has substantially more resources to draw from than does his adversary, he may conduct extensive and unnecessary discovery just to force the latter into a settlement.[102] The court system, however, is competent to control such abuse.[103] In addition, there is evidence that such abuse occurs rarely. Only eight percent of attorneys surveyed by the Project for Effective Justice reported that their adversaries had caused them undue expense in conducting discovery.[104]

Arbitration necessarily generates less legal fees than does formal litigation.[105] Ironically, however, the direct arbitration costs can be

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matter at issue, the requesting party may petition the court to require the responding party to pay the reasonable fees incurred in proving the matter in question, including attorney fees).

100. Holland-Am. Merchants Corp. v. Rogers, 23 F.R.D. 267, 269 (S.D.N.Y. 1959) (party requesting document production must pay for copies of documents); Hefter v. National Airlines, Inc., 14 F.R.D. 78, 79 (S.D.N.Y. 1952) (party requesting inspection of heavy machinery must pay to have it transported to his location, or must inspect it at the location of the discovered party); Hesch v. Erie R.R., 14 F.R.D. 518, 519 (N.D. Ohio 1952) (discovering party pays for copies of documents); Barrows v. Koninklijke Luchtvaart Maatschappij, 11 F.R.D. 400, 401 (S.D.N.Y. 1951) (same).

101. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978). The court stated that "[u]nder [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests." *Id.*

102. Jones II, *supra* note 10, at 842; *see, e.g.*, Segan v. Dreyfus Corp., 513 F.2d 695, 696 (2d Cir. 1975); Isaac v. Shell Oil Co., 83 F.R.D. 428, 430 (E.D. Mich. 1979); Global Maritime Leasing Panama, Inc. v. M/S N. Breeze, 451 F. Supp. 965, 967 (D.R.I. 1978); Jones v. Holy Cross Hosp. Silver Spring, Inc., 64 F.R.D. 586, 591 (D. Md. 1974); Dalmady v. Price Waterhouse & Co., 62 F.R.D. 157, 158 (D.P.R. 1973).

103. Fed. R. Civ. P. 26(c). Rule 26(c) allows the court to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* Courts often issue such protective orders to prevent abuse of discovery. *E.g.*, Isaac v. Shell Oil Co., 83 F.R.D. 428, 432 (D.C. Mich. 1979) (to protect against undue expense); Fishman v. A.H. Riise Gift Shop, Inc., 68 F.R.D. 704, 705 (D.V.I. 1975) (to prevent discovering party from obtaining evidence); Jones v. Holy Cross Hosp. Silver Spring, Inc., 64 F.R.D. 586, 591 (D. Md. 1974) (to protect against excessive interrogatories); United States v. 2,001.10 Acres of Land, More or Less, 48 F.R.D. 305, 308 (N.D. Ga. 1969) (to prevent discovery of expert witness's testimony); Textured Yarn Co. v. Burkart-Schier Chem. Co., 41 F.R.D. 158, 160 (E.D. Tenn. 1966) (to prevent disclosure of trade secrets).

104. W. Glaser, *supra* note 83, at 183.

105. *See supra* note 92 and accompanying text.

greater than court costs. For example, administrative fees of the American Arbitration Association are scaled to the amount in controversy.[106] In addition, parties pay not only for attorney time, but for arbitrator time as well.[107] The American Arbitration Association recommends paying arbitrators between three and five hundred dollars a day for hearings that last more than two days.[108] When there are three arbitrators presiding over a hearing, it can become very expensive to have them look on while attorneys search for information beneficial to their cause.

Whereas administrative fees will be unaffected by discovery, moving information searches to the pre-hearing phase will reduce the potentially onerous fees paid to arbitrators. The *Bigge Crane* court correctly focused on the effect that discovery would have on the speed and economy of arbitration.[109] Arbitration can be an inefficient process.[110] Requiring a party to establish that information is absolutely necessary to his cause effectively denies the arbitration process the benefits of discovery. As in litigation, discovery will turn arbitration "from a process of evasion into one of realization."[111]

CONCLUSION

The reasons behind the strict necessity test are ill-founded. Historical concerns are no longer valid, and practical concerns are largely

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106. The following chart represents the administrative fees charged by the American Arbitration Association for a commercial arbitration hearing:

Amount of Claim	Fee
Up to $10,000	3% (minimum $150)
$10,000 to $25,000	$300, plus 2% of excess over $10,000
$25,000 to $100,000	$600, plus 1% of excess over $25,000
$100,000 to $200,000	$1350, plus ½% of excess over $100,000
$200,000 to $5,000,000	$1850, plus ¼% of excess over $200,000

Where the claim or counterclaim exceeds $5 million an appropriate fee will be determined by the AAA. Commercial Arbitration Rules 15 (1981) (Am. Arb. Ass'n).

107. *See id.* rule 51.

108. Letter from Maureen Crean, Supervisor, Commercial Department, American Arbitration Association (Apr. 2, 1982) (on file at the *Fordham Law Review*).

109. *See* Bigge Crane & Rigging Co. v. Docutel Corp., 371 F. Supp. 240, 246 (E.D.N.Y. 1973).

110. M. Bernstein, *supra* note 23, at 142; Costikyan, *supra* note 7, at 1, 4; Phillips, *A General Introduction*, 83 U. Pa. L. Rev. 119, 122 (1934).

111. Jones III, *supra* note 83, at 1188.

exaggerated. It is possible for courts to order pre-hearing discovery and still preserve the speed and economy of arbitration. For these reasons, a finding of extraordinary circumstances should not be necessary before a court orders discovery in aid of arbitration. In abandoning this rigid standard in favor of a balancing test, the *Bigge Crane* court adopted a moderate and sensible approach to the question of court-ordered discovery. In determining whether to order discovery, courts should look at the particular facts of each case instead of summarily dismissing such requests. When facts show that no disproportionate expenses or delay will result, discovery should be allowed.

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