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Document Discovery From Non-Parties in Commercial Arbitration: Availability and Practical Considerations

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Litigators in the U.S. often take for granted the ease with which they can obtain discovery from non-parties in our federal and state courts. One might assume that the "presumption in favor of arbitrability" embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), would have been implemented with, among other things, a statutory grant of subpoena power to arbitrators that is virtually coextensive with that of a federal district court. No so, however. And depending on the place of arbitration, a party's ability to compel document production from a non-party, much less to depose that witness, prior to a hearing, may be very limited indeed. Problems and issues abound.

FAA Section 7

Section 7 of the FAA grants arbitrators authority to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." Thus, an arbitrator can compel testimony from a non-party at an arbitration hearing. Further, a non-party witness clearly can be compelled to produce material documents at a hearing, but arguably not otherwise.

Arbitrator's Subpoena Power

In most instances, an arbitrating party seeking documents from a non-party submits a subpoena to the arbitrator for signature, and serves it "in the same manner as subpoenas to appear and testify before the court." 9 U.S.C. § 7. Accordingly, procedural aspects of an arbitral subpoena are governed by Fed. R. Civ. P. 45. *E.g.*, *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.* , 33 Fed. Appx. 26, 27 (3d Cir. 2002). Although Rule 45(b) permits service of a subpoena on a non-party anywhere in the United States, and on U.S. nationals and residents located abroad (see 28 U.S.C. § 1783), the force of such a subpoena is limited by Rule 45(c) to compelling a non-party witness to appear (with or without documents) within 100 miles of where the witness "resides, is employed, or regularly transacts business in person," and possibly to appear at trial within the State of the witness's residence, employment or regular business transactions.

Obtaining Pre-Hearing Non-Party Discovery: A Mixed Bag

Notwithstanding the language of 9 U.S.C. § 7, whether an arbitrator can compel a non-party witness to testify and/or produce documents other than at an arbitral hearing is largely dependent on the law of the federal jurisdiction that includes the place of arbitration. Unsurprisingly, as regards virtually all such procedural matters concerning arbitration, the Federal Circuit Courts are split.

Both the Sixth and Eighth Circuits have interpreted FAA § 7 liberally to require responses to arbitral subpoenas from non-parties prior to an arbitration hearing. *See Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999) ("…the FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to a hearing."); *Sec. Life Ins. Co. of Am. v. Duncanson & Holt* , 228 F.3d 865 (8th Cir. 2000) ("[I]mplicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.").

At least one federal district court outside of the Sixth and Eighth Circuits has agreed with this view. *See Festus & Helen Stacy Found, Inc. v. Merrill Lynch, Pierce, Fenner, & Smith Inc.* , 432 F. Supp. 2d 1375, 1379-80 (N.D. Ga. 2006).

On the other hand, the Second and Third Circuits have held that, under FAA § 7, an arbitration subpoena cannot compel a third-party to produce any documents outside of an arbitral hearing. *See Life Receivables Trust Syndicate 102 at Lloyd's of London* , 549 F.3d 210, 218 (2d Cir. 2008)

(arbitrators can order production of documents by a non-party witness only in connection with the witness' appearance at a hearing, including preliminary non-merits hearings) (citing *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577-79 (2d Cir. 2005)); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406-07 (3d Cir. 2004) ("…Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.").

Numerous district courts in other federal jurisdictions have endorsed this relatively restrictive interpretation. *See, e.g.*, *Chi. Bridge & Iron Co. N.V. v. TRC Acquisition, LLC* , 2014 U.S. Dist. LEXIS 103287, at *6 (E.D. La. July 29, 2014); *Empire Fin. Group, Inc. v. Penson Fin. Servs.*, 2010 U.S. Dist. LEXIS 18782, at *9 (N.D. Tex. Mar. 3, 2010); *Alliance Healthcare Servs. v. Argonaut Private Equity, LLC* , 804 F. Supp. 2d 808, 810-11 (N.D. Ill. 2011); *CVS Health Corp. v. Vividus LLC*, 2016 U.S. Dist. LEXIS 77240, at *6 (D. Ariz. June 13, 2016); *Dodger, Inc. v. Interactive Data Corp.*, 2008 U.S. Dist. LEXIS 124006, at *10 (S.D. Cal. Sept. 16, 2016); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fl. 2009).

Finally, the Fourth Circuit has adopted a hybrid approach, allowing extra-hearing non-party document discovery only where the party seeking discovery can show "special need or hardship." *See COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999). The *COMSAT* Court did not define "special need" or "hardship," except to suggest that those categories include circumstances where the documents sought are not otherwise available to the party seeking them. *See id.*

None of the Courts of Appeals for the First, Fifth, Seventh, Ninth, Tenth, or Eleventh Circuits have considered the issue.

Additional Considerations: Jurisdiction, Venue, Defining "Hearing"

In most jurisdictions, an arbitral subpoena cannot compel a non-party to produce documents other than in an arbitrator-attended proceeding, but depending on the jurisdiction, that proceeding could be a merits hearing or some other proceeding before the arbitrator. *See*, *e.g.*, *Life Receivables*, 549 F.3d at 218; *Alliance Healthcare Servs.*, 804 F. Supp. 2d at 811.

Furthermore, if it becomes necessary for a party to seek enforcement by a federal district court in order to compel a non-party's compliance with a subpoena, the party should be mindful (a) that a non-party witness can only be compelled to attend before an arbitrator within 100 miles of where the witness "resides, is employed, or regularly transacts business," and (b) that a proceeding under FAA § 7 to enforce an arbitration subpoena must be initiated in the federal district court "for the district in which such arbitrators, or a majority of them, are sitting."

In addition, the non-party witness whose compliance is sought must be subject to personal jurisdiction in the district court wherein the enforcement proceeding is initiated.

Therefore, while the idea of conducting a non-merits proceeding by phone or video connection has great appeal, it may also have limited application unless the subpoenaed non-party is situated within the jurisdiction in which the arbitrator sits. *See* FAA § 7. It is also unlikely that a federal district court would have the power to enforce a subpoena that commands the appearance by phone or video connection of a non-party witness who is outside the court's normal geographic jurisdiction unless that court has an independent basis for personal jurisdiction over the non-party. *See, e.g.*, *Lin v. Horan Capital Mgmt., LLC*, 2014 U.S. Dist. LEXIS 114631, at *3-4 (S.D.N.Y. Aug. 13, 2014) (citing *Roundtree v. Chase Bank USA, N.A.*, 2014 U.S. Dist. LEXIS 76255, at *5 (W.D. Wash. June 3, 2014)) (denying motion to compel non-party witness to appear by video conference at arbitration proceeding and motion to compel non-party witness to produce documents at that proceeding).

Finally, the enforcing district court must also have federal subject matter jurisdiction over such an enforcement proceeding. In that regard, FAA § 7 itself does not itself establish federal question jurisdiction. *See, e.g.*, *Stolt-Nielsen*, 430 F.3d at 572. And the federal district courts diverge in their approaches to the subject matter jurisdiction inquiry. Some look to the underlying dispute in arbitration to determine whether a district court has such jurisdiction, while others frame the inquiry in terms of the court's subject matter jurisdiction over the enforcement proceeding itself. *Compare Schaieb v. Botsford Hosp.*, 2012 U.S. Dist. LEXIS 185519 (E.D. Mich. Nov. 13, 2012) (dismissing petition to enforce compliance with arbitration subpoena where court would not have had subject matter jurisdiction over underlying matter), *with Brazell v. American Color Graphics*, 2000 U.S. Dist. LEXIS 4482 (S.D.N.Y. Apr. 6, 2000) (establishing the court's diversity jurisdiction over the parties and ordering compliance with arbitration subpoena). It is therefore essential to assess beforehand how a prospective presiding district court will adjudicate the subject matter jurisdiction issue.

Conclusion

While there are many benefits to the limitations on discovery that are part and parcel of most arbitrations, an inability to obtain pre-hearing disclosures from non-parties without their consent can create significant problems of proof for both claimants and respondents.

Obtaining discovery in an arbitration from non-parties can be a fraught endeavor, especially when it is sought prior to a hearing on the merits. Parties negotiating arbitration agreements are wise to consider their likely discovery needs and their implications before settling on a place of arbitration, lest they

inadvertently foreclose themselves from being able to obtain evidence that is crucial to the prosecution or defense of their case.

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