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Compelling evidence from non-parties in arbitration

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Suppose you are handling a complex arbitration in Boston. Critical evidence is in the hands of non-parties located all over the country. Your client expects to gather this evidence to support its claim.

Can you obtain evidence from these non-parties? What powers do the arbitrators have to subpoena evidence from non-parties? And how do you enforce an arbitral subpoena if a non-party refuses to comply?

It may come as a surprise to your client that the law is uncertain in this area and enforcement can be cumbersome and expensive. Being able to present practical alternatives to your client for efficiently gathering evidence from out-of-state witnesses is essential to building a successful case in arbitration.

You should discuss these issues with your client early, and consider them when drafting arbitration agreements, especially venue provisions.

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Subpoena authority under FAA

Section 7 of the Federal Arbitration Act empowers arbitrators 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." 9 U.S.C. §7.

Typically, the requesting party presents the subpoena to the arbitration panel for approval and signature. A signed subpoena is then "served in the same manner as subpoenas to appear and testify before the court," which means that Fed. R. Civ. P. 45 governs. Rule 45(b)(2) permits nationwide service of process, so you can serve an arbitral subpoena anywhere in the United States.

While a subpoena can be served anywhere, it can command compliance only within 100 miles of where the non-party witness "resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c).

Non-party discovery under FAA – circuit split

The federal courts have split and the 1st Circuit has not yet ruled on whether the language authorizing arbitrators to "summon ... any person to attend before them ... as a witness" and to bring documents permits prehearing non-party discovery.

The 6th and 8th circuits have held that, by implication, this language permits prehearing document discovery from non-parties. *Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999); *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000).

The 4th Circuit has held that prehearing non-party discovery is allowed only on a showing of a "special need or hardship." *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999).

More recently, the 2nd and 3rd circuits have held that the plain language of FAA Section 7 does not permit prehearing non-party discovery. The arbitrators must convene a hearing, at which at least one arbitrator presides, to have the authority to subpoena a non-party for documents or testimony. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *Life Receivables Trust v. Syndicate* 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008).

The 2nd and 3rd circuits have indicated, however, that holding a preliminary hearing is a permissible way to obtain evidence before the final merits hearing. *Life Receivables Trust*, 549 F.3d at 218.

And these courts have noted that, practically speaking, non-parties will often simply produce documents to avoid the inconvenience of attending the preliminary hearing.

So in these circuits, or in jurisdictions where the law is unclear, the subpoena should summon the non-party to a hearing

within 100 miles of the witness with at least a majority of the arbitrators attending.

Keep in mind that it is often far more expensive for a non-party to defend an enforcement action than to simply comply with the subpoena. So a non-party might voluntarily provide a narrower category of documents than requested or agree to be deposed telephonically or near her business or residence.

Striking such a compromise is often worth avoiding the delay and expense of compelling full compliance.

Enforcement where 'arbitrators, or a majority of them, are sitting'

Sometimes, however, you need to compel full compliance in federal court. This can be tricky when dealing with an out-of-state witness.

FAA Section 7 requires enforcement to occur in the federal District Court "for the district in which such arbitrators, or a majority of them, are sitting."

Recall that Rule 45(c), however, limits the place of compliance to within 100 miles of the non-party. This usually means that at least a majority of the arbitrators must be "sitting" in the district where compliance is required.

That can present a problem, not to mention an inconvenience to the arbitrators, when non-parties are located far from the seat of arbitration.

One option to ease the burden on the arbitrators, suggested by the 2nd and 3rd circuits, is to have just one arbitrator preside over the hearing. See 9 U.S.C. §7 (arbitrators may summon any person to "attend before them or any of them").

But that provision presents a trap for the unwary. Section 7 gives only the federal court "for the district in which such arbitrators, or a majority of them, are sitting" the power to compel compliance. Therefore, the better practice is to have at least a majority of the arbitrators attend the hearing.

At this point you might be thinking, why not just have the non-party testify by videoconference? While appealing, that strategy is problematic.

First, the subpoena cannot be enforced in the district where the non-party is located because the arbitrators are not "sitting" there.

Second, the subpoena cannot be enforced where the arbitrators are sitting unless the non-party has sufficient connections to that forum to bring him within the subpoena power of that district court. E.g., *Ping-Kuo Lin v. Horan Capital Mgmt*., LLC, 2014 WL 3974585 (S.D.N.Y. Aug. 13, 2014) (videoconference "does not operate to extend the range or requirements of a subpoena.").

Thus, the better practice is to ensure that the witness is in the district where at least a majority of the arbitrators are sitting.

Personal, subject matter jurisdiction required for enforcement

If enforcement is necessary, you must be mindful of jurisdictional issues.

First, the non-party must be subject to personal jurisdiction in the district where enforcement is sought.

Second, the party seeking enforcement must establish federal subject matter jurisdiction independent of Section 7 of the FAA. Courts have consistently held that Section 7 does not independently establish federal question jurisdiction.

Courts disagree, however, about whether they look to the underlying arbitration or the enforcement action to determine whether federal subject matter jurisdiction exists.

It is critical, therefore, to understand the case law in the jurisdiction where enforcement is sought to determine how to establish subject matter jurisdiction.

State arbitration law

You should also consider the applicability of state arbitration law to the extent it is not preempted by the FAA. State law may be helpful because some states allow prehearing discovery from non-parties. Like the FAA, however, the law in many states is unclear about whether prehearing non-party discovery is available.

The state law process can also be more cumbersome than the federal process. State law often requires letters rogatory or commissions for the subpoenas to be enforceable; nationwide service of process may not be an option; and if the non-party is located in a different state, you must consult the law of two states to ensure that the subpoena will be enforceable.

Conclusion

Obtaining prehearing discovery from non-parties in arbitration can be difficult and cumbersome. If non-party discovery is important to your case, you should explain to your client the potential roadblocks you may face and the advantages of cooperating with non-parties, even if it means you end up with less information than you asked for.

When drafting arbitration agreements or arbitration provisions, you should be mindful of the impact the seat of arbitration will have on the ability to obtain evidence from non-parties.

In addition to the typical venue provision, you might consider including a provision that permits the arbitrators to move the arbitration temporarily to obtain evidence from non-parties as needed. Otherwise, critical evidence from non-parties may be unavailable. MLW