Use of Subpoenas in Arbitration - By Ethan A. Brecher

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Arbitration and its freedom from the complex substantive and procedural rules of litigation, can provide a better (or worse) means of dispute resolution than is available in court. As every practitioner who represents clients in arbitration knows, however, the arbitration process invariably creates legal problems that may require judicial intervention.

One of the more difficult issues that arises in arbitration, is the ability of a party engaged to subpoena third-party witnesses and their documents both before and during the arbitration hearing. The scope and availability of subpoena power in arbitration depends in part on whether the Federal Arbitration Act (FAA)[1] or New York's arbitration statute, CPLR Article 75, governs the proceeding.

Federal courts take judicial notice that discovery is generally limited in arbitration, most often as the result of the procedural rules the parties agree will govern their proceeding.[2] Section 7 of the FAA,[3] however, authorizes the majority of an arbitration panel to subpoena any "person," including third-parties, to appear and testify at the arbitration hearing, and to bring relevant documents.

Generally, a party will ask the arbitrators to sign a subpoena, after making a showing why testimony or documents need to be obtained from the third-party. The party must then serve the subpoena on the third-party witness in the same manner subpoenas are served (including appropriate witness fess), under Rule 45 of the Federal Rules of Civil Procedure.

FAA § 7 allows a party or the third-party witness to petition the federal district court[4] to compel compliance with the subpoena, or for an order quashing or modifying the subpoena.[5] The district court may enforce the subpoena and later hold a witness in contempt for disobeying an order directing compliance. The court also has the authority to rule on objections to the subpoena on grounds of over breadth, relevance, and make protective orders safeguarding from unwarranted discovery the subpoenaed party's

proprietary or confidential records.[6]

If the arbitrators deny or limit discovery, courts will rarely intervene and order additional discovery.[7] Moreover, in cases involving documents containing trade secrets or other proprietary business information, courts may impose conditions upon the production of the subpoenaed documents, such as directing the third-party to submit them to the arbitrator for an in camera inspection, and directing the arbitrator to withhold information irrelevant to the case, or to limit its disclosure to counsel only, or even to seal the record.[8]

More problematic is whether subpoena power under FAA § 7 extends to pre-hearing discovery.

'INTEGRITY' CASE

In recent case of first impression in New York, the U.S. District Court for the Southern District of New York held in Integrity Insurance Co. v. American Centennial Insurance Co., that FAA § 7 did not authorize arbitrators to compel third-party witnesses to appear for pre-hearing depositions.[9]

The Integrity court noted that federal policy favors arbitration as a means of dispute resolution, and that courts should interpret the FAA expansively.[10] It recognized that arbitrators have broad discretion to order discovery as between parties, depending, of course, upon the terms of the arbitration rules that govern their dispute.[11] Despite this policy, the court held that third-parties who never agreed to participate in the arbitration process are not subject to an arbitrator's subpoena directing their attendance at a pre-hearing deposition.

The Integrity court first reviewed decisions allowing parties to subpoena documents for production before an arbitration hearing. For example, in Santon v.Paine Webber Jackson & Curtis Inc., the District Court for the Southern District of Florida, over the plaintiff's objection, enforced arbitrator-issued subpoenas, which were directed to third-parties for the production of documents before the hearing.[12] The Stanton court held that any order quashing the subpoenas would undermine the FAA's purpose of facilitating arbitration.[13] In Meadows Indemnity Co.

Ltd. v. Nutmeg Insurance Co.,[14] the District Court for the Middle District of Tennessee overruled a third-party's objection to the arbitrators' subpoena directing the production of documents before the arbitration hearing.

The court held that the order did not prejudice the third-party, because it would have to produce the documents at the hearing in any event. Furthermore, the court held that FAA § 7, which authorizes arbitrators to compel production of documents at the hearing, implicitly authorizes them to compel the production of documents prior to the hearing. If FAA § 7 was construed in the narrow manner the third-party suggested, the court said, arbitration panels would unnecessarily be restricted in overseeing cases, thereby undermining the arbitration process.

The Integrity court distinguished the cases enforcing subpoenas that allowed pre-hearing document production on several grounds. First, it held that documents are produced only once, whether at the arbitration or before, and it makes sense to allow parties to review documents before the hearings.

The court concluded, however, that compelling a witness to testify is different. While this might occur in litigation, this result in arbitration is inappropriate, particularly because the third-party never agreed to be a part of the process.

Moreover, a witness at a pre-hearing deposition might be subject to abuse and harassment, especially because the arbitrator would not supervise the deposition.

Under these circumstances, the third-party would have to seek the court's protection, which would unnecessarily involve the court in the underlying arbitration.

The Integrity court concluded that FFA § 7 did not allow arbitrators to compel third-parties to appear for a pre-hearing deposition, because any other result would undermine the arbitration process and have the undesirable effect of leaving "the parties with one foot in court and the other in arbitration."

'AMGEN' CASE

In another recent case, Amgen Inc. v. Kidney Center of Delaware County, Ltd.,[15] the District Court for the Northern District of Illinois reached the opposite conclusion, holding that pre-hearing depositions are permissible under FAA § 7, on the basis that FAA § 7's broad power to compel the attendance of witnesses at arbitration hearings also permits arbitrators to order pre-hearing discovery.

The central issue in Amgen was whether the district court had the power to compel a third-party to appear for a pre-hearing deposition in another judicial district.

The Amgen court noted that subpoenas issued by arbitrators are enforceable only in the district court where the arbitration is held, and that, like with trial subpoenas issued under Federal Rule of Civil Procedure 45, the court's jurisdiction to compel compliance with the arbitrator's subpoena is limited to the 100-mile radius surrounding the courthouse.

Thus, while the power to issue a subpoena under FAA § 7 was not in dispute, the court's ability to enforce the subpoena was in doubt.

In order to resolve this apparent dilemma, the court directed the party seeking the pre-hearing deposition to issue a subpoena similar to one for a pretrial deposition under Federal Rule of Civil Procedure 45, bearing the case number and name of the proceeding brought to enforce the arbitrator's subpoena, and make it returnable in the district where the subpoenaed party resided.

In this way, the district court where the deposition was scheduled to take place could enforce the subpoena without violating the FAA.

The Integrity court's reluctance to extend FAA § 7 to encompass pre-hearing depositions is based on its view that arbitration does not allow wide-ranging discovery.

Its rationale that a third-party witness never agreed to

participate in the process and thus should not have to comply with an arbitrator-issued subpoena for a deposition is not entirely persuasive, because third-party witnesses rarely agree to involve themselves in litigation between parties, even in court. The underlying reasoning seems to be motivated in large part by its subscription to the notion that broad discovery in arbitration rarely occurs and is inappropriate.

Under CPLR 7505, arbitrators and attorneys may issue subpoenas to compel witnesses to appear, and to bring documents with them, to the arbitration hearings.[16]

Subpoenas issued under CPLR 7505 may only be served within the geographical boundaries of New York State.[17] While this limits somewhat the usefulness of the CPLR 7505 subpoena, it does not diminish completely its effectiveness.

For example, a foreign corporation that conducts business in New York and its officers and employees, whether or not they reside in New York, are subject to subpoenas issued under CPLR 7505."[18]

Like cases arising under the FAA, New York courts generally are reluctant to intervene in discovery disputes arising in arbitrations. For example, where an arbitrator refused to direct a party to appear and testify at the arbitration, a court on a motion to compel compliance with an attorney-issued subpoena will not enforce the subpoena unless it is "absolutely necessary for the protection of the rights of a party."[19]

Moreover, under CPLR 7505, subpoena power is limited to directing the production of witnesses and documents to the hearing only. Pre-hearing discovery is not allowed under CPLR 7505.[20] On a motion to quash, courts will scrutinize whether the testimony that arbitrators seek through the subpoena process is pertinent.[21]

CONCLUSION

The law regarding the use of subpoenas in arbitration is still evolving. Unquestionably, subpoenas may be used to compel witnesses to testify and to produce documents at the arbitration

hearing itself. More questionable is the availability of pre - hearing discovery from third-parties. The result depends on whether federal or state law applies, and sometimes in which court an application is made. It is clear, however, that courts will defer to the arbitrators' discretion about whether discovery is appropriate, and parties seeking to subpoena witnesses or documents are well advised to argue vigorously to the arbitration panel their case for obtaining discovery from third-parties. Conversely, third parties resisting discovery may turn to the courts to protect their privacy, and court will scrutinize closely the appropriateness of the subpoena.

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[1] The FAA applies in federal court where there is federal subject matter jurisdiction and when the contract calling for arbitration evidences a transaction involving interstate commerce. Barbier v. Shearson Lehman Hutton Inc., 948 F.2d 117, 120 (2d Cir. 1991); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967). The FAA does not itself create an independent basis of federal jurisdiction, even though it creates a body of federal substantive law establishing and regulating the duty to honor arbitration agreements. Southland Corp. v. Keating, 465 U.S. 1, 15 n.9 (1984); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S.1, 25 n. 32 (1983). Consequently, there must be an independent basis of federal jurisdiction, i.e. diversity or federal question, before a federal district court may entertain petitions under the FAA. Harry Hoffman Printing Inc. v. Graphic Communications, int'l Union, Local 261, 912 F.2d 608, 611 (2d Cir. 1990). New York state courts frequently entertain applications arising out of cases governed by the FAA in accordance with federal law. See e.g. Vigo Steamship Corp. Marship Corp., 26 N.Y.2d 157, 309 N.Y.S.2d 165 (1970).

[2] See e.g. Commonwealth Insurance Co. v. Beneficial Corp., 1987 WL 17951 (S.D.N.Y. 1987): "[F]ull scale discovery is not automatically available in arbitration, as it is in litigation. Everyone knows this is so; thus the unavailability of the full

panoply of discovery devices, with their attendant burdens of time and expense, may fairly be regarded as one of the bargained-for benefits (or burdens, depending on one's subsequent point of view) of arbitration."

[3] FAA § 7 provides: "The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may 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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summonsed to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

[4] In Amgen Inc. v. Kidney Center of Delaware County, Ltd., 1994 WL 594372 (E..D. Pa. 1994), the Court transferred to the District Court for the Northern District of Illinois a petition under FAA § 7 to compel compliance with an arbitrator-is-sued subpoena. The Court held that because the underlying arbitration was taking place in Chicago, the federal district court in Chicago was the court that should entertain the application.

[5] Integrity Insurance v. American Centennial Ins. Co., 885 F.Supp 69, 72 (S.D.N.Y. 1995) (Scheindlin, J.).

[6] Amgen Inc. v. Kidney Center of Delaware County, Ltd., 879 F. Supp. 878, 881-2 (N.D. Ill. 1995); Laufman v. Anpol Contracting, Inc., 1995 WL 360015 (S.D.N.Y. 1995); but see Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co., 157 F.R.D. 42, 43 (M.D. Tenn. 1994). In Meadows, the Court declined to second-guess the arbitration panel's determination on the relevance of the subpoenaed documents, and enforced the subpoena, because of its minimal contact with the issues in the arbitration and the

arbitration panel's expertise with the case. The conclusion, however, should not be interpreted to mean that courts will not scrutinize the propriety of the subpoena. The Meadows Court noted that another federal district court had already ruled that the documents requested in the challenged subpoena were relevant to the arbitration proceeding.

[7] Integrity, 885 F.Supp. at 72.

[8] Local Lode 1746 v. Pratt & Whitney Division of United Aircraft Corp., 329 F. Supp. 283, 287 (D.Conn. 1971); accord Laufman, supra.

[9] 885 F.Supp. at 73.

[10] 885 F.Supp. at 71.

[11] 885 F.Supp. at 72, (citing, In re Technostroyexport, 853 F. Supp 695, 697 (D.D.N.Y. 1994) (pre-hearing discovery between parties is "a matter governed by the applicable arbitration rules (as distinct from court rules) and by what the arbitrator decides."); Chiarella v. Viscount Indus. Co. Ltd., 1993 WL 497967 (S.D.N.Y. 1993)).

[12] 685 F. Supp. 1241 (S.D. Fla. 1988).

[13] 685 F.Supp. at 1242-43.

[14] 157 F.R.D. 42 (M.D. Tenn. 1994).

[15] 879 F.Supp. 878 (N.D. Ill. 1995).

[16] CPLR 7505 provides: "An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths."

[17] See New York Judiciary Law, § 2-b.

[18] Standard Fruit & Steamship Co. v. Waterfront Commission of New York Harbor, 43 N.Y.2d 11, 400 N.Y.S2d 732, 371 N.E.2d 453 (1977).

[19] Application of Bargioni, 192 A.D.2d 400, 596 N.Y.S.2d 67, 68 (1st Dep't 1993). In Bargioni, the Court held that because the subpoenaed party lacked significant personal knowledge of the facts underlying the claim at issue, there was no reason to enforce the subpoena.

[20] 885 F.Supp. at 71 n.3.

[21] In re Sun-Ray Cloak Co. Inc. 256 A.D. 620, 11 N.Y.S.2d 202 (1st Dep't 1939).