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LITIGATION

Pretrial Discovery From Non-Parties in Arbitration Under State Law

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Special to the Legal

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My earlier article addressing discovery from non-parties in arbitration ("Pretrial Discovery of Documents From Non-Parties in Arbitration," published Feb. 21) revealed that the speed, efficiency, reduced cost and confidentiality that are generally the desiderata of those employing arbitration in cases subject to the Federal Arbitration Act (FAA) often come at a price. Specifically, parties may suddenly discover that the wide-ranging discovery to which they have become accustomed in court litigation may not be available when application for such is made to the arbitrator. This is particularly true when discovery is sought of those who are not parties to the arbitration, and it may become even more problematic when that discovery is sought in a jurisdiction far removed from the place of arbitration.

But what happens in arbitrations where the FAA is not otherwise implicated or controlling, such as a local construction or accident case? Do arbitrators empowered under state law have the authority to order such pretrial discovery from non-parties?

As was reflected in the earlier article, there are differing opinions among the federal circuits with respect to the authority of the arbitrator to issue a pre-hearing discovery order to a non-party. Two circuits (the Second and Third) have indicated that under the FAA, an arbitrator lacks authority to order a non-party to appear at a deposition or provide requested documents. Two circuits (the Sixth and the Eighth) have held that the arbitrator has the implicit authority, at the very least to compel the production of documents by non-parties. One circuit (the Fourth) took a middle ground, stating (although not specifically holding) that there was no absolute bar to pre-hearing discovery, and that such would be permitted under "unusual circumstances" upon a showing of special need or hardship, including the likely unavailability of the information through some other means.

Similarly, in the state context, there is no simple answer to this question, as the reach of the arbitrator's authority will often depend on the jurisdiction in which the arbitration is being conducted as well as the arbitrator's unfettered exercise of discretion based upon the particular circumstances confronting him.

In Pennsylvania, for example, arbitrations are conducted under the Pennsylvania Uniform Arbitration Act (UAA). The act provides at 42 Pa. C.S.A. 7309(a) that arbitrators may issue subpoenas for the attendance of witnesses and the production of books, records, documents and other evidence; and, upon application to the court, subpoenas may be enforced in the manner provided for the service and enforcement of subpoenas in civil actions generally.

With respect to depositions, however, under 7309(b), the arbitrator "may permit" a deposition to be taken of a witness who cannot be served with a subpoena or who is unable to attend the hearing. In short, the arbitrator may, as a matter of discretion, accept the deposition of the unavailable witness in lieu of live testimony. The statute does not by its terms, however, specifically allow the arbitrator to order a witness, whether available or unavailable, to submit to a pretrial discovery deposition or to produce documents.

As a practical matter, such discovery is often accomplished by agreement of the parties and the acquiescence of the non-party. This is generally because the non-party prefers such a procedure to being required to appear subject to a subpoena at the actual arbitration hearing itself.

In the absence of such agreement and acquiescence, however, there has been no judicial unanimity nationally as to the actual authority of the arbitrator under the UAA. Some courts have interpreted this provision to mean an arbitrator may never order pretrial discovery. Others have concluded that an arbitrator has such authority but that what is required is a showing of extraordinary circumstances justifying the allowance of such discovery. Of course, such a finding

would rest solely within the discretion of the arbitrator.

Accordingly counsel advising arbitration under Pennsylvania law or other jurisdictions where the UAA is in effect should be considering whether the client is prepared to engage in the arbitration without the assurance that at the time of the hearing it will have secured all of the discovery that is customarily obtained in preparation for trial.

A very different situation, however, may confront those parties who are arbitrating their dispute under the statutes of other states, such as New Jersey. They will find that their arbitrator has specific statutory powers that far exceed those accorded arbitrators in Pennsylvania.

Why the difference between New Jersey and Pennsylvania? The simple answer is that several years ago New Jersey adopted the Revised Uniform Arbitration Act (RUAA)

Under Section 17 of the New Jersey RUAA (N.J.Stat sec. 2A: 23B-17), upon the request of a party, or even the prospective witness, the arbitrator may permit the deposition of any witness for use as evidence at the hearing, including a witness who cannot be subpoenaed or cannot attend a hearing.

The significant change in the RUAA in this regard, however, is that an arbitrator who determines that such discovery should be permitted, not only may agree to accept a deposition as evidence in the arbitration hearing but also has the authority to order any party or non-party to the proceeding to comply with discovery-related orders.

Specifically, "the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding." In permitting such discovery, the arbitrator is obliged to take into account the needs of the parties "and other affected persons," and the desirability of making the proceeding fair, expeditious and cost effective.

Typical factors that might be considered by an arbitrator would be how important or indispensable the information being sought is to the proceedings such that its non-disclosure will interfere with the ascertainment of the truth; is the information being sought otherwise available to the requesting party; can a party's expert render an opinion without access to the information, even though such information might enable preparation of an improved or enhanced statement; how onerous is the request for production on the non-party; to what extent does the request impact the business operations of the subpoenaed party both financially and operationally; will production of the requested information result in the disclosure of sensitive and/or confidential trade secrets, or business information such as customer lists, business plans or financial status. (As to this last point, the RUAA further authorizes the arbitrator to issue a protective order to prevent the disclosure of privileged or confidential information, trade secrets and other information that could be protected from disclosure in a regular civil action.)

The authority of arbitrators varies among states and attention should be given to the statutory framework.

Moreover, under the RUAA, courts may not only enforce subpoenas or discovery-related orders of a witness within the state, but also those subpoenas issued by an arbitrator in connection with an arbitration proceeding in another state in the same manner provided by law within the state where it is to be enforced. (Parenthetically, it should be noted that these latter provisions authorizing enforcement of such subpoenas by out-of-state courts may be questionable to the extent that they are deemed to be pre-empted by provisions of the FAA. Faced with that very issue, the Appeals Court of Indiana specifically held that Section 7 of the FAA pre-empted the Indiana discovery statute which would have allowed the enforcement of a subpoena issued by an arbitration panel in New York, *In re the Subpoena issued to Beck's Superior Hybrids*, 940 N.E.2d 352 (Ind App. 2011).)

Of course, under Section 4 of the RUAA, the parties may agree to waive these provisions authorizing more extensive pre-hearing discovery in an attempt to limit the cost and inconvenience attendant upon it. Accordingly, even in states where statutory provisions similar to the RUAA are in effect, counsel should consider whether in entering into an arbitration agreement, the parties would be better served by agreeing at the very beginning to limit or eliminate those provisions that could subject their clients or non-parties to compelled discovery.

As the above discussion demonstrates, counsel should consider the terms under which the arbitration will be conducted. Counsel must anticipate what will be necessary to prove the case. If extensive discovery will be required, particularly from third parties, allowing the arbitration to be conducted in a jurisdiction where such discovery is severely limited may unexpectedly undermine the party's ability to carry its burden. Conversely, if the case can be presented without extensive discovery, and there is a fear that the opposition is likely to engage in expensive and potentially ruinous and wasteful discovery, consideration should be given to whether the arbitration can be conducted under a statutory scheme where the authority of the arbitrator to order such discovery is limited.

In short, the authority of arbitrators varies among states and attention should be given to the statutory framework, as it may severely impact the opportunity to conduct the case most effectively for the client. •