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LITIGATION

Pretrial Discovery of Documents From Non-Parties in Arbitration

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Special to the Legal

Increasingly, parties are looking to arbitration for the resolution of their disputes. In resorting to arbitration, they often assume that they will benefit from certain of its positive aspects such as efficiency, confidentiality, cost and finality while having at their disposal all of the customary litigation tools necessary to prove their case.

Once the process has been initiated, however, they are often confounded by the realization that the extensive discovery process with which they are familiar may not be available to them, particularly when they seek discovery from non-parties to the arbitration agreement. They quickly learn that depending on the statutory process governing the arbitration and the jurisdiction in which the arbitration is to be conducted, results vary when judicial enforcement is sought of pre-hearing discovery subpoenas issued to such non-parties.

Initially, attention should be given to arbitrations that are subject to the Federal Arbitration Act (FAA). Section 7 provides, in pertinent part:

"The arbitrators … 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."

In addition, Section 7 provides

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that federal courts may enforce such subpoenas by compelling the attendance of such persons or punishing them for contempt.

The difficulty arises, however, because the language in the FAA does not make clear whether the arbitrator's statutory authority includes the right to order either depositions or document production prior to the arbitration hearing itself.

This article will only address the ordering of pretrial discovery of documents from non-parties.

Five federal appellate courts that have considered this issue have reached differing results.

Two of those courts have recognized the right to issue and enforce such pre-hearing subpoenas.

The 6th U.S. Circuit Court of Appeals in the 1999 case *American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit Inc.)* stated that "the FAA 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 the hearing."

The 8th Circuit, in its 2000 opinion in *In re Security Life Insurance Co. of America*, noted: "Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing." It held, therefore, that "implicit 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." In particular it noted that the panel's exercise of power "was proper whether or not [the subpoenaed party] is ultimately determined to be a party to the arbitration."

The 4th Circuit did not similarly conclude that under the FAA arbitrators had the authority to issue such discovery subpoenas to non-parties. In its 1999 opinion in *Comsat Corp. v. National Science Foundation*, the court specifically noted: "Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions or the authority to demand that the non-parties provide the litigating parties with documents during pre-hearing discovery … The enforcement provision does not expand the arbitrator's subpoena authority, which remains simply the power to compel non-parties to appear before the arbitration panel." The court viewed the rationale for limiting the arbitrator's subpoena power as consistent with the understanding that the parties were relinquishing certain procedural rights in return for a more efficient and

cost-effective resolution of their disputes.

Nonetheless, the court stated that it would not impose an absolute bar to such pre-hearing discovery. It concluded (in dictum) that in special complex cases, the efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing. Accordingly, under "unusual circumstances," pre-arbitration discovery might be compelled "upon a showing of special need or hardship." Such special hardship might include a showing that "the information it seeks is otherwise unavailable." Although no such special hardship was found in the *Comsat* case, such special need was discussed in the 4th Circuit's 1999 opinion in *In re Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, where the evidence being sought was on a ship that was to leave U.S. waters so that its availability in the future was questionable.

The approaches taken by the 6th, 8th and 4th circuits were rejected by both the 3rd and 2nd circuits.

The 3rd Circuit in its 2004 opinion in *Hay Group Inc. v. E.B.S. Acquisition Corp.* reversed the district court and ruled that the arbitrators who had issued a discovery subpoena to a non-party did not have the authority under the FAA to order a non-party to appear at depositions or to provide documents to the parties. (At this point, it is appropriate to note that I was one of those arbitrators whose order was stricken. I was in very good company, however, as my fellow arbitrators were Bill O'Brien of Conrad O'Brien and the late, great Jerry Shestack.)

The 3rd Circuit focused on the authority of the language of Section 7 of the FAA, which grants power to the arbitrators only with respect to "any person … before them … as a witness." The court pointed out that the only power conferred on the arbitrators with respect to the production of documents by a non-party is the power to summon a party to attend before them "and to bring with him or them" such documents. The language "with him," the court stated, "clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier." It further noted that the word "and" reflects that such production may only be required when "the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."

The 3rd Circuit not only specifically rejected the holding of the 8th Circuit but also the dictum in the 4th Circuit allowing such discovery "under unusual circumstances" and "upon a showing of special need or hardship." While recognizing that "such a power might be desirable," the court said that "there is simply no textual basis for allowing any 'special need' exception."

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Moreover, it stated that efficiency considerations cannot override the terms of Section 7 of the FAA. In fact, the court found a potential benefit in such limitation stating:

"The requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large-scale subpoenas upon non-parties. This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. Under a system of pre-hearing production, by contrast, there is less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the supposedly shorter and cheaper system of arbitration."

In a concurring opinion, Judge Michael Chertoff contended that such advance discovery may be attainable because a non-party may be ordered to appear with the documents before one of the arbitrators after which the hearing may be adjourned. In this respect, Chertoff essentially saw a means to "satisfy the desire that there be some mechanism 'to compel pre-arbitration discovery upon a showing of special need or hardship.'" (Citing *Comsat*).

In 2008, the 2nd Circuit agreed with the 3rd Circuit and similarly held that Section 7 does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding. (See *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*.) In addition, the court suggested that this position reflects the "emerging rule" in the United States, citing several cases in which this position was adopted.

Recognition of the varying approaches of the circuits suggests that a party contemplating resort to arbitration should consider what type of discovery it might require to support its position; and, if such pre-hearing discovery from third parties is crucial but unavailable, arbitration may not be the best forum through which to seek resolution.

Whether under the FAA an arbitrator is empowered to order the pre-hearing production of documents by third parties may well be an issue that will ultimately be faced by the U.S. Supreme Court. Of course, should this eventuate, those opposing such empowerment may take comfort from the fact that the judge who issued the *Hay* opinion in the 3rd Circuit barring such discovery was then-Judge, now-Justice Samuel A. Alito.

These cases, of course, only relate to arbitrations that are governed by the FAA. But what about those cases that are governed by state arbitration acts? Do they have different results? To echo Charles Forer in his ADR article of Jan. 31, this will be deferred and addressed in the next article in this series.

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