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Bringing Third Parties To The Table: Obtaining Discovery And Testimony From Nonparties In An Arbitration

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The oft-cited goals of arbitration, namely speed, efficiency, and lower costs, have resulted in a widespread acceptance of arbitration as a means of resolving commercial disputes. Both domestic and foreign corporations embrace arbitration as a way to avoid the high costs of litigation and, in particular, the costs of discovery, which often prevent the speedy resolution of even the simplest dispute.

When parties agree that disputes will be submitted to arbitration, they relinquish certain procedural rights attendant to formal litigation in exchange for what they believe will be a more efficient and cost-effective resolution of their dispute.[1] One of these rights is the right to full-blown discovery from the opposing party. Another is the ability to obtain full discovery from third parties. Yet the more arbitration is embraced as a viable means to resolve complex commercial disputes, the more likely it is that parties to such a dispute will require document discovery and testimony from third parties. And while speed, efficiency, and cost savings are all laudable goals, so too is a just and fair outcome that allows for the consideration of all relevant evidence and for an award that will be accepted by the parties. This Article addresses the avenues for obtaining discovery and testimony from third parties in arbitration governed by the Federal Arbitration Act ("FAA"), the federal arbitration law that governs interstate and international commercial arbitration.[2]

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Obtaining Pre-Hearing Discovery

Arbitration is a creation of contract: in drafting a clause providing for the submission of disputes to arbitration, the parties to a contract are free to include a provision setting forth what discovery will be permitted. Thus, for example, parties could include language providing that the parties agree to produce requested documents and to conduct limited pre-hearing depositions. In the absence of such a clause, however, the types and extent of discovery may be left to be decided by the arbitrators according to whatever institutional rules govern the arbitration, such as the rules of the American Arbitration Association or the International Chamber of Commerce.

When it comes to obtaining discovery from third parties in an arbitration governed by the FAA, however, the powers of an arbitrator are limited: "Because the parties to a contract cannot bind nonparties, they certainly cannot grant such authority to an arbitrator. Thus, an arbitrator's power over nonparties derives solely from the FAA."[3]

Specifically, Section 7 of the FAA provides in relevant part:

> Arbitrators . . . 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 . . .[4]

Courts generally read Section 7 of the FAA as limiting the subpoena power of an arbitration panel: "By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing."[5] Thus, subpoenas seeking pre-hearing depositions of non-parties have not been enforced.[6]

On the other hand, subpoenas seeking documents from nonparties prior to the hearing have been enforced, under the theory that the power of an arbitrator to compel the production of documents at a hearing "implicitly authorizes the lesser power to compel" production prior to a hearing.[7] Moreover, since documents are produced only once – at the arbitration or prior to it – requiring production is not as burdensome to a third party. Practically, it also makes sense that the documents be produced prior to a hearing so that the parties have the opportunity to review the documents in advance of the hearing.[8]

At least one court has recognized that in complex cases this limitation on the power of arbitrators degrades the "much-

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lauded efficiency of arbitration" if the parties are not able to review and digest relevant evidence prior to an arbitration hearing. Thus, that court left open the possibility that in "unusual circumstances" a party might petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship.[9]

Parties agreeing to arbitration might question why one should even consider this as an issue, particularly since most parties agree to arbitrate disputes precisely to avoid burdensome and expensive discovery. As more complex disputes are submitted to arbitration, however, the likelihood increases that document discovery or testimony from someone other than the parties will be necessary. Consider the case of an arbitral dispute between an insurer and the insured over the loss of a piece of equipment manufactured by a third party, or between a purchaser and the seller of products manufactured by a third party. If information is needed from an entity that is not a party to the arbitration agreement, an arbitrator may not have the authority to compel the nonparty to comply with even the most reasonable and limited discovery that could promote a just and efficient arbitration. In that event, a party would need to seek a court order, which could delay the arbitration. Similar difficulties also could be encountered in trying to subpoena a nonparty witness to testify at a hearing.

Testimony At A Hearing

Although Section 7 of the FAA allows arbitrators to subpoena nonparties to testify at a hearing, the subpoenas issued by a panel must be served "in the same manner as subpoenas to appear and testify before the court."[10] Some Federal courts have limited the subpoena authority of arbitrators to the territorial limitations set forth in Rule 45 of the Federal Rules of Civil Procedure.[11] To subpoena a nonparty who resides outside of the territorial limits, then, it may be necessary, if allowed under the governing arbitration rules, to move the situs of the arbitration hearing to a location at which the nonparty could be within the territorial limitations of Rule 45.

The power of an arbitration panel to move the location of the hearing is demonstrated by *Intercity Co. Establishment v. Ahto*, 13 F. Supp. 2d 253, 258 (D. Conn. 1998). There, the district court confirmed an arbitration award that was challenged for, inter alia, the arbitration panel's refusal to move the location of the hearings to accommodate a witness. The court rejected that argument and said of the hearings, which were initially commenced in New York, that "the record indicates that the panel did in fact attempt to accommodate [the witness] by moving the hearings to Stamford and later to Brookfield." *Id.* at 262. Thus, the court accepted the arbitration panel's determination regarding where the hearings should be held and, in confirming the award, confirmed that the panel had the authority to change the location of the hearings.

Furthermore, at least one court has recognized the arbitration panel's authority to change the location of an arbitration hearing specifically to hear the testimony of a nonparty witness who would otherwise be beyond the panel's subpoena power. *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, No. Misc. 01-162, 2001 WL 1159852, at *2 (E.D. Pa. Sep. 5, 2001). In that case, the arbitrators of a Philadelphia arbitration had issued a subpoena duces tecum to a nonparty witness, Mr. Abernathy, a resident of Florida, for a deposition to be held in Florida. *Id.* at *1. The court found that the subpoena had not been properly served but stated that

> . . . if the deposition of Mr. Abernathy and the documents sought by the subpoena are of sufficient importance, and if all else fails, attendance could presumably be compelled at an arbitration hearing in Florida.
> *Id.* at *2 (emphasis added).[12]

An Ounce Of Prevention

One way to avoid costly litigation over arbitration proceedings (the reason why parties agree to arbitration in the first place) is to anticipate the type of dispute that may arise under a contract, particularly one related to a product or service provided by a third party, and to provide in the contract a mechanism for obtaining critical information from the third party. For example, if an insurer would need access to information on equipment that it is insuring, it should require its insured to include a provision in its contract with the third-party supplier of the equipment that the third party will cooperate in any dispute between the insurer and the insured; that the supplier, without a court order, will produce requested documents and submit to pre-hearing depositions, if necessary; and will produce witnesses at a hearing. This type of clause should also be included in the insurance policy, with the third-party supplier agreeing separately in writing to be bound by the terms of such clause.[13]

By bringing a critical nonparty to the table before a dispute arises, the parties to a contract can take steps to insure that their arbitration agreement will result in a fair and balanced arbitration where all relevant evidence is considered.

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[1] See Comsat Corp. v. Nat'l. Sci. Found., *190 F.3d 269, 276 (4th Cir. 1999).*

[2] *9 U.S.C.A. §1 et seq. The FAA applies to maritime transactions and contracts "evidencing a transaction involving commerce." 9 U.S.C.A. "Commerce" is defined to mean "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." 9 U.S.C.A. §1. It is likely that similar difficulties in obtaining discovery from third parties would be experienced under state law, such as the law of New York.* See *N.Y.C.P.L.R. §3102*; In re Flood, *157 A.D.2d 780, 550 N.Y.S.2d 379 (N.Y. App. Div. 2d Dep't 1990)(denying petition for discovery of out-of-state nonparty because petitioner failed to establish "extraordinary circumstances").*

[3] Integrity Ins. Co. v. Am. Centennial Ins. Co., *885 F. Supp. 69, 71 (S.D.N.Y. 1995).*

[4] *9 U.S.C.A. §7.*

[5] Comsat, *190 F.3d at 275.*

[6] See, e.g., Integrity, *885 F. Supp. 69*.

[7] Integrity, *885 F. Supp. at 73* (quoting Meadows Indem. Co., Ltd. v. Nutmeg Ins. Co., *157 F.R.D. 42 (M.D. Tenn. 1994)).*

[8] Integrity, *885 F. Supp. at 73.*

[9] Comsat, *190 F.3d at 276* (*citing to* Burton v. Bush, *614 F.2d 389, 391 (4th Cir. 1980)(while not defining "special need," stating that a party, at a minimum, must be able to demonstrate that the information it seeks is otherwise unavailable).*

[10] *9 U.S.C.A. §7*.

[11] See Price Waterhouse LLP v. First Am. Corp., *182 F.R.D. 56, 63 (S.D.N.Y. 1998);* Amgen, Inc. v. Kidney Ctr. of Del. County, Ltd., *879 F. Supp. 878, 882-83 (N.D. Ill. 1995);* Commercial Solvents Corp. v. La. Liquid Fertilizer Co., *20 F.R.D. 359, 362-63 (S.D.N.Y. 1957).*

[12] I*n addition, a leading treatise and other scholarly works recommend the relocation of arbitration hearings for the convenience of the parties and in order to hear testimony of witnesses.* See *Gary B. Born*, International Commercial Arbitration in the United States *at 76 (1994) ("It is common (and, by some, recommended) to conduct hearings outside the arbitral situs for the convenience of the parties. . . . Moving hearings from the arbitral situs can be done simply for a single hearing, or for all hearings."); T. Snider*, The Discovery Powers of Arbitrators and Federal Courts Under the Federal Arbitration Act, *34 Tort & Ins. L. J. 101, 108 (Fall 1998) ("To deal with the difficulty created by the FAA's limits on enforcing subpoenas of nonparty witnesses, the parties can change the locale of the arbitration to coincide with the judicial district where the nonparty witnesses reside. The parties could then change the situs of the arbitration back to its original location once the subpoenas have been enforced.")*

[13] *Another way to obtain the cooperation of third parties is for parties to a contract to agree that any dispute will be arbitrated pursuant to the Federal Rules of Civil Procedure. By doing so, the parties agree to the liberal discovery allowed by those rules, including the ability to subpoena third parties.* See Amgen*, 879 F.Supp. at 883. The disadvantage to this route, however, is the loss of the streamlined nature of arbitration, as well as the likelihood that discovery disputes will arise, effectively eliminating one of the key benefits of arbitration*.