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BY EDWARD M. SPIRO

Available Discovery From Non-Parties in Arbitration Proceedings

Several recent federal court decisions have brought to the fore a question of some importance in determining the advisability of utilizing arbitration to resolve disputes: the extent that discovery may be obtained from non-parties in arbitration proceedings. Given the current prevalence of arbitration to resolve even complex commercial disputes, there is a remarkable lack of consensus on this issue. Federal decisions (some from within and some from outside the U.S. Court of Appeals for the Second Circuit), fall along a spectrum ranging from a highly permissive view, endorsing the use of arbitral subpoenas to obtain both pre-hearing document production and deposition testimony, to a highly restrictive view that no pre-hearing discovery may be obtained from non-parties under any circumstances. These cases, which may have a significant impact on a litigant's ability to prove its case, require careful consideration.

Federal Arbitration Act

Arbitration is fundamentally a creature of contract, subjecting the parties to an arbitration agreement to whatever procedures are set forth in that agreement or in the rules of the agreed-upon arbitration forum. Often such agreements result in fairly liberal discovery practices, with the rules of the American Arbitration Association and other arbitration organizations providing for document discovery and, in some instances, depositions.[1] But such provisions bind only the parties to the arbitration agreement, and have no bearing on potential third-party witnesses who are not parties to the agreement. In cases governed by the Federal Arbitration Act, the extent of an arbitrator's authority over third parties is controlled exclusively by the act, which makes no explicit reference to the availability of pre-hearing discovery from third parties. Section 7 of the act provides simply that "[t]he 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 as evidence in the case."[2] That section further provides for enforcement of arbitral subpoenas in the U.S. District Court for the district in which a majority of the arbitrators sit.

The Second Circuit has never ruled on whether §7 authorizes pre-hearing discovery, and has, in fact, declared this an open question. In its 1999 decision in *National Broadcasting Co. v. Bear Stearns & Co.*,[3] it explained, in dicta, that "the express language of §7 refers only to testimony before the arbitrators and to material physical evidence, such as books and documents, brought before them by a witness; open questions remain as to whether §7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties." District courts in the Southern District, as well as courts of appeal from other circuits that have directly addressed this issue, have given varying interpretations to the Federal Arbitration Act's silence on the question of pre-hearing discovery.

Divergent Interpretations

Only a handful of courts has found that arbitrators may order essentially unfettered pre-hearing discovery from third parties. In *Stanton v. Paine Webber Jackson & Curtis, Inc.*,[4] the district judge denied a motion to enjoin pre-hearing discovery from third parties. Although the subpoenas at issue in that case were solely for the production of documents, the court's decision was broadly worded so as to encompass and authorize both document production and pre-hearing deposition testimony. The court held that "arbitrators may order and conduct such discovery as they find necessary," and specifically rejected as "unfounded" the plaintiffs' contention that the Federal Arbitration Act only authorizes arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances.[5]

Relying in part on *Stanton*, the district court in *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*,[6] granted a motion to compel pre-hearing document production as well as deposition testimony from a third-party in an arbitration, finding that the arbitrator's subpoena was both valid and enforceable, even as against a non-signatory to the agreement. It observed, without extended discussion, that "[w]hile the statute appears to allow an arbitrator to summon a third person only to testify at trial, as opposed to a pretrial discovery deposition, courts have held (and [the third party] has not disputed) that implicit in the power to compel testimony and documents for purposes of a hearing is the lesser power to compel such testimony and documents for purposes prior to hearing."

Indeed, a number of courts have reasoned that the power to compel attendance and production of documents at a hearing carries with it the implicit authority to order pre-hearing production of documents. In *In re Security Life Ins. Co. of America*,[7] the U.S. Court of Appeals for the Eighth Circuit observed that "[a]lthough the efficient resolution of disputes through arbitration necessarily entails a limited discovery process … this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing." It went on to find 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."

Some courts that recognize this implicit authority, including several judges from the Southern District of New York, have drawn

Edward M. Spiro *is a principal of Morvillo, Abramowitz, Grand, Iason & Silberberg, concentrating in commercial litigation. He is the co-author of "Civil Practice in the Southern District of New York, 2d Ed." (West Group 2003).* **Judith L. Mogul** *assisted in the preparation of this article.*

a sharp distinction between pre-hearing document production and deposition testimony, permitting the former, while finding no authority to order the latter. In *Integrity Ins. Co. v. American Centennial Ins. Co.*,[8] Southern District Judge Shira A. Scheindlin accepted the reasoning that the power to order production of documents at a hearing carries with it the implicit authority to order their production prior to the hearing because the documents requested would ultimately have to be produced, so that requiring their earlier production imposed no additional burden on the producing party.[9] She noted that common sense also encouraged pre-hearing production in order to permit the parties to familiarize themselves with the documents prior to the hearing. She stressed however, that depositions were an entirely different matter.

First, she observed, permitting pre-hearing non-party depositions might subject the non-party to the burden of appearing twice — once for deposition and once at the hearing. Second, she noted that depositions not held before the arbitrators provided no protection to the non-party from harassing or abusive discovery, and that resort to court supervision of arbitration discovery was untenable because it would enmesh the court in the merits of the arbitration and leave " 'the parties with one foot in court and the other in arbitration.' "[10] Judge Scheindlin concluded that the arbitrator was thus without authority to compel attendance of a non-party at a pre-hearing deposition.

More recently, in his decision in *In re Hawaiian Electric Industries, Inc. v. Marsh USA, Inc.*,[11] Judge Lawrence M. McKenna found that arbitrators have no power to order pre-hearing deposition testimony, while recognizing that they possess the implicit authority to order document production. He underscored that " '[a] distinction … must be drawn between an arbitrator's power to compel document production … and her power to compel appearances at depositions before an arbitration hearing' " because a pre-hearing deposition, in contrast to pre-hearing document production, " 'requires a non-party to devote additional time to the arbitration process — assuming that the non-party will be called before the arbitrator at the actual hearing itself as well — and thus is likely to entail a greater burden on the non-party.' "[12] Judge McKenna recognized that the petitioners had made a good case for issuance of the deposition subpoenas, which were directed at the agents who had negotiated the terms of the insurance agreement at issue in the arbitration, noting that if he had the power to enforce the subpoena, he would not hesitate to do so. He concluded, however, the he had no such discretion because the arbitrators lacked the authority under the Federal Arbitration Act to issue deposition subpoenas.

No Non-Party Discovery

Other courts have taken an even more restrictive view of an arbitrator's authority to order discovery under the Federal Arbitration Act, finding that it contains no authorization to order any form of pre-hearing discovery from non-parties. Most recently, in August, Southern District Judge Jed S. Rakoff issued a decision in *Odfjell ASA v. Celanese AG*,[13] denying a motion to compel compliance with both a document production and a deposition subpoena issued by the chief arbitrator presiding over an arbitration. Judge Rakoff focused primarily on the language of §7, which confers power on arbitrators to "summon in writing any person to attend before them … as a witness and in a proper case to bring with him … any book, record, document, or paper which may be deemed material." He reasoned that "[t]he use of the words 'before them' strongly suggests that the power refers only to an evidentiary hearing before the arbitrators." He declined to find any implicit authorization for the power to compel pre-hearing discovery, concluding that had the drafters of the Federal Arbitration Act intended to confer that authority, they would have said so. He also noted that "inasmuch as arbitration is largely a matter of contract, it would seem particularly inappropriate to subject parties who never agreed to participate in the arbitration in any way to the notorious burdens of pre-hearing discovery."

Judge Rakoff's decision in *Odfjell* relies on the U.S. Court of Appeals for the Third Circuit's more extended discussion of this question earlier this year in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*[14] In *Hay*, the Third Circuit found that the language in §7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." It held that "[t]he power to require a non-party 'to bring' items 'with him' clearly apples 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."

Hay expressly disagreed with the "power-by-implication" approach taken by those courts that have found an implicit authority to order pre-hearing discovery, finding instead that by conferring the power to compel attendance at a proceeding, the Federal Arbitration Act's silence regarding pre-hearing authority "implicitly withholds the latter power." The court went on to hold that there was no rationale for looking beyond the plain language of the statute, because its reading, restricting the availability of pre-hearing discovery, was entirely consistent with the goals of the Federal Arbitration Act to resolve disputes in a timely and cost efficient manner. The court suggested that requiring documents to be produced at the hearing, rather than in advance, might streamline the process by discouraging the issuance of large-scale subpoenas upon non-parties.

Hay also addressed the only other Circuit Court decision on the question of pre-hearing discovery. That opinion, issued by the U.S. Court of Appeals for the Fourth Circuit in *COMSAT Corp. v. Nat'l Science Foundation*,[15] followed largely the same analysis as the Third Circuit opinion in *Hay*, finding no authority in the Federal Arbitration Act empowering an arbitrator to issue pre-hearing subpoenas. *COMSAT*, however, left the door slightly open for the issuance of such subpoenas, suggesting, in dicta, that it might be permissible for an arbitrator to order pre-hearing discovery "under unusual circumstances" upon a showing of "special need or hardship." The Third Circuit took issue with this exception, finding no textual basis for a hardship exception, and opting instead for a bright-line rule that arbitrators are entirely without authority to compel third-party pre-hearing discovery.

Although federal courts have adopted divergent views on pre-hearing discovery outside the Second Circuit, until Judge Rakoff's decision on *Odfjell*, the law in the Southern District appeared relatively settled that arbitrators could order pre-hearing document discovery from non-parties, although they could not compel the depositions of those non-parties. *Odfjell's* adoption of the more restrictive view taken by the Third Circuit in *Hay* creates a square conflict within the Southern District regarding the availability of pre-hearing document production, inviting the Second Circuit to resolve what it has acknowledged is an open question concerning the extent to which pre-hearing discovery is ever permissible in an arbitration proceeding.

1. See, e.g., American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule 21; JAMS Comprehensive Arbitration Rules and Procedures, Rule 17.
2. 9 USC §7.
3. 165 F3d 184 (2d Cir. 1999).
4. 685 FSupp. 1241 (SD Fla 1988).
5. The *Stanton* court concluded that it was without authority to interfere with the procedures employed by the arbitration panel, ruling that when arbitrators exceed their authority, the sole remedy available is to vacate their award.
6. 879 FSupp. 878 (ND Ill.1995).
7. 228 F3d 865 (8th Cir. 2000).
8. 885 FSupp. 69 (SDNY1995).
9. See note 8 at 73, citing *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 FRD 42 (MD Tenn 1994).
10. See note 8, quoting *Mississippi Power Co. v. Peabody Coal Co.*, 69 FRD 558, 564 (SD Miss 1976).
11. 2004 WL 1542254 (SDNY July 9, 2004).
12. See note 11, quoting *Procter & Gamble Co. v. Allianz Ins. Co.*, No. 02 Civ. 5480, unpub. slip op. at 4-5 (SDNY Dec. 2, 2003) (Wood, J.). See *In re Brazell v. American Color Graphics, Inc.*, 2000 WL 364997 (SDNY April 7, 2000) (Schwartz, J.).
13. 328 FSupp.2d 505 (SDNY 2004).
14. 360 F3d 404 (3d Cir. 2004).
15. 190 F3d 269 (4th Cir. 1999).