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Protecting the Rights of Non-Parties In Arbitration Discovery

BY BRETT D. JAFFE
AND NATHANIEL P. T. READ

CONSIDER THIS TROUBLING SCENARIO. Counsel represents a corporate client that has been served with a non-party subpoena to produce documents in an arbitration to resolve a complex commercial dispute. The subpoena is signed by an arbitrator chosen by the parties because of his perceived expertise with regard to the legal and business issues at the core of the dispute.

Counsel reviews the subpoena, and immediately realizes that the vast majority of responsive documents in his client's possession are communications between the client and its transactional counsel, core attorney-client communications protected from discovery. Counsel meets and confers with the attorney at whose request the subpoena was issued, to no avail; the adversary demands full compliance and disagrees with counsel's assertion of the attorney-client privilege.

A teleconference with the arbitrator is convened, and the arbitrator proposes an in camera review of the documents as to which the client has asserted the privilege. Counsel agrees, confident that as to these core attorney-client communications, the privilege claim will be upheld.

But to counsel's great surprise, and with no meaningful explanation, the arbitrator dispenses with the privilege claim and orders the production of the vast majority of the disputed documents. Armed with the arbitrator's order, the attorney behind the subpoena demands immediate production, and threatens a contempt proceeding and a motion for sanctions and costs if counsel fails to comply.

The client is rightfully troubled. If the documents are produced, the privilege may be waived, both in this matter and any other; if the client refuses, it risks the public embarrassment and potential penalties of a contempt proceeding. What should counsel do now?

With the increased use of arbitration to resolve sophisticated business disputes and a concomitant increase in non-party arbitration discovery, scenarios like this one have become more and more common. This can pose unique problems for counsel and clients because, although the non-party did not consent to appear before the arbitration forum and had no role in the selection of the arbitrator (or arbitration panel), the non-party is very much at the mercy of that forum.


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The arbitrator, who may have never practiced law, is empowered to issue subpoenas and rule on objections as to the breadth of the subpoena and the burden of compliance, as well as to adjudicate privilege claims. Thus, a non-party may be left with an unenviable choice: comply with an erroneous decision (and potentially waive privilege or work product protection) or refuse to do so and face contempt proceedings with potential sanctions and reputational harm.

Fortunately, there are steps counsel can take both upon receipt of the non-party subpoena and following an adverse decision by an arbitrator to protect the non-party's rights in the face of an arbitration discovery process gone awry.

Ensure Subpoena Is Valid

As a threshold matter, counsel should ensure that the non-party subpoena complies with applicable law.

An arbitration subpoena that seeks pre-hearing document discovery or deposition testimony may be facially invalid. Section 7 of the Federal Arbitration Act (FAA) permits arbitrators only to summon witnesses to a hearing and bring evidence with them. 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."[1] Under New York state law, CPLR 7505 similarly permits "an arbitrator and any attorney of record in the arbitration proceeding" to issue a subpoena, but only subpoenas that seek "evidence for the hearing or trial of the dispute."[2]

In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, the Second Circuit interpreted the FAA to authorize only document production by non-parties in connection with the subpoena of a "testifying witness."[3] Thus, an arbitration subpoena seeking only the production of documents without hearing testimony is facially invalid and subject to a motion to quash.[4]

The same authority supports quashing arbitration subpoenas seeking a pre-hearing deposition. Because FAA §7 only authorizes an arbitrator to "summon in writing any person *to attend before them* or any of them as a witness," non-parties cannot be compelled to testify outside of arbitration hearings under the FAA.[5]

However, non-parties should be careful to note that they can be compelled to produce documents or give testimony at a hearing before an arbitrator or a panel prior to the full merits hearing.[6] As a result, these deficiencies can be cured if the arbitration panel is willing to hold hearings other than the full merits hearing and the subpoena requires document production or testimony at such a hearing.

If such testimony is obtained, however, counsel for a non-party should make clear that the client will not appear again at the merits hearing, as a non-party should not be burdened by testifying twice in an arbitration.

Service Must Be Proper

Service of arbitration subpoenas must comply with Rule 45 of the Federal Rules of Civil Procedure.

Arbitration subpoenas must be "served in the same manner as subpoenas to appear and testify before the court" and can only be enforced in "the United States district court for the district in which the arbitrators, or a majority of them, are sitting."[7] Rule 45(b)(2) permits a subpoena to be served within the district of the issuing court, or within 100 miles of the district, "or at any place within the state" if a state statute or rule permits statewide service of a subpoena. Accordingly, an arbitration subpoena generally must be served within the district in which the arbitrator is located, or within 100 miles of the arbitration, or within the state in which the arbitration is taking place (if statewide service is permitted under state law).

The Second Circuit addressed this issue in *Dynegy Midstream Servs., LP v. Trammochem*.[8] In *Dynegy*, an arbitration panel sitting in New York issued a subpoena requiring a non-party located in Texas to produce documents in Texas. The non-party refused to

BRETT D. JAFFE *is a partner and* NATHANIEL P.T. READ *is counsel at Cohen & Gresser. Mr. Jaffe and Mr. Read are members of the firm's litigation and arbitration practice group.* MATTHEW V. POVOLNY, *a litigation associate with the firm, assisted with the preparation of this article.*

comply, and the party requesting the subpoena filed a motion to compel. The district court ordered the non-party to comply with the subpoena. The Second Circuit reversed, holding that Rule 45 imposes "clear territorial limitations" with which the subpoena had not complied.[9]

Seek Immediate Judicial Review

Once the non-party is subject to an arbitrator's discovery order, counsel should move quickly to protect the client's rights. It is critical to remember that the arbitrator's order, even in the above hypothetical order compelling the production of obviously privileged documents, is binding on the non-party under state and federal law.[10] In the first analysis, it appears that the non-party must choose between compliance with an erroneous arbitrator decision (and potential waiver of a privilege)[11] or face contempt proceedings. Fortunately, prompt judicial review may be available.

Counsel for the non-party may always seek review of an arbitrator's decision in state court by commencement of an action for injunctive relief.[12] However, for any number of strategic and practical reasons, counsel may wish instead to seek relief in federal district court.

Section 7 of the FAA provides that an arbitration subpoena may be enforced in the federal district court "for the district in which the arbitrators, or a majority of them, are sitting."[13] At first blush, this provision of the FAA would appear to create federal subject matter jurisdiction because motions to quash subpoenas issued under the FAA arise under that statute.

However, courts have consistently held that the FAA ordinarily does not itself confer federal jurisdiction.[14] In *Stolt-Nielsen SA v. Celanese AG*, the Second Circuit expressly held that "parties invoking Section 7 must establish a basis for subject matter jurisdiction independent of the FAA."[15] Thus, a non-party moving to quash an arbitration subpoena in federal court must establish a basis for subject matter jurisdiction independent of the FAA itself.

The most effective means of establishing independent subject matter jurisdiction has been to "look through" to the underlying arbitration as the source for jurisdiction. In other words, if the underlying arbitration could have been brought in federal court absent the arbitration agreement, a motion to quash or other proceeding relating to that arbitration may be brought in federal court.

For example, in *Stolt-Nielsen*, the Second Circuit found jurisdiction under 28 U.S.C. §1333 (maritime jurisdiction) because "the shipping contracts at issue in the underlying arbitration…fit squarely within the definition of a maritime contract."[16] Similarly, there will be federal subject matter jurisdiction where there is diversity between the underlying parties to the arbitration, and the arbitration itself satisfies the amount in controversy requirement. Note that "look through" diversity jurisdiction can be found even if the non-party would otherwise not be diverse to the parties in the arbitration.

The next procedural hurdle the non-party must overcome is the presumptive prohibition on the interlocutory review of arbitrator orders. Typically, arbitrator decisions will only be reviewed upon application of a party upon completion of the arbitration proceeding.

But such "end of the day" review is of little benefit to the non-party subject to a discovery order. Fortunately, the collateral order doctrine provides means for a non-party to obtain judicial review of an arbitrator's discovery order as to non-parties, especially to the extent such an order involves meaningful privilege determinations.

The collateral order doctrine generally permits district court review of interlocutory orders where the order in question (1) "conclusively determined the disputed question," (2) "resolve[d] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment."[17]

In *Odfjell ASA v. Celanese AG*, the court held that a non-party's challenge of an arbitrator's privilege decision met the requirements of the collateral order doctrine. The court found that a non-party has no ability to appeal the arbitrator's privilege determination after the arbitration is complete as it has no standing to challenge the final award and the harm to the non-party in waiving the privilege will have already occurred. Therefore, an arbitrator's final decision resolving a privilege issue wholly separate from the merits of the underlying arbitration may be subject to immediate judicial review.

Finally, it is helpful to note that the district court's interlocutory review of the arbitrator's decision on the non-party subpoena should be conducted de novo. For the non-party seeking relief, this is far better than the typical review of an arbitrator's decision, which will only be reversed by the court upon a finding of manifest disregard of the law.[18]

Four Practice Points

Considering the increase in arbitration discovery, it is critical that counsel consider the particular issues involved in arbitration subpoenas. The following are four practice points for counsel handling these subpoenas.

• Carefully review the subpoena. Parties issuing arbitration subpoenas often rely on form subpoenas used in court litigation. As a result, the subpoena may improperly request only the production of documents or a deposition, without a hearing. In addition, remember that arbitration subpoenas are served as legal process, and be mindful of the geographic limitations on arbitration subpoenas.

• Clearly articulate the grounds for assertions of attorney-client privilege and the work product doctrine, and provide counsel and the arbitrator with the key legal authority. Non-parties should also seek to address these issues with counsel or the arbitrator early in the process, to avoid hasty and ill-informed decisions by the arbitrator.

• Create a clear record of the arbitrator's decision on discovery matters. Consider requesting that preliminary hearings or discovery arguments be transcribed by a court reporter. To the extent possible, non-parties should memorialize the content of and basis for the arbitrator's decision, as well as the finality of the arbitrator's decision. These steps will prove crucial if judicial review of the arbitrator's decision proves necessary.

• Learn the procedural steps necessary to seek relief from an arbitrator's decision in the federal or state courts. For example, in the Southern District of New York, a non-party must initiate a miscellaneous action, to be heard by the Part I judge. In New York state courts, a non-party must commence an action for injunctive relief.

Conclusion

Counsel for individuals or entities subject to arbitration subpoenas have available to them several different means of protecting their clients. Counsel seeking non-party discovery should be careful to follow the dictates of the FAA and applicable state law to ensure that their subpoenas can be upheld if challenged in court. And all participants should be aware that arbitrator decisions, particularly as to critical issues of privilege, may be subject to review in court before the arbitration hearing is complete, and should consider whether they can reach reasonable agreements without the need for collateral litigation.

1. 9 U.S.C. §7.
2. CPLR §7505; see also McKinney's CPLR 7505 (Practice Commentary).
3. 549 F.3d 210, 216-17 (2008); see also *In re Proshares Trust Secs. Litig.*, No. 09 Civ. 6935(JGK), 2010 WL 4967988, at *1 (S.D.N.Y. Dec. 1, 2010) (quashing subpoena seeking documents from non-party without also seeking testimony at a hearing).
4. This result is the same under the CPLR, which does not permit arbitration subpoenas seeking pre-hearing document discovery from a non-party. See *CSP Techs. Inc. v. Hekal*, 869 N.Y.S.2d 449, 450 (1st Dept. 2008).
5. 9 U.S.C. §7 (emphasis added); see *Odfjell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) .
6. See *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577-79 (2d Cir. 2005).
7. 9 U.S.C. §7.
8. 451 F.3d 89 (2d Cir. 2006).
9. Id. at 96.
10. CPLR §7505; 9 U.S.C. §7.
11. The production of privileged documents to a third-party has been repeatedly held to constitute waiver to anyone else. See *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); see also *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302-07 (6th Cir. 2002).
12. See CPLR §7502.
13. 9 U.S.C. §7.
14. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); see also *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 267 (2d Cir. 1996).
15. 430 F.3d 567 (2d Cir. 2005).
16. Id.; see *Amgen Inc. v. Kidney Ctr. of Delaware Cnty., Ltd.*, 95 F.3d 562 (7th Cir. 1996); see also *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1268 (2009).
17. *Odfjell ASA v. Celanese AG*, 380 F. Supp. 2d 297, 301 (S.D.N.Y. 2005).
18. See 9 U.S.C. §7; see also *In re Grand Jury Subpoena Duces Tecum dated September 15, 1983*, 731 F.2d 1032, 1036-38 (2d Cir. 1984) (interlocutory review conducted de novo); see also *Wien & Malkin LLP v. Helmsley-Spear Inc.*, 6 N.Y.3d 471, 479 (2006) (final arbitrator decision reviewed for "manifest disregard").

COHEN & GRESSER LLP
800 Third Avenue
New York, NY 10022
Ph 212 957 7600
Fax 212 957 4514
www.cohengresser.com