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Compelling Third-Party Discovery In New York Arbitration

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In arbitration, as in other methods of dispute resolution, third parties often possess valuable information crucial to the dispute. Third parties, however, are not bound by the parties' arbitration agreement, and so compelling documents or testimony from third parties is a matter of law in the arbitral seat.

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Section 7 of the Federal Arbitration Act (FAA) provides that "arbitrators … may summon in writing any person to attend before 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." Ostensibly, this provision authorizes arbitrators to compel document production from "any person" during a hearing. However, parties and practitioners seeking third-party

discovery must consider three key questions.

First, U.S. courts are split on whether third-party discovery can be obtained *before* a hearing. If the relevant law requires arbitrators to call third parties to a hearing in order to obtain documents from them, an additional question arises about whether third parties should be called to the evidentiary hearing or a special hearing. Depending on these requirements, practitioners may need to consider the most efficient way to organize the required hearing(s).

Second, given the procedural rules governing the service of arbitral summons in the United States, practitioners need to consider the appropriate place of compliance with the summons to third parties.

Third, and finally, practitioners should be conscious of jurisdictional limitations on whether a given court can actually enforce an arbitral summons.

This article addresses New York law with respect to these three considerations and provides practitioners with some strategic tips for obtaining third-party discovery in arbitrations seated in New York.

Compelling Third-Party Discovery Before the (Evidentiary) Hearing

The Second Circuit has held that §7 of the FAA does *not* authorize arbitrators to compel "pre-hearing" discovery from a third party. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London* (2005). That is, if parties wish to obtain documents or testimony from a third party in New York, they cannot do so unless that party is called to testify at a hearing.

However, the Second Circuit has suggested a way that parties can still obtain third-party discovery in advance of the evidentiary hearing—arbitrators can hold a special hearing for purposes of obtaining documents or testimony from a third party. *Stolt-Nielsen Transp. Group v. Celanese AG* (2005).

Holding a separate hearing for the sake of collecting third-party discovery, or adding third parties as witnesses to the evidentiary hearing solely for the purpose of obtaining documents from them, can lead to considerable additional costs and raise several logistical concerns. If the arbitration is seated in New York, and substantial third-party discovery is required, the best approach may be for the parties to confer among themselves, the relevant third parties, and the tribunal to identify an efficient way forward. This approach will minimize the costs and other headaches associated with arranging the necessary hearings.

For example, the parties may wish to consolidate all third-party discovery to one preliminary hearing, as opposed to scheduling different hearings for different third parties. In addition, depending on the needs of the case, the parties may agree to schedule the preliminary and evidentiary hearings close together (thereby minimizing travel costs). Alternatively, the parties may agree to schedule the hearings far enough apart to allow the parties and the tribunal to properly consider information obtained from third parties in advance of the evidentiary hearing.

The parties may also agree to prepare a concise, joint list of questions for the witness at the hearing in order to avoid dilatory and redundant examinations from either party. To the extent that the parties have any control over the relevant third parties, they could also agree to produce certain documents from third parties without the need for arbitral summons. Lastly, third parties themselves may wish to avoid travel and other burdens and voluntarily produce certain documents.

The parties therefore have great flexibility in organizing their arbitration in a manner that mitigates the challenges of the hearing requirement under New York law.

Drafting Arbitral Summons

Practitioners representing parties in arbitrations seated in New York should be aware that the tribunal's power to compel discovery is subject to a geographical limitation. Section 7 of the FAA provides that summons should be served "in the same manner as subpoenas to appear and testify before the court." In the United States, Rule 45 of the Federal Rules of Civil Procedure governs the process by which subpoenas are served.

Rule 45 provides that "a subpoena may be served at any place within the United States." Rule 45(b)(2). Third parties can therefore be

served with summons anywhere in the United States, regardless of where the arbitration is seated.

However, Rule 45 places a territorial limitation on the *place of compliance* with the summons. Under the rule, the tribunal may only summon a third party to appear for testimony within either (1) a 100 miles of where the person resides, is employed, or regularly transacts business in person; or (2) the state in which the person resides, is employed, or regularly transacts business in person if the third party would not incur substantial expense. Rule 45(c)(1). Similarly, the summons may only require a third party to produce documents, electronically stored information, or tangible items that constitute or contain evidence at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person. Rule 45(c)(2).

Properly drafted arbitral summons, therefore, will identify a place of compliance that is consistent with the above requirements. In reality, depending on the location of the hearing, the "home base" of counsel, parties, and the arbitrators, the location and number of the relevant third parties that need to be served with summons, this requirement can exponentially increase parties' logistical and cost considerations.

Enforcing the Summons

Finally, practitioners seeking to enforce arbitral summons must consider three things:

- Whether courts in New York will have personal jurisdiction over the third party
- If seeking to enforce in federal court, whether there is an independent basis for the court's subject matter jurisdiction over the dispute
- Whether it would be safer to enforce in state court given the state courts' more expansive view of §7

First, the court compelling the third party to produce documents must have personal jurisdiction over that party. *Ping-Kuo Lin v. Horan Capital Mgt.* (2014). Practitioners should carefully consider the third party's circumstances in light of the requirements to establish personal jurisdiction before seeking to enforce arbitral summons in a New York court.

Second, the court must have subject matter jurisdiction over the dispute. The U.S. Supreme Court has conclusively held that the FAA does not, by itself, create federal-question jurisdiction. *Vaden v. Discover Bank* (2009); *Moses H. Cone Memorial Hospital v. Mercury Construction* (1983). Before seeking to enforce a summons in federal court in New York, the enforcing party must first identify the *independent* basis for federal jurisdiction over the dispute.

However, because U.S. state courts are courts of general jurisdiction, parties are saved from the additional step of identifying an independent basis for the court's jurisdiction over the dispute if they seek to enforce in state court.

Third, New York state courts allow the "deposition of nonparties … in FAA arbitration where there is a showing of 'special need or hardship,' such as where the information sought is otherwise unavailable." *ImClone Sys. v. Waksal* (2005); *Matter of Roche Molecular Sys.* (2018). That is, state courts will authorize discovery *before* a hearing as long as the enforcing party can show a special need or hardship. This is in contrast to the Second Circuit, which only authorizes discovery if the third party is called to a hearing.

Depending on the needs of the arbitration, this difference between New York state and federal courts may mean that state courts are a more attractive venue for enforcing summons, provided that they have personal jurisdiction over the third party.

Productive conversations with opposing counsel, the tribunal, and the relevant third parties can help parties obtain third-party discovery in an efficient manner. When that is not possible, parties should balance the value of obtaining the relevant third-party discovery against the challenges of meeting the above requirements.

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