International Arbitration

Enforcing Third Party Arbitral Subpoenas in the U.S. - Where does the arbitrator sit?

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Third party discovery may be important to the prosecution or defense of a party's case in international arbitration. Understanding the process to compel documents or attendance at an evidentiary hearing is crucial to ensure that the evidence needed from the third party is obtained.

Although U.S. law is fairly uniform for compelling non-party witnesses to attend an arbitral hearing before arbitrators, it is less settled for compelling discovery from non-parties for use in a U.S. seated arbitration *prior* to a hearing. It is important to understand what circuits have expressly endorsed third party subpoenas and where to enforce the subpoena when a party fails to comply. A recent Ninth Circuit Court of Appeals decision broadened the scope of where an arbitrator "sits."

Arbitration in the U.S. is governed both by federal and state law. The Federal Arbitration Act (FAA) is the main source of U.S. arbitration and is applicable in the state and federal courts of all U.S. jurisdictions. Section 7 of the FAA provides that arbitrators may summon in writing a witness "*to attend before them*" and "*bring with him or them any…document… which may be deemed material as evidence in a case*". If the person refuses or neglects to obey, "*upon petition the United States court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance*" or hold the person in contempt.

Although Section 7 is located in Chapter 1 of the Federal Arbitration Act (which some courts have argued addresses domestic arbitrations), a recent Federal Court of Appeals in the Ninth District held that "*Section 7 is a nonconflicting provision in Chapter 1*", and thus applied to international arbitration as well.

Whether a party can subpoena documents or testimony before a hearing depends on the circuit. The Sixth and Eighth Circuit Courts have held that Section 7 authorizes subpoenas for pre-hearing documents disclosure from non-parties. The Fourth Circuit has recognized discovery subpoenas for a "special need". The Second, Third, and Eleventh Circuits have interpreted Section 7 of the FAA as allowing only when the non-party appears at a hearing before arbitrators. The Court of Appeals for the remaining circuits have not yet addressed the issue.

Considering the third party subpoena may be located in a jurisdiction outside of the *seat* of the arbitration, enforcement of the arbitration subpoena may be a hurdle. Section 7 provides that a party may petition a "*United States district court for the district in which such arbitrators, or a majority of them, are sitting*" to compel the attendance or compliance of such person. The Ninth Circuit Court of Appeals in *Day v. Orrick* held that the seat of the arbitration is not the sole place of compliance, and that an arbitrator may "sit" in more than one location.

If followed by other circuit courts, the decision could indicate that parties may enforce third party subpoenas outside of the seat of the arbitration. Indeed, depending on how broadly it is applied, the decision may encourage U.S. federal courts to enforce orders issued in arbitration more generally.

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