THE
NATIONAL LAW REVIEW

How to Enforce an Arbitration Subpoena: Jurisdiction and Venue Basics

Monday, February 11, 2019

The Federal Arbitration Act ("FAA") §7 (9 U.S.C. §7) enables arbitrators to "summon ... 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 [document] which may be deemed material as evidence in the case." (We do not address here the myriad issues concerning the manner of implementation of that authority.) And the statutory mechanism for enforcement against a reluctant witness is as follows:

"[I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district for which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

Id. Well, that looks pretty straightforward. But U.S. law regarding the limited subject matter jurisdiction of its federal courts, coupled with Congress's omission to provide for such jurisdiction in Chapter 1 of the FAA, makes for a gaggle of issues at the threshold of enforcing an arbitral subpoena in connection with a domestic arbitration.

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Generally, getting through the federal courthouse door in order to commence such an enforcement proceeding presents issues, including (1) identifying which federal court's door to approach, and (2) establishing that court's subject matter jurisdiction over the enforcement proceeding. As a practical matter, one must first identify the federal jurisdiction in which the arbitrators, or a majority of them, "are sitting." And then one must credibly allege bases for that court's subject matter jurisdiction. In the case of a non-domestic arbitration, where FAA ch. 2 applies, subject matter jurisdiction is established by statute. *See* FAA § 203 (9 U.S.C. §203). But in the case of a domestic arbitration, as to which only FAA ch. 1 applies, a basis for subject matter jurisdiction -- diversity jurisdiction (28 U.S.C §1332), as a practical matter -- must exist independently.

In Washington National Insurance Co. v. Obex Group LLC, et ano., No. 7:18 -CV-09693-VB, 2019 U.S. Dist. LEXIS 9300 (S.D.N.Y. Jan. 18, 2019), the court considered such issues in the context of motions by two subpoenaed witnesses for reconsideration of their applications to dismiss an enforcement proceeding based principally on the contention that the District Court did not have subject matter jurisdiction. The respondent-witnesses also moved to quash the arbitral subpoenas in question. The court denied those motions and granted the petitioner's application to enforce arbitral summonses of the witnesses to appear with documents at a hearing in New York.

1. Venue: Where Are the Arbitrators "Sitting"

FAA §7 in effect instructs that the proper venue for a petition to enforce an arbitral subpoena is "the United States district court for the district for which such arbitrators, or a majority of them, are sitting...."[1] There is no statutory definition of "sitting" for those purposes, and the respondent-witnesses in *Washington National* argued

that the court should look to the arbitrators' respective business addresses to make that determination.

The court rejected that argument and in effect defined the "sitting" location as the place at which the arbitrators specified the subpoenaed witness should appear for a hearing. 2019 U.S. Dist. LEXIS 9300 at *13-*14. In most cases that is likely to be the "place" of arbitration designated in the arbitration agreement governing the arbitral proceeding. However, arbitrators are not constrained to conduct hearings solely at that place, but rather may do so elsewhere, generally with the agreement of the arbitration parties, but also in the discretion of the arbitrator(s). *See*, *e.g.*, American Arbitration Association Commercial Arbitration Rules R-11; *cf. id*. R-24. Consistently, the *Washington National* court pointed out that "nothing in Section 7 requires an arbitration panel to sit in only one location." 2019 U.S. Dist. LEXIS 9300 at *13-*14.

Indeed, arbitrators will strive to specify a hearing locale at or about the place of residence or business of the summoned witness, so as to ensure the enforceability of a court order of compliance by the witness with an arbitral subpoena issued elsewhere. In the instant case, the court noted that the arbitration panel in question had already "summoned a nonparty to appear for a hearing in Philadelphia, and a district court in the Eastern District of Pennsylvania issued an order on October 1, 2018 enforcing that summons." *Id*. at *13, *citing Bankers Conseco Life Ins. Co. v. Egan-Jones Ratings Co.*, 2:18-MC-0166-JS (E.D.Pa. Oct. 1, 2018).

The subpoenas in the proceeding at bar required the respondent-witnesses to appear at a hearing in New York City. Hence, the S.D.N.Y. court had enforcement authority and was the correct venue for the relevant petition. *Id.* at *14.

2. Diversity Jurisdiction: Which Parties are Relevant?

Regarding jurisdiction, the respondent-witnesses in *Washington National* argued that the court should adjudicate diversity jurisdiction by looking through the Section 7 petition to determine whether the parties to the underlying arbitration were diverse. The court rejected that argument, holding that it should consider the citizenships of the parties to the controversy actually before the court, rather than the citizenships of the parties to a "different" controversy. *Id.* at *8-*9.

In doing so, it distinguished the means of determining diversity jurisdiction with regard to petitions under §4 and §10 of the FAA. For purposes of establishing such jurisdiction, the parties to either a petition to compel arbitration (FAA §4) or a petition to vacate an arbitral award (FAA §10) are different than the parties to a petition to enforce an arbitration subpoena. The parties to the former petitions are the parties to the claims and defenses in arbitration, while the parties to the latter are one of the arbitrating parties and a non-party witness.

The court determined that the parties before it were indeed diverse.

3. Diversity Jurisdiction: Amount in Controversy

Diversity jurisdiction also requires a plausible allegation that "the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs. . . ." But how does one determine the amount in controversy with regard to a proceeding to enforce an arbitral witness subpoena?

In that regard, the court in effect had to look through the petition to estimate it's effect on the underlying arbitration. The court noted that "the requirement is that there be a reasonable probability of an amount in controversy exceeding [sic] jurisdictional amount if an amount can be ascertained pursuant to some realistic formula." *Id.* at *11, *citing Moore v. Betit*, 511 F.3d 1004-1006 (2nd Cir. 1975). Accordingly, the court sought to determine "the value of the consequences which may result from the litigation" before it. *See id.* It reasoned that if documents produced in compliance with the subpoena pertained to only a small fraction of the $134 million in damages sought in the underlying arbitration, the "amount" requirement would be satisfied. The court found that responsive documents would indeed have such value because the arbitration panel had "already determined that the summonses seek relevant information..." *See id.*

Thus, the jurisdictional amount requirement was deemed satisfied.

In sum, the jurisdiction and venue basics of judicial enforcement of an arbitral subpoena are navigable with a bit of foreknowledge.

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[1] For this discussion, we use the word "venue" in its generic sense. However, the statutory language concerning the forum selection for a Section 7 petition is analogous to that in Fed. R. Civ. P. 37(a)(2) concerning the "appropriate court" for a motion to compel disclosure by a non-party.