Restrictions on Obtaining Testimony and Documents from Non-Parties Under the Federal Arbitration Act

By Kathleen A. Roberts

Recent interpretations of the Federal Arbitration Act (FAA) impose significant restrictions on the ability of litigants to obtain testimony and documents from non-parties in arbitrations governed by the FAA. These include restrictions on the ability to obtain documents and testimony prior to the arbitration hearing, and territorial limitations on the reach of arbitral subpoenas for pre-hearing testimony and/or documents and for appearance at the arbitration hearing itself. Differing interpretations of the FAA among a number of circuits, and the absence of case law in many circuits, create a virtual minefield for parties and arbitrators and for non-parties responding to arbitral subpoenas. This article summarizes the existing case law and discusses the practical issues posed by current interpretations of the FAA.

Limitations on Discovery

Section 7 of the FAA provides in relevant part that "the arbitrators * * * or a majority of them, 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] The FAA is silent, however, regarding the arbitrator's power to compel testimony or production of documents prior to an arbitration hearing.

A number of recent federal court decisions have addressed this issue, resulting in the application of different rules and much uncertainty, depending on the federal circuit in which the arbitration takes place or in which the non-party is located.

The approach to non-party discovery taken by the Second and Third Circuits is the most restrictive. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,[2] the Third Circuit held that the FAA does not grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents in pre-hearing discovery. The court found that "[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing."[3]

Noting that a "hallmark" of arbitration is a limited discovery process, the court observed that "[t]he requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large-scale subpoenas upon non-parties. This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. Under a system of pre-hearing document production, by contrast, there is less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration."[4]

In a concurring opinion, Judge Chertoff observed that arbitrators are not "powerless to require advance production of documents when necessary to allow fair and efficient proceedings," because Section 7 permits the arbitrators to compel a third party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. Judge Chertoff noted that "[i]n many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence."[5]

Judge Chertoff further observed:

> To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents. But that is not necessarily a bad thing, since it will induce the arbitrators and parties to weigh whether advance production is really needed. And the availability of this procedure within the existing statutory language should satisfy the desire that there be some mechanism "to compel pre-arbitration discovery upon a showing of special need or hardship." *Comsat Corp. v. Nat'l. Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).[6]

The Second Circuit adopted the *Hay* approach and its reasoning in *Life Receivables Trust v. Syndicate 102*,[7] holding that Section 7 "does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding." In accordance with its prior decision in *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*,[8] the Second Circuit approved the procedure described by Judge Chertoff in *Hay*. The *Stolt-Nielsen* court held that Section 7 "unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel," and that "'[n]othing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing'."[9] The *Stolt-Nielsen* court further noted that Sec-

tion 7's reference to hearings "before [the arbitrators] *or any of them*" suggests that the provision authorizes the use of subpoenas at preliminary proceedings even in front of a single arbitrator, before the full panel "hears the more central issues."[10]

The Fourth Circuit has adopted an interpretation of the FAA similar to that of the Second and Third Circuits, but has held that an arbitrator may compel a non-party to provide pre-hearing discovery "under unusual circumstances" and upon "a showing of special need or hardship."[11]

In contrast to the Second, Third and Fourth Circuits, a number of courts in other circuits have found that the FAA permits pre-hearing document discovery, and may permit depositions of non-parties.

The analysis supporting pre-hearing document discovery is typified by the Eighth Circuit's decision in *Security. Life Ins. Co. of Am. v. Duncanson & Holt*, in which the court concluded that "[a]lthough the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."[12] The Eighth Circuit and other courts adopting this approach have found that although the statute by its terms permits arbitrators to compel non-parties only to "attend before them," the power to compel production of documents at a hearing implies the lesser power to require the documents to be produced in advance of the hearing. Other courts have also pointed out that an arbitrator's power to compel documents places little additional burden on the non-party, because the FAA explicitly grants the arbitrator authority to demand documents at the hearing, and the documents need be produced only once.[13]

A number of courts that permit pre-hearing document discovery draw a sharp distinction between pre-hearing document discovery and depositions, noting that "the power to require pre-hearing appearances by witnesses in effect would increase the burden on non-parties, by creating the potential to require them to appear *twice,* both for discovery depositions and then for testimony at the hearing itself."[14] Accordingly, the "power to compel a deposition cannot be seen as simply an implied power to control the timing, in the interests of efficiency, of a production the arbitrators concededly have the power to order, but constitutes an additional power not granted by the statute."[15]

There is no circuit court authority on these issues outside the Second, Third, Fourth, Sixth and Eighth Circuits.

Territorial Limitations

Even where the hurdles of statutory authority for pre-hearing discovery can be overcome, counsel may face significant territorial limitations on the subpoena power of the arbitration tribunal that do not exist in federal litigation.

FAA Section 7 states that an arbitrator's summons "shall be served in the same manner as subpoenas to appear and testify before the court." Section 7 also provides that the district court in the district in which the arbitrators are sitting may enforce such a summons by compelling attendance or punishing a non-attendee 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."

Service of subpoenas to appear before the federal courts and enforcement of those subpoenas is governed by Federal Rule of Civil Procedure 45. Rule 45(b)(2) provides, with limited exceptions not applicable here, that a subpoena may be

> served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena.[16]

Accordingly, a non-party cannot be subpoenaed for trial outside the applicable territorial limit.[17] However, the federal rules do provide a procedure for obtaining the testimony and documents of non-parties outside the territorial limits. Under the familiar provisions of Federal Rule 45(a)(3)(B), an attorney authorized to practice in the court in which a trial is being held may issue and sign a subpoena on behalf of a court for a district in which a deposition or production is to take place. The subpoena has the case name and number of the case pending before the court where the trial is to take place, but is enforced by the district court for the district in which the deposition is to take place.

A recent decision of the Second Circuit has effectively held that Rule 45(a)(3)(B) procedures for obtaining evidence from non-parties located outside the territorial limits of subpoena power are unavailable in arbitration. In *Dynegy Midstream Servs. v. Trammochem*,[18] the Court of Appeals held that the district court in New York lacked jurisdiction to enforce a subpoena issued by a New York arbitration panel requiring production of documents in Texas. The court held that the Federal Rules governing subpoenas to which Section 7 of the FAA refers "do not contemplate nationwide service of process or enforcement."[19] In addition, because Section 7 "explicitly confers the authority to issue subpoenas only upon the arbitrators," neither the parties to an arbitration nor their counsel may employ this provision to subpoena documents or witnesses.[20] Most importantly, the court expressly *rejected* the reasoning of *Amgen Inc. v. Kidney Center of Del. County, Ltd.*,[21] where the district court

enforced an arbitration subpoena against a distant non-party by permitting an attorney for a party to the arbitration to issue a subpoena that would be enforced by the district court in the district where the non-party resided, as provided in Fed. R. Civ. P. 45(a)(3)(B).[22]

In contrast to the Second Circuit, the Eighth Circuit held in *Security Life Ins. Co. of Am. v. Duncanson & Holt* that an arbitrator's subpoena for the production of documents by a non-party does not require compliance with Rule 45(b)(2)'s territorial limit because "the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel."[23]

Faced with decisions imposing territorial limitations on the ability to obtain testimony and documents from non-parties, some practitioners and arbitrators have adopted the practice of convening a pre-merits hearing before the arbitral panel or a member of the panel where the non-party is located. This practice is arguably supported by the language of Section 7 that permits arbitrators to summon a person to appear "before them or any of them," without expressly limiting the appearance to the arbitral forum, and by the pre-merits hearing procedure authorized by the Second and Third Circuits in *Hay* and *Stolt Nielsen*.

At least one court has upheld a subpoena requiring a non-party to appear and testify before a relocated tribunal. In *In re National Financial Partners Corp. and William Corry*,[24] a district judge in the Eastern District of Pennsylvania, relying on *Hay*, denied a motion to quash a subpoena issued in connection with a Pennsylvania arbitration, calling for a non-party to appear before the arbitrator for a pre-merits hearing in Florida.[25] However, in a recent case from the Northern District of Illinois, the judge refused to enforce subpoenas issued by an arbitration panel in connection with an arbitration being conducted in Chicago that called for oral testimony and the production of records before a member of the arbitration panel at a hearing in San Francisco, California.[26] The court based its decision on the provisions of Fed. R. Civ. P. 45(a)(2)A) and (b)(2), and agreed with the holding of the Second Circuit in *Dynegy*.[27] In another case addressing a variant of this practice, an Indiana appellate court refused to enforce a subpoena issued by the arbitral panel for an arbitration to be conducted in New York City that required a non-party to appear at a preliminary hearing in Indiana before one of the panel members and to produce certain business records.[28] The non-party refused to comply and the party seeking the documents asked an Indiana trial court to enforce the subpoena based upon an Indiana law permitting a court to order testimony or production of documents to assist tribunals and litigants outside the state. The trial court ordered the non-party to comply, but the Indiana Court of Appeal reversed, holding that the state law was preempted by the FAA, and that the subpoena was improper based upon the court's reading of the decisions in *Hay*, *Life Receivables* and *Dynegy*.

State Court Alternatives?

In contrast to the FAA, some state statutes expressly permit non-party discovery in arbitration, including those states, such as New Jersey, that have adopted the Revised Uniform Arbitration Act.[29] In New York, an arbitrator or attorney of record to an arbitration is authorized to issue subpoenas to non-parties, whether *ad testificandum* or *duces tecum*,[30] although it is unclear whether this subpoena power extends to pre-hearing discovery.[31] A court may order disclosure "to aid in arbitration" pursuant to N.Y. CPLR 3102(c), although court-ordered discovery is not available in arbitration proceedings "except under extraordinary circumstances."[32] With respect to territorial limitations, some states have procedures that permit a litigant to obtain a court order requesting the assistance of another state in obtaining documents and/or testimony.[33]

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*,[34] the Supreme Court held that in arbitrations otherwise subject to the FAA, parties may agree to the application of state arbitration procedures as long as they do not "undermine the goals and policies of the FAA."[35]

Several recent cases demonstrate that it is at best uncertain whether and to what extent limitations on non-party discovery and/or territorial limitations under the FAA can be overcome by adopting or using the provisions of state law.

In New York, the First Department has adopted an interpretation of the FAA that is more liberal than that adopted by the Second and Third Circuits. In *ImClone Systems Incorporated v. Waksal*,[36] a case decided prior to *Life Receivables*, the First Department upheld a New York Supreme Court order directing depositions of non-parties pursuant to a state statute in aid of an arbitration expressly governed by the FAA. The court held that "[w]hile it is an open question in the Second Circuit whether prehearing nonparty depositions are authorized under the FAA, and there is substantial federal authority that they are not, in the absence of a decision of the United States Supreme Court or unanimity among the lower federal courts, we are not precluded from exercising our own judgment in this matter."[37] Citing the Fourth Circuit's decision in *COMSAT*,[38] the court held that "[w]e subscribe to the view that depositions of nonparties may be directed in FAA arbitration where there is a showing of 'special need or hardship,' such as where the information sought is otherwise unavailable." The court found that "special need or hardship" had been demonstrated in that case "since the crucial issue in plaintiff's attempt to vitiate the agreement is its claim that it was induced by fraud, and the nonparties defendant seeks to depose are the officers and directors who took part in its drafting and negotiation."[39]

However, in *ConnecU, Inc., et al. v. Quinn Emanuel*,[40] an unpublished New York Supreme Court decision decided after *Life Receivables*, the court declined to enforce *subpoenas*

duces tecum issued to non-parties located out of state by a New York arbitration panel in an arbitration governed by the FAA. The court held that "even under the more liberal standards enunciated by the First Department," the petitioners had not met their burden of establishing special need or hardship necessary to justify granting their motion to compel.[41] Moreover, citing *Dynegy*, the court also held that it lacked the power to compel a non-party located out of state to testify at an arbitration in New York.[42] Interestingly, the court suggests that discovery from out-of-state non-parties could be obtained pursuant to N.Y. CPLR 3108, which authorizes New York courts to seek the assistance of a sister state court to compel discovery by issuing a commission or letter rogatory, but does not address the question of whether use of this procedure would be preempted by the FAA.[43]

Under the *Volt* pre-emption analysis, it seems unlikely that the FAA would pre-empt state court procedures that permit pre-hearing discovery, or that facilitate obtaining evidence outside the territorial reach of an arbitral subpoena. A different result, however, may be mandated by the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*,[44] which dramatically transformed the landscape of FAA pre-emption. In *Concepcion*, the Court emphasized the FAA's "overarching purpose to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings*" to strike down a California decision finding an arbitration provision unconscionable because it disallowed classwide proceedings.[45] The Court held that requiring the availability of classwide arbitration "interferes with fundamental attributes of arbitration" by sacrificing arbitration's informality and making the process slower and more costly.[46] Notably, this same emphasis on informality and streamlined proceedings informs the decisions in *Hay*, *Life Receivables*, and *Dynegy*.

There is little doubt that the use of state court procedures to overcome limitations on non-party discovery and/or territorial limitations under the FAA will be met with challenges based on FAA pre-emption. As set forth above, at least one court has rejected, on grounds of pre-emption, an attempt to enforce an arbitral subpoena using a state law provision permitting a court to order testimony or production of documents to assist tribunals and litigants outside the state.[47]

Conclusion

In sum, in the absence of definitive guidance from the Supreme Court, arbitrators and litigants in arbitrations governed by the FAA will be forced to grapple with a daunting array of procedural challenges. In order to succeed in this dynamic environment, practitioners cannot rely on the availability of procedures that may have become familiar prior to the uncertainties created by recent interpretations of the FAA. Both arbitrators and litigants must have a comprehensive understanding of newly imposed limitations on the ability to obtain evidence from non-parties in arbitrations governed by the FAA, as well as the procedural approaches that may be proposed to overcome those limitations.

Endnotes

1. 9 U.S.C. Section 7.
2. 360 F.3d 404 (3d Cir. 2004).
3. *Id.*, at 410.
4. *Id.*, at 409.
5. *Id.*, at 413-414 (citation omitted).
6. *Id.*, at 414.
7. 549 F.3d 210 (2d Cir. 2008).
8. 430 F.3d 567 (2d Cir. 2005).
9. 430 F.3d at 580 (quoting lower court decision, *Odfjell ASA v. Celanese AG*, 348 F.Supp.2d 283, 287 (S.D.N.Y. 2004)).
10. *Id.*; *Guyden v. Aetna Inc.*, 2006 U.S. Dist. LEXIS 73353 (D. Conn. September 25, 2006), *aff'd*, 2008 U.S.App. LEXIS 20783 (2d Cir. Oct. 2, 2008) (although a party may be precluded from taking depositions of non-party witnesses, she may obtain necessary information through a pre-merits hearing before the arbitrator). The reasoning of *Hay* and *Life Receivables* has been adopted by federal district courts outside the Second and Third Circuits. S*ee, e.g., Ware v. C. D. Peacock, Inc.*, 2010 U.S. Dist. LEXIS 44737 (N.D. Ill.); *Empire Financial Group, Inc. v. Penson Financial Services, Inc.*, 2010 U.S. Dist. LEXIS 18782 (N.D. Tex.); *Matria Healthcare v. Duthie*, 584 F.Supp.2d 1078 (N.D. Ill. 2008).
11. *COMSAT Corp. v. NSF*, 190 F.3d 269, 276 (4th Cir. 1999). The *COMSAT* court did not address what circumstances or showing would be sufficient to invoke this exception, but held that "'special need'" means that, "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." *Id.; see Gresham v. Norris*, 304 F. Supp. 2d 795 (E.D. Va. 2004) (no special need where non-party could be subpoenaed to testify at the arbitration hearing); *see also ImClone Systems Incorporated v. Waksal*, 802 N.Y.S.2d 653, 654 (1st Dep't 2005) (depositions of non-parties may be directed in FAA arbitration where there is a showing of "special need or hardship," such as where the information sought is otherwise unavailable).
12. 228 F.3d 865, 870-71 (8th Cir. 2000); *see also American Fed'n of TV & Radio Artists v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999) (arbitration panel may issue subpoena to non-party for production of documents); *Festus & Helen Stacy Found., Inc. v. Merrill Lynch*, 2006 U.S. Dist. LEXIS 32402 (N.D. Ga.); S*chlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 U.S. Dist. LEXIS 389 (D. Minn.); *In The Matter Of Meridian Bulk Carriers, Ltd. And Louis Dreyfus Corporation*, 2003 U.S. Dist. LEXIS 24203 (E.D. La. 2003); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1993); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F.Supp. 1241 (S.D. Fla. 1988). Prior to the Second Circuit decision in *Life Receivables Trust*, a number of district courts in that circuit had taken a less restrictive approach. See *Atmel Corp v. LM Ericsson Telefon, AB*, 371 F.Supp.2d 402 (S.D.N.Y 2005); *Nat'l Union Fire Ins. Co. v. Marsh USA, Inc.*, 2004 U.S. Dist. LEXIS 12716 (S.D.N.Y); *P&G v. Allianz Ins. Co.*, 2003 U.S. Dist. LEXIS 26025 (S.D.N.Y); *In re Arbitration between Brazell v. American Color Graphics*, 2000 U.S. Dist. LEXIS 4482 (S.D.N.Y.); *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 71-73 (S.D.N.Y 1995); *but see*, *Guyden v. Aetna Inc.*, 2006 WL 2772695 (D. Conn.); *Odfjell ASA v. Celanese AG*, 328 F.Supp.2d 505, 506 (S.D.N.Y 2004) (adopting the *Hay* approach).
13. *See*, *e.g.*, *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F.Supp. 69, 72-73 (S.D.N.Y 1995).
14. *See, e.g., Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F.Supp.2d 402, 403 (S.D.N.Y. 2005).

15. *Id.* Only a few courts have found that an arbitrator has the power to compel non-party depositions, none of which addresses the analysis of the many cases to the contrary. The leading cases are *Amgen Inc. v. Kidney Center*, 879 F.Supp. 878 (N.D. Ill. 1995) and the district court decision in *Security Life Ins. Co. of Am. v. Duncanson & Holt Inc.*, 1999 U.S. Dist. LEXIS 23385 (D. Minn.). *Amgen* was eventually dismissed for lack of subject matter jurisdiction, *Amgen, Inc. v. Kidney Ctr.*, No. 95-1988, 1996 U.S. App. LEXIS 28250 (7th Cir. Oct. 28, 1996), and when *Security Life* was appealed, the Eighth Circuit never addressed the issue of an arbitrator's power to compel depositions of non-parties, because the issue was moot. *Security Life*, 228 F.3d at 870; *see SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 U.S. Dist. LEXIS 389 (D. Minn.) (arbitration panel's authority to compel production of non-party witnesses for deposition testimony is unsettled). In *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F.Supp. 1241 (S.D. Fla. 1988), the court held, without analysis, that "[p]laintiffs' contention that § 7 of the Arbitration Act only permits the arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances, is unfounded."

16. Fed. R. Civ. P. 45(b)(2).

17. The majority of courts to consider the issue have held that a court may compel the trial testimony of parties (and, where the party is a corporation or entity, the party's high-level employees or officers) even when the person to be compelled resides beyond the Rule 45 territorial limit. *See* Fed. R. Civ. P. 45(c)(3)(A)(ii)); *AFGE, Local 922 v. Ashcroft*, 354 F.Supp.2d 909 (E.D. Ark. 2003) (collecting cases).

18. 451 F.3d 89 (2d Cir. 2006).

19. *Id.*, at 95.

20. *Id.*, at 96.

21. 879 F.Supp. 878, 882-83 (N.D. Ill. 1995).

22. In an unpublished opinion, the Third Circuit has held that the District Court for the Eastern District of Pennsylvania does not have the power to enforce an arbitration subpoena issued in Philadelphia calling for a non-party to appear for deposition and produce documents in Florida. *Legion Insurance Company v. John Hancock Mutual Life Insurance Company*, 33 Fed. Appx. 26; 2002 U.S. App. LEXIS 6797 (3d Cir.). The court did not discuss the *Amgen* decision or Rule 45(a)(3)(B).

23. 228 F.3d 865, 872 (8th Cir. 2000) (reserving for "another day" the "thorny" issue of whether an arbitrator's subpoena power is limited by the 100-mile limitation contained in Fed. R. Civ. P. 45(b)(2)); *see also Festus & Helen Stacy Found., Inc. v. Merrill Lynch*, 2006 U.S. Dist. LEXIS 32402 (N.D. Ga.) (compelling compliance with arbitral document subpoena served outside the Rule 45 territorial limits); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 U.S. Dist. LEXIS 389 (D. Minn.) (same, but also holding that the court does not have the power to enforce an arbitration panel's subpoena for deposition of a non-party).

24. 2009 U.S. Dist. LEXIS 34440 (April 21, 2009).

25. It is unclear whether the motion to quash was properly brought in the Eastern District of Pennsylvania. The basis on which this practice arguably overcomes the restrictive interpretation of Section 7 is that the subpoena is issued by an arbitrator "sitting" in Florida, in which case a challenge to enforcement of the subpoena would seemingly more properly be sought in a Florida court.

26. *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC and Medical Outsourcing Services, Inc.*, Case No. 11 C 3275, slip op. (Northern District of Illinois, Eastern Division, August 9, 2011).

27. The court expressly rejected the reasoning of an earlier case from the same district, in which the judge enforced a subpoena issued in connection with an arbitration being conducted in the Northern District of Illinois that required a non-party to produce documents and testify at a deposition in the Eastern District of Pennsylvania, where the non-party was located. *See Amgen Inc. v. Kidney Center*, 879 F.Supp. 878 (N.D. Ill. 1995), *dismissed for lack of subject matter jurisdiction*, 1996 U.S. App. LEXIS 28250 (7th Cir. Oct. 28, 1996). Arguably, enforcement of the subpoena could be sought in the Northern District of California, on the theory that the arbitral panel is "sitting" there for the pre-merits hearing.

28. *In re the Subpoena Issued to Beck's Superior Hybrids, Inc.*, 940 N.E.2d 352 (Ind. App. 2011).

29. N.J. Stat. § 2A:23B-17.

30. N.Y. CPLR 2302(a); 7505; *Reuters Limited v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 453 (1st Dep't 1997); *Minerals & Chemicals Philipp Corp. v. Panamerican Commodities*, 224 N.Y.S.2d 763, 773 (1st Dep't 1962), *appeal dismissed*, 11 N.Y.2d 1109.

31. *DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 406 (1974) (under the CPLR, arbitrators do not have the power to direct the parties to engage in disclosure proceedings).

32. *Id.*

33. *See, e.g.*, N.Y. CPLR 3108 (authorizing New York courts to seek the assistance of a sister state court to compel disclosure from out-of-state individuals by issuance of a commission or letter rogatory).

34. 489 U.S. 468 (1989).

35. *Id.*, at 478. In *Volt*, the Court addressed a provision of California law that permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where "there is a possibility of conflicting rulings on a common issue of law or fact." The Court found that although the application of the California rule resulted in a stay of the arbitration, the provision did not conflict with the FAA's "principal purpose of ensuring that private arbitration agreements are enforced according to their terms." *Id.*

36. 802 N.Y.S.2d 653 (1st Dep't 2005).

37. *Id.*, at 654 (other internal citations omitted).

38. *COMSAT Corp. v. NSF*, 190 F.3d 269, 276-277 (4th Cir. 1999).

39. *Imclone*, 802 N.Y.S.2d at 654.

40. Slip op., Supreme Court, N.Y. County, Index No. 602082/2008, January 6, 2010.

41. *Id.*, at 13.

42. *Id.*, at 21-22.

43. *Id.*, at 22.

44. 131 S.Ct. 1740 (2011).

45. *Id.*, at 1743.

46. *Id.*

47. *In re the Subpoena Issued to Beck's Superior Hybrids, Inc.*, 940 N.E.2d 352 (Ind. App. 2011).

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