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Beyond reach: obstacles to third-party discovery in arbitrations

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The increasing reliance on domestic and international arbitrations as a tool to end business disputes ramped up during the coronavirus (COVID-19) pandemic, as arbitral bodies became early adopters of remote proceedings when courts were shuttered.

As arbitrations have become more a part of the business landscape, litigants have increased their expectations of what is possible in arbitration, most notably getting discovery to prove their claims. This expectation can be met with disappointment, because a key tool in litigation – third-party discovery – just may not be available in arbitration.

Because arbitration is a creature of contract, arbitrators' authority is defined by the contours of the arbitration agreement and applicable law. Arbitrators generally have no authority to force non-parties to the arbitration agreement to participate except where specific law permits. Parties to domestic arbitrations typically have relied on section 7 of the Federal Arbitration Act (FAA), which gives arbitrators the authority to summon third parties to provide testimony and produce documents in the same manner as subpoenas.

The FAA generally applies to domestic arbitrations based on disputes arising out of transactions involving interstate commerce as well as to certain foreign arbitrations. Federal courts, however, have increasingly foreclosed or limited the breadth of section 7 as an avenue for obtaining third-party discovery.

Getting third-party discovery

In civil litigation, the Federal Rules of Civil Procedure (FRCP) or equivalent state rules generally authorise parties, without approval of the court, to obtain discovery from third parties. This is not the case with arbitrations subject to the FAA. Under section 7, only arbitrators have authority over the process for obtaining testimony and documents from third parties.

In addition, more and more federal courts have held that, under section 7, arbitrators generally only have the power to force a third party to provide testimony and produce documents in their presence at a hearing. The practical effect is that, to obtain discovery from a non-cooperating third party, a party must convince the arbitrators to convene and preside over a hearing, prior to the final hearing, for the purpose of taking discovery from that witness.

Complicating matters, some federal courts have imposed additional restrictions, such as that the arbitrators must be physically present, meaning that remote hearings are out of the question.

The only meaningful way to comply with these restrictions is for arbitrators to effectively act as 'roving commissions', moving around the country to take discovery from third parties. Even then, a party may not be able to compel the witness to appear. A party who wants to enforce a subpoena under section 7 must file a petition with the district court in which the arbitrators are sitting. However, for out of state witnesses, that district court may have no personal jurisdiction over the witness.

Thus, even if a party is able to convince the arbitrators to take third-party discovery in this way, it may have no way of forcing the witness to appear. Indeed, even if the witness does appear, the party may be saddled with the significant expenses associated with the arbitrators' travel and hourly expenses to conduct the hearing.

Yet, a party may be unable to convince the arbitrators to engage in this complicated procedure at all, in which case it may be deprived of any ability to discover and review beforehand what the witness has to say and what documents the witness has prior to the final hearing, if that witness can even be compelled to appear at the final hearing.

Getting into federal court

A party seeking to enforce a section 7 subpoena also may not have the option of going to federal court. Federal courts can only hear cases authorised by the US Constitution or federal statutes. The FAA itself does not provide federal courts with authority to hear section 7 enforcement actions. Parties to domestic arbitrations typically have relied on 28 US Code section 1332, which authorises federal courts to hear cases with: (i) complete diversity (meaning that no plaintiff share a state of citizenship with any defendant); and (ii) an amount in controversy exceeding $75,000. Given the multitude of views courts have adopted with respect to section 1332 and arbitrations, the outcome of third-party discovery may depend on litigation of that enforcement issue.

With respect to the complete diversity requirement, it would facilitate getting into federal court if, in determining complete diversity, courts would evaluate the citizenship of parties to the underlying arbitration. More and more federal courts, however, have held that the court instead must evaluate the citizenship of the parties to the section 7 enforcement action – the party seeking enforcement and the witness.

With respect to the amount-in-controversy requirement, it would facilitate getting into federal court if courts considered the value of the underlying arbitration. Federal courts, however, are split on whether they can do so or whether they are instead limited to valuing only the section 7 enforcement action.

Arbitrations outside the US

Beyond domestic arbitrations, a party to an international arbitration may want to obtain discovery in the US. Although the FAA applies to some foreign arbitrations, parties frequently have turned to section 1782 of title 28 of the US Code, which gives district courts the authority to order witnesses within their districts to provide testimony or produce documents "for use in a proceeding in a foreign or international tribunal". This avenue, however, may not be available in private foreign arbitrations.

The federal circuits are split on whether section 1782 is limited to district courts providing discovery assistance to state-sponsored foreign tribunals. If the court limits section 1782 to state-sponsored foreign tribunals, this would foreclose third-party discovery in the US for large swaths of foreign arbitrations.

As businesses and individuals increasingly turn to arbitrations to replace regular litigation, it is important for them to grasp the implications of potentially losing a key discovery tool – third-party discovery – which they might otherwise have had if they litigated in court. ■