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Win Your Commercial Arbitration by Using Section 7 of FAA

Winning a commercial arbitration often requires obtaining testimony and/or documents from a non-party. Unlike a federal or state court—which permits liberal discovery and allows for the use of subpoenas to obtain non-party pre-trial discovery—there is no enforceable mechanism in an arbitration to compel a non-party to produce discovery. So how can you prove your case/defenses? A recent Second Circuit decision—in which we represented the winning party—shows how successfully to use Section 7 of the Federal Arbitration Act (FAA) to obtain the non-party testimony and documents you need.

The FAA is designed to promote a liberal federal policy favoring arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "It is difficult to overstate the strong federal policy in favor of arbitration," that courts "have often and emphatically applied." *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d Cir. 2006). Section 7 of the FAA promotes this policy by providing:

The arbitrators selected either as prescribed in this title or otherwise, 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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; *if 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 in 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

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punishment for neglect or refusal to attend in the courts of the United States. (emphasis added).

The U.S. Court of Appeals for the Second Circuit recently clarified the rules for obtaining information from non-parties under Section 7. In *Washington National Insurance Co. v. OBEX Group LLC*, 958 F.3d 126 (2d Cir. 2020), the petitioner-appellee Washington National Insurance Company (WNIC) was a party to an arbitration alleging a massive fraud by Beechwood Re, Ltd. and others. WNIC obtained from the arbitration panel an "arbitration summons" directed to Obex Group LLC and its principal, Randall Katzenstein (collectively "Obex"), to appear before the arbitration panel at a hearing in New York City and provide testimony and documents. When Obex failed to appear at the hearing, WNIC filed a petition with the U.S. District Court for the Southern District of New York—where Obex resided and the arbitration hearing occurred—to compel Obex to appear with its documents and to testify. Relying on Section 7 of the FAA, the District Court granted the petition over Obex's strenuous objection.

In affirming the District Court's decision, the Second Circuit clarified several key points for obtaining Section 7 relief, including:

- Diversity jurisdiction is determined by looking at the parties to the petition only, and does not require that all parties in the underlying litigation be diverse. The FAA, unlike other Federal statutes, does not confer jurisdiction upon the Federal Courts. Therefore, a party filing a Section 7 petition to compel compliance with an arbitration summons must show an independent basis for federal subject matter jurisdiction. Many commercial arbitrations have multiple parties, and there may not be diversity of citizenship among all those parties and the non-party. But only the parties to the petition are reviewed for diversity, and there is no requirement to join all parties from the underlying arbitration in the petition. If one of two parties in the arbitration would destroy diversity, the non-diverse claimant can sit out the Section 7 proceeding against the non-party.
- The $75,000 amount in controversy required for diversity jurisdiction may be satisfied by the value that the petitioner ascribes to the information being sought, in light of the amount at issue in the underlying arbitration. Since a petition itself seeks essentially equitable relief (an order compelling testimony and the production of documents), there is no requirement that the amount in controversy be limited to what the non-party may view as the value of its testimony/documents. *See Washington National*, 958 F.3d at 135 ("even if the documents required by the summonses pertain to only a small fraction of [the award sought], the amount in controversy requirement would still be satisfied").
- While a "discovery" subpoena for documents only or a "deposition" is not allowed under the FAA, an arbitration summons issued by the arbitration panel is valid if it sets a specific hearing date in the jurisdiction where the non-party resides, and seeks testimony before the arbitrators, with or without a demand for documents. As long as the panel (or a majority of the panel) summons the non-party to hear testimony, then the summons is not an impermissible attempt at discovery. The Second Circuit went further and said that an offer to the non-party to accept documents in lieu of a hearing does not invalidate the summons or turn into a "subterfuge" for impermissible pre-hearing discovery.
- Any documents requested as part of an arbitration summons need only be deemed material to the arbitration. Whether or not something is material may be determined by the arbitration panel, not by the courts.
- Objections such as overbreadth, unduly burdensome and privilege may be determined by the arbitration panel. The District Court is not obliged to review those objections on a Section 7 petition.

Given the Second Circuit's thorough ruling, below are a few practical tips to win your commercial arbitration through non-party testimony and documents.

First, get the arbitration panel involved early. You should make clear to the panel what you believe is material to your case/defense, and then tailor the proposed arbitration summons to what is material. In particular, try to limit the document demand portion of the arbitration summons to what is truly needed, and do not prepare a "kitchen sink" list of document demands.

Second, make sure that the arbitration summons sets a formal hearing date and time for testimony (and production of documents) with at least the majority of the panel present. The hearing must be held in the jurisdiction where the non-party resides. There should be a court reporter present at the hearing. If the non-party fails to show, make a record to demonstrate that the summons was served, why the testimony/documents are material, and that the parties and the arbitration panel were in attendance at the scheduled time and location.

Third, prior to the hearing, you can and should negotiate informally with the non-party. As the Second Circuit made clear, offering to accept only documents (or documents and limited testimony) does not violate Section 7 of the FAA. Especially in the COVID-19 era, you should also discuss having a remote hearing where testimony is required.

Fourth, if the non-party fails to attend the hearing, make sure you have jurisdiction in Federal Court before filing a Section 7 petition. As the Second Circuit made clear, a District Court should determine diversity by looking only at the parties to the petition, not at all the parties to the underlying arbitration. The Section 7 petition should clearly state the basis for jurisdiction and attach documents (like the record you made at the scheduled hearing when the non-party failed to show).

Fifth, build time into your arbitration schedule to obtain non-party testimony and documents. Do not wait until the final hearing dates (*i.e.*, when the panel will hear party testimony and experts) to seek an arbitration summons. This should occur early in the proceedings, both to obtain testimony and documents helpful to your case and to provide time to file a Section 7 petition if the non-party refuses to comply with the arbitration summons.

When parties to a contract insert an arbitration provision, they often do not contemplate the need for non-party evidence to prove their case or defense when a dispute arises. Section 7 of the FAA—when employed as the Second Circuit's guidance suggests—allows a party to win by providing the tools necessary to obtain important evidence from even the most recalcitrant non-party.