Non-Party Subpoenas

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Significance of the Issue

- Importance of Non-Party Subpoenas: In many cases, non-parties are key witnesses and hold key documents.
- Concerns: Arbitration is a creature of contract. Non-parties should not be required to be involved absent a real need.

Overriding Practicalities as to Subpoenas

- Likely compliance by non-party witnesses: Anecdotally, it appears that non-party witnesses accept subpoenas in many instances, rather than disputing them, and then often negotiate convenient times for compliance.
- Reasons for acceptance of subpoenas: This may be because such witnesses want to come forward because they are aligned with a party, because they respect the process and feel a responsibility as a witness to cooperate, because they want to schedule their appearance to suit their own convenience, or because they want to avoid the time and expense of opposing the subpoena.

Considerations Applicable to What Subpoenas Arbitrators Should Sign

- Case specific considerations—Threshold Questions: Is this witness or are these documents reasonably necessary for the case? Is the other party objecting?
- Legal considerations: What law, federal or state, applies? What does that law provide?

Evolutionary Nature of Applicable Law

- Arbitration subpoenas as limited to "hearings": The Second and Third Circuits have held that FAA Section 7 only permits subpoenas to be returnable at hearings, albeit with "hearings" including pre-merits hearings – *see generally* The New York City Bar report at http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf
- Possibility of deposition subpoenas under other law: Some federal courts and the arbitration law of numerous states (including, it appears, New York), however, permit pre-hearing non-party depositions and/or pre-hearing discovery of documents from non-parties under some circumstances, as does Section 17 of the Revised Uniform Arbitration Act (RUAA), as promulgated by the National Conference of Commissioners of Uniform State Laws.
- Scope of subpoenas: There are also various approaches by different jurisdictions, federal and state, throughout the United States, as to the range of subpoenas, potentially raising issues as to whether a particular subpoena will enforceable, depending on where it was issued or where a party may try to enforce it. Some jurisdictions permit the process whereby commissions may be issued by a court at the site of the arbitration requesting that a subpoena be issued by a court in the jurisdiction where the witness or documents in question are located.
- The roving arbitrator alternative: There is the possibility under the law of some jurisdictions that an arbitrator (including possibly one member of a panel of arbitrators)

might "rove" from the seat of the arbitration to the location of the witness or documents at issue, sitting there, so as to conduct a hearing session or the like there, in some instances potentially making it possible for the parties to obtain testimony or documents they might not otherwise have been able to obtain.

- Choice of law questions: Accordingly, in any case where subpoenas are presented to arbitrators for signature, there may be a myriad of choice of law issues as to what jurisdiction's law is applicable, and whether the federal or state law of that jurisdiction is applicable.

Ethical and Practical Significance of the Uncertainty of the Law in this Area

- Unenforceable subpoenas: Many would argue that it is inappropriate for an arbitrator to sign a subpoena which she knows is unenforceable.
- Colorable subpoena: But what about a subpoena whose enforceability is at least colorable? May an arbitrator sign such a subpoena?

Some Standards for Consideration (If Only by Analogy)

- Canon I.F of the Code of Ethics for Arbitrators in Commercial Disputes: "An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.
- Canon IV: "AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY."
- Canon IV.B: "The arbitrator should allow each party a fair opportunity to present its evidence and arguments."
- Rule 4.1 of the New York Rules of Professional Conduct for Attorneys: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."
- Rule 3.1(a): "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."
- Rule 3.1(b): A claim or defense is frivolous "that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;"
- Rule 4.4(a): "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person."
- Rule 8.4(c): A lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Some Tentative Conclusions

- Arbitrator's right and duty to help the parties obtain non-party testimony and documents where not inappropriate: Desiring to accord the parties a fair and efficient resolution of their issues and a fair opportunity to present their evidence and arguments, the Muscular Arbitrator will generally want to help the parties obtain necessary non-party testimony and documents where not inappropriate.
- Overriding responsibility for subpoenas: It is the right and obligation of the parties, when they disagree as to the matter, to argue the law and facts as to subpoenas issues in an arbitration. As a general proposition, arbitrators are not required independently to

research such matters, but rather to decide issues presented based on the law and facts argued to them by counsel. However, this will often be an area where the arbitrators possess specialized knowledge not familiar to the parties or even their counsel.

- No signing of subpoenas known to be unenforceable: It would appear to be inappropriate for an arbitrator to sign a subpoena that she *knows* to be unenforceable under any circumstances, since that subpoena could be misleading to the non-party recipient.
- Appropriateness of signing subpoenas that are colorably enforceable: Although there are differing views on this, many arbitrators believe it is reasonable for arbitrators to sign subpoenas that are colorably enforceable, subject to resolving issues as to enforceability in the ordinary course when presented by the parties or by non-party recipients of subpoenas who bring the matter to the arbitrators.

Back-up Alternative Approach

- Inappropriateness of subpoenas in some instances: There will be instances where the arbitrators will decide to decline to sign subpoenas.
- The information request alternatives: In such instances, a non-binding information request may still be helpful in assisting the parties in obtaining the desired testimony or documents.

Summary

- Scheduling order: Provide for the consideration of subpoenas in the scheduling order, leaving sufficient time for possible court challenges or enforcement proceedings.
- Appropriateness for the case: Get comments from all parties. The arbitrator should always make the threshold determination as to whether the requested witnesses or documents sought by a subpoena are reasonably necessary for the case.
- Legal considerations: Assuming they are, the Muscular Arbitrator will generally want to cooperate with counsel in signing subpoenas when requested, unless it would be inappropriate to do so.
- Hearing argument from the parties: Arbitrators should hear argument from the parties if there is a dispute about signing the subpoenas and from the non-party recipients of subpoenas if they are willing to address their objections with the arbitrators.
- Requiring colorability: Arbitrators should not sign subpoenas unless they are at least colorably enforceable.
- The non-subpoena alternative: The Muscular Arbitrator, when she is unwilling to sign a non-party subpoena, may suggest to the Parties a non-binding "subpoena"—an information or document request that requests that the witness testify or the documents be produced, rather than directing that that happen.