

A Model Arbitral Subpoena

Law360, New York (January 29, 2016, 10:43 AM ET) -- Section 7 of the Federal Arbitration Act[1] authorizes the issuance of arbitral subpoenas. The laws of many states, such as Section 7505 of New York's Civil Practice Law and Rules, also authorize subpoenas in aid of arbitration. However, many practitioners, and arbitrators for that matter, are uncertain about the nuts and bolts of the actual issuance of arbitral subpoenas. Recently, two committees of the New York City Bar Association issued a report on this subject that included an annotated model federal arbitral subpoena.[2] This article discusses that model subpoena[3] as well as other issues raised by arbitral subpoenas. The form of the model subpoena, without annotations, is appended to the end of this article.



David Zaslowky

An important issue that has been litigated under Section 7 is whether arbitral subpoenas can be used to obtain prehearing discovery or only to command appearance at a hearing. Section 7 states:

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 "attend before them" language seems clear. Nevertheless, the Eighth Circuit has held that, under Section 7, "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." [4] The court reasoned that the guiding principle should be efficient dispute resolution and that prehearing production allows for such efficiency.

The Second and Third Circuits[5] disagree with the Eighth, holding that prehearing discovery in aid of arbitration is not authorized by the FAA. They reached this result by applying the plain language of the statute. The courts further explained that, as part of agreeing to arbitrate a dispute, parties give up some of the benefits of litigation, including not having all of the discovery rights available in litigation. Significantly, however, as it relates to actual practice, in a concurring opinion in *Hay*, former Judge Michael Chertoff suggested a practical work-around the problem of no prehearing discovery. Specifically, if the arbitrators choose to, they can convene a preliminary hearing (before just one arbitrator if they choose) for the purpose of having the third party appear and produce the documents at that preliminary hearing. The documents can be reviewed at that time and then used if necessary at the main hearing.

Another important issue relating to arbitral subpoenas concerns geographic scope. Section 7 of the FAA provides that an arbitral subpoena "shall be served in the same manner as subpoenas to appear and testify before the court." Prior to the December 2013 amendments to the Federal Rules of Civil Procedure, a subpoena could be served only within the judicial district of the issuing court, within 100 miles of the courthouse of the issuing court, or statewide where the judicial district was within a state whose civil procedure law provided

for statewide service of process. However, in December 2013, Rule 45 of the FRCP was amended to provide that "[a] subpoena may be served at any place within the United States."

While this change authorized nationwide service, it did not create a situation in which a witness could be compelled to testify at an arbitration taking place far from her home. Rather, the location for responding is based on FRCP 45(c)(1), which provides, "A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense."

This limitation should not, however, be read to mean that arbitrators sitting, for example, in New York, are powerless if a witness or documents are located in California. A possible solution in that situation is what is known as a "floating tribunal." Notwithstanding the fact that place of arbitration is in New York, the tribunal would still be able to sit in California for purposes of hearing testimony from a particular witness. For example, Rule 17.2 of the International Rules of the American Arbitration Association provide that a "tribunal may meet at any place it deems appropriate for any purpose, including to conduct hearings, hold conferences, hear witnesses, inspect property or documents." As a practical matter, that will likely occur only when the witness has information sufficiently important to the case to justify traveling. But the option is available.

In terms of the scope of an arbitral subpoena, Section 7 of the FAA refers to production of a document or record that "may be deemed material as evidence in the case." That is more narrow than the present version of Rule 26(b)(1) of the Federal Rules of Civil Procedure, which states that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." To the practitioner, this should mean that arbitral subpoena requests should be specific and not the "all documents referring or relating to" type of request that is typical in litigation.

As the New York City Bar Association report points out, specificity of requests for information, and/or a substantial showing of importance of the requested information, is emphasized in many rules and guidelines applicable to international and U.S. domestic commercial arbitration. See, e.g., International Arbitration Rules of the International Centre for Dispute Resolution, Rule 21(4) ("Requests for documents shall contain a description of specific documents or classes of documents"); CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Section 1(a) ("[D]isclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position."); JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases (document requests "should be restricted in terms of time frame, subject matter and person or entities to which the requests pertain, and should not include broad phraseology such as 'all documents directly or indirectly related to.'"); IBA Rules on the Taking of Evidence in International Arbitration, Article 3(3)(a)(ii) ("A Request to Produce shall contain ... a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist").

The model subpoena includes a provision that directs that any motion to quash the subpoena should be made to the arbitral tribunal, except that a motion to quash based on the position that the subpoena violates FAA Section 7 may also be made to a competent court. This language is based on court decisions that direct that objections to the relevance,

materiality, privileged nature or confidentiality of evidence sought, as opposed to objections based on the limitations imposed by FAA Section 7, be asserted before the arbitral tribunal in the first instance, rather than a court.

Finally, the model subpoena recommends identifying a natural person as the witness whenever possible. In a judicial proceeding, during discovery, a party might serve a subpoena based on FRCP 30(b)(6) and require the corporate recipient to identify a representative to testify. Uncertainty exists about whether such an approach is permissible in arbitration, and the bar association's report discusses arguments for and against using the FRCP 30(b)(6) practice in connection with arbitral subpoenas. Only one federal district court decision has addressed this question, holding that Section 7 does not permit enforcement of such an arbitral subpoena.[6]

In sum, if the need for an arbitral subpoena arises, the initial reaction will likely be, "no big deal." However, as the report indicates, there can in fact be numerous issues raised when arbitrators are asked to issue a subpoena. The model subpoena is an excellent starting point for any practitioner who needs an arbitral subpoena issued, or any arbitrator who is asked to issue such a subpoena. The report should be seen as an additional resource because it includes practical advice relating to arbitral subpoenas and discusses many issues that arbitrators and practitioners may encounter when the need arises for an arbitral subpoena.

CASE NO. [if applicable]

**[OPTIONAL: CAPTION IDENTIFYING THE PROVIDER ORGANIZATION AND/OR
APPLICABLE RULES OF ARBITRATION]**

IN THE MATTER OF AN ARBITRATION
BETWEEN:

X COMPANY, INC.,

Claimant,

And

Y LLC,

Respondent.

**ARBITRATION SUMMONS TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT
AN ARBITRATION HEARING**

TO: [J. Smith]
[Z Corporation]
[address]
[City], [State]

By the authority conferred on the undersigned arbitrators by Section 7 of the United States Arbitration Act (9 U.S.C. § 7), you are hereby SUMMONED to attend as a witness at a hearing before one or more of the undersigned arbitrators to be held on [insert date providing

reasonable notice] at 10:00 a.m. at the offices of the [X Law Firm], [insert address], [City], [State], and to bring with you to the hearing the documents identified in Schedule A annexed to this SUMMONS.

Provided that this SUMMONS has been served upon you in the same manner as is required of a judicial subpoena under Rule 45 of the Federal Rules of Civil Procedure, then if you shall refuse or neglect to obey this SUMMONS, upon petition the United States District Court for the District of [State] or a competent court of the State of [State] may compel your attendance, or punish you 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.

You may address questions concerning this SUMMONS to the attorneys [or the Case Manager [if applicable]] identified below. Any application by you to quash or modify this SUMMONS in whole or in part should be addressed to the arbitral tribunal in writing [and sent via the Case Manager [if applicable]], with copies to counsel for the parties, except that a motion upon the ground that the SUMMONS is unenforceable under Section 7 of the U.S. Arbitration Act may also be addressed to the United States District Court for the District of [State] or a competent court of the State of [State].

The attorneys for the Claimant in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

The attorneys for the Respondent in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

[The Case Manager [if applicable] is [identify] [phone] [email address].]

Dated: [Month] [Day], [Year]

[name], Arbitrator
[Address]

[name] Presiding Arbitrator
[Address]

[name], Arbitrator
[Address]

—By David Zaslowsky, Baker & McKenzie LLP

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The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 9 U.S.C. § 7.

[2] The model subpoena was part of a report published in May 2015 titled "A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing."

The Report was a joint effort of the Arbitration Committee and the International Commercial Disputes Committee of the New York City Bar Association. It can be found at: <http://www2.nycbar.org/pdf/report/uploads/20072911-ABCNYModelArbitralSubpoena.pdf>.

[3] The model document is actually referred to in the report as a "Model Summons" because FAA Section 7 refers to the compulsory process issued by an arbitrator as a "summons." Nevertheless, in this article, it will be referred to as the model subpoena.

[4] In *Re Sec. Life Ins. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000).

[5] *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008). *Hay Group, Inc. v E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).

[6] *Progenics Pharm., Inc. v. IMS Consulting Group*, No. 14 Misc. 245 (RA) (S.D.N.Y. Aug. 13, 2014) (unpublished).
