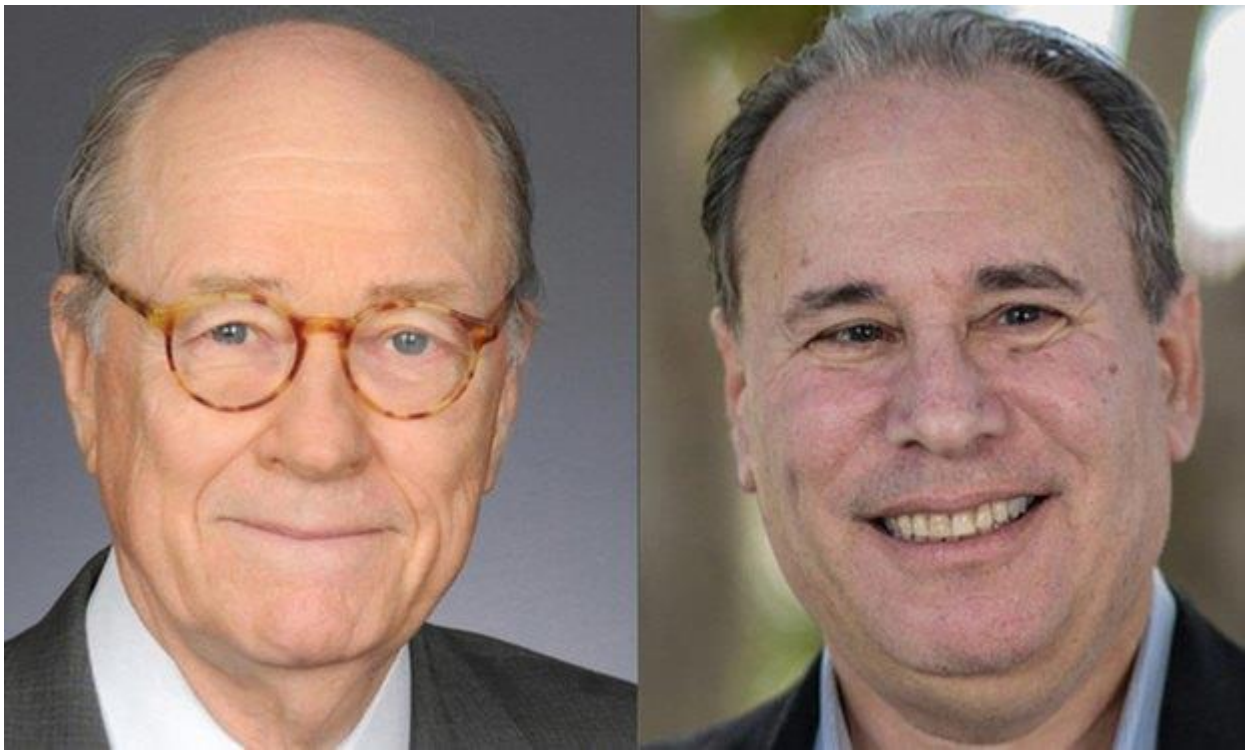
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'Seat' Versus 'Sitting': Third-Party Testimony in International Arbitration

In their International Litigation column, Lawrence W. Newman and David Zaslowsky analyze a recent decision from the U.S. Court of Appeals for the Ninth Circuit that, to the extent accepted by courts in other judicial circuits, may provide a solution to what can be a vexing problem for international arbitration proceedings in this country: How may unwilling witnesses from outside a judicial district be compelled to testify or provide documents?

By **Lawrence W. Newman and David Zaslowsky** | September 21, 2022 at 12:00 PM



Although international arbitration commercial proceedings often deal with evidence emanating from disputes between two contracting parties, they may also concern information in the form of documents or testimony from third parties. Although third parties may cooperate by providing requested information, some may not, and may require the force of a subpoena. Until a recent decision of the U.S. Supreme Court, it was sometimes possible, depending the federal circuit in which the target of the subpoena was located, for "interested persons" in commercial arbitrations outside the United States to make use of federal court discovery tools pursuant to 28 U.S.C. §1782. ZF Automotive US v. Luxshare Ltd., ___ S. Ct___ (June 13, 2022).

For arbitrations in the United States, however, the road to obtaining testimonial and documentary evidence from unwilling third-party witnesses runs through §7 of the Federal Arbitration Act (FAA) and Rule 45 of the Federal Rules of Civil Procedure concerning subpoenas. As amended in 2013, Rule 45 permits nationwide service of court subpoenas. Since such subpoenas may not be enforced nationally, but only by courts where unwilling witnesses are located, problems have arisen when an arbitration is taking place in one part of the country and the witness is located in a distant part.

Such a situation arose in Jones Day v. Orrick, Herrington & Sutcliffe, No. 21-16642, (9th Cir. Aug. 1, 2022), which involved a dispute arising out of the departure from Jones Day of a partner in its Paris office. Under the Jones Day partnership agreement, such disputes were to be resolved through arbitration in Washington, D.C. In June 2020, Jones Day commenced an arbitration against the departed partner and thereafter sought testimony and documents from Orrick, of which the departing partner had become a member. In the course of the arbitration, the tribunal issued, at the request of Jones Day, a summons (the term used in the FAA for subpoenas) requiring Orrick to appear at a virtual hearing and produce certain documents. Thereafter, upon the failure of Orrick to comply, Jones Day petitioned the district court for the District of Columbia to enforce the subpoena. Orrick responded by moving to dismiss the process. Following further submissions, the district court issued an order on May 14, 2021 denying the petition and granting Orrick's motion to dismiss.

The court ruled that it lacked general personal jurisdiction over Orrick (Jones Day, the petitioner, not having suggested specific personal jurisdiction). There was no dispute that Orrick had its principal place of business in San Francisco and that it was organized under the laws of California. The court found that, even though Orrick had a significant presence in the District of Columbia, it was not sufficient to establish jurisdiction under the test of Daimler v. Bauman, 571 U.S. 117, 127 (2014). Nor was there a basis, the court said, for Orrick's operations in the District of Columbia to place it as an exceptional case where its operations in the District were so substantial as to render it "at home" there.

Following this decision, the arbitral tribunal issued summonses to be served on the Orrick firm and two of its San Francisco partners requiring them to appear at a hearing in San Jose, a city within the Northern District of California. After Orrick failed to comply with the summonses, Jones Day filled a petition and a motion to compel compliance with the summonses. In an order dated Sept. 7, 2021, the district court in California denied both, saying that it lacked authority to compel compliance with them.

In its opinion, the district court focused on the language of §7 of the FAA, which authorizes "the district court for the district in which [the] arbitrators, or a majority of them, are sitting" to compel the attendance of witnesses before them or punish them for contempt for not having done so. In doing so, the district court found unpersuasive a case cited by Jones Day, Washington National Insurance Company v. OBEX Group, No. 18 CV 9693 (VB), 2019 WL 16668, at *5 (S.D.N.Y. Jan. 18, 2019), aff'd, 938 F. 3d 126 (2d Cir. 2020), involving enforcement of an arbitral summons from the Southern District of New York. In that case, neither the district court for the Southern District of New York nor the district court for the Eastern District of Pennsylvania saw fit to express concern at the fact that the same arbitral tribunal had heard testimony in Philadelphia and New York City pursuant to summonses issued to third-party witnesses by each of the courts.

Instead, the district court in California found persuasive the reasoning of a district court in Georgia in Rembrandt Vision Techs., L.P. v. Bausch & Lomb, No. 1:11-CV-2829-JEC, 2011 WL 1331943 at*2 (N.D. Ga. Oct 7, 2011) that pointed out that the statutory text of FAA §7 fails to indicate that "the district in which such arbitrators, or a majority of them, are sitting" is a flexible term such that additional words would not have to be added for it to mean wherever the arbitrators are having a hearing.

The court placed heavy emphasis on the word "seat," which the Restatement describes as "the legal or juridical home of the arbitration," Restatement (Third) U.S. Law of Int'l Comm & Inv. Arb. §1.3 cmt. a (Am. L. Inst. 2019). The district court linked "seat" to "sitting" as used in §7 which the district court seemed to say the arbitrators are not doing when they are holding hearings in places other than the "seat."

Jones Day appealed to the U.S. Court of Appeals for the Ninth Circuit, which reversed the decision of the district court and remanded the case with instructions to enforce Jones Day's petitions to compel Orrick and its partners to comply with the summonses of the arbitral tribunal. Whereas the district court had confined its analysis to the language of §7, the Ninth Circuit focused its attention on Chapter 2 of the FAA, which implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was applicable

because, as provided in FAA §202, the arbitration was commercial and "not entirely between citizens of the United States."

The Court of Appeals first engaged in a thorough analysis of whether the proceeding to enforce the arbitral summonses was, in the words of FAA §204, an "action or proceeding over which the district courts have jurisdiction pursuant §203 of this title." Orrick contended that a petition to compel enforcement of an arbitral summons was not within the narrow category of proceedings "falling under the Convention," as provided in §203: compelling arbitration, appointing arbitrators and confirming awards. The Ninth Circuit examined dictionary definitions of "fall under," from which it concluded that the ordinary meaning of the term did not support Orrick's contention that it comprises only the expressly listed or identified actions or proceedings..

The Ninth Circuit also referred to the U.S. Supreme Court case of GE Energy Power Conversion France SAS v. Outokumpo Stainless USA, 140 S. Ct 1637 (2020), in which the Supreme Court determined that Article II(3) of the New York Convention, when it provides that courts are to refer parties to arbitration when they have entered into written agreements to arbitrate, did not prohibit the application of the domestic doctrine of equitable estoppel to compel a party to arbitrate. The Court of Appeals said, "So too here," concluding that neither the Convention nor Chapter 2 of the FAA excludes the use of petitions to enforce arbitral summonses pursuant to FAA §7 providing for court orders to enforce arbitral summonses. Regarding the language "falling under," the Court of Appeals referred to FAA §205, under which removal from state to federal court is provided for where the subject matter of the state proceeding "relates to" an arbitration agreement or award falling under the Convention. The court said that, if "relates to" were not "at least co-extensive" with "falling under," there would be a narrower scope of original jurisdiction then for removal jurisdiction something inconsistent with the purpose of the Convention to encourage arbitration.

The appellate court also referred to a Fifth Circuit case, Stemcor USA v. CIA Siderurgica do Para Cosipar, 927 F. 3d 906 (5th Cir. 2019), in which that court held that "relates to" and "falling under" share the same meaning. And the Ninth Circuit referred to Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co, 668 F.3d 60 (2d Cir. 2012), in which the Second Circuit concluded that the district court in question had jurisdiction under §203 to vacate an arbitral award, although not expressly authorized to do so under Chapter 2.

The Ninth Circuit concluded: "The petition to compel Orrick's compliance with the arbitral summonses relates to the underlying arbitration agreement, as the arbitrator determined that evidence adduced from the participation may be material to resolving the dispute." Therefore, the court held, the district court had subject matter jurisdiction to compel enforcement of the summonses.

With respect to venue, the Court of Appeals impliedly criticized the district court for having looked only at §7 of the FAA, which refers to proceedings to enforce arbitrators' summonses' being brought in the district where the "arbitrators, or a majority of them, are sitting." The Court of Appeals went the other way, declining to resolve whether §7 provides for venue or where, focusing instead on FAA §204, which it described as a "permissive, supplemental venue provision in addition to the general venue provision, 28 U.S.C. §1391." Since under §1391(1), the Northern District of California was a proper venue because it was Orrick's principal place of business, the appellate court held that it was error for the district court not to have granted the petitions to enforce the summonses. That is, the witnesses in Jones Day were compelled to testify before an arbitral tribunal that would be sitting in a place different from the distant "seat" of the arbitration.

Issues of the kind addressed in the Jones Day v. Orrick cases were discussed in a May 2015 report by the International Commercial Disputes Committee and the Arbitration Committee of the New York City Bar titled "A Model Federal Arbitration Summons To Testify and Present Documentary Evidence at an Arbitration Hearing" (the second of the authors was a member of the subcommittee that drafted the Report). The committees favored an interpretation of FAA §7 that would permit a court where the arbitrators convened a hearing to compel a witness from the same district to comply with a summons as opposed to an interpretation that the place where the

arbitrators are sitting is a single, fixed location. The committees' report gave various reasons for their conclusion, including that the term sitting "does not clearly and unambiguously refer to the legal seat of the arbitration as opposed to the place where the arbitrators gather to hear evidence." Report, p. 27. One might also make the grammatical point that the word "seat" is a noun, meaning, in this context, a place, whereas the term "are sitting" is a verbal construct known as the progressive participle with the connotation of activity or movement.

Jones Day v. Orrick opens a pathway that can be followed not only by courts in the Ninth Circuit but also by courts elsewhere in this country that may deal with U.S.-based international arbitrations. With respect to domestic arbitrations, we will have to await further jurisprudential development as to the meaning and significance of the words "seat" and "sitting" in §7 of the FAA.

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