A REPORT BY THE
INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE
AND THE ARBITRATION COMMITTEE

A MODEL FEDERAL ARBITRATION SUMMONS TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING

Report As Originally Issued in May 2015
with Case Law Updates and Comments Added as of January 2024[1]

[1] **2024 UPDATE**: The case law updates through 2023 provided here are intended to identify areas of significant evolution or change in the applicable law. We have not sought to include systematically cases from 2015 through 2023 in areas of the 2015 report where the legal landscape has not materially changed.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street, New York, NY 10036
212.382.6600 | www.nycbar.org

Table of Contents

Introduction and Model Summons **1**

Annotation A: Denomination as "Witness Summons" **5**

Annotation B: Natural Person as Witness Summons Recipient **6**

Annotation C: Location of the Witness/Nationwide Service **7**

Annotation D: Who May Issue a Subpoena **8**

Annotation E: Viability of Pre-Hearing Discovery Subpoenas **12**

Annotation F-1: Place of Witness Hearing and Venue for Enforcement **23**

Annotation F-2[2]: Witness Hearings by Video Link **43**

Annotation G: Scope of "Duces Tecum" Witness Summons **47**

Annotation H: Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons **50**

Annotation I: Proper Setting for Witness to Raise Objections **60**

Annotation J: Arbitral Subpoena Based on FRCP 30(b)(6) **65**

Annotation K: Arbitral Role in Deciding Enforceability of Subpoenas **70**

Annotation L: Procedure in Regard to Arbitral Subpoenas Governed By FAA Section 7 .... **77**

Appendix 1: Model Summons Without Annotations **81**

Appendix 2[3]: Topical Guide to Case Law **83**

[2] **2024 UPDATE**: With the evolution of video-conferencing as a pragmatic solution for overcoming distances in a variety of arbitration hearing contexts, we now present this topic as a separate annotation.

[3] **2024 UPDATE**

Introduction and Model Summons

This annotated model federal arbitration witness summons (so titled because the Federal Arbitration Act ("FAA") uses the term "summon" rather than "subpoena" in Section 7) brings together in one resource guidance on law and practice in regard to the issuance by arbitrators of compulsory process for evidence to be obtained from non-party witnesses.[1] A major impetus for this project was the amendment of Rule 45 of the Federal Rules of Civil Procedure in December 2013, which in relevant part provided for nationwide service of a federal judicial subpoena. By implication, a federal arbitral witness summons, which per FAA Section 7 is to be served in the same manner as a federal judicial subpoena, now may be served nationwide. The consequences are likely to be (i) more extensive proposed and actual use of arbitral subpoenas than was the case when an arbitrator could compel attendance only of a witness found within 100 miles of the place of arbitration, and (ii) a greater frequency of litigation concerning the witness's duty of compliance.

The structure of this document, as the Table of Contents indicates, is to provide a Model Summons and a series of annotations that discuss applicable law and/or issues of practice and policy. The annotations are keyed to aspects of the Model Summons by footnotes (or hyperlinks) in the Model Summons, so the reader can readily refer to the analysis that underlies the various components of the Model Summons.

2024 UPDATE: The Model Summons and annotations have been updated with comments and case law through 2023 to identify areas of significant evolution or change in the applicable law since this report was issued in 2015 (the "2015 Report"). We have not sought to include systematically cases from 2015 through 2023 in areas of the 2015 Report where the legal landscape has not materially changed.

TEXT OF 2015 REPORT CONTINUES HERE

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[1] The subject of non-party evidence in international arbitration has been addressed in two recent reports by the International Commercial Disputes Committee of the New York City Bar Association. *See Obtaining Discovery from Non-Parties in International Arbitration in the United States,* 20 Am. Rev. Int'l Arb. 421 (2009); *28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration — Applicability and Best Practices*, https://www.nycbar.org/pdf/report/1782_Report.pdf (2008).

CASE NO. [if applicable][2]

[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[3] TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING[4]

TO: [J. Smith][5]
[Z Corporation][6]
[address]
[City], [State][7]

By the authority conferred on the undersigned arbitrators[8] by Section 7 of the United States Arbitration Act (9 U.S.C. § 7), you are hereby SUMMONED to

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2 *See* Annotation L (Procedure in Regard to Arbitral Subpoenas Governed by FAA Section 7).

3 *See* Annotation A (Denomination as "Witness Summons").

4 *See* Annotation K (Arbitral Role in Deciding Enforceability of Subpoenas).

5 *See* Annotation B (Natural Person As Witness Summons Recipient).

6 *See* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

7 *See* Annotation C (Location of the Witness/Nationwide Service).

attend as a witness at a hearing before one or more of the undersigned arbitrators[9] 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],[10] and to bring with you to the hearing the documents identified in Schedule A annexed to this SUMMONS.[11] With your consent and the consent of all counsel involved, the hearing may proceed on a videoconference platform, and your appearance at the designated physical location would be excused.[4]

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,[12] then if you shall refuse or neglect to obey this SUMMONS, upon petition the United States District Court for the District of [State][13] or a competent court of the State of [State][14] 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[15]

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[8] *See* Annotation D (Who May Issue a Subpoena).

[9] *See* Annotation E (Viability of Pre-Hearing Discovery Subpoenas).

[10] *See* Annotation F-1 (Place of Hearing and Venue for Enforcement) [**2024 UPDATE:** original Annotation F now divided in two parts with updated commentary].

[11] *See* Annotation G (Scope of "Duces Tecum" Witness Summons).

[12] *See* Annotation C (Location of the Witness/Nationwide Service).

[13] *See* Annotation F-1 (Place of Hearing and Venue for Enforcement). [**2024 UPDATE:** original Annotation F now divided in two parts with updated commentary].

[14] *See* Annotation H (Subject-Matter Jurisdiction to Enforce Witness Summons).

[15] The Model encourages the witness to communicate with counsel for the parties to avoid *ex parte* communications between the witness and the arbitral tribunal.

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[4] **2024 UPDATE**: This treatment of video conferencing is informed by the evolution in the case law discussed in Annotation F-2.

identified below. Any application by you to quash or modify this SUMMONS in whole or in part should be addressed to the arbitral tribunal[16] in writing with electronic copies sent to counsel for the parties and the Case Manager [if applicable], 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].[17]

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	[name] Presiding Arbitrator	[name], Arbitrator
[Address]	[Address]	[Address]

[16] *See* Annotation I (Proper Setting for Witness to Raise Objections)

[17] Annotation H (Subject-Matter Jurisdiction to Enforce Witness Summons).

Annotation A: Denomination as "Witness Summons"

FAA Section 7 refers to the compulsory process issued by an arbitrator as a "summons" and states that it should be served "in the same manner as subpoenas." We therefore make this formal distinction in the text of the Model Summons. In our annotations, however, we use interchangeably the terms "summons" and "subpoena" to refer to an arbitrator's compulsory process to a non-party witness.

Annotation B: Natural Person as Witness Summons Recipient

It is recommended to identify a natural person as the witness whenever possible. In a judicial proceeding, a party might in discovery serve a subpoena based on Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and require the corporate recipient to identify a representative to testify. Uncertainty exists about whether such an approach is permissible in arbitration. For further explanation, *see* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

Annotation C: Location of the Witness/Nationwide Service

The Summons may be issued to a witness residing at a considerable distance from the place of the arbitration. This is the consequence of amendments to Rule 45 of the Federal Rules of Civil Procedure ("FRCP") in December 2013 that provide for nationwide service of process of a judicial subpoena. *See* Annotation F (Place of Hearing). Section 7 of the FAA provides that the arbitral witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." FRCP 45(b)(2) as amended December 1, 2013 provides that "[a] subpoena may be served at any place within the United States."

2024 UPDATE: In at least three noteworthy cases since the issuance of our Report in 2015, federal courts have agreed with the position that the 2013 amendment to Rule 45(b)(2) with regard to nationwide service of a judicial subpoena makes available under Section 7 of the FAA nationwide service of process of an arbitral subpoena. *See Managed Care Advisory Group, LLC* v. *CIGNA Healthcare, Inc.* , 939 F.3d 1145, 1157 (11th Cir. 2019); *Broumand* v. *Joseph*, 522 F.3d 8, 18 (S.D.N.Y. 2021); *Int'l Seaway Trading Corp.* v. *Target Corp.*, 2021 WL 672990 at *5 (D. Minn. Feb. 22, 2021).

TEXT OF 2015 REPORT CONTINUES HERE

Annotation D: Who May Issue a Subpoena

Statutory background. Section 7 of the FAA provides that "*the arbitrators, or a majority of them*" (emphasis supplied) may "summon in writing any person to attend before them or any of them." Section 7 further provides that "[said] summons shall issue in the name of the arbitrator or arbitrators, or a majority of them." Section 7 therefore provides no authority for the issuance by counsel of a summons or subpoena, signed by such counsel, for a party to testify or produce records in an arbitration. In this respect Section 7 of the FAA differs from Section 7505 of the New York Civil Practice Law and Rules ("CPLR"), which provides: "An arbitrator *and any attorney of record in the arbitration proceeding* has the power to issue subpoenas" (emphasis supplied).

Caselaw. Federal court decisions suggest, even if they do not squarely hold, that state laws and rules conferring power on attorneys to issue subpoenas are not applicable in an arbitration to which the FAA applies, at least unless the parties have expressly agreed upon use of state law rules of arbitral procedure. *See*, *e.g.*, *Nat'l Broadcasting Co.* v. *Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (Section 7 "explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents and witnesses"); *St. Mary's Med. Center* v. *Disco Aluminum Prods.*, 969 F.2d 585, 591

(7th Cir. 1992); *Burton* v. *Bush*, 614 F.2d 389, 390 (4th Cir. 1980); *Kenney, Becker LLP* v. *Kenney*, 2008 WL 681452, at *2 (S.D.N.Y. Mar. 10, 2008) (citing *NBC* for the proposition that "under the Federal Arbitration Act . . . only arbitrators – and not parties to an arbitration – have the authority to issue subpoenas"); *Suratt* v. *Merrill Lynch, Pierce Fenner & Smith, Inc.*, 2003 WL 24166190, at *2 (S.D. Fla. July 31, 2003) (granting motion to quash attorney- issued subpoena because "[t]he FAA does not allow attorney-issued subpoenas in arbitration actions"). To the extent these cases held that an attorney-issued subpoena was improper, they did so on the basis that FAA Section 7 did not provide for it.

But these courts were not asked to find that a state law or rule allowing attorney-issued subpoenas in arbitration was pre-empted by the FAA. No federal court, to our knowledge, has directly answered the question whether FAA Section 7 pre-empts state arbitration rules concerning the powers of arbitrators or parties to issues subpoenas to non-parties for evidence to be used in an arbitration. Thus if an attorney in a New York-seated arbitration issued a subpoena upon the purported authority of CPLR 7505, in a case involving interstate or international commerce, it would apparently be a question of first impression in the Second Circuit whether CPLR 7505 is pre-empted by FAA Section 7.

Party agreement on state procedures. Federal case law suggests that one approach that may authorize use of state law procedures in an FAA arbitration would be for the parties to agree to such procedures, thereby triggering the federal policy in favor of enforcing the parties' agreed-upon procedures. *See Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (generic choice-of-New-York-law clause in contract containing arbitration clause to which the FAA applies should be construed to make applicable only substantive principles of New York law and not New York law restricting the powers of arbitrators); *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 476 (1989) (FAA does not reflect congressional intent to occupy the entire field of arbitration, and FAA does not prevent enforcement of agreements to arbitrate under rules different from those set forth in the FAA itself); *Savers Prop. & Cas. Ins. Co.* v. *Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 715-16 (6th Cir. 2014) ("Although the FAA generally preempts inconsistent state laws and governs all aspects of arbitrations concerning 'transaction[s] involving commerce,' parties may agree to abide by state rules of arbitration, and 'enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA'"); *Bacardi Int'l Ltd.* v. *V. Suarez & Co.*, 719 F.3d 1, 13 n.16 (1st Cir. 2013) ("[T]o use local arbitration rules instead of the FAA, the contract must say so unequivocally"); *Ario* v. *Underwriting Members of*

Syndicate 53 at Lloyd's, 618 F.3d 277, 288 (3d Cir. 2010) ("We have interpreted the FAA and *Volt* to mean that 'parties [may] contract to arbitrate pursuant to arbitration rules or procedures borrowed from state law, [and] the federal policy is satisfied so long as their agreement is enforced.'").

Annotation E: Viability of Pre-Hearing Discovery Subpoenas

Federal court decisions addressing pre-hearing document discovery. Some federal courts of appeals have interpreted the text of Section 7 to require the appearance of the witness at a hearing before one or more members of the arbitral tribunal, and thus have concluded that Section 7 does not permit a documents-only arbitral subpoena for pre-hearing production of documents by a non-party witness. This was the position taken by the Third Circuit (in an opinion authored by then Circuit Judge Samuel Alito) in *Hay Group, Inc.* v. *E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). The Second Circuit agreed with the Third Circuit in *Life Receivables Trust* v. *Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008).

The implication of the reasoning in both decisions – that the language of Section 7 requires the attendance of a witness at a hearing before one or more arbitrators – is that Section 7 also precludes an arbitral subpoena for a pre-hearing discovery deposition, but this issue was not directly presented in either case. Both of these courts rejected the view adopted by the Eighth Circuit 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." *In Re Sec. Life Ins. of Am.*, 228 F.3d

865, 870-71 (8th Cir. 2000).[5] The Second and Third Circuits also rejected the view adopted by the Fourth Circuit that, while Section 7 generally precludes discovery subpoenas, discovery subpoenas may be allowed exceptionally upon a showing of special need or hardship. *COMSAT Corp.* v. *Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).

For federal trial court cases that follow *Life Receivables* and *Hay Group* and deny enforcement of pre-hearing discovery outside the presence of an arbitrator, *see Chicago Bridge & Iron Co.* v. *TRC Acquisition, LLC*, 2014 WL 3796395 (E.D. La. July 29, 2014); *Ware* v. *C.D. Peacock, Inc.*, 2010 WL 1856021 (N.D. Ill. May 7, 2010); *Empire Fin. Group* v. *Pension Fin. Servs., Inc.*, 2010 WL 742579 (N.D. Tex. Mar. 3, 2010); *Kennedy* v. *Am. Express Travel Related Servs.*, 646 F. Supp. 2d 1342 (S.D. Fla. 2009). For a district court case following the Eighth Circuit position that the power to require pre-hearing discovery is implicit in Section 7, *see Ferry Holding Corp.* v. *GIS Marine, LLC*, 2012 WL 88196, at *2-3 (E.D. Mo. Jan. 11, 2012). An older case predating the emergence of the conflict between the Circuit courts finds the position that arbitrators may not order pre-hearing non- party discovery to be "unfounded." *See Stanton* v. *Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp.

[5] **2024 UPDATE**: A federal district court in the Eighth Circuit followed the *Security Life Insurance* position in a recent case, enforcing an arbitrator's subpoena for a pre-hearing discovery deposition of a non-party. *See Int'l Seaway Trading Corp. v. Target Corp.*, 2021 WL 672990 (D. Minn. Feb. 22, 2021).

1241, 1243 (S.D. Fla. 1988).

2024 UPDATE: Since the original publication of this Report, other federal Circuits have adopted the same position as the Second and Third Circuits, making this the prevailing position among the federal Circuits that have addressed the issue. *See Managed Care Advisory Group, LLC* v. *CIGNA Healthcare, Inc.*, 939 F. 3d 1145 (11th Cir. 2019); *CVS Health Corp.* v. *Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017). And for a recent US district court case reaching this conclusion, *see Dodson Int'l Parts, Inc. v. Williams Int'l*, 2019 WL 5680811 at *2 (E.D. Mich. Jun. 26, 2019).

It is quite common in practice that an arbitral subpoena will be issued calling for a testimonial appearance of a witness who will bring with him or her certain documents, in accordance with the "no-discovery" position taken in most federal circuits, but for the party seeking the evidence then to negotiate an agreement with the witness to forgo the hearing and simply to obtain the documents. The argument might be made that this converts the subpoena into a discovery subpoena that the governing law in the jurisdiction may prohibit. That argument was presented to and rejected by the Second Circuit in *Washington Nat'l Ins. Co.* v. *OBEX Group LLC*, 958 F.3d 126, 136 (2d Cir. 2020), where the Court observed: "A properly issued summons is not rendered invalid by a claimant's offer, a respondent's offer, or a joint agreement to produce documents without a hearing."

New York's Civil Practice Law and Rules (CPLR) has for many decades included a provision allowing for pre-action discovery, including discovery "in aid of arbitration" in appropriate circumstances. CPLR § 3102 (c).[6] It has long been the position of the New York courts to allow this provision to be used for discovery in aid of arbitration only "under extraordinary circumstances." *DeSapio* v. *Kohlmeyer*, 35 N.Y.2d 402, 406 (1974). In a case in 2019, that test was found to be satisfied where an applicant sought discovery of documents, by judicial subpoena to a non-party residing in New York, that were claimed to be essential to prove the quantum of the claim in a UK-seated international arbitration. *Zampolli* v. *Range Developments*, 2019 WL 5394487 (Sup. Ct. N.Y. Co. Oct. 22, 2019).

TEXT OF 2015 REPORT CONTINUES HERE

New York State court decisions addressing pre-hearing document discovery. The Appellate Division of New York Supreme Court, First Department, in a 2005 case (pre-dating *Life Receivables)* held that in a case governed by the FAA, it would apply Section 7 to permit discovery depositions of non-parties pursuant to a summons "where there is a showing of 'special need or hardship,' such as where the

[6] **2024 UPDATE**: This provision states: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order."

information sought is otherwise unavailable." *ImClone Sys. Inc.* v. *Waksal*, 22 A.D.3d 387, 388 (1st Dep't 2005). The Court stated that it would adhere to this view "in the absence of a decision of the United States Supreme Court or unanimity among the lower federal courts." *Id.* We are not aware of any New York State appellate decision after *Life Receivables* that either follows or overrules *ImClone* in light of *Life Receivables*. At least one New York State trial court has followed *Imclone* after and notwithstanding *Life Receivables*, finding that pre-hearing document discovery by subpoena under FAA Section 7 to a non-party may be ordered upon a showing of special need or hardship (although in that case the court found that this test was not satisfied). *Connectu* v. *Quinn Emanuel Urquhart Oliver & Hedges*, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cnty. Mar. 11, 2010).

2024 UPDATE: In *Matter of Roche Molecular Systems, Inc.*, 60 Misc.2d 222, 76 N.Y.S.3d (Sup. Ct. Westchester Co. 2018), a New York trial court enforced a discovery subpoena under § 3119 of the New York Civil Practice Law and Rules (CPLR)[7] based on commission for an out-of-state deposition obtained from a

[7] **2024 UPDATE**: CPLR § 3119 is New York's version of the Uniform Interstate Depositions and Discovery Act. It permits a New York-licensed attorney, as officer of the court, to issue a subpoena to a New York-resident person where a party to an out-of-state proceeding provides that attorney with a valid out-of-state subpoena addressed to that person. The statute treats a commission issued by the clerk of court of another state as the equivalent of an out-of-state subpoena. Whether CPLR 3119 would provide a New York procedural route to effectuate an out-of-state *arbitral* subpoena was not decided in *Roche* and appears not to have been decided in any other New York decision. The subpoena enforced in *Roche* was the commission issued by a California Superior Court.

California court, as provided by California's Civil Discovery Act, with the permission of a California-seated tribunal in an arbitration deemed to be international under that statute. The New York trial court further stated (albeit in *dictum*) that in the case of an out-of-state *arbitral* subpoena in an arbitration to which the FAA applies, it would be bound by *Imclone* v. *Waksal* as a controlling New York appellate precedent to apply the position that FAA Section 7 permits an arbitral discovery subpoena upon a showing of "special need or hardship."[8]

TEXT OF 2015 REPORT CONTINUES HERE

Implications of federal-state split in New York. For New York practitioners, the divergence between the position of the Appellate Division of the New York

[8] **2024 UPDATE**: A state court in a state other than New York might interpret Section 7 of the FAA as a remedial provision that creates subpoena enforcement remedies that are available exclusively in a US district court where the arbitrators are sitting. (This is in contrast to the view, discussed in the 2024 Update to Annotation F – now designated Annotation F-1 - below, that this portion of FAA Section 7 may be understood as a permissive federal venue provision). An arbitral subpoena issued by the California-seated arbitral tribunal in the *Roche* case was denied enforcement by a Massachusetts state court on the basis that Section 7 provides a remedy exclusively available in a US district court. *See Gilead Sciences Inc.* v. *Roche Molecular Systems*, Inc., Civil Action No. 177CV06126 (Mass. Superior Court, Essex Co., Nov. 27, 2017).

Supreme Court and the Second Circuit, if it continues, may be significant, as many Section 7 subpoenas in domestic cases involving interstate commerce may have to be enforced in the New York courts because federal subject matter jurisdiction is absent. *See*, *e.g*., *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005) (holding that Section 7 of the FAA does not, by virtue of its reference to federal district courts as courts that may compel compliance, create federal question subject matter jurisdiction for enforcement of subpoenas in FAA- governed arbitrations, and that Section 7, like other provisions of FAA Chapter 1, requires an independent basis for federal subject matter jurisdiction). *See* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons).

Practice question: how should a tribunal conduct document production? Assuming that a tribunal adopts the position in *Life Receivables* and *Hay Group*, a practice question is presented: How should the tribunal conduct the procurement of documents from the non-party witness if the parties and witness do not agree? (If there is agreement, the non-party often will elect to avoid the inconvenience of a testimonial appearance by a documents custodian by delivering the requested documents to counsel for the parties. Thus pre-hearing non-party discovery may often occur simply because it is the path of least resistance).

The Model Summons contemplates that, absent agreement of the parties, the documents sought will be received into evidence in conjunction with testimony from a non-party witness at a hearing at which the parties and one or more members of the tribunal would be present. We believe this is required by the text of Section 7, which contemplates that document production should be an adjunct to the testimony of a witness. This interpretation of Section 7 is supported by the fact that, as the Third Circuit in *Hay Group* observed, the forerunner of modern Rule 45 of the Federal Rules of Civil Procedure ("FRCP") as it was at the time Section 7 was adopted did not permit a documents-only subpoena.

Tribunals retain discretion, however, to conduct a witness hearing in any fashion that comports with due process and so it is not inevitable that the physical presence of the arbitrator and the witness in the same place is necessary. If the parties waive cross-examination, the witness's testimony could be presented through a witness statement or declaration. There should be no obstacle to the fulfillment of the testimonial requirement, if the witness consents, via a telephonic or video-conferenced hearing during which the documents are received by an

electronic submission.[18] In order to comply with the view that this is not discovery but a hearing preceding the final merits hearing, the tribunal should receive the documents as evidence and may then rely upon them in an award whether or not the parties in their further submissions refer to them.

In practice, arbitrators will continue to be asked to issue pre-hearing subpoenas for discovery, especially when the witness resides in a location within a federal judicial circuit that either takes an approach to Section 7 that permits an arbitral summons for discovery in at least some instances (*e.g.*, the Fourth and Eighth Circuits) or has not taken a position on the question. We believe the Second and Third Circuit decisions are well reasoned, and faithful to the text of Section 7, and that in practice it makes sense for arbitrators to issue witness summonses that conform to the evidentiary-hearing model. The Model Summons is therefore structured along those lines. If the witness agrees to a discovery-like procedure, the interests of the party that sought compulsory discovery are not prejudiced, and the subpoena functions as a sort of predictable back-up method for obtaining the non-party's evidence.

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[18] As we discuss in Annotation F-2, while we believe that taking testimony telephonically or by videoconference does not require a witness to consent, it may be prudent to obtain that consent where possible.

Subpoenas for pre-hearing witness testimony. In the *Life Receivables* and *Hay Group* cases, the Second and Third Circuits, respectively, reversed orders of the district courts that had enforced subpoenas for pre-hearing document production by non-party witnesses. The decisions therefore implied that a subpoena requiring pre-hearing document production at a hearing held in the presence of one or more of the arbitrators would be enforceable. But the question of enforceability of a subpoena for witness testimony was not directly involved in the *Life Receivables* and *Hay Group* cases, and therefore those decisions did not squarely answer the question of whether Section 7 permits a non-party subpoena for witness testimony at a proceeding held in the presence of one or more arbitrators that is not the arbitration hearing on the merits.

Prior to *Life Receivables*, the Second Circuit in *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 577 (2d Cir. 2005), had affirmed enforcement of a subpoena for witness testimony at a hearing before the arbitrators to be held prior to the arbitration merits hearing, and rejected the contention that the pre-merits timing of the non-party witness hearing converted the proceeding into a deposition not permitted under Section 7. The Second Circuit held that "there is nothing in the language of Section 7 that requires, or even suggests," that the non-party witness may only be required to attend and testify at the merits hearing. *Id.* at 579-80.

Based upon *Life Receivables* and/or *Hay Group*, arbitral subpoenas that specifically required a witness to appear and give testimony at a pre-merits hearing have been enforced. *E.g.*, *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606 (S.D.N.Y. July 18, 2014); *In re Nat'l Fin. Partners Corp.*, 2009 WL 1097338 (E.D. Pa. April 21, 2009).

Annotation F-1: Place of Witness Hearing and Venue for Enforcement[9]

The Model Summons envisions that the arbitrators will convene a hearing to secure the testimony of a witness (or receive documents) at or near the place where the witness is located, rather than at the place of arbitration. This procedure results from the interplay of the nationwide service of process provisions of Rule 45 of the Federal Rules of Civil Procedure ("FRCP"), the limitations in that Rule on how far a witness may be compelled to travel and the language of FAA Section 7 that calls for the summons to be enforced by "the United States district court for the district in which such arbitrators, or a majority of them, are sitting."

Nationwide service of process and distant witnesses. FAA Section 7 provides in part that the arbitral witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." As amended effective December 1, 2013, FRCP 45(b)(2) provides that a judicial subpoena may be served anywhere in the United States. Previously the subpoena could be served only within the judicial district of the issuing court, within 100 miles of the courthouse of the issuing court, or state-wide where the judicial district was within a state whose civil procedure law provided for state-wide service of process. The new availability of

[9] **2024 UPDATE**: The title of this Annotation has been modified from the 2015 Report to take into account the reasoning of the *Jones Day* v. *Orrick* case, and its implications for interpretation of FAA Section 7, as discussed in the update of this Annotation.

nationwide service of process has implications for a witness summons issued by an arbitral tribunal under FAA Section 7 to a witness located at a considerable distance from the seat of the arbitration.

If the witness does not indicate willingness to comply, the arbitral summons served in a far-flung corner of the country with the benefit of the new Rule 45 provision for nationwide service of process may need to be enforced by the federal court or a competent state court in the judicial district where the arbitrators are "sitting." *See* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons). Section 7 states: "[T]he 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 punishment for neglect or refusal to attend in the courts of the United States." (Emphasis added.)

Court decisions on place of hearing prior to nationwide service rule. The new statutory authorization for nationwide service of process clears at least one procedural hurdle to such enforcement: that there must be statutory authorization for the service of process as a precondition to personal jurisdiction over the witness in the enforcing federal district court. That was a problem under FAA Section 7 before

the recent Rule 45 amendment. In *Dynegy Midstream Servs., LP* v. *Trammochem*, 451 F.3d 89 (2d Cir. 2006), an arbitral tribunal sitting in New York issued a subpoena to a Houston witness calling for production of documents at a Houston location. When the witness ignored the subpoena, a motion to compel compliance was made in the U.S. District Court for the Southern District of New York, the motion was granted, and the Houston witness appealed on grounds that the New York federal district court lacked personal jurisdiction. The Second Circuit agreed, holding that personal jurisdiction over the Houston witness could not exist because FAA Section 7 in conformity with Rule 45 did not authorize a New York-based arbitral tribunal summons to be validly served on a Houston witness in Houston, just as Rule 45 would not allow a Southern District of New York trial subpoena to be validly served on a Houston witness in Houston.

A similar outcome occurred in *Legion Ins. Co.* v. *John Hancock Mutual Life Ins. Co.*, 33 Fed. Appx. 26 (3d Cir. April 11, 2002). There, the Third Circuit held that the U.S. District Court for the Eastern District of Pennsylvania did not have power to enforce a subpoena, issued by an arbitral tribunal in Philadelphia, directed to a non-party witness located in Florida, which required the witness to appear for deposition in Florida and to bring with him certain documents and papers. The Court relied on the language in Section 7 that arbitration subpoenas "shall be served in the

same manner as subpoenas to appear and testify before the court," and held: "In light of the territorial limits imposed by Rule 45 upon the service of subpoenas, we conclude that the District Court did not commit error in denying John Hancock's motion to enforce the arbitration subpoena." *Id.* at 28.

Remaining limits on personal jurisdiction. Rule 45(b)(2) as amended to permit nationwide service of a judicial subpoena, and by extension nationwide service of an arbitral summons to a non-party witness, solves the threshold personal jurisdiction problem found to exist in *Dynegy* and in *Legion Insurance*. But this does not mean that the federal district court at the seat of the arbitration will always have personal jurisdiction over a witness upon whom valid personal service of the arbitral summons has been made. Statutory authorization for nationwide service of process is a necessary step to establish personal jurisdiction, but there are two more steps: personal jurisdiction must be available under the law of the state in which the district court is located, and if that law extends personal jurisdiction to the federal Constitutional limit, the subpoena must also comport with due process under the U.S. Constitution. *See Licci* v. *Lebanese Canadian Bank*, 673 F.3d 50, 60-61 (2d Cir. 2012).

Now that nationwide service of an arbitral summons is possible, two questions linked to personal jurisdiction over the non-party witness for enforcement purposes

arise:

1) Can an arbitral summons require the witness to appear at a hearing at the place of arbitration even though it is far distant from his or her domicile?

2) If the summons calls for a hearing near the domicile of the witness, with arbitrators in attendance, do the local courts have power under Section 7 to enforce compliance?

Can a summons require the witness to travel to the place of arbitration? On the first question, as to where the witness might be required to attend a hearing, the Rule 45 amendments have not fundamentally changed the Rule's geographic boundaries for the place of compliance, but merely consolidate them in amended Rule 45(c). Rule 45(c)(1) now 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." Thus, an arbitral summons cannot properly call for a non-party witness to travel to a hearing more than 100 miles from where the witness resides, is employed or regularly transacts business, except that the witness can be required to travel further within the

state if the witness would not incur substantial expense.

What court enforces the summons? As for the enforcing court, the amendments to Rule 45 now make it clear that the federal district court at the place of compliance with a judicial subpoena is the court in which enforcement should be sought, unless that court elects to transfer the enforcement case to the federal district where the action is pending. This effects no real change in judicial practice as to enforcement, except that previously the federal district court at the place of compliance was the court in whose name a judicial subpoena for pre-trial discovery was issued by an attorney as an "officer of the court," and now such a subpoena is issued in the name of the federal district court where the action is pending. In parallel to federal judicial subpoena practice, we believe that the federal district court at the place of proposed compliance with the arbitral subpoena (or a state court if there is no basis for federal subject-matter jurisdiction, *see* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons)) should be the enforcement court.

Limitations in FAA Section 7 on where the witness hearing can take place. The question arises whether an arbitral summons can call for attendance at a hearing to be held at a place other than the seat/locale of the arbitration. As illustrated by the *Dynegy* and *Legion Insurance* cases, before the December 1, 2013 amendment, Rule

45's territorial limitation on service of process answered the place-of-compliance question, making it impossible to secure non-party evidence from witnesses not within striking distance of the place of arbitration. But now that an arbitral summons, like a federal subpoena, may be served nationwide, the question is squarely presented whether there are territorial limits on where a witness served with an arbitral summons may be required to appear to give evidence in the arbitration.

Section 7 lodges power to enforce the arbitral summons by an order compelling the witness to appear, or by an order of contempt for non-compliance, in "the United States district court for the district in which such arbitrators, or a majority of them, are sitting." If the arbitrators (or a majority of them) elect to convene a hearing in the district where the witness resides, there is no obstacle to personal jurisdiction over the witness in the local federal district court, and that court (provided it has subject-matter jurisdiction (Annotation H)) may enforce the subpoena under Section 7 if the arbitrators "are sitting" in that district. Federal courts have not considered this question.[10] In the case of a federal judicial discovery subpoena, whether for documents or a deposition, amended Rule 45 specifically

[10] **2024 UPDATE**: As set forth in the update to this Annotation, below at p. 35, in our discussion of the *Symetra* decision and the decision of the district court in the *Jones Day v. Orrick* case, federal courts have reached divergent conclusions on this question.

provides that the enforcement court shall be the federal district court embracing the place of residence or employment of the witness. If that is the correct paradigm for arbitral subpoena practice, then it would follow that the federal district court embracing the place of compliance with the arbitral subpoena, or the competent state court at that place, should be the enforcement court.

If, by contrast, the place where the arbitrators "are sitting" under Section 7 refers to a single fixed location that has been designated as the place of arbitration – the seat of the arbitration, in international arbitration parlance – then there is only one federal judicial district where courts (federal and state) have enforcement power, and their ability to exercise that power over a distant witness would depend upon those courts having personal jurisdiction over the witness. But if the arbitrators "are sitting," in Section 7 terms, at the hearing location specified in their summons, then enforcement power will be lodged in the federal judicial districts where witnesses served with arbitral summonses are found.

We favor this interpretation for several reasons. First, it ensures that enforceability of an arbitral subpoena will not depend on personal jurisdiction over the witness in a court at the place of arbitration, a criterion which would make the availability of non-party testimony unpredictable and would invite collateral litigation over the personal jurisdiction issue. Second, it is logical that the witness

should not face the inconvenience and cost of defending a motion to compel imposed on a witness served with a federal deposition subpoena because such a witness must be compelled in a proceeding before the federal district court in the locale of the witness. Third, this interpretation aligns judicial enforcement power in international arbitrations seated in the United States with the typical provisions of international arbitration rules permitting arbitrators to convene hearings at any place convenient for obtaining evidence.[19] Fourth, this interpretation does no violence to

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[19] From an arbitration procedure perspective, there is usually no difficulty in having the arbitrators venture out physically or virtually to a location other than the place of arbitration to conduct proceedings. For example, under Rule 11 of the Commercial Arbitration Rules of the American Arbitration Association: "The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations (i.e., other than the agreed or designated 'locale' of the arbitration) if reasonably necessary and beneficial to the process." [**2024 UPDATE**: This is now found at Rule R-12 in the AAA Commercial Rules as amended and effective September 1, 2022 ("2022 Commercial Rules")]. Further, Rule 32(c) of the Commercial Rules provides: "When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination." [**2024 UPDATE**: This now appears in slightly modified language in Rule R-33(c) of the 2022 Commercial Rules]. *See also*, to similar effect, Rules 17(2) and 20(2) of the International Arbitration Rules of the International Centre for Dispute Resolution, and Article E-9 of the International Expedited Procedures, effective as of June 1, 2014. [**2024 UPDATE**: In the amended ICDR Rules effective March 1, 2021, *see* Rules 22(2) and 26(2) and also Article E-9 of the Expedited Procedures]. This is in conformity with the provisions that have long been included in the UNCITRAL Arbitration Rules and most institutional rules for international arbitration, permitting the tribunal to convene hearings at locations other than the seat of the arbitration.

the language of Section 7 because 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. Fifth, this interpretation does not violate, and indeed can be seen as consistent with, the expressed intent of Congress in the enactment of Section 7 – as it appears to have been Congress's intent that Section 7 would evolve in parallel with changes in federal judicial practice with regard to non-party witnesses. If, after the 2013 Rule 45 amendments, the "are sitting" language were construed to refer only to the court at the place of arbitration, the ability of the parties and arbitrators in an arbitration to obtain relevant and material testimony from non-parties would be significantly less than in litigation before the federal courts.

The more restrictive interpretation, *i.e.*, that only a court at the place of arbitration is located where the arbitrators "are sitting," significantly limits the actual impact on arbitral evidence gathering of the extension of nationwide service of process to arbitral witness summonses. This may be said to conform to a view of arbitration as a private method of dispute resolution between the parties that involves less fact gathering and places fewer burdens on non-disputants than does court litigation. As set forth in a separate annotation to this Model Summons (*see* Annotation E (Viability of Pre-Hearing Discovery Subpoenas)), our interpretation

of Section 7 supports this view of arbitration in the requirement that evidence should be gathered from non-parties in the presence of the arbitrator. We believe that the Congress that enacted Section 7 in 1925 left the matter of where arbitrators might "sit" to hold such hearings without specific restriction.

2024 UPDATE:

Introduction

In U.S.-seated international arbitrations, enforcement of an arbitral subpoena in a U.S. District Court at the domicile of the witness, even hundreds or thousands of miles from the arbitral seat, may well be obtainable without obtaining a favorable ruling on the question of whether the "are sitting" language is a restriction to the district court at the juridical arbitral seat. That is most clearly so in the Ninth Federal Judicial Circuit, as a result of that Court's decision in *Jones Day* v. *Orrick, Herrington & Sutcliffe, LLP*, 42 F.4th 1131 (9th Cir. 2022). The Ninth Circuit in *Orrick* ordered the U.S. District Court for Northern California to enforce an arbitral subpoena, issued by a Washington, D.C.-seated tribunal, that directed resident partners of a San Francisco law firm to testify before the tribunal at a witness hearing to be held in San Jose, California.

Whereas our discussion of the *Orrick* case will be extended, we precede it by noting first that the U.S. Sixth Circuit Court of Appeals, in a decision issued three

months after the Ninth Circuit's *Orrick* decision, but decided without reference to it, held in a domestic FAA Chapter One case that where the arbitral subpoena declared that the tribunal would sit in Michigan to hear the non-party witness even though the final merits hearing in the arbitration would be in Houston, a U.S. district court in Michigan could hear and decide the petition to compel compliance with the subpoena. *Symetra Life Ins. Co.* v. *Administration Systems Research Corp. Int'l*, 2022 WL 16730542 at *4 (6th Cir. Nov. 7, 2022):

> ASR submits that the arbitration panel may "sit" only in one location: where the final hearing is to be conducted. Here, that would be Houston, Texas. But the FAA's text contains no such restriction, and we decline ASR's invitation to read additional terms into the statute. … The arbitration panel declared that it was sitting in Grand Rapids, Michigan, for the hearing related to the subpoena at issue. Under the circumstances of this case, we thus hold it was not improper for Symetra to bring this action in the Western District of Michigan.[11]

Implications of Orrick for International Arbitrations

Returning now to the *Orrick* case: There were two essential analytical steps in the Ninth Circuit's reasoning. First, the Court held that an action or proceeding to enforce an arbitral subpoena, where the New York Convention applies to the arbitration

[11] **2024 UPDATE**: *See also Katena Computing Technologies, Inc.* v. *DeNaut*, 2023 WL 6858717 at *2 (D. Conn. Oct. 4, 2023) (finding venue proper in district court at the witness's domicile in Connecticut to enforce arbitral subpoena for witness hearing in Connecticut issued by California-seated tribunal in a domestic arbitration, where subpoena stated the intention of arbitrators to travel to Connecticut for witness hearing).

agreement and would apply to any award, "fall[s] under the Convention" and the proceeding is therefore within FAA Chapter Two's grant of federal subject matter jurisdiction. Second, the Court held that the venue provision of Chapter Two, FAA Section 204, is permissive not mandatory/exclusive,[12] such that an application for enforcement of an arbitral subpoena may be heard and decided in any U.S. District Court – that has subject matter and personal jurisdiction – where venue may be laid under the general federal venue statute (28 USC ¶ 1391(b)).[13]

These determinations made the U.S. District Court in Northern California an appropriate court for enforcement of the Washington, D.C.-seated tribunal's subpoena, and required that District Court to enforce the subpoena – and to do so irrespective of the District Court's views on whether, under FAA Section 7, the arbitrators could "sit" to hear non-party testimony at a place other than the arbitral

[12] **2024 UPDATE:** The Ninth Circuit cited *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193 (2000), where the U.S. Supreme Court held that the venue provisions of FAA Sections 9, 10 and 11 are permissive and function in addition to and not to the exclusion of the general venue statute. The Court also cited a 2001 Ninth Circuit decision that extended the reasoning of *Cortez Byrd* to the venue provision in FAA Section 4. The Ninth Circuit in *Orrick* did not cite any cases addressing the exclusivity *vel non* of the venue language in FAA Section 7, and our own research has not uncovered any. But cf. the Massachusetts state court case cited in fn. 8 above, treating this portion of FAA Section 7 as an exclusive remedy available only in a US district court.

[13] **2024 UPDATE**: FAA Section 204 permits venue of an action or proceeding falling under the Convention "in any [US district] court in which save for the arbitration agreement an action or proceeding with respect to the controversy … could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration." 28 USC § 1391(b)(3) provides as a default venue "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."

seat.

The Ninth Circuit in *Orrick* did not weigh in expressly on how Section 7's "*are sitting*" language should be interpreted, and so the impact of its decision on arbitral subpoena enforcement in domestic cases remains to be seen. In contrast to the later Sixth Circuit decision in *Symetra*, the District Court in *Orrick* had held that Section 7 permits arbitral subpoena enforcement only in the judicial district at the arbitral seat.[14]

Insofar as other courts find *Orrick* persuasive for *international* arbitrations, however, the "are sitting" interpretive issue under Section 7 may no longer be important. FAA Section 7 applies in cases that belong in federal court under FAA Chapter Two "to the extent … not in conflict with this chapter or the Convention…" (9 USC § 208). If a court adopts the 9th Circuit's *Orrick* holding concerning the availability of the general venue statute under FAA Chapter Two, a venue-restrictive interpretation of FAA Section 7 may not matter because, under *Orrick*, Chapter Two provides for venue in any court that has personal jurisdiction over the subpoenaed party.

Moreover, even if other courts do not agree with *Orrick*'s interpretation of Section 204 as permitting venue under the general venue statute 28 USC § 1391, the

[14] **2024 UPDATE:** 2021 WL 4069753 (N.D. Cal. Sept. 7, 2021), *rev'd and remanded on other grounds*, 42 F.4th 1131 (9th Cir. 2022).

question of whether "are sitting" in Section 7 refers only to the arbitral seat of the arbitration may not matter. Section 204 states that venue lies "in any … court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought."

If a court were to hold (contrary to *Orrick*) that Section 204 is exclusive and permits enforcement of an arbitral subpoena only where "save for the arbitration agreement an action . . . could be brought," the subpoena might still be issued and enforced in a district court where the witness is domiciled. The argument for that result could be as follows. When the FAA Chapter Two "action or proceeding" is to enforce an arbitral subpoena, the "controversy between the parties" refers to the enforcement controversy and the parties to it. That view would be consistent with the now-prevailing view that, for purposes of diversity jurisdiction in an arbitral subpoena enforcement case, it is the citizenship of the parties to the enforcement case, not citizenship of the parties to the arbitration, that matters. (See Annotation H, 2024 Update). The enforcement controversy, "but for the arbitration agreement," would concern a Rule 45 judicial subpoena (or a subpoena issued under state law, if federal subject matter jurisdiction were absent). Rule 45 provides for enforcement in, or the quashing or modifying of the subpoena in, the district court at the place of compliance (save for transfer to the district of the issuing court upon consent of the witness or in

exceptional circumstances).

On this argument, an arbitral subpoena in an international arbitration that calls upon the witness to attend before the arbitrators (or any of them) for a hearing in proximity to the witness' domicile (or place of employment) would be enforceable without regard to Section 7's reference to a federal judicial district where the arbitrators (or a majority of them) "*are sitting*." That would be so, on this line of argument, because even if "*are sitting*" refers to the juridical seat of the arbitration, this venue limitation conflicts with Section 204. Per Section 208, "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

Implications of Orrick for Domestic Arbitrations

Further, even for purely domestic arbitrations governed by FAA Chapter One, *Orrick* contributes an important new dimension to the "*are sitting*" interpretation issue under FAA Section 7. The jurisprudence underlying the *Orrick* Court's conclusion that Chapter Two's venue provision is permissive, and does not exclude laying venue under the general federal venue statute – mainly the *Cortez* case (see fn. 4 above) and its progeny[15] – potentially applies with equal force to the venue-

[15] **2024 UPDATE**: The *Orrick* Court also referred to non-arbitration case law holding that general venue statutes apply alongside more specific ones unless there is clear language of exclusivity in the latter.

conferring language in FAA Section 7. That is, the *Orrick* Court's reliance on *Cortez* (see fn. 12 above) may lead to the conclusion that the general venue statute should also apply, making venue of the subpoena enforcement case available in the district of the witness' domicile. If accepted, that position would make it unnecessary for such a district court to decide, for venue purposes, if arbitrators who plan to hear witness testimony at the witness' domicile "are sitting" there.

There is force to the position that the general venue statute is just as applicable to Section 7 as the Supreme Court in *Cortez* found with regard to Sections 9-11. At the time of Section 7's enactment in 1925, a federal trial subpoena could only be served in a very restrictive geographic range from the judicial district of its issuance, with very limited exception.[16] Section 7 expressly required — by its "in the same manner…" language – that arbitral subpoenas respect the same geographic limits. In that context, the venue provision in Section 7 at the time of enactment may have simply given the enforcing party a second venue option that, subject to limits of

[16] **2024 UPDATE**: A federal statute provided "Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: *provided,* That in civil cases, no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance that one hundred miles from the place of holding without the permission of the court being first had upon proper application and cause shown…." Act of September 19, 1922, ch. 344, 42 Stat. 848 (1922) (codified as amended at 28 U.S.C. 654 (1925-26). The exception for permission to serve beyond the 100-mile limit was evidently motivated by the Justice Department's desire to prosecute fraud cases against war material contractors, and the exception expired in 1928. *See* the 2009 Report of the International Commercial Disputes Committee cited in n.1 [2015 footnotes], *supra*, at n. 74.

personal jurisdiction over the witness, would permit the party to the arbitration to open a proceeding at the place of arbitration as well as at the place where the witness resided or worked.

To summarize, the *Orrick* and *Symetra* cases are significant federal appellate rulings consistent with the position in our 2015 Report that, in international as well as domestic arbitrations, an arbitral subpoena directed to a witness located outside the judicial district of the seat of arbitration should direct the appearance of the witness at a witness hearing to be held before one or more of the arbitrators at a location within the judicial district where the witness resides or is employed, and should indicate that compliance may be compelled or non-compliance punished by a federal district court at that location.

The Restatement Position

According to the Restatement of the Law, The U.S. Law of International Commercial and Investor-State Arbitration (American Law Institute 2023), at § 3.4 comment c (ii):

> Actions to enforce an arbitral subpoena, and impliedly motions to quash it, are according to FAA § 7 properly brought to "the United States district court for the district in which such arbitrators, or a majority of them, are sitting." The questions of what constitutes a place of "sitting" and whether there is only one such place has not been well examined in the case law. Tribunals ordinarily may conduct hearings away from the seat of arbitration and under the Restatement view may do so in order to receive nonparty testimony

and subpoenaed materials in a manner that comports with the place-of-compliance restrictions noted above.

FAA Section 7 Subpoenas in Foreign-Seated Arbitrations?

There is one further question that may arise, particularly now that the U.S. Supreme Court has held that §1782 no longer provides a potential avenue to secure U.S. federal judicial assistance to gather evidence in the U.S. for use in private commercial arbitrations seated abroad[17]: could a *foreign*-seated arbitral tribunal issue an FAA Section 7 subpoena to a U.S. resident witness to attend before the arbitrators (or any of them) at a hearing to be held in the U.S. at a location in proximity to the witness? We are not aware of any U.S. judicial decisions that have considered the enforceability of such a subpoena. Indeed, we do not know of an instance of such a subpoena having been issued by a foreign-seated tribunal. As this is undeveloped terrain, we proceed only to note two potential issues: first, whether reliance upon FAA Section 7 by foreign-seated arbitral tribunals is limited by the principle that Congress generally intends federal statutes to apply only domestically (*see Abitron Austria GmbH* v. *Hetronic International, Inc.*, 600 U.S. 412, 143 S. Ct. 2522 (2023)), and second, whether an interpretation that extended FAA Section 7 to foreign-seated arbitrations would be inconsistent with the Supreme Court's decision in *ZF*

[17] **2024 UPDATE**: *ZF Automotive US, Inc.* v. *Luxshare, Ltd.*, 596 U.S. 619, 142 S. Ct. 2078 (2022).

Automotive.[18]

TEXT OF 2015 REPORT CONTINUES HERE

[18] **2024 UPDATE**: Some commentators writing after *ZF Automotive* note the enhanced possibility of an FAA Section 7 subpoena "work-around" for US evidence-gathering in private foreign arbitrations, based on the *Orrick* court's reasoning on Chapter Two subject matter jurisdiction. *See* E. van Ginkel, *Section 1782 Revisited: Deconstructing ZF Automotive – Is There Hope for a Work-Around?*, 33 (3) Am. Rev. Int'l Arb. 187, 227-31 (2023); T. Meshel, *Enforcing International Arbitral Subpoenas in the United States*, 39 Arb. Int'l 19, 27-28, 34-37 (2023). Professor Meshel observes that such enforcement would restore US parity with other countries whose arbitration laws enable judicial evidence-gathering for foreign-seated private arbitrations. *Id.*

Annotation F-2: Witness Hearings by Video Link[19]

Suppose, for example, that an arbitral tribunal sitting in New York does wish to hear from an unwilling non-party witness residing in Seattle. Suppose the tribunal issues a subpoena that calls for the witness to appear and give testimony by video conference at the offices of a Seattle law firm or in the Seattle regional office of the AAA, with a video link to a New York location where the arbitrators, or at least one of them, will be present. In our view, Section 7's objectives (as considered by some courts) of requiring a hearing are achieved, even though the witness and the arbitrators come together by electronic means. Electronic presence of the arbitrator is an adequate substitute for physical presence, because the arbitrator *could* lawfully attend in person. However, the use of technology in this fashion ought not to become entangled with the enforceability of the witness summons by a federal or state court where the witness is located. Some recalcitrant witnesses may argue that the tribunal is not "sitting" in the federal district where the witness is found if the subpoena provides for a video link.

While we believe FAA Section 7 is reasonably read not to impose any requirement that the arbitrator appear in the physical presence of the witness – that

[19] **2024 UPDATE**: This annotation begins with the original text of the 2015 Report's subsection of Annotation F concerning video testimony.

adjudicative presence of the arbitrator (to rule on objections and declare evidence admitted) is the touchstone of Section 7 according to the interpretation given in the *Life Receivables* and *Hay Group* decisions – it is prudent to avoid controversy on this point by providing in the subpoena that the arbitrators will attend in person unless otherwise agreed. However, if a subpoena does call for video-linked hearing, enforceability of the subpoena might be supported by reference to FRCP 43, which expresses the judicial preference for testimony in open court but provides that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." FRCP 43(a).

2024 UPDATE:

Case law prior to, during and after the Covid-19 pandemic has generally opposed enforcement of arbitral subpoenas that purported to <u>require</u> the witness to appear at a witness hearing by videoconference. *See, e.g.*, *Managed Care Advisory Group, LLC* v. *CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019); *SB PB Victory, L.P.* v. *Two Farms, Inc.,* U.S. District Court, District of Colorado, Civil Action No. 1:23-mc-00019-RMR (Feb. 23, 2023); *Certified Laboratories* v. *Momar, Inc.*, 2022 WL 4370456 at *6 (N.D.Tex. Aug. 16, 2022); *Broumand* v. *Joseph*, 522

F.Supp.3d 8, 25 (S.D.N.Y. 2021); *Dodson Int'l Parts, Inc.* v. *Williams Int'l*, 2019 WL 5680811 at *2 (E.D. Mich. Jun. 26, 2019) ("[Petitioner's] assertion that testifying and transmitting documents by remote uplink is equivalent to appearing 'before the arbitrator' stretches that phrase past its breaking point. In no meaningful sense is a third-party in Connecticut [testifying by video link] 'before' an arbitrator in Michigan"). *But see Int'l Seaway Trading Corp.* v. *Target Corp.*, 2021 WL 672990 at *5 (D. Minn. Feb. 22, 2021).[20]

The cases rejecting Tribunal-mandated video conference testimony may be said to take a "static" rather than "dynamic" approach to interpretation of Section 7's requirement that the witness "attend[]… before" the arbitrator; that is to say, they construe the relevant phrasing in Section 7 as it would have been understood at the time of Section 7's enactment in 1925.[21] In view of the recent widespread adoption of videoconferencing for the conduct of arbitral evidentiary hearings generally, it is likely that in many instances the non-party witness and participating counsel will

[20] **2024 UPDATE**: In this case the witness did not raise the issue of whether the FAA permits an arbitral subpoena to require a videoconference appearance. The witness contended only that the place of compliance, by videoconference, was at the venue of the arbitration in Minneapolis, more than 100 miles distant from his home in St. Louis, and thus in violation of FRCP 45. The District Court rejected that position.

[21] **2024 UPDATE**: A useful general discussion of "static" versus "dynamic" interpretation of federal statutes may be found in Justice Breyer's dissenting opinion in *Jam* v. *International Finance Corp.*, 586 U.S. __, 139 S.Ct. 759 (2019).

consent to a videoconference appearance without that method having been commanded in the text of the witness summons, particularly if the summons in its text invites such consent. We have modified the recommended form of witnesses summons to reflect this consent option for a videoconference witness hearing. This option should not affect enforceability. It appears that the achievement of the dual objectives of predictable judicial enforceability of the witness summons and efficient use of electronic means to secure the testimony, are best served if the witness summons identifies an appropriate physical venue where the witness hearing will take place unless the consent of the witness to a videoconference testimonial appearance is obtained. The arbitrator/tribunal of course retains discretion based on the expressed preferences of counsel and its own potential interest in an in-person hearing to decide that it prefers not to offer a videoconference option.

TEXT OF 2015 REPORT CONTINUES HERE

Annotation G: Scope of "Duces Tecum" Witness Summons

Section 7 of the FAA refers to production of a document or record that "may be deemed material as evidence in the case." Under the present version of Rule 26(b)(1) of the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." That Rule further provides, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The latter clause is widely understood – and evidently misunderstood[20] – as the benchmark for a very broad scope of discovery in federal litigation.

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[20] The Judicial Conference of the United States has proposed an amendment of Rule 26(b)(1) that would replace the "reasonably calculated to lead" phrase with the following language: "Information within this scope of discovery [*i.e.*, relevant to a claim or defense] need not be admissible in evidence to be discoverable." The report of the Judicial Conference observes that the original intent of the "reasonably calculated" language was only to prohibit objections to discovery based on rules governing admissibility of evidence at trial, and that the amendment should dispel the common misperception that the phrase expands the scope of discovery beyond what *is* relevant to sources that *might contain* relevant information. *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Appendix B-1 at pp. 9-10 (September 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf.

2024 UPDATE: In 2015, the amendment to Rule 26(b)(1) discussed in the footnote was adopted, deleting the sentence referring to discovery appearing "reasonably calculated to lead to the discovery of admissible evidence" and replacing it with, "Information within this scope of discovery need not be admissible in evidence to be discoverable." The Rule continues to rest on a relevance standard rather than the materiality standard in Section 7 of the FAA.

TEXT OF 2015 REPORT CONTINUES HERE

"Materiality" embraces an assessment of the importance of the evidence to resolution of the case. When requests for information are reasonably specific, arbitral tribunals can more effectively assess the importance of the evidence than when a request seeks all documents containing information within a broad category of subject matter. As a general practice, tribunals should require a high degree of specificity in the "duces tecum" portion of a subpoena, aiming for non-cumulative evidence known to exist (or perhaps reasonably believed to exist), not available from sources within the party's control, and reasonably necessary to establish a fact in dispute. While in exceptional cases a party may demonstrate a clear need for a broader search for evidence, this narrower approach will fulfill the statutory mandate

that the subpoena seek material evidence,[21] not sources or repositories of potential evidence.

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[21] 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 . . . .") [**2024 UPDATE**: Article 24(4) in the 2021 ICDR Rules]; 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.") [**2024 UPDATE**: The 2021 revision of the CPR Protocol modifies this language: "[D]isclosure should be granted only as to items that are relevant and material to the outcome of the dispute and for which a party can demonstrate a need in order to present its position, taking into account proportionality criteria set forth in Section 1(e) below…"]; 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 …").

Annotation H: Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons

Court decisions holding that FAA Section 7 does not provide subject-matter jurisdiction. The text of the Model Summons takes into account that a federal district court may or may not have subject-matter jurisdiction to enforce the arbitral witness summons, and that enforcement may have to be sought in a state court if there is no independent basis for federal subject-matter jurisdiction. The two federal circuit courts of appeals that have addressed the issue have held that Section 7 of the FAA does not confer subject-matter jurisdiction on federal district courts, notwithstanding that Section 7 empowers those courts to compel compliance and punish non-compliance with an arbitral witness summons. The position taken in these decisions is that an "independent" basis of subject-matter jurisdiction, *i.e.* a source of subject-matter jurisdiction other than the text of Section 7, must exist. *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005); *Amgen, Inc.* v. *Kidney Ctr. of Delaware Cnty., Ltd.*, 95 F.3d 562, 567 (7th Cir. 1996).

District courts in other circuits have found these decisions persuasive. *See*, *e.g.*, *Chicago Bridge & Iron Co.* v. *TRC Acquisition LLC*, 2014 WL 3796395 (E.D. La. July 14, 2014); *Schaieb* v. *Botsford Hosp.*, 2012 WL 6966623 (E.D. Mich. Nov.

13, 2012). *But see Ferry Holding Corp.* v. *GIS Marine LLC*, 2012 WL 88196 (E.D. Mo. Jan. 11, 2012) (holding that Section 7 confers subject matter jurisdiction on the federal district court for the district in which the arbitrators are sitting).

FAA Chapters 2 and 3 provide jurisdiction in international cases. When the witness summons is issued by a tribunal in an international arbitration seated in the United States, FAA Chapter 2 and/or 3 provides the necessary basis for subject-matter jurisdiction. An action or proceeding under Chapter 2 or 3 is deemed to arise under the laws and treaties of the United States because the eventual award in the arbitration is subject to recognition and enforcement under either the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") or the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). *See* 9 U.S.C. §§ 202, 203, 302. FAA Section 7 is included in FAA Chapters 2 and 3 covering international arbitrations by virtue of the provisions in those chapters for residual application of non-conflicting sections of FAA Chapter 1. *See* 9 U.S.C. §§ 208, 307.

2024 UPDATE:

We refer to the 2024 Update to Annotation F-1 above, where the Ninth Circuit's decision in the *Orrick* case is discussed. A significant element of the Court's analysis in *Orrick* was that its conclusion that a proceeding for enforcement of an arbitral witness summons is an "action or proceeding" within FAA Section 203, and therefore is within federal subject-matter jurisdiction if the arbitration agreement is covered by the New York Convention, because of the relationship of such a proceeding to the agreement to arbitrate. The Court observed: "Recognizing and enforcing arbitration agreements includes facilitating the arbitration process and providing arbitrators – in both domestic and international arbitrations – with access to the ancillary actions and proceedings necessary to arrive at an arbitration award. This includes arbitral subpoenas and their enforcement." The Court cited our 2015 Report in support of this position.[22]

TEXT OF 2015 REPORT CONTINUES HERE

[22] **2024 UPDATE:** 42 F. 4th at 1136, 1139.

Federal court may have jurisdiction if it has previously acted with respect to the arbitration. Federal subject-matter jurisdiction may also exist if the federal district court had previously entered an order relating to enforcement of the agreement to arbitrate. *See*, *e.g.*, *Stolt-Nielsen*, 430 F.3d at 572 (admiralty jurisdiction provided basis for jurisdiction to enforce subpoena because the parties to the arbitration had previously appeared before the court, based on admiralty jurisdiction, in the context of a motion to stay the arbitration).

Diversity jurisdiction to enforce an arbitral summons. The application of diversity jurisdiction principles to an enforcement proceeding under FAA Section 7 is not a well-developed area of law. The few decisions on point in federal district courts have held that diversity jurisdiction must exist over the enforcement proceeding, *i.e.*, between the movant and the witness. *See*, *e.g.*, *In re Application of Ann Cianflone*, 2014 WL 6883128, at *1-2 (N.D.N.Y. Dec. 4, 2014) (dismissing petition to enforce arbitral subpoena, finding no diversity jurisdiction where there was "no allegation or plausible indication" that the amount in controversy between the petitioner and the witness exceeded $75,000); *Chicago Bridge & Iron Co.*, 2014 WL 3796395, at *2 (rejecting amount in controversy in the underlying arbitration as reference point for diversity jurisdiction over arbitral subpoena enforcement case, and finding no facts of record to support amount in controversy

exceeding $75,000 between movant and the witness). But if the amount in controversy between movant and witness is decisive, it may be wondered how the requirements for diversity jurisdiction may be satisfied in most cases.

Jurisdiction based on the underlying arbitration? Federal courts may wish to consider whether federal subject-matter jurisdiction based on diversity should be measured by the citizenship of the parties to the underlying arbitration and the amount in dispute in that arbitration (and likewise whether federal question jurisdiction may be based on the subject matter of the underlying arbitration). Even if Congress did not intend Section 7 to be a jurisdiction-conferring statute, the enforcement of a subpoena brings before the court one aspect of enforcing the parties' agreement to arbitrate – not the right to arbitrate itself, but the enjoyment of a key procedural attribute of the arbitration the parties bargained for. In this view, a federal court would have jurisdiction to enforce the subpoena whenever it would have jurisdiction to compel arbitration – that is, whenever the court would have plenary jurisdiction over the dispute but for the agreement to arbitrate.[22] Further, from a broader perspective, Section 7 does clearly contemplate

[22] Section 4 of the FAA provides "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties" has jurisdiction to enter an order compelling arbitration under a written arbitration agreement.

proceedings in federal district courts and calls upon judges to invoke the remedies provided by federal law to compel compliance or punish non-compliance. The statutory language indicates at least that Congress intended that there would be a meaningful involvement of federal district courts in arbitral subpoena enforcement, and that level of involvement would not exist if, for example, the "amount in controversy" requirement for diversity jurisdiction must be measured as between the movant and the witness.

2024 UPDATE:

The "look-through" approach suggested in this section of our 2015 Report does not appear to be viable in light of the U.S. Supreme Court's decision in *Badgerow* v. *Walters*, 596 U.S. 1, 142 S. Ct. 1310 (2022). The Court held that in a proceeding under FAA Sections 9 or 10 seeking to confirm, vacate or modify an award in a domestic arbitration under FAA Chapter 1, federal subject matter jurisdiction may not be established on a "look-through" basis by looking at the citizenship of the parties to the underlying arbitration (for purposes of diversity) or by referring to the nature of the causes of action asserted (for a potential federal question). The Court held that the "look through" approach to federal subject matter jurisdiction over actions to compel arbitration under FAA Section 4, permitted by the Court's decision in *Vaden* v. *Discover Bank*, 556 U.S. 49, 58-59 (2009), is

confined to Section 4 because that Section, unlike Sections 9 and 10, contains specific language connecting a federal court's power to compel arbitration to the power it would have had to adjudicate the merits had there been no agreement to arbitrate. Whereas Section 7, like Sections 9 and 10 and unlike Section 4, has no such language linking federal subject matter jurisdiction to the hypothetical plenary jurisdiction that would have existed in the absence of an arbitration agreement, it seems highly likely that lower federal courts would consider *Badgerow* to be controlling with regard to arguments for a "look through" approach to federal subject matter jurisdiction under Section 7.

Likewise, even before *Badgerow*, the federal courts consistently in recent decisions had looked only to the citizenship of the parties to the subpoena enforcement proceedings for purposes of determining if the federal diversity statute's requirement of complete diversity is met. *See, e.g.*, *Washington Nat'l Ins. Co.* v. *OBEX Grp. LLC*, 929 F.3d 126, 129 (2d Cir. 2020); *Hermès of Paris, Inc.* v. *Swain*, 367 F.3d 321, 324 (2nd Cir. 2017); *Generation Preferred Mobile, LLC* v. *Roye Holdings, LLC*, 2021 WL 6882442 at **2-5 (E.D. Mich. Oct. 29, 2021); *Schottenstein* v. *Wells Fargo Bank, N.A.*, 2020 WL 7399003 at **3-5 (S.D. Fla. Dec. 17, 2020); *Royal Merchant Holding LLC* v. *Traeger Pellet Grills, LLC*, 2019 WL 2502937 at *1 (D. Utah Jun. 17, 2019, *report and recommendation adopted at* 2019

WL 2774280 (D. Utah July 2, 2019).

In a separate development, starting before and continuing after *Badgerow*, many but not all federal decisions concerning satisfaction of the amount-in-controversy for federal diversity jurisdiction in arbitral subpoena enforcements have adopted a pragmatic approach, making an estimate of the economic value of the evidence sought in relation to the value of the claim in the underlying arbitration (or the portion of the claim to which the desired evidence relates). This has enabled courts to find the amount in controversy requirement to be satisfied where it is reasonable to conclude that the evidence sought from the non-party could have an economic impact on the award of at least $75,000. Three federal judicial circuits have embraced this approach. *See, e.g.*, *Symetra Life Ins. Co.* v. *Admin. Systems Research Corp.*, 2022 WL 16730542 at *4 (6th Cir. Nov. 7. 2022) ("[W]e agree with our sister circuits that the amount in controversy may be established by a good faith allegation of the subpoenaed information's value to the plaintiff in the underlying arbitration dispute"); *Maine Community Health Options* v. *Albertsons Companies, Inc.*, 993 F.3d 720, 722 (9th Cir. 2021); *Washington Nat'l Ins. Co.* v. *OBEX Group LLC*, 958 F.3d 126, 135 (2d Cir. 2020). *Accord*, *Certified Laboratories* v. *Momar, Inc.*, 2022 WL 4370456 at **3-4 (N.D. Tex. Aug. 16, 2022); *Next Level Planning & Wealth Mgmt, LLC* v. *Prudential Ins. Co.*, 2019 WL 585672 at *2 (E.D.Wis. Feb.

13, 2019) *But see Schottenstein* v. *Wells Fargo Bank, N.A.*, 2020 WL 7399003 at **4-6 (S.D. Fla. Dec. 17, 2020) (amount in controversy is to be measured without reference to the value involved in the underlying arbitration); *Royal Merchant Holdings, LLC* v. *Traeger Pellet Grills, LLC*, 2019 WL 2502937 at **3-4 (D. Utah. Jun. 17, 2019) (same).

TEXT OF 2015 REPORT CONTINUES HERE

State court jurisdiction to enforce FAA summons. In all events, the FAA applies in state courts when the arbitration involves interstate or foreign commerce. *See*, *e.g.*, *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500, 501 (2012); *Vaden* v. *Discover Bank*, 556 U.S. 49, 58-59 (2009), *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, a state court would be obligated either to enforce the arbitral subpoena under Section 7 or to provide for enforcement of the arbitral subpoena in a fashion that does not derogate from the enforcement rights the applicant would enjoy under Section 7 before a federal district court.

2024 UPDATE:

As an example of recent state court case law supporting the position stated in the 2015 Report, we note the position of the California Court of Appeal in *Aixtron,*

Inc. v. *Veeco Instruments, Inc.*, 52 Cal. App. 5th 360, 392 (Ct. App. 6th Dist. 2020), *citing and quoting from* the California Supreme Court's decision in *Cronus Investments, Inc.* v. *Concierge Services*, 35 Cal.4th 376, 390 (2005) (citations and quotation marks omitted, cleaned up):

> Under United States Supreme Court jurisprudence, we examine the language of the contract to determine whether the parties intended to apply the FAA to the exclusion of California procedural law and, if any ambiguity exists, to determine whether [the procedural law at issue] conflicts with or frustrates the objectives of the FAA…. Like other federal procedural rules, … the procedural provisions of the FAA are not binding on state courts…provided applicable state procedures do not defeat the rights granted by Congress.

Thus state arbitration law to be compliant with the FAA in a case that involves interstate or foreign commerce should provide a procedure that enables a state court to compel compliance with and punish non-compliance with an arbitral subpoena in the same manner that the court would enforce or punish non-compliance with a judicial subpoena.

TEXT OF 2015 REPORT CONTINUES HERE

Annotation I: Proper Setting for Witness to Raise Objections

We have included in the Model Summons a sentence 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 described below 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. Witnesses unfamiliar with the arbitral process might naturally assume that the proper forum in which to raise such issues is a competent court. The inclusion of such language may tend to overcome that assumption, and thus avoid the delay associated with a judicial adjudication that may well lead to such issues being remanded to the arbitral tribunal for determination.

Objections to power to issue subpoena under FAA Section 7. The text of Section 7 refers only to a potential motion to compel compliance with an arbitral subpoena. Unlike Rule 45 of the Federal Rules of Civil Procedure, Section 7 does not refer to a motion to quash by the recipient of an arbitral subpoena. We know of no federal decision that squarely holds, based on the text of Section 7, that a motion to quash made by the recipient is improper. However, those instances in

which courts have granted motions to quash have largely been where the witness asserted that the arbitrators lacked power to issue the subpoena under Section 7, and the subpoena was found to have transgressed a specific textual limitation on arbitral power under Section 7. *See*, *e.g.*, *In re Proshares Trust Sec. Litig.*, 2010 WL 4967988, at *1 (S.D.N.Y. Dec. 1, 2010) (granting motion to quash arbitral third-party document discovery subpoena that was "plainly inappropriate" under Section 7 in view of the Second Circuit's holding in the *Life Receivables* case); *Ware* v. *C.D. Peacock, Inc.*, 2010 WL 1856021, at *3 (N.D. Ill. May 7, 2010) (granting motion to quash arbitral deposition subpoena, based on district court adopting position of Second and Third Circuits that Section 7 only empowers arbitrators to compel testimony at a hearing in presence of one or more arbitrators).

Objections to relevance, materiality, privilege, confidentiality, etc. In contrast, when motions to quash made by the witness, or a witness's objections to a motion to compel, have presented such issues as relevance and materiality of the evidence sought, attorney-client privilege, or confidentiality, courts have denied these motions or objections on the basis that the determination of these matters in the first instance is left to the arbitrators. *See*, *e.g.*, *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870, 71 (8th Cir. 2000) (Section 7's requirement that information

sought by arbitral subpoena be "material as evidence" does not entitle the witness to judicial assessment of materiality, as such a requirement would be "antithetical to the well-recognized policy favoring arbitration, and compromises the panel's presumed expertise in the matter at hand"); *Am. Fed. of Television & Radio Artists* v. *WJBK-TV*, 164 F.3d 1004, 1010 (6th Cir. 1998) (relevance of information sought by arbitral subpoena should be determined by arbitrator in the first instance); *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606, at *2-4 (S.D.N.Y. July 18, 2014) (denying motion to quash that sought independent judicial review of materiality of evidence sought by arbitral subpoena and holding that once an arbitral tribunal has determined that evidence sought by subpoena may affect the outcome of its deliberations, a court may not "draw[] an independent conclusion on the same topic") (citing and quoting from *In re Security Life* with approval); *Walt Disney Co.* v. *Nat'l Ass'n of Broadcast Emps. & Technicians*, 2010 WL 3563110, at *4 (S.D.N.Y. Sept. 10, 2010) (denying motion to quash and granting cross-motion to compel compliance with arbitral subpoena, on the ground that issues of attorney-client privilege associated with information sought by the arbitral subpoena are reserved to the arbitrator "at least in the first instance"); *Festus & Helen Stacy Found.* v. *Merrill Lynch, Pierce Fenner & Smith, Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (denying motions to quash and granting

cross-motions to enforce subpoena on the basis that issues of relevance and materiality should be determined by the arbitrators); *Odfjell Asa* v. *Celanese AG*, 348 F. Supp. 2d 283, 288 (S.D.N.Y. 2004) (denying motion to quash on basis that "objections on the grounds of privilege and the like should first be heard and determined by the arbitrator before whom the subpoena is returnable" and expressing "considerable doubt" that a district court is the proper forum to hear such matters "since the FAA nowhere explicitly gives a person subpoenaed to an arbitration the right to move in a federal district court to quash the subpoena").

2024 UPDATE:

In a helpful recent decision, Judge Rakoff in the Southern District of New York held that federal district courts have the authority, but not the obligation, to rule on privilege objections to compliance with an arbitral subpoena in the context of a petition to enforce the arbitral subpoena. *Turner* v. *CBS Broadcasting Inc.*, 599 F.Supp.3d 187 (S.D.N.Y. 2022). That authority, the Court reasoned, is derived from Federal Rule of Civil Procedure 45(d), which it construed to permit the Court in an arbitral subpoena enforcement context to protect a non-party witness – including protection against compelled disclosure of privileged information, in view of Section 7's mandate that arbitral subpoenas be enforced by U.S. district courts in the same manner as federal court trial subpoenas. The Court elected to refrain from exercising

that power and instead to defer to the arbitrator's judgment on the privilege issues raised by the witness, because the witness (CBS) was in practical effect a party to the arbitration by virtue of having signed the collective bargaining agreement that provided for an employee grievance arbitration brought by his collective bargaining unit. The Court indicated, however, that in a situation where the witness subject to arbitral subpoena enforcement is a genuine stranger to the arbitration, judicial exercise of its authority to address under FRCP Rule 45 the witness's concerns about attorney-client privilege might well be appropriate.

TEXT OF 2015 REPORT CONTINUES HERE

Annotation J: Arbitral Subpoena Based on FRCP 30(b)(6)

The Model Summons, by naming in brackets both a natural person and a corporation as the witness, seeks to identify a possible enforcement problem where only a legal person such as a corporate entity is named, and the entity is expressly or by implication directed to designate a representative. This problem is avoidable if the subpoena can be addressed to an individual located in the United States. Parties and arbitrators are therefore encouraged to avoid the potential enforceability issues by using available means to identify an individual witness who is subject to arbitral subpoena power pursuant to Section 7 of the FAA.

But if the individual witness with most pertinent knowledge cannot be so identified, or is located abroad but in the employ of a U.S. company, there is uncertainty as to whether an arbitral witness summons may, like a deposition subpoena under Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), be addressed to the corporation and call for the appearance of a corporate representative found within the United States to testify about the designated subject matter. Only one federal district court decision, to our knowledge, has addressed this question, and that decision held that Section 7 does not permit enforcement of

such an arbitral subpoena. *Progenics Pharm., Inc.* v. *IMS Consulting Group*, No. 14 Misc. 245 (RA) (S.D.N.Y. Aug. 13, 2014) (unpublished).[23]

Our Committees take no position on whether a FRCP 30(b)(6) type of procedure should be available under Section 7, but do think it is helpful to identify issues that may arise when courts or arbitrators consider this question.

FRCP 30(b)(6) as a pre-trial discovery procedure. One way of framing the issue is to focus on the fact that FRCP 30(b)(6) is a pre-trial discovery procedure. Thus, courts that interpret Section 7 of the FAA as not permitting pre-hearing discovery – as perhaps most now do (*see* Annotation E "Viability of Pre-Hearing Discovery Subpoenas") – may conclude that the FRCP 30(b)(6) procedure has no place under Section 7. However, a court might read cases like *Life Receivables* and *Hay Group* only to say that, under Section 7, non-party evidence must be adduced in the presence of an arbitrator, and not that such evidence must (or should) be received at "the" merits hearing. Under this view, the "discovery

[23] In another recent case, the arbitral subpoena was issued to a New York bank, not an individual, and the subpoena was enforced, although the bank evidently did not raise the "30(b)(6)" objection. The court stated that the subpoena was "a straightforward exercise of the panel's power to command third parties to appear for testimony before it and to bring with them documents related to the subject of their testimony." *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606, at *4 (S.D.N.Y. July 18, 2014).

objection" to proceeding with an arbitral subpoena by analogy to Rule 30(b)(6) is not necessarily an obstacle to enforcement.

FAA Section 7 and federal trial subpoenas. A second issue flows from reading the statute to mean that the Section 7 arbitral summons procedure must be in procedural lockstep with a federal trial subpoena. This reading focuses on the final sentence of Section 7, which provides that the arbitral summons shall be enforceable by a federal district court by the same methods (orders compelling compliance, contempt) used to "secure[] the attendance of witnesses . . . in the courts of the United States." Under this reading, one must answer the question whether a FRCP 30(b)(6)-type of subpoena may be used at trial. The courts seem to be split on this issue. *Compare Donoghue* v. *Orange County*, 848 F.2d 926, 932 (9th Cir. 1987) (affirming district court order quashing "30(b)(6)" trial subpoena) *and Dopson-Troutt* v. *Novartis Pharm. Corp.*, 295 F.R.D. 536, 539-40 (M.D. Fla. 2013) (quashing "30(b)(6)" trial subpoena) *with Conyers* v. *Balboa Ins. Co.*, 2013 WL 2450108, at *1-2 (M.D. Fla. June 5, 2013) (enforcing trial subpoena that required corporate witness to designate representative) *and Bynum* v. *Metro. Transp. Auth.*, 2006 WL 6555106, at *2-3 (E.D.N.Y. Nov. 21, 2006) (upholding "30(b)(6)" trial subpoena to labor union).

Interpreting Section 7's final sentence to require procedural lockstep with judicial trial subpoenas is not, however, the only possible interpretation. The language might be understood to mean simply that judges have available to enforce arbitral subpoenas the same arsenal of coercive devices as federal law provides for enforcing judicial subpoenas. And the statutory phrase "attendance . . . in the courts" might be understood to refer to *any testimonial appearance* in a judicial proceeding, not only an appearance at a trial. 9 U.S.C. § 7. If this language in Section 7 is given this less restrictive construction, then the enforcement of an arbitral witness summons to a corporation would not be linked to the question whether a trial subpoena may be addressed to an entity by analogy to Rule 30(b)(6). Further, because Section 7 specifically contemplates a separate hearing to obtain evidence from the non-party witness that is *not* the merits hearing – the hearing may be held before only one of three arbitrators – there is specific support in the text for the view that Section 7 enforceability need not turn on whether the same procedure could be used to compel a witness to testify at a judicial trial.

Policy issues relating to use of Rule 30(b)(6) procedures. There are also a number of policy issues to consider. On the view that, by agreeing to arbitrate, a party agrees to a more limited evidentiary process that does not involve all the evidence gathering tools available in court, a court may hesitate to say that Section

7 permits a hybrid procedure that combines elements of a federal trial subpoena and a federal deposition subpoena. Furthermore, with regard to international arbitration, there is already a perception abroad that arbitration in the United States is characterized by discovery similar in scope to what occurs in our courts. Importing Rule 30(b)(6) into Section 7 will further reinforce that perception. There is a concern that foreign criticism of U.S. evidence gathering methods will intensify, and the perception in some foreign circles of the United States as an inhospitable environment for international arbitrations will be reinforced, if a common practical effect of Rule 30(b)(6) arbitral subpoenas is to compel foreign- resident employees of U.S.-based companies to testify in U.S.-seated arbitrations.

Another possible view is that concerns about expansion of evidence gathering from non-parties in arbitration should not necessarily lead to the position that Section 7 categorically provides no power to enforce a "30(b)(6)" arbitral subpoena. Under this view, such concerns may be addressed on a case-by-case basis (i) by arbitrators in considering whether to issue a particular subpoena, and/or
(ii) by courts in the enforcement context under the rubric of "undue burden" under FRCP 45.

Annotation K: Arbitral Role in Deciding Enforceability of Subpoenas

The tribunal's handling of a request for issuance of a subpoena is properly subject to judicial review during the arbitration to the extent provided for in Section 7 of the FAA, unlike other procedural orders the tribunal may issue. Section 7 provides that "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 for contempt." The prospect of interlocutory review in the context of subpoena enforcement raises the question of what is the proper role of the tribunal, at the time a proposed subpoena is presented for signature, with respect to the legal validity and enforceability of the subpoena.

The role of the tribunal – administrator or gatekeeper. As to the interplay between Rule 45 of the Federal Rules of Civil Procedure ("FRCP") and the effectiveness of the subpoena, some tribunals conceive their role as more or less administrative. On this view, the tribunal acts as a proxy for the requesting party, provides the signature for issuance that a party's attorney is permitted to furnish in a judicial proceeding (or in arbitration under some state statutes, including Section 7505 of New York's Civil Practice Laws and Rules), and leaves questions about

the conformity of the subpoena with FAA Section 7 and the requirements of FRCP 45 to be decided by a judge if the recipient of the subpoena resists enforcement and the proponent of the subpoena moves in court to compel compliance.

An alternative view is that Section 7 of the FAA is – uniquely among the provisions of the FAA – a rule governing the conduct of arbitrators during the arbitration and not a rule mainly concerning judicial enforcement of arbitration agreements and awards. We believe this view is to be preferred, for reasons that are both textual and practical, but we say this with an important caveat: The law concerning the permitted scope of subpoenas under Section 7 is not uniform nationally, and the implications for arbitration of the recent Rule 45 amendment to permit nationwide service of process have yet to be addressed by courts. Arbitral tribunals should hesitate to deny issuance of a proposed subpoena based on their preferred view of the law, or based upon a prediction of how an issue may be decided by a court that is not bound by *stare decisis* to decide it in a particular fashion.

Reasons supporting view that arbitrators should consider enforceability of proposed subpoenas. With that caveat, we encourage arbitrators to consider carefully the enforceability of proposed subpoenas as a condition of issuance. First, had Congress intended the arbitral role to be purely administrative, it could

have permitted attorneys in arbitrations to issue subpoenas as they do in cases before the courts, or the FAA might have provided for signature by any member of a three-member tribunal rather than a majority or for the pre-issuance reference of any Rule 45 issue to the federal district court. The fact that Section 7 was written to require issuance by a majority of a three-member tribunal connotes that the issuance is adjudicative. The fact that no distinctions were drawn between elements primarily in the domain of the tribunal (relevance and materiality) and matters relating to Rule 45 suggests that Congress intended that arbitrators should apply Rule 45 subject to judicial review as provided in Section 7.

Second, Section 7 vests arbitrators with the same authority that courts possess in regard to a subpoena, to command a party to appear and give testimony. The subpoena, if drafted by reference to standard judicial subpoena forms, will "command" the witness to appear, and the fact that a tribunal rather than counsel for a party has issued the subpoena carries a stronger implication of the legal validity of the "command" than does a judicial subpoena signed not by a judge but by the attorney for a party. Arbitral tribunals that allow an inference of validity to be drawn by a non-party witness who may not be represented by counsel, if the tribunal has in fact formed a judgment that the subpoena would not be enforced by

the relevant court, risk misleading a non-party, and inducing compliance through the apparent authority of the subpoena.

Third, on a purely practical level, the tribunal should handle subpoenas in a fashion that minimizes, to the extent possible, collateral litigation over enforceability, by making well-conceived decisions based on clearly applicable case law, so that the tribunal rules at the point of issuance of a subpoena as it would rule if it were a judge deciding a motion to compel compliance. This is of course subject to the caveat stated above. If the law in the relevant jurisdiction that would have power to enforce the subpoena concerning permissibility of non-party discovery under FAA Section 7 is unsettled, the tribunal by issuing the subpoena permits judicial review of that issue if the witness does not agree to appear. If the tribunal on the other hand denied issuance of the subpoena based on its own preferred view of that issue, and the issue is unsettled in the court where enforcement could be sought, the tribunal's denial of issuance of the subpoena is not judicially reviewable and the party seeking the subpoena is deprived of the opportunity to establish enforceability through the courts.

Illustrations of the proper role of the arbitral tribunal. As illustrations of the approach a tribunal might take, in different situations, we provide the following:

***Illustration #1 – The "Discovery" Subpoena*:** The party proposing a subpoena submits a draft that calls for production of documents at an office of the witness or in proximity to the witness' place of residence, but does not provide for the documents to be brought to a hearing to be held in the presence of one or more arbitrators. It is a "discovery" subpoena. We believe the tribunal should modify the proposed subpoena to provide for a hearing before one or more of the arbitrators, at which the witness will testify and bring the requested documents. Although some federal courts may permit the "discovery" subpoena, by providing for the hearing any doubts about enforceability are removed. The proponent of the subpoena may seek the consent of the witness to produce the documents without a hearing. *See* Annotation E (Viability of Pre-Hearing Discovery Subpoenas).

***Illustration #2 – The Subpoena Calls for the Witness to Travel to the Place of Arbitration*:** The party proposing a subpoena submits a draft that calls for a witness residing in Alaska to appear for a hearing before one or more of the arbitrators in New York, which is the seat of the arbitration. We believe the tribunal should modify the proposed subpoena to provide for a place of compliance that is within 100 miles of the place of residence or place of business of the witness. As it is relatively clear that the geographic limitations of compliance under Rule 45 apply to arbitral subpoenas, and that a subpoena that does not

respect these geographic limitations would not be enforced, the tribunal should not, by issuing a subpoena that is likely to be unenforceable, imply the contrary. To do so, in the Committees' view, risks an abuse of power by the tribunal. *See* Annotation F (Place of Hearing)[23] and Annotation C (Location of the Witness/Nationwide Service).

***Illustration #3 – The "30(b)(6)" Subpoena*:** The party proposing a subpoena submits a draft that identifies a corporation or other legal person as the witness and directs the legal person to designate a natural person as its representative to appear at a witness hearing and bring along the requested documents. The tribunal may wish to inquire of the parties whether there is a natural person with particular knowledge of the matters in issue who might be identified as the recipient of the subpoena, calling the attention of the parties to the uncertain status of arbitral subpoenas to legal persons. If no natural person can be identified, the tribunal should issue the subpoena to the legal person. Where the enforceability of the subpoena is uncertain because the law is not well developed, as is the case for example with regard to a subpoena that seeks a corporate representative witness designation by analogy to FRCP Rule 30(b)(6), the tribunal should not deprive the subpoena proponent of the opportunity to obtain the evidence with the consent of the witness

[23] **2024 UPDATE**: Annotation F-1.

nor should the tribunal, by denying issuance, deprive the proponent of a judicial forum to litigate the enforceability question. *See* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

Annotation L: Procedure in Regard to Arbitral Subpoenas Governed By FAA Section 7

Addressing need for use of arbitral subpoenas at early procedural conferences. Procedure relating to requests to arbitral tribunals for issuance of arbitral subpoenas often receives less attention than it deserves in early-stage procedural conferences. One possible explanation is that counsel may be less familiar than arbitrators with the nature of arbitral subpoena power and the procedure surrounding it. Or they may assume that, as is the case under the arbitration law of New York and some other states, attorneys themselves may issue subpoenas as they routinely do in judicial proceedings. *See* Annotation D (Who May Issue a Subpoena). Thus, even in those arbitrations in which the parties are invited to agree insofar as possible on an initial procedural order, it is not unusual to find that the parties do not establish a timetable or a procedure for dealing with subpoenas for non-party witnesses.

If not addressed in the procedural timetable, subpoena-related issues may threaten delay and disruption of the schedule. Parties and arbitrators will open their calendars to find mutually available dates for merits hearings, but they may overlook the need to hold pre-merits hearings to obtain evidence from non-party witnesses. Parties and arbitrators need to focus on the need for these hearings to be

held in the presence of one or more of the arbitrators unless the parties and the witnesses otherwise agree, and identify dates when members of the tribunal can be available to attend in person a hearing in a location where the witness will agree to attend or could be compelled to attend. An adverse party may not agree that a proposed subpoena should be issued, and the briefing, hearing and determination of that issue (and ancillary issues such as the scope of the subpoena and the timing of the witness' appearance) may require considerable time. Judicial proceedings that might ensue concerning enforcement of a subpoena bring into play the timetable applicable in the enforcement court, which may or may not be able to tailor its schedule to the timetable of the arbitration.

It is therefore suggested that the tribunal advise the parties that the issue of subpoenas is one the parties should address in their draft of the initial omnibus procedural order, and that the tribunal should endeavor to resolve disagreements over this aspect of procedure at the time the initial procedural order is made.

Matters relating to subpoenas that might be addressed in initial procedural order. The tribunal might provide for a deadline for: the parties to submit proposed subpoenas, the submission of an accompanying statement as to relevance, materiality and need, *see* Annotation G (Scope of "Duces Tecum" Witness Summons), and a timetable for briefing and resolving disputes over

proposed issuance. The parties might also be invited to declare by a particular date whether it is proposed to receive the testimony at the merits hearing or in advance thereof, and if the latter, at what location and whether it is proposed that the full tribunal or one of its members should be present. If a party proposes to seek issuance of a discovery subpoena, either for document production or a deposition, the party should be invited to make a *prima facie* legal showing that, in the relevant jurisdiction(s) (*e.g.*, embracing the place of arbitration or the place where the witness will attend), Section 7 of the FAA is applied to permit such practice, and the tribunal may wish to draw the attention of the parties to the conflicting positions of federal circuit courts of appeals in this respect, *see* Annotation E (Viability of Pre-Hearing Discovery Subpoenas), and the uncertainty about enforcement that may arise if a subpoena seeks discovery.

Risks of denying a requested subpoena. The tribunal's refusal to issue a requested subpoena might lead the aggrieved party to challenge the award based on denial of a fair hearing. For examples of unsuccessful challenges, *see*, *e.g.*, *Doral Fin. Corp.* v. *Garcia-Velez*, 725 F.3d 27 (1st Cir. 2013), and *Rubenstein* v. *Advanced Equities, Inc.*, 2014 WL 1325738 (S.D.N.Y. 2014). Reasons for refusal to issue a requested subpoena might include – in addition to territorial scope, *see* Annotation F (Place of Hearing) – that the proposed evidence is not relevant and

material, that it is cumulative, or that the request is untimely. In one decision, *Tempo Shain Corp.* v. *Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997), the Second Circuit refused to confirm an award on the ground that the arbitrators decided not to keep hearings open to hear from a witness whom one of the sides wanted to call (albeit not through a subpoena) but who became unavailable as a result of family medical issues. The district court confirmed the award but the Second Circuit reversed, holding that the arbitrators did not sufficiently explain why they believed the excluded evidence would merely be cumulative. Although it would be a truly exceptional case where an award would be vacated because a party was denied the opportunity to obtain evidence from a non-party witness, the risk of this contention being made in a motion to vacate context to obstruct enforcement of an award is sufficiently present that arbitrators who elect to deny issuance of a subpoena might find it useful to explain in a written procedural order the basis for having refused to issue a subpoena rather than merely issuing a one-sentence order stating that the proposed subpoena is denied.

Appendix 1: Model Summons Without Annotations[24]

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. With your consent

[24] **2024 UPDATE**: Refer to the annotated Model Summons at the beginning of this Report to identify changes to the text between 2015 and 2024.

and the consent of all counsel involved, the hearing may proceed on a videoconference platform, and your appearance at the designated physical location would be excused.

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 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 with electronic copies sent to counsel for the parties and the Case Manager [if applicable]], 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	[name] Presiding Arbitrator	[name], Arbitrator
[Address]	[Address]	[Address]

Appendix 2: Topical Guide to Case Law

2024 UPDATE: This topical guide has been added as a quick reference resource for practitioners. It is a selective index of leading cases on selected topics. There are many cases cited in the 2015 Report and some cases from the 2024 Update that are found in the main text but not in this selective guide. There are also topics covered in the main text not chosen for inclusion here.

1. Federal Subject Matter Jurisdiction

Day v. *Orrick, Herrington & Sutcliffe, LLP*, 42 F.4th 1131 (9th Cir. 2022)

Washington Nat'l Ins. Co. v. *OBEX Grp. LLC*, 929 F.3d 126 (2d Cir. 2020)

Generation Preferred Mobile, LLC v. *Roye Holdings, LLC*, 2021 WL 6882442 (E.D. Mich. Oct. 29, 2021)

Schottenstein v. *Wells Fargo Bank, N.A.*, 2020 WL 7399003 (S.D. Fla. Dec. 17, 2020)

2. Subpoena for Discovery?

Managed Care Advisory Group, LLC v. *CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019)

CVS Health Corp. v. *Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017)

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)

In Re Security Life Ins. Co., 228 F.3d 865, 870-71 (8th Cir. 2000)

COMSAT Corp. v. *Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999)

3. Place of Witness Hearing and Enforcement Venue

Day v. *Orrick, Herrington & Sutcliffe, LLP*, 42 F.4th 1131 (9th Cir. 2022)

Symetra Life Ins. Co. v. *Administration Systems Research Corp. Int'l*, 2022 WL 16730542 (6th Cir. Nov. 7, 2022)

Katena Computing Technologies, Inc. v. *DeNaut*, 2023 WL 6858717 (D. Conn. Oct. 4, 2023)

4. Use of Video Conferencing

Managed Care Advisory Group, LLC v. *CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019)

SB PB Victory, L.P. v. *Two Farms, Inc.,* U.S. District Court, District of Colorado, Civil Action No. 1:23-mc-00019-RMR (Feb. 23, 2023)

Certified Laboratories v. *Momar, Inc.*, 2022 WL 4370456 (N.D.Tex. Aug. 16, 2022)

Broumand v. *Joseph*, 522 F.Supp.3d 8 (S.D.N.Y. 2021)

Int'l Seaway Trading Corp. v. *Target Corp*., 2021 WL 672990 (D. Minn. Feb. 22, 2021)

Dodson Int'l Parts, Inc. v. *Williams Int'l*, 2019 WL 5680811 (E.D. Mich. Jun. 26, 2019)

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