KING & SPALDING

# Client Alert

International Arbitration Practice Group

January 29, 2018

## Ninth Circuit Confirms Limitation on Arbitrators' Power to Compel Production of Documents from Third Parties Outside a Hearing[1]

### Introduction

On December 21, 2017, the U.S. Court of Appeals for the Ninth Circuit decided *Vividus, LLC v. Express Scripts, Inc.*,[2] affirming a decision by the U.S. District Court for the District of Arizona, and agreeing with the Second, Third, and Fourth Circuits that the Federal Arbitration Act does not empower arbitrators to compel the production of documents from third parties outside an arbitration hearing. The Ninth Circuit's decision further solidifies the majority view on this issue, on which only the Eighth Circuit has reached an opposite conclusion.

### Background

*Vividus* arose out of a September 2014 antitrust case filed in New York state court by Vividus, LLC, FKA HM Compounding Services, LLC and HMX Services, LLC (jointly, "HMC") against, among others, Express Scripts and CVS/Caremark Corp. Soon after filing, the case was removed to the U.S. District Court for the Eastern District of New York, which ordered HMC to arbitrate its dispute with CVS/Caremark in Arizona pursuant to a preexisting arbitration agreement, and to litigate its dispute with Express Scripts before the U.S. District Court for the Eastern District of Missouri, pursuant to a forum selection clause in a preexisting agreement between the parties.

The Missouri court, in the course of discovery, ordered Express Scripts to produce certain specified documents. Having been informed of Express Scripts's production in the Missouri litigation, the arbitration panel in the CVS/Caremark dispute issued its own subpoena instructing Express Scripts to produce the documents it had produced in the Missouri litigation, so that they could be used in the Arizona arbitration. Express Scripts, which was not a party to the Arizona arbitration, did not produce documents in accordance with the subpoena.

In December of 2015, HMC filed a petition with the U.S. District Court for the District of Arizona pursuant to 9 U.S.C. § 7 seeking to enforce the panel's subpoena. The district court denied HMC's petition, holding that the text of the Federal Arbitration Act (FAA) only allows an arbitrator to "summon

For more information, contact:

**James E. Berger**
+1 212 556 2202
jberger@kslaw.com

**Charlene C. Sun**
+1 212 556 2107
csun@kslaw.com

**King & Spalding**
***New York***
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100
Fax: +1 212 556 2222

**www.kslaw.com**

testimony and documents from a non-party during a hearing."[3] HMC appealed.

On appeal, the Ninth Circuit agreed with the district court, holding that "section 7 of the FAA does not grant arbitrators the power to order third parties to produce documents prior to an arbitration hearing."[4]

Section 7 of the FAA empowers arbitrators to, among other things, "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[5] As noted by the Ninth Circuit, this section of the FAA grants arbitrators two discrete powers, namely, to "compel the attendance of a person 'to attend before them . . . as a witness,' and second, arbitrators may compel such person 'to bring with him or them' relevant documents."[6] In the event a person instructed to appear before an arbitrator does not heed the arbitrator's order, the FAA empowers district courts in the district where the arbitration is seated to compel the person's attendance before the arbitrator or arbitral panel.[7] Contrary to the appellant's argument, the Ninth Circuit affirmed the district court's decision that a plain reading of section 7 "reveals that an arbitrator's power to compel the production of documents is limited to production at an arbitration hearing."[8] The Ninth Circuit further asserted that "[t]he text of section 7 grants an arbitrator no freestanding power to order third parties to produce documents other than in the context of a hearing."[9]

In reaching this conclusion, the Ninth Circuit joined several other Circuits that have interpreted section 7 of the FAA similarly. For instance, in 2004, the Third Circuit held in *Hay Group, Inc. v. E.B.S.* that "[t]he power to require a non-party 'to bring' items 'with him' clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier."[10] Similarly, the Second and Fourth Circuits have held that "the text of section 7 is unambiguous and does not grant arbitrators the power to subpoena documents from third parties to be produced outside the presence of the arbitrators."[11] The Fourth Circuit has, however, read an exception into the FAA allowing parties to petition the district court in the district where an arbitration is seated to compel discovery "upon a showing of special need or hardship."[12]

Though the abovementioned Circuits represent the majority opinion on the issue of whether the FAA empowers arbitrators to order third-party document disclosure, their position is not shared by all Circuits that have addressed the issue. Notably, the Eighth Circuit has reached the opposite conclusion, finding that "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."[13] To reach this conclusion, the Eighth Circuit relied on the notion that this implicit power furthers the goal of facilitating the efficient resolution of disputes.

Unfortunately, the Supreme Court and most of the Circuits have yet to rule on this issue. Notwithstanding, the Courts of Appeals that have addressed this question have done so in clear and unambiguous terms, thereby eliminating, or at least greatly reducing, the uncertainty surrounding any future decision on this question of law.

Under the majority view, a party to an arbitration will not be able to compel a non-party to produce documents in advance of a hearing, depriving parties of the ability to review those documents before deciding whether to use them. This makes the decision to seek a document subpoena in arbitration one that must be approached with care, and that will reinforce the conventional view that discovery in arbitration should and will be narrower than it is in litigation.

* * *

---

[1] The authors would like to thank Enrique Molina, an associate in King & Spalding's Global Disputes practice (New York) for his contributions to this client alert.

[2] *Vividus, LLC v. Express Scripts, Inc.*, 878 F. 3d 703 (9th Cir. 2017).

[3] *Id.* at *706.

[4] *Id.* at *708.

[5] *Id.* at *706.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F. 3d 404, 407 (3d Cir. 2004).

[11] *Vividus, LLC v. Express Scripts, Inc.*, 878 F. 3d 703, *707 (9th Cir. 2017) (citing *Life Receivables Tr. V. Syndicate 102 at Lloyd's of London*, 549 F. 3d 210, 216 (2d Cir. 2008) ("The language of section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness"); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F. 3d 269, 275 (4th Cir. 1999) ("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them'")).

[12] *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F. 3d 269, 275 (4th Cir. 1999).

[13] *In re Security Life Insurance Co. of America*, 228 F. 3d 865, 870 (8th Cir. 2000).