Non-Party Discovery in Reinsurance Arbitrations

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A reinsurance transaction often involves many individuals or entities who are not parties to the reinsurance contract itself. Brokers, intermediaries, managing general agents or underwriters, third-party administrators and former employees of parties have often played vital roles in the transactions in dispute, and pertinent information concerning those transactions is often in their possession and control. Therefore, parties to reinsurance arbitrations often seek discovery from non-parties prior to the ultimate hearing in a matter. Many times, non-parties are willing to produce documents or provide testimony without conflict, due to their business interests. However, when the non-party from whom pre-hearing discovery is sought refuses to comply, issues arise as to the power of the arbitrators to compel such discovery under the Federal Arbitration Act ("FAA").

Non-Party Discovery under the FAA

Section 7 of the FAA empowers arbitrators to compel certain forms of discovery. It provides, among other things, that "arbitrators... or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in this case."[1] While this language is clear with respect to an arbitrator's authority to require non-parties to appear and produce documents at an arbitration hearing, it does not address whether such power extends to pre-hearing discovery. Thus, courts have struggled to balance the discovery powers available to arbitrators under the FAA with one of the goals of arbitration - avoiding the burden, expenses, harassment, and lack of efficiency commonly associated with discovery in litigation.[2]

Pre-Hearing Depositions of Non-Parties

Recent case law illustrates judicial resistance towards permitting arbitrators to compel non-parties to attend depositions prior to the ultimate hearing. [3] Nonetheless, a jurisdictional split remains on this issue.

Federal district courts in the Seventh and Eleventh Circuits have held that an arbitrator has the authority to compel non-party depositions prior to the arbitration.[4] For example, in *Stanton v. Paine Webber Jackson & Curtis*, the Southern District of Florida held that Section 7 of the FAA empowers arbitrators to compel pre-hearing discovery, including the power to compel non-parties to appear for depositions prior to the hearing.[5] Similarly, several decisions originating from the Northern District of Illinois have held that an arbitration panel has the authority to order pre-hearing non-party depositions,[6] although a recent decision by that court held the contrary. *See Matria Healthcare, LLC, et al. v. Duthie, et al.*, No. 08-C-5090 (N.D. Ill. Oct. 6, 2008). In *Matria Healthcare*, the court rejected the Northern District of Illinois's decision in *Amgen Inc.* and held that "[b]y its own terms, the [FAA's] subpoena authority is defined as the power to compel non-parties to appear before them; that is, to compel testimony by non-parties at the arbitration hearing. A deposition simply does not fall within those terms."

Other courts have reached the same conclusion as the Northern District of Illinois in *Matria Healthcare*. Federal district courts in the Second, Fourth, Fifth, and Eighth Circuits have rejected the notion that Section 7 of the FAA empowers arbitrators to order pre-hearing depositions of non-parties. [7] In *Atmel Corp.*, the Southern District of New York held that "the weight of judicial authority favors the view that the Federal Arbitration Act, 9 U.S.C. § 7, does not authorize arbitrators to issue subpoenas for discovery depositions against third parties." [8]

Moreover, the Second, Third and Fourth Circuits have found, at least implicitly, that an arbitration panel lacked the authority to order non-parties to appear for pre-hearing depositions.[9] Indeed, the Third Circuit stated in *Hay Group v. E.B.S. Acquisition Corp.* that, pursuant to the "unambiguous" language of Section 7 of the FAA, an arbitrator's subpoena power is limited to "situations in which a non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."[10] Recently, the U.S. Court of Appeals for the Second Circuit characterized *Hay Group* as the "emerging rule," finding that "the arbitrator's subpoena authority under FAA § 7 does not include the authority to subpoena non-parties or third parties for pre-hearing discovery even if a special need or hardship is shown."[11]

Thus, while the majority of case law favors the view that arbitrators do not have the authority to order pre-hearing depositions of non-parties, several federal district courts have held to the contrary.

Pre-Hearing Document Production

Arbitrators have greater latitude with respect to ordering pre-hearing non-party document production. The majority of jurisdictions that have addressed the issue permit arbitrators to compel non-party document discovery prior to the hearing.

The Sixth and Eighth Circuits, as well as federal district courts in the Fifth, Seventh and Eleventh Circuits, have held that the FAA empowers arbitrators to compel pre-hearing document discovery from non-parties.[12]

By contrast, the Second and Third Circuits, as well as a federal district court in the First Circuit, have held that Section 7 of the FAA does not provide arbitrators with the authority to compel pre-hearing document discovery from non-parties to the arbitration proceeding.[13] For example, in *Life Receivables Trust*, the Second Circuit held that an arbitrator lacks authority under Section 7 of the FAA to compel pre-hearing document discovery from non-parties, essentially overruling prior decisions by federal district courts in that circuit that held the contrary.[14]

Similarly, in *COMSAT Corp.*, the Fourth Circuit held that an arbitrator lacks the authority to compel pre-hearing discovery "absent a showing of special need or hardship."[15]

Moving forward, it is likely that courts will continue to determine this issue on a case-by-case basis, guided where applicable by controlling appellate precedent. Nonetheless, it remains clear that courts are more willing to permit non-party document discovery prior to the hearing than they are depositions.

The Power to Compel Witness Testimony before an Arbitrator prior to the Final Hearing on the Merits

As noted, Section 7 of the FAA authorizes arbitrators to "summon in writing any person" to appear "before them or any of them as a witness" and bring documents that may be relevant to the case.[16] Citing this provision, a few recent cases have recognized that arbitrators have the authority to compel a non-party to provide documentary and testimonial evidence before them prior to the ultimate hearing.[17]

In *Stolt-Nielsen SA v. Celanese AG*, the Second Circuit examined whether Section 7 authorizes arbitrators to summon non-party witnesses to give testimony and provide evidence at a pre-merits hearing before an arbitration panel.[18] The non-parties objected to the subpoenas on the grounds that Section 7 does not provide arbitrators with the power to summon non-parties for the purpose of compelling testimonial and documentary evidence in advance of the ultimate hearing.[19] The Second Circuit held that based on the above language of Section 7, arbitrators have the authority to require non-parties to appear before them with documents and provide testimony on relevant issues prior to the final hearing. This case was recently cited with approval by the Second Circuit, as well as by a federal district court in Connecticut.[20]

Moreover, Section 7 of the FAA states that an arbitral subpoena "shall be served in the same manner as subpoenas to appear and testify before the court." Thus, the Second and Third Circuits, as well as a federal district court in the First Circuit, have held that the 100-mile jurisdictional limits of Rule 45 of the Federal Rules of Civil Procedure ("FRCP") applies to the service and enforcement of arbitral subpoenas.[21] In those jurisdictions, an arbitral subpoena may be quashed unless it is served on a non-party within 100 miles of the location where the non-party resides, is employed or regularly transacts business in person. However, the Stolt-Nielsen procedure may provide parties and arbitrators with an end-run around the

jurisdictional limits of FRCP 45, as an arbitrator could simply decide to "sit" in a location within the judicial district, or within 100 miles, of the non-party from whom discovery is sought for the sole purpose of obtaining discovery.[22]

Conclusion

Non-parties to the reinsurance agreement are often in a unique position to provide important information to cedents and reinsurers engaged in arbitration. However, except in the rare circumstance when a non-party has a contractual obligation to provide pre-hearing discovery, parties to arbitration may not be able to obtain it. Given the current state of uncertainty on this issue, entities and individuals involved in a reinsurance transaction should be aware of the law in the applicable jurisdiction when deciding whether to seek or oppose non-party discovery in a related arbitration.

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[1] 9 U.S.C. § 7 (West 2008).

[2] Graydon S. Staring, *Law of Reinsurance*, §22.2 (1998).

[3] *See, e.g., Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, No. 07-cv-1197 (2d Cir.Nov. 25, 2008); *Hay Group v. E.B.S. Acquisition Group*, 360 F.3d 404, 407 (2d Cir. 2004); *Matria Healthcare, LLC, et al. v. Duthie, et al.*, No. 08-C-5090 (N.D. Ill. Oct. 6, 2008); *Atmel Corp. v. LM Ericsson Telefon*, 371 F. Supp. 2d 402 (S.D.N.Y. 2005); *Odfjell ASA v. Celanese AG*, 328 F. Supp. 2d 505 (S.D.N.Y. 2004); *In re Arbitration Between Hawaiian Elec. Industries, Inc. and HEI Power Corp.*, No. M-82, 2004 WL 1542254, (S.D.N.Y. July 9, 2004); *In re Arbitration Between The Procter and Gamble Co. and Allianz Ins. Co.*, 2003 U.S. Dist. LEXIS 26025, at *5 (S.D.N.Y. Dec. 3, 2003).

[4] *Amgen Inc. v. Kidney Center of Del. County, Ltd.*, 879 F. Supp. 878, 879-80 (N.D. Ill. 1995); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988).

5 *Stanton*, 685 F. Supp. at 1242-43.

[6] *In re Arbitration Between Scandinavian Reinsurance Co. Ltd. and Continental Cas. Co.*, No. 04-C-7020 (N.D. Ill. Dec. 10, 2004); *Amgen, Inc.*, 879 F. Supp. at 879-80.

[7] *Atmel Corp.*, 371 F. Supp. 2d 402; *Odfjell ASA*, 328 F. Supp. 2d at 505; *In re Arbitration Between Hawaiian Elec. Industries, Inc. and HEI Power Corp.*, No. M-82; *Gresham v. Norris*, 304 F. Supp. 2d 795, 797 (E.D. Va. 2004); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. Civ. 02-4304PAMJSM, 2004 WL 67647 (D. Minn. Jan. 9, 2004); *In re Meridian Bulk Carriers, Ltd.*, No. 03-2011, 2003 WL 23181011, at **1-2 (E.D. La. July 17, 2003); *In re Arbitration Between The Procter and Gamble Co. and Allianz Ins. Co.*, 2003 U.S. Dist. LEXIS 26025, at *5; *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995).

[8] *Atmel Corp.*, 371 F. Supp. 2d at 403.

[9] *Life Receivables Trust*, No. 07-cv-1197, at 10; *Hay Group*, 360 F.3d at 407; *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269, 276, 278 (4th Cir. 1999).

[10] 360 F.3d at 407.

[11] *See Life Receivables Trust*, No. 07-cv-1197, at 10.

[12] *See, e.g., In re Sec. Life Insur. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000); *Am. Fed'n of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999); *Festus & Helen Stacy Foundation v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006); *SchlumbergerSema, Inc.*, No. Civ. 02-4304PAMJSM, 2004 WL 67647, at *2; *In the Matter of Meridian Bulk Carriers, Ltd.*, No. 03-2011, 2003 WL 23181011, at **1-2; *Amgen Inc.*, 879 F. Supp. at 882-83; *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44 (M.D. Tenn. 1994); *Stanton*, 685 F. Supp. at 1242.

[13] *See, e.g., Life Receivables Trust*, No. 07-cv-1197; *Hay Group, Inc.*, 360 F.3d at 408, 410-11; *Liberty Mut. Ins. Co. v. White Mountains Ins. Group Ltd.*, No. 06-11901 (D. Mass. Feb. 26, 2007), reported in *Mealey's Litigation Reporter: Reinsurance*, Volume 17, Issue 22, March 22, 2007.

[14] *Life Receivables Trust*, No. 07-cv-1197, at 8-10.

[15] *COMSAT Corp.*, 190 F.3d at 275-76, 278.

[16] 9 U.S.C. § 7.

[17] *Life Receivables Trust*, No. 07-cv-1197, at 13-14; *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 578-79 (2d Cir. 2005); *Hay Group, Inc.*, 360 F.3d at 410-11; Guyden v. Aetna, Inc., 2006 WL 2772695, at *7 (D. Conn., Sept. 25, 2006).

[18] *Stolt-Nielsen*, 430 F.3d at 578-79.

[19] *Id*. at 577.

[20] *Life Receivables Trust*, No. 07-cv-1197, at 13-14; *Guyden*, 2006 WL 2772695, at *7.

[21] *Compare Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89, 94-95 (2d Cir. 2006), *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.* 33 Fed. Appx. 26, 27-28 (3d Cir. 2002) and *Liberty Mut. Ins. Co.*, No. 06-11901 *with Festus & Helen Stacy Foundation*, 432 F.Supp.2d at 1378.

[22] While courts have yet to specifically address the precise meaning of "sit," there is arguably precedent from several federal courts that a panel is "sitting" in the location where the underlying arbitration is actually taking place. *See Gresham*, 304 F. Supp. 2d at 796 ("[A] district court maintains jurisdiction over such a petition [to enforce a subpoena under 9 U.S.C. § 7] if the situs of the pending arbitration is within its jurisdiction."); *Thompson v. Zavin*, 607 F. Supp. 780, 783 n.5 (D.C. Cal. 1984) (noting that the only federal court that has the power to enforce or issue a non-party subpoena under the FAA is the district court in which the arbitrators were "sitting").