Kluwer Arbitration Blog

New York Arbitration Week 2023 Recap – Obtaining Evidence in the United States from Non-parties to an International Arbitration in a Post-1782 World

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On November 15, 2023, during the 5th annual New York Arbitration Week, White & Case LLP hosted an event covering the possibility of obtaining evidence from non-parties to an international arbitration following the 2022 U.S. Supreme Court decision in *ZF Automotives US Inc. v. Luxshare, Ltd.*, 596 U.S. ___ (2022) ("*ZF Automotives*"). In that decision, the U.S. Supreme Court ruled unanimously that discovery under 28 U.S.C. § 1782 is not available in support of private foreign or international arbitration proceedings, resolving a U.S. Circuit Court split on the issue.

With the door now closed for discovery under 28 U.S.C. § 1782 in support of international arbitration, the event explored parties' prospects of using an alternative means to obtain non-party evidence, namely 9 U.S.C. § 7 (*i.e.*, Section 7 of the Federal Arbitration Act (the "FAA")). Section 7 provides in relevant part that: "The arbitrators selected … or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."

To explore the possibilities (and limits) of this alternative, the event consisted of three mock applications under Section 7 of the FAA for non-party evidence in support of a hypothetical arbitration. Sven Volkmer (White & Case LLP) and Kiera Gans (DLA Piper) moderated the event. Martin Gusy (Bracewell LLP), Jessica Beess und Chrostin (King & Spalding LLP), Thomas W. Walsh (Freshfields Bruckhaus Deringer LLP), and Thomas G. Allen (Kilpatrick Townsend LLP) argued the mock applications. Klaus Reichert SC (Brick Court Chambers), Dana MacGrath (MacGrath Arbitration), Yasmine Lahlou (Chaffetz Lindsey), and Faith Hochberg (Hochberg ADR LLC) served as arbitrators and judge, respectively, of the three applications.

The Hypothetical Arbitration

The (fictional) facts underlying each of the three mock applications were the same. A Mexican software developer, TechSavvy, was involved in a dispute with its Swiss client, Salazar, concerning a Licensing Agreement. Salazar commenced institutional arbitration against TechSavvy alleging malfunctions with software developed by TechSavvy. TechSavvy countered

that the cause of any malfunction was the improper and negligent integration of software by Salazar. Salazar had contracted U.S. vendor, Nutz-and-Boltz, to manage and supervise the integration, which Nutz-and-Boltz did through a key employee, Ms. Smith, resident in Miami. Nutz-and-Boltz was an affiliate (a sister company) of Salazar, and a non-party to the arbitration between TechSavvy and Salazar.

Scenario 1: an application to a tribunal in a NY-seated arbitration, applying NY law

In the first scenario, the Licensing Agreement provided that the seat of arbitration would be New York, and that New York law would govern the Agreement. Participants argued a mock application made to the Tribunal by TechSavvy to obtain documents from Nutz-and-Boltz's offices in Westchester, New York, and to have Ms. Smith attend a one-day hearing.

Gusy argued the application for TechSavvy. He made four arguments. First, he argued that the Tribunal had the authority to grant the application in an international arbitration because, although Section 7 appears in FAA, Chapter 1, which generally governs domestic arbitration proceedings, it applies equally to international arbitration proceedings generally governed by FAA, Chapter 2, because there is no conflict with any provision of Chapter 2. Second, he argued that the evidence was relevant and material because it would substantiate TechSavvy's complete defense on the merits. Third, he argued that because Nutz-and-Boltz's documents and Ms. Smith's evidence were necessary for TechSavvy's defense, obtaining this evidence was a matter of procedural fairness and the Tribunal had no discretion to deny the request. Fourth, he argued the application was timely, citing the IBA's Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), which provide that the Tribunal may order the production of evidence "at any time."

Walsh argued Salazar's opposition. He, too, made four arguments. First, he argued that third-party subpoenas were not available in a New York-seated international arbitration under Section 7 of the FAA because Section 7 appears only in Chapter 1 of the FAA, which is limited to domestic arbitration. Second, he argued that even if a third-party subpoena were permitted in international arbitration, the Tribunal would have no authority to grant the requested subpoena. He argued that Section 7 of the FAA required Ms. Smith's attendance for any document production (because the witness must "bring with [them]" the documents), that Ms. Smith's attendance was contrary to Rule 45(c) of the U.S. Federal Rules of Civil Procedure ("FRCP") because she resides in Miami, which is more than 100 miles from New York, and further that Salazar could not direct Ms. Smith to comply with any subpoena, because Nutz-and-Boltz was Salazar's sister company, and not a subsidiary. Third and fourth, he argued that the requested information was speculative and not relevant and material to the dispute, and further that allowing the subpoena would prejudice Salazar by significantly delaying the procedural calendar of the arbitration.

Scenario 2: **an application to a tribunal seated in Paris, applying Utopia law**

In the second scenario, participants assumed the same facts as the first scenario, but further assumed that the Licensing Agreement provided that the seat of arbitration would be Paris, France, and that Utopia law would govern the Agreement. The arbitration clause in this scenario also provided that any award would be rendered within 12 months of the Request for Arbitration, absent exceptional circumstances. Finally, TechSavvy sought in this scenario to examine Ms. Smith at a

final merits hearing that would shortly commence.

Beess und Chrostin argued TechSavvy's application. Despite the Paris seat, and the application of Utopia law, she argued that because the hearing was slated to take place in New York, Section 7 of the FAA authorized the grant of a third-party subpoena. In this connection, she noted that third-party subpoenas were also available under Article 1469 of the French Code of Civil Procedure and the IBA Rules. She further argued that the Tribunal should be guided only by concern for whether to issue the subpoena, and not by concern for whether any subpoena would or could be enforced, as a practical matter. She also echoed several of the arguments made by Gusy.

Allen argued Salazar's opposition. He argued that the enforceability of any subpoena is relevant to the decision to grant the subpoena because, under Article 3.9 of the IBA Rules, a party may ask the Tribunal only to take steps "legally available" to obtain third-party discovery. And on that basis, he echoed Walsh's argument that the third-party discovery sought would not be enforceable in the U.S. because Section 7 of the FAA applies only to domestic arbitration and not to international arbitration, and because the FRCP places a geographical limit on those compelled to testify in third-party subpoenas (echoing Walsh's argument on the same point). He also argued that adducing non-party evidence only at the merits hearing would give Salazar no fair opportunity to respond to that evidence and that the alternative – delaying the hearing – would inevitably (and unjustifiably) cause the Tribunal to issue an award more than 12 months after the Request for Arbitration.

Scenario 3: **an application to the U.S. District Court for the Southern District of New York**

The final scenario saw the participants before a U.S. district court judge in the Southern District of New York. It assumed that the Paris-seated Tribunal had issued a subpoena to obtain documents from Nutz-and-Boltz's offices in Westchester, New York, and to have Ms. Smith testify at the arbitration hearing on the merits by video-conference from her domicile in Miami. TechSavvy brought an application before the U.S. district court to enforce the subpoena. Salazar opposed.

Acting as a hot bench, Judge Hochberg elicited argument on four main issues: the relevance of the evidence, the parties' ability to obtain the evidence in the absence of a subpoena, the enforceability of the subpoena, and the court's subject matter jurisdiction.

Gusy argued TechSavvy's application. He asked the U.S. district court to enforce the subpoena and stressed that Nutz-and-Boltz's documents and Ms. Smith's evidence were necessary for TechSavvy's defense. He denied the possibility that the evidence could have been obtained in the underlying arbitration, as Salazar had no control over Nutz-and-Boltz or its employee and could not compel either of them to cooperate. He also argued that the subpoena was enforceable because third-party subpoenas were available under the French Code of Civil Procedure and the IBA Rules.

Allen argued Salazar's opposition. He argued that the subpoena could not be enforced as drafted, noting that the arbitration contemplated 60 days between document production and the hearing on the merits, in contradiction with the terms of the subpoena. He also argued that the U.S. district court did not have subject matter jurisdiction, and pointed to *Badgerow v. Walters et al.*, 596 U.S. ___ (2022), in which the U.S. Supreme Court ruled by a majority that the FAA did not confer an independent basis for subject matter jurisdiction and that a court may not "look through" the application to the underlying substantive controversy between the parties to determine whether it

had jurisdiction. The U.S. district court took the matter under advisement.

Conclusion

Parties in international commercial arbitrations may well have lost a powerful tool in the aftermath of *ZF Automotives* but, as the panel and the lively discussion that followed made clear, the Supreme Court's ruling does not close the door entirely on avenues to obtain evidence from non-parties located in the United States.

Alternatives to § 1782 assistance may be available to parties in need of such evidence from non-parties. Section 7 of the FAA may be one option, and others may also exist depending on the seat and circumstances of the arbitration. For example, to obtain discovery from entities located in New York, parties might look to § 3102(c) of the New York Civil Practice Law and Rules, which allows a state court to order discovery "in aid of arbitration." In other circumstances, legislation governing arbitrations seated in foreign jurisdictions may allow non-U.S. courts to assist in obtaining evidence for use in arbitration.

Whatever the forum, enforcement of the arbitration subpoena may be challenging, as the panel highlighted. Parties should therefore be judicious in ascertaining what evidence is truly needed to meet their burden of proof, and should direct efforts towards obtaining that evidence through the arbitration whenever possible. This could mean, among other things, marshaling the necessary evidence to substantiate claims or defenses in ways that do not involve non-party evidence, and relying more heavily on the tribunal's power to enforce its own document production orders.

If obtaining non-party evidence through an arbitral subpoena is necessary, parties should expect scrutiny from arbitral tribunals wary of delaying or derailing the proceedings. Parties will need to demonstrate to the tribunal why the evidence is needed, why it cannot be obtained from the parties to the case, and why the delay and burden of gathering it from non-parties is justified. Tribunals may well inquire whether the parties have exhausted all avenues available to them within the arbitral process to obtain the evidence they need before petitioning the tribunal for a non-party subpoena. Tribunals may also wish to make it clear early in the arbitration procedure that if non-party subpoenas may be required, parties should account for that process in the procedural calendar in order to minimize disruptions to the arbitration schedule.

Kluwer Arbitration Blog's full coverage of New York Arbitration Week is available here.

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