New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
MONDAY, APRIL 19, 2021

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Thorny Issues Raised by Third-Party Discovery in Arbitration

In this edition of their Southern District Civil Practice Roundup, Edward M. Spiro and Christopher B. Harwood discuss the nuanced analysis of third-party discovery issues in 'Broumand v. Joseph', a subpoena enforcement proceeding where the out-of-state respondents successfully resisted arbitral subpoenas.

In an arbitration, third-party discovery—i.e., seeking documents or testimony from non-parties—can raise thorny legal issues, particularly where the non-parties and the arbitrator are located in different jurisdictions. Practitioners seeking to enforce arbitral subpoenas need to consider personal jurisdiction and procedural requirements through the lens of both the Federal Arbitration Act (FAA) and the Federal Rules of Civil Procedure (FRCP). Senior U.S. District Court Judge Jed S. Rakoff for the Southern District of New York recently conducted a nuanced analysis of these issues in *Broumand v. Joseph*, 2021 WL 771387 (S.D.N.Y. Feb. 27, 2021), a subpoena enforcement proceeding where the out-of-state respondents successfully resisted arbitral subpoenas.

By **Edward M. Spiro**

And **Christopher B. Harwood**

Background

In *Broumand*, the underlying arbitration involved the petitioner's claim that two individuals diverted assets from a New York corporation in which the petitioner had an interest. The arbitrator issued subpoenas for documents and testimony to two non-parties who were officers of the corporation. The arbitrator was sitting in New York and the respondents were domiciled in Virginia and California. The arbitrator directed that the "hearing" would proceed via videoconference. After the respondents ignored the subpoenas, the petitioner filed a petition to compel their compliance.

Personal Jurisdiction

Judge Rakoff's analysis began with the first hurdle for an arbitral subpoena issued to an unwilling third party—personal jurisdiction. To establish personal jurisdiction, a petitioner must show: (1) procedurally proper service; (2) a statutory basis for service; and (3) that service comports with the requirements of due process. Judge Rakoff focused on the second and third requirements.

FRCP Rule 4(k)(1)(A) provides that service may be effected on a person who is subject to service in a court of general jurisdiction in the state where the district court sits. Under New York's long-arm statute, a court has general jurisdiction over a nonresident who has systematic contacts with New York such that she is essentially at home in the state. A court has specific jurisdiction over a nonresident who has transacted business in New York and the claims at issue relate to that activity. Judge Rakoff held that the respondents' ongoing contractual relationships with a New York entity were insufficient to establish general or specific jurisdiction. The respondents did not negotiate or execute their contracts in New York, the contracts did not require

EDWARD M. SPIRO *and* CHRISTOPHER B. HARWOOD *are principals of Morvillo Abramowitz Grand Iason & Anello P.C. Mr. Spiro is the co-author of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson Reuters 2021), and Mr. Harwood is the former Co-Chief of the Civil Frauds Unit at the U.S. Attorney's Office for the Southern District of New York. Curtis Leitner, counsel at Morvillo Abramowitz, assisted with the preparation of this article.*

them to submit payments or notices into New York, and the contracts did not have a New York choice of law provision.

Judge Rakoff recognized, however, that the FAA provides an independent basis to establish personal jurisdiction. 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." In *Dynegy Midstream Services v. Trammochem*, 451 F.3d 89 (2nd Cir. 2006), the Second Circuit held that this provision incorporates by reference the service requirements for third-party subpoenas in the FRCP, Rule 45(b)(2). When *Trammochem* was decided, Rule 45(b)(2) limited the service of out-of-district subpoenas to 100 miles from the place of compliance. In 2013, Rule 45(b)(2) was amended to permit nationwide service.

Judge Rakoff considered whether the FAA incorporates Rule 45(b)(2)'s limitations as of the time that the FAA was passed, the so-called "static" approach, or Rule 45(b)(2)'s limitations at the time a subpoena is enforced, the so-called "dynamic" approach. In *Managed Care Advisory Group v. CIGNA Healthcare*, 939 F.3d 1145 (11th Cir. 2019), the U.S. Court of Appeals for the Eleventh Circuit held that a statute that refers to a "general subject"—as opposed to a specific title or section—adopts the currently effective law on the subject. Based on the FAA's general directive that subpoenas "be served in the same manner as subpoenas to appear and testify before the court," the Eleventh Circuit held that the FAA adopts the dynamic approach to Rule 45(b)(2)'s service requirements. Judge Rakoff followed the Eleventh Circuit's approach. In accordance with the current version of Rule 45(b)(2), Judge Rakoff held that the FAA authorizes nationwide service of process, and therefore the petitioner established a statutory basis to assert personal jurisdiction over the respondents.

Due Process

For the exercise of jurisdiction to comport with due process, the respondents must have sufficient contacts with the forum and the exercise of jurisdiction must be reasonable. As noted above, the respondents lacked sufficient contacts with New York. However, Judge Rakoff ruled that the minimum contacts analysis properly is based on the respondents' connection *with the United States*—not New York. Although no Second Circuit decision was on point, Judge Rakoff followed the approach of other circuit courts which have held that when (1) a case arises under federal law and (2) the statute authorizes nationwide services of process, personal jurisdiction turns on the served party's contacts with the United States.

Judge Rakoff noted that the out-of-circuit authority was not directly on point because the FAA is not a grant of federal jurisdiction. A party asking a federal court to enforce an arbitral subpoena must provide an independent basis for jurisdiction—for example, a federal question in the underlying arbitration or the diverse citizenship of parties in the subpoena enforcement proceeding. The basis for jurisdiction in *Broumand* was the diversity of citizenship of the parties—not a federal claim. Nonetheless, Judge Rakoff held that the national contacts approach still applied because the court was vindicating the federal policy favoring arbitration. Although the respondents had insufficient contacts with New York, they plainly had sufficient contacts with the United States. In addition, given the minimal burden of testifying by videoconference, Judge Rakoff held that the exercise of personal jurisdiction over the respondents was reasonable.

Geographic Constraints

Judge Rakoff next considered whether the arbitral subpoenas were consistent with the 100-mile geographical limitation in FRCP Rule 45(c). Rule 45(c) provides that a subpoena may compel a third party to testify within 100 miles of her residence or place of employment. Judge Rakoff analyzed two issues: whether arbitral subpoenas are required to comply with the 100-mile limitation, and if so, whether remote testimony can be used to circumvent the limitation.

Although the Second Circuit has not addressed whether Rule 45(c)'s 100-mile limitation applies to arbitral subpoenas, it has analyzed whether *other restrictions* in Rule 45 apply to arbitral subpoenas. In *Washington Nat'l Ins. v. OBEX Grp.*, 958 F.3d 126 (2d Cir. 2020), the respondents moved to quash arbitral subpoenas under Rule 45(b)(d)(3) because the subpoenas purportedly requested privileged information, and were duplicative, overbroad, and burdensome. The district court exercised its discretion not to address these objections in the context of an arbitral subpoena.

The Second Circuit affirmed and held that the requirements in Rule 45 are not incorporated wholesale into the FAA. Section 7 provides that if a person fails to comply with an

arbitral subpoena, the district court in the district where the arbitrator is sitting may "punish said person … for contempt *in the same manner provided by law for securing the attendance of witnesses … in the courts of the United States.*" (emphasis added). The Second Circuit held that this language does not impose Rule 45's obligations on a district court enforcing an arbitral subpoena. It merely indicates that arbitral subpoenas should be enforced in the same manner as subpoenas in civil litigation—i.e., through contempt proceedings. The Second Circuit reasoned that requiring district courts to rule on privilege, burdensomeness, and related objections would frustrate the strong federal policy favoring arbitration. Requiring district courts to address those issues would turn a federal court into a "full-bore legal and evidentiary appeals body" every time a party seeks third-party discovery in arbitration.

The *Broumand* respondents argued that the arbitral subpoenas were unenforceable because they exceeded the 100-mile limitation in Rule 45(c). Notwithstanding *OBEX*, the petitioner conceded that the 100-mile limitation applied to arbitral subpoenas. Judge Rakoff acknowledged the tension between *OBEX*'s teaching that a district court need not address privilege and burdensomeness objections to an arbitral subpoena under Rule 45, and the court's application of the geographic requirements in the same rule to the arbitral subpoenas in *Broumand*.

Judge Rakoff drew two distinctions between *Broumand* and *OBEX*. First, the petitioner in *Broumand* conceded that the Court could "simply decline to enforce the subpoena, without technically quashing or modifying it," as the petitioner requested in *OBEX*. Second, Judge Rakoff stated that there was "a colorable argument that the ruling in *OBEX* should not apply" to objections based on the 100-mile limitation. Judge Rakoff reasoned that, unlike a privilege or burdensomeness objection, the 100-mile limitation is "straightforward" to apply and does not entangle a district court in the merits of the arbitration.

Although the petitioner acknowledged that his subpoenas exceeded the 100-mile limitation, he argued that the subpoenas were enforceable because the respondents could testify by videoconference. Judge Rakoff noted that several out-of-circuit district courts have approved the use of remote testimony as a way around the 100-mile limitation. Nonetheless, the Court rejected these precedents because the text of Rule 45(c) "speaks, not of how far a person would have to travel, but simply the location of the proceeding at which a person would be required to attend." Judge Rakoff added that any other reading would render the 100-mile limitation a nullity and "bestow upon any arbitrator … the unbounded power to compel remote testimony from any person residing anywhere in the county." Accordingly, Judge Rakoff granted the respondents' motion to dismiss the petitioner's enforcement proceeding based on the 100-mile limit in Rule 45(c).

Presence Requirement

Judge Rakoff concluded by holding that the so-called "presence" requirement of the FAA provided an independent basis to reject the subpoenas. Section 7 states that "the arbitrators … may summon in writing any person to attend before them … as a witness and in a proper case to bring with him" any "record" which "may be deemed material to the case." The FAA does not explicitly authorize document subpoenas. Nonetheless, the Second Circuit (and other circuits) have authorized a workaround by holding that an arbitrator may require a witness to attend a preliminary hearing before the arbitrator for the sole purpose of producing subpoenaed documents. To compel an unwilling subpoena recipient, the arbitrator must be present at the hearing.

The petitioner argued that, given the extraordinary circumstances posed by the COVID-19 pandemic, an arbitrator can satisfy the presence requirement by videoconference. Judge Rakoff ruled that petitioner's "policy concerns … cannot trump the plain meaning of Section 7 of the AAA." The purpose of the presence requirement is to "force an arbitrator to think twice before issuing an arbitral subpoena," and "[a]llowing arbitrators to subpoena nonparties for discovery without requiring the arbitrators to convene and preside over a physical hearing would largely undermine that calculation."

Conclusion

Broumand serves as a cautionary note to practitioners seeking third-party discovery in an arbitration. Counsel should be cognizant of the interplay between the FAA and FRCP 45, and, if the discovery sought from a recalcitrant witness is worth the expense, consider arranging for arbitrators to travel in order to comply with geographic limits and to preside over physical hearings.