New York Law Journal
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JUNE 22, 2022

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Judicial Review of an Arbitrator's Privilege Rulings

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When parties agree to arbitrate their disputes, they consent to have an arbitrator, rather than a court, resolve disputes about whether particular documents are discoverable, including whether the documents are privileged. A novel legal issue exists, however, with respect to whether, in connection with a petition to enforce an arbitral subpoena under the Federal Arbitration Act (the FAA), a district court is authorized to consider de novo privilege objections to the production of the requested documents.

In *Turner v. CBS Broadcasting*, 2022 WL 1209680 (S.D.N.Y. April 25, 2022), U.S. District Court Judge Jed S. Rakoff for the Southern District of New York recently addressed this issue of first impression, concluding that a court is authorized, but not required, to consider de novo privilege objections to an arbitral subpoena. In *Turner*, Judge Rakoff declined to exercise that authority because, among other things, he concluded that "even a cursory review reveals that the arbitrator's … decision to overrule CBS's assertion of privilege over the … documents [at issue] was anything but arbitrary."

> Although courts have discretion to adjudicate the merits of privilege objections to an arbitral subpoena, courts may decline to exercise such discretion, as Judge Rakoff did in 'Turner v. CBS Broadcasting'.

'Turner'

In *Turner*, the petitioner, the International Brotherhood of Electrical Workers Local 1200, AFL-CIO (IBEW or Union), sought to enforce an arbitral subpoena seeking an internal investigation report and associated records from the respondent, CBS Broadcasting. The underlying arbitration was brought by the Union after a long-term, freelance cameraman was removed from a "referral list" of cameramen eligible to be hired by CBS to film sporting events. CBS removed the cameraman from the referral list after another CBS employee complained that the cameraman had touched her without her consent.

Upon receiving the complaint, a CBS human resources (HR) employee conducted an internal investigation of the alleged sexual harassment. The investigation included interviews of the complainant and other witnesses. In June 2020, CBS's HR director informed the cameraman that CBS (1) had completed its internal investigation, (2) had "thoroughly investigated the complaint," and (3) had concluded that the cameraman was "no longer eligible for employment on any future assignments" and was "disqualified from working for any other ViacomCBS event or their affiliated or related events."

After filing a grievance, the Union brought an arbitration before the American Arbitration Association (AAA) under the parties' applicable collective bargaining agreement, seeking, among other things, for the cameraman to be placed back on the referral

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list. The Union asserted that the cameraman's removal from the list was arbitrary and capricious because, among other things, CBS failed to conduct a full and fair investigation.

In connection with the arbitration, the Union asked the arbitrator to issue a subpoena to CBS for various documents, including documents relating to CBS's internal investigation of the harassment complaint. Following oral argument that necessarily concerned both privilege and relevance issues, the arbitrator decided to issue the requested subpoena.

In response, CBS refused to provide certain documents relating to its internal investigation, including (1) the investigator's report, (2) notes from the investigation, (3) documentation prepared in the course of the investigation, and (4) the names and contact information of the individuals interviewed by CBS as part of the investigation and of the individual who made the complaint. CBS argued that the documents were not discoverable, because they constitute privileged attorney-client communications and/or attorney work product.

The Union responded by filing a petition to enforce the arbitral subpoena under §7 of the FAA, seeking the foregoing categories of documents.

Relevant Legal Principles

Judge Rakoff first observed that "[o]nce it is determined … that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." 2022 WL 1209680, at *2 (citations omitted). Consequently, "discovery … issues that arise in the context of a pending arbitration proceeding"—including whether to authorize the issuance of subpoenas—"are committed to the discretion of the arbitrator, at least in the first instance." Id.

However, "arbitrators lack the means to compel compliance with their subpoenas." Id. For this reason, Judge Rakoff explained, the FAA "provides that parties in arbitration may seek the federal courts' assistance in enforcing arbitral subpoenas." Id. Specifically, §7 of the FAA provides: "[I]f 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 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." Id. at *3 (quoting 9 U.S.C. §7).

Judge Rakoff then turned to the central legal issue in *Turner*: namely, whether after an arbitrator has authorized the issuance of an arbitral subpoena (and thus necessarily overruled any privilege or relevance objections) and the recipient has refused to produce, the recipient may raise privilege objections before the district court in which a §7 petition is filed. Judge Rakoff observed that "when the Second Circuit has considered whether respondents may raise legal objections to an arbitral subpoena in opposition to a section 7 petition, it has framed the issue as whether a section 7 respondent may interpose an objection that sounds in one of the grounds set forth in Fed[eral] R[ule] of Civ[il] P[rocedure] 45(d)(3)(A)." Id. Rule 45(d)(3)(A) provides that "[o]n timely motion, the court for the district where compliance is required must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45; (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A).

Judge Rakoff noted, however, that the Second Circuit has declined to address whether a §7 respondent may raise privilege objections in the context of a §7 petition. Specifically, in *Washington National Ins. Co. v. OBEX Grp.*, 958 F.3d 126, 139 (2d Cir. 2020), the Second Circuit held that a district court hearing a §7 petition is not *obligated* to consider objections to the arbitral subpoena because "the [arbitration] panel is responsible for issuing summonses, hearing evidence, and ruling on objections." Id. at *4. But the Second Circuit declined to address whether a district court hearing a section 7 petition is "*authorize[d]* … to consider objections to pre-hearing discovery that sound in the grounds

for quashing a subpoena set forth in Rule 45(d)(3)(A)." Id.

Judge Rakoff concluded that a district court "is authorized to consider privilege objections sounding in Rule 45(d)(3)(A)(iii)." Id. Judge Rakoff reasoned that (1) Rule 45 "authorizes a district court to 'protect[] a person subject to a subpoena' in the context of 'enforcement,'" (2) "section 7 of the FAA provides that the 'district court … *may* compel the attendance of such person … before [an] arbitrator … or punish said person … 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,'" and (3) "[i]t would be improper to construe section 7—which expressly contemplates the possibility of a district court *not* enforcing an arbitral subpoena—to prohibit a court from 'protect[ing] a person subject to a subpoena' where the documents or testimony called for are clearly privileged." Id. at *4, *5 (ellipses, alterations, and emphasis in original). Judge Rakoff emphasized that "[w]hile the federal policy favoring arbitration counsels deference to the substantive and procedural decisions of arbitrators, deference does not require abdication of the Court's duty [] to protect people from enforcement of patently unlawful subpoenas." Id. at *5.

Although Judge Rakoff held that courts are "authorized to decline to grant a section 7 petition to compel [on the ground] that the subpoena calls for clearly privileged information," he also counseled that "deference to the arbitrator's privilege and admissibility rulings (whether express or implicit) will be appropriate in the mine run of cases to avoid making a section 7 petition a vehicle to obtain, in effect, interlocutory appeal of discovery rulings obtained in arbitration." Id.

Application of Relevant Legal Principles to 'Turner'

Applying the above-referenced principles, Judge Rakoff held that, in *Turner*, deference to the arbitrator's implicit decision that the documents at issue were not privileged was appropriate. Accordingly, Judge Rakoff declined to exercise his authority to consider the merits of CBS's privilege objections to the arbitral subpoena.

Judge Rakoff held that deference to the arbitrator's implicit privilege decision was appropriate for two reasons. *First*, Judge Rakoff explained that CBS was a party to the collective bargaining agreement that gave rise to the underlying arbitration, and that "the rationale for deferring to an arbitrator's decisions on privilege issues is particularly strong where the objecting respondent is a party to the contract that gave rise to the underlying arbitration" (as opposed to a non-party subpoena recipient). Id. Judge Rakoff emphasized that "[i]n agreeing to arbitrate disputes … with the Union, CBS elected to have an arbitrator, rather than a court, resolve any discovery disputes that might ensue, including making decisions about CBS's assertions of legal privilege." Id.

Second, Judge Rakoff observed that "even a cursory review reveals that the arbitrator's implicit decision to overrule CBS's assertion of privilege over the internal investigation documents was anything but arbitrary." Id. at *6. In particular, Judge Rakoff noted that "the Union persuasively argued [before the arbitrator] that CBS put the internal investigation in issue in this dispute, because the [parties' collective bargaining agreement] prohibited the cameraman's 'arbitrary and capricious' removal and the only rationale CBS ever provided for the cameraman's removal was that the alleged victim's complaint was fully investigated and found to be meritorious." Id. Although Judge Rakoff "decline[d] to adjudicate CBS's privilege objection," he found that "the arbitrator's implicit rejection of CBS's position [was] far from arbitrary." Id.

Conclusion

Although courts have discretion to adjudicate the merits of privilege objections to an arbitral subpoena, courts may decline to exercise such discretion, as Judge Rakoff did in *Turner*. Accordingly, parties to an arbitration should not count on being able to challenge adverse privilege rulings by the arbitrator in the context of a §7 proceeding.