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UNITED STATES

Pre-hearing discovery II: further divergence in court treatment of pre-hearing depositions and pre-hearing document discovery

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An international arbitration tribunal sitting in the United States derives its power over individuals or companies who are not party to the arbitration ('non-parties') exclusively from the US Federal Arbitration Act (the 'FAA').[1] Specifically, section 7 of the FAA authorises arbitrators to 'summon in writing *any person* to attend before 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 . . .'.[2]

Two recent New York federal court decisions interpreting the FAA show, ironically, that while arbitrators sitting in the United States have less power than the US courts to compel testimony from non-party witnesses, they may actually have more power than the courts to direct non-parties to produce documents.

On 22 April 2005, the US District Court for the Southern District of New York held, in the case of *Atmel Corporation v Ericsson Telefon, AB,* that Section 7 of the FAA does not give arbitrators the power to subpoena non-parties to appear and give oral testimony at a pre-hearing deposition.[3] In other words, *Atmel* ruled that arbitrators – unlike the US courts – lack the authority to compel non-party deposition testimony. In this regard, *Atmel* is consistent with the recent trend in US judicial decisions, which have interpreted the FAA narrowly in case of depositions.

On the other hand, on 15 June 2005, in the case of *Trammochem v Atofina-Petrofina SA*, the US District Court for the Southern District of New York (same court, different judge) held that section 7 of the FAA implicitly granted arbitrators a *greater* authority than the US courts to compel the production of documents from non-parties.[4] Specifically, *Trammochem* held that an arbitrator's power to subpoena documents from non-parties is *not* circumscribed by Federal Rule of Civil Procedure Rule 45 ('Rule 45'), a rule that prohibits federal courts from issuing subpoenas to non-parties who are located more than 100 miles from the site of the courthouse.[5] Moreover, *Trammochem* held that because section 7 of the FAA authorises the federal courts to assist arbitrators in obtaining evidence, the federal courts are allowed to enforce an *arbitrator's* subpoena outside the 100-mile limit otherwise imposed by Rule 45 on judicial subpoenas.[6]

In both *Atmel* and *Trammochem*, the judges appeared to rely on the rationale that the courts should interpret the FAA so as to 'to facilitate and expedite' the arbitral process, and thereby promote the 'interests of efficiency' in arbitration.[7] Thus, depositions, which are time-consuming and at odds with the supposed efficiency of arbitration, are not allowed. Contrariwise, permitting arbitrators to expeditiously subpoena the production of documents from non-parties – even if such subpoenas extend beyond the 100-mile limit imposed on the courts – will work to facilitate, rather than impede, the arbitral process.

Atmel: the arbitrator's lack of power to compel pre-hearing deposition testimony

In *Atmel*, an arbitration tribunal sitting in New York issued a subpoena requiring Sony Ericsson Mobile Communications (USA), Inc ('Sony Ericsson') – a company that was not a party to the arbitration – to make one or more of its officers available for a pre-hearing witness deposition. Sony Ericsson, in turn, made a motion in New York federal court seeking to 'quash' (or vacate) the arbitrators' subpoena on the ground that arbitrators lacked power to compel such discovery. Specifically, Sony Ericsson argued that because section 7 FAA, by its express language, only permits arbitrators to subpoena non-party witnesses to appear 'before them', the statute necessarily precludes arbitrators from ordering non-parties to provide any pre-hearing discovery (since pre-hearing discovery, by definition, does not take place 'before' the arbitrators).[8]

After reviewing recent decisions by the federal judiciary on the subject, the *Atmel* court ruled, on the one hand, that arbitrators *did* have the power to subpoena the pre-hearing production of documents by non-parties, even though, technically speaking, such a document production would not take place 'before' the arbitrators. On the other hand, the *Atmel* court held that section 7 FAA did *not* authorise arbitrators to issue subpoenas for pre-hearing deposition testimony.[9] In so holding, the court, invoking the notion of arbitral efficiency, reasoned as follows:

> 'The [FAA] by its terms permits arbitrators to compel non-parties only to 'attend before them' and not to provide pre-hearing discovery. However, the power to compel production of documents at a hearing implies the lesser power to require the documents to be produced in advance of the hearing. With respect to depositions, however, the power to require pre-hearing appearances by witnesses in effect would increase the burden on non-parties, by creating the potential to require them to appear *twice*, both for discovery depositions and then for testimony at the hearing itself. The power to compel a deposition thus cannot be seen as simply an implied power to control the timing, in the interests of efficiency, of a production the arbitrators concededly have the power to order, but constitutes an additional power not granted by the statute.'[10]

The decision in *Atmel*, therefore, is grounded ultimately on the premise that a pre-hearing deposition – unlike a pre-hearing document production – is inefficient and contrary to the very nature of arbitration. Moreover, the court rejected the argument made by Atmel Corporation ('Atmel') – the party on whose behalf the deposition subpoena was issued – that enforcing the subpoena would not lead to any inefficiencies since Atmel did not intend to require Sony Ericsson to testify a second time at the arbitration hearing. The *Atmel* court concluded that this argument was, at best, speculative. Indeed, the court noted that 'if the deposition [of Sony Ericsson were] successful' – such that the witness testified to important information in a pre-hearing setting – 'the chances that Sony Ericsson would be called as a witness [a second time at the arbitration hearing] would clearly increase'.[11]

The *Atmel* decision reaffirms the recent, unmistakable trend in US case law that arbitrators cannot order non-parties to provide pre-hearing deposition testimony. Although several federal courts in the 1980s and early 1990s held that arbitrators did in fact have the power to compel non-party depositions,[12] the emerging consensus among US federal courts over the last decade is that pre-hearing depositions of non-parties are beyond the permissible scope of discovery in arbitration proceedings, and thus are not authorised by the FAA.[13]

It should be noted, however, that the US Supreme Court has not yet weighed in on this issue and only one US federal appellate court appears to have directly addressed the issue. Thus, a firm rule is not yet in place in this still emerging field of law.

Trammochem: the arbitrator's power to compel pre-hearing document production

In *Trammochem*, an arbitration panel sitting in New York issued a subpoena directing Dynergy Midstream Services, LP ('Dynergy') – a non-party to the arbitration, headquartered in Houston, Texas – to produce certain documents in advance of the final arbitration hearing. The subpoena was served on Dynergy in Houston, Texas. When Dynergy refused to produce any documents in response, certain parties to the arbitration filed a motion in New York federal court seeking to compel Dynergy's compliance with the subpoena.

Despite the fact that the subpoena unquestionably reached far beyond the 100-mile geographical limit imposed by Rule 45 on judicial subpoenas, the *Trammochem* court concluded that the arbitrators nevertheless had the statutory authority to issue the subpoena against Dynergy. Most critically, the court held as follows:

> 'Had Congress intended to restrict arbitrators' authority to issue subpoena *duces tecum* to those enumerated in the Federal Rules of Civil Procedure, as it does courts, the FAA would have explicitly included such language. Instead, by explicitly limiting the court's jurisdictional authority to issue subpoenas, without any indication of such a limitation on arbitrators, s*ection 7 [of the FAA] implicitly grants arbitrators greater authority to issue subpoenas than it does this court.*[14]

Moreover, the *Trammochem* court held that because section 7 FAA provides the federal courts with the authority to assist arbitrators in obtaining evidence, the power of a federal court to enforce an *arbitral* subpoena – even if beyond the 100-mile limit imposed by Rule 45 – was 'clearly within th[e] [c]ourt's bailiwick'.[15] In other words, *Trammochem* held that a federal court located in the district where the arbitrators are sitting can both determine the enforceability of an arbitral subpoena on a non-party and, if appropriate, enforce such subpoena – *regardless of the location of the non-party.*

Trammochem exposes a significant divergence of opinion in the US federal judiciary as to whether an arbitral subpoena for document production is enforceable beyond the 100-mile limit set out in Rule 45. This is explained, at least in part, by an unintended 'gap' in the statutory framework. On the one hand, Section 7 FAA requires parties to an arbitration to seek judicial enforcement of any arbitral subpoena exclusively in 'the United States District Court for the district in which [the] arbitrators . . . are sitting'. On the other hand, section 7 also requires such court to enforce any arbitral subpoena 'in the same manner as subpoenas to appear and testify before the court' – that is, pursuant to the restrictions of Rule 45. Thus, interpreting the statute literally, if a party to a New York-based arbitration wanted to enforce an arbitral subpoena directed against a non-party located in Texas, he or she must:

(1) seek enforcement in the federal court located in New York (ie he cannot seek enforcement in the Texas court because the arbitrators are not sitting in Texas); but
(2) the New York court would lack the authority to enforce the subpoena (ie because the Texas-based non-party would be outside the 100-mile boundary).

The net result of such a literal statutory interpretation would be that parties to an arbitration would never be able to obtain discovery from non-parties located in judicial districts outside the place of arbitration.

In *Amgen, Inc v Kidney Center of Delaware County, Ltd*, the US District Court for the Northern District of Illinois found a solution to this 'thorny question' by invoking Rule 45(a)(3)(B), which permits an attorney authorised to practice in a judicial district where a trial is being held to sign and issue a subpoena on behalf of the court for a district in which a deposition or document production is to take place. Accordingly, *Amgen* held that parties to an arbitration should – instead of relying on a subpoena signed by the arbitrators – get their own attorneys to sign the subpoena and then seek enforcement of such subpoena directly in the court where the non-party is located.[16]

The holding in *Trammochem*, obviously goes well beyond the holding of *Amgen*. Whereas *Amgen* remained loyal to Rule 45, holding that only the court located in the district where the non-party is located has the authority to enforce a subpoena against such non-party, *Trammochem* has in effect junked the Rule 45 100-mile territorial limitation for courts enforcing arbitral subpoenas. Under the *Trammochem* holding, the court in the district where the arbitration tribunal is sitting has, in effect, nationwide reach in enforcing subpoenas issued by the tribunal.

At the time of this writing, *Trammochem* appears to be alone in this finding. It is therefore unclear whether the *Trammochem* decision will be followed by other courts in the future, or bring any lasting change to the law.

Conclusion

Federal policy under the FAA strongly favours arbitration as an alternative dispute resolution process.[17] In interpreting the FAA, the US courts have paid particular attention to the purpose of arbitration, which is 'to facilitate and expedite the resolution of disputes, ease court congestion, and provide disputants with a less costly alternative to litigation'.[18] Accordingly, depending on their assessment of the efficiency and cost-effectiveness of a particular arbitral procedure, the US courts have been willing to interpret the FAA

statute both narrowly and liberally in order to validate the procedures that best serve the purpose of arbitration. As shown above, such flexibility has led to the authorisation of somewhat contradictory powers for arbitrators: on one hand, the courts generally forbid arbitrators from compelling non-parties to provide deposition testimony; on the other hand, as shown in the case of *Trammochem*, the courts have been willing to give arbitrators even more power than the courts have themselves to compel the production of documents from non-parties. Consensus among US district and appellate courts has not yet been fully formed, however. Final resolution of these issues may require the involvement of the US Supreme Court.

Notes

1 The FAA is codified at 9 USC 1 *et seq.*
2 9 USC § 7 (italics added).
3 No M8-85 (GEL), 2005 US Dist LEXIS 7319, at *3 (SDNY 22 April 2005).
4 No 05 Misc M8-85, 2005 US Dist LEXIS 11544, at *9 (SDNY 15 June 2005).
5 Rule 45 provides in relevant part as follows:
'A subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena.'
6 *Trammochem*, 2005 US Dist LEXIS 11544, at *9-*10.
7 *Ibid* at *10; *Atmel*, 2005 US Dist LEXIS 7319, at *3.
8 *Trammochem*, 2005 US Dist LEXIS 11544, at *1.
9 *Atmel*, 2005 US Dist LEXIS 7319, at *2.
10 *Ibid* at *2-*3 (internal citations omitted).
11 *Ibid* at *3.
12 See, eg *Amgen Inc v Kidney Center of Del County*, 879 F. Supp. 878, 880 (ND Ill. 1995) (holding that implicit in the arbitrator's power to compel testimony for purpose of a hearing is the lesser power to compel such testimony for purposes prior to hearing); *Stanton v Paine Webber Jackson Curtis, Inc*, 685 F. Supp. 1241, 1242 (SD Fla. 1998) (finding that, under the FAA, 'arbitrators may order and conduct such discovery as they find necessary' and that '[p]laintiffs' contention that § 7 of the [FAA] only permits arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances, is unfounded').
13 See, eg *COMSAT Corp v Nat'l Science Foundation*, 190 F.3d 269, 275-76 (4th Cir. 1999); *Odfjell ASA v Celanese AG*, 328 F. Supp. 2d 505, 507 (SDNY 2004); *In re Hawaiian Elec Indus*, No M-82, 2004 US Dist LEXIS 12716, at *7 (SDNY 9 July 2004); *SchlumbergerSema, Inc v Xcel Energy, Inc*, No Civ. 02-4304 (PAM/JSM), 2004 US Dist LEXIS 389, at *7 (D. Minn. 9 January 2004); *The Proctor & Gamble Co v Allianz Ins Co*, No 02 Civ. 5480 (KMW), 2003 US Dist LEXIS 26025, at *7 (SDNY 2 December 2003); *Integrity Insur Co v American Centennial Insurance Co*, 885 F. Supp. 69, 73 (SDNY 1995).
14 *Trammochem*, 2005 US Dist LEXIS 11544 at *9-10 (italics added).
15 *Ibid* at *9.
16 *Amgen*, 879 F. Supp. at 882.
17 See, eg *Integrity*, 885 F. Supp. at 70 (citing *Moses H Cone Memorial Hosp v Mercury Constr Corp*, 460 US 1 (1983)).
18 *Stanton*, 685 F. Supp. at 1242 (quoting *Recognition Equipment, Inc v NCR Corp*, 532 F. Supp. 271, 275 (ND Tex. 1981)).

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