New York Law Journal

NEW YORK LAW JOURNAL SPECIAL REPORT

An ALM Publication

Alternative Dispute Resolution

WWW.NYLJ.COM

VOLUME 263—NO. 50

MONDAY, MARCH 16, 2020

Getting Real About Discovery In Arbitrations

BY DAVID M. BRODSKY

SHUTTERSTOCK

Arbitration is not like litigation. Among the ways they differ is the way in which discovery is treated. Because of the revolutionary impact on our business and personal lives of electronic communications, modern-day discovery is often an exercise in discovering, managing, and using electronic data. In addition, because of the relative ease of travel to and digital communications with people in far-flung places, depositions are regularly noticed to occur in venues far removed from the venue of the litigation; use of video-conferencing now eases the burden of transcontinental and intercontinental travel; and courts regularly authorize the issuance of subpoenas duces tecum to third parties. For at least the last 30 years, arbitrators have wrestled with the same revolution facing courts. However, because of the fundamental differences between litigation and arbitration, codified in the Federal Arbitration Act, or similar state statutes, arbitrators, and courts dealing with enforcement issues, have dealt with the revolution in very different ways.

The Federal Arbitration Act was adopted in 1925, predating the Federal Rules of Civil Procedure and similar state codes. In the almost 100 years since adoption, the FAA hasn't substantively changed in material aspects. In 1925, there was scant use of depositions, and nothing like nationwide service of

DAVID M. BRODSKY *is a Fellow of the College of Commercial Arbitrators and a member of the Commercial Panels of the American Arbitration Association and of FedArb.*

process or any form of modern electronic communications.

Section 7 of the FAA regulates the taking of discovery on third parties. That provision provides, as follows:

> The arbitrators ... 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*. ... Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and *shall be served in the same manner as subpoenas to appear and testify before the court*; ...

9 USCA §7 (emphasis added).

What it means to "attend before them" or "bring with him ... any book" are likely to be answered differently if analyzed from the perspective of what those words meant in 1925 or from the perspective of their meaning in 2020.

For example in 2020, in a dispute between a manufacturer incorporated in Delaware with its principal place of business in Los Angeles, against a factory incorporated in and principally doing business in Michigan, the arbitration clause requires the arbitration to be held in New York. Panel members are made up of two party-designated arbitrators from New York and New Jersey, and the chair is from Connecticut. The claimant manufacturer seeks evidence from the independent accountant to respondent factory, located in Chicago, and requests the Panel to issue a summons under §7 for the auditor to testify in a pre-hearing deposition and bring identified documents. If the arbitration was held in 1925, and without the consent of the auditor, her presence could not be required, as the auditor could not be served with a subpoena. Until the Federal Rules were amended in 2013, subpoenas could not be served on persons residing outside of 40 (later, 100) miles from the site of the deposition. In addition, it is highly unlikely, even if the witness was willing to testify, that she would be willing to testify in NYC or Hartford, where arbitrators are physically present.

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But in 2020, the circumstances may be different. First, geographical restrictions on the service of a subpoena were all but eliminated. Further, in federal court, "[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by *telephone or other remote means*. For the purpose of this rule ... the *deposition takes place where the deponent answers the questions*." Fed. Rules of Civil Procedure Rule 30(b)(4) (emphasis added). "Other remote means" has been interpreted to include Skype or other remote visual applications, see, e.g., *Lopez v. CIT Bank, N.A.*, 2015, where the court held that "remote videoconference depositions conducted through software like Skype tend to be an effective and efficient means of reducing costs. *Guillen v. Bank of America*; see also *Trejo v. Macy's*. Likewise, this court has noted that leave to conduct depositions by telephone should be liberally granted and that a desire to save money constitutes good cause to depose out-of-state witnesses through remote means."

The question is, however, if the same dispute was in an arbitration forum, could it utilize the same modern conveniences as video or telephonic depositions? Would the witness be in "attend[ance] before" the chair if the witness was in Chicago and the chair was presiding over the video deposition from her office in Hartford?

A recent decision in the Eleventh Circuit, *Managed Care Advisory Group v. CIGNA Healthcare*, 939 F.3d 1145 (11th Cir. 2019) sheds some light on these issues:

> Congress passed Section 7 in 1925, so we must ascertain the meaning of "attendance" and "before" in Section 7's grant of authority to district courts to

"compel the *attendance* of such person or persons *before* said arbitrator ... in the same manner provided by law for securing the *attendance* of witnesses ... in the courts of the United States" as of 1925. 9 U.S.C. §7 (emphasis added); see also *Oliveira, ––– U.S. ––––*, [139 S. Ct. 532,] 539-40 & 540 n.1 ... Looking to dictionaries from the time of Section 7's enactment makes clear that a court order compelling the "attendance" of a witness "before" the arbitrator meant compelling the witness to be in the physical presence of the arbitrator. In 1925, "attendance" meant the "[a]ct of attending," and "attend" meant "be present at." See, e.g., H.W. Fowler & F.G. Fowler, *The Concise Oxford Dictionary of Current English* 52 (1926). Similarly, "before" meant "in [the] presence of." *Id*. at 74. And "presence" meant "place where person is," while "present" meant "[b]eing in the place in question." *Id*. at 650. *Thus, Section 7 does not authorize district courts to compel witnesses to appear in locations outside the physical presence of the arbitrator, so the court may not enforce an arbitral summons for a witness to appear via video conference* (emphasis added).

By contrast, some years ago, the Eighth Circuit held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." *In re Security Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000).

Is there some way to reconcile these seemingly opposing views of bringing modern means of communication fully into the arbitration world? One thought is to look at the original rationale of Congress when it enacted the FAA in 1925. In 2001, the Supreme Court had an opportunity to discuss the purpose of the FAA: Congress enacted the FAA in 1925 in "response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Store v. Adams*, 532 U.S. 105, 111 (2001). If that is still good law, one would think that a court would look favorably upon a development that continued to make arbitration a viable and efficient alternative to standard litigation.

Further, there is language in another portion of §7 that suggests that Congress wanted the FAA to move with the times and not remain stuck in the pre-Federal Rules era. When referencing the issuance of summonses (or subpoenas), Congress made clear that summons "*shall be served in the same manner as subpoenas to appear and testify before the court*." In other words, a summons may now be served on a nationwide basis, as per the 2013 amendments to the Federal Rules.

If Congress intended in 1925 to allow the mechanics of serving a subpoena in an arbitration to change with the times, the same logic would hold true for how a witness appears "before" an arbitrator? If the methods used comport with due process, arbitrators and the parties that appear before them should not be restricted in their ability to utilize modern modes of communication It stands to reason that embracing these communication tools when conducting depositions or videoconferencing hearings are consistent with the goals of arbitration to be efficient and cost-effective. It shouldn't require finding a dictionary published in 1925 to govern how arbitrations, and, specifically, discovery incident to such arbitrations, are conducted in 2020.