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Enforcement of Arbitration Subpoenas in Federal Court in the United States

Thomas F. Bush[1]

In this article, the author discusses Section 7 of the Federal Arbitration Act, which authorizes a federal court to enforce an arbitration subpoena and for which no Supreme Court decision addresses when a federal court can act.

Several sections of the Federal Arbitration Act (FAA) authorize a "United States district court" or a "United States court" to grant relief to a party in arbitration:

- Section 4 (compelling arbitration),
- Section 7 (enforcing arbitral subpoenas),
- Section 9 (confirming a final award),
- Section 10 (vacating a final award), and
- Section 11 (correcting a final award).[2]

Notwithstanding this language, the U.S. Supreme Court has held that the FAA does not itself establish federal court jurisdiction.[3] For some of these sections, the Supreme Court has defined the requirements for federal jurisdiction. This article discusses FAA § 7, which authorizes a federal court to enforce an arbitration

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[2] 9 U.S.C. §§ 4, 7. 9, 10, and 11. In addition, Section 5 authorizes "the court" to appoint an arbitrator or umpire in certain circumstances but does not refer to a "United States court."

[3] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 26 n.32 (1983).

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subpoena and for which no Supreme Court decision addresses when a federal court can act.

Importance of Federal Court Enforcement of Arbitration Subpoenas

Federal court jurisdiction generally is not critical to parties seeking juridical relief relating to arbitration. Every state has enacted an arbitration statute that authorizes the state's courts to compel arbitration, to appoint arbitrators when necessary, and to confirm, vacate, and correct arbitration awards on grounds that largely mirror the grounds for such relief under the FAA.[4] It is unlikely that the substantive benefits offered by these provisions of the FAA would be unavailable to a party required to seek relief in state court.

The same point is not true for the enforcement of arbitral subpoenas. Every state arbitration law authorizes arbitrators to issue subpoenas and bestows jurisdiction on the state's courts to enforce those subpoenas.[5] However, a state court's subpoena is not enforceable outside of the territory of the state.[6] A federal court's subpoena, by contrast, "may be served any place within the United States."[7] Without access to a federal court, evidence required by a party in arbitration may be beyond the reach of a subpoena.

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[4] See Uniform Arbitration Act §§ 2, 3, 11, 12, 13; Revised Uniform Arbitration Act §§ 7, 11, 22, 23, 24. A large majority of states have adopted one of these uniform laws. See also CA Civ. Pro. Code §§ 1281.2, -.6, 1285, 1286, 1286.2, 1286.6, 1287.4; NY CPLR §§ 7503, 7504, 7509, 7510, 7511.

[5] See T. Bush, Subpoenas to Third Parties in Arbitration, Appendix 2 (Mealey's Litigation Reports April 26, 2021).

[6] See Quinn v. Eight Judicial District Court, 410 P.3d 984, 987-88 (Nev. 2018); Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 770 S.E.2d 440, 443-44 (Va. 2015); Colorado Mills, LLC v. Sunopta Grains & Foods, Inc., 269 P.3d 731 (Col. 2012).

[7] Fed. R. Civ. P. 45(c)(1). Prior to the 2013 amendments to the Federal Rules, federal court subpoenas could be enforced only in a limited geographic area, generally a 100-mile radius around the courthouse.

Supreme Court Decisions on Federal Court Jurisdiction Under the FAA

In a 1983 decision, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court wrote: "The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction."[8] This decision raised the question of how to establish federal court jurisdiction for petitions under the FAA.

The Court first addressed that question in 2009 in *Vaden v. Discover Bank*,[9] which involved a petition to compel arbitration under Section 4 of the FAA. Section 4 authorizes petitions to compel arbitration to proceed in "any United States district court which, save for such [arbitration] agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties."[10] The Court interpreted the "save for" language to establish a "look through" analysis, which grants the federal court jurisdiction when the court would have jurisdiction over the underlying controversy in the absence of an agreement to arbitrate.[11]

Following *Vaden*, lower federal courts split on whether the "look through" analysis applies to petitions filed under other provisions of the FAA. In 2022, the Court held that it did not in *Badgerow v. Walters*,[12] which involved petitions to conform and to vacate an arbitration award under Sections 9 and 10.[13] Because those two sections did not contain language similar to

[8] 460 U.S. 1, 26 n. 32 (1983) (cleaned up).

[9] 556 U.S. 49 (2009).

[10] 9 U.S.C. § 4.

[11] 556 U.S. at 53-54.

[12] 596 U.S. 1 (2022).

[13] 9 U.S.C. §§ 9, 10.

the "save for" language in Section 4, "a court may look only to the application actually submitted to it in assessing its jurisdiction."[14]

Section 7 of the FAA is similar to Sections 9 and 10 in that it contains no language similar to the "save for" language of Section 4. *Badgerow* clearly forecloses the application of a "look through" analysis under Section 7. Federal jurisdiction must be established on the basis of the petition to enforce a subpoena, not the underlying dispute. Beyond that one point, federal question jurisdiction for arbitral subpoenas is unclear.

Federal Question Jurisdiction

Federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[15] A "case arises under federal law when federal law creates the cause of action asserted."[16] Petitions to confirm or vacate awards do not qualify for this grant of federal question jurisdiction, according to *Badgerow*, because the parties are contesting not their underlying dispute "but the enforceability of an arbitral award."[17] That award, the Court explained, "is no more than a contractual resolution of the parties' dispute—a way of settling legal claims. And quarrels about legal settlements—even settlements of federal claims—typically involve only state law, like disagreements about other contracts."[18]

This explanation does not apply to petitions to compel arbitral subpoenas. The target of the subpoena usually is a witness who is not a party to the arbitration agreement or to any contract that might obligate them to provide testimony or to produce documents for use in the arbitration. The rights that the petitioner is

[14] 596 U.S. at 5, 9-11.

[15] 28 U.S.C. § 1331.

[16] Gunn v. Minton, 568 U.S. 251, 257 (2013).

[17] 596 U.S. at 9.

[18] Id.

asserting were created entirely by a federal statute. This seems to be a clear case of federal question jurisdiction.[19]

The Supreme Court has never considered whether petitions under FAA § 7 specifically qualify for federal question jurisdiction. However, in ruling on cases involving other provisions of the FAA, the Court has broadly described the Act as "bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis."[20] No lower federal court has found that FAA § 7 confers federal question jurisdiction. Every federal court of appeals to address the issue has relied on the Supreme Court's broad language to hold that it does not.[21] So while a substantial argument can be made for federal question jurisdiction, the existing caselaw makes the success of that argument doubtful.

Diversity Jurisdiction

Parties seeking to enforce arbitral subpoenas are most likely to seek to establish federal jurisdiction on the basis of diversity of citizenship.[22] Several issues arise in these cases.

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[19] This assumes that the arbitration agreement is found in a "maritime transaction" or a "transaction involving commerce," and hence is subject to the FAA. 9 U.S.C. § 1.

[20] Moses H. Cone Memorial Hospital, supra note 3, at 26 n.32; accord Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 581-82 (2008); Vaden, supra note 9, at 59; Badgerow, supra note 12, at 8.

[21] Maine Community Health Options v. Albertsons Cos., 993 F.3d 720, 722 (9th Cir. 2021); Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1156 (11th Cir. 2019); Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 572 (2d Cir. 2005); American Federation of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1007 (6th Cir. 1999); Amgen, Inc. v. Kidney Center of Delaware County, Ltd., 95 F.3d 562, 567 (7th Cir. 1996); see also Neighbors Credit Union v. Lawrence, 2023 WL 3055320 (E.D. Mo. Apr. 24, 2023); Zurich Insurance PLC v. Ethos Energy (USA) LLC, 2016 WL 4363399, at *2 (S.D. Tex. Aug. 16, 2016); Chicago Bridge & Iron Co. v. TRC Acquisition, LLC, 2014 WL 3796395, at *2 (E.D. La. July 29, 2014).

[22] 28 U.S.C. § 1332(a).

Citizens of Different States

Diversity jurisdiction requires complete diversity of citizenship; no party can be a citizen of the same state as any party on the other side of the dispute.[23] *Badgerow* holds that jurisdiction is determined by the petition before the Court.[24] Therefore, the witness targeted by the subpoena may not share citizenship with any party seeking to enforce the subpoena.

Prior to *Badgerow*, some federal courts held that diversity jurisdiction should be based on the citizenship of the parties to the underlying arbitration.[25] Other lower courts held that diversity jurisdiction is not defeated by parties to the arbitration who have not joined the petition to enforce the subpoena.[26] These parties are not seeking relief on the petition. Nor are they parties that must be joined to the petition, because the court can grant complete relief on the petition without them, and their absence will not prejudice them or any existing party to the petition.[27] For these reasons, courts that have considered the issue have held that the citizenship of parties to the arbitration who do not join the petition needs to be considered when determining diversity jurisdiction.

The dissent in *Badgerow* suggested that the citizenship of the arbitrators may be relevant.[28] FAA § 7 requires that a majority of the arbitrators sign and issue subpoenas.[29] The arbitrators have an interest in enforcing their subpoenas, because the subpoenas will provide them with evidence that they have determined to be

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[23] Strawbridge v. Curtiss, 7 U.S. 267 (1806).

[24] 596 U.S. at 9.

[25] See Amgen, supra note 21, at 567; Shirvanian v. Byers, 2016 WL 11754322, at *4 (S.D. Fla. Sept. 22, 2016).

[26] Washington National Insurance Co. v. OBEX Group LLC, 958 F.3d 126, 133-35 (2d Cir. 2020); Generation Mobile Preferred, LLC v. Roye Holdings, LLC, 2021 WL 6882442, at *5 (Oct. 29, 2021), report and rec. adopted, 2022 WL 252176 (E.D. Mich. Jan. 26, 2022); Schottenstein v. Wells Fargo Bank, N.A., 2020 WL 7399003, at *4 (S.D. Fla. Dec. 17, 2020).

[27] Fed. R. Civ. P. 19(a)(1).

[28] 596 U.S. at 23.

[29] 9 U.S.C. § 7.

material to the dispute that they will decide. However, the argument for treating the arbitrators as parties to the enforcement action is not strong, given that they rarely join the petition or participate in the proceedings before the court. So far, no court has found that the citizenship of the arbitrators is relevant to diversity jurisdiction.

Jurisdictional Amount

Diversity jurisdiction also requires that "the matter in controversy exceeds the sum or value of $75,000, exclude of interest and costs."[30] A petition to compel compliance with a subpoena seeks non-monetary relief comparable to an injunction. The Supreme Court has held in "actions seeking declaratory or injunctive relief," that "the amount in controversy is measured by the value of the object of the litigation."[31] Several courts have applied this rule to petitions to enforce arbitral subpoenas, reasoning that they are comparable to injunctions.

From the perspective of the witness opposing enforcement, the value of the object of the petition includes the avoidance of the costs of compliance. Hence, the jurisdictional amount is met if the cost of compliance will exceed $75,000.[32] This may be the case where the subpoena requires production of documents that will be expensive to locate and produce. If the subpoena requires only that the witness appear to testify and bring a small volume of readily accessible documents, the jurisdictional amount might not be satisfied. And a party seeking to enforce a subpoena may be reluctant to assert that compliance will cost the witness more than $75,000, as that assertion could support an objection of undue burden.

From the perspective of the party seeking to enforce the subpoena, the value of the object of the petition is the value of

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[30] 28 U.S.C. § 1332(a).

[31] Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 347 (1977).

[32] See Maine Community Health Options v. CVS Pharmacy, Inc., 2020 WL 1130057, at *2 (D.R.I. Mar. 9, 2020).

the evidence that the subpoena seeks. How to value the evidence is unclear.

In one of the leading cases on this issue, the U.S. Court of Appeals for the Second Circuit noted that diversity jurisdiction required only a good faith allegation that the value exceeds $75,000 and that the allegation will be sufficient "unless it appears to a legal certainty that the claim is really for less."[33] The petition before the court sought to enforce a subpoena in the arbitration of a claim for $134 million. "It does not appear to a legal certainty that the amount is really for less because even if the documents required by the summonses pertain to only a small fraction of the award sought, the amount in controversy requirement would still be satisfied."[34] The U.S. Courts of Appeals for the Sixth and Ninth Circuits have taken a similar approach.[35]

Some district courts have rejected this approach. One reasoned that it "should not have to make a determination as to the relevance of the documents sought in a subpoena—often the ultimate issue in a Section 7 case—before deciding the threshold matter of whether it has subject matter jurisdiction over the case."[36] Other courts have held more simply that reference to the amount of the claim in the underlying arbitration is inappropriate on a petition to enforce a subpoena.[37]

At this point, it is uncertain how courts will resolve the issue of how to determine the amount in controversy for a petition

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[33] Washington National, supra note 26, at 135 (2d Cir. 2020) (cleaned up).

[34] *Id.* (cleaned up).

[35] Symetra Life Insurance Co. v. Administration Systems Research Corp., 2022 WL 16730542, at *4 (6th Cir. Nov. 7, 2022); Maine Community, supra note 21, at 723-24. See also Generation Mobile Preferred, LLC v. Roye Holdings, supra note 26, at *3.

[36] Royal Merchant Holdings, LLC v. Traeger Pellet Grills, LLC, 2019 WL 2502937, at *4 (June 17, 2019), report and rec. adopted, 2019 WL 2774280 (D. Utah July 2, 2019).

[37] Next Level Planning & Wealth Management, LLC v. Prudential Insurance Co. of America, 2019 WL 585672, at *2 (Feb. 13, 2019), report and rec. adopted, 2019 WL 1466049 (E.D. Wis. Apr. 3, 2019); Wallace v. Allianz Life Insurance Co., 2017 WL 11725970, at *1 (S.D. Fla. Aug. 23, 2017); Zurich Insurance PLC v. Ethos Energy (USA) LLC, supra note 21, at *3.

under FAA § 7. One clear point is that there will be cases where the jurisdictional amount cannot be established.

New York Convention

An international treaty known as the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," also known as the "New York Convention," applies to arbitration agreements with an international dimension. A federal statute implementing the Convention provides that an "action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States" and that U.S. district courts "shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."[38] The Ninth Circuit has held that when an arbitration agreement "falls under the Convention," federal courts have jurisdiction to enforce arbitral subpoenas.[39] An arbitration agreement "falls under the Convention," when it arises from a commercial relationship and has some relationship with a foreign state, such as the involvement of a foreign party, performance abroad or property abroad.[40]

Ancillary Jurisdiction

The doctrine of ancillary jurisdiction "recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them."[41] Some courts have applied this doctrine to cases where a federal court compels arbitration under FAA § 4,[42] holding

[38] 9 U.S.C. § 203.

[39] Jones Day v. Orrick, Herrington & Sutcliffe, LLP, 42 F.4th 1131, 1135-39 (9th Cir. 2022).

[40] 9 U.S.C. § 202.

[41] Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375, 378 (1994).

[42] As noted, a federal court has jurisdiction under FAA § 4 whenever it would have jurisdiction over the underlying dispute in the absence of an agreement to arbitrate. Vaden, supra note 9.

that the court retains jurisdiction to hear petitions in the same arbitration including petitions to enforce arbitral subpoenas.[43]

Work-Arounds

In the event that arbitrators subpoena a witness or documents located outside of the state where the arbitration is being heard and federal jurisdiction cannot be established, processes under state arbitration laws may provide a means of enforcing the subpoena.

The Revised Uniform Arbitration Act (RUAA), which has been adopted in 23 states, provides that a court of the state "may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State."[44] When the witness is located in an RUAA state, the arbitrators can issue a subpoena for a witness to testify at a deposition in the state, and potentially to produce documents, and the parties can seek enforcement in the state's courts.

If the witness or documents are not located in an RUAA state, a process might still be available to enforce the subpoena. The process involves calling a special hearing in the witness's state for the limited purpose of the arbitrators receiving the witness' testimony and documents. This special hearing is used in federal courts to address a limitation that most courts have found in the FAA, which is that arbitrators have no authority to issue subpoenas for prehearing discovery; they can only compel a witness to attend a hearing.[45] By holding a special hearing in the witness's state, the party seeking to enforce the subpoena can ask a court of that state to issue an in-state subpoena.

This process increases the cost of arbitration, by requiring a separate hearing in a location that is not necessarily convenient to

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[43] Stolt-Nielsen SA v. Celanese AG, supra note 21, at 573; Amgen, supra note 21, at 566.

[44] RUAA § 17(g).

[45] See Stolt-Nielsen SA v. Celanese AG, supra note 21, at 577-80.

the parties or the arbitrators. The process might not be available if the arbitration clause calls for the hearing to be conducted in a specific location outside of the witness's state and the parties do not agree to the separate hearing within the state.[46] And it is not established that such a limited hearing within the state is sufficient to invoke the court's authority to enforce a subpoena under the state's arbitration laws. No state court has considered the issue. However, no state's arbitration law contains language that would preclude the process.

For arbitrations pending in California, the state's Arbitration Act provides that if the arbitrator "orders the taking of the deposition of a witness who resides outside the state, the party who applied for the taking of the deposition shall obtain a commission, letters rogatory, or a letter of request therefor from the superior court."[47] The party can then use the commission to obtain a subpoena from the court in another state under the statute authorizing the court to enforce subpoenas issued by other states' courts.[48]

Ten states have adopted the UNCITRAL Model Law on International Commercial Arbitration, which applies to international arbitrations. Like the California Arbitration Act, the UNCITRAL Model Law authorizes a party to "request from a competent court of this State assistance in taking evidence."[49] This statute

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[46] Some state arbitration laws set a place for the hearing, see, e.g., NE Code 25-2606(c), but the parties can still agree to a hearing in a different place. See Damrow v. Murdoch, 739 N.W.2d 229, 239-40 (Neb. App. 2007).

[47] CA Civ. Pro Code § 1283. The statute applies to a deposition "to be taken for use as evidence and not for discovery," id.

[48] See, e.g., Uniform Interstate Deposition and Discovery Act §§ 2(2), 3(b) (authorizing the enforcement of a "foreign subpoena," which is defined as "a subpoena issued under authority of a court of record of a foreign jurisdiction"); see also Matter of Roche Molecular Systems, Inc., 76 N.Y.S.3d 752, 756 (N.Y. Sup. Ct. 2018) (the petitioner "does not rely on an arbitral subpoena, but rather on a commission obtained from a court of record based on the arbitrator's authorization to seek such a commission").

[49] Article 27. The Model Law has been adopted in California, Connecticut, Florida, Illinois, Louisiana, North Carolina, Ohio, Oregon, Texas, and Washington.

authorizes a court to issue a commission for an out-of-state deposition, which can be enforced in the courts of another state.[50]

Finally, if a party is able to serve a subpoena on an out-of-state witness while that witness is found in a state where the subpoena can be enforced, a court of that state would have "tag jurisdiction" to enforce the subpoena.[51]

These work-arounds are extensive, but they do not necessarily reach all potential witnesses. There will be cases where witnesses are simply beyond the reach of an arbitral subpoena.

[50] See Roche Molecular, supra note 48, at 755-57.

[51] See In re Edelman, 295 F.3d 171, 179 (2d Cir. 2002).