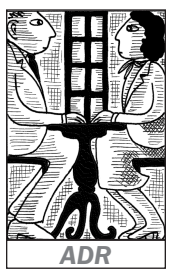
Arbitrators Now Face Geographic Gaps in Subpoena Powers

By Shawn Hanson and Halia Barnes



Recently, the 2nd U.S. Circuit Court of Appeals held in *Dynegy Midstream Services LP v. Trammochem*, 451 F.3d 89 (2d Cir. 2006), that the Federal Arbitration Act does not authorize nationwide service of process. The court held that if a district court lacks personal jurisdiction, it does not have the authority to enforce a subpoena if it is served beyond the 100-mile radius established by Rule 45 of the Federal Rules of Civil Procedure. The 2nd Circuit acknowledged that this creates a "gap that may reflect an intentional choice on the part of Congress."

Dynegy contradicts other decisions enforcing arbitration subpoena outside the 100-mile boundary, leaving this critical area of arbitration procedure unresolved on a national basis.

In *Dynegy*, a New York arbitration panel issued a subpoena duces tecum for documents to a non-party (Dynegy) located in Houston. Dynegy refused to comply in opposition to a motion to compel before the U.S. District Court for the Southern District of New York. Dynegy argued that the district court lacked jurisdiction to enforce the arbitration subpoena because Section 7 of the Federal Arbitration Act states that an arbitrator's summons "shall be served in the same manner as subpoenas" and that Rule 45 dictates that a court-issued subpoena may be served only within 100 miles of the place of the proceeding. The moving party argued that Section 7 grants unrestricted service of subpoenas issued by arbitrators because Section 7 provides that 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 … evidence."

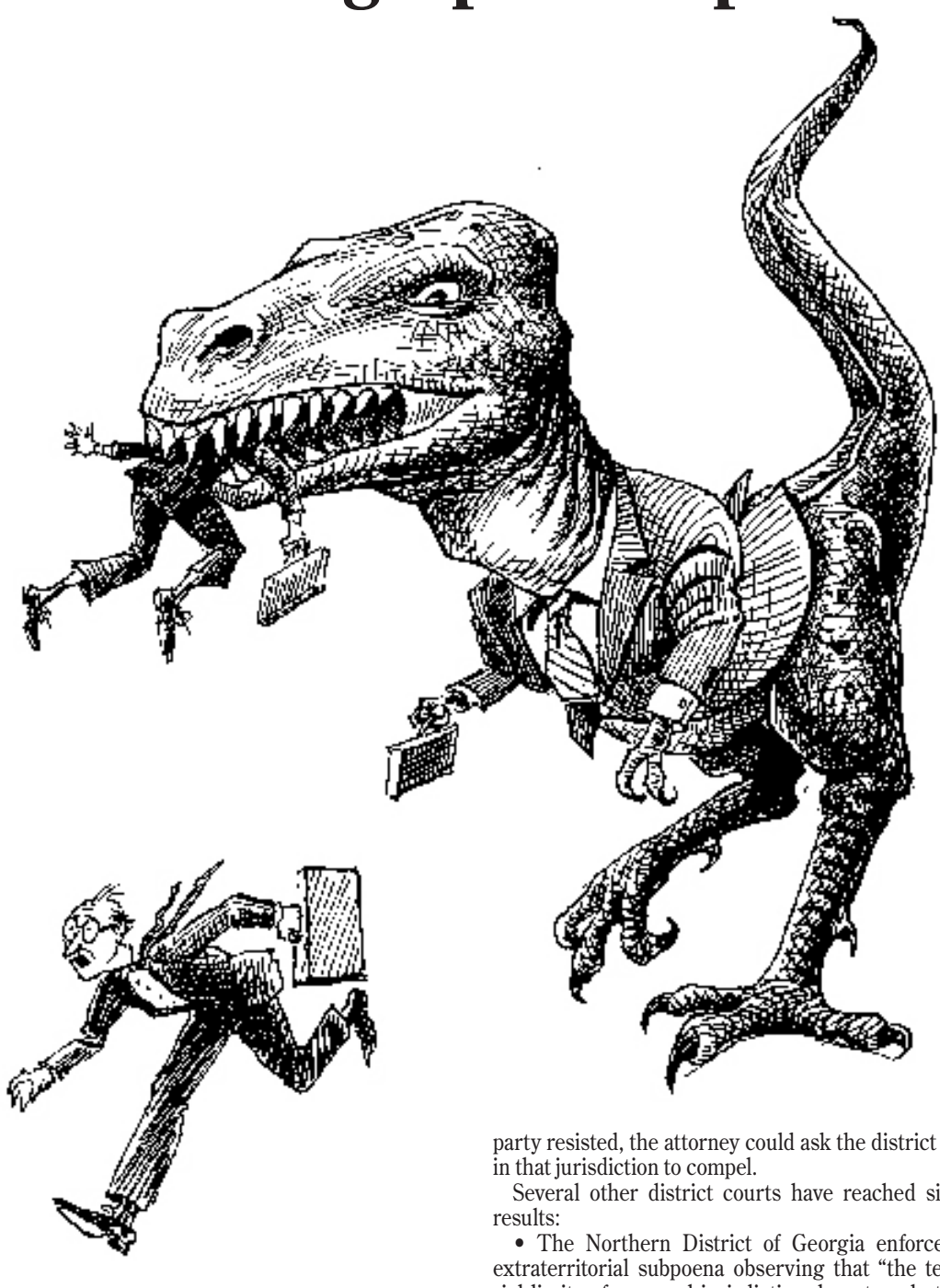
The district court denied Dynegy's motion, reasoning that a court-issued subpoena "would unquestionably be beyond the geographical limitations specified in Rule 45 … [yet,] the Arbitration Panel issued the subpoena and the Arbitration Panel now seeks this Court's 'assistance' in compelling compliance with the subpoena. …

"Had Congress intended to restrict arbitrators' authority to issue a 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."

The district court continued: Because Congress explicitly limited the court's jurisdictional authority, but failed to explicitly place such limitations on arbitrators, "Section 7 implicitly grants arbitrators greater authority to issue subpoenas than it does this Court."

In reversing, the 2nd Circuit focused on the language in Federal Arbitration Act Section 7 that provides a subpoena "shall be served in the same manner as subpoenas to appear and testify before the court" and that the district court can compel attendance "in the same manner provided by law for securing the attendance of witnesses … in the courts of the United States." This language "suggests that the ordinary rules applicable to the district courts apply," and "federal district courts do not generally have nationwide jurisdiction unless authorized by a federal statute."

Because Section 7 does not authorize nationwide service of process, the 2nd Circuit found that the district court erred. The appellate court acknowledged that its holding suggests that Section 7 authorizes the issuance of a group of subpoenas that cannot be enforced, but the court found "no reason to come up with an alternate method" to close the gap.



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The Trend in Subpoena Enforcement

Dynegy is inconsistent with the national trend. The 8th Circuit enforced an arbitral subpoena for pre-hearing document production against an extraterritorial non-party. The court took a policy-based stance: "We do not believe an order for the production of documents requires compliance with Rule 45(b)(2)'s territorial limit" because "the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel." *Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000). Further, "although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."

In *Amgen Inc. v. Kidney Center of Delaware County*, 879 F.Supp. 878 (N.D. Ill. 1995), the district court devised a mechanism to enforce an arbitral subpoena for document production and deposition testimony against an extraterritorial non-party. The court instructed one party's attorney in the arbitration to issue a subpoena in the district where the non-party resided. If the non-party resisted, the attorney could ask the district court in that jurisdiction to compel.

Several other district courts have reached similar results:

- The Northern District of Georgia enforced an extraterritorial subpoena observing that "the territorial limits of personal jurisdiction do not apply to the enforcement of a subpoena for documents under the FAA." *Festus & Helen Stacy Found. v. Merrill Lynch, Pierce Fenner, & Smith*, No. 06-CV-0865G, 2006 WL 1490979 (N.D. Ga. May 23, 2006).
- A district court in Minnesota, *SchlumbergerSema Inc. v. XCEL Energy Inc.*, held that Section 7 "allows this Court to enforce the panel's subpoena as to documents, but not as to deposition testimony" for extraterritorial non-parties. The court reasoned that "[t]o facilitate the purposes of the FAA … it has the power to compel compliance with the arbitration panel's document subpoena" since the "production of documents is less onerous and imposes a lesser burden than does a witness deposition."
- The Southern District of Florida held that "arbitrators did not exceed their powers by considering and deciding to direct Plaintiff to subpoena" a Pennsylvania resident to appear at a hearing in Florida. *Liberty Sec. Corp. v. Fetcho*, 114 F. Supp. 2d 1319 (S.D. Fla. 2000).

Open Question for the 9th Circuit

The 9th Circuit has not weighed in on this issue. When it does, there are good reasons not to follow *Dynegy*. The ruling defies logic. It means a group of subpoenas may be issued, but only a subgroup of those can be enforced. While the 2nd Circuit finds "no reason to come up with an alternate method" to close the gap, there are good reasons to do so.

The court reasoned that the gap "protect[s] non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law." This fails to acknowledge that under the liberal federal discovery rules, either party could depose or seek documents from a non-party anywhere in the country if the case had been filed in court. The 2nd Circuit stated that "parties should not be permitted to stretch the law beyond the text of Section 7 and Rule 45 to inconvenience witnesses." However, at the time parties enter into an arbitration agreement, they probably do not contemplate the location of future material witnesses.

Under *Dynegy*, the venue of an arbitration could arbitrarily decide its outcome if, for example, the arbitration panel can subpoena one non-party witness, but cannot subpoena the opposing side's extraterritorial non-party witness.

Further, at least one textual interpretation of Section 7 suggests that the congressional grant of jurisdictional authority was unequivocal. Section 7 provides that arbitrators "may summon … any person" and the more restricting language seems to relate only to the manner" of service and enforcement. The "manner" language does not necessarily implicate all of Rule 45. Rather, "same manner" could be a direction on how to serve, and not a jurisdictional limit.

Perhaps the most favorable position for litigators would be if the 9th Circuit adopted the middle ground. It could allow enforcement of extraterritorial arbitral subpoenas when a special need or hardship is proven. This may occur where it will be impossible for a party to prove its claim without such evidence. Congress enacted the Federal Arbitration Act to govern a broad array of disputes, and the act authorizes arbitrators to "summon in writing any person" to testify before them. Given this subject matter and direction it seems plain that disputes governed by the act will involve cases where material witnesses or documents reside in multiple states. The 9th Circuit should allow enforcement of extraterritorial subpoenas at least in situations where a party could not otherwise prove its case.

What Should Litigators Do After 'Dynegy'?

Litigators should determine whether the district court where their panel is located has a basis for personal jurisdiction over all witnesses or entities they wish to subpoena. If an individual has no contacts with the jurisdiction, it may be possible to use principles of agency or estoppel to argue that the individual is bound by the arbitration agreement. This would be applicable when issuing arbitration subpoenas directed at officers and directors who may be located extraterritorially, but who took part in drafting or negotiating the agreement. The officers or directors could be considered agents of the corporate entity, and thereby bound to the arbitration agreement.

Alternatively, the party may ask the individual or entity to agree to waive Rule 45 service of process prior to the arbitration proceedings. These parties could agree to a different form of service of process such as service via the mail. A third approach involves asking the arbitral panel to move or recess the proceeding to the jurisdiction where the extraterritorial non-party resides. This may be easily accomplished if the arbitral organization the parties use has offices in multiple jurisdictions.

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