MCA Group, Video Conference Hearings, and COVID-19 | Federal Arbitration Act Section 7 Part III | Businessperson?s Federal Arbitration Act FAQ Guide

The **last instalment** of the Businessperson's Federal Arbitration Act FAQ Guide discussed whether under Section 7 of the Federal Arbitration Act arbitrators can issue an enforceable subpoena that purports to allow a witness to appear at a hearing via video conference or teleconference. It explained that the answer, at least according to the U.S. Court of Appeals for the Eleventh Circuit in **Managed Care Advisory Grp. v. CIGNA Healthcare**, 939 F.3d 1145, 1158-61 (11th Cir. 2019) (?MCA Group?), is ?no.?

In light of COVID-19 restrictions, in-person hearings are unlawful in certain jurisdictions, or at least contrary to government-issued medical guidance. As a practical matter that means the rule espoused by MCA Group would render unenforceable under Section 7 any arbitral subpoena seeking documents or testimony from a third party. Parties and non-parties may agree to comply with subpoenas authorizing video conference appearances, but those subpoenas cannot, under the reasoning of MCA Group, be enforced

by courts under Federal Arbitration Act Section 7.

This instalment addresses the question whether other courts are likely to follow MCA Group, particularly in light of the COVID-19 pandemic.

Will Courts follow the 11th Circuit MCA Group Decision in Light of the COVID-19 Crisis?

The answer is nobody really knows yet, but there are reasons to believe courts may not follow MCA Group if compelling in-person attendance would violate government-imposed COVID-19 restrictions or contravene government-issued medical guidance applicable in the jurisdiction where the in-person hearing would take place.

First, on September 18, 2019, at the time MCA Group was decided, nobody knew that the United States would, in a matter of months, be battling the COVID-19 virus and facing pandemic conditions of a type we haven't experienced in over 100 years. So the Court was not addressing the arbitral subpoena enforceability question in the context in which it might now arise.

Second, a court could, consistent with the same kind of textual analysis MCA Group adopted, reach a different outcome by concluding that "applying the statute in accordance with the plain language would lead to an absurd result.? MCA Group, 939 F.3d at 1161 (citing Consol. Bank, N.A. v. U.S. Dep't of Treasury], 118 F.3d 1461, 1463-64 (11th Cir. 1997)).

MCA Group determined that the statute did not lead to an absurd result because requiring witnesses to appear physically before the arbitrators ?force[s] the parties ?to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before the arbitrator is required.'? MCA Group, 939 F.3d at 1161 (quoting Hay Group, Inc. v. E.B.S. Acquisition Corp.], 360 F.3d 404, 409 (3d Cir. 2004) (Alito, J.).

?This[,]? said the MCA Group Court, ?leads to a redistribution of bargaining power where ?the party seeking the documents cannot simply obtain a subpoena requiring the documents to be shipped from one warehouse to another; instead, the party [seeking the documents] will be forced to appear at a proceeding during which the documents are produced.'? MCA Group, 939 F.3d at 1161(quoting Hay Group, 360 F.3d at 411). And ?enforcing the bar on pre-hearing discovery is beneficial because it will impose some inconvenience on the arbitrator that will induce the arbitrator to weigh whether the production of the documents is necessary.? MCA Group, 939 F.3d at 1161 (citing Hay Group, 360 F.3d at 414) (Chertoff, J., concurring).

But none of these considerations would be relevant if COVID-19 considerations make virtual appearance the only viable alternative to a physical, personal appearance and a physical personal appearance would be unlawful, contrary to in-force medical guidance, or both.

For the absurdity would be in the application of the statutory language to extreme conditions that were presumably not contemplated by Congress. The COVID-19 response has not suspended indefinitely all civil litigation or arbitration, even in hard-hit places like New York.

Video conferencing or teleconferencing is being used as a tool to keep litigation and arbitration going, even though video conferencing is not always an ideal substitute for an ordinary, in-person deposition, conference, or hearing. Right now it plays an important role in helping us face COVID-19's challenges.

But back in 1925 the idea that one day technology akin to video conferencing might be readily available and used as a substitute for an arbitration hearing in the event of a pandemic would have been novel indeed, and even to the extent the idea might have been entertained by a highly prescient few, it would not be something that one would factor into the drafting of arbitration legislation.

In our current predicament, interpreting Section 7 to permit in-person hearings only is to render Section 7 ineffectual and deny

parties a limited, but valuable, mechanism for obtaining evidence from third parties. That would, in turn, defeat the Section 7's objective, which, as evidenced by its text, is to permit judicial enforcement of certain arbitral subpoenas that request third-parties to present testimony and documents at a hearing.

It seems absurd to interpret Section 7 to have no force and effect in a health crisis that has hindered, but not suspended, arbitration as a way of resolving disputes. That is especially so given that few would question the power of a federal court to summon non-party witnesses to a hearing that it decided it wanted to hold by video conference in light of COVID-19 restrictions on courthouse access and use.

There are no doubt other arguments that can be advanced in favor of permitting enforcement under Section 7 of arbitral subpoenas requiring persons to attend by video conference. And it remains to be seen whether Courts will follow MCA Group in circumstances where COVID-19-related restrictions would render an in-person appearance unlawful, contrary to government-issued medical guidance, or both.

Permitting enforcement of subpoenas authorizing appearance by video conference under Section 7 does not mean enforcing arbitral subpoenas that would, if they required in-person attendance, be unenforceable because they required attendance at a hearing held outside Fed. R. Civ. P. 45(c)'s territorial boundaries. (See our prior post, here].) The issue is, and should remain, whether courts can enforce under Section 7 an arbitral subpoena requiring or authorizing attendance by video conference at a hearing held, or deemed to be held, in the district where the arbitrators are sitting or are deemed to be sitting by agreement of the parties.

Please note. . .]

This guide, including the instalments that will follow in later posts, and prior instalments, does not purport to be a comprehensive recitation of the rules and principles of arbitration law pertinent or potentially pertinent to the issues discussed. It is designed simply to give clients, prospective clients, and other readers general information that will help educate them about the legal challenges they may face in arbitration-related litigation and how engaging a skilled, trustworthy, and experienced arbitration attorney can help them confront those challenges more effectively.

This guide is not intended to be legal advice and it should not be relied upon as such. Nor is it a ?do-it-yourself? guide for persons who represent themselves pro se, whether they are forced to do so by financial circumstances or whether they elect voluntarily to do so.

If you want or require arbitration-related legal advice, or representation by an attorney in an arbitration or in litigation about arbitration, then you should request legal advice from an experienced and skilled attorney or law firm with a solid background in arbitration law.

Contacting the Author

If you have any questions about arbitration, arbitration-law, arbitration-related litigation, this article, or any other legal-related matter, please contact the author, Phil Loree Jr., at (516) 941-6094 or at **PJL1@LoreeLawFirm.com**.

Philip J. Loree Jr. is a partner and founding member of Loree & Loree. He has 30 years of experience handling matters arising under the Federal Arbitration Act and in representing a wide variety of clients in arbitration, litigation, and arbitration-related litigation.

Loree & Loree represents private and government-owned-or-controlled business organizations, and persons acting in their individual or representative capacities, and often serves as co-counsel, local counsel or legal adviser to other domestic, and international, law firms requiring assistance or support.

Loree & Loree was recently selected by **Expertise.com** out of a group of 1,763 persons or firms reviewed as one of Expertise.com's top 18 ?Arbitrators & Mediators? in New York City for 2019, and now for 2020. (See **here** and **here**.)

ATTORNEY ADVERTISING NOTICE: Prior results do not guarantee a similar outcome.

Photo Acknowledgment]

The photo featured in this post was licensed from **Yay Images** and is subject to copyright protection under applicable law.