Venue and Hearing Procedure | Application to Compel Arbitration | Businessperson?s Federal Arbitration Act FAQ Guide | Nuts and Bolts of Pre-Award Federal Arbitration Act Practice under Sections 2, 3, and 4 (Part IV)

This segment of the Businessperson's Federal Arbitration ACT FAQ Guide focuses on the venue and hearing procedure aspects of compelling arbitration under Section 4 of the Federal Arbitration Act.

The **last instalment** discussed the following FAQ related to Section 4 applications to compel arbitration: ?What Papers Comprise an Application to Compel Arbitration and how are they Served??

This segment addresses two FAQs:

- How does a Federal Court ?Hear? an Application to Compel Arbitration?
- In what Federal Court may an Application to Compel Arbitration be Filed?

Introduction: Section 4 and its Component Parts

As explained in our prior posts, Section 4 consists of 386 words jammed into a single paragraph, but it is easier to digest and follow if we divide it into subparagraphs or subsections, which we do below, using bold and bracketed text:

[(a) Who may Petition what Court When and for What. A party aggrieved by the alleged failure, neglect, or refusal of another to

arbitrate under a written agreement for arbitration may petition any United States district court which, save for such 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, for an order directing that such arbitration proceed in the manner provided for in such agreement.
[(b) Notice and Service of Petition. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.
[(c) Hearing Procedure and Venue. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.
[(d) Jury Trial, where Applicable If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.
[(e) Disposition upon Trial. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
9 U.S.C. § 4 (bold and bracketed text added).

How does a Federal Court ?Hear? an Application to Compel Arbitration?

What we refer to as ?Section 4(c)? provides that ?[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.? But, Section 4 continues, "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.? 9 U.S.C. § 4.

This portion of Section 4 explains how a district court should, in the first instance, adjudicate an application or motion to compel arbitration.

To determine whether ?the making of the agreement for arbitration or the failure to comply therewith? is or is not ?in issue,? 9 U.S.C. § 4, ?the court applies a standard similar to that applicable for a motion for summary judgment.? **Bensadoun v. Jobe-Riat**, 316 F.3d 171, 175 (2d Cir. 2003) (citations omitted). The Court ascertains whether ?there is an issue of fact as to the making of the agreement [or compliance with it]. . . .? 316 F.3d at 175. ?If,? the Second Circuit has said, ?there is a genuinely disputed factual issue whose resolution is essential to the determination of the applicability of an arbitration provision a trial as to that issue will be necessary; but where the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other

as a matter of law, we may rule on the basis of that legal issue and avoid the need for further court proceedings.? **Wachovia Bank, National Ass'n v. VCG Special Opportunities Master Fund, Ltd.**, 661 F.3d 164, 172 (2d Cir. 2011) (quotations and citations omitted).

That ?[t]he court shall hear the parties? does not necessarily mean that the court must hold an in-person evidentiary hearing or oral argument on the motion or application. Fed. R. Civ. P. 43(c), entitled ?[e]vidence on a [m]otion[,]? provides that ?[w]hen a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.? Fed. R. Civ. P. 43(c).

In what Federal Court may an Application to Compel Arbitration be Filed?

What we refer to as ?Section 4(c)? answers the question of which federal court is the proper court for filing an application to compel, that is, the proper venue for the application.

As we've seen, if the court determines that there is no genuine issue of fact concerning the making of the agreement or the opposing party's failure to comply with it, Section 4 instructs ?the court. . . [to] make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.? 9 U.S.C. § 4 (emphasis added). The next sentence of Section 4 provides that ?[t]he hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.?

If the parties specify in their arbitration agreement a single place where the arbitration is to held, that is, the ?situs? of the arbitration, then compelling arbitration ?in accordance with the terms of the agreement,? and ?within the district in which the? application to compel is filed, is possible only if the application is filed in the district within which the parties agreed to arbitrate.

Arbitration agreements specifying the arbitration situs are fairly common, and so situations have arisen where petitions to compel arbitration were made in districts other than the arbitration situs district. Federal Circuit Courts of Appeals that have addressed this venue problem have reached three different conclusions.

One group of courts, including the Tenth, Seventh, and Sixth Circuits, representing the majority view, have determined that, in cases where parties agree to arbitrate in one particular district, then only a court sitting in that district has the power to compel arbitration. See, e.g., Ansari v. Qwest Communications Corp.], 414 F.3d 1214 (10th Cir. 2005) (citing cases). Under this line of cases, courts cannot compel arbitration outside the district in which the application is filed and cannot compel arbitration within that district if parties agreed arbitration would proceed outside the district only. While the Second Circuit has not definitively resolved the issue, a district court in the Southern District of New York would most likely follow this majority rule. See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. Seneca Family Agencies], 255 F. Supp. 3d 480, 486 (S.D.N.Y. 2017); Petition of Home Ins. Co.], 908 F. Supp. 180 (S.D.N.Y. 1995) (citing cases); Couleur Intern. Ltd. v. Saint-Tropez West, Etc.], 547 F. Supp. 176, 177-78 (S.D.N.Y. 1982) (citing

cases); Lawn v. Franklin], 328 F. Supp. 791, 794-94 (S.D.N.Y. 1971).

This majority-rule approach best harmonizes Section 4's text pertinent to venue, except arguably in one respect. Section 4 states that an ?aggrieved? party ?may petition any United States district court which, save for such [written arbitration] agreement, would have [subject matter] jurisdiction. . . .? 9 U.S.C. § 4. That language, while prefaced by the permissive term ?may,? suggests that venue for a Section 4 petition should be present whenever the general venue statute would authorize it. See 28 U.S.C. § 1391 (general venue statute). But under the majority rule that is not always so when parties specify the arbitration situs in their agreement.

There are two minority views, one held by the Fifth Circuit, one by the Ninth. The Fifth Circuit has held that, notwithstanding Section 4's requirement that a compelled arbitration be held in the district, a court can compel arbitration outside the district if the parties have stipulated to an outside-the-district situs. Dupuy-Busching Gen. Agcy. v. Ambassador Ins. Co.], 524 F.2d 1275, 1278 (5th Cir. 1975). The problem with that approach is that in cases where parties have specified a situs, it does not give effect to Section 4's directive that arbitration be held in the district where the petition is filed.

While the Fifth Circuit's approach allows the parties choice of venue to supersede Section 4's compel-arbitration-within-the-district-only directive, the Ninth Circuit approach allows that same directive to supersede (a) the terms of the parties arbitration agreement, and (b) Section 4's directive that arbitration be compelled ?to proceed in accordance with? the parties' ?agreement.? 9 U.S.C. § 4. The Ninth Circuit holds that a court can compel arbitration in its own district, even if the agreement requires arbitration to be held outside the district. See Textile Unlimited, Inc. v. A..BMH & Co.], 240 F.3d 781, 784-86 (9th Cir. 2001).

Where an arbitration agreement does not specify an arbitration situs, or when the arbitration agreement authorizes arbitration to be held either within or without the district, then venue is determined by the general venue statute, 28 U.S.C. § 1391. Doctor's Associates, Inc. v. Stuart], 85 F.3d 975, 983 (2d Cir. 1996). In addition, where parties agree to arbitrate in a particular location they are deemed to consent to personal jurisdiction and venue in that district. Id.

In cases where a person files a lawsuit on a claim another claims to be arbitrable, and the parties have agreed to arbitrate that claim in another district, that court may not be able to compel arbitration, but can stay the arbitration under Section 3 of the Federal Arbitration Act. 9 U.S.C. § 3.

If, upon the granting of the stay, the parties can agree to arbitrate the claim in the district where the suit is brought, then the court could enter an order compelling arbitration. Alternatively, the party seeking to compel arbitration will have to file suit in the other district (unless the court transfers the action under 28 U.S.C. § 1404, an issue that is beyond the scope of this post).

FAQs concerning the other two parts of Section 4 will follow in one or more future segments of this post.

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 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 voluntarily elect 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.

About the Author

Philip J. Loree Jr. is a partner and founding member of Loree & Loree. He has nearly 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. He is a former partner of the litigation departments of the New York City firms of Cadwalader, Wickersham & Taft LLP and Rosenman & Colin LLP (now known as Katten Munchin Rosenman LLP).

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**.)

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

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