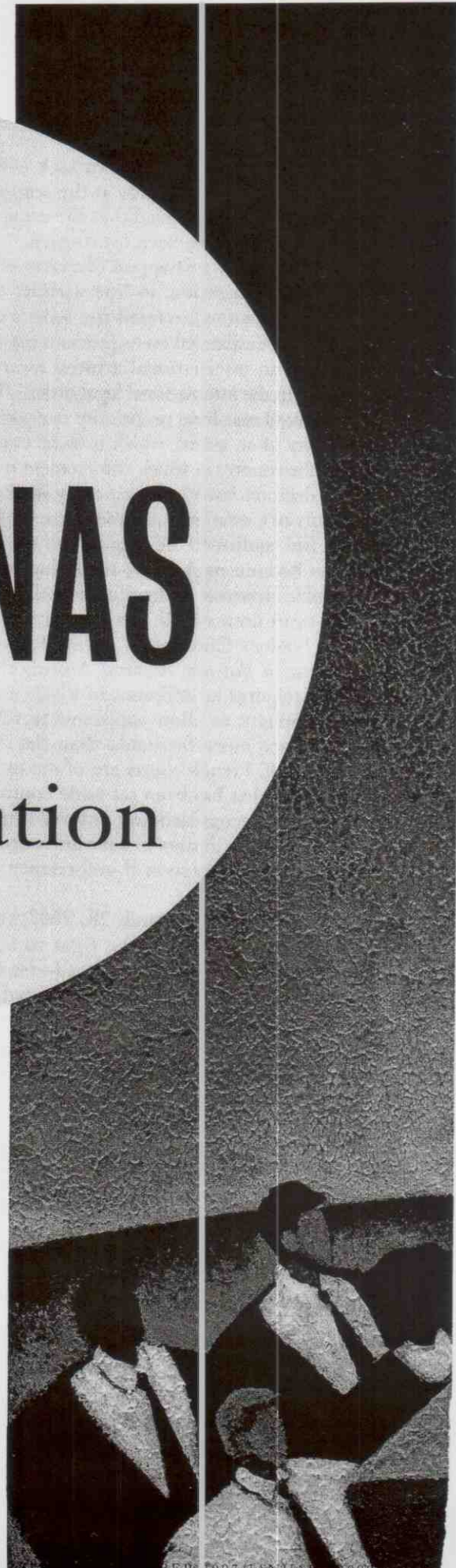
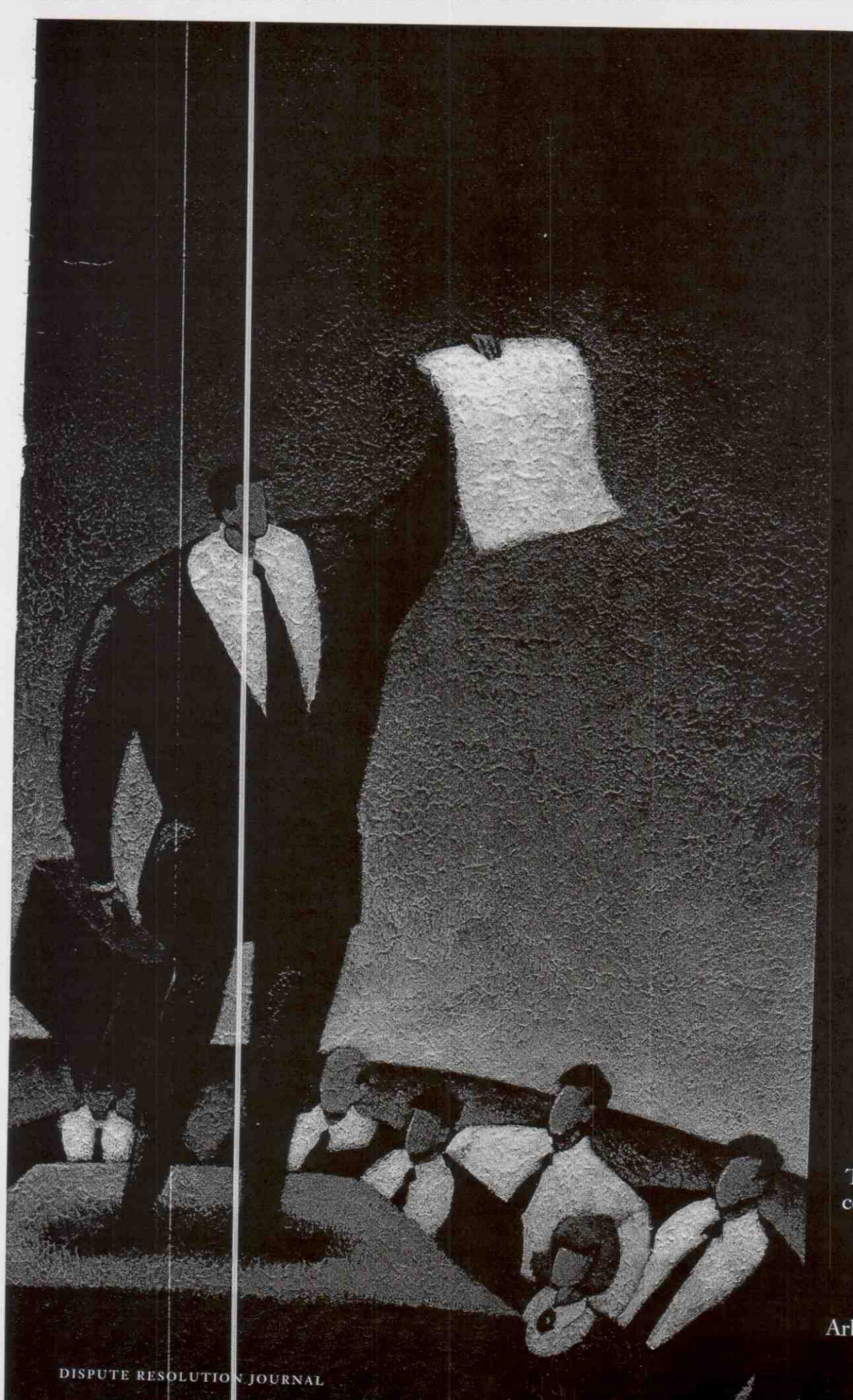


The **Use** *of*
SUBPOENAS
in
Arbitration

Documents in the possession or under the control of non-parties are sometimes vital to an arbitration. For this reason the ability to subpoena those documents is crucial. While subpoenas used in litigation are enforceable nationwide, that is not the case for arbitral subpoenas issued in arbitration proceedings in the United States.¹





A look at
enforceability
issues involving
subpoenas for
documents in
the hand of
non-parties
who reside
outside the
state where
the arbitration
is being held.

**BY
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Because of limitations in the Federal Arbitration Act (FAA), parties may find it difficult to enforce arbitral subpoenas against non-parties who reside outside the state where the arbitration is being held. This article discusses these subpoena issues and how courts have dealt with them. Finally, it suggests that the problem of enforcing document subpoenas on non-parties who reside out of state could be overcome by having the arbitrators move the hearing location (for document production purposes only) to the state where the non-party resides. It also suggests that the American Arbitration Association (AAA) consider amending its arbitration rules to make clear that arbitrators are authorized to do this.

FAA § 7 and Cases Thereunder

The use of subpoenas in arbitration is governed by § 7 of the FAA, which makes § 45 of the Federal Rules of Civil Procedure (Federal Rules or FRCP) applicable as well. The FAA, together with the Federal Rules, puts several restrictions on the enforceability of arbitral subpoenas. First, the federal or state court asked to enforce the subpoena must be sitting in the state where the arbitration is being held. Second, if enforcement is sought in federal court, the court has jurisdiction to enforce the subpoena only if: (1) the person or entity served resides within the state in which that court sits or within 100 miles of that court and (2) the court has independent subject matter jurisdiction, such as diversity of citizenship. The FAA requires subpoenas to be signed by a majority of the arbitrators and made returnable at a hearing held before one or more of them.

Cases Interpreting § 7

While some earlier cases held that there was nationwide service of process under § 7 of the FAA, and that documents could be subpoenaed to a site without a hearing, there is little statutory support for that interpretation. The more recent cases have held that documents can only be subpoenaed to a hearing at which one or more of the arbitrators are present, even though this hearing does not need to be on the merits but only on the

admissibility of the documents.

Thus, in *Security Life Insurance Co. of America v. Duncanson & Holt*² the 3rd Circuit held that arbitrators have implicit power to issue subpoenas for documents to allow a party's advance review of them without holding a hearing. It also held that there is nationwide jurisdiction to enforce this type of subpoena. The court found this power is implied from the arbitrator's authority to issue hearing subpoenas, stating, "[W]e do not believe an order for the production of documents requires compliance with Rule 45(b)(2)'s territorial limit."

The 4th Circuit has held that there is nationwide process in extraordinary circumstances—meaning that the party seeking the subpoena has shown special need or hardship.³

But in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,⁴ the 3rd Circuit, in a majority opinion written by then Circuit Court Judge Samuel Alito, held that the FAA does not authorize arbitrators to issue pre-hearing document subpoenas. The court expressly disagreed with *Security Life's* ruling that the power to issue pre-hearing document subpoenas could be implied from the language of § 7. However, it held that the arbitrators could subpoena non-parties to appear before them for a pre-merit hearing and bring the documents with them to this hearing. Judge

The Federal Arbitration Act and Subpoenas

With regard to subpoenas, § 7 of the FAA provides in relevant part:

The arbitrators ... or a majority of them, 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 be served in the same manner as subpoenas to appear and testify before the court....

Chertoff clarified this, in a concurring opinion, when he said:

Under Section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third party in advance, notwithstanding the limitations of Section 7 of the FAA.⁵

Judge Chertoff's concurrence is also useful for its statement that if there is a three-arbitrator panel, only a single arbitrator must attend the document production hearing.

The *Hay Group* case also discussed the territorial limitations of a court's subpoena power. It

held that a document subpoena could be enforced only so long as the person being subpoenaed was subject to the district court's jurisdiction. The fact, however, that the documents might reside outside of that jurisdiction was not relevant because the person subpoenaed, who had control over those documents, was subject to the jurisdiction of the district court.

The 2nd Circuit held in *Stolt-Nielsen SA v. Celanese AG*,⁶ following *Hay Group*, that arbitral subpoenas do not have to be made returnable at a hearing on the merits. The court held that a subpoena issued under § 7 could be made returnable before the arbitrators at a hearing for document production and authentication purposes only. In other words, the hearing did not have to be the hearing on the merits. *Stolt-Nielsen* upheld a procedure whereby the arbitrators required a non-party to produce over 300 boxes of documents at a hearing that did not concern the merits of the case. When the documents were produced at the hearing, testimony was taken with respect to authenticity of the records and then the hearing was continued to give counsel the opportunity to review the documents contained in the boxes.

The teachings of the *Hay Group* case were recently followed by a district court in the 2nd Circuit. *Guyder v. Aetna*⁷ held that only one of the three arbitrators was required to be present for the document production hearing.

The *Hay Group*'s holding was also followed by the 2nd Circuit with respect to the territorial limits of a court in enforcing a subpoena. In *Dynegy Midstream Services L.P. v. Trammochem*,⁸ the 2nd Circuit held that subpoenaed persons must be subject to the enforcing district court's jurisdiction. There the arbitration proceeding was located in New York City, but the person subpoenaed resided in Texas. The court held that the district court in New York did not have jurisdiction to enforce a subpoena. The court explained that under FRCP 45, enforcement of a subpoena under § 7 had to be in the district court covering the State of New York (or 100 miles from that court). However, under § 7 of the FAA, a district court in Texas would not have jurisdic-

tion to enforce the subpoena because the arbitrators were not "sitting" in Texas.

Implications

The better reasoned and more recent cases hold that the FAA does not authorize nationwide service of subpoenas. Thus, if a non-party witness resides in a state other than one in which the arbitration is being held, or more than 100 miles from the district court in which enforcement of the subpoena is sought, the arbitrator would not be able to issue an arbitral subpoena for documents.

To circumvent this issue, we should ask whether the arbitrator could hold a separate document production hearing in the district where the witness resides and have the subpoena made returnable to that hearing. If the witness did not appear, then the party requesting the subpoena could ask the district or state court in that location to enforce the subpoena and for purposes of § 7 of the FAA, the arbitrators would be "sitting" in that district.

The 2nd and 3rd Circuits have recognized that documents may be subpoenaed to a "pre-hearing hearing" (i.e., one that is not on the merits), and that document subpoenas can be enforced by the courts. There would not seem to be any logical reason why arbitrators should not be authorized to hold hearings for the production of documents at a location where the non-party would be subject to service of process.

The AAA Rules

Rule 10 of the AAA Commercial Arbitration Rules provides that the locale of the hearing is either fixed by agreement (including agreement in the initial agreement to arbitrate) or, in the absence of an agreement, the AAA "shall have the power to determine locale...." Rule 22 provides that the "arbitrators shall set the date, time and place for each hearing." There would seem to be little problem for the arbitrators to set a different place for hearings for document production purposes, if the agreement does not specify the location of the arbitration hearing.

In the author's view, in a rare case where the arbitrators find it sufficiently important that documents from a non-party be produced, they should be able to hold a hearing for document production purposes in the state where the non-party resides.

Where the agreement between the parties specifies a hearing location, a more difficult question is raised. In such cases, courts have enforced the hearing location agreed upon.⁹ Since some circuits have upheld arbitral authority to issue document subpoenas for production at a hearing prior to the hearing on the merits, it would be a small step for arbitrators to be allowed to convene such a hearing outside the state where the merit hearing will be held.

I would urge that, in a rare case where the arbitrators find it sufficiently important that documents from a non-party be produced, they should be able to hold a hearing for document production purposes in the state where the non-party resides and therefore would be subject to the jurisdiction of the court. The AAA could facilitate this by making the power to hold document production hearings explicit in its rules. Once parties have agreed to arbitrate under the AAA commercial rules, those rules become part of the parties' agreement.

State Law and Subpoenas

Because federal court requires an independent basis for jurisdiction other than the FAA to enforce a subpoena,¹⁰ such as diversity or federal question jurisdiction, a party may have to enforce its subpoena in a state court. Some state courts have held that if a case involves interstate commerce, even if the parties' agreement contains a choice-of-law clause selecting the law of a particular state to apply to the proceedings, only the FAA governs.¹¹ This would not seem appropriate because the U.S. Supreme Court in *Volt Information Sciences Inc. v. Board of Trustees of Leland Stanford, Jr. University*,¹² held:

There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure enforceability according to terms, a private agreement to

arbitrate. Interpreting a choice of law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the liberal construction set forth in *Moses H. Cohen*, nor does it any other policy embodied in the FAA.

Recent Federal Cases Involving Subpoenas

Over the past seven years, the following decisions addressed the arbitrator's authority to issue subpoenas to third parties:

Security Life Insurance Co. of America v. Duncanson & Holt, a decision in 2000 by the 8th Circuit, allowed arbitrators to issue pre-hearing document subpoenas to third parties.

Hay Group, Inc. v. E.B.S. Acquisition Corp., a decision in 2004 by the 3rd Circuit, is to the contrary, but it allowed arbitrators to issue pre-hearing document subpoenas that are returnable at a hearing for document production purposes.

Stolt-Nielsen SA v. Celanese AG, a 2005 decision by the 2nd Circuit, followed the 3rd Circuit decision in *Hay Group*.

Dynegy Midstream Services L.P. v. Trammochem, a 2006 decision by the 2nd Circuit, held that the Federal Arbitration Act does not authorize nationwide service of process.

Guyden v. Aetna, a 2006 decision by a district court in the 2nd Circuit, held that only one arbitrator need attend a hearing for purposes of reviewing documents produced by a third party pursuant to a document subpoena.

Subpoenas would seem to be one of these procedural matters in which both state and federal law could apply without upsetting the federal arbitration scheme. The Revised Uniform Arbitration Act (RUAA) appears to give the arbitrators somewhat greater subpoena powers than the FAA. RUAA § 7 provides, in relevant part: "(a) The arbitrators may cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence..."¹³

The RUAA does not require documents to be produced at a hearing or that the hearing on the merits be within the state in order for the courts of that state to enforce a subpoena. Thus, courts in states with the RUAA should be open to enforcing a subpoena on a non-party who resides within the state and is directed by the arbitrators to produce records at a location with the state.

However, even though the RUAA does not specify that the documents requested be produced at a hearing, some state court may require that anyway. In New York, which does not have the RUAA, the statute provides that "an arbitrator and any attorney of record in the arbitration proceeding have the power to issue subpoenas."¹⁴ But the commentary to the New York rule states that it "is limited to procuring of evidence for the hearing or trial of the dispute." Given various state law interpretations, arbitrators will be better off limiting subpoenas to production of documents at hearings, as required by the FAA.

Naturally, where a non-party is willing to produce documents without a court order, the hearing requirement could be waived with the consent of the parties. Without such consent, it would be prudent for the arbitrators to hold a hearing for the production and authentication of the documents before the hearing on the merits.

Conclusion

Arbitrators should only sign subpoenas returnable before one or more of the arbitrators at a hearing. Enforcing a document subpoena against a party who resides outside the jurisdiction of a court where the arbitration hearing takes place may prove difficult. It is suggested that the best way to handle this is for the arbitrators to hold a separate hearing in the jurisdiction where the third party is located for the purpose of producing these documents. This procedure should only be exercised in the rare case where the arbitrators believe that the documents involved are very relevant and are likely to be critical to their decision. Because it is not entirely clear that arbitrators have the authority under the AAA rules to conduct a special hearing for document production purposes at a location other than the one originally chosen, the AAA may wish to consider whether it is necessary to make this authority explicit. Such a rule would recognize the nationwide scope of commerce and bring the AAA rules

in line with the changes in the federal rules, which now allow for nationwide service and enforcement of subpoenas in federal court. ■

ENDNOTES

¹ Parties in arbitral proceedings in foreign countries can obtain documents anywhere in the United States through a federal court proceeding under 28 U.S.C. 1782(a). *Intel Corp. v. Advanced Micro Data, Inc.*, 542 U.S. 241 (2004).

² 228 F.3d 865, 872 (8th Cir. 2000).

³ See *Comsat Corp. v. National Sci. Found.*, 190 F.3d 269 (4th Cir. 1999). See also *Festos & Helen Stacey Found. v. Merrill Lynch Pierce Fenner & Smith*, 432 F. Supp. 2d 1375 (N.D. Ga. 2006) (holding that the district court had nationwide jurisdiction to enforce a document subpoena).

⁴ 360 F.3d 404 (3d Cir. 2004).

⁵ *Id.* at 413.

⁶ 430 F.3d 567 (2d Cir. 2005).

⁷ 2006 U.S. Dist. Lexis 73353 (D. Conn. 2006).

⁸ 451 F.3d 89 (2d Cir. 2006).

⁹ See *Bear Stearns & Co. v. Bennett*, 938 F.2d 31, 42 (2d Cir. 1991) ("We reject Bennett's argument that 'situs of suit' should be determined by the arbitrators or the AAA rather than by the district court. Where there was a valid agreement for arbitration, Congress has directed the courts to order that arbitration proceed 'in accordance with the terms of the agreement.'"). See also *Paine Webber, Inc. v. Rutherford*, 903 F.2d 106, 108 (2d Cir. 1990).

¹⁰ See *Stolt-Nielsen*, *supra*, n. 2.

¹¹ *Suratt v. Merrill Lynch Pierce Fenner & Smith*, 2006 U.S. Dist. Lexis 26650 (S.D. Fl. 2003).

¹² 489 U.S. 468, 476 (1989).

¹³ For similar statutes, see: Fla. Stat., § 682.08; Kan. Stat. Ann. § 5-407.

¹⁴ N.Y.C.P.L.R. § 7505.

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