

RECENT CASE ON ARBITRATION

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Arbitration has its uses, but as you may know from reading my prior memos, it also has more than its share of problems. Right before Thanksgiving, the Second Circuit decided a case that points out yet another downside of having disputes resolved in arbitration. In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, ___ F.3d ___ (Nov. 25, 2008), the Second Circuit held that the Federal Arbitration Act ("FAA") does not authorize arbitrators to issue pre-hearing subpoenas to third parties for production of documents. In other words, in arbitration there is no third-party discovery.

According to the Second Circuit, § 7 of the FAA provides only that arbitrators can compel third parties to appear before the arbitration panel at the arbitration hearing and to provide testimony and documents at the hearing. It does not authorize discovery *before* the hearing.

This decision conflicts with decisions of the Eighth and Fourth Circuit and agrees with a decision in the Third Circuit. Because of the circuit split, it is possible that the Supreme Court may take this case or a similar one in the near future, to resolve the split of authority.

It is also possible that there is less at stake here than meets the eye. Arbitrators who deem third party documents to be necessary or desirable could simply schedule a hearing session at which documents would be produced and authenticated, and then adjourn for a later session at which the documents would be used and testimony taken. The Second Circuit had previously held in *Stolt-Nielsen v. Celanese*, 430 F. 3d 567 (2d Cir. 2005), that an arbitrator's subpoena power under § 7 applies not just at the hearing on the merits but also at preliminary hearings. This means that arbitrators and parties can get around the inability under § 7 to compel pre-hearing production of documents by simply labeling the return date of a subpoena as a "hearing date." Nevertheless, this bit of unwieldiness and technicality does point out one of the downsides of arbitration.

If you have any comments or questions about this case, or would like to see a copy of it, please feel free to contact me at sriback@sillerwilk.com or at (212) 981-2326.