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**_Dynegy Midstream Services, LP_ v. _Trammochem_, No. 05-3544-cv (2d Cir. June 13, 2006)**

On June 13, 2006, the United States Court of Appeals for the Second Circuit addressed the issue of the permissibility of nationwide service of process under Section 7 of the Federal Arbitration Act ("FAA") in *Dynegy Midstream Services, LP* v. *Trammochem.*[1] Finding that the FAA does not authorize nationwide service of process, the court reversed the decision of the United States District Court for the Southern District of New York, which had ordered compliance with a subpoena duces tecum issued by an FAA arbitration panel based on its interpretation of FAA Section 7 as authorizing nationwide service of process. Because it found no authority under the FAA for nationwide service, the Court of Appeals did not address the issue of whether the FAA authorizes the service of subpoenas for production of documents only.

## I. THE FACTS

A dispute arose between cargo ship owners, A.P. Moller (Maersk Gas Carriers) and Igloo Shipping, A/S, and the cargo owners, Trammochem, when the cargo that had been transported from Houston, Texas to Antwerp, Belgium arrived contaminated. Pursuant to the arbitration clause, which required all disputes arising from the parties' shipping contract to be arbitrated in New York City, the dispute was referred to an arbitration panel in the Southern District of New York.

Trammochem asserted that its cargo became contaminated while on the vessel in Houston, and a report from the nautical Commission to the Commercial Court at Antwerp determined that the contamination likely occurred on the vessel as a result of deficiencies in the vessel's shore-flare system. Seeking indemnity, the vessel owners sought to vouch in (or implead) Dynegy Midstream Services ("DMS"), the company which had been subcontracted to service and supply the vessel in preparation for the Trammochem shipment.[2]

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1 *Dynegy Midstream Services, LP* v. *Trammochem*, No. 05-3544-cv, 2006 WL 1612722 (2d Cir. June 13, 2006).

2 "The vessel owners hired Inert Gas Systems, Inc. to perform services on the vessel in Houston in preparation for use by Trammochem, and Inert Gas Systems, Inc. engaged appellant-petitioner Dynegy Midstream Services ("DMS") to provide certain facilities and supplies." *Id.*

## II. PROCEDURAL HISTORY

In response to DMS' refusal to intervene in the arbitration, and relying on Section 7 of the FAA,[3] the arbitration panel issued a subpoena duces tecum which required DMS to deliver documents regarding the DMS shore-flare system. The subpoena was served on DMS in Houston and directed that the requested documents be produced in Houston. When DMS failed to comply with the subpoena, Trammochem and the vessel owners filed a motion to compel compliance in the United States District Court for the Southern District of New York. DMS argued that Section 7 of the FAA did not authorize nationwide service of process and thus because DMS had no contacts with New York, the district court lacked personal jurisdiction over DMS. The district court rejected DMS' argument and granted the motion to compel production, holding that there was personal jurisdiction over DMS as Section 7 of the FAA authorized nationwide service of process.

On appeal, the Second Circuit reversed and remanded, holding that "FAA Section 7 does not authorize nationwide service of process, and the district court therefore erred in asserting personal jurisdiction over DMS."[4]

## III. RATIONALE OF THE COURT

The court of appeals declined to accept the district court's interpretation of FAA Section 7, finding that "it was erroneous for the district court to assume that nationwide jurisdiction existed [in FAA Section 7 merely] because Congress had not expressly prohibited it."[5] Although there was no express prohibition or authorization of nationwide service[6], the Court of Appeals found that arbitrators' subpoena power under Section 7 of the FAA includes "clear territorial limitations."[7] The FAA provides that summons issued by arbitrators "shall be served in the same manner as subpoenas to appear and testify before the court" and shall be enforced "upon petition [to] the United States district court for the district in which such arbitrators, or a majority of them, are sitting" whereby the district court "may compel the attendance of" or "punish said person or persons for contempt in the same manner provided by law . . . in the courts of the United States."[8]

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3 FAA Section 7 states 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 or them any book, record, document, or paper which may be deemed material as evidence in the case." 9 U.S.C. § 7.

4 *Dynegy*, 2006 WL 1612722, at 6.

5 *Id*. at 5, n.4.

6 The Court of Appeals found the absence of clear authorization of nationwide service to indicate a prohibition on such service: "Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention." *Omni Capita Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987).

7 *Id.* at 5.

8 9 U.S.C. § 7.

The rules governing service and enforcement of subpoenas in federal courts to which FAA Section 7 refers are Rules 45 and 37 of the Federal Rules of Civil Procedure. As Rules 45 and 37 "do not contemplate nationwide service of process or enforcement,"[9] but rather contain geographical limitations on service of process[10] and enforcement[11] proceedings, their geographical limitations are incorporated by reference into Section 7 of the FAA, which thus cannot be interpreted to provide for nationwide service of process.

Few courts have addressed the issue of whether the FAA permits nationwide service of process. One such case is *Amgen, Inc.* v. *Kidney Center of Delaware County*, 879 F.Supp. 878, 882-83 (N.D. Ill. 1995), in which the district court permitted an attorney of one of the parties to the arbitration to issue a subpoena in a district court which had personal jurisdiction over the non-party. In *Dynegy*, the Court of Appeals declined to adopt the compromise position fashioned in *Amgen*, and refused to craft another method to bridge the enforceability gap created by FAA Section 7's prohibition on nationwide service of process and enforcement. The Court of Appeals' decision hinged on the lack of a textual justification for allowing non-arbitrators to issue subpoenas under Section 7 of the FAA[12] and the possibility that the enforcement gap "may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect 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."[13]

## IV. SIGNIFICANCE OF DECISION

The permissibility of nationwide service of process under Section 7 of the FAA is a subject which few courts have addressed; the dearth of case-law has created uncertainty and speculation for non-parties faced with subpoenas issued by arbitration panels. The decision of the court of appeals in *Dynegy* settles the issue in the Second Circuit by establishing that service and enforcement of subpoenas issued under FAA Section 7 have geographical limitations. This decision provides non-parties with the certainty that they will not be subject to nationwide service

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9 *Dynegy*, 2006 WL 1612722, at 5.

10 Service of process is limited geographically: A subpoena may be "served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena." FED. R. CIV. P. 45(b)(2).

11 Enforcement of the subpoena is limited geographically: Failure to comply with a subpoena for the production of documents "may be deemed a contempt of the court from which the subpoena issued." FED. R. CIV. P. 45(e). Ordinarily, non-compliance with a subpoena for the production or inspection of documents results in contempt of "the court for the district where the production or inspection [of documents] is to be made." FED. R. CIV. P. 45(a)(2). "An application for an order [to compel discovery] to a person who is not a party shall be made to the court in the district where discovery is being, or is to be, taken." FED. R. CIV. P. 37(a)(1).

12 *NBC* v. *Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (holding that Section 7 "explicitly confers authority only upon *arbitrators*; by necessary implication the *parties* to an arbitration may not employ this provision to subpoena documents or witnesses.").

13 *Dynegy*, 2006 WL 1612722, at 6.

of process under the FAA nor enforcement of subpoenas issued pursuant thereto by arbitration panels or courts located in the Second Circuit. The decision is likely to influence the interpretation of courts in other Circuits in the future.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Charles A. Gilman at (212) 701-3403 or cgilman@cahill.com; Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at (212) 701-3323 or jschuster@cahill.com.