May Arbitrators Issue Discovery Subpoenas To Non-Parties? – The Deepening Split Among the Circuits

Tiffany E. Clements and Howard S. Suskin

As arbitration clauses increasingly appear in contracts, more and more disputes are being determined in arbitration forums. This trend raises some practical issues for attorneys, including the question of what types of discovery procedures will be available in arbitration. Recently, several courts have addressed the issue of whether pre-hearing document discovery is available from non-parties in arbitrations, and a split amongst courts of appeals has arisen regarding whether an arbitrator may order the pre-hearing production of documents from non-parties. Some courts interpret the Federal Arbitration Act (FAA), 9 U.S.C. § 7, as authorizing an arbitrator to issue pre-hearing document subpoenas to non-parties; however, other courts have held that a non-party may be required to produce documents only when giving testimony as a witness during the hearing. The implications of this split are significant because non-parties often hold key documents highly relevant to the dispute. In jurisdictions where pre-hearing subpoenas are restricted, attorneys will have to consider alternative procedures to obtain relevant documents from non-parties.

The interpretation of Section 7 of the FAA lies at the heart of the courts’ different views. Section 7 does not expressly grant arbitrators the power to order pre-hearing document production from non-parties, but it does contain the following:

The arbitrators selected either as prescribed in this title or otherwise, 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.

Id. At issue is whether Section 7 can be read to authorize arbitrators to order non-parties to produce documents prior to the hearing. The circuits are split on this issue.

Some Courts Permit Pre-Hearing Discovery From Non-Parties

The Eighth Circuit takes the most permissive view of Section 7 of the FAA. The Eighth Circuit holds that Section 7 grants arbitrators the implicit power to subpoena non-parties to produce relevant documents prior to the arbitration hearing. In re Sec. Life Ins. Co. of Am., 228 F.3d 831 (8th Cir. 2000). Security Life involved an arbitrated dispute relating to a reinsurance contract between the insured and the management company for seven insurers. The arbitration panel issued a discovery subpoena to one of the insurers, a non-party to the arbitration but a signatory of the reinsurance contract, to produce documents prior to the hearing. The insurer refused to comply, and the management company petitioned the district court to compel the insurer to produce the requested documents. The matter was referred to a magistrate judge who authorized the management company’s attorney to subpoena the insurer on behalf of the court. The insurer appealed, but the district court affirmed. The insurer then appealed to the Eighth Circuit, but the Eighth Circuit likewise affirmed the order to compel the production of documents.

The Eighth Circuit based its opinion primarily on considerations of efficiency, reasoning that efficiency is promoted by giving a party time to review documentary evidence before the arbitration hearing. Id. at 870-71. The court interpreted Section 7’s grant of power to arbitrators to subpoena an individual to appear and produce documents at a hearing as an implicit authorization to order the production of documents prior to the hearing. The court held that this implicit power can also be properly exercised over a non-party to the arbitration. The court then noted that the non-party subpoenaed in this case was not a “mere bystander” but was a party to the reinsurance contract that led to the dispute. Id. The fact that the Eighth Circuit specifically described the relationship of the insurer to the contract has left some commentators concluding


The Sixth Circuit, in *dicta*, has indicated that it may follow the Eighth Circuit’s approach. The Sixth Circuit has upheld a labor arbitrator’s decision to issue a subpoena to compel a non-party to produce pre-hearing documents under Section 301 of the Labor Management Relations Act (LMRA) of 1947. *Am. Fed’n of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999). While relying on the LMRA, the court reached its decision by analogy to Section 7 of the FAA, which suggests that the Sixth Circuit agrees with the Eighth Circuit’s view that the FAA authorizes pre-hearing discovery subpoenas to non-parties.

*Other Courts Restrict or Prohibit Pre-Hearing Discovery from Non-Parties*

In contrast, the Fourth Circuit has adopted a position on pre-hearing discovery subpoenas that is less expansive in comparison to the Eighth Circuit. *Comsat Corp. v. Nat’l Science Found.*, 190 F.3d 269 (4th Cir. 1999). The Fourth Circuit holds that the FAA does not authorize arbitrators to subpoena non-parties for pre-hearing document production without a showing of special need or hardship. *Id.* at 271. According to the court, “the subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA,” *id.* at 275, and the FAA does not specifically grant arbitrators the authority to issue pre-hearing discovery subpoenas to non-parties. Additionally, the court noted that the enforcement provision of Section 7 does not expand arbitrators’ power to issue subpoenas. In justifying the limit on arbitrators’ subpoena power, the court emphasized that parties to an arbitration contract agree to sacrifice certain procedural rights in exchange for a more efficient, less costly dispute resolution. *Id.* at 276. The court noted that limited discovery is necessary to maintain the efficiency of arbitration, but that there are circumstances where the interests of efficiency favor allowing a party to review evidence prior to the hearing. Accordingly, the court carved out an exception for the “unusual circumstance” where a party can show special need or hardship. To demonstrate a special hardship, the party must show at least that the “information it seeks is otherwise unavailable.” *Id.*

The Third Circuit takes the most restrictive view of pre-hearing discovery, holding that the limit of an arbitration panel’s power over non-parties is to compel witnesses to attend an arbitration hearing and bring documents with them. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004). In *Hay Group*, an arbitration panel had issued subpoenas to two non-parties to produce documents prior to a hearing. The district court enforced the subpoenas, holding that the subpoenas were valid under both the Fourth and Eighth Circuit approaches. *Id.* On appeal, Judge Alito, now Justice Alito, writing for the court, disagreed. Reversing the district court, the Third Circuit found the statutory text of Section 7 to be “unambiguous” in that the only power granted to arbitrators over non-parties is the “power to summon a non-party ‘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.’” *Id.* at 407 (quoting FAA § 7). The Third Circuit concluded that the word “and” in Section 7 establishes that a non-party can be compelled only to “bring” documents “with him” when the non-party is subpoenaed to appear before the arbitrator as a witness. *Id.*

The Third Circuit also was persuaded by the interpretation of similar language in a prior version of Federal Rule of Civil Procedure 45. *Id.* at 407-408. The 1990 version of Rule 45 stated that “[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.” The Third Circuit noted that the accepted interpretation of Rule 45, from 1937 until its amendment in 1991, was that federal courts lacked authority under Rule 45 to issue pre-hearing document production subpoenas on non-parties. *Id.* Instead, under the old version of Rule 45, a federal court was authorized only to subpoena a party to appear in court as a witness and could additionally require the subpoenaed party to bring documents with him. *Id.*
The Third Circuit acknowledged that some district courts and the Eighth Circuit have held that Section 7 grants arbitrators the authority to issue pre-hearing document subpoenas, but the Third Circuit disagreed with those courts’ “power-by-implication” analysis of the FAA. According to the Third Circuit, by specifically granting an arbitrator the power to subpoena a non-party to appear as a witness and bring documents at a hearing, the FAA implicitly withholds the broader power to compel pre-hearing production of documents without summoning the non-party to testify. Id. The court concluded that “[i]f the FAA had been meant to confer the latter, broader power, we believe that the drafters would have said so, and they would have then had no need to spell out the more limited power to compel a non-party witness to bring items with him to an arbitration proceeding.” Id. at 409.

After concluding that the text of Section 7 of the FAA is clear, the Third Circuit analyzed whether the result was absurd and found that it was not. Id. First, the fact that Rule 45 was interpreted to preclude the power to compel pre-hearing document production from non-parties suggests that interpreting Section 7 similarly is not absurd. Second, interpreting Section 7 to limit an arbitration panel’s power over non-parties “who did not agree to its jurisdiction” is not absurd. Id. Additionally, the court observed that the literal reading of Section 7 arguably furthers arbitration’s policy goals of timeliness and cost-efficiency. Requiring non-parties to produce documents at a hearing could dissuade parties from issuing broad subpoenas to non-parties. On the other hand, the availability of pre-hearing document production increases a party’s incentive to engage in “fishing expeditions,” which undermines some of the advantages of arbitration. The court concluded that if allowing pre-hearing document production from non-parties is a desirable policy goal, the proper way to confer that power in arbitrators is to amend Section 7 of the FAA, just as Congress did with Rule 45. Id.

In concluding that an arbitrator’s power does not extend to pre-hearing document production from non-parties, the Third Circuit noted that the Fourth Circuit’s interpretation of Section 7 of the FAA in Comsat is “largely consistent with our reading.” Id. at 409-10. The Third Circuit, however, disagreed with “dicta” in Comsat that an arbitration panel may authorize a subpoena for non-party pre-hearing production “upon a showing of special need or hardship.” Id. at 410 (quoting Comsat, 190 F.3d at 276). According to the Third Circuit, there is no textual support for a hardship exception in Section 7 of the FAA. Id.

The Third Circuit also addressed the Eighth Circuit’s policy arguments presented in Security Life. In disagreement with the Eighth Circuit’s reliance on efficiency considerations to disregard the plain meaning of the statutory text, the Third Circuit expressed the view that “efficiency is not the principal goal of the FAA. Rather, the central purpose of the FAA is to give effect to private agreements” based on the Supreme Court’s holding in Dean Witter Reynolds, Inc. v. Byrd, 470 U.S 213, 218-19 (1985). In Byrd, the Supreme Court rejected the view that an expeditious resolution is the principal goal of arbitration and instead concluded that effectuating the parties’ agreement is the preeminent concern of the FAA. Id. at 219.

Most recently, the Second Circuit has adopted the Third Circuit’s restrictive approach and held that Section 7 of the FAA does not authorize an arbitration panel to compel non-parties to produce documents in advance of a hearing. Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210 (2d Cir. 2008). In Life Receivables, the arbitration panel ordered a non-party to produce documents prior to the hearing. In adopting the Third Circuit’s view, the Second Circuit noted that the Third Circuit’s opinion in Hay Group represents the growing consensus among courts as to the limits of arbitrators’ power over non-parties. Id. at 216. The Second Circuit found that the statutory language of Section 7 is unambiguous and also noted that “FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted.” Id. at 216. In a footnote, the Second Circuit observed that there are “valid reasons for limited arbitral subpoena authority, since timeliness and efficiency are among the primary reasons to resolve disputes through arbitration.” Id. at 216 n.9.
The Second Circuit was not persuaded by the defendant’s arguments to justify pre-hearing document production from non-parties. *Id.* The defendant argued: first, that the non-party was “intimately related” to one of the parties and, second, that the non-party to the arbitration was a party to the arbitration agreement. In response to the defendant’s first argument, the Second Circuit explained that “section 7 contains no discovery exception for closely related entities.” *Id.* As to the defendant’s second argument, the Second Circuit found that the fact that the non-party is a party to the arbitration agreement is not determinative. The Second Circuit concluded that the plain language of Section 7 does not grant arbitrators the power to compel pre-hearing discovery from non-parties, even those “that signed the underlying arbitration agreements.” *Id.* at 217.

The Second Circuit also addressed whether the American Arbitration Association (AAA) rules provide authority for an arbitration panel to compel document production from non-parties in advance of a hearing. The court noted that the arbitration agreement at issue incorporated the AAA rules by reference into the agreement and that the language in AAA Commercial Rule 31(d) can be interpreted as authorizing arbitration panels to compel the production of documents from both parties and non-parties. Nonetheless, the court concluded that “when a non-party refuses to comply voluntarily, . . . the party seeking discovery is limited to section 7 as a vehicle to enforce the subpoena” and that Section 7 does not authorize pre-hearing enforcement against non-parties. *Id.* at 218.

Attorneys May Formulate Strategies to Overcome Restrictions on Discovery

Faced with the growing trend among courts to restrict or entirely prohibit pre-hearing discovery from non-parties in arbitrations, attorneys should consider alternative strategies for preparing their arbitration cases. Here are several suggestions, some of which have been endorsed even by the courts that have taken the most restrictive views of arbitrators’ powers to authorize pre-hearing discovery from non-party witnesses.

First, given that an arbitrator’s Section 7 arbitral authority “extends to hearings covering a variety of preliminary matters” an arbitrator can compel a non-party to appear and produce documents as a witness in a preliminary hearing. *Life Receivables*, 549 F.3d at 218.

Second, the inconvenience of appearing at a hearing may cause the testifying witness simply to “deliver the documents and waive presence” at a hearing. *Id.*

Third, arbitrators “have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings.” *Hay Group*, 360 F.3d at 413 (Chertoff, J., concurring).

Fourth, if a witness is not a party to the arbitration but is a party to the arbitration agreement, formal joinder of that witness as a party to the arbitration may be an option. *Life Receivables*, 549 F.3d at 218.

The sharpening split amongst the courts of appeals regarding an arbitration panel’s subpoena power over non-parties is likely to continue to intensify until Congress amends the FAA or the U.S. Supreme Court addresses this issue. Until this issue is resolved, and particularly in jurisdictions where arbitrators’ subpoena power over non-parties is limited, attorneys seeking pre-hearing document productions from non-parties should consider using some of the suggested alternative procedures for overcoming current restrictions.

Howard S. Suskin is a partner and Tiffany E. Clements is an associate in the Chicago office of Jenner & Block LLP.

---

1 AAA Commercial Rule 31(d) states “[a]n arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.” (2007).