Through a Glass Darkly: Non-Party Discovery Under the US Federal Arbitration Act

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Non-party discovery of corporate affiliates, accountants and other non-party witnesses can elicit evidence crucial to the parties' claims and defences. Yet parties often agree to arbitrate at a convenient location, such as New York City or Chicago, without appreciating how the location of the arbitrators for the final hearing affects access to non-party discovery, or how courts in that jurisdiction construe an arbitrator's authority to compel non-party discovery under federal law. To evaluate whether arbitral parties will have access to non-party discovery under the Federal Arbitration Act,[1] (FAA or the Act), the parties must take into account: (1) the arbitrators' authority to issue a subpoena; and (2) the federal district court's power to enforce the subpoena. The parties should also consider whether they can draft around limitations on non-party discovery in the agreement to arbitrate or through agreement during the arbitration itself.

1. Validity of an Arbitration Subpoena

An arbitrator's power to authorise non-party discovery derives solely from the FAA. As one court succinctly explains, "[b]ecause the parties to a contract cannot bind nonparties, they certainly cannot grant such authority to an arbitrator".[2] Arbitrators therefore turn to FAA s.7, which provides, in relevant part, that the panel or a majority of the panel may summon witnesses to attend before them and bring along relevant documents:

> "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" (emphasis added).

Courts have struggled to define the scope of statutory authority that FAA s.7 affords arbitrators to authorise pre-hearing document discovery of non-parties.[3] Although the Act broadly applies to "any person", it appears to require some form of hearing ("attend before them"), and to require that document production occur in conjunction with the appearance of a witness ("to bring with him").

"Power-by-implication" analysis

In several early decisions, two circuit courts of appeal determined that the arbitrators' power to compel third party document production for a final hearing implicitly authorised the lesser power to compel such documents before the hearing.[4] The Sixth Circuit, for instance, concluded that FAA s.7 "implicitly include[d] the authority to compel the production of

[1] 9 USC s.7.

[2] *Integrity Ins Co in Liquidation v Am Centennial Ins Co* 885 F. Supp. 69, 71 (S.D.N.Y. 1995).

[3] Generally, the FAA does not confer subject matter jurisdiction. Rather, "the parties invoking Section 7 must establish a basis for subject matter jurisdiction independent of the [Act]," such as diversity of parties or federal question jurisdiction: *Stolt-Nielsen SA v Celanese AG* 430 F. 3d 567 at 572 (2d Cir. 2005).

[4] A map of the various US federal circuits can be found at *http://www.uscourts.gov/court_locator.aspx* [Accessed June 5, 2012].

documents for inspection by a party prior to hearing".[5] The Eighth Circuit similarly held that

> "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing".[6]

"Special needs" exception

An early Fourth Circuit decision acknowledged that the FAA does not authorise an arbitrator to compel pre-hearing discovery, but suggested in dicta that for efficiency's sake, a court might order pre-hearing non-party document production "under unusual circumstances" and upon a "showing of special need or hardship".[7] *Hay* shows the way.

The seminal *Hay* decision from the Third Circuit, however, rejected the "power-by-implication" analysis and the special needs exception.[8] Writing for the court, Alito J. (now a Justice on the US Supreme Court) explained:

> "Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."[9]

The court held that the FAA requires non-party document discovery to occur in the context of a hearing (the arbitrators must summon the non-party to "attend before them"), and in conjunction with the attendance of a witness (bring documents with them).[10] In particular, the court concluded that the FAA's text, which mandates summoning a "person to attend", precludes issuing a document-only subpoena (which would otherwise be permitted under the Federal Rule of Civil Procedure (Rule) 45(a)(2)(C)).[11] Instead, and without specifying any preference, the court held that the subpoena must be issued pursuant to r.45(a)(2)(A) (hearings) or r.45(a)(2)(B) (witness depositions).[12]

Although *Hay* denied the pre-hearing non-party discovery under review, it instructed the arbitrators on how to issue a new subpoena that would satisfy FAA s.7. The court specifically addressed the eventuality that "Hay will obtain a new subpoena" calling on the non-party "representative to appear at an arbitration proceeding and to bring the documents at issue to that proceeding".[13] In this regard, a concurring opinion by Chertoff J. identifies a streamlined process whereby the arbitrators can compel a "third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings".[14] Although this procedure requires arbitrators to "suffer some inconvenience of their own", in many instances, the "inconvenience" for the non-party of making a personal appearance "may well prompt the witness to deliver the documents and waive presence".[15]

The influential Second Circuit, which covers New York, has signalled its approval of Chertoff J.'s method for overcoming the problem.[16] As a result, using a nominal hearing

[5] *Am Fed'n of Television & Radio Artists AFL-CIO v WJBK-TV (New World Commc'ns of Detroit Inc)* 164 F.3d 1004 at 1009 (6th Cir. 1999).
[6] *In re Se Life Ins Co of Am* 228 F.3d 865, 870 (8th Cir. 2000).
[7] *COMSTAT Corp v Nat'l Sci Found* 190 F.3d 269, 276 (4th Cir. 1999).
[8] *Hay Group Inc v E.B.S. Acquisition Corp* 360 F.3d 404, 408–409 (3d Cir. 2004).
[9] *Hay* 360 F.3d 404, 407 (3d Cir. 2004).
[10] *Hay* 360 F.3d 404, 411 (3d Cir. 2004).
[11] *Hay* 360 F.3d 404, 412 (3d Cir. 2004).
[12] Rule 45(a)(2) provides that a subpoena must be issued as follows:
"(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;
(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and
(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made."
[13] *Hay* 360 F.3d 404, 411 (3d Cir. 2004).
[14] *Hay* 360 F.3d 404, 413 (3d Cir. 2004) (Chertoff J. concurring).
[15] *Hay* 360 F.3d 404, 413 (3d Cir. 2004).
[16] *Stolt-Nielsen* 430 F.3d 567, 581 (2d Cir. 2005).

for pre-hearing document discovery has begun to emerge as the accepted approach for issuing non-party subpoenas in jurisdictions that do not follow the power-by-implication analysis. See, for example, *Alliance Healthcare Servs v Argonaut Private Equity (Argonaut)*[17] (Illinois District Court agreeing arbitrator may "hold a preliminary hearing that is not a hearing on the merits").

Despite the differing approaches, courts increasingly acknowledge that FAA s.7 authorises arbitrators to issue a valid subpoena to a non-party for pre-hearing document production. But this addresses only one step in the process; even if a party persuades the arbitrators to issue a non-party subpoena, the non-party's compliance remains voluntary unless a court intervenes.

2. Enforcing an Arbitration Subpoena

"[T]he authority of an arbitration panel to *issue* a non-party subpoena is not equivalent to the authority to *enforce* that subpoena" (emphasis added).[18] FAA s.7 provides a mechanism to enforce arbitral subpoenas in the federal district court located where the arbitrators sit:

> "[I]f any person ... shall refuse or neglect to obey said summons, upon petition to the United States district court for the *district in which such arbitrators, or a majority of them, are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators" (emphasis added).

Although at first blush this language appears to give broad authority to federal courts to enforce arbitral subpoenas, district courts interpret the language as containing a crucial gap that precludes court enforcement of out-of-district subpoenas.

Mind the gap

The gap in out-of-district subpoenas occurs because of a mismatch between the Federal Rules of Civil Procedure and the FAA. The applicable Rules require *issue* of the subpoena from the court for the district where: (i) a hearing is to be held under r.45(a)(2)(A); or (ii) a deposition is to be taken under r.45(a)(2)(B).[19] FAA s.7, however, allows for *enforcement* only from the district where the "arbitrators, or a majority of them, are sitting". In some cases, the difference between the Rules and the FAA results in a gap in a party's ability to enforce a subpoena for out-of-district discovery.

For example, *Argonaut*, which involved a Chicago-based arbitration related to a business sale, authorised out-of-district document discovery, but not out-of-district testimony related to the same documents. The arbitrators, at the sellers' request, issued subpoenas directing the accounting firm and its director, who oversaw the buyer's due diligence for the transaction, to testify and produce documents at a preliminary hearing before one of the three arbitrators in San Francisco.[20] Although the Illinois Federal District Court upheld the arbitrators' general authority to issue pre-hearing subpoenas to a non-party pursuant to r.45(a)(2)(A), it refused to enforce them. First, in disregard of the plain language of r.45(a)(2)(A), which requires the subpoena to be issued from the location of the hearing, the arbitrators in that case purported to issue the subpoenas from Chicago for a hearing in San Francisco. Secondly, contrary to FAA s.7, the seller attempted to enforce subpoenas that compelled discovery in San Francisco before a district court in Chicago.[21] But the court authorised the arbitrators to issue a new subpoena directing the non-party, Chicago-based

[17] 804 F. Supp. 2d 808, 810–811 (N.D. Ill. 2011).
[18] *In re Beck's Superior Hybrids Inc* 940 N.E.2d 352, 359 (Ind. App. 2011).
[19] A separate rule restricts service of the subpoena to the district of the issuing court or 100 miles from the place specified for the hearing or deposition. See r.45(b)(2).
[20] *Alliance Healthcare Servs v Argonaut Private Equity* 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).
[21] *Argonaut* 804 F. Supp. 2d 808, 812 (N.D. Ill. 2011).

accounting firm to furnish the due diligence records "even if [the documents were] not physically located in the District".[22] As a net result, the parties had access to the out-of-district due diligence records, but not the testimony of the out-of-district director who performed the due diligence.

The *Argonaut* court also declined to cure the defective subpoenas with a gap-filling procedural manoeuvre adopted by another judge in the same district. See *Amgen Inc v Kidney Ctr of Delaware Cnty Ltd.*[23] *Amgen* similarly involved an arbitration pending in Chicago and non-party discovery in Pennsylvania. To bridge the gap, the *Amgen* court permitted the attorney to serve a subpoena in Pennsylvania under the Illinois caption[24] and if necessary enforce the subpoena in Pennsylvania.[25] But the *Argonaut* court rejected this approach because the parties had not effected proper service in California and the *Amgen* procedure involves enforcement of the subpoena outside the district of the Chicago-based arbitration.[26]

3. A Modest Proposal to Close the Gap on Non-party Discovery

Hay held that the statutory phrase, "arbitrators ... or a majority of them" authorised a "single arbitrator", with the majority's approval, to convene a preliminary hearing to conduct non-party discovery.[27] *Hay* erased the distinction between "preliminary" and "final" hearings. But despite *Hay*, gaps remain for out-of-district non-party discovery: the Rules limit the ability of arbitrators to issue out-of-district subpoenas, and the FAA prohibits enforcement of out-of-district subpoenas. The solution to both of these problems would seem to be for the arbitrator to not only travel to the location of the deposition, as contemplated in *Argonaut*,[28] but "sit" for the preliminary hearing at the location of the deposition.

During the pendency of the matter, non-resident arbitrators routinely issue subpoenas from and "sit" for preliminary hearings at the location designated by the parties for the final hearing. By including appropriate language in the arbitration agreement, or by stipulation of the parties after the arbitration commences, the arbitrators could similarly provide for the arbitrators to travel to the location of the deposition in order to "sit" for a preliminary discovery hearing. For example, members of a Chicago-based panel could convene in San Francisco to sit for a deposition. Holding the preliminary hearing at the deposition location would authorise the arbitrator to issue a valid subpoena from the district where the "hearing" is "to be held", see r.45(a)(2)(A), and permit the federal district court at the location of the preliminary hearing to enforce the arbitrator's subpoena because the court would be in "the district in which such arbitrators, or a majority of them, are sitting".[29] Rather than trying to persuade the courts to recognise the arbitrators' authority to issue non-party discovery beyond the jurisdiction of the arbitration proceeding, it may simply be a matter of the parties authorising a shift in where the arbitrators sit for purposes of pre-hearing discovery.

[22] *Argonaut* 804 F. Supp. 2d 808, 813 (N.D. Ill. 2011).

[23] 879 F. Supp. 878, 883 (N.D.Ill. 1995).

[24] *Argonaut* 804 F. Supp. 2d 808, 813 (N.D. Ill. 2011). The court relied on r.45(a)(3)(B), which authorises an attorney to issue a subpoena on behalf of the district court where the deposition is to be taken or production is to be made.

[25] *Amgen* 879 F. Supp. 878, 883 (N.D.Ill. 1995).

[26] *Argonaut* 804 F. Supp. 2d 808, 813 (N.D. Ill. 2011). Not everyone agrees. Some courts continue to follow *Amgen* 879 F. Supp. 878 (N.D.Ill. 1995). See, e.g. *Ferry Holding Corp v GIS Marine LLC* 2012 WL 88196 at *3 (E.D. Mo. Jan. 11, 2012).

[27] *Hay* 360 F.3d 404, 413 (concurrence); *Stolt-Nielsen* 430 F.3d 567, 579 (2d Cir. 2005); *Argonaut* 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).

[28] *Argonaut* 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).

[29] See 9 USC s.7.