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Nonparty Discovery & the Federal Arbitration Act

Confronting the limitations of subpoenaing nonparties in arbitrations governed by federal law.

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ISBA RESOURCES >>

- Nicholas A. Gowen, *Obtaining Third-Party Discovery in Arbitration Is Not Guaranteed*, In the Alternative (Mar. 2021), law.isba.org/3u80LdW.
- Kristen E. Hudson & Luis A. Hille, *Nonsignatory to International Arbitration Agreement May Be Allowed to Compel Arbitration*, In the Alternative (Jan. 2021), law.isba.org/2X3ENCg.
- Mitchell L. Marinello & John Haarlow Jr., *Nonparty Discovery Under the Federal Arbitration Act*, 98 Ill. B.J. 476 (Sept. 2010), law.isba.org/3EOtcT8.

PARTIES IN A DISPUTE OFTEN NEED INFORMATION FROM NONPARTY witnesses to prepare their case. Under Federal Rule of Civil Procedure 45, a litigant in federal court can subpoena information from nonparties. Parties in an arbitration can also subpoena information from nonparties, but there are significant limitations. This article explains those limitations and how they sometimes can be overcome.

Section 7 of the Federal Arbitration Act

Section 7 of the Federal Arbitration Act (FAA) governs the issuance of arbitral subpoenas and can be broken into three parts:

1) "[T]he 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."[1]
2) "[The] summons shall issue in the name of the [] arbitrators …[,] shall be signed by the arbitrators …[,] and shall be served in the same manner as subpoenas to appear and testify before the court."[2]
3) "If any person[] so summoned to testify shall refuse or neglect to obey said summons, upon petition 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 [the arbitrators] or punish said person or persons for contempt in the same manner [as] … in the courts of the United States."[3]

What information can you get from third parties?

Nonparties are almost never deposed. Courts analyzing section 7 have almost all held that section 7 does not authorize nonparty depositions.[4] This view is dictated by the first sentence of section 7, which states that arbitrators may summon "any person to attend before them … as a witness."[5] Federal courts have interpreted this language literally, holding that arbitrators may require a nonparty witness to appear and testify at a hearing before them, but not require them to give testimony at a deposition before the parties alone. The only exception appears to be a 2021 case from the District of Minnesota permitting a video deposition of a third-party witness.[6]

Federal courts are split regarding document discovery from nonparties.

The U.S. Courts of Appeals for the Second, Third, Ninth, and 11th circuits and the U.S. District Court for the Northern District of Illinois do not permit such document discovery. In 2004, in *Hay Group v. E.B.S. Acquisition Corp.*, the Third Circuit, writing through then-Judge Alito, announced what is now the majority rule: Section 7 does not permit document discovery from nonparties.[7] Reviewing section 7 of the FAA, the court held:

> The only power conferred on arbitrators with respect to the production of documents by

1. 9 U.S.C. § 7.
2. *Id.*
3. *Id.*
4. See, *e.g.*, *Ware v. CD Peacock, Inc*, 2010 WL 1856021, *3 (N.D. Ill. 2010).
5. 9 U.S.C. § 7.
6. *International Seaway Trading Corp. v. Target Corp.*, 2021 WL 672990, at *4-*5 (D. Minn. Feb. 22, 2021).
7. *Hay Group v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

TAKEAWAYS >>

- In arbitration, a party's ability to obtain discovery from nonparty witnesses is restricted under the Federal Arbitration Act (FAA). Depositions are almost never available, though it may be possible to obtain documents in certain federal jurisdictions, depending on a federal court's interpretation of the interplay between the FAA and Federal Rule of Civil Procedure 45.
- It is crucial to examine relevant federal caselaw to learn what discovery is available and whether a document subpoena will be enforced.
- There are numerous splits among federal courts as to whether there is jurisdiction to enforce arbitral subpoenas to nonparties and, if so, where they can be enforced.
- These limits might be circumvented by issuing a nonparty subpoena, asking the arbitrators to convene a hearing for the nonparty to produce documents, and/or testify before the arbitrators and adjourning the hearing afterwards—all before the bulk of the merits hearing.

UNDER FEDERAL RULE OF CIVIL PROCEDURE 45, A LITIGANT WHO HAS FILED SUIT IN ONE DISTRICT CAN SERVE A SUBPOENA NATIONWIDE, AND CAN ENFORCE THE SUBPOENA IN THE DISTRICT IN WHICH THE WITNESS IS LOCATED. UNDER SECTION 7 OF THE FEDERAL ARBITRATION ACT, HOWEVER, ARBITRATION PARTIES MUST ENFORCE A SUBPOENA IN THE DISTRICT WHERE THE ARBITRATORS ARE "SITTING."

> a non-party 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." 9 U.S.C. § 7 …. Thus, 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.[8]

Notably, federal courts generally hold that this "physical presence" requirement means that nonparty appearances cannot take place via videoconference.[9]

The *Hay Group* court bolstered its holding by referring to the original version of Rule 45, which was enacted in 1937 (12 years after the FAA, for historical context). As originally written, Rule 45 did not allow federal courts to issue document-only subpoenas to nonparties. Instead, it required witnesses to appear before the court and to bring any subpoenaed documents with them. The Third Circuit reasoned that section 7 of the FAA probably was intended to operate the same way. It stated that its interpretation furthered the goal of arbitral efficiency because "parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed" to obtain the documents.[10]

Several federal courts have closely tracked *Hay Group* and held that the plain language of section 7 does not permit document discovery from nonparties. The Second Circuit (2008), Ninth Circuit (2017), and 11th Circuit (2019) have all joined this view, as well as the Northern District of Illinois.[11]

The Fourth Circuit allows document discovery under special circumstances. The Fourth Circuit takes a slightly more liberal approach. In 1999, in *COMSAT Corp. v. National Science Foundation*, it held that "[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel nonparties to appear 'before them;' that is, to compel testimony by nonparties at the arbitration hearing."[12] Despite this, the court held that there is an exception to this rule when a party demonstrates a "special need or hardship." The court was persuaded that, in such circumstances, it would serve arbitral efficiency if the parties were able to "review and digest relevant evidence prior to the arbitration hearing."[13]

Since *COMSAT*, two district courts in the Fourth Circuit have considered the "special need or hardship" standard. In *Gresham v. Norris*, the court held that the standard requires more than a "general desire to conduct discovery" and found nothing that justified the requested discovery in that case.[14] In *Robertson v. T-Mobile US, Inc.*, the court commented that to meet the test, "a party must demonstrate that the information it seeks is otherwise unavailable."[15] Because the petitioner showed that the records sought were "essential" to his claims and "otherwise unavailable," the court compelled the nonparty to produce them.[16]

The Eighth Circuit allows document discovery from nonparties. In 2000, in *In re Security Life Insurance Co.*, the Eighth Circuit held that document discovery from nonparties is permissible under section 7.[17] The court held that "implicit" in the power section 7 provides to require the production of documents *at* a hearing is the power to require documents to be produced *before* a hearing. The court stated that arbitral efficiency is promoted when the parties can review and digest documentary evidence in advance.

The district courts in the Fifth and Sixth circuits are split regarding document discovery from nonparties. In the Fifth and Sixth circuits, district courts disagree about the availability of document discovery from nonparties.

In 1994, a district court in the Sixth Circuit followed *Security Life* and held that section 7 permits document discovery from nonparties.[18] In 2018 and 2019, however, two sister courts held that the text of section 7 does not permit such document discovery.[19]

District courts in the Fifth Circuit are also split. In 2003, a district court held that prehearing document discovery is permissible under section 7.[20] In 2010 and 2014, two other district courts held that section 7 only permits arbitrators to compel documents from nonparties at a hearing in the presence of the arbitrator.[21]

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8. *Id.*
9. See, *e.g.*, *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc*, 939 F.3d 1145, 1160 (11th Cir. 2019).
10. *Hay Group*, 360 F.3d at 408-09.
11. *Managed Care*, 939 F.3d at 1159; *CVS Health Corp v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017); *Life Receivables Trust v Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008); *Alliance Healthcare Services Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).
12. *COMSAT Corp v. National Science Foundation*, 190 F.3d 269, 275 (4th Cir. 1999).
13. *Id.* at 276.
14. *Gresham v. Norris*, 304 F.Supp. 2d 795, 797 (E.D. Va. 2004).
15. *Robertson v. T-Mobile US, Inc.*, 2019 WL 5683455, at *2 (D. Md. 2019).
16. *Id.*
17. *In re Security Life Insurance Co.*, 228 F.3d 865, 870-71 (8th Cir. 2000).
18. *Meadows Indemnity Co. v Nutmeg Insurance Co.*, 157 FRD 42, 45 (M.D. Tenn. 1994).
19. *Dodson International Parts, Inc. v. Williams International Co. (Triumph Engine)*, 2019 WL 5680811, *2 (E.D. Mich. 2019); *Westlake Vinyls, Inc. v. Resolute Management, Inc.*, 2018 WL 4515997 (W.D. Ken. 2018); *Westlake Vinyls, Inc. v. Lamorak Insurance Co.*, 2018 WL 4516005 (W.D. Ken. 2018).
20. *In re Meridian Bulk Carriers*, 2003 WL 23181011, *1-2 (E.D. La. 2003).
21. *Chicago Bridge & Iron Co. v. TRC Acquisition LLC*, 2014 WL 3796395, at *2 (E.D. La. 2014); *Empire Fin Group v. Penson Financial Services*, 2010 WL 742579, *3 (N.D. Tex. 2010).

Issuing & serving arbitral subpoenas

Section 7 provides that a nonparty "summons shall issue in the name of the arbitrator[s] …[,] shall be signed by the arbitrators …[,] and shall be served in the same manner as subpoenas to appear and testify before the court."[22] The American Arbitration Association website has a form parties can use for that purpose. In 2013, Federal Rule of Civil Procedure 45, which governs subpoenas, was amended to provide for national service of subpoenas by "delivering a copy to the named person." Thus, arbitral subpoenas can be issued by the arbitrators and served nationwide.

Enforcing arbitral subpoenas

If a person served with an arbitral subpoena refuses to comply, section 7 says that an enforcement action may be initiated "upon petition [to] the United States district court." Nonetheless, there is a split as to whether the federal courts have jurisdiction to hear such enforcement actions, and, even if they do, whether the geographic limits of Rule 45 apply.

Split regarding subject-matter jurisdiction

The Second, Seventh, and 11th circuits and district courts in the Fifth and Ninth circuits hold that section 7 does not provide subject-matter jurisdiction. Many federal courts have held that section 7 does not provide federal subject-matter jurisdiction. These courts will not hear an action to enforce an arbitral subpoena unless there is an independent basis for federal jurisdiction; the FAA is not enough.

The U.S. Supreme Court has not decided whether section 7 provides subject-matter jurisdiction. When considering a different section of the FAA, the Court held that the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction …."[23] In *Amgen Inc. v. Kidney Center of Delaware County*, the Seventh Circuit cited this decision and held that the FAA "does not create subject matter jurisdiction for independent proceedings … involv[ing] … § 7."[24] The Second Circuit, 11th Circuit, and district courts in the Fifth and Ninth circuits have reached the same result.[25]

With no federal-question jurisdiction, parties are left to argue that diversity jurisdiction exists; *i.e.*, that the parties are citizens of different states and more than $75,000 is at stake in the dispute. Courts also have split on how those requirements can be met for the enforcement of arbitral subpoenas. Some courts hold that the amount at issue in the underlying arbitration dictates whether the amount-in-controversy requirement is met.[26] At least two other courts have held that the amount-in-controversy requirement cannot be met regardless of how much money is in dispute in the arbitration.[27] Consistent with this view, another district court has held that a sufficient amount is in controversy when the cost of complying with the subpoena would exceed $75,000.[28]

The upshot is that the federal courts in these circuits will not hear petitions to enforce arbitral subpoenas. Instead, petitioners can enforce an arbitral subpoena in state court either under section 7 of the FAA or under the state's arbitration act.

The Third Circuit, the U.S. District Court for the District of Puerto Rico, and the U.S. District Court for the Eastern District of Missouri hold that section 7 provides subject-matter jurisdiction. Some federal courts have held that section 7 does provide federal jurisdiction for the enforcement of arbitral subpoenas, and such enforcement actions can proceed in those jurisdictions. In *Legion Insurance Co. v. John Hancock Mutual Life Insurance Co.*, the Third Circuit succinctly stated with respect to a motion to enforce an arbitral subpoena: "The District Court had jurisdiction over this case under the Federal Arbitration Act, 9 U.S.C. § 7."[29] District courts in Missouri and Puerto Rico have reached the same result. These courts base federal subject-matter jurisdiction on the language of section 7, which states that arbitral subpoenas may be enforced "upon petition [to] the United States district court for the district in which such arbitrators, or a majority of them, are sitting."[30]

FEDERAL COURTS HAVE HELD THAT ARBITRATORS MAY REQUIRE A NONPARTY WITNESS TO APPEAR AND TESTIFY AT A HEARING BEFORE THEM, BUT MAY NOT REQUIRE THEM TO GIVE TESTIMONY AT A DEPOSITION BEFORE THE PARTIES ALONE.

Geographic limitations on enforcement

While section 7 provides for the enforcement of an arbitral subpoena, Rule 45 permits subpoenas to command the recipient to comply with a subpoena seeking documents or testimony only "within 100 miles of where the person resides, is employed, or regularly transacts business." Rule 45 also grants enforcement of subpoenas exclusively to the district court where compliance with the subpoena is required. Courts have split on whether and how these Rule 45 limitations apply to arbitral subpoenas.

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22. 9 U.S.C. § 7.
23. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983).
24. *Amgen Inc. v. Kidney Center of Delaware County*, 95 F.3d 562, 567 (7th Cir. 1996).
25. See, *e.g.*, *Maine Community Health Options v. Albertsons Cos.*, 993 F.3d 720, 722 (9th Cir. 2021).
26. *Washington National Insurance Co. v. Obex Group LLC*, 2019 WL 266681, at *4 (S.D.N.Y. 2019), *aff'd*, 958 F.3d 126 (2d Cir. 2020).
27. See, *e.g.*, *In re Application of Ann Cianflone*, 2014 WL 6883128, at *1 (N.D.N.Y. 2014).
28. *Maine Community Health Options v. CVS Pharmacy, Inc.*, 2020 WL 1130057, at *3-*4 (D. R.I. 2020) (collecting cases).
29. *Legion Insurance Co. v. John Hancock Mutual Life Insurance Co.*, 33 F App'x 26, 27 (3d Cir. 2002).
30. See, *e.g.*, *Moyett v Lugo-Sánchez*, 321 F. Supp. 3d 263, 266 (D. P.R. 2018).

The Second and Third circuits and district courts in the Sixth and Seventh circuits hold that these limits apply. In *Dynegy Midstream Services, LP v. Trammochem*, arbitrators sitting in New York issued a subpoena for a witness to produce documents in Houston, where the witness lived.[31] When the witness failed to comply, an enforcement action was brought in New York. The Second Circuit held that under section 7, only the New York federal court—the district where the arbitrators were sitting—could enforce subpoenas issued by those arbitrators. However, the court held that the geographic limitations of Rule 45 also applied, meaning that only the federal court in Houston could enforce a subpoena when compliance was required there. Because production of the documents was to take place in Houston, the Second Circuit concluded that the district court in New York could not entertain enforcement proceedings. The Third Circuit reached the same conclusion in *Legion*,[32] and district courts in the Sixth and Seventh circuits have reached the same result.[33]

These cases reveal an important limitation on arbitral subpoenas. Under Rule 45, a litigant who has filed suit in one district can serve a subpoena nationwide, and can enforce the subpoena in the district in which the witness is located. Under section 7, however, arbitration parties must enforce a subpoena in the district where the arbitrators are "sitting." Thus, if the witness is located in a judicial district other than the one in which the arbitrators are "sitting," a federal court will have no power to enforce a subpoena served on that witness.

The Eighth and Eleventh circuits hold that Rule 45's geographic limits do not apply. In *Security Life*, the Eighth Circuit held that the territorial limits in Rule 45 do not apply to subpoenas for documents issued by arbitrators.[34] There, the arbitration was pending in Minnesota, and the subpoena called for a nonparty witness to produce documents in California—far outside the reach of a federal court sitting in Minnesota. The Eighth Circuit held that arbitral subpoenas can be served nationwide and enforced by courts in the Eighth Circuit. Since then, at least one district court in the Eighth Circuit has followed *Security Life* and enforced an arbitral document subpoena against a witness located in a distant state.[35]

In *Managed Care*, the 11th Circuit took a different approach. It recognized that section 7 and Rule 45 appear to be inconsistent, "because Rule 45 requires the motion to be filed in the district where compliance is required, while 9 U.S.C. § 7 requires the motion to be filed in the district where the arbitrators sit."[36] But then it held, "[u]ltimately however, this inconsistency is avoided because 9 U.S.C. § 7 simply states that compelling attendance must be done in the same manner provided by law (*i.e.*, filing a motion) and does not incorporate Rule 45 regarding *where* motions to compel must be filed."[37] Thus, the 11th Circuit concluded, motions to compel had to be filed where the arbitrators were sitting, but could be filed against any party nationwide.

Circumventing the limits on arbitral discovery

Some federal courts have suggested a possible way to avoid—or at least reduce—obstacles to enforcing arbitral subpoenas. In *Stolt-Nielsen*, the Second Circuit held that under section 7, the arbitrators have the power to:

- issue a subpoena to a nonparty;
- convene a hearing at which the nonparty is to produce its documents and/or testify before the arbitrators; and
- adjourn the hearing afterwards.[38]

Other courts, including the Third Circuit in a concurring opinion, also have recognized this procedure.[39] An arbitral party may avoid the nationwide prohibition on the deposition of nonparty witnesses and the majority rule against nonparty document production by issuing a subpoena that requires the nonparty to give testimony and/or produce documents at a hearing before the arbitrator and at a location that satisfies Rule 45's territorial limits.

Stolt-Nielsen held that such a hearing can be held even if it precedes a later-scheduled "arbitration hearing on the merits" and "does not transform the [] hearing into a discovery device."[40] Indeed, section 7 says that third parties must appear "before" the arbitrators to provide documents or testimony, but does not require that this take place at any particular stage of the arbitration proceedings.

To use this procedure, the party seeking information from nonparties will have to persuade the arbitrators that the information it wants is important enough to justify a hearing to obtain that information.[41] This may be difficult if the arbitrator must travel a great distance to the proposed hearing locale. A mitigating factor is that, at least with respect to documents, the special hearing may never be needed because the nonparty witness may voluntarily produce its documents to avoid having to appear before the arbitrator.

There are risks to this procedure. The nonparty's testimony might backfire just as it might if you called a witness at trial without having first deposed that witness. The nonparty's testimony might also be a waste of time. Either way, the party who persuaded the arbitrators to convene the hearing may lose credibility.

The federal courts have given the *Stolt-Nielson* procedure a mixed reception when it involves a hearing distant from where the merits hearing will take place. One court embraced it, stating that:

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31. *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89, 92, 94-95 (2d Cir. 2006).
32. *Legion Insurance Co.*, 33 Fed Appx at 28.
33. See, *e.g.*, *e-Merging Market Techs, LLC v. ELK Automotive Components*, 2011 WL 3440470, at *2 (E.D. Mich. Aug 8, 2011).
34. *In re Security Life Insurance of America*, 228 F.3d 865, 868 (8th Cir. 2000).
35. *Schlumbergersema, Inc. v. Xcel Energy, Inc*, 2004 WL 67647, *2 (D. Minn. 2004) (enforcing a subpoena for documents issued by arbitrators in Minnesota to a witness located in New York).
36. *Managed Care Advisory Group v. CIGNA Healthcare*, 939 F.3d at 1145, 1158 (11th Cir. 2019).
37. *Id.*
38. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577-78 (2d Cir. 2005).
39. See, *e.g.*, *Hay Group v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413 (3d Cir. 2004).
40. *Stolt-Nielsen SA*, 430 F.3d at 577.
41. See, *e.g.*, *id.* at 580.

> Nothing in section 7 requires an arbitration panel to sit in only one location. Indeed, such a holding would greatly circumscribe an arbitration panel's ability to decide a case, potentially discourage litigants from arbitrating disputes involving nonparty witnesses in multiple locations, and thus contradict "the strong federal policy in favor of arbitration."[42]

But another court has rejected it, holding that "there is but one place where the arbitrators, or a majority of them, are sitting," *i.e.,* the place where the merits hearing is to take place, and this does not include the place "where the nonparty was to respond to a subpoena."[43]

Conclusion

In arbitration, a party's ability to obtain documents and/or testimony from nonparty witnesses is restricted under the FAA, but it may be possible in certain federal jurisdictions. As always, one should consult the governing caselaw to learn what is permitted and consider the time and cost involved before taking action. IBJ

42. *Washington National Insurance Co. v. Obex Group LLC*, 2019 WL 266681, at *5 (S.D.N.Y. 2019), *aff'd*, 958 F.3d 126 (2d Cir. 2020).
43. *Rembrandt Vision Techs, LP v. Bausch & Lomb, Inc*, 2011 WL 13319343, at *2-*3 (N.D. Ga. 2011).