THIRD-PARTY DISCOVERY IN ARBITRATION

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I. Introduction

Arbitrators derive their authority from the parties' agreement to arbitrate the dispute. Non-parties related to the dispute made no such agreement, but arbitrators generally have the authority (with certain limitations imposed by applicable rules) to subpoena non-parties to testify and/or to produce documents at the arbitration hearing. But what about pre-hearing discovery? Do arbitrators have the authority to require non-parties to produce documents or to testify at depositions as part of pre-hearing discovery? And if so, under what circumstances should arbitrators issue such subpoenas and in what form? Further, do arbitrators have the authority to compel a non-party to comply with a subpoena that they issue?

The rules and the case law can be complicated, and the outcome can vary greatly depending on the jurisdiction. The current state of the law is summarized below.

II. Applicable Rules/Statutes

a. American Arbitration Association (AAA) Rules
    i. Commercial Rule 34(d)
    ii. An arbitrator or other person **authorized by law to subpoena witnesses or documents** may do so upon the request of any party or independently.

b. Construction Rule 35(d)
    i. An arbitrator or other person **authorized by law to subpoena witnesses or documents** may do so upon the request of any party or independently. Parties who request that an arbitrator sign a subpoena shall provide a copy of the request and proposed subpoena to the other parties to the arbitration simultaneously upon making the request to the arbitrator.

c. Construction Large, Complex Rule L-4(f)
    i. **In exceptional cases**, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the **arbitrator may order depositions to obtain the testimony of a person** who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

III. Federal Arbitration Act, 9 U.S.C. § 7

a. The arbitrators selected either as prescribed in this title or otherwise, or a majority of them**, may summon** in writing **any person <u>to attend before them or any of them</u> 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.** … **Said summons** shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and

shall be directed to the said person and **shall be served in the same manner as subpoenas to appear and testify before the court**;

b. **if any person or persons 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 said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

IV. IL Arbitration Act, 710 ILCS 5/1 et seq. (Based on Uniform Arb. Act)

a. **The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence,** and shall have the power to administer oaths. **Subpoenas so issued shall be served, and upon application to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.**

b. On application of a party and for use as evidence, **the arbitrators may permit a deposition** to be taken, in the manner and upon the terms designated by the arbitrators, **of a witness who cannot be subpoenaed or is unable to attend the hearing.**

c. All provisions of law compelling a person under subpoena to testify are applicable.

d. Fees for attendance as a witness shall be the same as for a witness in the Court.

V. Pre-Hearing Discovery Under The FAA, Section 7 (9 U.S.C. § 7)

a. Depositions

i. U.S. courts generally refuse to enforce arbitral subpoenas for pre-trial depositions, including for non-party witnesses.

ii. However, there is one significant exception. In February 2021, a Federal District Court in Minnesota enforced an arbitral subpoena for a deposition issued to non-party former employee. *International Seaway Trading Corp. v Target Corp.*, Case No. 0:20-mc-00086 (D. Minn. Feb. 22, 2021).

1. *International Seaway* relies heavily on the Eighth Circuit's decision in *In re Security Life Insurance Co.*, 228 F.3d 865, 870–71 (8th Cir. 2000), which enforced a pre-hearing arbitral subpoena for documents issued to a non-party. The decision states: "Moreover,

> the Eighth Circuit's holding in *Security Life Insurance* includes the rationale that … the interest in efficient resolution of disputes through arbitration 'is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing.' The same interest in efficiency supports the Court's conclusion here: implicit in an arbitrator's power to subpoena a witness to testify before him or her at a hearing is the power to order the witness to testify at a pre-hearing deposition so that the parties may review and digest the relevant testimony before the hearing occurs."

b. Selected Illinois Cases:

   i. *ValuePart, Inc. v. Farquhar*, N.D. IL, (Judge St. Eve) (Not Reported in Fed. Supp.) (2016) ("In accord with other courts in this district, the Court interprets Section 7 to mean that neither an arbitrator nor a federal court can compel a non-party to give pre-hearing oral testimony").
   ii. *Ware v. C.D. Peacock, Inc.*, N.D. IL (Magistrate Nan Nolan) (Not Reported in F.Supp.2d) (2010) (Section 7 of the FAA does not authorize arbitrators to issue subpoenas for depositions of non-parties outside the physical presence of the arbitrator).
   iii. *Matria Healthcare, LLC v. Duthie*, 584 F.Supp.2d 1078 (N.D. IL 2008) (Judge Cole) (non-parties to arbitration cannot be compelled to participate in discovery without their consent).
   iv. *But see: Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F.Supp. 878 (1995) (arbitral subpoena to non-party for pre-hearing discovery including documents and deposition enforced where parties agreed FRCP applied to arbitration).

VI. Document Discovery

a. There is a split of authority in the federal courts of appeals regarding the scope of the arbitrator's subpoena power for documents under Section 7 of the FAA.

b. The statute contains no language authorizing a subpoena for documents apart from the appearance of a witness at a hearing before one or more of the arbitrators. Section 7 provides that witnesses summoned to testify at an arbitration hearing may be required "to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."

c. The **Second, Third, Ninth and Eleventh Circuits** have interpreted Section 7 to restrict the arbitrator's subpoena power to hearings in the physical presence of the arbitrator. *Hay Group, Inc. v. E.B.S. Acquisition Corp.* (3d Cir. 2004) 360 F.3d 404, 410 ("Nowhere does the FAA grant an arbitrator authority to order non-parties to appear at depositions, or to demand that non-parties provide ... documents during pre-hearing discovery"); *Life Receivables Trust v. Syndicate 102 at Lloyd's of*

London (2d Cir. 2008) 549 F.3d 210, 212, 216-217*; CVS Health,* 878 F.3d 703, 704-705 (9th Cir.); *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.* (11th Cir. 2019) 939 F.3d 1145, 1160.

d. Two decisions from federal district courts located in the **Fifth Circuit** adopted the reasoning of the decisions cited immediately above to hold that the FAA does not authorize arbitrators to compel production of documents from a non-party unless they are doing so in connection with the non-party's attendance at an arbitration hearing. *Chicago Bridge & Iron Co. NV v. TRC Acquisition, LLC*, 2014 U.S. Dist. LEXIS 103287, 2014 WL 3796395 (E.D. La. July 29, 2014); *Empire Fin. Group, Inc. v. Penson Fin. Servs.*, 2010 U.S. Dist. LEXIS 18782; 2010 WL 742579 (March 3, 2010) ("Section 7 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.")

e. The **Fourth Circuit** agrees that subpoenas *duces tecum* generally are not available under FAA Section 7 but adds that an arbitration panel might be able to subpoena a nonparty for prehearing discovery "under unusual circumstances" and "upon a showing of special need or hardship." *COMSAT Corp. v. National Science Foundation* (4th Cir. 1999) 190 F.3d 269, 275-276. *See also Waksal*, 802 N.Y.S.2d at 654 (New York state courts follow Fourth Circuit approach).

f. A recent trial court decision holds for the first time in the **Sixth Circuit** that pre-hearing discovery is not permitted under Section 7 of the FAA. *Depuy Synthes Sales, Inc. v. Smith+Nephew, Inc.,* 1:21-mc-11-MWM (S.D. Ohio Jan. 7, 2022). The decision finds that the "majority of the courts that have spoken on this issue have concluded that section 7 forbids prehearing discovery, permitting only live testimony in front of the arbitrator at a hearing."

    i. *Depuy* distinguishes *Am. Fed'n of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.),* 164 F3d 1004,1009 (6th Cir. 1992), on the ground that the order compelling pre-hearing production of documents in that case was limited to arbitration discovery under Section 301 of the Labor Management Relations Act.

g. The **Eighth Circuit** disagrees with the case law cited above. The Eighth Circuit holds that the power of an arbitrator under the FAA to subpoena a witness to testify and bring documents at a hearing includes the "implicit" power "to order the production of relevant documents for review by a party prior to the hearing." *In re Security Life Insurance Co., 228 F.3d 865, 870–71 (8th Cir. 2000).* This holding has been specifically rejected by some of the other courts. *See CVS Health, supra, 878 F.3d 703, 704-705 (9th Cir.).* But it was recently reaffirmed and extended to allow pre-hearing depositions by a Minnesota federal district court. *See International Seaway Trading Corp. v Target Corp*., Case No. 0:20-mc-00086 (D. Minn. Feb. 22, 2021) (discussed above).

h. The Restatement takes the position that arbitral subpoenas may only be issued to require documents to be produced and testimony to be taken during arbitral hearings, which can include a preliminary hearing to take evidence from nonparty witnesses prior to the hearing on the merits (Restatement (Third) U.S. Law of Int'l Comm. Arb. § 3.4, cmt. b PFD).

i. **Illinois**: The cases cited above from the Northern District of Illinois appear to agree with the majority view – namely that pre-hearing discovery from non-parties is not permitted under Section 7 but document discovery might be permitted if the witness is required to appear before the arbitrators. (However, as noted above, an Illinois state court judge recently quashed an arbitral subpoena for documents issued to a non-party even though the subpoena called for the documents to be produced at a hearing before the arbitrators.) One federal district court decision (*Amgen*) enforces deposition subpoenas, but in that case the parties agreed that the Federal Rules of Civil Procedure applied for discovery.

VII. State Arbitral Laws

a. States have adopted UAA § 7(a) or RUAA § 17(a). Illinois is a UAA state.

b. Most state statutes expressly authorize arbitrators to issue subpoenas *duces tecum*. This authority contrasts with the FAA, which as noted above, has been interpreted by most federal courts to permit arbitral subpoenas for documents only in connection with a subpoena for a witness to testify at an arbitration hearing. In addition, the state provisions generally do not require testimony before at least one arbitrator, as the FAA does.

c. The UAA is ambiguous on whether arbitral subpoenas are available to compel pre-hearing discovery. It authorizes the arbitrators to permit the deposition "of a witness who cannot be subpoenaed or is unable to attend the hearing." That language can be read as permitting depositions only for the purpose of obtaining testimony in advance for a witness who will not attend the primary hearing. But it also can be read more broadly to permit depositions for the purpose of discovery. There are no published judicial decisions addressing this issue under the UAA.

d. The RUAA removes the ambiguity. It provides that an "arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances," and may "issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding."

VIII. What is the extent/reach of the subpoena power?

a. Section 7 – National service under FRCP 45.

b. IL UAA – Subpoena power of the state court.

IX. Enforcement

a. Interpreting section 7 according to its "plain meaning" does not leave arbitrators powerless' to order the production of documents. On the contrary, arbitrators may, consistent with section 7, order "any person" to produce documents so long as that person is called as a witness at an arbitration hearing.

b. But can the subpoena be enforced? That is another question.

i. A court, not the arbitrator, has the authority to determine if a subpoena has been lawfully issued. In other words, the arbitrator cannot determine if he or she had the power to issue the subpoena under applicable law and compel enforcement. (On the other hand, it is generally accepted that the arbitrator can address and determine objections to the scope of a document subpoena that has been issued.)

c. What court?

i. For subpoenas issued under FAA Section 7: "The United States district court for the district in which such arbitrators, or a majority of them, are sitting."

ii. Most courts interpret Section 7 to mean that the only proper venue to seek or to contest enforcement of a subpoena is the court where the arbitration is being administered, *not* the court where the witness is located. *See Depuy Synthes Sales, Inc. v. Smith+Nephew, Inc.*, 1:21-mc-11-MWM (S.D. Ohio Jan. 7, 2022) ("multiple other courts have similarly concluded that the arbitrator 'is sitting' where the underlying arbitration is being administered - not the place of production").

1. NOTE: There is a potential conflict between Section 7 of the FAA and Rule 37 of the Federal Rules of Civil Procedure that could create a jurisdictional gap. Section 7 of the FAA provides for enforcement of panel subpoenas by the "United States district court for the district in which the [the panel is] sitting." But under Fed. R.Civ.P 37(a)(1) enforcement of a subpoena to a non-party "shall be made to the court in the district where the discovery is being, or is to be, taken."
2. *See SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. CIV 02-4304PAMJSM, 2004 WL 67647 (D. Minn. Jan. 9, 2004) (odd decision finding court had power under Section 7 to enforce subpoena for documents but not depositions).

iii. For subpoenas issued under the UAA or RUAA: Venue is proper in the state court where the witness is located.

d. In federal court, there must be *independent* federal jurisdiction. If not, the petitioner must proceed in state court.

e. The subpoena powers of a state court do not extend beyond the borders of the state. If a party to an arbitration needs to compel testimony or the production of documents from a non-party located outside the state where the arbitration is proceeding, then the party should seek enforcement, if possible, in a federal court and take advantage of nationwide service of process available under Federal Rule 45.

f. If federal jurisdiction cannot be established for the enforcement action, then the party must, if possible, have a subpoena issued or enforced by a court in the state where the witness can be found. (See discussion below regarding same.)

X. Can A Party Enforce An Arbitral Subpoena In State Court Under The FAA?

a. The Supreme Court has held that in "considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction." This "presumption of concurrent jurisdiction can be rebutted," the Court held, "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."

b. Commentators observe that FAA Section 7 contains no "explicit statutory directive" to limit the enforcement of arbitral subpoenas to federal courts. The statute authorizes the federal court to enforce the subpoena "upon petition" of the party seeking enforcement but does not say that the petition must be filed in federal court. The legislative history of the FAA says nothing about an exclusive federal forum, and therefore a state court could be called upon to enforce the subpoena to the extent permitted under the FAA.

i. But note: An Indiana decision holds that FAA Section 7 only allows a federal court to enforce an arbitration subpoena. *In re Beck's Superior Hybrids, Inc.*, 940 N.E.2d 352 (Ind. App. 2011). This decision first holds that a non-party arbitral summons that requires a witness to appear before an arbitrator is valid under Section 7. But the decision then holds that only a federal district court with independent federal jurisdiction located where the arbitrators are sitting can enforce the subpoena. Because the party seeking to enforce the subpoena could not establish federal jurisdiction, it did not have any way to enforce the subpoena under Section 7. (It appears that this decision has never been cited or followed in a published opinion.)

XI. Does the FAA Apply? Interstate Commerce.

a. The substantive provisions of the FAA apply to every arbitration "involving commerce."

b. According to the United States Supreme Court, the phrase "involving commerce" signals "an intent to exercise Congress' commerce power to the full." The specific transaction at issue in the arbitration need not occur in interstate or foreign commerce. If "in the aggregate the economic activity in question would represent a general practice" that is "subject to federal control," then only "that general practice need bear on interstate commerce in a substantial way."

c. It would be the exceptional arbitration case that would not involve commerce sufficiently to be subject to the FAA. Most arbitrations are subject to the substantive laws of both the FAA and at least one state's arbitration laws.

XII. What if the contract has a choice of law provision?

a. Generally, the FAA will apply to a matter involving interstate commerce *unless* the arbitration provision specifically provides that state law applies.

b. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995), the United States Supreme Court held "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration." This decision "has been read to mean that a general choice of law provision in a contract will not extend to the arbitration clause, absent specific evidence that the parties intended it to do so." *State Farm Mutual Automobile Insurance Co. v. George Hyman Construction Co.*, 715 N.E.2d 749 (1999).

c. In Illinois, where a contract contains a general choice-of-law provision and also incorporates the American Arbitration Association rules of arbitration, the FAA applies to questions regarding arbitration. *LRN Holding, Inc. v. Windlake Capital Advisors, LLC*, 949 N.E.2d 264, 270-72 (Ill. App. 3d Dist. 2011). *See also Aste v. Metropolitan Life Ins. Co.*, 728 N.E.2d 629 (1st Dist. 2000) (whether arbitration agreement is enforceable is determined under the FAA and not the Illinois UAA where the contract containing the arbitration provision involved interstate commerce).

d. In *LRN Holding*, the Third District of the Illinois Appellate Court noted "courts have held where parties to a contract agree to arbitrate in accordance with state law, the [Federal Arbitration Act] does *not* apply, even where interstate commerce is involved" (emphasis added). But the defendant in *LRN Holding* argued the arbitration provision incorporated the rules of the American Arbitration Association and not the Illinois Arbitration Act. The appellate court agreed, finding the contract contained a generic state choice-of-law clause but also incorporated the American Arbitration Association rules of arbitration. "As such, we cannot find that the parties explicitly intended, by the mere inclusion of the generic choice-of-law clause, that disputes encompassed by the arbitration agreement be settled pursuant to the Uniform Arbitration Act." *LRN Holding*, 409 Ill. App. 3d at 1035, 949 N.E.2d at 272. The court therefore applied the FAA to resolve the dispute.

e. Illinois Update: On June 17, 2021, Judge Caroline Kate Moreland (Circuit Court of Cook County) issued an order dismissing with prejudice an action to enforce arbitral subpoenas for documents issued to non-parties. The court found that the FAA (not state law) applied because the contract involved interstate commerce. Based in part on certain of the federal court decisions cited above, the court also ruled that pre-hearing subpoenas for documents issued to non-parties are not permitted under the FAA.

XIII. What if State Law Conflicts with the FAA? Preemption?

a. Some state arbitration statutes grant broader subpoena powers to arbitrators than the FAA, for example, by authorizing subpoenas *duces tecum,* and subpoenas for depositions, pre-hearing discovery and potentially for video testimony. Can a party enforce a subpoena under such a state statute where the FAA also applies?

b. Generally, even though the FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration, state law may nonetheless be pre-empted to the extent that it conflicts with federal law -- that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

c. In other words, the procedural provisions of the FAA are not binding on state courts *provided that* the applicable state procedures do not defeat the rights granted by Congress. Some commentators argue that under United States Supreme Court jurisprudence, the court could or should examine the language of the contract to determine whether the parties intended to apply the FAA to the exclusion of state procedural law and, if any ambiguity exists, to determine whether the procedural law at issue conflicts with or frustrates the objectives of the FAA. *See Subpoenas to Third Parties in Arbitration,* Thomas F. Bush/Freeborn & Peters.

d. To the extent that a state court is asked to enforce an arbitral subpoena that would be enforceable in federal court but for the absence of federal jurisdiction, no issue of preemption should arise. If a state court is enforcing the same measure of subpoena power, the purposes and objectives of Congress are not being frustrated.

e. But to resolve a discovery dispute about arbitral subpoenas that seek pre-hearing discovery under a state statute that would *not* be permitted under the FAA, a court might have to determine whether the state statute that authorized the subpoena conflicts with and would "defeat the rights granted by Congress" in the FAA. (I am not aware of any cases that directly address this issue.)

f. With respect to discovery depositions, it can be argued that a state statute that authorizes them is in "conflict" with the FAA. Similarly, it can be argued that a state arbitration statute that authorizes subpoenas for documents conflicts with the FAA's requirement that documents can only be obtained from a witness at a hearing

before an arbitrator. Some argue that this means arbitrators do not have the power to issue subpoenas for pre-hearing discovery in cases that involve interstate commerce.

g. But it can also be argued that even though the FAA does not provide for these types of subpoenas, neither the language of the statute or its legislative history suggests a policy of preventing them. Some commentators therefore conclude that courts should not find that the FAA preempts state authorization of these types of subpoenas.