Obtaining Third-Party Discovery in Arbitration Is Not Guaranteed

BY NICHOLAS A. GOWEN

I frequently advise colleagues to not approach arbitration the same as a case being litigated in federal or state court. Arbitration and traditional litigation are like homonyms.[1] They may seem the same upon first appearance, but their origins, functionality, and meanings are different. Arbitration is a creature of contract, meaning that the powers granted to arbitrators are contractual and only apply to those with privity. You cannot expect an arbitrator, unlike a judge, to have the authority to wield expansive powers over parties not in privity to the underlying arbitration agreement. Although there are several aspects of arbitration that differ from litigation, this article will highlight the challenges of obtaining third-party discovery in an arbitrated matter.

These discussions make more sense in context, so imagine a hypothetical where you are navigating discovery in a contentious commercial arbitration. You represent an Illinois-based manufacturer as the claimant in a contract dispute against an out-of-state supplier in an arbitration based in Chicago. You learn during discovery that a non-party based in a different state has critical evidence that you will need to effectively establish liability and secure an unexpected measure of damages in favor of your client. To properly evaluate the evidence, you will need to obtain the documents from the non-party before the hearing, as well as secure its testimony at hearing. The non-party has indicated that it will not cooperate without being compelled to do so and may nevertheless fight any subpoena served upon it. You understand that the Federal Arbitration Act and the forum's rules permit the arbitrator to issue subpoenas to non-parties to testify at hearing, but you consider that an academic exercise. In practice, you are unsure whether the arbitrator's authority is more expansive to apply to pre-hearing document production. Moreover, you are unsure how you can go about enforcing the subpoena if the out-of-state non-party refuses to comply.

These issues often arise in arbitrations, so this article provides a snapshot of the applicable law and practical considerations to consider as you address such a predicament during your next arbitration.

The Federal Arbitration Act Grants Arbitrators Subpoena Power

The Federal Arbitration Act (the "FAA") applies to any arbitration arising from "a contract evidencing a transaction involving commerce."[2] An arbitrator's authority to issue subpoenas derives from section 7 of the FAA, which states that the arbitrator "may summon in writing any person to attend before them or any of them as a witness" and may order the witness "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."[3]

Section 7 does not distinguish between parties and non-parties and allows an arbitrator to compel a non-party to bring documents and testify at a hearing. Section 7, however, contains no language authorizing a subpoena commanding a witness to appear for a deposition where no arbitrator is present. Most courts hold that section 7 does not provide an arbitrator the ability to compel depositions or any other form of pre-hearing discovery of non-parties.[4]

The eleventh circuit, in *Managed Care*, considered the validity of summonses directed to non-parties to appear by video and to produce documents. The subpoenaed parties objected to summonses and took the position that they would not comply absent being ordered to do so. After the trial court ordered that the subpoena recipients comply with the summonses, the matter was appealed to the eleventh circuit. The eleventh circuit, relying on the plain-meaning of section 7, held that the trial court abused its discretion in enforcing the arbitral summons because the arbitrator lacked the power to order witnesses to appear at a video conference and lacked the power to order witnesses to provide pre-hearing discovery.[5] This holding tracks a similar position taken by the second circuit in *Life Receivables that held that* section 7 *is* "straightforward and unambiguous," in requiring that "documents are only discoverable in arbitration when brought before arbitrators by a testifying witness."[6] So, too, was the third circuit's holding in *Hay Group,* which held that section 7's language unambiguously restricts an arbitrator's subpoena power to situations where the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.[7]

Despite these restrictive views, the courts recognize that third-party evidence may be obtained in advance of the arbitration hearing so long as the evidence is taken before the arbitrator.[8] In *Stolt-Nielsen,* a subpoena required witnesses to appear before the arbitrators with 300 boxes of documents. The witnesses appeared, the arbitrators heard limited testimony and then suspended further compliance with the subpoena to allow the parties to review the documents. The witnesses complained that this was "a thinly disguised effort to obtain pre-hearing discovery," but the appellate court found the process proper, citing three reasons: the subpoenas did not expressly require the witnesses to appear "at a deposition;" the arbitrators did hear some testimony; and that testimony "became part of the arbitration record, to be used by the arbitrators in their determination of the dispute before them." The court held that "the mere fact that the session before

the arbitration panel . . . was preliminary to later hearings that the panel intended to hold does not transform" that session "into a discovery device."[9] Similar to *Stolt-Nielsen*, other courts also allow arbitral subpoenas to be used for presentation at "preliminary hearings" convened for the limited purpose of obtaining the subpoenaed testimony and documents.[10]

The courts permit arbitrators to convene preliminary hearings with arbitrators present for the sole purpose of presenting the documents and limited testimony despite the FAA not authorizing the arbitrator to compel a non-party to appear for a deposition.

Arbitral Subpoenas May Be Enforced in Federal Court

Section 7 does not limit where arbitrators can command a witness to appear to testify or produce documents. For the subpoena to be enforceable in federal court, section 7 requires that any enforcement proceeding be brought "upon petition [to] the United States district court . . . 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."[11]

The primary obstacle to enforcing an arbitrator's subpoena is that the enforcement action must be filed in the district where the final hearing will occur. Section 7 states that enforcement actions should be filed in "the United States district court for the district in which such arbitrators, or a majority of them, are sitting []." The determination of where arbitrators "sit" is the situs of the final hearing.[12] But with nationwide service of subpoenas, that is not an impediment to enforcing arbitral subpoenas. Federal Rule of Civil Procedure 45 provides that a "subpoena may be served at any place within the United States."[13] The court can command a person served anywhere in the United States to comply with the subpoena within the following geographic limits: (a) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (b) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense.[14] As applied to arbitral subpoenas, an arbitrator may issue a subpoena to be served on a witness anywhere in the United States, provided that the subpoena requires the witness to appear before one or more arbitrators at a hearing, a part of a hearing, or a preliminary hearing.

Practical Considerations

In the hypothetical above, as claimant's counsel, you will certainly be able to request that the arbitrator issue a subpoena to the non-party to testify at the final hearing and order that documents be produced in conjunction with that testimony. If you anticipate needing to review the documents beforehand, then you will need the arbitrator to issue a subpoena to testify at a preliminary hearing where the arbitrator will be present to ask limited questions of the subpoena respondent. The arbitrator may then continue the hearing to allow the parties the opportunity to further review the documents before taking additional testimony.

If there is a likelihood that the non-party will refuse to comply with the arbitral subpoena, the arbitrator should issue the subpoena to command the appearance to be within the geographic limits set forth in Federal Rule of Civil Procedure 45. Then, if the non-party refuses to comply, you may seek enforcement in the federal court where the arbitration is pending—here the U.S. District Court for the Northern District of Illinois. The federal court may then compel the non-party to appear before the arbitrator in a preliminary hearing anywhere in the United States, as long as the hearing occurs within the geographic limits set forth in Rule 45. In an instance where the witness is located in a district other than where the final hearing is to occur, it may be necessary for the arbitrator to temporarily convene a preliminary hearing within the state where the witness resides or transacts business—even if that location is not the site of the final hearing.

Arbitration is an efficient way of resolving complex commercial matters, but there is no guarantee that you will be able to obtain third-party discovery as in federal or state court litigation.■

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1. Ok, maybe not, but I could not think of a better comparison.
2. 9 U.S.C. §§ 1, 2.
3. *Id*. § 7. Unlike subpoenas issued in federal courts, Section 7 requires that subpoenas "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."
4. *See, e.g*., *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc*., 939 F.3d 1145, 1159-60 (11th Cir. 2019); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017); *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquis. Corp*., 360 F.3d 404, 410 (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found*., 190 F.3d 269, 275 (4th Cir. 1999) ("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery."). The minority view accepted by the Sixth and Eighth Circuits hold that parties to an arbitration should be able to participate in pre-hearing discovery from third parties in advance of any arbitration. *See Sec. Life Ins Co. of Am. v. Duncanson & Holt Inc*., 228 F.3d 865, 970-971 (8th Cir. 2000) (holding that, although the language of Section 7 is unclear, "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" when a nonparty was "integrally related to the underlying arbitration."); *see also Tele. & Radio Artists v WJBK-TV*, 164 F.3d 1004, 1010 (6th Cir. 1999).
5. 939 F.3d at 1159-60.
6. 549 F.3d at 216.
7. 360 F.3d at 410.
8. *See Stolt-Nielsen SA v Celanese AG*, 430 F.3d 567, 577-78 (2d Cir. 2005) (holding that the arbitration panel had the authority to compel a third-party to testify and produce documents in advance of the full merits hearing so long as the evidence was taken before the arbitration panel).
9. *Id*. at 577-78.
10. Alliance Healthcare Serv., Inc. v. Argonaut Private Equity, LLC, 804 F. Supp. 2d 808 (N.D. Ill. 2011) (only one member of a three-member panel appeared at preliminary hearing was sufficient to satisfy Section 7); see also Next Level Planning & Wealth Mgmt., LLC v. Prudential Ins. Co. of Am., 2019 U.S. Dist. LEXIS 23375, *11 (E.D. Wis. Feb. 13, 2019) ("arbitrators may conduct preliminary hearings during which witnesses may be ordered to appear and produce documents").
11. 9 U.S.C. § 7.
12. See, e.g., *COMSAT*, 190 F.3d at 273; *Alliance,* 804 F. Supp. 2d at 811-12.
13. Fed. R. Civ. 45(b)(2).
14. Fed. R. Civ. P. 45(c)(1).