



# Witnesses in Arbitration – Federal Arbitration Act

By Richard Chernick, Esq.  
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Testimony and documents may be obtained in arbitration in accordance with the parties' agreement, the applicable institutional arbitration rules and provisions of law (federal and state arbitration acts, as applicable). My prior article addressed the **California Arbitration Act**, but there are significant differences under the Federal Arbitration Act (FAA).

The FAA provides limited authority to subpoena witnesses or a summons to a hearing under Section 7:

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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. 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; 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.

This provision principally concerns summoning a witness to an arbitration hearing. It is also relevant, however, to the ability of a party to obtain documents from a third-party witness pre-hearing, and case law in this regard is quite limiting.

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Some federal courts have interpreted Section 7 as requiring the appearance of the witness at a hearing before one or more of the arbitrators; thus Section 7 does not authorize a documents-only arbitral subpoena for pre-hearing production of documents by a non-party. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*; *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*. A concurring opinion on *Hay Group* (Chertoff) suggests that so long as one of the arbitrators is present at the “hearing,” a party may ask the arbitrators to issue a summons for documents to be produced by the non-party at the “hearing;” once that occurs, the “hearing” is adjourned until the time set for the merits hearing. (Often once the subpoena is issued, the non-party is amenable to production of the requested documents directly to counsel, avoiding the need for anyone to attend an actual hearing.)

Presumably these holdings would apply to a pre-hearing subpoena for a discovery deposition, although neither *Hay Group* nor *Life Receivables Trust* addressed this issue. These cases also reject the view of the Eighth Circuit that Section 7 implicitly authorizes issuance of a subpoena for production of relevant documents for review by a party prior to the hearing. *In re Security Life Ins. Co. of America*. The Third and Second Circuit cases also reject the view that in exceptional cases discovery subpoenas are allowed on a showing of special needs or hardship. *COMSAT Corp. v. National Science Fdn.* See *Stolt-Nielsen SA v. Celanese AG* (affirming enforcement of a subpoena issued to

a non-party to give testimony in the presence of one or more of the arbitrators – there is nothing in the language of Section 7 that requires or suggests that the non-party witness may only be required to attend and testify at the merits hearing).

Subpoenas issued in arbitration are aided by the recent change to the Federal Rules of Civil Procedure, Rule 45, in 2013, which provides for nationwide service of a judicial subpoena; under the FAA that provision would by implication be applicable to summons served in connection with Section 7. A “summon(s) in writing ... [is] served in same manner as subpoenas to appear and testify” in court; *Stolt-Nielsen SA v. Celanese AG*. The court may punish the witness for contempt.

A summons may be issued to a natural person or to a corporation. It is unclear whether Rule 30(b) (6) may be employed under Section 7. Section 7 contemplates issuance by the arbitrators or a majority of them, not by counsel. State law provisions permitting issuance by counsel are likely inapplicable under the FAA (*National Broadcasting Co. v. Bear, Stearns & Co.*) absent party agreement (cf. *Mastrobuono v. Shearson Lehman Hutton, Inc.*). ●

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