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Third-Party Discovery in Arbitration: The Hurdles

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You receive a call from a longtime client. They have a contractual dispute with a manufacturer of supplies necessary for their business. You set up a preliminary meeting and learn two important things: A significant number of the documents and witnesses to the dispute are nonparties in another state, and the claim is governed by a contract that has an arbitration clause.

In addition, to properly prepare, you will need to evaluate the documents as well as hear what the witnesses have to say before the hearing.

The nonparties have declined to cooperate.

Do you have a problem?

Arbitration is a matter of the contract, and the powers that the arbitrator has are contractual. An arbitrator, unlike a judge, does not have the authority over nonparties to the underlying arbitration agreement.

However, the Federal Arbitration Act does allow the arbitrator to issue subpoenas to nonparties. But what is the arbitrator's authority to compel attendance and pre-hearing discovery? How is an arbitrator's subpoena enforced?

The Controlling Portions of the Federal Arbitration Act and Rule 45 of the Federal Rules of Civil Procedure

The arbitrator's authority to issue subpoenas is found in section 7 of the Federal Arbitration Act (FAA):

The 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.

Section 7 makes no distinction between parties and nonparties, but neither does it provide for any deposition testimony. Indeed, most courts have held that Section 7 does not give the arbitrator the power to compel depositions or any other form of pre-hearing discovery of nonparties.

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(But see the minority view accepted by the Sixth and Eighth circuits, which found that parties to arbitration should be able to participate in pre-hearing discovery from third parties in advance of any arbitration. *Sec. Life Ins. Co. of Am. V. Duncanson & Holt Inc.*, 228 F.3d 865, 970-971 (8th Cir. 2000)).

Recent cases are instructive on the controlling standards for pre-hearing discovery in arbitrations. *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019) ("[W]e conclude that 9 U.S.C. § 7 does not permit pre-hearing depositions and discovery from non-parties." *Id.* at 1160). *Aixtron, Inc. v. Veeco Instruments Inc.*, 52 Cal.App.5th 360 (2020) ("[W]e hold that the arbitrator's prehearing discovery subpoena for [nonparty's] business records and computers was not authorized under the FAA." *Id.* at 402-404).

But nonparty testimony may be taken "before the arbitrator." Thus, the courts have permitted arbitrators to hold preliminary hearings with the arbitrator present, for the purpose of securing the documents and testimony of third parties. *Managed Care Advisory Group*, *Id.* at 1159. "The FAA confers the power to compel a non-party to attend an arbitration hearing and bring documents"; *CVS Health Corporation v. Vividus,*

LLC, 878 F.3d 703 (2017) ("A plain reading of the text of section 7 reveals that an arbitrator's power to compel the production of documents is limited to production at an arbitration hearing … [A]ny document productions ordered against third parties can happen only 'before' the arbitrator.") *Id.* at 706.

The subpoena may be issued by the arbitrator at the request of any party, but the arbitrator has no enforcement authority. For the subpoena to be enforceable, Section 7 requires that an 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.

But there are limitations on the enforcement of an arbitrator's subpoena. It must be filed in the district where a hearing is or can be held. Section 7 provides that such actions must 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 the arbitrators "sit" is governed by the party's contract and, more specifically, the arbitration clause and the rules incorporated therein.

So, while Rule 45(b)(2) of the Federal Rule of Civil Procedure (FRCP) provides that "[a] subpoena may be served at any place within the United States," according to Rule 45(c)(1), the court can require a person served "anywhere" in the United States to comply with the subpoena only:

(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.

Thus, under the mandates of Section 7 and Rule 45, an arbitration subpoena can only be for a hearing (1) before the arbitrators and (2) in a location consistent with Rule 45.

Handling Pre-Hearing Discovery

Given these limitations, the simplest recourse is to have the arbitrator issue a subpoena to the nonparty to testify at the final hearing and order that documents be produced at that time.

But what if you want to review the documents before the hearing? Or the final hearing is at a location that is outside of the constraints of Rule 45?

Counsel will need to request one or more preliminary hearings and have the arbitrator issue a subpoena for these preliminary hearings where the arbitrator will be present. Unfortunately, this will add cost because the arbitrator must be present in person. (Thus, Section 7 does not authorize district courts to compel witnesses to appear in locations outside the physical presence of the arbitrator, so the court may not enforce an arbitral summons for a witness to appear via videoconference. *Managed Care Advisory Group*, *Id.* at 1160.)

If the nonparty indicates that it will not comply with an arbitrator's subpoena, the arbitrator needs to issue the subpoena to compel the appearance within the geographic limits in Rule 45. Then, if the nonparty still refuses to comply, counsel will need to apply for enforcement in the federal court where the arbitrator is to hear the testimony ("sits"). The federal court may then compel the nonparty to appear.

This is where a carefully crafted arbitration clause can be of great benefit. (Because arbitration is a creation of the contract, arbitration agreements may provide arbitrators greater discovery powers with respect to the parties bound by such agreements. *CVS Health Corporation*, *Id.* At n.1.)

The site of the arbitration can be defined expensively to make compliance with Rule 45 more manageable. For example, by incorporating JAMS Comprehensive Arbitration Rules and Procedures in the arbitration clause, the following language in Rule 19(c) is controlling:

The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena duces tecum to a third-party witness."

Counsel should first seek voluntary cooperation by the nonparty. If that fails, have the arbitrator issue a subpoena; and if that fails, have the arbitral subpoena converted to a judicial subpoena in the federal court where the hearing is to take place. The subpoena(s) can be for one or more preliminary hearings before the arbitrator at a location consistent with the arbitration clauses' specified location.

Third-party discovery is an area where arbitration expense and effort increase significantly.

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