Do You Know How to Obtain Third-Party Discovery in Arbitration?

By Janice L. Sperow

Most practitioners, and even arbitrators, assume arbitrators have the inherent power to issue third-party discovery subpoenas to obtain document discovery in domestic arbitrations. But do they? The answer may surprise you. Like many lawyer answers, the answer is, "it depends." It depends on your jurisdiction, the applicable arbitral code, and the parties' arbitration agreement. This July 2020, California aligned itself with the Ninth Circuit and the growing number of other state and circuit courts holding that the Federal Arbitration Act (FAA) and state analogs do not empower arbitrators to issue third-party discovery subpoenas in domestic arbitrations.[i]

The FAA Subpoena Power

The FAA empowers arbitrators to "summon in writing any person to attend before 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."[ii] The statute thus contemplates arbitrator power to issue a subpoena for third party attendance at the merits hearing and to compel the third-party production of documents at that hearing. The courts have grappled with the question of whether this power also includes the authority to subpoena third parties and their documents *before* the hearing. The courts have examined this question of compelled third-party discovery in arbitration, and they are split.

The Majority View

In 2017, the Ninth Circuit joined the Second and Third Circuits in holding that the FAA does not grant an arbitrator subpoena power to order prehearing discovery from third parties. In *CVS Health Corp. v. Vividus, LLC.*, a pharmaceutical company filed suit in New York state court against various pharmacy benefit managers.[iii] The New York court ordered arbitration or litigation in separate proceedings based on the dispute resolution and forum selection clauses in the parties' preexisting agreements. One pharmacy involved in one of the litigations produced documents to the pharmaceutical company pursuant to a protective order. The pharmaceutical company wanted to use those same documents in another state's arbitration, so it requested a subpoena. The arbitrators granted the request and directed the pharmacy to produce the documents in advance of the actual hearing date. The pharmaceutical company filed a motion to enforce the subpoena with the district court when the pharmacy did not respond. The district court concluded that the arbitrators did not have discovery subpoena authority under the FAA, and the pharmaceutical company appealed.

The Ninth Circuit found that “under the FAA an arbitrator is not necessarily vested with the full range of discovery powers that the courts possess.” Ultimately, the Ninth Circuit agreed with the district court based upon the FAA’s “clear statutory language.” The court explained that the FAA gives arbitrators only two express powers: (1) the power to compel the attendance of persons to appear as witnesses at a hearing before them; and (2) the power to compel those persons to bring documents with them to the hearing. Relying on a textual reading of the statute, the court explained that § 7 limits an arbitrator's power to compel the production of documents to production at an arbitration hearing. The court noted that the phrase "bring with them" referred to the arbitrator’s power to summon a witness before the arbitrator at a hearing. Under this framework, any document productions ordered against third parties can happen only "before" the arbitrator. “The text of section 7 grants an arbitrator no freestanding power to order third parties to produce documents other than in the context of a hearing." The court therefore concluded the FAA does not authorize arbitrators to issue document-only subpoenas to third parties “outside of a hearing."[iv]

The Second Circuit had already reached the same conclusion in 2008. In *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, the Second Circuit analyzed all the decisions on the issue and noted the “emerging rule” that the FAA confers no third-party discovery subpoena power upon arbitrators.[v] The court found section 7’s language straightforward and unambiguous: “[d]ocuments are only discoverable in arbitration when brought before arbitrators.”[vi] Similarly, in *Hay Group, Inc. v. E.B.S. Acquisition Corp*., then-Judge, now U.S. Supreme Court Justice Alito, writing on behalf of the Third Circuit, found that section 7 “speaks unambiguously to the issue” and concluded that the “power to require a non-party ‘to bring’ items ‘with him’ clearly applies only to situations in which a non-party accompanies the items to the arbitration proceedings, not to the situations in which items are simply sent or brought by a courier.”[vii] But, despite what the Second, Third, and Ninth Circuits consider to be clear statutory language, not all circuits agree.

The Minority View

Some commentators consider the split even, with the Second, Third, and Ninth Circuits on one side and the Fourth, Sixth, and Eighths Circuits on the other side. In actuality, only the Eighth Circuit disagrees directly with the majority view. In *In re Security Life Insurance Co. of America*, the Eighth Circuit held that “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.” The court stated that this implicit power furthered the goal of facilitating efficient resolution of disputes by allowing parties to “review and digest” documents before hearings. However, even the Eighth Circuit acknowledged that section 7 “does not . . . explicitly authorize the arbitration panel to require the production of documents for inspection by a party.”[viii]

Similarly, in a case involving an interpretation of section 301 of the Labor-Management Relations Act, the Sixth Circuit noted that “courts may look to the FAA for guidance in

labor arbitration cases," and it followed decisions from district courts interpreting section 7 as implicitly allowing pre-hearing document discovery from third parties. However, the decision is limited to the labor arbitration context.[ix]

Likewise, the Fourth Circuit has provided for third-party discovery in "unusual circumstances." But its decision does not support arbitrator power to issue third-party pre-hearing subpoenas. In *COMSAT Corp. v. Nat'l Sci. Found*., the Fourth Circuit allowed third-party document subpoenas pre-hearing pursuant to the FAA upon a showing of "special need or hardship." However, the Fourth Circuit did not define "special need" and instead left open the question of what precisely a party must show to establish "special need or hardship." Importantly, however, the court never held that the FAA empowered the arbitrator to issue the subpoena. Instead, it opined that "a party might, under unusual circumstances, petition *the district court* to compel pre-arbitration discovery upon a showing of special need or hardship." Thus, the Fourth Circuit appears to assume that only district courts would have such power, not arbitrators. Finally, the court, like its sister circuits, explicitly acknowledged that "[n]owhere 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."[x]

California Joins the Fray

On July 16, 2020, the California Court of Appeal held in *Aixtron v. Veeco Instruments*, as an issue of first impression, that arbitrators do not have the statutory power to issue pre-hearing discovery subpoenas to third parties unless authorized by the applicable arbitration provision. Specifically, the court held that neither the FAA nor the California Arbitration Act (CAA) grant an arbitrator subpoena power to order prehearing discovery from third parties if the parties to the arbitration did not provide for such discovery rights in their arbitration agreement[xi].

In *Aixtron*, an employee resigned from his position to work for a competitor. The former employer commenced arbitration proceedings against the employee for data theft pursuant to an arbitration clause. The arbitrator issued a pre-hearing discovery subpoena for the current employer's business records, which the current employer challenged. The court concluded that the arbitrator did not have the authority to issue pre-hearing subpoenas to third parties under either the CAA or the FAA.

Aixtron confirmed that the CAA limits the right to discovery in arbitration. While the California Code of Civil Procedure (CCP) section 1283.05 incorporates the California Discovery Act and authorizes discovery as if the arbitration "were pending before a superior court," this authorization is only conferred if (1) the dispute arises out of claims for wrongful death or for personal injury; or (2) the arbitration provision so provides. Because the arbitration provision In *Aixtron* did "not mention the California Discovery Act or section 1283.05, or even contain the word discovery," the court held that the pre-hearing subpoenas were not authorized. Thus, while arbitration provisions *can* create enforceable rights for full discovery by stating, for example, that

the arbitration shall provide for discovery “pursuant to the California Discovery Act” or “pursuant to CCP § 1298.05,” they must explicitly do so.[xii]

Other Related Misconceptions

Many practitioners also assume that *they* can issue a subpoena in arbitration, much as they would in litigation. Wrong. They also assume that the scope of third-party subpoenas extends to all matters “reasonably calculated to lead to the discovery of admissible evidence.” Wrong again.

In arbitration, only the arbitrator or panel majority can issue a subpoena, not the practitioner.[xiii] Likewise, the scope of third-party subpoenas is narrower than typical discovery. Under the Federal Rule of Civil Procedure 26, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” But an arbitrator’s power under section 7 extends only to documents “which may be deemed material as evidence in the case.” Arguably, material evidence encompasses a narrower bandwidth than relevant discovery.

Practical Considerations and Takeaways

Some arbitrators have permitted a convenient workaround to the third-party discovery quandary. Sympathetic arbitrators have been known to commence a hearing simply to facilitate document production. Indeed, the Second Circuit seemed to expressly endorse this workaround in *Stolt-Nielsen SA v. Celanese AG.*[xiv]

In *Stolt,* respondent objected to a "trial-like arbitration hearing" as a mere ruse to compel discovery in advance of a "merits hearing" and "a thinly disguised effort to obtain pre-hearing discovery." Stolt pointed out that the arbitrators made the subpoena returnable during the period that they had scheduled for fact depositions, months in advance of the "hearing on the merits." Stolt argued that claimants and the arbitration panel conspired to "circumvent Section 7’s limitations through the contrivance of conducting its discovery in the presence of the arbitrators."

The Second Circuit disagreed and essentially laid out a roadmap for properly obtaining third-party discovery in domestic arbitrations. First, the presence of one arbitrator will sufficiently convert the session from a deposition to a hearing.[xv] Second, the arbitrators heard testimony and ruled upon evidentiary issues. Third, the testimony became part of the arbitration record, to be used by the arbitrators in their determination.

The court concluded that the FAA does not deny arbitrators the power to summon witnesses to a hearing under such circumstances. The court did not worry that the session occurred months before the main hearing because "[n]othing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing." To the contrary, the Second Circuit found the language of Section 7 broad, limited only by the requirement that the witness be

summoned to appear "before [the arbitrators] or any of them" and that any evidence requested be material to the case.

So, putting the case law together, practitioners have a couple of procedurally correct options to obtain the third-party discovery they need in domestic arbitrations. First, they can revise their arbitration agreements to incorporate *Aixtron*'s suggested language and explicitly endow arbitrators with third-party discovery subpoena power. Second, they can convene a hearing for the purposes of securing the necessary evidence. While the second option may have presented a costly method of getting documents just last year (think travel time, hourly rates, room charges, hearing fees, and more), with the prevalence of remote hearings, this option becomes much more attractive in the appropriate case. Moreover, given the choice between appearing at a hearing for the sole purpose of producing documents at a time and place dictated by the arbitrator versus producing the documents at a mutually agreeable time, location, and format, third parties may choose the cooperation route.

And here's a final question to ponder: on whichever side of the circuit split you sit, what does it mean to "bring documents" with you to the hearing in the modern digital age. The FAA, enacted in 1925, certainly did not contemplate cloud computing, e-discovery, electronically stored information (ESI), augmented reality (XR), artificial intelligence (AI), machine learning, remote hearings, software generated documents, smart contracts, and other issues surrounding modern day "documents." Must a third party bring ESI, its software, and its computer to the hearing as well? Does the arbitrator have the power to compel the third party to do so? Hmmm, time to dust off your arbitration clauses.

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[i] For an excellent and insightful article on this issue, *see* Theodore K. Cheng, "Nonparty Discovery in Domestic Arbitration Proceedings (U.S.)," Lexis Practical Guidance (Oct. 2020).
[ii] 9 U.S.C. § 7.
[iii] 878 F.3d 703, 706 (9th Cir. 2017).
[iv] *Id.*
[v] 549 F.3d 210, 215–16 (2d Cir. 2008).
[vi] *Id.* at 216.

[vii] 360 F.3d 404, 407 (3d Cir. 2004).
[viii] 228 F.3d 865, 870-71 (8th Cir. 2000).
[ix] *Am. Fed'n of Tel. & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999).
[x] 190 F.3d 269, 275-76 (4th Cir. 1999) (emphasis added).
[xi] 52 Cal. App. 5th 360.
[xii] *See also Life Receivables*, 549 F.3d at 217.
[xiii] *See, e.g., Nat'l Broadcasting Co. v. Bear Stearns & Co*., 165 F.3d 184, 187 (2d Cir. 1999) (Section 7 "explicitly confers authority only upon arbitrators").
[xiv] 430 F3d 567, 577-78 (2nd Cir. 2005).
[xv] *Id.*; *see also Hay Group*, 360 F.3d at 407 (noting that the FAA does permit subpoenas 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").