

KEY THIRD-PARTY DISCOVERY ISSUES IN ARBITRATION

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- I. To what extent can discovery be obtained from third parties in arbitration?
 - A. Four Main Issues:
 1. Who can sign a third-party subpoena?
 2. From whom can you obtain documents?
 3. When can you require documents from someone outside the jurisdiction?
 4. When can you get a non-party to give a deposition?
- II. Issue 1: Who can sign a third-party subpoena?
 - A. Under Section 7 of the Federal Arbitration Act (FAA), only the arbitrator may issue subpoenas. See 9 U.S.C. § 7.
 - B. Revised Uniform Arbitration Act likewise only allows arbitrators to issue subpoenas. See RUAA §17.
 1. UAA or RUAA have been adopted by 35 states, although not New York
 2. However, attorneys often issue subpoenas under UAA anyway
 3. Such subpoenas are not technically valid, but are often complied with
 - C. New York has unique laws governing state arbitration procedures
 1. “An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas.” N.Y. C.P.L.R. § 7505.
 - (a) Subpoenas can be used to compel both attendance and the production of documents at the hearing
 - (b) Both the NYSE and NASD also provide that attorneys can issue subpoenas. See NASD Rule 10322(a); NYSE Rule 619(f).
 2. This is true in all states, whether or not they have enacted the UAA. See, e.g., Siemes and Halske, GmbH. v. Gres, 324 N.Y.S.2d 639, 37 A.D.2d 768 (1st Dep’t 1971).

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3. As a result, in New York, attorney-issued subpoenas are only valid if served upon a non-party in the state.
- D. The FAA does not preempt state arbitration laws, so long as their provisions are not directly in conflict with the FAA. Volt Information Sciences, Inc. v. Stanford University, 489 U.S. 468 (1989).
1. Parties may agree to resolve their disputes under federal or state law, or to be governed by the rules of an arbitration association.
 2. Absent an agreement, the FAA controls only when the underlying dispute involves interstate or foreign commerce. See 9 U.S.C. § 2.
- E. To be safe, parties should have arbitrators issue subpoenas if a dispute over compliance is anticipated.
- III. Issue 2: When can you obtain documents from third parties?
- A. The arbitrator has clear authority to compel production of documents by a non-party at the hearing (see 9 U.S.C. § 7)
- B. Courts have split over the extent to which arbitrators may compel prehearing discovery of non-parties.
- (a) Compare Rippe v. West Am. Ins. Co., 1993 WL 512547 (Conn. Super. Ct., Dec. 2, 1993); Burton v. Bush, 614 F.2d 389 (4th Cir. 1980) (party to arbitration contract had no right to prehearing discovery) with In re Deiulemar di Navigazione, 153 F.R.D. 592 (E.D. La. 1994) (allowing prehearing discovery in extraordinary circumstances) and Stanton v. PaineWebber Jackson & Curtis, Inc., 685 F. Supp 1241 (S.D. Fla. 1988); Transwestern Pipeline Co. v. J.E. Blackburn, 831 S.W.2d 72 (Tex. Ct. App. 1992) (allowing prehearing discovery in the discretion of the arbitrator).
- C. Federal courts have split over whether Section 7 allows an arbitrator to compel document production before the hearing.
1. *Hay Group, Inc. v. EBS Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) held that the FAA does *not* confer authority to subpoena documents from third parties before the hearing;
 2. *COMSTAT Corp. v. Nat'l Science Foundation*, 190 F.3d 269 (4th Cir. 1999) reached the same result; however, it recognized that in cases of "special need or hardship," it might reach the opposite conclusion.
- IV. Issue 3: To what extent can you obtain documents from a third party located outside the jurisdiction?

- A. FAA § 7 provides that arbitrator-issued subpoenas must be served in the same manner as court-issued subpoenas; this provision does not specifically address whether the territorial limits of the Federal Rules of a subpoena apply.
 - B. Fed. R. Civ. P. 45(b)(2) limits service to: a place within the district of the issuing court; any place within 100 miles of the place of the deposition or document production; or any place within the state as provided by state law.
 - C. The 3rd and 8th Circuits agree that the territorial limits of Rule 45 do not apply to subpoenas issued under the FAA. *See Security Life Ins. Co.*, 228 F.3d at 872; *Hay Group*, 360 F.3d at 413.
 - D. *Amgen, Inc. v. Kidney Ctr. of Del. County, Ltd.*, 879 F.Supp. 878 (N.D. Ill. 1995), held that an attorney may issue a subpoena on behalf of the District Court in which the non-party is located, in accordance with Rule 45(a)(3)(B), although note that the arbitration clause at issue called for discovery under the Federal Rules.
 - E. The 2nd Circuit has not addressed this issue.
 - F. However, any subpoena issued under state law cannot be served outside the state.
 - G. RUAA § 17(g) provides that courts in states adopting the RUAA should enforce arbitration subpoenas and discovery orders made by arbitrators in another state.
 - 1. This provides a mechanism to obtain discovery from non-parties in other states.
- V. Issue 4: When can you require a non-party to give a deposition?
- A. Some courts have held that arbitrators cannot order discovery depositions.
 - 1. *COMSTAT* (4th Cir. 1999) held that, absent hardship, arbitrators lack power to issue subpoenas for either document production or depositions.
 - 2. *Integrity Insurance Co. v. American Centennial Ins. Co.*, 885 F.Supp. 69 (S.D.N.Y. 1995), interpreting the FAA, held that an arbitrator may not issue a subpoena for depositions prior to the hearing.
 - B. However, several other courts have held that arbitrators may issue prehearing deposition subpoenas under the FAA in certain circumstances.
 - 1. See, e.g., *American Fed'n of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999) (looking to FAA for guidance in a labor arbitration); *Amgen, Inc. v. Kidney Center of Del. County, Ltd.*, 879 F.Supp. 878 (N.D. Ill. 1995); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton v. PaineWebber Jackson & Curtis, Inc.*, 685 F.Supp. 1241 (S.D. Fla. 1988).

- C. Depositions are allowed in limited circumstances to preserve testimony of a witness who cannot be brought to the hearing. See e.g., Koch Fuel International, Inc. v. M/V South Star, 118 F.R.D. 318 (E.D.N.Y. 1987).
- D. Alternatively, the arbitration panel may be persuaded to sit for hearing in the location of an out-of-forum witness to facilitate the taking of testimony from an otherwise unavailable witness.