

ARTICLES

Getting the Discovery You Need in Arbitration

By Carly Milner and Aurra Fellows – March 05, 2019

In one of its first opinions of 2019, the U.S. Supreme Court continued a trend of pushing cases to arbitration. The Court unanimously held that the [Federal Arbitration Act](#) (FAA), 9 U.S.C. § 1 et seq., requires arbitrators, not courts, to decide the question of arbitrability if the parties have so agreed, even if the dispute clearly is outside the scope of the parties' arbitration clause. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272, 2019 WL 122164, at *4 (U.S. Jan. 8, 2019). As courts continue to push disputes to arbitration, parties must confront the limitations of that forum. Parties long have assumed that limited discovery in arbitration would translate to a benefit—saving costs and time—but what if those limits prevent a party from proving its case? Before agreeing to arbitrate or moving to compel arbitration, parties need to understand what discovery will be available and whether that meets their needs.

Variable Rules Depending on the Parties' Agreements.

The rules specified in an arbitration agreement govern the parties' discovery in arbitration. Sometimes the parties elect external rules, such as those promulgated by the American Arbitration Association (AAA) or JAMS. Each arbitral organization approaches party discovery differently, and the rules often vary with the type of dispute. For example, the [AAA Commercial Arbitration Rules](#) allow the arbitrator to decide what the parties must produce. *See* AAA Commercial Arb. R. R-34. But the rules do not provide for depositions except in “large, complex commercial disputes,” and then only in “exceptional cases, at the discretion of the arbitrator.” AAA Commercial Arb. R. L-3(f). In contrast, the [JAMS Comprehensive Arbitration Rules & Procedures](#) require the parties to produce “all non-privileged documents . . . relevant to the dispute or claim immediately after commencement of the Arbitration” and permit one deposition of the opposing party or person controlled by the opposing party, with discretion in the arbitrator to permit additional depositions. JAMS R. 17. In other cases, the parties' agreement identifies a different set of rules for party discovery.

These rules disrupt the typical litigation process: How many litigators are accustomed to having to justify their need for a handful of depositions? Or to relying on the opposing party to decide what documents are relevant, rather than choosing what documents to request? For some disputes, these limitations operate as intended, focusing parties and lawyers on the key information needed for a fair hearing. But in other cases, particularly where access to information is lopsided or documents are not readily available, the rules may prevent a party from obtaining necessary facts or evidence.

Obtaining Discovery from Nonparties

What happens if important information resides with former employees no longer controlled by a party? Or another third party? The parties' arbitration agreement does not bind nonparties and does not, therefore, require them to participate in any aspect of the arbitration. Courts can bind nonparties, but they must have the authority to do so. The ability to obtain an enforceable subpoena for nonparty discovery in advance of the arbitration hearing depends heavily on the location of the arbitration and the state law applicable to the agreement.

Federal law provides little relief. Section 7 of the FAA, 9 U.S.C. § 7, permits arbitrators to subpoena witnesses:

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.

Whether this permits the subpoena of third-party witnesses or things *prior to an actual hearing*, though, is debatable. Courts disagree about whether the FAA provides authority for arbitrators to compel pre-hearing, nonparty discovery. Many courts interpret the above provision to allow arbitrators to summon witnesses only for the hearing because the statute says that arbitrators may summon witnesses “to attend before them” and to “bring with them” the requested documents. Currently, only the Sixth and Eighth Circuits interpret this provision to allow arbitrators to issue document subpoenas to nonparties for pre-hearing document discovery, concluding that the power is implicit in the FAA’s discovery provision. See *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870–71 (8th Cir. 2000); *Am. Fed’n of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Commc’ns of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999). The Second, Third, and Ninth Circuits have rejected pre-hearing document subpoenas to nonparties in opinions focused on the plain meaning of the statutory text. See *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 705 (9th Cir. 2017); *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216–17 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

No appellate court has allowed pre-hearing depositions in arbitration as a general matter. The Second Circuit has indicated that arbitrators may be able to issue a subpoena for a pre-hearing deposition to take place before the arbitrators, and the Fourth Circuit has held that pre-hearing document discovery and depositions of nonparties may be possible if the party shows a special need or hardship. See *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577–78 (2d Cir. 2005); *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999). The Second Circuit’s approach hews closely to the text of the FAA, which does not explicitly require the witness to appear at the final hearing—only before the arbitrator or arbitrators.

Given the Supreme Court’s recent focus on close textual readings of the FAA, it seems unlikely that the current Supreme Court would construe the FAA as providing for pre-hearing discovery from nonparties outside the presence of the arbitrators, whether at the final hearing or some other proceeding. See *Schein*, 2019 WL 122164, at *2; see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018). In fact, former Third Circuit judge Alito wrote the opinion in *Hay*, in which the Third Circuit held that “Section 7’s language unambiguously restricts an arbitrator’s subpoena power to situations 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.” *Hay*, 360 F.3d at 407. While the Supreme Court likely would interpret the FAA to permit some type of subpoenaed pre-hearing testimony and document discovery from nonparties to be provided *in the presence of*

the arbitrator or arbitrators, it is unlikely many parties will want to conduct pre-hearing discovery in such a setting.

With these severe limitations on assistance from federal courts, where can you turn in arbitration to compel nonparties to appear for a deposition or produce needed documents? Fortunately, many states' arbitration and foreign discovery statutes provide a path to subpoenaing nonparties, and the FAA does not preempt discovery provisions of state arbitration acts.

The Importance of Researching Applicable State Law

The first step is to review the arbitration statute in the state in which your arbitration is seated (unless your agreement is governed by a different state's law). Does this law provide for nonparty depositions or document discovery, and what are the requirements? California provides for expansive pre-hearing discovery from nonparties, only requiring an affidavit explaining why such discovery is necessary. [Cal. Civ. Proc. Code](#) § 1985. In contrast, New York permits nonparty discovery only when there is a special need or extraordinary circumstances (the same standard as the Fourth Circuit's). *See ImClone Sys. Inc. v. Waksal*, 22 A.D.3d 387, 388, 802 N.Y.S.2d 653, 654 (2005); *see also AXA Equitable Life Ins. Co. v. Kalina*, 101 A.D.3d 1655, 1656, 956 N.Y.S.2d 743, 744–45 (2012). States that have adopted the [Uniform Arbitration Act](#) created in 1955 (amended in 1956) by the Uniform Law Commission—including, e.g., Delaware and Pennsylvania—generally allow issuance of nonparty subpoenas in the arbitrator's discretion. (The [Revised Uniform Arbitration Act](#) created by the Uniform Law Commission in 2000 has not been as widely adopted, but it also allows for issuance of nonparty subpoenas in the arbitrator's discretion.)

If the state does allow nonparty discovery subpoenas, the typical procedure requires the arbitrators to issue the subpoena, then the party institutes a proceeding in the local state court to enforce the subpoena. Depending on the location of your arbitration, this may require hiring local counsel to appear in the state court (some states, such as Wisconsin, require the party to file a petition to enforce the arbitral subpoena). If your witness resides in the same state as your arbitration, this completes the process. However, if your witness lives in another state, a further step is required: examining the law of the state in which your witness resides to determine the rules for obtaining discovery to be used in foreign proceedings.

Many states will enforce subpoenas for discovery from another state (including in the arbitration context) under their versions of the Uniform Interstate Depositions and Discovery Act. *See, e.g., S.C. Code* § 15-47-100 to § 15-47-160; *Va. Code* § 8.01-412.10; *Wis. Stat.* § 887.24. This generally requires a subpoena from the arbitrator or arbitrators; a subpoena (or a "commission" for issuance of a subpoena) from the state court in the state of the arbitration; and a domestication of that subpoena by the court clerk of the state in which the witness resides. This last step may require hiring of local counsel depending on state law and whether the witness contests the subpoena. Other states, such as Colorado, allow their courts to enforce arbitral subpoenas from arbitrations in other states, so that parties can skip the step of obtaining a subpoena from the state of the arbitration. *See Colo. Rev. Stat.* § 13-22-217. This multistep process for obtaining a nonparty subpoena takes time and money, particularly if it is contested by

your opponent or the nonparty. In a fast-track arbitration, parties should plan ahead if nonparty discovery may be needed.

Conclusion

Arbitration agreements, the FAA, and state arbitration statutes interact to create a complex and highly variable system of discovery, both from parties and nonparties, and the trend at the federal level is to restrict nonparty discovery under the FAA. Before your client agrees to arbitrate or moves to compel arbitration, review the discovery provisions of the arbitration agreement, any rules adopted by the agreement, and the arbitration statutes of the relevant state to determine whether you will be able to obtain the discovery you need.

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