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Analysis
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Third Party Subpoenas In Arbitration

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The popular allure of alternative dispute resolution is its speed and perceived lower cost. But these attributes have a serious downside if a party needs to subpoena third party witnesses to obtain critical evidence for use at the hearing. Not only does the streamlined discovery process in arbitration not allow for the same subpoena powers as litigation, but it remains unclear exactly what subpoena powers exist at all. An arbitration clause, after all, is only a contractual arrangement governing the parties to the contract. Third parties stand outside this contractual arrangement and are not bound by it.

Accordingly, the only legal force of an arbitration is derived from federal and state statutes. At the federal level, the Federal Arbitration Act (''FAA''), 9 U.S.C. § 7, provides that the arbitrators may summon a witness to the hearing and may command such witness to bring any relevant documents. The FAA also gives enforcement power to the federal district court for the district in which the arbitrator is sitting. These simple provisions have the potential to cause innumerable problems.

You May Want to Think Twice About Selecting Arbitration If:

1. You need pre-hearing discovery from third party witnesses.

The FAA does not explicitly permit pre-hearing discovery subpoenas, which has created a split among various federal courts as to whether a discovery subpoena issued by an arbitration panel is enforceable at all. The Third and Fourth Circuit Courts of Appeal have concluded that no arbitrator can issue witness or document subpoenas as a matter of pre-hearing discovery. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) (''The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party '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.' '') (quoting 9 U.S.C. § 7); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (''The subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA.'').

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The only subpoenas enforceable by the court are those that command the witness to appear before the panel at an arbitration hearing. *Id.* Such subpoenas may command the witness to bring with him/her ''any book record, document, or paper which may be deemed material as evidence in the case.'' 9 U.S.C. § 7.

The concurring opinion in *Hay Group* notes that, as the statute explicitly gives the power to compel appearance and production of documents at a hearing, the arbitrator simply needs to call a hearing to secure both an appearance and the production of documents. *Hay Group*, 360 F.3d at 413–14 (Chertoff, J., concurring). As this is a less convenient method for all involved, the threat of such action may serve to convince the subpoenaed party to comply with pre-hearing discovery subpoenas voluntarily. *Id.* Under the method adopted by the Third and Fourth Circuits, there would likely be no discovery depositions unless they were agreed to by the deposed party, be that with or without the threat of the more intrusive subpoena power as allowed explicitly under the FAA. *Id.*

While restricting discovery in arbitration seems to be the direction of the law (to the extent there is any clear direction), contrary authority for expansive pre-hearing discovery can be found. One of the more notable decisions is *Amgen, Inc. v. Kidney Center of Del. County Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995), which held that ''implicit in the power to compel testimony and documents for the purpose of a hearing is the lesser power to compel testimony and documents prior to a hearing.'' *Id.* at 880. Most circuit courts of appeal have yet to even reach the issue.

2. Your witnesses are in other districts.

The FAA gives the court in the district where the arbitration is occurring the power to issue subpoenas, but does not extend its territorial powers to any other district. *See* 9 U.S.C. § 7. This leaves a gap in the statute whereby those third parties outside the district of arbitration would be outside the territory of the only court given jurisdiction under the FAA to enforce subpoenas. In *Amgen*, the federal court in Chicago devised a hybrid system by which it empowered one of the parties' attorneys to issue a subpoena with ''the name and number of a case pending before [that] court.'' *Amgen*, 879 F. Supp. at 878. The attorney could then take that subpoena to the court in the district in which the witness was

(continued on page 279)

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(continued from back page)

located and petition that court to enforce the subpoena. *Id.*

The Second Circuit considered and then rejected this approach, finding that the FAA gave them no power over those outside their territory, either directly or indirectly based on (i) the language in the FAA which indicates that enforcement is to be handled ''in the same manner provided by law for securing the attendance of witnesses . . . in the courts of the United States,'' and (ii) the lack of language in the FAA that Congress usually inserts to create nationwide jurisdiction. *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 95–96 (2d Cir. 2006). Courts that are disinclined to stray far from the text of the FAA, such as the Third and Fourth Circuits, may find the first reason especially compelling and would probably also decline to find enforcement power outside the limits of Fed. R. Civ. P. 45.

The Eighth Circuit adopted its own approach and concluded that a court could go beyond such limitations when enforcing a subpoena for documents, but specifically declined to discuss whether it would adopt the same approach when it came to witness depositions. *In re Security Life Ins. Co. of America*, 228 F.3d 865, 871–72 (8th Cir. 2000).

3. You need to compel witnesses to appear personally.

While some courts have found prehearing document subpoenas to be enforceable, they avoided ruling on whether deposition subpoenas are similarly permissible. *See, e.g., Security Life*, 228 F.3d at 872 (declaring ''the enforcement of witness subpoenas under the FAA'' to be ''a thorny question indeed'' and limiting the ruling to document subpoenas only). Similarly, courts that enforce extraterritorial subpoenas as to documents may not do so against a witness, even at the arbitration hearing itself. *See id.* (basing the decision to enforce a subpoena as to documents partly on their easy portability).

'[A] Thorny Question Indeed'

So where does that leave a party in an arbitration when it needs the testimony of witnesses or production of documents for third parties in order to sustain its position? Perhaps, out of luck and unable to prove its case. It is an anomaly that the litigants in a multi-million dollar commercial arbitration have lesser ability to gather relevant evidence than a consumer suing his dry cleaners in state court, but it is an inevitable consequence of arbitration. Corporate counsel would be wise to consider these consequences before automatically inserting arbitration clauses in their commercial contracts.