

# Discovery Limitations in Arbitration Proceedings: Is the Price of “Efficiency” Really Worth it?

BY DAVID J. NOVOTNY

Arbitration often is viewed as a more efficient means of resolving disputes compared to litigation in state or federal courts. While in many instances arbitration may be a less costly endeavor than litigation, counsel must keep in mind that discovery options often are quite limited. In proceedings governed by the Federal Arbitration Act<sup>1</sup> or the Illinois Uniform Arbitration Act,<sup>2</sup> non-party discovery may not be available at all. Even in jurisdictions where non-party discovery is allowed, judicial enforcement of arbitration subpoenas against uncooperative deponents is often problematic. This article examines the potential limits and issues attorneys may encounter in pursuing discovery against non-parties in the arbitration process.

**Non-Party Discovery is Governed by the Rules of the Forum and Applicable Statutes.** If the parties and non-party witness agree to a deposition or the production of documents, then the deposition or document production should proceed without difficulty, assuming the arbitrator does not prohibit it. If the parties and witness have not reached an agreement, then one must look to the rules of the forum and the applicable law to determine the extent to which non-party discovery may be compelled.

In limited situations, a party to an arbitration proceeding may be able to obtain documents from a non-party prior to the arbitration hearing if the non-party has agreed to be bound by the rules of the forum. For example, under the rules of the Financial Industry Regulatory Authority (“FINRA”) applicable to disputes between customers and securities broker-dealers or their registered representatives, a party to an arbitration proceeding may request the panel

to issue an order requiring the production of documents in the possession of another FINRA member.<sup>3</sup> Because all FINRA members are bound by the FINRA arbitration rules by virtue of their membership in the organization, a member is required to comply with such an order for production.

In most arbitration proceedings, however, parties seeking discovery from non-parties will not have the advantage of a common membership situation and thus must look to the applicable law to determine the extent to which non-party discovery is allowed. In Illinois, two statutes potentially govern the availability of non-party discovery: the Federal Arbitration Act (“FAA”) and the Illinois Uniform Arbitration Act (“IUAA”).<sup>4</sup>

1 9 U.S.C. §1 *et seq.*  
2 710 ILCS 5/1 *et seq.*

3 FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12100(r), 12513.  
4 Specialized statutes may also apply in arbitration proceedings involving specific kinds of disputes, such as the Health Care Arbitration Act, 710 ILCS 15/1 *et seq.*, and the

**Non-Party Discovery under the FAA.** The FAA applies to arbitration proceedings if the agreement to arbitrate is contained in a contract evidencing a transaction involving “commerce,”<sup>5</sup> which is defined to include interstate commerce and commerce with foreign nations.<sup>6</sup> Given the broad scope of the definition, it is difficult to imagine an arbitration agreement arising from a significant commercial transaction that is not subject to the FAA.

There is no clear consensus on whether the FAA authorizes non-party discovery, or the extent to which it can be compelled. Section 7 of the FAA provides that 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.”<sup>7</sup> While this language clearly allows arbitrators to issue a subpoena or “summons” to compel witnesses to testify and produce documents at the arbitration hearing, the courts do not agree on whether this language authorizes courts to issue subpoenas to non-parties for pre-hearing depositions and document production.

**Some Courts Have Allowed Full Non-Party Discovery under the FAA.** At least one early case imposed no limits on an arbitrator’s power to issue discovery subpoenas to non-parties. In *Stanton v. Paine Webber Jackson & Curtis, Inc.*,<sup>8</sup> the Southern District of Florida declined to enjoin an arbitrator’s issuance of subpoenas for depositions and the production of documents. In partial support of its decision, the court held, with little explanation, that the “contention that §7 of the [FAA] only permits the arbitrators to compel witnesses at the hearing” but not for discovery purposes is “unfounded.”<sup>9</sup>

Other courts also appear to have acknowledged the authority of arbitrators to issue subpoenas for any form of discovery. In *Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co.*,<sup>10</sup> the Middle District of Tennessee denied a motion to quash a subpoena for documents in an arbitration proceeding, holding that the panel’s statutory authority to compel the production of documents by a non-party at the final hearing “implicitly authorizes the lesser power to compel such documents” in discovery and that concluding

otherwise would require “adoption of an unnecessarily constrictive and unreasonable reading of Section 7.”<sup>11</sup> Later, the Eighth Circuit adopted a similar stance in *In re Security Life Insurance Co. of America*,<sup>12</sup> holding with little explanation that, while Section 7 does not explicitly authorize subpoenas for the production of documents, this power is “implicit in an arbitration panel’s power to subpoena relevant documents for production at a hearing.”<sup>13</sup>

**The “Special Need” Approach.** One circuit has taken a novel approach by suggesting that subpoenas for depositions and the pre-hearing production of documents may be allowed, but only where the requesting party has demonstrated a

“special need” for the discovery. In *Comsat Corp. v. National Science Foundation*,<sup>14</sup> the Fourth Circuit acknowledged that the FAA by its terms does not grant arbitrators the authority to order non-parties to appear at depositions or produce documents in advance of the hearing. However, the Court commented, again with little explanation, that the issuance of subpoenas may be justified “upon a showing of special need or hardship.”<sup>15</sup> The Court stated it would not attempt to define “special need” but that, at a minimum, a party would be required to show that the information it seeks is not available by other means.<sup>16</sup>

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*David J. Novotny is a founding member of Chittenden, Murday & Novotny LLC. He practices in the area of complex commercial litigation and arbitration, representing corporations in a variety of areas, including financial services companies and securities broker-dealers. He received his undergraduate and law degrees from DePaul University, where he was executive editor of the DePaul Law Review. He has been recognized as an Illinois Super Lawyer and Illinois Leading Lawyer.*

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International Commercial Arbitration Act, 710 ILCS 30/1.1 *et seq.* If an arbitration proceeding is subject to such a statute, counsel should confirm whether it contains discovery-related provisions that also should be taken into account.

5 9 U.S.C. §2.

6 9 U.S.C. §1.

7 9 U.S.C. §7.

8 *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S. D. Fla. 1988).

9 *Stanton*, 685 F. Supp. at 1243.

10 *Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co.*, 157 F.R.D. 42 (M. D. Tenn. 1994).

11 *Meadows Indemnity Co., Ltd.*, 157 F.R.D. at 45.

12 *In re Security Life Insurance Co. of America*, 228 F.3d 865 (8<sup>th</sup> Cir. 2000).

13 *In re Security Life Insurance Co. of America*, 228 F.3d at 870-71.

14 *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4<sup>th</sup> Cir. 1999).

15 *Comsat Corp.*, 190 F.3d at 276.

16 The *Comsat* court ultimately declined to enforce the subpoena against the deponent (a federal agency) on the ground that the agency’s refusal to comply was not “arbitrary and capricious” and therefore sustainable under principles of

**Some Courts Disallow Non-Party Discovery Entirely.** Other courts have concluded that Section 7 of the FAA does not authorize the issuance of subpoenas for pre-hearing discovery under any circumstances. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,<sup>17</sup> a party to an arbitration proceeding sought to enforce an arbitrator's subpoena for the pre-hearing production of documents. The Third Circuit (in an opinion authored by then-Circuit Judge Samuel Alito) 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" at the arbitration hearing.<sup>18</sup> The court rejected the "power by implication" analysis exemplified by *Stanton* and *Meadows Indemnity* and declined to adopt the "special need" approach adopted in *Comsat*.<sup>19</sup> The court's approach to interpreting Section 7 clearly suggests that subpoenas for discovery depositions are disallowed in the Third Circuit as well.

The Second Circuit followed the Third Circuit in *Life Receivables Trust v. Syndicate 102 at Lloyd's, London*,<sup>20</sup> holding that "Section 7 does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding," reasoning that "[a] statute's clear language does not morph into something more just because courts think it makes sense for it to do so."<sup>21</sup> Again, the Second Circuit's definitive view of the statutory language indicates that deposition subpoenas likewise are deemed unauthorized in that Circuit.<sup>22</sup>

**The View in Illinois and a Possible Work-Around.** The federal courts in Illinois have not agreed on the availability of non-party discovery under the FAA. In the first case addressing the issue, *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*,<sup>23</sup> the court entertained a

proceeding to enforce an arbitrator's discovery subpoena, but since none of the parties contested the arbitrator's authority to issue the subpoena, the court did not rule on the issue. Later, in *Matria Healthcare, LLC v. Duthie*,<sup>24</sup> the Northern District of Illinois specifically held that Section 7 plainly does not authorize arbitrators to issue subpoenas for the production of documents in discovery.

More recently, in *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*,<sup>25</sup> District Judge Kennelly embraced a helpful "workaround" that had been discussed earlier in the Second Circuit.<sup>26</sup> In *Alliance Healthcare*, the court confirmed that Section 7 does not authorize the issuance of subpoenas for depositions or the production of documents in the ordinary sense. The court explained, however, that Section 7 clearly authorizes an arbitrator, upon application of a party, to summon non-party witnesses to provide testimony or produce documents *before any member of the panel* in a pre-hearing proceeding. The court explained that "[n]othing in the language of the FAA limits the point of 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 final hearing."<sup>27</sup> Judge Kennelly's approach thus provides a sound avenue for non-party "discovery" while remaining faithful to the language of the FAA.

**Federal Jurisdiction Is Required for Enforcement Proceedings under the FAA.** Section 7 of the FAA allows a party to bring a proceeding to enforce an arbitrator's "summons" in federal court in the district in which "the arbitrator, or a majority of them, are sitting."<sup>28</sup> Assuming a particular district or circuit interprets Section 7 to allow the issuance of subpoenas for non-party discovery in some form, a party may be able to enforce the subpoena against an uncooperative deponent under that provision. But a party considering enforcement proceedings under Section 7 first must determine whether federal jurisdiction exists over that proceeding. If the arbitration agreement is subject to the FAA, one might think federal question jurisdiction automatically exists over enforcement proceedings

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sovereign immunity applicable to government agencies. A New York state court, citing *Comsat*, followed the "special need" exception discussed in *Comsat* in *Imclone Systems, Inc. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (2005). Presumably, that holding was abrogated by the Second Circuit's pronouncement in *Life Receivables Trust v. Syndicate 102 at Lloyd's, London*, 549 F.3d 210 (2d Cir. 2008), discussed in the text that follows.

17 *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3<sup>rd</sup> Cir. 2004)

18 *Hay Group, Inc.*, 360 F.3d at 407.

19 *Hay Group, Inc.*, 360 F.3d at 408, 411.

20 *Life Receivables Trust v. Syndicate 102 at Lloyd's, London*, 549 F.3d 210 (2d Cir. 2008).

21 *Life Receivables Trust*, 549 F.3d at 216-17.

22 The Northern District of Texas also adopted this view in *Empire Financial Group, Inc. v. Penson Financial Services, Inc.*, 2010 WL 742579 (N.D. Tex. March 3, 2010), as did the Southern District of Florida in *Kennedy v. American Express Related Services Co.*, 646 F. Supp. 2d 1342 (S. D. Fl. 2009).

23 *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995), remanded on other grounds, 95 F.3d 562 (7<sup>th</sup> Cir. 1996),

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dismissed, 101 F.3d 100 (7<sup>th</sup> Cir. 1996).

24 *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078 (N. D. Ill. 2008).

25 *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808 (N.D. Ill. 2011).

26 See *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577-78 (2d Cir. 2005). Also see *Guyden v. Aetna, Inc.*, 2006 WL 2772695 (D. Conn. Sept. 25, 2006).

27 *Alliance Healthcare Services, Inc.*, 804 F. Supp. 2d at 811 (quoting *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577-78 (2d Cir. 2005)). This approach also was highlighted in a concurring opinion filed in *Hay Group, Inc. v. E.B.S. Acquisition Corp. supra*.

28 9 U.S.C. § 7.

brought under Section 7. That is not the case, however. If the arbitration is proceeding pursuant to a stay entered in pending federal litigation, then the court has subject matter jurisdiction to hear enforcement proceedings relating to the arbitration. However, if the arbitration is not “embedded” within existing federal litigation, a party seeking to enforce a subpoena in an independent proceeding must establish a basis for the exercise of federal jurisdiction. To accomplish that, the party must show that the underlying conflict between the arbitrating parties meets the requirements for federal question or diversity jurisdiction.<sup>29</sup> Absent such an independent federal jurisdictional basis, an enforcement proceeding in a “non-embedded” context cannot be brought in federal court.<sup>30</sup>

**Venue Issues Are Complicated when the Deponent Resides in Another District.** Assuming federal subject matter jurisdiction exists for a proceeding to enforce a subpoena, the party seeking enforcement must select the proper venue. Section 7 provides that enforcement proceedings must be brought in the district in which

“the arbitrator, or a majority of them, are sitting.”<sup>31</sup> If the witness whose testimony or documents are sought resides in that district, then enforcement may proceed in a normal fashion. But what if the deponent whose testimony or documents are sought resides in another district?

One court in the Northern District of Illinois—the *Amgen* case discussed above—developed a creative approach to the problem.<sup>32</sup> In that case, Amgen sought to enforce a subpoena issued by an arbitrator in Chicago, directed to a deponent in Pennsylvania. While Section 7 of the FAA indeed required the action to enforce the arbitrator’s subpoena to be brought in the Northern District of Illinois, the court concluded it lacked the power to enforce that subpoena in Pennsylvania, beyond the territorial limits of Rule 45 of the Federal Rules of Civil Procedure.<sup>33</sup> The court therefore directed Amgen to issue a *judicial* subpoena for the deposition bearing the case name and number of the enforcement proceeding, which the court reasoned could be enforced by the Eastern District of Pennsylvania under Rule 37(a)(1).<sup>34</sup>

The *Amgen* opinion has not developed a following, either in this district or in other circuits. In *Dynegy Midstream Services, LP v. Trammochem*,<sup>35</sup> the Second Circuit declined to adopt *Amgen’s* methodology, reasoning that Section 7 only authorized *arbitrators* to issue subpoenas and did not contemplate the issuance of *judicial* subpoenas to accomplish discovery in arbitration proceedings. In *Alliance Healthcare*, Judge Kennelly likewise expressly declined to follow *Amgen*.<sup>36</sup>

29 *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d at 561-72; *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 95 F.3d at 567-68.

30 Section 7 only authorizes federal district courts to hear enforcement proceedings. However, at least one reported state court case entertained Section 7 proceedings without comment. *Imclone Systems, Inc. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (2005).

31 9 U.S.C. §7.

32 See note 22, *supra*.

33 Fed. R. Civ. P. 45.

34 Fed. R. Civ. P. 37(a)(1). The Third Circuit (which encompasses the Eastern District of Pennsylvania) has since ruled in *Hay Group, Inc.* that non-party discovery is not authorized by the FAA in any event. This illustrates an interesting problem that could arise in the approach adopted in *Amgen*: the district in which the arbitration panel sits may recognize the arbitrator’s authority to issue discovery subpoenas to non-parties, but the district in which enforcement of the surrogate judicial subpoena is sought under Rule 37 may not. One can only speculate whether a court would enforce a judicial subpoena under such circumstances.

35 *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89 (2d Cir. 2006).

36 *Alliance Healthcare Services, Inc.*, 804 F. Supp. 2d at 813. As it happens, the parties in *Amgen* never had the opportunity to engage in the process directed by the District Court. On appeal from the District Court’s ruling, the Seventh Circuit remanded the case for a determination of whether federal subject matter jurisdiction existed for the enforcement proceeding. On remand, the District Court concluded that it possessed neither federal question nor diversity jurisdiction, and the entire case was dismissed. See note 22, *supra*.

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One court in the District of Minnesota has concluded it does not matter if the deponent resides in another district, at least for a subpoena for documents. In *Schlumbergersema, Inc. v. Xcel Energy, Inc.*,<sup>37</sup> a party to arbitration brought an enforcement proceeding under Section 7 in the District of Minnesota for a subpoena for deposition and documents propounded on a non-party in New York. The deponent argued that the court lacked the power to enforce the subpoena because Rule 37<sup>38</sup> requires discovery motions against non-parties to be brought in the district in which the discovery is to be taken. The court held, with sparse reasoning, that in order to “facilitate the purposes of the FAA” it could enforce a subpoena for documents served on a non-party regardless of where the subpoena is served.<sup>39</sup> Paradoxically, the court concluded it had no such extraterritorial power to enforce subpoenas for depositions served elsewhere.

**The Illinois Act May Be Helpful.** Section 7 of the IUAA, which is based upon the Uniform Arbitration Act (1956), governs “witnesses, subpoenas and depositions.”<sup>40</sup> While the FAA preempts state law in many respects, it generally does not preempt provisions such as Section 7 which do not purport to limit or invalidate the parties’ arbitration agreement.<sup>41</sup> Thus, the IUAA should be considered when seeking non-party discovery, particularly if the federal district court in which enforcement is sought does not interpret the FAA to allow non-party discovery, or if a party seeking to enforce an arbitrator’s subpoena for discovery cannot establish the requisite basis for federal subject matter jurisdiction.

There is a surprising lack of case law concerning an arbitrator’s authority to compel non-party discovery under the IUAA. Section 7(a) of the IUAA states that arbitrators “may issue subpoenas for the attendance of witnesses and for the production of . . . documents,” and Section 7(c) states that “all provisions of law compelling a person under subpoena to testify are applicable.” There is no question these sections authorize arbitrators to issue subpoenas for purposes of the arbitration hearing, but the question remains whether these sections grant arbitrators the power to issue subpoenas for pre-hearing depositions and document production as well. Sections 7(a) and (c) appear to be broadly worded, so it is arguable that these

provisions indeed authorize arbitrators to issue subpoenas for discovery purposes. However, Section 7(b) states that an arbitrator “may permit a deposition to be taken . . . of a witness who cannot be subpoenaed or is unable to attend the hearing.”<sup>42</sup> Such qualifying language would be unnecessary if indeed Sections 7(a) and 7(c) grant arbitrators the blanket authority to issue subpoenas for depositions in any situation. Under the maxim of *in pari materia*,<sup>43</sup> it appears arbitrators have the authority to issue subpoenas directed to persons who are “unable to attend the hearing” for purposes of conducting an examination analogous to an “evidence deposition,” but not in other pre-hearing contexts.<sup>44</sup> If a party to an arbitration proceeding seeks the deposition of a person located outside of Illinois, the situation becomes even more complicated. Under those circumstances, counsel will need to research the extent to which assistance may be available under the laws of the deponent’s state of residence.<sup>45</sup>

**Conclusion.** Arbitration may offer a relatively efficient, cost-effective method for dispute resolution in many cases. Such efficiency, however, may be achieved at the expense of valuable discovery options. Unless a non-party has agreed to discovery or agreed to be bound by the rules of the arbitration forum, the options for non-party discovery can be severely restricted. Some jurisdictions prohibit the issuance of non-party subpoenas entirely under the FAA; others allow it, but only to a limited extent. Judicial enforcement of such subpoenas is often problematic because of jurisdictional and venue issues. The IUAA may provide additional options that should be explored. In all events, however, attorneys advising clients on whether to agree to arbitration must take into account the arbitration rules of the likely forum, the possible need for discovery from non-parties, the location of the non-parties, and the views of the jurisdiction in which judicial enforcement of an arbitrator’s subpoena may be required. Depending on these factors, the obstacles to full discovery may outweigh the advantages of arbitration. □

42 710 ILCS 5/7(b) (emphasis added).

43 See *People v. Rinehart*, 2012 IL 111719, ¶126, 962 N.E.2d 444, 453 (2012) (“two parts of one statute concerning the same subject must be considered together in order to produce a ‘harmonious whole’”).

44 A North Carolina court concluded similarly in interpreting its own arbitration statute, also based on the Uniform Arbitration Act (1956). See *Prime South Homes, Inc. v. Byrd*, 102 N.C.App. 255, 260, 400 S.E.2d 822, 826 (1991).

45 Some states have adopted statutes based on a more recent version of the uniform act, the Uniform Arbitration Act (2000), which contains more expansive discovery provisions.

37 *Schlumbergersema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647 (D. Minn. January 9, 2004).

38 Fed. R. Civ. P. 37.

39 *Schlumbergersema, Inc.*, 2004 WL 67647 at \*2.

40 710 ILCS 5/7.

41 See C. Drahozal, Federal Arbitration Act Preemption, 79 INDIANA L.J. 393, 417-420 (2004).