

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

VOL. 37 NO. 4 APRIL 2019

Arbitration

When, Where and Whether: The Confusing Law of Third-Party Evidence

BY BENJAMIN J. EICHEL & MATTHEW H. ADLER

The U.S. Supreme Court has demonstrated with increasing frequency over the past 20 years a particular fascination with arbitration. There have been at least 20 Scotus cases in the past decade on arbitration, including three cases in the current term—two in the first week in October.

By contrast, even though there remains far more cases in federal court than in arbitration, and even though personal jurisdiction

is both a frequently litigated issue and an evolving concept in our Internet age of virtual “presence,” there have been only three cases expanding on federal jurisdictional issues.

One might think that by this point all that is required to be said from the Supreme Court about arbitration has been said.

But one would be wrong. The Supreme Court’s seeming obsession with arbitration is a mile deep but only an inch wide.

Most of the cases of the past decade are concerned exclusively with arbitration jurisdiction—so-called questions of arbitrability—and, in particular, with whether arbitration clauses can exclude any form of class action even though some states are virulently opposed to these exclusions and some federal statutes arguably are adversely affected by them. See *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DIRECTV Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013), *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, West Inc. v. Jackson*, 561 U.S. 63 (2010).

Left virtually unmentioned upon by the Supreme Court have been particular questions of arbitration procedure. The Court has shown itself to be far more concerned with the dog’s chase of the arbitration car than with what the dog does once it gets there.

Nowhere has the absence of guidance been felt so acutely and painfully as on the subject of third-party discovery in arbitration. This is not an esoteric topic. Any litigator reading this article knows how critical, and frequently dispositive, the testimony and documents of a non-party to the dispute can be to the outcome.

Third-party witnesses usually do not have a stake in the result of the case and so can emerge to the finder of fact as the most credible witnesses in the case. They also may have documents unavailable to any of the parties.

U.S. civil procedure recognizes this and makes it easy for a party to access evidence from third parties. Federal Rules of Civil Procedure Rule 45 was amended in 2013 to make third-party discovery more straightforward. At the state level, a significant majority of states have adopted some form of the Uniform Interstate Depositions and Discovery Act, which simplifies the process for state courts in enforcing out-of-state subpoenas.



(continued on page 55)

Arbitration

(continued from front page)

The result is that third parties can be subpoenaed and then served virtually anywhere in the United States; they can be made to show up for depositions and produce documents, and they can be called to give evidence at trial. Third-party testimony is a core element of civil litigation.

Not so in arbitration. The rules of third-party evidence in arbitration are a mess. At first blush, it might not appear so, since Federal Arbitration Act Sec. 7 provides in plain terms that the arbitrator has the power to summon third-party witnesses to give testimony and provide documents at the hearing:

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.

Notwithstanding this seemingly clear language in the statute, little is clear in practice. The confusion and uncertainty involves three

variables: when, where, and what court will enforce a subpoena, if any?

1. *When?* Fifteen years after the Third U.S. Circuit Court of Appeals' restrictive reading of the FAA in *Hay Group*—a case discussed full below and one that provoked substantial commentary—there remains a growing and substantial circuit court split as to whether *pre-hearing* discovery from third-party witnesses is allowed at all—and if so, with what parameters and what participation from the arbitrator(s).

(On the circuit split, see Heather L. Heindel, Third-Party Document Discovery in Arbitration? Do Not Count On It, ABA Forum on Construction Law (Dec. 5, 2018) (available at <http://bit.ly/2H6gPat>); on the *Hay Group* commentary, see Third Circuit Says Arbitrators Cannot Force Non-Parties to Provide Documents for Review, Michael R. Triplett, *BNA* (March 15, 2004); Second Circuit Adds to Circuit Split on Arbitration Discovery, Holding that Third Parties Cannot be Compelled to Produce Discovery Documents Under 7 of the Federal Arbitration Act, Cleary Gottlieb (Dec. 4, 2008) (available at <http://bit.ly/2HqWyf0>); Rolling With *Hay*: Compelling Third-Party Discovery in Arbitration Proceedings,

David J. McLean and Vincent Mekles, *N.J. Law Journal*, Vol. CXCIV-No. 13 (March 30, 2009).)

2. *Where?* There is disagreement as to the territorial reach of arbitral subpoenas in compelling a witness to give testimony and/or produce documents when the witness and/or the documents are located outside of the arbitral seat.

3. *What court?* There is disagreement over whether the federal courts have exclusive jurisdiction on actions to compel compliance with an arbitral subpoena and how jurisdiction of that court is properly determined.

The result is that even though arbitration takes place under a federal statute, and even though the Supreme Court has repeatedly claimed that courts should construe arbitration decisions with a decided preference toward arbitration (FAA “Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983); see also *Perry v. Thomas*, 482 U.S. 483, 489 (1987)), there is at present no consistent body of precedent that serves as a guidepost to

(continued on next page)

Arbitration

(continued from previous page)
practitioners.

There are no set standards. The “when” and the “where” questions are very much localized; make predictions impossible; raise costs; and, most of all, affect arbitration adversely. The result is higher costs: despite choosing arbitration as a supposedly more efficient process, parties may have to fight pitched battles within the arbitration or in related court proceedings to secure access to evidence.

This article examines the confusion in each of these “when,” “where,” and “what court” areas; analyzes competing arguments in favor of the present chaos—primarily that burdens on third-party discovery make arbitration more “efficient”—and finally, proposes a needed procedural amendment to the Federal Arbitration Act to eradicate the confusion.

I. When during the Course of an Arbitration Can a Party Obtain Third-Party Evidence?

As compared to the issues of territoriality (Section II below) and what court (Section III), the issue of “when” is comparatively straightforward, because the outcomes of any given court are somewhat predictable thanks to the federal appeals courts.

The result is that many circuit practitioners can predict what will happen, but the prediction can depend on the fates of fortune in dictating the location of the third-party evidence.

Luck, not consistency, dictates success here. There remains a substantial need for clarification by the Supreme Court or, failing that, for the type of amendment proposed below.

The Sixth and Eighth Circuits both take the expansive view that the policies underlying the FAA require that parties to an arbitration should be able to take discovery from third parties in advance of any arbitration hearing.

The Second, Third, and Ninth Districts have issued decisions making it clear that courts will not enforce arbitral subpoenas for documents and testimony prior to any hearing and outside of the arbitrators’ presence. While those courts generally do not permit discovery, some of them have accepted and even encouraged a loophole practice whereby

the arbitrators can hold a “mini-hearing” prior to the main merits hearing in order to obtain the necessary third-party evidence.

The Fourth Circuit comes out in the middle and permits discovery “under special circumstances.” Those cases and the policies supporting them are discussed below.

A. *Courts Taking a Permissive View of Third Party Discovery*: The Eighth U.S. Circuit Court of Appeals in *Security Life Ins. Co. of Am. v. Duncanson & Holt Inc.*, 228 F.3d

Setting Standards

The problem: The compulsory participation of third parties in arbitration.

The law: ‘[L]ittle is clear in practice.’

The remedy: Reconcile the questions of when, where and in what court by amending the Federal Arbitration Act. After examining the uncertainty, the authors propose new language for Congress to consider.

865, 870–71 (8th Cir. 2000), explained that the efficient resolution of disputes through arbitration “is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing.” It enforced an arbitrator’s subpoena for documents on a third party without regard to where the witness possessing the documents resided. *Id.* at 872. The Sixth Circuit took the same approach in *Television and Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1010 (6th Cir. 1999).

B. *Decisions Prohibiting Pre-Hearing Discovery from Third Parties*: The Third Circuit in *Hay Group Inc. v. E.B.S. Acquisition Corp.* 360 F.3d 404 (3d Cir. 2004), rejected the Sixth and Eighth Circuits’ analysis, holding that the FAA did not give arbitrators subpoena power to require third parties to produce documents in advance of any hearing.

Then-Circuit Judge Samuel A. Alito Jr. reasoned that “[t]his slight redistribution of bargaining power is unlikely to have any substantial effect on the efficiency of arbi-

tration. Moreover ... the rule we adopt in this case may in fact facilitate efficiency by reducing overall discovery in arbitration.” The Second Circuit agreed with the *Hay Group* decision in *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005).

More recently, the Ninth Circuit joined the Second and Third Circuits and held that “Section 7 of the FAA does not grant arbitrators the power to order third parties to produce documents prior to an arbitration hearing.” *CVS Health Corp. v. Vividus LLC*, 878 F.3d 703, 708 (9th Cir. 2017).

C. *The “Mini Hearing” Method*: In a concurring opinion in the *Hay Group* case, then-Circuit Judge Michael Chertoff stated that the court’s opinion should not completely foreclose a party from obtaining the sought evidence in advance of the prime merits hearing:

Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence. See David M. Heilbron, *The Arbitration Clause, the Preliminary Conference, and the Big Case*, 45 *Arb. J.* 38, 4344 (1990).

360 F.3d at 413. The Second Circuit joined with approval in this approach in *Stolt-Nielsen v. Celanese*, holding that the arbitration panel had the authority to compel a third party to testify and produce documents in advance of the full merits hearing so long as the evidence was taken before the arbitration panel:

Any rule there may be against compelling non-parties to participate in discovery cannot apply to situations, as presented here, in which the non-party is “summon[ed] in writing ... to attend before [the arbitrators] or any of them as a witness and ... to bring with him ... [documents] which may be deemed material as evidence in the case.” 9 U.S.C. § 7.

Stolt-Nielsen v. Celanese, 430 F.3d at 577-578; see also *Life Receivables Trust v. Syndicate 102 at Lloyd's London*, 549 F.3d 210 (2008).

For some courts, the *Hay Group* and *Stolt-Nielsen v. Celanese* decisions left open the question of whether the tribunal members needed to be physically present for the third-party testimony or document production, or whether testimony of a distant third party could be heard by the arbitrator via phone or videoconference.

The court in *Westlake Vinyls Inc. v. Cooke*, No. 3:18-MC-00018, 2018 BL 491532 (W.D. Ky. Aug. 20, 2018) (Magistrate recommendation accepted in 2018 BL 491535 (W.D. Ky. Oct. 16, 2018)), addressed that issue and held that an arbitrator can order pre-hearing discovery of a third party, but that discovery must occur in the context of an actual hearing with *live* participation by at least one arbitrator. *Id.* (“Due to lack of physical presence of at least one arbitrator at the hearing described by the subpoena, the Court lacks authority to enforce it pursuant to FAA, Section 7.”)

D. Discovery Available Only Under Special Circumstances: The Fourth Circuit has taken a slightly different approach, which while it has some facial appeal appears difficult to implement in practice and provides insufficient guidance for lower courts. In *COMSAT Corp. v. Natl. Science Foundation*, 190 F.3d 269, 275 (4th Cir. 1999), the court held that Section 7’s plain meaning did not empower an arbitrator to issue prehearing discovery subpoenas to nonparties. 190 F.3d at 275.

In dicta, however, the *COMSAT* court suggested that an arbitration panel might be able to subpoena a nonparty for pre-hearing discovery “under unusual circumstances” and “upon a showing of special need or hardship.” *Id.* at 276.

II. What are the territorial limits on obtaining third-party evidence?

Location of the witness, and the documents controlled by that witness, is the second variable affecting availability of third-party evidence in arbitration.

Courts must grapple with their authority over third parties outside of the court’s district. This in turn leads to questions regarding the proper interpretation of Fed. R. Civ. P. 45, the

federal rule for subpoenas.

While Rule 45 has been amended to make taking discovery from third parties easier—the 2013 amendments to Rule 45 included requiring that subpoenas issue from the court where the underlying dispute is pending and permitted nationwide service of process (Fed. R. Civ. P. 45(a)(2), (b)(2))—the arbitration decisions have apparently ignored these amendments and have done little to aid practitioners in obtaining necessary third-party evidence.

Uncertainty remains. In *Amgen Inc. v. Kidney Ctr. of Delaware County Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995), an arbitrator sitting in Chicago issued a subpoena for a deposition of a Pennsylvania company, KCDC. Amgen then sought to enforce the subpoena in Pennsylvania’s Eastern District, where KCDC is located, but the court transferred the matter to Illinois’ Northern District, the proper venue under FAA Section 7. 9 U.S. Code § 7 (“[U]pon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators.”).

KCDC then objected to the subpoena on the basis that “the arbitrator has no authority to subpoena persons who are located outside of the district in which he sits or beyond 100 miles of the site of the arbitration.” *Id.* at 880.

The court rejected this argument and held that it must be possible for parties to obtain evidence located outside of the judicial district where the arbitration is taking place:

To find that the wording of the FAA precludes issuance and enforcement of an arbitrator’s subpoena of a witness outside the district in which he or she sits, particularly where, as here, such discovery is agreed upon by the parties to the arbitration, would likely lead to rejection of arbitration clauses altogether.

Id. at 882. The *Amgen* court “gap-filled” the FAA by relying on the portion of Rule 45 that permits an attorney to issue subpoenas for depositions under the courts where the deposition is to take place and that a court sitting in another jurisdiction could then enforce the subpoena. *Id.* at 883. See also *Ferry Holding Corp. v. GIS Marine LLC*, No. 4:11-MC-687, 2012 BL 6546 (E.D. Mo. Jan. 11, 2012) (fol-

lowing *Amgen* and permitting counsel to issue subpoenas for documents located in the Eastern District of Louisiana).

Many years later, another Northern District of Illinois court rejected this analysis and refused to enforce an arbitration subpoena when it did not comply with Rule 45’s territorial limitations. *Alliance Healthcare Servs. Inc. v. Argonaut Private Equity LLC*, 804 F. Supp. 2d 808 (N.D. Ill. 2011). The court explained that FAA Section 7 limits the court’s “arbitration subpoena enforcement authority to the authority it has under existing law,” meaning the power conferred by Rule 45. *Id.* at 813. The court acknowledged this created a gap, “[b]ut it is up to Congress, not a court, to fill such gaps.” *Id.*

Similar to *Alliance Healthcare*, the Second Circuit in *Dynegy Midstream Servs. LP v. Trammochem*, 451 F.3d 89 (2d Cir. 2006) addressed the situation of arbitrators issuing a subpoena for out-of-state evidence. The court held that the FAA did not provide the arbitrators with nationwide service of process and that the arbitrators were limited as if they were a district court sitting in New York. *Id.* at 95. The court refused to follow the *Amgen* gap-filling role because Section 7 only permits arbitrators to issue subpoenas, not lawyers. *Id.* at 96.

Finally, turning back to one of the first discussed cases above, the Eighth Circuit apparently does not consider the territoriality to be an issue at all. The court in *Security Life Ins. Co. of Am. v. Duncanson & Holt Inc.*, 228 F.3d 865, 870–71 (8th Cir. 2000), did not mind at all that the arbitral subpoena for the production of documents did not comply with Rule 45’s territorial limitations. *Id.* at 872 (“Whether or not Transamerica is correct in insisting that a subpoena for witness testimony must comply with Rule 45, we do not believe an order for the production of documents requires compliance with Rule 45(b)(2)’s territorial limit.”)

III. Does a Federal Court have Jurisdiction over a Section 7 Action?

The final frustrating factor for arbitration lawyers is that even in jurisdictions where there may be good answers as to “when” and “where,” there might not be an available court to enforce the subpoena.

(continued on next page)

Arbitration

(continued from previous page)

Despite federalizing arbitration procedure and codifying that arbitration is enforceable, the FAA does *not* confer subject-matter jurisdiction on federal district courts. See *Stolt-Nielsen v. Celanese* at 572 (“parties invoking Section 7 must establish a basis for subject matter jurisdiction independent of the FAA”); *Amgen* at 567 (7th Cir. 1996) (holding that the FAA “itself does not create subject matter jurisdiction for independent proceedings, whether they involve § 4 or § 7”); see also *American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1007-08 (6th Cir. 1999) (holding that FAA Section 7 did not bestow jurisdiction but finding federal jurisdiction pursuant to the Labor Management Relations Act of 1947).

To get into federal court, an arbitration must qualify for diversity jurisdiction just as any other federal court case. A \$50,000 arbitration between citizens of different states, or a \$1 million arbitration between Pennsylvanians, will generally not provide the federal court with jurisdiction. 28 U.S. Code § 1332.

This collides with the FAA’s requirement that any action to enforce a subpoena be brought in federal district court. The cases below show how arbitration parties have struggled to address this issue.

In *Beck’s Superior Hybrids Inc. v. Monsanto Co.*, 940 N.E.2d 352 (Ind. Ct. App. 2011) Monsanto and Dupont were parties to a New York arbitration. To obtain documents from third party Beck’s, the arbitral tribunal issued a subpoena to Beck’s, ordering Beck’s to appear at a preliminary hearing, in Indiana.

The arbitration panel and the parties took this approach because they were presumably aware that they could not order Beck’s, an Indiana company with no New York contacts, to appear in New York. And under *Stolt-Nielsen v. Celanese*, a New York court would not enforce a documents-only subpoena outside of an arbitrator’s presence.

Beck’s refused to produce documents and Monsanto filed suit in Indiana state court to enforce the subpoena. Monsanto brought suit in Indiana because it admitted that New York’s Southern District did not have jurisdiction because of a lack of diversity (both Dupont

and Monsanto are Delaware corporations).

The Indiana Court of Appeals held that it was preempted from enforcing the subpoena because Congress was clear in enacting FAA Section 7: “This limited federal jurisdiction for enforcement is a reflection of Congress’ desire to keep arbitration simple and efficient, ‘to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law,’ and not to burden state courts with incidental enforcement procedures.” Id. at 362-63.

Monsanto argued that for Section 7 purposes, the tribunal would be sitting in Indiana when one of the arbitrators convened a hearing for obtaining the documents from Beck’s. The court, however, rejected this argument because a majority of the arbitrators would never leave New York City. Id. at 364, citing Section 7 (“the arbitration panel, or a majority of its members”).

While the *Beck’s* court focused on the citizenship of the arbitration parties, rather than focusing on the citizenship of the parties seeking the evidence and the relevant third party, that is not always the case. In *Federal Ins. Co. v. Law Offices of Edward T. Joyce*, No. 08 C 0431, 2008 BL 61782 (N.D. Ill. Mar. 13, 2008), the party to the arbitration initiated an action to compel compliance with an arbitral subpoena. The court held it had jurisdiction because the party to the arbitration and the third party were from different states.

Similar to diversity, determining the amount in controversy is not settled. The court in *Chi. Bridge & Iron Co. v. TRC Acquisition LLC*, No. 14-1191, 2014 BL 208908 (E.D. La. July 29, 2014), determined that while there was diversity, the plaintiff failed to satisfy the amount-in-controversy requirement and could not rely upon the amount at stake in an underlying arbitration because that amount was not sought from the defendant in the federal case, which was a third party to the arbitration.

In contrast, the court in *Next Level Planning & Wealth Mgmt. LLC v. Prudential Ins. Co. of Am.*, No. 18-MC-65, 2019 BL 47933, at *3 (E.D. Wis. Feb. 13, 2019), addressed the problem differently and held that the amount in controversy should be assessed based on the value of the arbitration.

Another recent set of cases all arising from

the same single California arbitration further demonstrates the problem. Similar to the *Beck’s* court, the court in *Gilead Sciences Inc. v. Roche Molecular Sys. Inc.*, No. 1777 CV01626, 2017 BL 487247 (Mass. Super. Ct. Nov. 27, 2017) rejected a party’s attempt to make a Section 7 compliance action in state court.

A New York state court reached the opposite conclusion as part of the same arbitration. In *Matter of Roche Molecular Sys. Inc. v. Gutry*, 76 N.Y.S.3d 752 (Sup. Ct. 2018), Roche requested that the tribunal authorize Roche to seek a commission—a common step in obtaining an out-of-state subpoena for a state court action—from a California Superior Court to take a former employee’s deposition in New York. After the tribunal provided authorization, the California Superior Court issued the commission. New York counsel for Roche then served the former employee with a subpoena directing him to appear for a deposition.

The court held that a California Civil Procedure Rule permits tribunals “to authorize a party to seek the assistance of a California court in granting a subpoena for the taking of a deposition.” (Illinois has a similar statute as California’s. See 710 Ill. Comp. Stat. § 30/20-55 [“Court assistance in taking evidence. The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”])

The New York *Roche Molecular* opinion also said that the commission issued by the California court satisfied the meaning of “out of state subpoena” provided by New York’s version of the Uniform Interstate Depositions and Discovery Act.

Finally, the court rejected the argument that the FAA prohibits pre-hearing depositions, because state law could provide parties with greater rights in arbitration than those provided by the FAA:

While the substantive rules of the FAA apply in state court as well as in federal court, in *Southland Corp. v. Keating* (465 U.S. 1, 104 S Ct 852, 79 L Ed 2d 1 [1984]), the U.S. Supreme Court explained that the purpose of the preemption of state substantive rules regarding arbitration was “to foreclose state legislative attempts to undercut the enforceability of arbitration

agreements” (465 U.S. at 16), but it went on to clarify that it did not intend such preemption to extend to state rules of civil procedure that are applicable in state proceedings (465 U.S. at 16 n. 10).

Id. at 757.

The New York *Roche Molecular* court further explained that cases prohibiting discovery subpoenas were inapplicable because (1) the case does not involve an arbitral subpoena, but rather a New York subpoena based on a California commission and (2) a prior New York appellate court decision held that depositions of nonparties may be directed in an FAA arbitration where there is a showing of ‘special need or hardship,’ such as where the information sought is otherwise unavailable.” *ImClone Sys. Inc. v Waksal*, 22 A.D.3d. 387, 802 N.Y.S.2d. 653 [1st Dept. 2005]).

The *Matter of Roche* court distinguished itself from the related Massachusetts action by noting that Massachusetts has not adopted the “Uniform Interstate Depositions and Discovery Act, so the procedure employed in the dispute before this court was not available there. The analysis employed by the Massachusetts court is inapplicable here.” *Matter of Roche Molecular Sys. Inc. v. Gutry*, 76 N.Y.S.3d at 759.

WHAT ARE THE POSSIBILITIES?

Having examined the issues of “when” “where” and “what court,” we will now explore how these issues play out with the following hypothetical:

JoJo Enterprises and Fultz Inc., both Philadelphia companies, enter into a contract in 2017 that includes an arbitration clause, calling for American Arbitration Association in Philadelphia. In 2019, Fultz is sold to Magic Co., after which the Fultz executive who negotiated the contract with JoJo leaves Fultz/Magic Co. After operating the business for a month, Magic, as the new owner of Fultz, alleges that JoJo breached the sale of business contract. It demands arbitration under the contract’s dispute resolution clause. Three months thereafter, the parties convene for the initial arbitration conference, but right before the conference occurs, the executive who

negotiated the initial contract between JoJo and Fultz on behalf of JoJo moves to California. At this point in time, the individual who negotiated the contract for Fultz has retired but remains in Philadelphia. It becomes clear in the initial conference that a key issue in the case will be the proper construction of ambiguous terms in the contract—but now neither party has an employee on its payroll who negotiated the agreement

The following applies the when, where and what court questions considered above to the hypo.

First, when is the evidence available to the parties? Because the arbitration is seated in Philadelphia and the former employees are located in Philadelphia and California, *Hay* and *Vividus* control, and so the only means of obtaining relevant documents and testimony will be through a live hearing before a majority of the arbitrators.

Second, as to the where, there is no dispute that the arbitration panel could order Fultz’s former employees to appear at a Philadelphia hearing, but the majority of decisions would prevent the parties from enforcing an arbitral subpoena against the JoJo executive in California.

Third, as to what court, because the arbitration is seated in Philadelphia, most courts would agree that the Eastern District of Pennsylvania is the exclusive venue for enforcing an arbitral subpoena.

If one of the parties attempts to enforce a subpoena against the Fultz employee—a Philadelphia resident—there would not be diversity. In contrast, if one of the parties attempts to enforce a subpoena against the JoJo employee, who is a California resident, there would be diversity.

A court, however, could also independently have jurisdiction over an FAA Section 7 action as a result of a prior action relating to a dispute between the underlying parties. See, e.g., *Shasha v. Malkin*, No. 14-cv-9989 (AT) (RWL), 2018 BL 239435, at *2 (S.D.N.Y. July 05, 2018) (“This Court had federal question jurisdiction when Plaintiffs filed this lawsuit and retains jurisdiction over any subsequent application involving the same agreement to arbitrate.”). The result is a litigation minefield of uncertainty with a significant possibility of

an uneven playing field where one party is able to obtain its desired evidence and the other is left defending a claim with one arm tied behind its back.

As discussed below, this type of result should not be tolerated and requires change.

AN IMMODEST PROPOSAL

The FAA’s third-party discovery provision needs to be amended to address the situation that the hypo above illustrates.

The Federal Arbitration Act has been in effect since 1925. During that time, and with increasing rapidity over the last generation, arbitration has become more widely used, precisely as the drafters of the FAA intended.

And during the decade since the Supreme Court’s rejection of class-action waivers in arbitration clauses in *AT&T Mobility v. Concepcion* (and its multiple progeny), arbitration has become more and more controversial, with calls mounting for more consumer-friendly changes to the process. See “Senate Strikes Down CFPB Arbitration Rule,” Matthew H. Adler, et al., (Oct. 25, 2017) (available at <http://bit.ly/2SRRIPA>), and “Garden State Says #MeToo: Bill Barring Non-Disclosure Clauses Passes in Both Chambers,” Blank Rome (Feb. 4, 2019) (available at <http://bit.ly/2TCbUnF>).

But this article has little to do with social policy, important though those questions are to arbitration’s future. Instead, this article focuses on basic logistics.

Arbitration right now is not working to achieve the full exposition of the facts necessary in complex cases requiring third-party evidence. That is a fact. Whether that is worth it—whether the intent of arbitration is an incomplete record—is a question worth pondering.

But given that most institutional arbitration rules now swing sharply in favor of more discovery, including electronic discovery, that seems a difficult proposition to maintain. AAA Commercial Arbitration Rules and Mediation Procedures (effective Oct. 1, 2013) (R-23 empowers the arbitrator to enforce its rules relating to “imposing reasonable search parameters for electronic and other documents”); JAMS Comprehensive Arbitration Rules & Procedures, (effective July 1, 2014) (R-17: “The Parties shall cooperate in good

(continued on next page)

Arbitration

(continued from previous page)

faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ('ESI')) relevant to the dispute or claim immediately after commencement of the Arbitration.”) But see CPR Institute Administered Arbitration Rules (effective March 1, 2019) (Rule 11—Discovery: “The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.”).

The solution, which should *not* be contro-

versial, is to amend the FAA. It should provide for (a) the right to take third party document and deposition discovery and (b) means to enforce any arbitral subpoena. The following changes to Section 7 reflected in the below redline would achieve both of these goals:

Upon a showing of good cause, tThe 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 at a hearing or for a pre-hearing deposition outside the presence of any arbitrators or any of them as a witness and to order any witness 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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of

the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; ~~if~~ any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of the witness and/or evidence resides shall have jurisdiction to hear any petition to compel such person or persons to comply with the subpoena and before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States. 