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**OBTAINING EVIDENCE FROM NON-PARTIES IN INTERNATIONAL
ARBITRATION IN THE UNITED STATES**

*The International Commercial Disputes Committee
of the Association of the Bar of the City of New York*

Introduction

Section 7 of the Federal Arbitration Act (“FAA”)—which applies to any arbitration in the United States involving interstate or international commerce—provides:

The arbitrators . . . 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 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 such person or persons 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.¹

Under Section 7, the ability of the parties to and arbitrators in domestic or international arbitrations to obtain documents and testimony from non-parties is far more circumscribed than the ability of litigants in US litigation to obtain evidence from non-parties in federal court. It is subject, in the first instance, to the discretion of the arbitrators, who must issue any subpoena and, potentially, to the review of the federal district court in the place where the arbitrators are sitting, which must enforce it.²

¹ 9 USCS § 7.

² In these respects, the procedure for obtaining evidence from non-parties under Section 7 is comparable to the procedure under the law of a number of foreign jurisdictions. For example, in England and Wales, Section 43(1) of the Arbitration Act 1996 permits a party to arbitral proceedings to “use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.” Under Section 43(2), “This may only be done with the permission of the tribunal or the agreement of the other parties.” Arbitration Act 1996, c. 23 (Eng.). *See also*, Section 1050 of the German Civil Procedure Statute: “[T]he arbitral tribunal or a party with the approval of the arbitral tribunal may request court assistance in taking evidence or performance of other judicial acts which the

Two main issues have confronted courts under Section 7. The first issue is whether it authorizes arbitrators to compel *pre-hearing* document production or testimony from non-parties.³ There is a conflict regarding this issue among the circuits and between federal and state courts in New York. The Second⁴ and Third⁵ Circuits have held that Section 7 does *not* authorize arbitrators to order the pre-hearing production of documents or testimony from non-parties; rather, non-parties may be ordered to provide documents and testimony only at a hearing before one or more of the arbitrators. The Fourth Circuit has suggested that a federal court may compel a non-party to comply with an arbitrator's subpoena for prehearing document production or testimony upon a showing of "special need or hardship."⁶ In New York, the Appellate Division for the First Department, purporting to follow the Fourth Circuit, has held that, under Section 7, courts may require pre-hearing document production and testimony from non-parties in cases of "special need."⁷ The Sixth⁸ and Eighth Circuits⁹ have concluded that arbitrators are authorized by Section 7 to issue orders requiring pre-hearing production of documents from non-parties, but have not addressed the question whether pre-hearing testimony is also permitted.

The second issue is whether Section 7 imposes any territorial limitation on an arbitrator's power to summon a non-party to testify and produce documents, or upon the power of a federal district court to enforce such an order. There is a split of authority on this question as well. The Second Circuit has held that Section 7 does *not* authorize nationwide service or enforcement of arbitral orders for testimony or production of documents and that the territorial limitations set forth in Fed. R. Civ. P. 45 for service and enforcement of subpoenas issued by district courts

arbitral tribunal is not empowered to carry out. Unless it regards the application as inadmissible, the court shall execute the request according to its rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions." Zivilprozeßordnung [ZPO] [Civil Procedure Statute] Jan. 1, 1998, Bundesgesetzblatt, Teil I [BGBl. I], § 1050 (F.R.G.); Article 35(1) of the Japanese Arbitration Law): "The arbitral tribunal or a party may apply to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary as entrustment of investigation, examination of witnesses, expert testimony, investigation of documentary evidence (excluding documents that the parties may produce in person) or inspection (excluding that of objects the parties may produce in person) prescribed in the Code of Civil Procedure." Chusai Ho [Arbitration Law], Law No. 138 of 2003, art. 35 (Japan); Article 184 of the Swiss Private International Law Act: "Where the assistance of state authorities is needed for taking evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court of the seat of the arbitral tribunal. Such court shall apply its own law." Bundesgesetz über das Internationale Privatrecht (IPRG) [Private International Law Act], Dec. 18, 1987, AS 1776 (1988), art. 184, ¶ 2 (Switz.); and Section 27 of the UNCITRAL Model Law: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent Court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

³ Courts have accepted that arbitrators have power to require pre-hearing discovery from the *parties* to the proceeding. *See* *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 217 (2d Cir. 2008) ("Although section 7 does not distinguish between parties and non-parties to the actual arbitration proceeding, an arbitrator's power over parties stems from the arbitration agreement, not section 7. . . . Where agreements so provide, that authority includes the power to order discovery from the parties in arbitration since 'the FAA lets parties tailor some, even many features of arbitration by contract, including . . . procedure.' . . . An arbitrator can enforce his or her discovery order through, among other things, drawing a negative inference from a party's refusal to produce . . . and, ultimately, through rendering a judgment [sic] enforceable in federal court. . . .") (citations omitted).

⁴ *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008).

⁵ *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).

⁶ *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999).

⁷ *ImClone Sys. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (N.Y. App. Div. 2005).

⁸ *Amer. Fed'n of TV & Radio Artists v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999).

⁹ *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865 (8th Cir. 2000).

apply to arbitral orders.¹⁰ The Third Circuit, in an unpublished opinion, has reached the same conclusion.¹¹ In contrast, the Eighth Circuit has held that Section 7 permits nationwide service of arbitral orders for non-party production of documents and that a district court in the place where the arbitrators are sitting has jurisdiction to enforce such orders, even against non-parties located elsewhere.¹² One federal district court has adopted what has been characterized as a “compromise position,” holding that the territorial limits of Rule 45 apply but that a court in the place of arbitration may avoid those limits by authorizing an attorney for a party to the arbitration to issue a subpoena in the enforcement proceeding as an officer of a federal district court in the place where discovery is sought.¹³

The FAA was enacted in 1925, before discovery was commonly available in U.S. courts. Under Section 7, arbitrators were given power to require testimony and production of documents from non-parties comparable to that of federal courts of that era. Considering the language of Section 7 and the historical background against which it was enacted, this Committee agrees with the reasoning of those decisions that have held that Section 7 does *not* authorize courts to enforce arbitral subpoenas for pre-hearing document production or testimony from non-parties and does *not* authorize nationwide service or enforcement of arbitral subpoenas. Despite these limitations, as a practical matter, documents and testimony can, under Section 7, be obtained from non-parties prior to the hearing on the merits. Both the Second and Third Circuits have held that an arbitral subpoena may require production of documents or testimony at a “pre-merits” hearing convened for that purpose—a hearing that may then be adjourned to give the parties time to review the material produced.¹⁴ In order to avoid the territorial limitations imposed on service and enforcement of arbitral subpoenas, the pre-merits hearing may be scheduled for a place within 100 miles of the person subject to the subpoena. The need to employ these measures has been the subject of a good deal of debate.

In the Committee’s view, the ability under the FAA to obtain documents and testimony from non-parties as evidence in arbitrations should remain limited and subject to the control of the arbitrators and the courts. However, with respect to production of documents, Section 7 should be modified to remove procedural obstacles and lacunae that are vestiges of a bygone era and that impose unnecessary burdens and costs on all concerned—the parties, the arbitrators and the non-parties who are subject to the subpoena. The Committee does not advocate a piecemeal amendment of the FAA merely to correct these deficiencies. As explained below, amending only Section 7 of the FAA might be perceived as an expansion of the scope of arbitrators’ authority to obtain evidence from non-parties—a perception that could potentially discourage some parties and their counsel from agreeing to arbitrate in the United States.

If and when other provisions of the FAA are amended, the Committee believes that Section 7 should be amended in two respects:

¹⁰ *Dynergy Midstream Servs. v. Trammochem Div. of Transammonia, Inc.*, 451 F.3d 89 (2d Cir. 2006).

¹¹ *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 Fed. Appx. 26 (3d Cir. 2002).

¹² *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865 (8th Cir. 2000).

¹³ *Amgen, Inc. v. Kidney Ctr. of Del. County*, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995).

¹⁴ *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413 (3d Cir. 2004). With respect to documents, as noted in a concurring opinion in *Hay Group*, “the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.” *Id.*

First, Section 7 should be amended to eliminate any requirement of appearance at a hearing for production of documents by non-parties.¹⁵ Because providing testimony potentially imposes a greater burden on non-parties than document production, the Committee would retain Section 7's requirement of an arbitrator-attended hearing for the taking of testimony from non-parties.

Second, Section 7 should be modified to permit arbitral subpoenas directed to non-parties outside the district in which the arbitrators are sitting to be served and enforced in the place where the prospective witness or document custodian is located.

This report also contains the Committee's recommendations for best practices with respect to the procedures available under existing law for obtaining evidence from non-parties in international arbitrations¹⁶ The Committee believes that rules, practices and expectations concerning disclosure and evidence-taking in international arbitration differ in significant respects from the rules, practices and expectations prevailing in domestic arbitration and that best practices for international cases should reflect those differences. Accordingly, while the Committee believes that Section 7 provides a useful means of obtaining essential non-party evidence in appropriate cases, it also recommends that in international arbitrations in the United States, arbitrators should limit resort to Section 7 to exceptional circumstances, issuing subpoenas for non-party evidence only when the evidence sought is unavailable from any of the parties to the arbitration and is required for the fair and just resolution of the parties' dispute. The Committee also believes that, in issuing such orders, arbitrators in international cases should be guided by international standards for the scope of disclosure and evidence, such as those reflected in the IBA Rules on the Taking of Evidence in International Arbitration (adopted 29 May 2010), and should take measures to minimize the burden that such orders impose upon non-parties.

I. The current state of U.S. law

A. There is a split among the Circuits and between federal and state courts in New York as to whether section 7 of the FAA authorizes arbitrators to issue subpoenas for pre-hearing document production and testimony from non-parties.

The Circuits are divided on whether Section 7 authorizes arbitrators to require pre-hearing production of documents and testimony from non-parties. The Second and Third

¹⁵ For cases in federal court, Rule 45(c)(2)(A) provides that no such appearance is required either for discovery or for trial. FED. R. CIV. P. 45(C)(2)(A). This provision is considered to be protective of non-parties and to avoid undue burden and expense. This Committee sees no justification for a different rule for production of documents by non-parties in arbitration.

¹⁶ Under 9 U.S.C. § 202, the New York Convention applies to agreements for arbitration in the United States between citizens of different countries or between citizens of the United States if the relationship between them "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 933 n.2 (2d Cir. 1983); *see also Yusuf Alghanim & Sons v. Toys 'R' Us, Inc.*, 126 F.3d 15, 18–19 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998); *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481–82 (7th Cir. 1997), *cert. denied*, 522 U.S. 811 (1997).

Circuits, relying upon the plain language and historical background of Section 7, have held that the FAA does not provide arbitrators with such authority. The Fourth Circuit has agreed, but has indicated that Section 7 would permit a district court to enforce an arbitral subpoena for pre-hearing document production or testimony from a non-party when a “special need” is shown—a position that has been rejected by the Second and Third Circuits. The Sixth and Eighth Circuits have concluded that the power expressly granted to arbitrators under Section 7 to require non-parties to appear and produce documents at a hearing implicitly includes the “lesser power” to require production of documents prior to a hearing. The Second, Third and Fourth Circuits have rejected this notion.¹⁷

There is also a conflict between federal and state courts in New York. In New York, the Appellate Division for the First Department, purporting to follow the Fourth Circuit, has held that, under the FAA, courts may compel pre-hearing discovery from non-parties in cases of “special need.”¹⁸

1. The Second and Third Circuits have held that Section 7 does not authorize pre-hearing document production or testimony from non-parties.

In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,¹⁹ the Third Circuit reversed a district court order requiring pre-hearing production of documents from a non-party witness. Focusing on the “plain language” of Section 7, the Court held that the statute did not authorize arbitrators to order pre-hearing document production from non-parties:

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.” 9 U.S.C. § 7 (emphasis added). The power to require a non-party “to bring” items “with him” clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition, the use of the word “and” makes it clear that a non-party may be compelled “to bring” items “with him” only when the non-party is summoned “to attend before [the arbitrator] as a witness.” Thus, *Section 7*’s language unambiguously restricts an arbitrator’s

¹⁷ The Seventh and Eleventh Circuits do not appear to have decided this question and there are conflicting decisions among the lower courts within these circuits. In the Seventh Circuit, see *Matria Healthcare, LLC v. Duthie*, 584 F. Supp.2d 1078 (N.D. Ill. 2008) (holding that Section 7 does not authorize pre-hearing non-party discovery) and *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F.Supp. 878 (N.D.Ill. 1995) (holding that implicit in the arbitrators’ power to compel testimony and production of documents for purposes of a hearing is the “lesser” power to compel pre-hearing testimony and document production). In the Eleventh Circuit, see *Kennedy v. Am, Express Travel Related Servs. Co.*, 646 F.Supp.2d 1342, 1344 (S.D. Fla. Aug. 12, 2009) (finding that an arbitrator is not statutorily authorized under the FAA to issue summonses for pre-hearing depositions and document discovery from non-parties) and *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (holding that the FAA impliedly permits an arbitration panel to order document discovery prior to a hearing). We have not found any cases addressing this issue in the First, Fifth, Ninth, Tenth or D.C. Circuits.

¹⁸ *ImClone Sys. v. Waksal*, 22 A.D.3d 387, 388, 802 N.Y.S.2d 653, 654 (1st Dep’t 2005).

¹⁹ 360 F.3d 404 (3d Cir. 2004) (Alito, J.).

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.²⁰

As noted in a recent district court decision,²¹ the historical background against which Section 7 was enacted also supports the conclusion that it was not intended to authorize pre-hearing document production from non-parties:

That Congress had in mind in § 7 testimony by a witness at the arbitration and not at a deposition is apparent not only from the plain language of § 7 but from the historical background against which it was enacted. The Federal Arbitration Act was enacted in 1925 The Federal Rules of Civil Procedure, with their provisions for depositions and other mechanisms for discovery, were more than a decade away.

* * *

While it was possible to apply to equity for a bill of discovery to require the production of documents in advance of trial, such pretrial production was anything but common and could not in any circumstances call for an adversary's documents Prior to 1937 there had long been a statute that allowed a court in an action at law to compel one party to produce in advance of trial books and papers for examination and inspection of his adversary. *See* § 724 of the revised statutes (U.S.Comp.Stat.1901, p. 583) But the Supreme Court . . . held that the statute only required production at the trial.

* * *

Thus, Congress could not have intended when it enacted § 7 of the FAA in 1925 to have authorized arbitrators and district courts to require pre-hearing production in arbitrations when such production was not authorized by § 724 in actions at law Moreover, the language of the current version of § 7 is identical to the 1925 version The fact that Congress has not changed the language of § 7 in eighty years is compelling evidence that the original limitations inherent in § 7 were intended to remain undisturbed²²

In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,²³ the Second Circuit joined the Third Circuit in holding that Section 7 does not authorize arbitral orders for pre-hearing document production or testimony from non-parties:

The language of section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying

²⁰ *Id.* at 407.

²¹ *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1080-1081 (N.D. Ill. 2008).

²² *Id.* (citations omitted). In *Matria*, a merger agreement established an escrow account to satisfy potential post-closing claims and provided for arbitration of certain disputes in accordance with the Commercial Arbitration Rules of the American Arbitration Association (“AAA”). A subpoena was issued in the arbitration for the depositions of two former officers of one of the merged corporations. Initially, the former officers agreed to be deposed on condition that their attorneys’ fees and expenses in connection with the depositions would be paid. When a dispute arose as to whether those fees were reasonable the former officers refused to be deposed.

²³ 549 F.3d 210 (2d Cir. 2008).

witness. The FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted. The fact that the Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so. There may be valid reasons to empower arbitrators to subpoena documents from third parties, but we must interpret a statute as it is, not as it might be, since “courts must presume that a legislature says in a statute what it means and means in a statute what it says” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). A statute’s clear language does not morph into something more just because courts think it makes sense for it to do so. Thus, we join the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings.²⁴

Although faced with requests for the production of documents, the Third Circuit in *Hay* and the Second Circuit in *Life Receivables* made it clear that Section 7 also precludes orders for pre-hearing testimony.²⁵

2. Both the Second and Third Circuits have held that an arbitral subpoena may require production of documents or testimony at a “pre-merits” hearing convened for that purpose.

The Second and Third Circuits have each concluded that, notwithstanding the absence of any statutory authority for pre-hearing discovery from non-parties, documents and testimony may be obtained from non-parties in advance of any hearing on the merits at a “pre-merits” hearing convened especially for that purpose. In *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, the Second Circuit held that “Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel”²⁶ The court in *Stolt* rejected the argument of the non-party seeking to quash a subpoena that Section 7 permits arbitrators to summon witnesses “only to a merits hearing akin to a full-blown trial.”²⁷

In *Hay*, Judge Chertoff, in a concurring opinion, observed that, although Section 7 did not authorize pre-hearing document discovery, it could, as practical matter, be obtained in many cases by ordering production of the documents at a pre-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,

²⁴ *Id.* at 216-217.

²⁵ See *Life Receivables*, 549 F.3d at 216 (citing *Odjfell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004), *aff’d*, *Stolt-Nielsen Transp. Group v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005) (quashing a deposition subpoena); *Hay Group*, 360 F.3d at 410 (“Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery.”) (quoting *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999)).

²⁶ 430 F.3d 567, 581 (2d Cir. 2005).

²⁷ *Id.* at 579.

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 To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents. But that is not necessarily a bad thing, since it will induce the arbitrators and parties to weigh whether advance production is really needed.²⁸

In *Life Receivables*, the Second Circuit expressed its agreement with the views of Judge Chertoff of the Third Circuit:

Interpreting section 7 according to its plain meaning “does not leave arbitrators powerless” to order the production of documents. *Hay Group*, 360 F.3d at 413 (Chertoff, J., concurring). On the contrary, arbitrators may, consistent with section 7, order “any person” to produce documents so long as that person is called as a witness at a hearing. 9 U.S.C. § 7 In *Stolt-Nielsen*, we held that arbitral section 7 authority is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters As then-Judge Chertoff noted in his concurring opinion in *Hay Group*, the inconvenience of making a personal appearance may cause the testifying witness to “deliver the documents and waive presence.” 360 F.3d at 413 (Chertoff, J., concurring). Arbitrators also “have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings.” Section 7’s presence requirement, however, forces the party seeking the non-party discovery -- and the arbitrators authorizing it -- to consider whether production is truly necessary. *See id.* at 414 In sum, arbitrators possess a variety of tools to compel discovery from non-parties. However, those relying on section 7 of the FAA must do so according to its plain text, which requires that documents be produced by a testifying witness.²⁹

3. The Fourth Circuit has held that an arbitral subpoena for pre-hearing discovery may be enforced when there is a showing of “special need or hardship.”

In *COMSAT Corp. v. Nat’l Science Foundation*,³⁰ the Fourth Circuit also concluded that Section 7, by its terms, did not authorize arbitrators to issue orders requiring either pre-hearing testimony or production of documents from nonparties. The court held, however that, a non-party

²⁸ *Hay Group*, 360 F.3d at 413-14.

²⁹ 549 F.3d at 218 (citations omitted). *Accord* *Guyden v. Aetna, Inc.*, 544 F.3d 376, 386-387 (2d Cir. 2008) (“The FAA . . . provides the arbitrator with further authority to compel the production of evidence and witnesses at a pre-merits hearing Guyden thus has both a contractual and a statutory basis for further discovery should it prove necessary for her claim.”).

³⁰ 190 F.3d 269, 276 (4th Cir. 1999).

could be compelled by a district court to comply with such an order upon a showing of “special need or hardship.” In this regard, the court said:

Yet COMSAT argues quite persuasively that in a complex case such as this one, the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing. For this reason, in *Burton* we contemplated that a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship. 614 F.2d at 391.

We do not now attempt to define “special need,” except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable. COMSAT did not attempt such a showing before the district court, and we infer from the record that no such showing would be possible.³¹

* * *

[W]e hold today that a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship.³²

The court in *COMSAT* did not cite any case in which an arbitral subpoena for prehearing discovery was enforced upon a showing of special need or hardship. Instead, it relied upon cases involving requests by one party to an arbitration agreement for pre-arbitration discovery from the other party.³³

Shortly after its decision in *COMSAT*, the Fourth Circuit had occasion to address a claim of “special need.” Again, unlike *COMSAT*, the context was a request by one party to an arbitration agreement for pre-arbitration discovery from the other party. In *Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*,³⁴ the court held that Fed. R. Civ. P. 27 permitted pre-arbitration discovery when the petitioner, the charterer of a vessel under a charter party containing a London arbitration clause, “sought evidence from a ship that was soon leaving United States waters” for the “perpetuation of evidence that, if not preserved, was going to disappear or be materially altered [and which] was necessary to its arbitration claim”³⁵ The

³¹ *Id.* at 276. The court observed that COMSAT had already obtained many of the documents through FOIA requests and that other documents were available from the opposing party in the arbitration.

³² *Id.* at 278. Because there was no showing of “special need,” the *COMSAT* court's views regarding the possible enforcement of arbitral subpoenas in the case of “special need” have been characterized as “*dicta*.” *Hay Group*, 360 F.3d at 410.

³³ The court in *COMSAT* referred to its *dictum* in *Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980), which, in turn, cited *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y. 1973) and *Ferro Union Corp. v. SS Ionic Coast*, 43 F.R.D. 11 (S.D. Tex. 1967).

³⁴ *Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, 481 (4th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000).

³⁵ 198 F.3d at 481. Rule 27(a)(1) provides, in pertinent part that

A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must

court in *Deiulemar* observed that its holding was narrow:

We . . . do not intimate that by recognizing Rule 27 discovery in aid of arbitration in these specific facts, we intend to open all forms of prearbitration discovery in circumstances of “special need.” To the contrary, we limit our holding today to Rule 27 perpetuation in the specific circumstances described above. We leave for future determination the proper scope of the “special need” exception as it applies to other forms of discovery in aid of arbitration.³⁶

All but one of the reported cases in which federal courts have ordered discovery in aid of arbitration, whether or not they rely on Rule 27, have involved circumstances similar to those in *Deiulemar*—the need to obtain and preserve from a departing vessel and its crew evidence that might otherwise disappear or be materially altered.³⁷ We have found no subsequent cases in the Fourth Circuit delineating further the scope of the “special need” exception or applying it to enforce an arbitral order for non-party discovery.³⁸

Both the Second and Third Circuits have rejected the suggestion in *COMSAT* that a federal court might, under Section 7, enforce an arbitral subpoena for pre-hearing non-party

show:

- (A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;
- (B) the subject matter of the expected action and the petitioner's interest;
- (C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;
- (D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and
- (E) the name, address, and expected substance of the testimony of each deponent.

The Fourth Circuit in *Deiulemar* concluded that it was sufficient to satisfy the requirements of Rule 27(a)(1)(A) that, at the time of the petition, the charterer expected to be a party to an action to compel the owner to arbitrate even though it soon became clear that no such proceeding would be necessary.

³⁶ *Id.* at 481 n.10.

³⁷ See *In re Compania Chilena de Navegacion Interoceanica S.A.*, 03 cv 5382, 2004 U.S. Dist. LEXIS 6408 (E.D.N.Y. 2004) (granting charterer's Rule 27 request for deposition of crew members and production of documents from vessel about to leave port when charterparty provided for London arbitration); *In re Deiulemar*, 153 F.R.D. 592, 593 (E.D. La. 1994) (same); *Koch Fuel International, Inc. v. M/V South Star*, 118 F.R.D. 318 (E.D.N.Y. 1987) (refusing in an admiralty action commenced under 28 U.S.C.S. § 1333, to vacate an order for the expedited depositions of crew members of vessel about to depart the country when the charterparty provided for London arbitration); *Ferro Union Corp. v. SS Ionic Coast*, 43 F.R.D. 11 (S.D. Tex. 1967) (granting a vessel owner's request, under Section 3 of the FAA to stay trial of an matter pending a New York arbitration, but denying the owner's motion to quash or vacate deposition notices of the master and crew members and granting charterer's motion under Fed. R. Civ. P. 34 for production and inspection of documents on board a vessel about to leave the port). The one exception is *Bigge Crane*, where the court, in declining to stay discovery, found a sufficiently extraordinary circumstance in the fact that formal discovery would hasten the ultimate resolution of the parties' dispute. 371 F. Supp. at 246.

³⁸ If its requirements are satisfied, Rule 27 can be used to obtain discovery from non-parties. See, e.g., *In re I-35w Bridge Collapse Site Inspection*, 243 F.R.D. 349, 352 n.3 (D. Minn. 2007) (“Rule 27 authorizes such an order to be entered against both parties and non-parties to anticipated litigation.”) (citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2456, at 29 (2d ed. 1995) (“A subpoena duces tecum also may issue pursuant to a court order without the commencement of an action for the perpetuation of testimony under Rule 27.”)).

discovery based upon a showing of “special need or hardship.” In *Hay Group*, the Third Circuit reversed the district court’s holding that “special need” justified enforcement of a subpoena for pre-hearing document production, stating that “there is simply no textual basis for allowing any “special need” exception.”³⁹ In *Life Receivables*, the Second Circuit also expressed disagreement with *COMSAT*, referring, with approval, to the “emerging rule” that “the arbitrator’s subpoena authority under FAA § 7 does not include the authority to subpoena nonparties or third parties for prehearing discovery even if a special need or hardship is shown.”⁴⁰

4. The First Department has held that courts may issue orders for pre-hearing discovery in arbitration when there is a showing of “special need or hardship.”

There is a conflict between federal and state courts in New York as to the availability of pre-hearing document production and testimony from non-parties under Section 7 of the FAA. Citing *COMSAT*, the Appellate Division for the First Department has held that the FAA does permit parties to an arbitration agreement to obtain pre-hearing discovery from non-parties in cases of “special need.” In *ImClone Sys. v. Waksal*,⁴¹ the First Department affirmed a lower court order issuing “open commissions in aid of arbitration.”⁴² The open commissions provided for pre-hearing depositions of out of state non-party witnesses.⁴³ The lower court observed that they were issued at the joint request of the parties to the arbitration and that “the arbitrators [had] determined that it [was] appropriate to take such depositions.”⁴⁴ The lower court denied a subsequent motion of the non-party witnesses to vacate its order, holding that New York law applied and that the depositions were authorized by CPLR 3102(b), which has been held to permit pre-hearing discovery from non-parties when sought pursuant to a stipulation between the parties to an arbitration.⁴⁵

³⁹ 360 F.3d 404, 410.

⁴⁰ 549 F.3d at 216 (citation omitted).

⁴¹ 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep’t 2005).

⁴² *Id.*

⁴³ *Id.* CPLR 3108 permits the issuance of commissions “where necessary or convenient for the taking of a deposition outside of the state. The deposition to be taken can be on oral or written questions, as the parties may agree or as the court directs. If on oral questions, it is commonly called an ‘open’ commission.” DAVID D. SIEGEL, NEW YORK PRACTICE § 360, at 589 (4th ed. 2005).

⁴⁴ See *ImClone v. Waksal*, No. 602996/02, 2005 WL 5351321, slip. op. at 2 (N.Y. Sup. Ct. April 4, 2005).

⁴⁵ *Id.* at 2. In this regard, the lower court cited *Textron, Inc. v. Unisys Corp.*, 138 Misc.2d 124, 126 (Sup. Ct. N.Y. County 1987) (“Both parties to the arbitration, by stipulation and joint application, sought the contested disclosure resulting in the commissions here, and the matter is authorized by CPLR 3102 (b) where stipulated disclosure is favored.”) and *In re ACE American Insurance Co.*, 800 N.Y.S.2d 342 (Sup. Ct. N.Y. County 2004) (unpublished table decision) (same). The lower court in *ImClone* held that any restrictions that might otherwise be imposed by CPLR 3102(c), which permits disclosure “to aid in arbitration,” applied to a request for discovery only “when one party is resisting it, not where the parties agree.” Slip op. at 2. CPLR 3102(c) provides: “Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.” N.Y. C.P.L.R. 2004. *Textron* stated that this provision was intended to apply to discovery sought by one party from the other. In any event, as one commentator has observed, it has “been generally understood to require very special circumstances before court aid will be offered for this purpose, although one occasionally sees cases that seem to take a more liberal view of the matter.” DAVID D. SIEGEL, NEW YORK PRACTICE § 597, at 13 (4th ed. 2005). Among the “liberal” cases is *Hendler & Murray P.C. v. Lambert*, 127 A.D.2d 820, 821, 511 N.Y.S.2d 941, 942 (2d Dep’t 1987) (permitting an order requiring discovery from party when “the respondent has demonstrated that the documents are required ‘to present a proper case to the arbitrator’” (quoting *Moock v. Emanuel*, 99 A.D.2d 1003, 473 N.Y.S.2d 793 (1st Dep’t 1984))). Federal courts in the Second Circuit have also indicated that discovery in aid of arbitration is available. See *Oriental*

On appeal in *ImClone*, the First Department affirmed on different grounds. First, the court determined that the arbitration in question was subject to the FAA. The court assumed that Section 7 of the FAA preempted state procedural rules such as CPLR 3102 that permit a court to require discovery in aid of arbitration.⁴⁶ The court observed that “it is an open question in the Second Circuit whether prehearing nonparty depositions are authorized under the FAA⁴⁷ . . . and there is substantial federal authority that they are not”⁴⁸ Then, citing the decisions of the Fourth Circuit in *COMSAT* and *Deiulemar*, the court held that:

depositions of nonparties may be directed in FAA arbitration where there is a showing of “special need or hardship,” such as where the information sought is otherwise unavailable This view properly takes into consideration the realities and complexities of modern arbitration.⁴⁹

The First Department held that the showing required to demonstrate “special need or hardship” was what the court in *COMSAT* described as the “minimum”—that the information was unavailable from sources other than the non-party:

Here, the information sought would plainly be unavailable from other sources, since the crucial issue in plaintiff’s attempt to vitiate the agreement is its claim that it was induced by fraud, and the nonparties defendant seeks to depose are the officers and directors who took part in its drafting and negotiation. It was unnecessary for defendant to state in so many words that such information was otherwise unavailable or that exceptional circumstances, special need or hardship exist.⁵⁰

Commercial & Shipping Co. v. Rosseel, N.V., 125 F.R.D. 398, 400 n.3 (S.D.N.Y. 1989) (“Discovery in aid of arbitration is permitted by federal courts in this Circuit under essentially the same standard as under New York law.”); Bigge Crane and Rigging Co. v. Docutel Corp., 371 F. Supp. 240 (E.D.N.Y. 1973) (pre-arbitration discovery permitted as consistent with Federal Arbitration Act and New York law).

⁴⁶ We note that *ImClone* was decided before *Dynegy Midstream Servs. v. Trammochem Division of Transammonia, Inc.*, 451 F.3d 89 (2d Cir. 2006), discussed below, which held that Section 7 imposed territorial limitations on issuance and enforcement of arbitral subpoenas. Based on the very broad view of the court in *ImClone* concerning the preemptive effect of Section 7, it could conceivably be argued that these territorial limitations would also apply to issuance of commissions for taking of discovery from out of state witnesses.

⁴⁷ *ImClone* was decided before *Life Receivables* resolved this question in the Second Circuit. *Life Receivables* is not, in any event, binding on New York state courts interpreting the FAA. See *Flanagan v. Prudential-Bache Security, Inc.*, 67 N.Y.2d 500, 506, 504 N.Y.S.2d 82, cert. denied, 479 U.S. 931 (1986) (“When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts . . . a State court required to interpret the Federal statute has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits”).

⁴⁸ 22 A.D.3d at 388; 802 N.Y.S.2d at 654 (citing *Hay Group, Inc. v E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004); *Integrity Ins. Co. v Am. Centennial Ins. Co.*, 885 F Supp 69, 71-73 (S.D.N.Y. 1995); *Odjfell ASA v Celanese AG*, 328 F Supp 2d 505, 506 (S.D.N.Y. 2004)). Each of these cases concerned whether arbitrators had authority to require non-party discovery under Section 7—not whether a state court could order such discovery under state procedural rules.

⁴⁹ *Id.* at 388.

⁵⁰ *Id.* It is questionable whether the Fourth Circuit would find a “special need” to exist in these circumstances. See *Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, 479 (4th Cir. 1999) (observing that courts have allowed discovery in aid of arbitration “where a movant can demonstrate ‘extraordinary circumstances,’”

Since the decision of the Second Circuit in *Life Receivables*, there has been a conflict between state and federal courts in New York regarding the availability and extent of pre-hearing discovery from non-parties under Section 7 of the FAA. As a recent state court decision put it:

The hardline rule of the Second Circuit permitting document discovery of non-parties only when it is part-and-parcel of the non-parties' giving of testimony at an arbitration hearing is at odds with the First Department's decision in *ImClone* The law in the First Department is that under the FAA a court may compel compliance with arbitrators' subpoenas for pre-hearing depositions and document discovery if a "special need or hardship" exists⁵¹

5. The Sixth and Eighth Circuit have concluded that arbitrators have an "implied power" under Section 7 to require pre-hearing production of documents.

In *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, the Eighth Circuit held that the power expressly granted to arbitrators under Section 7 to require non-parties to appear and produce documents at a hearing included the implicit power to require production of such documents prior to a hearing.⁵² The court relied upon *Meadows Indem. Co. Ltd. v. Nutmeg Ins. Co.*,⁵³ which held that the authority conferred by Section 7 to require production of documents from non-parties at a hearing implicitly included the "lesser power" to compel the production of documents prior to the hearing. The court in *Security Life* also observed that allowing production of documents would assist in the efficient resolution of disputes:

Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.⁵⁴

In *AFTRA v. WJBK-TV*,⁵⁵ the Sixth Circuit held, upon similar grounds, that a labor arbitrator had authority under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to issue a subpoena requiring a non-party to produce documents either before or at an arbitration hearing. The court held that the arbitrators' power under the LMRA was as broad as that of arbitrators under the FAA and that "the FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held

such as "where a vessel with crew members possessing particular knowledge of the dispute is about to leave port," or where there is a "special need for information which will be lost if action is not taken immediately.").

⁵¹ *Connectu, Inc. v. Quinn Emanuel Urquhart Oliver & Hedges*, No. 602082/08, slip op. at 10 (Sup.Ct. N.Y., Mar. 11, 2010).

⁵² 228 F.3d 865 (8th Cir. 2000).

⁵³ 157 F.R.D. 42, 44-45 (M.D. Tenn. 1993).

⁵⁴ 228 F.3d at 870-71.

⁵⁵ 164 F.3d 1004 (6th Cir. 1999).

to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing.”⁵⁶

Neither the Sixth Circuit in *AFTRA* nor the Eight Circuit in *Security Life* reached the question of whether the implied power they found in section 7 authorized arbitrators to order depositions of non-parties.⁵⁷ The district court cases that have addressed this issue (many of which were decided by courts in the Second Circuit prior to *Life Receivables*) have almost uniformly held that the implied power does *not* extend that far and that arbitrators may *not* order the deposition of non-parties.⁵⁸ In each of the cases, the distinguishing factor was that depositions imposed a greater burden on non-parties than document production. As stated in *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*:

Documents are only produced once, whether it is at the arbitration or prior to it. Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The nonparty may be required to appear twice—once for deposition and again at the hearing. That a nonparty might suffer this burden in a litigation is irrelevant; arbitration is not litigation, and the nonparty never consented to be a part of it. Furthermore, as the deposition is not held before the arbitrator, there is nothing to protect the nonparty from harassing or abusive discovery. The nonparty would, of necessity, turn to the court, obligating the court to become enmeshed in the merits of the matter being arbitrated. This would leave “the parties with one foot in court and the other in arbitration.”⁵⁹

In *Hay Group*, the Third Circuit rejected altogether the “implied power” approach, stating:

We disagree with this power-by-implication analysis. By conferring the power to compel a non-party witness to bring items to an arbitration proceeding while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power. If the FAA had been meant to confer the latter, broader power, we believe that the drafters would have said so, and they would have then had no need to spell out the more limited power to compel a non-party witness to bring items

⁵⁶ *Id.* at 1009 (citing *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988)).

⁵⁷ *Id.* at 1009 (“We do not reach the question of whether an arbitrator may subpoena a third party for a discovery deposition relating to a pending arbitration proceeding”); *Security Life*, 228 F.3d at 871 (declining to reach the question of whether Section 7 authorized arbitrators to issue orders requiring depositions of nonparties, as that issue had become moot through the nonparties’ compliance with that portion of the subpoena.).

⁵⁸ *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402 (S.D.N.Y. 2005); *Nat’l Union Fire Ins. Co. v. Marsh USA, Inc. (In re Hawaiian Elec. Indus.)*, No. M-82, 2004 U.S. Dist. LEXIS 12716 (S.D.N.Y. July 9, 2004); *Procter and Gamble Co. v. Allianz Ins. Co.*, No. 02-cv-5480(KMW), 2003 U.S. Dist. LEXIS 26025 (S.D.N.Y. Dec. 3, 2003); *In re Meridian Bulk Carriers, Ltd.*, No. 03-2011, 2003 U.S. Dist. LEXIS 24203 (E.D. La. July 17, 2003); *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995). *But see* *Amgen, Inc. v. Kidney Center of Delaware County*, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995) (enforcing compliance with a subpoena requiring the deposition and production of documents by a nonparty).

⁵⁹ 885 F. Supp. at 73 (citations omitted).

with him to an arbitration proceeding. As mentioned above, until its amendment in 1991, Rule 45 of the Federal Rules of Civil Procedure was framed in terms quite similar to Section 7 of the FAA, but courts did not infer that, just because they could compel a non-party witness to bring items with him, they could also require a non-party simply to produce items without being subpoenaed to testify.⁶⁰

B. There is a split of authority among the Circuits as to whether Section 7 of the FAA imposes any territorial limitation on an arbitrator's power to summon a non-party to testify and produce documents or upon the power of a federal district court to enforce such an order.

Section 7 does not contain any express territorial limitation on the power of the arbitrators to summon "any person" to attend before him and produce documents or upon the power of courts to enforce such orders. The statute does state, however, that such orders "shall be served in the same manner as subpoenas to appear and testify before the court." Regarding judicial enforcement of such orders, Section 7 provides that

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 such person or persons 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.

9 U.S.C. § 7 (2006) (emphasis added).

Fed. R. Civ. P. 45(b)(2) governs service of subpoenas to appear and testify in proceedings in federal court. It imposes certain territorial limits on service, providing that:

a subpoena may be served at any place

- (A) within the district of the issuing court;
- (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
- (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or
- (D) that the court authorizes on motion for good cause, if a federal statute so provides.

Regarding issuance of subpoenas, Fed. R. Civ. P. 45(a)(2) provides:

⁶⁰ 360 F.3d at 408-9.

(2) A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

Under Rule 45, motions to compel compliance with a court issued subpoena or to quash or modify it are decided by the issuing court. In the case of a subpoena for the production of documents, that court would ordinarily be the court for the district where the production or inspection is to be made.

There is a split of authority among the circuit courts as to (a) whether the requirement in Section 7 that arbitral subpoenas be served in “the same manner as subpoenas to appear and testify before the court” incorporates the territorial limits on service of such subpoenas imposed by Fed. R. Civ. P. 45(b)(2); and (b) whether a “district court in which such arbitrators . . . are sitting” may enforce an arbitral subpoena served upon a witness beyond those limits.

1. The Second and Third Circuits have held that Section 7 does not authorize nationwide service or enforcement of arbitral subpoenas.

In *Dynegy Midstream Servs. v. Trammochem, Division of Transammonia, Inc.*,⁶¹ the Second Circuit held that a federal district court in New York could not enforce a *subpoena duces tecum* issued by a New York arbitral tribunal requiring the pre-hearing production of documents in Houston, Texas by Dynegy, a non-party located in Houston. The court observed that “the Federal Rules governing subpoenas to which *Section 7* refers do not contemplate nationwide service of process or enforcement; instead, both service and enforcement proceedings have clear territorial limitations.” *Id.* at 95. The Second Circuit rejected the district court’s conclusion that Section 7 authorizes nationwide service and enforcement of arbitral subpoenas.

Contrary to the district court's reading of the statute, nothing in the language of FAA Section 7 suggests that Congress intended to authorize nationwide service of process. In fact, the language of Section 7 specifically suggests that the ordinary rules applicable to the district courts apply by stating that subpoenas under the section "shall be served in the *same manner* as subpoenas to appear and testify before the court" and the district court may compel attendance “in the *same manner provided by law* for securing the attendance of witnesses . . . in the courts of the United States.” 9 U.S.C. § 7 (emphasis added).⁶²

In *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*,⁶³ the Third Circuit, in an

⁶¹ 451 F.3d 89 (2d Cir. 2006).

⁶² *Id.* at 95.

⁶³ 33 Fed. Appx. 26, 2002 U.S. App. LEXIS 6797 (3d Cir. 2002).

unpublished opinion, reached the same conclusion. The Third Circuit held that a district court in Philadelphia properly denied a motion to enforce an arbitration subpoena requiring a nonparty to appear for a deposition in Florida.⁶⁴ Like the Second Circuit in *Dynegy*, the Third Circuit held that service and enforcement of arbitral subpoenas were subject to the territorial limits set forth in Fed. R. Civ. P. 45.

2. The Eighth Circuit has held that the territorial limitations of Rule 45 do not apply to the issuance by arbitrators or to the enforcement by a federal district court of subpoenas for the pre-hearing production of documents.

In *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*,⁶⁵ the Eighth Circuit held that a district court in Minnesota had the power to enforce a *subpoena duces tecum* issued by an arbitral tribunal sitting there requiring pre-hearing production of documents from a nonparty in California.⁶⁶ The court's conclusion seems to have been based upon its view that there was an implied power in Section 7 to require production of documents from nonparties and its perception of the minimal burden upon the non-party of producing documents at a distance. In this regard, the court said: "[W]e do not believe an order for the production of documents requires compliance with Rule 45(b)(2)'s territorial limit. This is because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel."⁶⁷ At least two district courts have followed the decision in *Security Life*.⁶⁸

One district court has reached what has been described as a "compromise position." In *Amgen, Inc. v. Kidney Center of Delaware County*,⁶⁹ a federal district court in Illinois was asked to enforce compliance with a subpoena issued by an arbitrator sitting there requiring the deposition of and production of documents by a nonparty in the Eastern District of Pennsylvania. A federal district court in Pennsylvania had previously refused to enforce the subpoena, holding that under Section 7, only the court in the place where the arbitrators were sitting could do so.⁷⁰

⁶⁴ *But see In re Nat'l Fin. Partners Corp.*, No. 09-mc-00027, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009) (refusing to quash a subpoena issued by arbitral tribunal in Pennsylvania for the deposition of a non-party in Florida).

⁶⁵ 228 F.3d 865 (8th Cir. 2000).

⁶⁶ As noted above, the court in *Security Life* did not reach the question whether Section 7 authorized arbitrators to issue orders requiring depositions of nonparties, as that issue had become moot through the nonparties' compliance with that portion of the subpoena. 228 F.3d at 871.

⁶⁷ *Id.* at 872.

⁶⁸ *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 02-4302, 2004 U.S. Dist. LEXIS 389 (D. Minn. Jan. 9, 2004), (holding that a district court in Minnesota was authorized to compel compliance with a subpoena duces tecum issued by an arbitral tribunal there requiring the deposition of and production of documents by a nonparty located in the Eastern District of New York, notwithstanding the provisions of Fed.R.Civ.P 37 that a motion to compel disclosure or discovery from a nonparty must be made in the court where the discovery is or will be taken); *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc.*, 432 F. Supp. 2d 1375, 1378-1379 (D. Ga. 2006) (holding that Section 7 authorized the court to enforce a subpoena issued by an arbitral tribunal sitting in Atlanta, Georgia requiring production of documents from a nonparty in the Southern District of New York and that Rule 45 did not circumscribe its authority.).

⁶⁹ 879 F. Supp. 878, 882-83 (N.D. Ill. 1995)

⁷⁰ *Amgen Inc. v. Kidney Ctr.*, No. 94-mc-0202, 1994 U.S. Dist. LEXIS 15451, at *3 (E.D. Pa. Oct. 19, 1994) ("Since the arbitrator in the underlying arbitration is sitting in Chicago, it was incumbent upon Amgen, pursuant to the plain language of Section 7, to bring its petition to compel compliance in the United States District Court for the

The Illinois court concluded that, although Section 7 “does not provide for extraterritorial service or extraterritorial enforcement” of arbitral subpoenas, failing to enforce such a subpoena would leave an unsatisfactory “gap in the law”.⁷¹

KCDC’s argument is unavailing because it leaves a gap in the law, which is contrary to Congressional intent, and unnecessary. By definition, the FAA applies only to actions involving interstate commerce, 9 U.S.C. § 2; indeed, the Act itself is based on congressional power to regulate interstate commerce. *Seymour v. Gloria Jean's Coffee Bean Franchising Corp.*, 732 F. Supp. 988 (D. Minn. 1990). By enacting the FAA, Congress declared a national policy favoring arbitration. *Perry v. Thomas*, 482 U.S. 483, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987). The arbitration of any action affecting interstate commerce is likely to involve parties and witnesses located in more than one district or state. 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. That would be contrary to the intent of Congress in enacting a national policy favoring arbitration.⁷²

In order to avoid the territorial limitations of Rule 45 on service and enforcement, the federal court in Illinois authorized an attorney for a party to the arbitration to issue a subpoena as an officer of the Pennsylvania court, using the case name and number of the action pending in the Illinois court as permitted by Fed. R. Civ. P. 45(a)(3)(B).⁷³

In *Dynegy*, the Second Circuit rejected the approach used by the court in *Amgen*:

Appellees . . . ask us either to adopt the compromise position created in *Amgen, Inc. v. Kidney Center of Delaware County*, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995), where the district court enforced an arbitration subpoena against a distant non-party by permitting an attorney for a party to the arbitration to issue a subpoena that would be enforced by the district court in the district where the non-party resided, or to suggest another method to get around this gap in enforceability. We decline to do so. We see no textual basis in the FAA for the *Amgen* compromise. Indeed, we have already held that Section 7 “explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to

Northern District of Illinois.”).

⁷¹ 879 F. Supp at 882-883.

⁷² *Id.* at 882.

⁷³ Rule 45 (a)(3) (B) provides that an attorney “may issue and sign a subpoena as an officer of . . . a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.” The same procedure was later used by the district court in *Security Life*. The Eighth Circuit did not reach the question whether it was authorized, however, because of its holding that an order requiring the production of documents did not require compliance with the territorial limitations of Rule 45. 228 F.3d at 872 On appeal in *Amgen*, the Seventh Circuit questioned whether the district court had subject matter jurisdiction and remanded for the district court to make and certify a finding of jurisdictional facts. *Amgen, Inc. v. Kidney Ctr.*, 95 F.3d 562, 567 (7th Cir. 1996). The district court concluded that it lacked either federal question or diversity jurisdiction, and the Court of Appeals accordingly dismissed the action. *Amgen, Inc. v. Kidney Ctr.*, 1996 U.S. App. LEXIS 28250 (7th Cir. Oct. 28, 1996).

an arbitration may not employ this provision to subpoena documents or witnesses.” *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999). Moreover, we see no reason to come up with an alternate method to close a gap that may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order 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.⁷⁴

C. The role of state statutes permitting pre-hearing discovery from non-parties.

There are a number of state statutes, such as those based upon the Revised Uniform Arbitration Act (“RUAA”),⁷⁵ which allow arbitrators to require pre-hearing discovery from non-parties without the restrictions that have been imposed under Section 7.⁷⁶ Under Section 17 (c) of the RUAA, an arbitrator may “permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.”⁷⁷ Official Comment 5 of the RUAA states that “sometimes arbitrations involve outside, third parties who may be required to give testimony or produce documents. Section 17(c) provides that the arbitrator should take the interests of such ‘affected persons’ into account

⁷⁴ 451 F.3d at 96. It is questionable whether the “gap” in Section 7 can be seen as an “intentional choice” on the part of Congress. When the FAA was enacted in 1925, federal courts had nationwide subpoena authority. A federal statute provided: “Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: *provided*, That in civil cases, no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding without the permission of the court being first had upon proper application and cause shown. . . .” Act of September 19, 1922, ch. 344, 42 Stat. 848 (1922) (codified as amended at 28 U.S.C. 654 (1925-1926)). See James B. Sloan and William Gotfryd, *Eliminating The 100 Mile Limit For Civil Trial Witnesses: A Proposal To Modernize Civil Trial Practice*, 140 FED.RULES DECISIONS 33, 36 (1992) (“[A]fter the end of World War I, Congress pressed the Executive branch to pursue civil damage actions against war material contractors who had defrauded the United States. In response to the entreaties of the Justice Department, which protested its inability to assure the appearance and testimony of all necessary witnesses, Congress passed an amendment to the general subpoena statute which provided that for a period of three years, ‘the permission of the court being first had upon proper application and cause shown’ a trial subpoena could be served anywhere in the United States. Although the Congressional intent was to provide broader subpoena power only to the Justice Department in the prosecution of war fraud cases, and specifically to allow all such cases to be brought before courts in the District of Columbia, no such restrictions were written into the Statute. The Statute was subsequently amended again to provide for another three-year extension of nationwide service power.”). Arguably, any gap in enforcement of arbitral subpoenas developed in 1928 when the statute authorizing nationwide service of subpoenas expired with no corresponding amendment of Section 7. See *Vincennes Steel Corp. v. Miller*, 94 F.2d 347, 349 (5th Cir. 1938); *Barnett v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 438 F. Supp. 2d 664, 667 (E.D. La. 2006) (“[E]xcept for a six year period between 1922 and 1928, the 100 mile rule has always remained a part of the federal subpoena’s life . . .”).

⁷⁵ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ARBITRATION ACT (2000), <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf> (hereinafter “RUAA”).

⁷⁶ The RUAA has been adopted in the following states: Alaska, Colorado, District of Columbia, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. In 2010, legislation to enact the RUAA has been introduced in Alabama, Arizona, Massachusetts, Minnesota and Pennsylvania. See National Conference of Commissioners of Uniform State Laws, A Few Facts About the Uniform Arbitration Act (2000), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited July 8, 2010).

⁷⁷ RUAA at 58.

in determining whether and to what extent discovery is appropriate.”⁷⁸ Section 17(d) provides that [i]f an arbitrator permits discovery under subsection (c), the arbitrator may . . . issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding”⁷⁹ According to Official Comment 6, “Section 17(d) explicitly states that if an arbitrator allows discovery, the arbitrator has the authority to issue subpoenas for a discovery proceeding such as a deposition.”⁸⁰ Taking note of cases such as *COMSAT*, which held that, under the FAA, arbitrators generally did not have authority to issue subpoenas to non-parties for pre-hearing discovery, Comment 6 further states: “Because of the unclear case law, Section 17(d) specifically states that arbitrators have subpoena authority for discovery matters under the RUAA.”⁸¹

Under Section 17(g) of the RUAA, courts in states where the RUAA has been enacted may enforce subpoenas issued by arbitral tribunals in other jurisdictions. Section 17(g) provides:

The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.⁸²

Other state statutes may also permit pre-hearing discovery from non-parties.⁸³

⁷⁸ *Id.* at 61.

⁷⁹ *Id.* at 58.

⁸⁰ *Id.* at 61.

⁸¹ *Id.*

⁸² *Id.* at 59. Official Comment 9 to Section 17(g) states: “Section 17(g) is intended to allow a court in State A (the State adopting the RUAA) to give effect to a subpoena or any discovery-related order issued by an arbitrator in an arbitration proceeding in State B without the need for the party who has received the subpoena first to go to a court in State B to receive an enforceable order. This procedure would eliminate duplicative court proceedings in both State A and State B before a witness or record or other evidence can be produced for the arbitration proceeding in State B. The court in State A would have the authority to determine whether and under what appropriate conditions the subpoena or discovery-related orders should be enforced against a resident in State A. Similar to the language in 17(b) and (c), the statute directs the court to enforce subpoenas and discovery-related orders to ‘make the arbitration proceeding fair, expeditious, and cost effective.’ The last sentence of 17(g) requires that the subpoena be served and enforced under the laws of a civil action in State A where the request to enforce the subpoena is being made.” *Id.* at 63.

⁸³ For example, in *Hay Group*, then Judge Alito cited the original Uniform Arbitration Act, as enacted in Delaware and Pennsylvania, as an example of statutes that “explicitly grant arbitrators the power to issue pre-hearing document production subpoenas on third parties.” 360 F.3d at 407 n.1 (citing DEL. CODE ANN. tit. 10, § 5708(a) (2003) (“The arbitrators may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts, and all other documents and evidence, and shall have the power to administer oaths.”) and 42 PA.CONS.STAT. ANN. § 7309 (2003) (“The arbitrators may issue subpoenas in the form prescribed by general rules for the attendance of witnesses and for the production of books, records, documents and other evidence.”)). In Judge Alito’s view, “The language of these state statutes clearly shows how a law can give authority to an arbitrator to issue pre-hearing document-production orders on third parties.” 360 F.3d at 407 n.1. A number of states have

Significantly, there is authority for the proposition that state procedural rules are not preempted by the FAA. As the Supreme Court observed in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*,⁸⁴ “[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”⁸⁵ In *Volt*, a contractual choice of law clause had been determined by the state courts to incorporate not only California substantive law but also California procedural law governing arbitration—including § 1281.2(c) of the California Civil Procedure Code, which permits a court to stay an arbitration pending the outcome of litigation involving one of the parties. The Supreme Court held that the FAA did not bar the enforcement of such an agreement, even though no such stay of arbitration is available under the FAA. In this regard, the Court said: “There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”⁸⁶ Since *Volt*, a number of state courts have held that the FAA does not preempt state arbitral procedural rules, as long as those rules do not defeat the substantive right to arbitration granted by the FAA, and have applied state arbitration rules regarding procedural matters.⁸⁷

enacted International Commercial Arbitration Acts, some of which confer broad powers upon arbitrators to order pre-hearing discovery from non-parties. *See e.g.*, HAW. REV. STAT. ANN. § 658D-7 (2010) which provides, in pertinent part, “that any arbitral tribunal or other panel established pursuant to such rules shall: . . .

- (2) Be able to utilize any lawful method that it deems appropriate to obtain evidence additional to that produced by the parties;
- (3) Issue subpoenas or other demands for the attendance of witnesses or for the production of books, records, documents, and other evidence;
- (4) Be empowered to administer oaths, order depositions to be taken or other discovery obtained, without regard to the place where the witness or other evidence is located”

One case in Pennsylvania has indicated that discovery in aid of an arbitration taking place in another state or foreign country is available under the Uniform Interstate and International Procedure Act (UIIPA). *Quijada v. Unifrutti of Am. Inc.*, 12 Pa D. & C.4th 225 (Pa. Ct. Com. Pl. 1991). Jurisdictions that have enacted the relevant provisions of the UIIPA include Massachusetts: MASS. GEN. LAWS ch. 223A, §§ 1-14 (2000); Michigan: MICH. COMP. LAWS §§ 600.1852, 600.2114a, 600.2118a (1970); Pennsylvania: 42 PA. CONS. STAT. §§ 5321-5329 (2010); and the Virgin Islands: V.I. CODE ANN. tit. 5, §§ 4901-4943 (2010). Section 3.02(a) of the UIIPA provides in relevant part: “[A court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a matter pending in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement of producing the documents or other things.” UNIF. INTERSTATE & INT’L PROCEDURE ACT § 3.01(a), 13 U.L.A. 355 (1986). The commentary to this section of UIIPA states provides that “the term ‘tribunal’ is intended to encompass any body performing a judicial function.” *Id.*

⁸⁴ 489 U.S. 468, 477 (U.S. 1989)

⁸⁵ *Id.* at 477.

⁸⁶ *Id.* at 476.

⁸⁷ *See, e.g., In re Houston Pipe Line Co.*, No. 08-800, 2009 Tex. LEXIS 468, at *5 (Tex. 2009) (holding that “[w]hen Texas courts are called on to decide if disputed claims fall within the scope of an arbitration clause under the Federal Act, Texas procedure, [including rules permitting pre-arbitration discovery,] controls that determination); *Clites v. Clawges*, 685 S.E.2d 693, 696 (W. Va. 2009) (holding that the FAA did not preempt state law permitting appeal from a writ of prohibition staying all judicial proceedings pending arbitration of the dispute between the parties); *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008) (holding that the FAA did not preempt California law permitting the parties to an arbitration agreement to contract for an expanded scope of judicial review); *St. Fleur v. WPI Cable Sys./Mutron*, 879 N.E.2d 27, 34 (Mass. 2008) (holding that state law procedure for petitions to enforce or vacate arbitral awards did not “undermine the purposes” of the FAA and therefore, was not preempted by the FAA); *Moscattello v. Hilliard*, 939 A.2d 325, 330 (Pa. 2007) (holding that the FAA did not preempt state procedural law setting a thirty-day time limit for challenging an arbitration award);

However, as noted above, in *ImClone Sys. v. Waksal*,⁸⁸ the First Department concluded that Section 7 of the FAA preempted state procedural rules such as CPLR 3102 that permit a court to order discovery from non-parties in aid of arbitration. In reaching this conclusion, the court in *ImClone* first examined the choice of law clause in the contract between the parties and found it to be a “generic” New York law clause, which did not specifically incorporate New York procedural rules. Therefore, the court reasoned, the FAA preempted New York law.

The court in *ImClone* evidently assumed that, unless specifically incorporated by the parties in their agreement, state procedural rules governing arbitration were preempted by the FAA. However, in the absence of any express pre-emptive provision in the FAA or any Congressional intent to occupy the entire field, it may be argued that there is no basis for such a presumption. In this view, whether a choice of law clause is “generic” will be relevant for a state court only when that court must determine whether it may apply provisions of state law that impose substantive restrictions on the parties’ rights under the FAA or “special rules limiting the authority of arbitrators.”⁸⁹ In such cases, the federal policy favoring arbitration requires

Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co., 647 S.E.2d 102, 105 (N.C. Ct. App. 2007) (holding that the FAA did not preempt application of RUAA provisional remedies); Walther v. Sovereign Bank, 872 A.2d 735, 742 (Md. 2005) (“In enforcing § 2 of the FAA . . . state courts are not bound by the federal procedural provisions of the FAA, which are found in §§ 3 and 4 of the FAA, but may generally apply their own procedures.”); Webb v. Am. Employers Group, 684 N.W.2d 33, 40 (Neb. 2004) (holding that the FAA did not preempt state procedural law regarding appeal of an order denying a motion to compel arbitration); Sultar v. Merrill Lynch, No. CV040527411S, 2004 Conn. Super. LEXIS 3003 (Oct. 13, 2004) (holding that the Connecticut deadline for petitions to vacate an arbitration award applied and not the longer period set forth in the FAA.); Toler’s Cove Homeowners Ass’n, Inc. v. Trident Constr. Co., 586 S.E.2d 581, 584 (S.C. 2003) (holding that the FAA does not preempt South Carolina’s procedural rule on appealability of arbitration orders); Bush v. Paragon Prop., Inc., 997 P.2d 882, 887-88 (Ore. 2000) (en banc) (holding that provisions in the FAA for interlocutory appeal of an order denying a petition to compel arbitration did not preempt state law that failed to provide state court jurisdiction for such an appeal); Simmons Co. v. Deutsche Fin. Servs. Corp., 532 S.E.2d 436, 439-440 (Ga. Ct. App. 2000) (“[W]e find that the Georgia rule allowing a preliminary appeal from an order compelling arbitration does not undermine the purposes or objectives of the FAA to enforce arbitration agreements.”); Collins v. Prudential Ins. Co., 752 So. 2d 825, 828-29 (La. 2000) (“[S]tates are free to follow their own procedural rules regarding appeals, unless those rules undermine the goals and principles of the FAA.”); S. Cal. Edison Co. v. Peabody W. Coal Co., 977 P.2d 769 (Ariz. 1999) (same); Superpumper, Inc. v. Nerland Oil, Inc., 582 N.W.2d 647, 651 (N.D. 1998) (“[A] state is not obligated to altogether ignore its own procedural requirements in light of the procedural aspects of the FAA, provided the state enacted procedure does not defeat the rights granted by Congress.”); Manson v. Dain Bosworth Inc., 623 N.W.2d 610, 614 (Minn. Ct. App. 1998) (holding that FAA governs arbitrability of dispute and Minnesota law governs all other issues, including procedural ones); Duggan v. Zip Mail Servs., Inc., 920 S.W.2d 200, 203 (Mo. Ct. App. 1996) (“Our courts are not bound by the procedural provisions of the FAA and state procedural rules may be applied when arbitration is pursuant to the FAA.”); *In re Propulsora Ixtapa Sur, S.A. De C.V. v. Omni Hotels Franchising Corp.*, 621 N.Y.S.2d 569, 211 A.D.2d 546, 548 (N.Y. App. Div. 1995), *app. denied*, 85 N.Y.2d 805, 650 N.E.2d 415 (1995) (holding that the FAA did not preempt the twenty-day limitation period for petitions to compel or stay arbitration under CPLR 7503(c)).

⁸⁸ 802 N.Y.S.2d 653 (N.Y. App. Div. 1st Dept. 2005).

⁸⁹ *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 64 (1995). The cases relied upon by the court in *ImClone* are not to the contrary. See *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 253, 793 N.Y.S.2d 831, 834-835 (N.Y. 2005) (holding that a generic choice-of-law clause in a contract containing a broad arbitration agreement was insufficient to withdraw from the arbitrators the authority to decide whether a claim was barred by New York’s statute of limitations); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 47 (N.Y. 1997) (holding that a generic New York choice-of-law clause was not sufficient to withdraw from the arbitrators the authority to decide questions of arbitrability when a broad arbitration clause specifically incorporated by reference rules providing that the arbitration panel shall have the power to rule on its own jurisdiction).

something more than generic language to incorporate such restrictions or limits.

In the Prefatory Note to the RUAA, the Commissioners on Uniform State Laws addressed the pre-emption issue.⁹⁰ They expressed the view that the FAA would probably not preempt the RUAA's provisions on discovery. ("It is likely that matters not addressed in the FAA are also open to regulation by the States. State law provisions regulating purely procedural dimensions of the arbitration process (e.g., discovery [RUAA Section 17], consolidation of claims [RUAA Section 10], and arbitrator immunity [RUAA Section 14]) likely will not be subject to preemption.")⁹¹

If the FAA does not preempt state procedural rules concerning non-party discovery, then, under current law, the availability and extent of pre-hearing discovery from non-parties in FAA cases may depend on whether enforcement of orders for non-party discovery is sought in federal court or state court.⁹² For purely domestic arbitrations, this may depend on such fortuities as whether there is complete diversity between the parties to the arbitration or whether there is some other independent basis for federal court jurisdiction. Even where there is a basis for federal jurisdiction, parties may choose to proceed in state court in order to take advantage of state procedural rules. The inconsistency between state and federal procedural law creates a potential for forum shopping.

A further potential anomaly under Section 7 is that another federal statute, 28 U.S.C. § 1782, has been held to allow courts to order both document discovery and depositions from non-parties anywhere in the United States for private international arbitrations seated outside the United States.⁹³ As a result, access to pre-hearing discovery from non-parties, at least when it is

⁹⁰ See RUAA at 1.

⁹¹ *Id.* at 5.

⁹² Whether a federal court sitting in diversity should apply state law rules authorizing courts to order discovery in aid of arbitration is an *Erie* question. See generally *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). We have found no authority directly addressing this question. Although arguments can be made to the contrary, we assume for the purpose of this discussion that such rules would be regarded as procedural and would not be applied in federal court.

⁹³ See *In re Application of Chevron Corporation*, No. M-19-111, 2010 U.S. Dist. LEXIS 47034 (S.D.N.Y. May 10, 2010); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265 JBA, 2009 U.S. Dist. LEXIS 109492 (D. Conn. Aug. 27, 2009); *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co., LLC*, No. 08-135-GMS, 2008 U.S. Dist. LEXIS 90291 (D. Del. Oct. 14, 2008), *appeal dismissed as moot*, No. 08-3518, 2009 U.S. App. LEXIS 17289 (3d Cir. Aug. 3, 2009); *In re Application of Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007); *In re Application of Babcock Borsig AG*, 583 F. Supp. 2d 233 (D. Mass. 2008); *In re Oxus Gold PLC*, No. Misc. 06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006). In a report on § 1782, this Committee has concluded that the statute applies to private international arbitrations. See Association of the Bar of the City of New York, International Commercial Disputes Committee, *28 U.S.C. § 1782 as a Means of Obtaining Discovery in aid of International Commercial Arbitration—Applicability and Best Practices*, http://www.nycbar.org/pdf/report/1782_Report.pdf (2008) (hereinafter "*§1782—Applicability and Best Practices*"). A minority of cases have held that the Section 1782 does not apply to private international arbitrations, *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, No. 08-20771, 341 Fed. Appx. 31, 2009 U.S. App. LEXIS 17596 (5th Cir. Aug. 6, 2009); *In re Operadora DB Mex., S.A.*, No. 6:09cv383, 2009 U.S. Dist. LEXIS 68091 (M.D. Fla. Aug. 1, 2009); *In re Arbitration in London between Norfolk Southern Corp. v. Gen. Sec. Ins. Co.*, 626 F. Supp. 2d 882 (N.D. Ill. 2009).

authorized by the arbitrators,⁹⁴ may be granted to parties to foreign arbitrations⁹⁵ but denied, under Section 7, to parties to U.S. arbitrations.⁹⁶

II. The Views of the Committee

A. Section 7 of the FAA does not authorize arbitrators to issue orders for pre-hearing testimony or document production from nonparties

The Committee agrees with the reasoning of the decisions of the Second and Third Circuits holding that Section 7 of the FAA does not authorize arbitrators to require pre-hearing testimony or production of documents. The only authority expressly granted to arbitrators under Section 7 is the authority to “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”⁹⁷ The statute does not, by its terms, grant any authority to arbitrators to require testimony or production of documents from non-parties prior to a hearing. It would be anachronistic to impute to the Congress that enacted Section 7 in 1925 an intent to grant such authority to arbitrators when, at the time, federal courts had no such authority and “the Federal Rules of Civil Procedure, with their provisions for depositions and other mechanisms for discovery, were more than a decade away.”⁹⁸

The Committee does not agree with the reasoning of the courts in *Security Life* and other cases that have held the power to require production of documents at a hearing includes the “lesser” power to require such production prior to a hearing.⁹⁹ It is debatable whether the power to require pre-hearing document production is, in fact, a lesser power included within the power to require production of documents at a hearing or whether it is something qualitatively different.¹⁰⁰ To assume that it is a “lesser” power effectively begs the question.¹⁰¹ As to the assertion that such a reading would further the interest in the efficient resolution of disputes, we

⁹⁴ In its report on § 1782, the Committee has suggested that courts should be deferential to arbitrators in exercising and issue such orders only upon the request of the arbitral tribunal. *§1782—Applicability and Best Practices* at 30-32.

⁹⁵ In its § 1782 report, a majority of the Committee concluded that discovery in aid of arbitration should be available only in those private international arbitrations seated outside the United States. *Id.* at 35.

⁹⁶ If they wish to do so, parties to international commercial arbitrations seated in New York may possibly be able to avoid application of state procedural rules which provide broader access to non-party discovery by removing any enforcement proceedings to federal court under Section 205 of the FAA., 9 U.S.C. § 205, which provides that the defendant in any state court action relating to an arbitration agreement falling under the New York Convention may remove such action to federal court. We have, however, found no case in which the removal statute has been employed in a proceeding to enforce or quash an arbitral subpoena.

⁹⁷ *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1080-1081 (N.D. Ill. 2008) (emphasis added).

⁹⁸ *Id.*

⁹⁹ As one commentator has observed, “Despite its prevalence and appeal, the argument that the greater includes the lesser must be used cautiously.” Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 B.Y.U.L. Rev. 227, 241.

¹⁰⁰ *Id.* (noting that one “obvious error in relying on the greater-includes-the-lesser argument occurs when one proposition is not in fact ‘the lesser’ of the other.”).

¹⁰¹ In this regard, we note that, before the enactment of the federal rules allowing for pretrial discovery, the Supreme Court held that section 24 of the revised statutes (U.S. Comp. Stat. 1901, p. 583), which allowed courts to require parties to produce books or writings “in the trial of actions at law,” did *not* authorize courts to require such production *prior* to the trial. *Carpenter v. Winn*, 221 U.S. 533 (1911).

agree with the Second and Third Circuits that, while there may be valid reasons to empower arbitrators to require pre-hearing testimony and production of documents from non-parties, a “statute’s clear language does not morph into something more just because courts think it makes sense for it to do so.”¹⁰²

One leading commentator has suggested that the reliance in *Hay* and *Life Receivables* upon the plain language of the FAA and the historical context of its enactment reflects an excessively narrow minded approach to statutory interpretation and laments the fact that courts have not been more flexible in interpreting the FAA.¹⁰³ Among other things, he observes that the “plain meaning” approach reflects an underlying assumption that “a rational legislature would have wished to freeze the structure of an arbitration in the amber of 1925—rendering irrelevant any later evolution in our notions of procedure”¹⁰⁴ At 12. While the Committee agrees that the current state of the law is unsatisfactory, we believe that the solution is for Congress, at the appropriate time, to amend the statute and not for courts to continue to interpret it in ways that they think appropriate (or that they think a rational legislature would have found appropriate) – a process which, thus far, has resulted in conflicting decisions.

We also agree with the reasoning of the Second and Third Circuits that Section 7 does not confer upon federal courts authority to enforce arbitral orders for pre-hearing non-party discovery in the case of “special need or hardship,” as suggested by the court in *COMSAT*. We note that there is authority for the proposition that federal courts may order discovery under Fed.R.Civ.P 27 in order to preserve evidence for arbitrations.¹⁰⁵ However, the Committee believes that, in most cases, the requirement of Rule 27 that the party seeking such discovery “expects to be a party to an action cognizable in a United States court”¹⁰⁶ would be an obstacle to the use of Rule 27 in connection with arbitrations.

It is true that, under current law, advance production of documents can be obtained in many cases by holding a pre-merits hearing or by threatening one, as suggested by Judge Chertoff in *Hay Group*. It is also true that territorial limitations on service and enforcement of arbitral subpoenas can possibly be avoided by relocating the arbitral tribunal or one of its members, or by threatening to do so. However, as explained below, the Committee believes that, ideally, Section 7 should be amended to provide for a more straightforward and less burdensome

¹⁰² *Life Receivables*, 549 F.3d at 216.

¹⁰³ Alan Scott Rau, Evidence and Discovery in American Arbitration: The Problem of “Third Parties”, 19 AM. REV. INT’L ARB. 1, 9 (2008). Professor Rau found the decisions in *Hay* and *Life Receivables* “eerily reminiscent of the Supreme Court’s equally wooden reading of § 10 in the recent *Hall Street* decision.” *But see* *Hayden v. Pataki*, 449 F.3d 305, 367 (2d Cir. 2006) (Calabresi, J., dissenting). (“[I]t might be a good idea if . . . courts were permitted to read the law according to what they perceived to be the will of the current Congress, rather than that of a long-gone-by one. . . . But whatever the merits of such an arrangement in the abstract, it is simply not a part of our legal system.”).

¹⁰⁴ Rau, *supra* note 102, at 12.

¹⁰⁵ 198 F.3d at 481. Although *Deiulemar* involved a request for interparty discovery, discovery may also be obtained from non-parties under Rule 27. *See, e.g., In re I-35w Bridge Collapse Site Inspection*, 243 F.R.D. 349, 352 n.3 (D. Minn. 2007) (“Rule 27 authorizes such an order to be entered against both parties and non-parties to anticipated litigation.”) (citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2456, at 29 (2d ed. 1995) (“A subpoena duces tecum also may issue pursuant to a court order without the commencement of an action for the perpetuation of testimony under Rule 27.”)).

¹⁰⁶ FED.R. CIV. P. 27(a)(1)(A).

procedure for obtaining documents and testimony from non-parties.

B. Section 7 of the FAA should be amended in due course.

The Committee recommends that Section 7 of the FAA be amended in due course to eliminate any requirement of a hearing for production of documents from non-parties, and to allow arbitral subpoenas to be served and enforced in the place where the testimony or production is to take place. We do not advocate, however, an amendment of the FAA solely for the purpose of revising Section 7; we believe that such a piecemeal amendment could send the wrong message to the international arbitration community. Amending only Section 7 of the FAA might be perceived as an expansion of the scope of arbitrators' authority to obtain evidence from non-parties—a perception that could potentially discourage discovery-adverse parties from agreeing to arbitrate in the United States. Accordingly, the Committee believes that the revisions it recommends to Section 7 below be made only if and when other sections of the FAA are amended as well, as part of a broader review and amendment of the FAA.¹⁰⁷

1. Section 7 should be amended to eliminate any requirement of a hearing for production of documents from non-parties.

The Committee believes that, as part of a broader amendment of the FAA, Section 7 should eventually be amended to eliminate any requirement of a hearing for production of documents from non-parties. Most of the decisions that have addressed the question appear to recognize that allowing pre-hearing document production from non-parties would enhance the efficiency of arbitration and would not impose any undue burden. The Second and Third Circuits have recognized that the efficient, cost effective resolution of disputes is an important goal of arbitration, but have concluded that the prospect of enhanced efficiency cannot cause the language of the statute to morph into something else. Congress should eventually act to rectify the problem.

The requirement for arbitrators to hold a hearing or to employ the stratagem proposed by Judge Chertoff in order to obtain pre-hearing document production from non-parties has been sharply criticized. As Professor Siegel has observed:

What can happen . . . suggests the court as one way around the restriction, is for the arbitrator to subpoena the nonparty to appear, with designated materials, after which the hearing can be adjourned, presumably affording the boning-up opportunity—analogue to pretrial disclosure in litigation—by that route. Maybe the party seeking the documents can just bargain with the nonparty: we'll save you the trouble of an appearance if you'll just give us the documents without one. Extorting a circuitous gambol like that suggests in any event that maybe the

¹⁰⁷ There has been debate among commentators as to the potential benefits and risks for international arbitration of amending the FAA. See William W. Park *Amending the Federal Arbitration Act*, 13 AM. REV INT'L ARBITRATION 1(2002); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L LAW 1241 (2003); Jan Paulsson, "International Arbitration is Not Arbitration," John E. C. Brierley Memorial Lecture McGill University, Montreal, 28 May 2008. Cf. J. Townsend *The Federal Arbitration Act Is Too Important To Amend*, THE INTERNATIONAL ARBITRATION NEWS (ABA), Summer 2004.

federal cases on the other side of the conflict have the better of the argument.¹⁰⁸

Another commentator was equally blunt:

It is supposed to be more flexible and less costly than litigation. The decisions in *Hay* and *COMSAT* invite an absurd subterfuge that is inconsistent with the purposes of arbitration. Judge Chertoff's concurring opinion in *Hay* actually endorses this subterfuge. He wrote that "arbitrators have the power to compel a third-party witness to appear with the documents before a single arbitrator, who can then adjourn the proceedings." He dismissed the cost issue, stating, "To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents." But it is not the arbitrators who will be inconvenienced; it is the parties, who will have to pay the arbitrators for wholly unnecessary activity.¹⁰⁹

The Committee shares these concerns. Although it may be necessary and appropriate for arbitrators to hold hearings to rule on disputed issues of privilege or other document production issues that might be ripe for decision prior to a merits hearing, in many cases the identity of the documents to be produced may not be in dispute. In such cases, the requirement of a hearing and an appearance by the witness to obtain production of documents is a relic of a distant era. There is no longer any comparable requirement for production of documents by a non-party witness in cases in litigation in U.S. federal court. Since 1937, the federal rules have permitted pre-trial document production from non-parties without any requirement of a hearing. In 1991, Rule 45 was amended to eliminate any requirement of an appearance by a witness for document production, whether for discovery or at a hearing or trial.¹¹⁰ In the Committee's view, the ability under the FAA to obtain documents from non-parties should remain limited and subject to the control of the arbitrators and the courts. However, it is difficult to conceive of any justification for maintaining the requirement of a hearing and an appearance by the witness for document production in arbitration. It potentially imposes unnecessary burdens and costs on all concerned—the parties, the arbitrators and the non-parties who are subject to the subpoena. Indeed, Rule 45(c)(2)(a), which eliminated the requirement of an appearance by the witness for production of subpoenaed documents, is one of a number of provisions listed under the heading "Protecting a Person Subject to a Subpoena."¹¹¹

Judge Chertoff sought to rationalize Section 7's requirement of a hearing for document production with one or more arbitrators present by suggesting that it "will induce the arbitrators and parties to weigh whether advance production is really needed."¹¹² While it is conceivable

¹⁰⁸ David D. Siegel, *Under Federal Arbitration Act, While Arbitrator can Subpoena Nonparty as Witness, it Can't Separately Compel Discovery; What's N.Y. Rule?* SIEGEL'S PRAC. REV. 2, December 2008.

¹⁰⁹ Lowell Pearson, *The Case for Non-Party Discovery Under the Federal Arbitration Act*, DISP. RESOL. J., AUG.-OCT. 2004, at 46, 52.

¹¹⁰ Rule 45(c)(2)(A) provides that "a person commanded to produce documents . . . need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial." FED. R. CIV. P. 45(c)(2)(A).

¹¹¹ FED. R. CIV. P. 45(c).

¹¹² 360 F.3d at 414.

that it will have that effect, it may also cause arbitrators and parties to forego advance production even when there is a legitimate need.

2. The requirement of Section 7 of a hearing for testimony of non-parties should be maintained.

Under *Life Receivables* and *Hay Group*, any examination of non-party witnesses must take place with one or more arbitrators in attendance. The Committee believes that this requirement should be maintained. In this regard, the Committee agrees with the concerns expressed by the court in *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, including the concern that the non-party might be required to appear twice (once for a deposition and again at the hearing) and the concern that, without the presence of the arbitrators, there is nothing to protect the non-party from harassing or abusive discovery, with the result that the non-party would be obliged to turn to the court for protection.¹¹³

3. Section 7 should be amended to allow arbitral subpoenas directed to non-parties to be served and enforced in the place where the non-parties are located, in same manner as subpoenas issued under Rule 45(a)(3)(B).

Rule 45 (a)(3)(B) provides that an attorney “may issue and sign a subpoena as an officer of . . . a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.”¹¹⁴ The Rule effectively permits nationwide service and enforcement of discovery subpoenas for litigation in federal courts as long as they are issued in the name of a district court for the district where the deposition or document production is to take place and served either within that district, outside that district but within 100 miles of the place specified for the deposition or document production, or within the state of the issuing court. As these provisions of Rule 45 recognize, commerce, communications and business enterprises in the United States transcend state lines and the borders of judicial districts. In many cases, information necessary for the fair and efficient resolution of a dispute subject to arbitration will be in the hands of parties more than 100 miles from the place where the arbitrators are sitting. The Committee sees no reason why similar mechanisms for service and enforcement should not also be available for subpoenas for pre-hearing document production and testimony issued by arbitral tribunals.

There may be ways, under current law, to overcome the territorial limitation imposed in such cases as *Dynegy* on the service and enforcement of arbitral subpoenas. For example, as the authors of one article have observed: “One way for an arbitral panel to overcome this territorial jurisdictional obstacle is temporarily to relocate the arbitration hearing to within 100 miles of the subject of the subpoena.”¹¹⁵

¹¹³ 885 F. Supp. at 71-72.

¹¹⁴ FED. R. CIV. P. 45(a)(3)(B).

¹¹⁵ Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas under U.S. Law and Practice*, 14 AM. REV. INT’L ARB. 197, 227 (2003). See also Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: the Power of Arbitrators*, 35 FORDHAM URB. L.J. 83, 99 (2008) (“[A]n arbitration panel could decide to ‘sit’ in a location other than where the arbitration is taking place but within 100 miles of the nonparty from whom discovery is sought for the sole purpose of complying with the territorial limits of FRCP 45 and section 7 to obtain nonparty discovery.”); Teresa Snider, *The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act*, 34 TORT & INS. L.J. 101,

Most institutional international arbitration rules permit arbitral tribunals to conduct hearings and meetings at locations other than the arbitral *situs*.¹¹⁶ It is possible that, even in *ad hoc* arbitrations, the authority of arbitrators to establish their own procedural rules includes the authority to hold hearings elsewhere.¹¹⁷

At least one court has upheld a subpoena requiring a non-party to appear and testify before a relocated tribunal. In *In re Nat'l Fin. Partners Corp.*,¹¹⁸ a federal district court in Pennsylvania refused to quash a subpoena issued by a sole arbitrator in Philadelphia ordering a non-party witness to appear and testify and to produce documents at a pre-merits hearing to be held within 100 miles of her home in Florida.¹¹⁹ The court rejected the argument that the arbitrator lacked authority to issue such an order, holding: “The arbitrator apparently has concluded that the third-party testimony is relevant and is important enough to warrant travel to Florida, and I see no basis to disturb that determination.”¹²⁰

108 (1998) (“To deal with the difficulty created by the FAA’s limits on enforcing subpoenas of nonparty witnesses, the parties can change the locale of the arbitration to coincide with the judicial district where the nonparty witnesses reside.”); Leslie Trager, *The Use of Subpoenas in Arbitration*, DISP. RESOL. J., NOV. 2007-JAN. 2008, at 14, 17 (“To circumvent this issue, we should ask whether the arbitrator could hold a separate document production hearing in the district where the witness resides and have the subpoena made returnable to that hearing. If the witness did not appear, then the party requesting the subpoena could ask the district or state court in that location to enforce the subpoena and for purposes of §7 of the FAA, the arbitrators would be sitting in that district.”)

¹¹⁶ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 427, 458 (2d ed. 2001); ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL ARBITRATION 275-6 (4th ed. 2004). See, e.g., UNCITRAL Rules 16(2) (“[The arbitral tribunal] may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.”); ICC Arbitration Rules 14(2) (“The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties.”); AAA International Dispute Resolution Procedures Rule 13(2) (“The tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate. The parties shall be given sufficient written notice to enable them to be present at any such proceedings.”). But see Trager, *supra* note 115, at 5 (“Because it is not entirely clear that arbitrators have the authority under the AAA rules to conduct a special hearing for document production purposes at a location other than the one originally chosen, the AAA may wish to consider whether it is necessary to make this authority explicit.”).

¹¹⁷ On the authority of arbitrators to fashion procedural rules, see *Commercial Risk Reinsurance Co. Ltd. v. Security Insurance Company of Hartford* 526 F.Supp.2d 424, 428 (S.D.N.Y.) (stating that arbitrators “possess broad latitude to determine the procedures governing their proceedings, to hear or not hear additional evidence, to decide what evidence is relevant, material or cumulative, and otherwise to restrict the scope of evidentiary submissions.”).

¹¹⁸ *In re Nat'l/Fin. Partners Corp.*, No. 9-mc-00026, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009).

¹¹⁹ *Id.* at *2.

¹²⁰ *Id.* It is questionable whether the Pennsylvania court in *National Financial Partners* had authority to decide a motion to quash a subpoena issued for documents and testimony from a non-party witness in Florida. First, in the district court in *Stolt*, Judge Rakoff questioned whether federal courts have authority under Section 7 to quash a subpoena, observing that “the FAA nowhere explicitly gives a person subpoenaed to an arbitration the right to move in a federal district court to quash the subpoena.” 348 F. Supp.2d 283, 288 (S.D.N.Y. 2004). Judge Rakoff noted that there is some authority for the idea that the right to bring a motion to quash goes hand in hand with the court’s power to enforce or refuse to enforce an arbitration subpoena, citing *Integrity Insurance Co. v. American Centennial Insurance Co.*, 885 F. Supp. 69, 72 (S.D.N.Y. 1995). On appeal in *Stolt*, 430 F.3d 567 (2d Cir. 2005), the Second Circuit seemed to assume that there was such authority. In *National Financial Partners*, however, the only possible basis for the arbitrator’s authority to issue the subpoena was that he was (or would be) “sitting” in Florida. Therefore, under Section 7, the only court that would have authority either to enforce or quash that subpoena would be a court in the place where the arbitrator was or would be “sitting”—a federal district court in Florida.

However, in the absence of an express rule permitting the arbitrators to do so, it may be possible for a recalcitrant party to object to the holding of hearings in any place other than the agreed place of arbitration.¹²¹ One commentator has suggested that there is some uncertainty as to whether federal courts would, in fact, enforce a subpoena issued by an itinerant panel, noting the absence of any case law on this issue and observing that some cases have equated Section 7's reference to "the place where the arbitrators are sitting" with the *situs* of the arbitration.¹²²

In New York, another possible approach to obtaining evidence from a distant non-party would be to do what the parties did in *ImClone*: obtain open commissions from a state court permitting the taking of evidence from out of state non-parties. However, under *Life Receivables*, such evidence-taking measures will not be available to parties who find themselves in federal court.

The Committee believes that Section 7 should be amended in order to provide clear authority for the service and enforcement of arbitral subpoenas in much the same manner as subpoenas issued Rule 45(a)(3)(B). However, the Committee would not change the requirement of Section 7 that only the arbitrators are authorized to issue such subpoenas, subject to review by the courts. The Committee would not extend that right to the attorneys for the parties as permitted under Rule 45.

C. Recommended Best Practices Under the Current Law.

The Committee believes that Section 7 of the FAA provides parties and arbitrators in U.S.-based international arbitrations with useful means of obtaining evidence from non-parties located in the United States where such evidence is necessary for the fair and efficient resolution of the parties' dispute. As indicated above, the Committee believes that certain aspects of Section 7 could, and eventually should, be amended to provide more efficient means of obtaining necessary evidence from non-parties. The availability of these means of obtaining evidence from non-parties is entirely consistent in principle with international arbitration norms, as reflected in the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") which codify prevailing international arbitration evidence-taking procedures and which specifically contemplate the possibility of obtaining evidence from non-parties.¹²³

¹²¹ See Snider, *supra* note 115, at 101 ("However, many arbitration agreements require the consent of all parties to change the locale of the arbitration hearing, and a party may resist moving the hearing in order to preclude court enforcement of a subpoena."). The assertion that "many" arbitration agreements contain such specific limitations is questionable.

¹²² DiUbaldo, *supra* note 115, at 99. See *Gresham v. Norris*, 304 F. Supp. 2d 795, 796 (E.D. Va. 2004) ("[A] district court maintains jurisdiction over such a petition [to enforce a subpoena under 9 U.S.C. § 7] if the *situs* of the pending arbitration is within its jurisdiction."). But see *In re Nat'l Fin. Partners Corp.*, No. 09-mc-00027-JF, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009).

¹²³ A new version of the IBA Rules was issued on May 30, 2010. See http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. With respect to documents, Article 3.9 of the IBA Rules provides: "If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested documents or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take,

The Committee believes, however, that control over the process of obtaining evidence from non-parties must remain with the arbitrators (as opposed to the parties), and that arbitrators should exercise their discretion to subpoena evidence from non-parties only in exceptional circumstances where necessary to obtain evidence indispensable for the fair and just resolution of the parties' dispute. This arbitral control and discipline over the process of obtaining non-party evidence is necessary not only to protect the efficiency of the arbitral process against attempts by parties to obtain a broader scope of discovery or evidence from third parties than the arbitrators might otherwise allow, but also to respect the interests of non-parties who have not agreed to arbitration and are not parties to the arbitration. More specifically, in exercising control and discipline over the non-party evidence process, the Committee believes that arbitrators in international arbitrations: (i) should limit the scope of documents and testimony sought from non-parties to the tailored scope of disclosure and evidence ordinarily available in international arbitration as reflected in the IBA Rules;¹²⁴ (ii) should issue arbitral subpoenas for non-party evidence only when the evidence sought is unavailable from any of the parties to the arbitration and is indispensable to the fair and just resolution of the parties' dispute; and (iii) should ensure that the non-parties are burdened as little as possible by the demand for non-party evidence. Thus, arbitrators should subpoena non-parties only for "evidence" as opposed to "discovery," should request only evidence without which the case cannot likely be fairly decided, and should ordinarily ensure that a non-party need only testify once (rather than twice, first at a "pre-merits" hearing and again at the merits hearing). Finally, while Section 7 provides that non-party evidence may be taken "before [the arbitrators] or any of them," the Committee believes that all arbitrators should be present when a non-party provides testimony in an international arbitration. This is recommended both to ensure that arbitrators carefully weigh whether the non-party's testimony is "really needed" (to borrow Judge Chertoff's words), and to protect the enforceability of the arbitrators' eventual award from any challenges under the FAA or the New York Convention.¹²⁵

authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies. With respect to testimony, Article 4.10 provides: "If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome."

¹²⁴ Article 3(3) of the IBA Rules, for example, requires that Requests to Produce describe each requested "Document" or "a narrow and specific . . . category of Documents that are reasonably believed to exist," contain a statement as to how the Documents requested are "relevant to the case and material to its outcome." Under Article 9(2)(c) of the IBA Rules, the Arbitral Tribunal must exclude from evidence or production any document or testimony "an unreasonable burden to produce the requested evidence."

¹²⁵ For instance, a losing party could argue that testimony taken from a non-party outside the presence of the arbitrator appointed by that party was "not in accordance with the agreement of the parties" that the case be heard and decided by all of the arbitrators within the meaning of Article V(1)(d) of the New York Convention. In this regard, we note that some arbitration rules require the presence of all of the arbitrators for the taking of evidence. For example, Rule 31 of the AAA Commercial Rules provides: "All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be

When arbitrators have concluded, based on the factors outlined above, that it is appropriate to issue an order for the production of documents or testimony from non-parties, questions may arise as to the procedure to be followed. As discussed above, there is conflict among the Circuits and between state and federal courts as to the availability of pre-hearing evidence from non-parties. The Committee believes that, in formulating orders for the production of documents by non-parties, the best practice for arbitrators under current law is to endeavor to follow the clearly authorized path prescribed in such cases as *Life Receivables* and *Hay Group*. This will involve the issuance of an order for the production of documents at a “pre-merits” hearing convened especially for that purpose. In order to comply with the requirements of *Stolt*, the order should command the non-party “to appear . . . in an arbitration proceeding” and “to bring with [them] and produce at that time and place any and all documents and things, of which [they] have custody or control, which are responsive” to the requests contained in the subpoena.¹²⁶

It is possible that, as Judge Chertoff suggested, the inconvenience of making such a personal appearance may well prompt the non-party witness to deliver the documents and waive presence. When a non-party witness is located outside the jurisdiction of the United States district court for the district in which the arbitrators are sitting, the arbitrators should be prepared to hold the pre-merits hearing at a place within 100 miles of the subject of the subpoena. Again, it is possible that even distant non-parties will deliver documents in response to such a subpoena without the need for the tribunal to relocate. A similar approach may be followed where the arbitrators believe that it is appropriate to require the testimony of a non-party prior to or in connection with a hearing on the merits.¹²⁷

In states that have enacted the RUAA or other statutes permitting pre-hearing depositions of non-parties without the presence of the arbitrators, arbitrators may be asked to issue subpoenas for such depositions. In arbitrations subject to the FAA, courts that are asked to enforce arbitral subpoenas will also be faced with the question whether the FAA preempts state procedural law in this regard. The Committee believes that, whether or not state law is preempted by the FAA, arbitrators in international arbitrations should *not* issue subpoenas for depositions of non-party witnesses. As the International Centre for Dispute Resolution’s

present.” Some state statutes also seem to impose such a requirement. *See, e.g.*, N.Y. C.P.L.R. § 7502(e), which provides: “The hearing shall be conducted by all the arbitrators, but a majority may determine any questions and render an award.”

¹²⁶ *See Odfjell ASA v. Celanese AG*, 348 F. Supp. 2d 283, 285 (S.D.N.Y. 2004).

¹²⁷ In New York, an arbitral tribunal may be asked to cooperate with one or more of the parties in requesting the assistance of a state court in obtaining evidence from out of state non-parties. In *ImClone*, the First Department interpreted the FAA to permit pre-hearing discovery, including the issuance of commissions for the deposition of out of state witnesses, in “special circumstances” which, the court held, meant only that the information was unavailable from sources other than the non-party. In the lower court decision in *ImClone*, such commissions were issued at the joint request of the parties to the arbitration where “the arbitrators [had] determined that it [was] appropriate to take such depositions.” *ImClone v. Waksal*, No. 602996/02, 2005 WL 5351321, slip. op. at 2 (N.Y. Sup. Ct. April 4, 2005). The Committee believes that state courts should require such a finding from the arbitrators before issuing commissions for obtaining evidence from out of state non-party witnesses. This decision should be left to the arbitrators in order to minimize the intrusion of courts into the sphere of arbitration and to avoid the waste of resources by ensuring that the information thus obtained can be used in the arbitration. As discussed below, the Committee believes arbitrators in international cases should *not* request state courts to issue commissions for depositions.

Guidelines for Arbitrators Concerning Exchanges of Information states in its Article 6(b): “Depositions . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.”¹²⁸

Finally, the Committee believes that, in international arbitrations, the issuance of orders for documents or testimony from non-parties should always be subject, in the first instance, to the control of the arbitrators. There are some state statutes which permit attorneys for the parties to arbitrations to issue subpoenas.¹²⁹ (As discussed above, the RUAA confers such authority only upon the arbitrators.) In cases subject to the FAA, federal courts have held that only the arbitrators may issue subpoenas for production of documents or testimony.¹³⁰ The question whether subpoenas issued by attorneys under state law should be enforced is likely to arise only in state courts.¹³¹ The Committee believes that courts asked to enforce attorney-issued subpoenas for non-party testimony or document production for international arbitrations should exercise their discretion not to do so.

July, 2010

¹²⁸ INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, art. 6(b) (2008), <http://www.adr.org/si.asp?id=5288>.

¹²⁹ For example, N.Y. C.P.L.R. § 7505 provides: “An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas.”

¹³⁰ A number of federal courts have held that, under Section 7, the parties to an arbitration may not issue subpoenas. *See NBC v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (“§ 7 explicitly confers authority only upon arbitrators; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents or witnesses.”); *St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 591 (7th Cir. 1992); *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) (“While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege.”) (citations omitted).

¹³¹ Under *ImClone*, a New York court is likely to hold that the Section 7 of the FAA preempts CPLR §7505.

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The Arbitration Committee, chaired by Kathleen M. Scanlon, consulted on the Report.