Commentary

Obtaining And Precluding Evidence From Non-Parties Based Upon The Scope Of Arbitrator Authority Under The Federal Arbitration Act

By
Louis J. Aurichio
Mark A. Schwartz
and
Joseph P. Noonan III

[Editor's Note: Louis J. Aurichio is a partner at Butler Rubin Saltarelli & Boyd LLP, in Chicago, Illinois, where he concentrates his practice on arbitration and litigation of reinsurance disputes. Section I of this article, which Mr. Aurichio authored, appeared in the May 13, 2004 edition of ***Mealey's Litigation Report: Reinsurance****. Mr. Aurichio would like to acknowledge his colleagues, Mark Schwartz and Joe Noonan, for their substantial assistance in updating and expanding his original article. Mr. Schwartz and Mr. Noonan are associates and have represented U.S. and European insurance and reinsurance clients, providing counseling and litigation services.* *Replies welcome.]*

Participants in reinsurance arbitrations are often faced with circumstances in which information relevant to contested issues is in the possession of companies or individuals who are not a party to the arbitration. As a result, reinsurance arbitrators are often requested to issue subpoenas to non-parties seeking the production of documents and witnesses. The ability to obtain information from non-parties, or to thwart such efforts, is influenced greatly by the federal courts' interpretation of the scope of authority granted to arbitrators under the Federal Arbitration Act ("FAA"). Understanding the evolving federal case law on this subject is therefore important to parties and counsel seeking to obtain or preclude the introduction of non-party evidence in reinsurance arbitrations.

This article examines a number of federal cases addressing whether the FAA authorizes arbitrators to compel by subpoena the production of documents and testimony from non-parties. Because the courts' analysis of this question varies significantly depending on whether the information is being sought for pre-hearing discovery or for use at an arbitration hearing, this article is organized accordingly. Thus, the first section of the article examines the three federal appellate decisions that have squarely addressed whether the FAA authorizes arbitrators to compel non-parties to comply with pre-hearing subpoenas. Several representative district court decisions are also discussed, two of which point to a developing trend in the case law. The second section discusses the power of arbitrators to compel non-parties to appear before them to testify or to produce documents at an arbitration hearing. The final section addresses whether federal law places territorial limitations on arbitrators' subpoena authority to compel the production of documents or testimony from non-parties.

I. Arbitrators' Authority To Compel Non-Parties To Produce Documents And Witnesses For Pre-Hearing Discovery Purposes

The three U.S. Courts of Appeals that have ruled on the scope of arbitrators' authority to compel non-parties to produce documents or witnesses for pre-hearing discovery have reached widely varying conclusions. Likewise, district courts that have addressed this issue have reached inconsistent results. Those

three federal appellate decisions and certain district court opinions that have figured largely in the debate are discussed below.

A. The Federal Appellate Court Decisions

1. Eighth Circuit: In Re Security Life Ins. Co. Of America

In *In re Security Life Ins. Co. of America*, a Minnesota insurance company, Security Life ("Security"), entered into a reinsurance treaty with a group of reinsurers, among them Transamerica. Under the treaty, which was managed by Duncanson & Holt ("D&H"), the reinsurers agreed to assume liability for Security's bad faith or negligent handling of claims, provided Security counseled with and obtained the concurrence of D&H concerning actions giving rise to extracontractual liabilities. The reinsurers refused to pay a loss ceded to the treaty because, according to D&H and the reinsurers, Security failed to honor the "counsel and concur" provision in the treaty. *In re Security Life Ins. Co. of America*, 228 F.3d 865, 867 (8th Cir. 2000).

Security demanded arbitration against D&H, but did not designate Transamerica or any of the other reinsurers as parties to the arbitration. *Id.* at 868. At Security's request, however, the arbitration panel issued a subpoena to Transamerica at its Los Angeles offices requiring the production of documents and the testimony of a Transamerica employee. (There is no indication in the *Security Life* court's opinion that the document production or deposition was to occur in connection with a physical appearance before the Panel). Transamerica refused to comply, contending that it was not a party to the arbitration and that the arbitration panel therefore had no authority under the FAA to issue the subpoena. Upon Security's petition to compel Transamerica's compliance, the district court directed Security's counsel to issue a subpoena to Transamerica (pursuant to F.R.C.P. 45(a)(3)(B)) on behalf of the district court in which the deposition or production was compelled by the subpoena. Transamerica appealed. *Id.* at 868-69.

Finding that Transamerica's challenge to the district court's order compelling attendance of its employee at a pre-hearing deposition was mooted, the Eighth Circuit's decision dealt exclusively with that portion of the subpoena requiring the production of documents.[1] Like all courts that have grappled with the scope of arbitrators' pre-hearing subpoena authority under the FAA, the *Security Life* court's analysis centered on the following language in § 7 of the Act, which grants arbitrators 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 which may be deemed material evidence in the case.

The court stated that permitting a party to review relevant documentary evidence before the arbitration hearing furthers the efficient resolution of disputes through arbitration. Having established efficient dispute resolution as its guiding principle, the court held that "implicit in an arbitration panel's power to subpoena relevant documents for production at hearing is the power to order the production of documents for review by a party prior to the hearing." The court found that "the panel's exercise of this implicit power was proper" regardless of whether Transamerica was found to be a party to the arbitration – a disputed issue on appeal. *Id.* at 870-71.

2. Fourth Circuit: Comsat Corp. v. National Science Foundation

In contrast to the Eighth Circuit, the Fourth Circuit found no "implicit power" in the FAA pursuant to which an arbitrator can subpoena a non-party for purposes of pre-hearing discovery. In *Comsat Corp. v. National Science Foundation*, 190 F.3d 269, 271-72 (4th Cir. 1999), an arbitrator issued subpoenas demanding that the National Science Foundation ("NSF"), which was not a party to the arbitration agreement, produce documents and employee testimony regarding a contract dispute between Comsat Corporation and an NSF awardee. The subpoenas were issued returnable to Comsat's counsel. The NSF refused to comply, the district court granted a petition to compel NSF's compliance, and NSF appealed. *Id.* at 273-74.

Focusing on the same provisions in Section 7 as did the *Security Life* court, the *Comsat* court stated that "[n]owhere does the FAA grant an arbitrator the authority" to order non-parties to appear at depositions or to produce documents to arbitrating parties

during pre-hearing discovery. Adhering to the express language of the FAA, the court observed:

[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them;" that is, to compel testimony by non-parties at the arbitration hearing.

Id. at 275.

The *Comsat* court stated that the "rationale for constraining an arbitrator's subpoena power is clear." *Id.* at 276. Parties to arbitration agreements agree to relinquish certain procedural rights afforded in the litigation context "in return for a more efficient and cost-effective resolution of their disputes." *Id.* A defining feature of arbitration and a predicate to its efficient operation is "a limited discovery process." Accordingly, the court reasoned, disputants who have elected to arbitrate should not expect to obtain full-blown discovery from each other "or from third parties." *Id.*

The court's analysis did not end there, however; the court carved out an exception to its holding. Specifically, the court noted that a party might, "under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship." *Id.* The court did not attempt to define "special need," except to say that a party must, at a minimum, demonstrate that "the information it seeks is otherwise unavailable." *Id.*

3. Third Circuit: Hay Group, Inc. v. E.B.S. Acquisition Corp.

A March 2004 decision by the Third Circuit lays out an interpretation of Section 7 that, intentionally or not, charts a course somewhere between the holdings in *Security Life* and *Comsat*. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, the Third Circuit rejected the *Security Life* court's "power-by-implication" analysis, finding no basis in the language of Section 7 for implying the power to require non-parties to produce documents when the production is not connected to a physical appearance before the panel. 360 F.3d 404, 408-09 (3d Cir. 2004). The court also rejected *Comsat*'s "special need" exception, finding no textual basis in Section 7 for permitting an arbitration panel, even under unusual circumstances, to require a non-party to produce documents in advance of the ultimate arbitration hearing unassociated with an actual appearance before an arbitrator. *Id.* at 409-10. But the *Hay Group* court stated that Section 7 conferred upon arbitrators the authority to convene, before the hearing on the merits, for purposes of having the subpoenaed non-party appear and the requested documents turned over. *Id.* at 410-11.

Hay Group involved a dispute between a management consulting firm, Hay Group, Inc. ("Hay") and its former employee (Hoffrichter) who left Hay to join PriceWaterhouseCoopers in 1999. In 2002, PriceWaterhouseCoopers sold to E.B.S. the division employing Hoffrichter. Hay commenced arbitration against Hoffrichter, alleging that he breached a non-solicitation clause in a separation agreement between Hay and Hoffrichter. The agreement at issue provided that any dispute arising under it be resolved by arbitration. *Id.* at 405-06.

During discovery in the arbitration, Hay served subpoenas for documents on E.B.S. at its Pittsburgh office and on PriceWaterhouseCoopers at its Philadelphia office. It appears from the *Hay Group* court's opinion that the subpoenaed records were to be produced in Pennsylvania, and that such documents were to be produced without a personal appearance by the subpoenaed witnesses before the arbitration panel. The subpoenas called for production prior to the ultimate hearing on the merits. PriceWaterhouseCoopers and E.B.S. raised their objections to the subpoenas with the arbitration panel to no avail. When PriceWaterhouseCoopers and E.B.S. still refused to comply, Hay petitioned the U.S. District Court for the Eastern District of Pennsylvania to enforce the subpoenas. The district court granted Hay's petition, accepting the Eighth Circuit's view that the FAA authorizes arbitration panels to issue subpoenas to non-parties for pre-hearing document discovery. PriceWaterhouseCoopers and E.B.S. appealed. *Id.*

The Third Circuit began its analysis by noting that an arbitrator's authority over parties that are not contractually bound by the arbitration agreement derives solely from the FAA. Construing Section 7, the court stated:

> [t]he 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.

The court thus held that Section 7 restricts an arbitrator's subpoena authority to situations where "the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." Id. at 407.

The *Hay Group* court acknowledged that its holding had an "ambiguous efficiency effect" on the arbitration process. *Id.* at 411. The court observed that "a reasonable argument can be made" that its literal reading of Section 7 furthers arbitration's goal of resolving disputes in a timely and cost-efficient manner. A physical appearance requirement "may . . . discourage the issuance of large-scale subpoenas upon non-parties" because the proponent of the discovery will be forced to decide "whether the documents are important enough to justify the time, money, and effort [it] will be required to expend if an actual appearance before an arbitrator is needed." *Id.* at 409. The court acknowledged that a physical appearance requirement might increase the time and expense of arbitration but nevertheless concluded that, in the case before it, "convening and adjourning an arbitration panel will hardly prove an insurmountable obstacle . . ." *Id.* at 411.

This discussion of the practical effect of its holding ends with the court's observation that, whatever the effect on efficiency, "efficiency considerations clearly cannot override the terms of Section 7." *Id.* Accordingly, the court concluded that if Hay wanted access to the requested documents for purposes of pre-hearing discovery, "the panel must subpoena PriceWaterhouseCoopers and E.B.S. to appear before it and bring the documents with them." *Id.*

A concurring opinion lends some clarity to the *Hay Group* court's ruling. In more direct terms than the majority opinion, the concurring judge noted that the court's opinion does not leave arbitrators powerless to require the production of documents by non-parties before the ultimate hearing on the merits. "Under section 7 . . . arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings." *Id.* at 413.

Like the statement in the majority opinion about the "ambiguous efficiency effect" of the court's ruling, the concurring judge's comments reveal a certain lack of assurance about the effect of the ruling on the arbitration process. The concurring judge noted that, as a practical matter, the inconvenience of making a personal appearance may well prompt a non-party witness to "deliver the documents and waive presence." *Id.* The judge also observed that the inconvenience of the physical appearance requirement for arbitrators may curb unnecessary discovery by "induc[ing] the arbitrators and parties to weigh whether advance production is really needed." *Id.* at 413-14. These two observations are somewhat difficult to reconcile, for if the inconvenience of making a personal appearance prompts non-parties to deliver requested documents and waive presence, the physical appearance requirement may do little to curb the incidence of broad discovery requests on non-parties.

B. Representative U.S. District Court Decisions

Like the federal circuit courts that have addressed the issue of arbitrators' power under the FAA to compel pre-hearing discovery from non-parties, district courts have diverged in their analytical approach and conclusions regarding this issue. As discussed below, some courts distinguish between subpoenas for depositions and documents, holding that arbitrators have power to issue subpoenas for the pre-hearing production of documents but not for pre-hearing depositions. In what appears to be a post-*Hay Group* developing trend, two recent district court decisions may foreshadow courts' increasing acceptance of arbitrators' authority to subpoena non-parties for deposition testimony prior to the ultimate hearing so long as non-parties (1) are subpoenaed to appear and testify in the arbitration proceeding, and (2) will not be required to testify again during the proceedings.

1. Pre-Hay Group District Court Decisions

Two oft-cited district court cases stand for the proposition that under the FAA an arbitrator's authority to compel non-parties to produce documents implicitly includes the authority to compel the production of documents for inspection by a party before the hearing. *Meadows Indemnity Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton v. Paine Webber*, 685 F. Supp. 1241 (S.D. Fla. 1988). The

subpoenas at issue in *Meadows* and *Stanton* called for the production of documents (but not testimony) in advance of the arbitration hearing. *Meadows*, 157 F.R.D. at 44; *Stanton*, 685 F. Supp. at 1242. Both *Meadows* and *Stanton* involved the production of records by non-parties unrelated to a physical appearance before an arbitration panel. *Meadows*, 157 F.R.D. at 44 (subpoena called for production of documents at non-parties' Tennessee office or at another location as agreed by parties); *Stanton*, 685 F. Supp. at 1242 (the subpoenas "require pre-hearing production of documents to the defendants"). Not surprisingly, the Eighth Circuit, in *Security Life*, cited approvingly to *Meadows* while the Third Circuit, in *Hay Group*, explicitly rejected *Meadows* "power-by-implication" analysis.

Meadows and *Stanton* also figure largely in the decision by the United States District Court for the Southern District of New York in *In re Arbitration Between Douglas Brazell v. American Color Graphics, Inc.* No. M-82 AGS, 2000 WL 364997, at *2-*3 (S.D.N.Y. April 7, 2000). There, the underlying arbitration between American Color Graphics ("ACG") and its former employee, Brazell, included a counterclaim in which ACG alleged that Brazell violated the non-compete provisions of his employment agreement. In connection with its counterclaim, ACG requested and obtained a subpoena issued by the presiding arbitrator, which required the production of documents by LTC, a competitor of ACG that was not a party to the arbitration. The subpoena demanded the non-party, LTC, to produce certain documents in advance of the hearing, unconnected to any physical appearance before the arbitrator. LTC refused to comply and ACG sought an order compelling production of the requested documents. *Brazell*, 2000 WL 364997, at *1.

In concluding that case law "support[s] the arbitrator's authority to provide for pre-hearing production of documents from third parties," the court drew heavily on the holdings and rationale of *Stanton* and *Meadows*. *Brazell*, 2000 WL 364997, at *2-3. The court, invoking its authority under Section 7 of the FAA, ordered non-party LTC to produce the requested documents promptly for inspection "at a time and location agreed upon by the parties . . . ." *Id.* at *3.

The court in *Brazell* took pains to distinguish its ruling from that in *Integrity Insurance Co. v. American Centennial Insurance Co.* (885 F. Supp. 69 (S.D.N.Y. 1995) – an earlier Southern District of New York decision in which the court held that Section 7 of the FAA does not empower arbitrators to compel attendance of a non-party at a pre-hearing deposition. As noted by the *Brazell* court, the judge in *Integrity* distinguished *Stanton* and *Meadows* on the ground that those cases dealt with pre-hearing production of documents, while the petition to quash the subpoenas in *Integrity* focused solely on pre-hearing depositions. *Id.* (citing *Integrity*, 885 F. Supp. at 72-73). In explaining the significance of this distinction, the court in *Integrity* found that pre-hearing depositions were more burdensome for non-parties than pre-hearing production of documents:

It is the burden placed on the nonparty that distinguishes Meadows from the instant case. 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.

Integrity, 885 F. Supp. at 73.

District courts sitting in Louisiana and Minnesota have followed the *Integrity* court's rationale to compel non-parties' compliance with document subpoenas but not those portions of the subpoenas purporting to require pre-hearing depositions of non-party witnesses. *In the Matter of Meridian Bulk Carriers, Ltd.*, No. 03-2011, 2003 WL 23181011, at *1-*2 (E.D. La. July 17, 2003);[2] *Schlumbergersema, Inc. v. XCEL Energy, Inc.*, No. Civ. 02-4304PAMJSM, 2004 WL 67647, at *2 (D. Minn. Jan. 9, 2004). In their refusal to enforce pre-hearing deposition subpoenas, the courts in *Meridian Bulk Carriers* and *Schlumbergersema* expressed concern about the burden on non-party witnesses called to testify at pre-hearing depositions. *See Meridian Bulk Carriers*, 2003 WL 23181011, at *1-*2 (following reasoning of *Integrity* and modifying subpoenas to allow production of documentary evidence but quashing subpoena for deposition testimony); *Schlumbergersema*, 2004 WL 67647, at *2 (citing *Security Life* and *Integrity* for proposition that "the production of documents

is less onerous and imposes a lesser burden than does a witness deposition"). As discussed below, concern over the burden placed on non-parties subpoenaed for deposition played a significant role in recent district court opinions construing the boundaries of arbitrator authority under the FAA.

2. Post-Hay Group District Court Decisions

Not long after the Third Circuit issued its opinion in *Hay Group*, the District Court for the Southern District of New York issued two opinions in *Odfjell ASA v. Celanese AG* that are particularly enlightening. The opinions, which discuss various subpoenas issued in an underlying arbitration, illustrate a procedure for obtaining testimony from a non-party before commencement of the hearing on the merits. In the first opinion, the chief arbitrator, at Celanese's request, issued a subpoena for deposition and documents to a non-party. *Odfjell ASA v. Celanese AG*, 328 F.Supp.2d 505, 506 (S.D.N.Y. 2004) ("*Odfjell I*"). The non-party failed to comply with the subpoena, and Celanese moved to compel. *Id.* Referring to arbitrators' power under Section 7 of the FAA to summon witnesses, the court noted that "[t]he use of the words 'before them' strongly suggests the power refers only to an evidentiary hearing before the arbitrators." *Id.* at 507. The court then cited approvingly to *Hay Group* in rejecting the notion that Section 7 "implicitly" confers on arbitrators the power to compel a pre-hearing deposition or pre-hearing document production from a non-party. *Id.* Accordingly, the court denied the motion to compel. *Id.*

Several months later, in the same arbitration proceeding, the arbitration panel issued additional subpoenas to different non-parties, who also refused to comply with subpoenas for documents and testimony. *Odfjell ASA v. Celanese AG* , 348 F.Supp.2d 283, 284-85 (S.D.N.Y. 2004) ("*Odfjell II*"). Although this second wave of subpoenas was also returnable in advance of the ultimate hearing, this time the district court granted a motion to compel the non-parties' compliance. *Id.* at 285-86. Whereas the subpoena in *Odfjell I* did not require the non-party to appear before the arbitrators, the subpoena in *Odfjell II* directed the non-parties to "appear at an arbitration proceeding" to give testimony and produce documents. *Id*. This difference in the language of the subpoenas was critical to the district court's analysis. As the court noted, Section 7 of the FAA gives arbitrators power to summon "any person" to attend "before them or any of them"[3] as a witness, which is "precisely what the instant subpoenas require." *Id.* at 286-87. "Nothing in the language of the FAA limits the point in time in the arbitration process when this power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing." *Id.* at 287.

Thus, because the subpoenas explicitly required appearance before the arbitrators, the court held that the subpoenas fell within the scope of the authority imparted to arbitrators under Section 7 of the FAA. *Id.* at 286-87. In so holding, the court emphasized that it had relied on the movant's representation that it did not intend to recall the non-parties to testify as witnesses or to produce documents at the final hearing. *Id.* The court warned that "[a]ny failure to comply with this representation may therefore give rise to the imposition of sanctions." *Id.* at 287 n.2. The *Odfjell* court specifically addressed the court's concern in *Integrity* (discussed above) that permitting arbitrators to subpoena non-parties for pre-hearing depositions would unduly burden those who had never agreed to participate in the arbitration. *Odfjell II*, 348 F.Supp.2d at 287 n.2. The *Odfjell II* court distinguished *Integrity* on the ground that this concern – that a non-party witness may be forced to testify twice – was not implicated given the representation that the non-parties in *Odfjell II* would not be recalled. *Odfjell II*, 348 F.Supp.2d at 287 n.2.[4]

In another recent decision, the U.S. District Court for the Northern District of Illinois ordered a non-party to comply with a pre-hearing deposition subpoena, but, like the court in *Odfjell II*, premised its order in part on the fact that the subpoenaed non-party would only be called to testify once. *Scandinavian Reinsurance Co. Ltd. v. Continental Casualty Co.*, No. 04 C 7020 (N.D. Ill. Dec. 10, 2004). In *Scandinavian Reinsurance,* the underlying arbitration involved a dispute between Scandinavian Reinsurance Company and Continental Casualty Company over two multi-million dollar reinsurance contracts brokered by Aon Re. Scandinavian Re sought the deposition testimony of three employees of Aon Re, which was not a party to the arbitration. *Scandinavian Reinsurance*, Slip Op. at 1. In their motion to quash, the Aon Re witnesses raised several objections to the subpoenas, including

that the arbitrators did not have power to compel them, as non-parties, to attend pre-hearing depositions. The district court disagreed. Slip Op. at 3. Significant to the court's decision was the fact that the witnesses' deposition testimony was to be used in lieu of live testimony at the hearing:

While there may be some authority to the contrary . . . I note that the non-parties may be summoned to attend hearings, and that here Scan Re seeks to depose the Witnesses and use the transcripts of their depositions at the final hearing in lieu of summoning non-parties to attend the hearings.

Slip Op. at 4. Interestingly, the district court in *Scandinavian Reinsurance* made no attempt to reconcile its ruling with the language in Section 7 of the FAA, pivotal to the *Odfjell II* court's analysis, that arbitrators only have the power to subpoena witnesses to appear "before them or any of them."

As the foregoing discussion demonstrates, federal courts have interpreted the FAA in disparate ways, which has left litigants (at least those outside the Third, Fourth and Eight Circuits) without clear guidance as to whether, or to what extent, arbitrators are authorized to compel non-parties to participate in pre-hearing discovery. While far from unified in their approach and conclusions, most courts appear motivated to strike a balance between allowing non-party discovery and not overburdening non-parties who are served with pre-hearing subpoenas. Because they perceive document discovery as less burdensome than pre-hearing depositions, many courts have held that Section 7 empowers arbitrators to compel non-parties to produce documents in advance of the arbitration hearing. It is not surprising, therefore, that when it is clear that a non-party will be compelled to testify only once, and thus will not be subject to multiple appearances, some courts have found that Section 7 also grants arbitrators the power to subpoena non-parties to appear and give testimony, even before the full hearing on the merits.

II. Arbitrators' Power To Compel Non-Parties To Produce Documents And To Appear As Witnesses At The Ultimate Hearing On The Merits

Section 7 of the FAA empowers arbitrators to summon "any person" before 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 evidence in the case." 9 U.S.C. § 7. Other than debate about the territorial reach of their authority (discussed below in Section III), there is no question that the FAA empowers arbitrators to compel non-parties to appear to testify at an arbitration hearing. The language of the Act is clear on this point. As for the compelled production of documents, arbitration participants typically seek to obtain non-party documents before the final hearing convenes so as to have the opportunity to review the requested documents in advance of the hearing. It is this desire for advance review of non-party documents that has engendered the litigation regarding pre-hearing document discovery discussed in Section I above. There may be occasions, of course, when production of non-party documents at the final hearing may suffice, such as when production of original documents is important to the dispute. So long as the documents sought are "deemed material evidence in this case," the plain language of Section 7 authorizes arbitrators to compel non-parties to appear before them and produce such documents. Id.

In the vast majority of reported federal decisions, courts agree that it is not the role of the district court in which the petition to compel is filed to make an independent assessment of the materiality of the information sought by the disputed subpoena. Citing arbitrators' greater familiarity with the details of the underlying disputes, courts typically decline to second-guess arbitrators' judgment about the materiality of subpoenaed information.[5] Of course, to the extent Comsat's "special need" exception is followed, the courts' current hands-off approach may change, since the materiality of the particular information sought would undoubtedly be an integral component of any attempt to demonstrate a "special need" for information in the possession or control of a non-party.

III. The Power Of Federal Courts To Compel Non-Parties To Produce Documents And Witnesses Beyond The Territorial Limits Of The Federal Rules

The intersection of the FAA and the Federal Rules of Civil Procedure presents certain jurisdictional challenges with respect to the enforcement of subpoenas issued to non-parties by arbitrators. The tension

arises because, while the FAA permits arbitrators to subpoena "any person" and to command such person to bring material documents with her, the parties must look to the federal courts for enforcement of such a subpoena and the Federal Rules of Civil Procedure provide that the federal courts have a limited territory in which they can issue their own subpoenas. The courts are divided as to whether they can enforce a subpoena that they could not themselves issue and whether the territorial limits of the federal rules apply to arbitration subpoenas. Parties seeking to enforce or avoid such a subpoena should acquaint themselves with the sparse but emerging case law.

The FAA requires that an arbitrator-issued subpoena "be served in the same manner as subpoenas to appear and testify before the court." 9 U.S.C. § 7. If a summoned person refuses to comply with the subpoena, "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 . . . ." *Id.* However, such enforcement authority is limited to "the same manner provided by law for securing the attendance of witnesses . . . to attend in the courts of the United States." *Id.* Rule 45 of the Federal Rules of Civil Procedure provides that "a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of deposition, hearing, trial, production, or inspection specified in the subpoena." Fed. R. Civ. P. 45(b)(2). Accordingly, although the FAA permits arbitrators to summon "any person," there are some challenges in enforcing a subpoena beyond the jurisdictional territory of the district in which the hearing is to take place. The challenge is not insurmountable, but the case law offers little consistency and thus little predictability.

The Third Circuit, in an unpublished case, held very simply that a subpoena summoning a non-party to produce documents cannot be enforced beyond the territorial limits of Rule 45. *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 Fed. Appx. 26, 28 (3d Cir. 2000). The Court held that the arbitration panel could not serve a subpoena that the district court could not itself issue. *Id.* at 27. The court reasoned that the FAA requires that arbitration subpoenas "be served in the same manner as subpoenas to appear and testify before the court," and Rule 45 prohibits the court from issuing a subpoena to a non-party for document production beyond certain territorial boundaries. *Id.* at 27.

Other courts have been more permissive. The Eighth Circuit, reserving the "thorny question" of potential geographic limitations of enforcing witness subpoenas under the FAA, held that an order enforcing a subpoena for the production of documents does not require compliance with Rule 45's territorial limit. *In re Security Life Ins. Co. of America*, 228 F.3d 865, 872 (8th Cir. 2000). The Court reasoned that "the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel." *Id.* Accordingly, it held that the territorial limits of Rule 45 do not apply to subpoenas that are limited to the production of documents.

In the wake of *Security Life*, another court decided that Rule 37 of the Federal Rules of Civil Procedure presented no obstacle to the enforcement of a subpoena for documents beyond Rule 45's territorial limit either. *Schlumbergersema, Inc. v. Xcel Energy, Inc.*, No. Civ. 02-4304PAMJSM, 2004 WL 67647 (D. Minn. Jan. 9 2004). Rule 37 provides that "[a]n application for an order to a person who is not a party shall be made to the court in the district where discovery is being, or is to be, taken." Fed. R. Civ. P. 37(a)(1). The summoned party in *Schlumbergersema* argued that pursuant to Rule 37 only the district court where the discovery is proposed to be taken can compel compliance, but the FAA only permits the subpoena to be enforced in the district where the panel sits. *Schlumbergersema*, 2004 WL 67647 at *2. Because the enforcement proceeding was brought in the district where the panel sat, the summoned party argued that the court did not have authority to compel compliance with the subpoena under Rule 37 since the discovery was to take place beyond the territorial limit of the district where the enforcement proceeding was brought. *Id.* at *2. The court agreed that the FAA required that the enforcement suit be brought in the district where the panel sits. But, relying on the rationale of *Security Life*, the court held that it had the power to enforce compliance with the panel's subpoena for document production, although not to enforce the witness subpoena, because "the production of documents is less onerous and imposes a lesser burden than does a wit-

ness deposition." *Id*. In sum, both the *Security Life* and *Schlumbergersema* courts held that the territorial limitations imposed by the Federal Rules do not apply to an arbitrator's subpoena when the subpoena is limited to documents.

Of course, as previously discussed, there is a split of authority with respect to whether the FAA grants arbitrators the authority to require a non-party to produce documents without also requiring a physical appearance before the arbitrator. If a physical appearance before the arbitrator is required, then the territorial question arises anew with respect to the summoned individual. In *Hay Group*, the Third Circuit addressed whether a subpoena *duces tecum* could be enforced where the summoned individual was within the Federal Rule's territorial boundaries for the enforcing district but the documents were not. *Hay Group*, 360 F.3d at 411-12. The court held that the subpoena power is over the person, so the location of the documents was irrelevant. *Id.* at 412. "[T]he person subject to the subpoena is required to produce materials in that person's control *whether or not the materials are located within the District or within the territory within which the subpoena can be served*." *Id.* (quoting Fed. R. Civ. P. 45, Committee Notes, 1991 Amendment Subdivision (a)) (emphasis added by *Hay Group* court).

As discussed above, some courts do not apply territorial restrictions on the enforcement of document subpoenas. But, of those courts, *Security Life* reserved the question of whether territorial restrictions apply to witness subpoenas and *Schlumbergersema* held that the restrictions do apply. Other courts, though, have held that compelling witness attendance beyond the territorial restrictions of the Federal Rules is possible.

The United States District Court for the Northern District of Illinois was posed with an apparent enforceability gap similar to the one addressed by the *Schlumbergersema* court in connection with Rule 37. *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995) (remanded on jurisdictional grounds, 95 F.3d 562 (7th Cir. 1996). The *Amgen* court noted that Rule 45 requires that a deposition subpoena issue from the court in which the deposition is to be taken, but the FAA requires that an action to enforce a subpoena be filed only in the district where the arbitrators sit. *Id.* at 882. Thus, it might appear that there is an enforceability gap because the only court that can enforce an arbitrator-issued subpoena lacks the power to issue its own subpoena to compel compliance outside its territory while the only court that can issue an enforceable subpoena lacks jurisdiction to enforce a arbitrator-issued subpoena under the FAA.

Holding that such a gap is "contrary to Congressional intent," the *Amgen* court pointed out that an arbitrator-issued subpoena was not the only means of summoning a non-party. *Amgen*, 879 F. Supp. at 883. The court observed that Rule 45(a)(3)(B) permits an attorney to issue a subpoena on behalf of a court for a district where a deposition is to take place using the case name and number of a case pending in the jurisdiction where the trial is to take place. *Id.* Accordingly, the court directed the attorney for the party who sought to enforce the subpoena to issue a subpoena on behalf of the court where the deposition was to take place using the case name and number of the enforcement action in the Northern District of Illinois. *Id.* This avoids the gap because, although the court local to the deposition cannot enforce the arbitrators' subpoena pursuant to the FAA, it can enforce the attorney's subpoena that is issued using the case name and number of a court proceeding in the district where the arbitration is to take place pursuant to Rule 45(a)(3)(B).

Using the *Amgen* procedure to enforce a subpoena effectively requires a two-step process. First, pursuant to the FAA, an enforcement action is brought in the jurisdiction where the arbitration is to take place. Second, the attorney for the party seeking the subpoena issues the subpoena pursuant to Rule 45(a)(3)(B) on behalf of the court for the district where the deposition is to take place using the case name and number of the proceeding in the court for the district where the arbitration is to take place. If the summoned party still refuses to comply, then the attorney can bring an enforcement action in the court for the district where the deposition is to take place.

More recently, the Southern District of New York, confronted with the same apparent enforcement gap

between the FAA and Rule 45, held that the gap is illusory. *In re Arbitration Trammochem*, No. 05 MISC. M8-85, 2005 WL 1400096 (S.D.N.Y. June 15, 2005). There, the court observed that Rule 45 governs the territory where the federal district court can issue a subpoena, but the subpoena in question was issued pursuant to the FAA by an arbitration panel, not the federal district court. *Id.* at *3. Thus, the territorial restrictions of Rule 45 do not apply. *Id.*

The Court reasoned:

> Had Congress intended to restrict arbitrators' authority to issue a subpoena duces tecum to those enumerated in the Federal Rules of Civil Procedure, as it does courts, the FAA would have explicitly included such language. Instead, by explicitly limiting the court's jurisdictional authority to issue subpoenas, without any indication of such a limitation on arbitrators, Section 7 implicitly grants arbitrators greater authority to issue subpoenas than it does this Court.

Id. Moreover, the court found that assistance in compelling compliance with the subpoena "is clearly within [the] Court's bailiwick" pursuant to the FAA, quoting the Second Circuit: "Section 7 [of the FAA] provides statutory authority for invoking the powers of the federal district court to *assist* the arbitrators in obtaining evidence." *Id.*

Conclusion

The scope of arbitrator authority under the FAA to compel by subpoena the production of documents and testimony from non-parties is still evolving. The three federal circuits that have addressed the issue directly have reached differing conclusions. And the district courts are no more unified in their approach or holdings, although some analytical trends are surfacing. Perhaps with time and the issuance of additional decisions, particularly by the circuit courts, a predominant line of authority will emerge. Until then, participants in reinsurance arbitrations seeking to obtain or preclude evidence from non-parties must be keenly aware of the evolving case law that will determine their chances of success, jurisdiction by jurisdiction.

Endnotes

1. During the pendency of Transamerica's Eighth Circuit appeal, Security obtained a subpoena from the district court in California, which was served on Transamerica in Los Angeles. When Transamerica failed to appear, the California district court granted Security's motion for a contempt order. Transamerica subsequently complied with the subpoena by producing a deponent and documents, but appealed to the Ninth Circuit. The Eighth Circuit held that Transamerica's compliance mooted Transamerica's appeal relating to the subpoenaed deposition but not that portion of the appeal regarding the subpoenaed records. According to the court, Transamerica had a sufficient interest in maintaining the secrecy of the documents such that the appeal might "lead to meaningful relief in the form of the return of those documents." *Id.* at 869-70 & n.2.

2. In its discussion of the scope of arbitrators' authority under Section 7, the court in *Meridian Bulk Carriers* cites to *National Broadcasting Co. v. Bear Sterns and Co.,* 165 F.3d 184 (2d Cir. 1999) as an example of a court that has held that an "arbitration panel does not have the power to engage in discovery as to non-parties to the arbitration." *Meridian Bulk Carriers*, 2003 WL 23181011, at 1. This statement is not an accurate characterization of the Second Circuit's opinion in *National Broadcasting Co.* There, the question presented was whether a commercial arbitration conducted in Mexico under the auspices of the International Chamber of Commerce, a private organization headquartered in France, is a "proceeding in a foreign or international tribunal" as those words are used in 28 U.S.C. § 1782. *Nat'l Broadcasting Co.*, 165 F.3d at 185. The Second Circuit did not decide the scope of arbitrators' subpoena authority over non-parties for pre-hearing discovery under Section 7 of the FAA. Rather, in the course of its opinion, the Second Circuit noted – but did not rule on – what it characterized as "open questions . . . as to whether § 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties." *Id.* at 187-88.

3. Echoing the view expressed in *Hay Group*, the court noted that the FAA's provision that arbitrators may summon the witness to come "before them *or any of*

them" contemplates that not every appearance before an arbitrator or panel of arbitrators "will consist of a full-blown trial-like hearing." *Id.* at 287 (emphasis in original).

In practical terms, this means that, while the necessity of appearing before at least one arbitrator will prevent parties to an arbitration from engaging in the extensive and costly discovery that is the bane of civil litigation, at the same time preliminary proceedings can proceed expeditiously before a single arbitrator to deal with preliminary questions of admissibility, privilege, and the like before the full panel hears the more central issues. *Id.*

4. The court's ruling in *Odfjell II* is currently on appeal to the Second Circuit Court of Appeals. *See Odfjell ASA v. Celanese AG*, No. 04 CIV 1758(JSR), -- F.Supp.2d --, 2005 WL 1863224, at *3 (S.D.N.Y. Aug. 8, 2005).

5. *See, e.g., Security Life*, 228 F.3d at 871 (concluding that the determination as to the relevancy of the subpoenaed records to the underlying dispute should be made by the arbitrator not the court); *AFTRA v. WJRK-TV*, 164 F.3d 1004, 1010 (6th Cir. 1999) (same); *Schlumbergersema*, 2004 WL 67647, at *3 (same); *Brazell*, 2000 WL 364997, at *3 (same); *Meadows*, 157 F.R.D. at 44 (same). ■