

# Closing the Enforcement Gap: Third-Party Discovery Under the FAA and the Federal Rules of Civil Procedure

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## INTRODUCTION

Arbitration has been increasingly replacing court adjudication of disputes in the U.S.<sup>2</sup> It offers contracting parties a flexible, enforceable, and private dispute resolution mechanism that is potentially more time-efficient and cost-effective than litigation.<sup>3</sup> Indeed, contracting parties enjoy the freedom, supported by the Federal Arbitration Act (“FAA” or “Act”),<sup>4</sup> to choose their arbitrators and empower them to resolve current and future disputes according to agreed upon procedures. Such parties effectively opt-out of the court system, limiting their right to access the courts for the resolution of their disputes.<sup>5</sup> They also opt out of some of

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2. Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 5–6 (2014) (reporting the results of 1997 and 2011 surveys of the first Fortune 1000 corporate counsel with respect to dispute resolution mechanisms which indicate a “general shift in corporate orientation away from litigation and toward ADR,” including arbitration, although the use of arbitration seemed to decrease between 1997 and 2011 in favor of mediation).

3. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. REP. NO. 97-542, at 13 (1982)) (noting that arbitration is “usually cheaper and faster than litigation . . . can have simpler procedural and evidentiary rules . . . normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties.”); see also Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199, 200 (1997).

4. 9 U.S.C. §§ 1–16. The FAA applies to arbitration agreements “in any maritime transaction or a contract evidencing a transaction involving commerce.” *Id.* § 2. It also creates federal substantive law requiring parties and courts to honor and enforce arbitration agreements. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 213 (4th Cir. 2020) (quoting *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 680 (4th Cir. 2018)) (“[W]ith the enactment of the FAA, Congress ‘elevat[ed] the arbitration of claims as a favored alternative to litigation when the parties agree in writing to arbitration.’”). This article concerns only arbitrations falling under the FAA. Those that do not fall within the purview of the Act are regulated by state arbitration statutes.

5. Courts generally do not intervene in the conduct of arbitral proceedings. John Wiley &

the procedures that are part and parcel of litigation in federal courts pursuant to the Federal Rules of Civil Procedure (“FRCP”).<sup>6</sup> This article is concerned with one such procedure—discovery<sup>7</sup>—and the extent to which it is available to parties in FAA arbitrations. Specifically, this article advocates for a broad reading of the FAA in the context of pre-hearing discovery from third parties in arbitration,<sup>8</sup> a position that has been

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Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964) (“Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”). For instance, pursuant to the FAA courts do not hear claims that are subject to a valid arbitration agreement, 9 U.S.C. §§ 3–4, and do not review the merits of arbitral awards, 9 U.S.C. §§ 10–11. At the same time, arbitration is not entirely detached from the court system either. With the enactment of the FAA, Congress “undertook to regulate the [arbitral] process and confer supervisory authority on U.S. district courts.” *Servotronics, Inc.*, 954 F.3d at 213. Accordingly, courts provide support to arbitrating parties, for instance with respect to the appointment of arbitrators where the parties have failed to do so, 9 U.S.C. § 5, and with respect to the confirmation of arbitral awards, 9 U.S.C. § 9.

6. The FRCP “govern the procedure in all civil actions and proceedings in the United States district courts.” FED. R. CIV. P. 1. This article concerns only FAA-related litigation in federal courts, even though the FAA applies also in state courts. *Southland Corp.*, 465 U.S. at 14–15.

7. The term “discovery” is a broad concept that includes the parties’ duty to disclose documents in their possession as well as “pre-trial depositions of witnesses, interrogatories, and the identification of relevant individuals.” Robert Bradshaw, *How to Obtain Evidence from Third Parties: A Comparative View*, 36 J. INT’L ARB. 629, 641 (2019). A deposition is “[a] witness’s out-of-court testimony that is reduced to writing (usually by a court reporter) for later use in court or for discovery purposes. Also termed *examination before trial*.” *Deposition*, BLACK’S LAW DICTIONARY (11th ed. 2019) (internal citation omitted). “Depositions usually take place outside the presence of the decision maker, and they are designed to allow parties to prepare for the eventual presentation of evidence or examination of witnesses before the decision maker at trial or a hearing.” *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 578 (2d Cir. 2005). The term “discovery” is used in this article broadly to refer to the production of evidence, whether documentary or testimonial. While this term is usually used in the context of litigation, it is also commonplace in the arbitration context. For guidance on arbitral “discovery” in specific types of disputes, see, e.g., *Discovery Guide*, FIN. INDUS. REGUL. AUTH. (Dec. 2, 2013), <https://www.finra.org/sites/default/files/ArbMed/p394527.pdf> [<https://perma.cc/2MSX-XQNS>] (in the securities arbitration context); *Initial Discovery Protocols for Employment Arbitration Cases*, AM. ARB. ASS’N (Apr. 2013), [https://www.adr.org/sites/default/files/document\\_repository/Initial-Discovery-Protocols-for-Employment-Arbitration-Cases.pdf](https://www.adr.org/sites/default/files/document_repository/Initial-Discovery-Protocols-for-Employment-Arbitration-Cases.pdf) [<https://perma.cc/29WX-5PRK>] (in the employment arbitration context); *JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases*, JUD. ARB. & MEDIATION SERVS. (Jan. 6, 2010), [https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Arbitration\\_Discovery\\_Protocols.pdf](https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf) [<https://perma.cc/BS84-C826>] (in the commercial arbitration context). While arbitration rules are important to the conduct of the arbitral proceedings they govern, the present article focuses on “discovery” guidance provided in the FAA and by the federal courts, rather than arbitration rules. Such rules tend to be general and to lack specificity with regard to evidence production. Moreover, they are subject to limitations provided by applicable laws. See, e.g., *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS’N 23 (Oct. 1, 2013), [https://www.adr.org/sites/default/files/CommercialRules\\_Web-Final.pdf](https://www.adr.org/sites/default/files/CommercialRules_Web-Final.pdf) [<https://perma.cc/V2GF-9EQ4>] (“An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.”).

8. The term “third party” as used in this article refers to a person who is not a party to the arbitration (*i.e.*, to the dispute) even if it is a signatory to the arbitration agreement.

rejected by most circuit courts.

It is well accepted that evidentiary rules differ greatly in litigation and in arbitration. In order to ensure the expeditious and cost-effective resolution of disputes in arbitration, evidentiary rules are less stringent than in litigation, and the scope of discovery tends to be much more limited.<sup>9</sup> Moreover, evidentiary rules in arbitration are determined by the parties and the arbitral tribunal and may differ greatly from arbitration to arbitration. Nevertheless, arbitral tribunals must hear relevant evidence in order to resolve disputes effectively and render an enforceable award.<sup>10</sup> Indeed, “[a]n arbitrator ‘must grant the parties a fundamentally fair hearing,’” which requires an “opportunity to be heard and to present relevant and material evidence and argument before the decision

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9. *Loc. Lodge 1746, Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Pratt & Whitney Div. of United Aircraft Corp.*, 329 F. Supp. 283, 286–87 (D. Conn. 1971) (“Arbitration has never afforded to litigants complete freedom to delve into and explore at will, the adversary party’s files under the pretense of pre-trial discovery.”). For instance, Rule 17(b) of the JAMS Comprehensive Arbitration Rules & Procedures provides that “[e]ach Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party.” *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS (June 1, 2021), <https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-17> [<https://perma.cc/7V2L-FE6P>].

10. While arbitrators generally conduct the proceedings, including evidentiary issues, at their discretion, the presumption is usually that the parties will present evidence to support their claims. *See, e.g., Commercial Arbitration Rules and Mediation Procedures*, *supra* note 7, at 22 (“The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. . . . The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”). Moreover, refusing “to hear evidence pertinent and material to the controversy” may lead to vacation of the arbitral award under § 10(a)(3) of the FAA. *See, e.g., In re Home Indem. Co. v. Affiliated Food Distribs., Inc.*, No. 96 Civ. 9707, 1997 WL 773712, at \*3–4 (S.D.N.Y. Dec. 12, 1997) (finding a violation of fundamental fairness and vacating an arbitral award where arbitration panel refused to allow one of the parties any discovery unless it first posted security in the full amount at issue in the arbitration); *Attia v. Audionamix Inc.*, No. 14 Civ. 706, 2015 WL 5580501, at \*8–9 (S.D.N.Y. Sept. 21, 2015) (vacating an arbitral award because the arbitrator’s exclusion of pertinent and material evidence was fundamentally unfair). Nevertheless, the burden of proof necessary to vacate an arbitral award remains very high given the great deference courts afford to arbitral tribunals, and the arbitrator’s “error must be one that is not simply an error of law, but which so affects the rights of a party that . . . he was deprived of a fair hearing.” *N.J. Bldg. Laborers Dist. Councils Loc. 325 v. Molfetta Indus. Co.*, 365 F. App’x 347, 350 (3d Cir. 2010) (citing *Newark Stereotypers’ Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968)); *see also Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 829 (S.D.N.Y. 1991) (citing *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1512 (S.D.N.Y. 1987)) (“[E]ven if the Panel erroneously excluded evidence, this would not in itself provide a basis for vacating the award absent substantial harm.”); *Al Maya Trading Establishment v. Glob. Exp. Mktg. Co.*, No. 16-CV-2140, 2017 WL 1050123, at \*4 (S.D.N.Y. Mar. 17, 2017) (noting an absence of fundamental unfairness); *Barinaga v. Cox*, No. 05-1432-HU, 2007 WL 184687, at \*10 (D. Or. Jan. 12, 2007) (citing *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Loc. 901*, 763 F.2d 34, 40 (1st Cir. 1985)) (“Setting aside an arbitration award on the basis that an arbitrator refused to hear evidence is appropriate only when exclusion of relevant evidence so affects the rights of a party that it may be said that he was deprived of a fair hearing.”).

makers.”<sup>11</sup> Discovery of documentary and testimonial evidence may therefore be desirable, and at times even necessary, for a fair and comprehensive resolution of a dispute in arbitration—just as in litigation.

Section 7 of the FAA addresses the production of evidence in arbitrations falling under the Act.<sup>12</sup> It provides for judicial support in the enforcement of arbitral subpoenas<sup>13</sup> of witness testimony as well as document production<sup>14</sup>:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . Said summons . . . 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.<sup>15</sup>

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11. *Bad Ass Coffee Co. of Haw. v. Bad Ass Coffee Ltd. P’ship*, 25 F. App’x 738, 743 (10th Cir. 2001) (citing *Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012–13 (10th Cir. 1994)).

12. More than half of the states have adopted either the 1956 Uniform Arbitration Act or the 2000 Revised Uniform Arbitration Act. Section 7 of both Acts empowers arbitrators to subpoena for the attendance of a witness and to produce records and other evidence at any hearing, as well as to permit a deposition of any witness to be taken for use as evidence at the hearing.

13. A subpoena is “a command from the court ordering a person to appear and give testimony, to produce documents or other materials, or to permit an inspection of property within the person’s control. Subpoenas may be used during discovery or at trial. Subpoenas are most frequently directed at nonparties and, indeed, are often the only way to obtain discovery from nonparties absent their consent.” Steven S. Gensler & Lumen N. Mulligan, *Rule 45. Subpoena*, FED. RULES CIV. PROC., RULES & COMMENT. (2021). The term “summons” in § 7 has been considered as equivalent to a “subpoena” under the FRCP. *See, e.g.*, *Amgen Inc. v. Kidney Ctr. of Del. Cnty., Ltd.*, 879 F. Supp. 878, 880 n.1 (N.D. Ill. 1995). These two terms are therefore used interchangeably in this article.

14. *Unison Co. v. Juhl Energy Dev., Inc.*, No. 13-CV-3342, 2016 WL 4942034, at \*3 (D. Minn. Mar. 21, 2016) (“The courts are empowered by the [FAA] to step in when a party to the arbitration, or a non-party subpoenaed by the arbitrator, is commanded to turn over documents and disobeys that command.”); *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (“The subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA.”).

15. 9 U.S.C. § 7. Although § 7 explicitly refers to a “United States district court,” the Supreme Court has held that the FAA does not in itself create federal question jurisdiction under 28 U.S.C. § 1331 or otherwise. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) (explaining that the FAA is “something of an anomaly in the field of federal-court jurisdiction.”). Therefore, in order for a federal district court to hear an independent motion invoking § 7 of the FAA

Section 7 has been interpreted as empowering arbitrators<sup>16</sup> to compel evidence from parties to the arbitration at any stage of the proceedings, as well as from third parties *at a hearing*.<sup>17</sup> Does it also empower arbitrators to order *pre-hearing* evidence from third parties in the same manner as the FRCP? The phrase “pre-hearing” is somewhat misleading in this context, since “[t]here is no rule that discovery is unacceptable or acceptable before or after the date the arbitration hearing begins.”<sup>18</sup> I therefore use the term “pre-hearing” discovery generically to indicate “simply the most basic form of generally prohibited discovery occurring outside the context of a

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(*i.e.*, a motion that is not part of an underlying litigation for which subject matter jurisdiction is already established), it must have jurisdiction to hear the dispute that is separately rooted in 28 U.S.C. § 1331, diversity jurisdiction (28 U.S.C. § 1332), or some other independent basis such as admiralty jurisdiction (U.S. CONST. art. III, § 2), bankruptcy jurisdiction (28 U.S.C. § 1334), or the Labor Management Relations Act (29 U.S.C. § 301). *See id.*; *Southland Corp. v. Keating*, 465 U.S. 1, 17 n.9 (1984); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581–82 (2008). Where a federal district court does not have subject-matter jurisdiction to hear an application under § 7 of the FAA, a state court would have jurisdiction to do so. This is because the FAA applies in both federal and state courts, which have concurrent jurisdiction to enforce its provisions. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n.34; *Southland Corp.*, 465 U.S. at 14–15. A discussion of state court jurisprudence on § 7 is beyond the scope of this article, but it should be noted that in some states, the state and federal courts may diverge on issues relating to § 7. George A. Bermann, Robert H. Smit & JurisNet, LLC, *Report of the International Commercial Disputes Committee and the Arbitration Committee of the Association of the Bar of the City of New York: A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing*, 26 AM. REV. INT'L ARB. 157, 163 (2015).

16. Section 7 empowers only the arbitrators to summon the production of evidence. *See, e.g.*, *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (“[Section] 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.”); *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.”) (internal citation omitted); *Joia v. Jozon Enters., Inc.*, No. 18-365WES, 2019 WL 1226986, at \*8 n.16 (D.R.I. Mar. 13, 2019) (The FAA “provides that it is the arbitrator who summons the witnesses; the court may enforce an arbitrator’s summons.”). This is in contrast to the FRCP, which allow a clerk of the court or an attorney to issue a subpoena. FED. R. CIV. P. 45(a)(3). This is also possible in arbitrations under some state arbitration laws. *See, e.g.*, *Loc. 757, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Borden, Inc.*, 71 Civ. 3076, 1971 WL 801, at \*3 (S.D.N.Y. Sept. 24, 1971) (discussing N.Y. C.P.L.R. § 2302 (MCKINNEY 2011)).

17. There is now general agreement among federal courts that “any person” in § 7 includes persons who are not parties to the dispute. *See, e.g.*, *Golden State Bank v. First-Citizens Bank & Tr. Co.*, EDCV 10-526, 2011 WL 13047425, at \*5 (C.D. Cal. July 7, 2011); *Moyett v. Lugo-Sánchez*, 321 F. Supp. 3d 263, 266 (D.P.R. 2018); *Bradshaw*, *supra* note 7, at 642; *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008); *Neal v. Asta Funding, Inc.*, No. 13-6981, 2016 WL 3566960, at \*20 (D.N.J. June 30, 2016); *e-Merging Mkt. Techs., LLC v. ELK Auto. Components*, No. 08-15150, 2011 WL 3440470, at \*2 (E.D. Mich. Aug. 8, 2011); *McGreal v. AT & T Corp.*, 892 F. Supp. 2d 996, 1019 n.6 (N.D. Ill. 2012); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009).

18. *Westlake Vinyls, Inc. v. Resolute Mgmt., Inc.*, No. 3:18-MC-00013-CHB, 2018 WL 4515997, at \*7 n.2 (W.D. Ky. Aug. 21, 2018) (quoting *Chi. Bridge & Iron Co. N.V. v. TRC Acquisition, LLC*, No. 14-1191, 2014 WL 3796395, at \*3 (E.D. La. July 29, 2014) (“The fact that a hearing might already have been held is immaterial.”)).

hearing.”<sup>19</sup> Conducting third-party discovery can be important since third parties are often considered the most credible witnesses and may possess documents unavailable to the parties.<sup>20</sup> Yet circuit courts have long been split on the availability of pre-hearing discovery of third parties in arbitration, sending mixed signals to parties, counsel, and arbitrators, and frustrating the FAA’s goal of promoting a uniform, pro-arbitration federal policy.<sup>21</sup>

Several circuit courts have interpreted § 7 restrictively, authorizing arbitrators to compel evidence from third parties only in connection with an appearance at a hearing. The Fourth Circuit, however, has signalled a willingness to allow arbitrators to subpoena pre-hearing evidence from third parties where there is a special need or hardship.<sup>22</sup> Going a step further, the Eighth Circuit found that § 7 confers an implicit power on arbitrators to do so even without a showing of special need.<sup>23</sup> Commentators have also diverged on this issue, some raising cost and efficiency arguments in support of a narrow interpretation of § 7 (limiting the arbitrators’ pre-hearing subpoena powers), while others raising fairness and effectiveness arguments in support of a broad interpretation (expanding the arbitrators’ powers in this regard).<sup>24</sup>

In this article, I present an argument that has yet to be fully explored in the literature for preferring the minority view interpreting § 7 broadly.<sup>25</sup>

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19. *Id.*

20. Benjamin J. Eichel & Matthew H. Adler, *When, Where and Whether: The Confusing Law of Third-Party Evidence*, 37 ALTS. TO HIGH COST LITIG. 49, 54 (2019).

21. Danielle C. Beasley, *Recurring Concerns in Arbitration Proceedings: Examining the Contours of Arbitral Subpoenas Issued to Nonparty Witnesses*, 87 U. DET. MERCY L. REV. 315, 316 (2010); Eichel & Adler, *supra* note 20, at 54 (“Nowhere has the absence of guidance [from the Supreme Court] been felt so acutely and painfully as on the subject of third-party discovery in arbitration.”); Lisa M. Eddington & Howard S. Suskin, *Enforcing Third-Party Discovery in Arbitration: Location of Arbitrators May Impact Ability to Obtain Documents/Testimony Prior to Hearing*, 37 LITIG. NEWS 26, 27 (2012) (“The current split among the courts as to the scope of pre-hearing arbitration discovery undermines the national uniformity in the arbitration process that the FAA was designed to promote.”); Daniel R. Strader, *Bridging the Gap: Amending the Federal Arbitration Act to Allow Discovery of Nonparties*, 41 STETSON L. REV. 909, 928 (2012) (highlighting how the “inconsistent manner in which the federal courts have applied and enforced the FAA’s discovery provisions . . . thwarts Congress’ original intent to promote a truly ‘national policy favoring arbitration’ and results in an unsustainable system in which the application of a federal law varies wildly depending on one’s jurisdiction.”).

22. *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999).

23. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 872 (8th Cir. 2000).

24. For a summary of the two sides of this debate, see Gabriel Herrmann, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 801–07 (2003).

25. Exceptions include Beasley, *supra* note 21, Strader, *supra* note 21, and Alan Scott Rau, *Evidence and Discovery in American Arbitration: The Problem of “Third Parties”*, 19 AM. REV. INT’L ARB. 1 (2008), where the authors discuss the convergence of § 7 of the FAA and FRCP 45. However,

I argue that the dominant judicial approach advocating for a narrow interpretation of arbitral subpoena powers may result in a problematic interplay between § 7 and the FRCP. Section 7 of the FAA provides that enforcement of arbitral subpoenas is to be done “in the same manner provided by law” for court-ordered subpoenas, thereby bringing into play the FRCP.<sup>26</sup> However, since § 7 of the FAA was enacted over a decade before the FRCP were devised and has never been amended, the two instruments are not always in line. If the narrow view of arbitral subpoena powers under § 7 is adopted, the concurrent application of this section and the FRCP may create gaps in the enforcement of arbitral subpoenas to third parties. One such enforcement gap may result from the application of FRCP 45(c), which requires the place of compliance with a subpoena to be within 100 miles of the location of the subpoenaed person.<sup>27</sup> When coupled with a narrow interpretation of arbitral powers under § 7 of the FAA as limited to the production of evidence in person at a hearing, FRCP 45(c)’s geographic restriction limits the jurisdictional reach of arbitrators to third parties located within 100 miles of the place of the hearing. Given the interstate nature of FAA arbitrations, this limitation may leave parties with no recourse for obtaining third-party evidence that is material to the resolution of their dispute.<sup>28</sup>

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these articles were written prior to the 2013 amendments to FRCP 45, discussed further below.

26. 9 U.S.C. § 7.

27. FED. R. CIV. P. 45(c).

28. Another enforcement gap may result from the concurrent application of § 7 and FRCP 45(d)(2)(B)(i) concerning which court has jurisdiction to enforce compliance with arbitral subpoenas. Section 7 requires that the federal district court where the arbitrators “are sitting” enforce such subpoenas. 9 U.S.C. § 7. FRCP 45(d)(2)(B)(i) provides that “the serving party may move the court for the district where compliance is required for an order compelling production or inspection.” FED. R. CIV. P. 45(d)(2)(B)(i). The Eleventh Circuit has recently noted that “this inconsistency is avoided because 9 U.S.C. § 7 simply states that compelling attendance must be done in the same manner provided by law (i.e., by filing a motion) and does not incorporate Rule 45 regarding *where* motions to compel must be filed. As a result, we conclude that the plain meaning of 9 U.S.C. § 7 requires that a motion to compel must be filed in the district in which the arbitrators are sitting.” *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1158 (11th Cir. 2019). The term “are sitting” in § 7 of the FAA has generally been interpreted as referring to the location of the specific arbitration hearing for which a subpoena is issued, rather than the location designated in the arbitration agreement or the domicile or physical location of the arbitrators. *See, e.g., Seaton Ins. Co. v. Cavell USA*, No. 3:07-CV-356, 2007 WL 9657277, at \*2 (D. Conn. Mar. 21, 2007) (where the arbitration was moved to a location other than the one designated in the arbitration agreement in order to obtain testimony and documents from witnesses who would not be subject to subpoenas in the contractually designated location). Courts have also distinguished the place of other hearings in the same arbitral proceedings. *See, e.g., Wash. Nat’l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126, 139 (2d Cir. 2020) (where the hearing to which the summons in question was issued was held in New York, while a previous hearing issuing separate summons was held in Pennsylvania); *Ferry Holding Corp. v. GIS Marine, LLC*, No. 4:11-MC-687, 2012 WL 88196, at \*2 (E.D. Mo. Jan. 11, 2012) (although the final arbitration hearings were to take place in Washington, D.C., the court found this factor to be

In Part 1 of the article, I briefly discuss discovery under the FRCP and the benefits and drawbacks of “litigation-style” discovery in the arbitral context. In Part 2, I examine the jurisprudence on arbitral power to issue pre-hearing subpoenas to third parties under § 7 and identify the circuit court split in this regard. In Part 3, I discuss the potentially problematic interplay between § 7 and FRCP 45(c) and identify the enforcement gap that may result from the dominant judicial view limiting arbitrators’ powers to issue pre-hearing subpoenas to third parties. In Part 4, I argue that the minority view allowing arbitrators to subpoena pre-hearing third-party evidence under § 7 of the FAA, at least in some circumstances, is preferable in this regard. Failing the adoption of this approach, I suggest alternative ways in which courts and/or arbitrators might close the enforcement gap resulting from the concurrent application of FRCP 45(c) and the dominant narrow interpretation of § 7 in the context of arbitral subpoenas to third parties. I conclude in Part 5 that parties and arbitrators, rather than courts, should determine whether broad, narrow, or no discovery at all is appropriate in a particular arbitration. Absent due process issues, courts should interpret § 7 of the FAA with a view to the statute’s pro-arbitration policy and consider potentially unworkable outcomes when applying FRCP 45(c) to arbitral subpoenas.

## 1. DISCOVERY UNDER THE FRCP AND THE FAA

When the FAA was enacted in 1925, pre-trial discovery was uncommon and the provisions of the FRCP governing discovery were more than a decade away.<sup>29</sup> In 1924, the United States Supreme Court (“Supreme Court”) held that “[i]t is contrary to the first principles of justice to allow a search through all the respondents’ records [sic], relevant

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outweighed by the fact that the arbitration agreement provided that any arbitration proceeding was to be conducted in St. Louis, the subpoenas issued by the arbitrators stated that they were issued from the St. Louis office of the American Arbitration Association, and plaintiff had previously obtained an order confirming a preliminary arbitration award in a separate proceeding before the Missouri court); *Moyett v. Lugo-Sánchez*, 321 F. Supp. 3d 263, 266–67 (D.P.R. 2018) (where the arbitrators were located in Georgia but the parties were in Puerto Rico and the arbitration hearing was to be conducted by videoconference). *But see* *Jones Day v. Orrick, Herrington & Sutcliffe LLP*, No. 21-mc-80181-JST, 2021 WL 4069753, at \*1 (N.D. Cal. Sept. 7, 2021) (where the California district court concluded that it had no authority to compel compliance with a third-party arbitral subpoena issued for a hearing in San Jose, California because the seat of the underlying arbitration was Washington, D.C.).

29. *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1080 (N.D. Ill. 2008); *see also* *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216 (2d Cir. 2008) (“The FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted.”).



or irrelevant, in the hope that something will turn up.”<sup>30</sup> Instead, “the common law’s ‘sporting theory of justice’ permitted the litigant to reserve evidential resources (documents and witnesses) until the final moment, marshaling them at the trial before his surprised and dismayed antagonist.”<sup>31</sup> Therefore, it seems unlikely that Congress intended § 7 of the FAA to empower “arbitrators and district courts to require pre-hearing production in arbitrations when such production was not authorized . . . in actions at law.”<sup>32</sup> However, the adoption of the FRCP in 1937 signaled a departure from this position and a movement toward broad discovery in federal courts.<sup>33</sup> The approach of the Supreme Court also shifted accordingly, holding in 1947 that “civil trials in the federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.”<sup>34</sup> Nevertheless, third-party discovery was slower to develop.

Until their amendment in 1991, the FRCP “did not authorize the compelled production of documents from a third party unless related to a hearing or deposition.”<sup>35</sup> In fact, FRCP 45, which governs subpoenas, resembled § 7 of the FAA in that it did not allow federal courts to issue pre-hearing, document-only subpoenas to third parties.<sup>36</sup> Additionally, FRCP 45 was “consistently read to limit the power of federal courts to

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30. Fed. Trade Comm’n v. Am. Tobacco Co., 264 U.S. 298, 306 (1924) (in the context of administrative subpoenas). However, by 1950 this position was abandoned. See *In re McVane*, 44 F.3d 1127, 1134 (2d Cir. 1995) (recognizing that the Supreme Court abandoned this position in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), and *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)).

31. *Matria Healthcare, LLC*, 584 F. Supp. 2d at 1080.

32. *Id.* at 1081.

33. Jason F. Darnall & Richard Bales, *Arbitral Discovery of Non-Parties*, 2001 J. DISP. RESOL. 321, 322 (2001).

34. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

35. *Next Level Plan. & Wealth Mgmt., LLC v. Prudential Ins. Co. of Am.*, No. 18-MC-65, 2019 WL 585672, at \*5 (E.D. Wis. Feb. 13, 2019) (citing *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407–08 (3d Cir. 2004)).

36. *Hay Grp., Inc.*, 360 F.3d at 407–08 (citing FED. R. CIV. P. 45). This restriction, based on the rule’s first two paragraphs, provides:

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena . . . shall command each person to whom it is directed to attend and give testimony at a time and place therein specified . . . .

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein . . . .

order pre-trial discovery from non-parties.”<sup>37</sup> Of course, the FAA and FRCP 45 diverged in 1991, when the latter was amended to broaden the discovery powers of federal courts and parties to federal court proceedings, including from third parties. For instance, FRCP 45 now authorizes parties, without approval of the court, to initiate and conduct broad discovery to obtain all evidence relevant to a claim or defense, whether or not the evidence is used or admissible in the proceeding.<sup>38</sup> At the same time, FRCP 45 “seeks to balance the interests of the parties who seek information from non-parties with the need to protect those non-parties from any undue costs or burdens that might result from compliance.”<sup>39</sup>

Section 7 of the FAA, however, has not been so amended. One court views Congress’ retention of the original text of § 7 as “compelling evidence that the original limitations inherent in § 7 were intended to remain undisturbed.”<sup>40</sup> Moreover, the original language of § 7 is said to be “perfectly consistent with the continuing concept of arbitration as a more efficient and cost-effective mechanism for the resolution of disputes than formal litigation.”<sup>41</sup> This view of arbitration, moreover, is at odds with “the broad-ranging discovery made possible by the Federal Rules of Civil Procedure.”<sup>42</sup> At the same time, the statutory language of § 7 that brings into play the FRCP suggests that Congress intended that § 7 “would evolve in parallel with changes in federal judicial practice with regard to non-party witnesses.”<sup>43</sup> As noted by one district court,

Congress generally linked the method of service for arbitral subpoenas

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37. *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1346 (S.D. Fla. 2009) (citing *Newmark v. Abeel*, 106 F. Supp. 758, 759 (S.D.N.Y. 1952)).

38. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 215 (4th Cir. 2020).

39. *Gensler & Mulligan*, *supra* note 13.

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

41. *Id.* at 1082 (citing *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)).

42. *Id.* (quoting *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190–91 (2d Cir. 1999)). Unlike the FAA, some state arbitration statutes explicitly grant arbitrators the power to issue pre-hearing document production subpoenas to third parties. *See, e.g.*, 10 DEL. CODE ANN. § 5708(a) (West, Westlaw through ch. 116 of the 151st Gen. Assem. (2021–2022)) (“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.”); 42 PA. STAT. AND CONS. STAT. ANN. § 7309(a) (West, Westlaw through 2021 Reg. Sess. Act 70) (“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.”); 710 ILL. COMP. STAT. ANN. 5/7(a) (West, Westlaw through P.A. 102–178 of the 2021 Reg. Sess.) (“The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths.”).

43. *Bermann, Smit & JurisNet, LLC*, *supra* note 15, at 169.

to the method of service of court-issued subpoenas. One must presume that, in doing so, Congress anticipated that the method of service of court-issued subpoenas might change, and that any such change would be incorporated into Section 7 of the FAA.<sup>44</sup>

There is no doubt that one of the main advantages of arbitration, as compared with litigation, is its informal procedural requirements, including the absence of prolonged discovery.<sup>45</sup> Informal procedural requirements translate into lower costs and greater speed and efficiency,<sup>46</sup> while extensive discovery is generally perceived as a threat to the practical benefits of arbitration.<sup>47</sup> Parties to arbitration agreements therefore forego the right to broad discovery in exchange for a quick and efficient resolution of their dispute.<sup>48</sup> Accordingly, courts have long rejected

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44. *Broumand v. Joseph*, No. 20-cv-9137, 2021 WL 771387, at \*5 (S.D.N.Y. Feb. 27, 2021).

45. *Matria Healthcare, LLC*, 584 F. Supp. 2d at 1082 n.5 (“[T]he absence of protracted discovery—the bane of modern litigation—is viewed as perhaps the most important of the advantages arbitrations enjoy over litigation in state or federal courts.”) (internal citation omitted); *see also Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 943 (1961) (“Discovery is expensive and time-consuming, and is thus inconsistent with the desires of parties who refer their disputes to arbitrators rather than to formal judicial tribunals.”); *Block 175 Corp. v. Fairmont Hotel Mgmt. Co.*, 648 F. Supp. 450, 453–54 (D. Colo. 1986) (explaining that arbitration’s limited discovery promotes judicial economy).

46. *Ware v. C.D. Peacock, Inc.*, No. 10 C 2587, 2010 WL 1856021, at \*3 (N.D. Ill. May 7, 2010) (quoting *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999); *see also Smith v. Am. Arb. Ass’n, Inc.*, 233 F.3d 502, 506 (7th Cir. 2000) (citing *Harter v. Iowa Grain Co.*, 220 F.3d 544, 553 (7th Cir. 2000)) (“The choice of arbitration is a choice to trade off certain procedural safeguards . . . against hoped-for savings in time and expense (other than the expense of the tribunal), a measure of procedural simplicity and informality, and a differently constituted tribunal.”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (explaining that in arbitration parties trade reduced discovery “for the simplicity, informality, and expedition of arbitration.”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010) (citing *Gilmer*, 500 U.S. at 31) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”); *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216 n.9 (2d Cir. 2008) (citing *Nat’l Broad. Co.*, 165 F.3d at 190–91) (“There are also valid reasons for limited arbitral subpoena authority, since timeliness and efficiency are among the primary reasons to resolve disputes through arbitration.”).

47. *Ho*, *supra* note 3, at 213–14. In the survey conducted by Stipanowich & Lamare, a majority of respondents reported that “discovery is typically the most significant source of expense and delay in litigation, and the scope of discovery is closely linked to concerns about process time and cost.” Stipanowich & Lamare, *supra* note 2, at 38 (footnote omitted).

48. *COMSAT Corp.*, 190 F.3d at 276 (“A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process. Consequently, [where parties] have elected to enter arbitration, neither may reasonably expect to obtain full-blown discovery from the other or from third parties.”) (internal citation omitted); *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) (“An arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these accoutrements is the right to pre-trial discovery.”) (internal

challenges to the enforcement of arbitration agreements on the grounds that limited discovery in arbitration is inadequate or constitutes a fraudulent device intended to prevent them from proving their case.<sup>49</sup> Moreover, since arbitration is strictly a creature of contract and a product of consent, the authority that arbitrators may exercise over third parties to an arbitration is inevitably more limited than that of a court and must be derived from the FAA.<sup>50</sup> Indeed, “allowing arbitrators to issue subpoenas to non-parties could result in problems such as dragging non-parties into disputes which have no relevance to them and/or forcing non-parties to incur substantial expense in disputes which have no relevance to them.”<sup>51</sup>

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citations omitted); *Nat'l Broad. Co.*, 165 F.3d at 190–91 (“The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness—characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure . . . . The limitations in § 7 of the FAA . . . are consistent with these traditional discovery limits.”) (internal citation omitted); *Next Level Plan. & Wealth Mgmt., LLC v. Prudential Ins. Co. of Am.*, No. 18-MC-65, 2019 WL 585672, at \*4 (E.D. Wis. Feb. 13, 2019) (“When parties agree to settle their disputes through arbitration, it comes with tradeoffs, one of which is foregoing the full panoply of discovery available in litigation. That is the bargain the parties make when they agree to arbitration; it is the court’s obligation to give force to that agreement.”) (internal citation omitted).

49. *See, e.g., Morrison v. Cir. City Stores, Inc.*, 317 F.3d 646, 673 n.16 (6th Cir. 2003) (concluding that limited discovery was not grounds for finding the arbitration agreement unenforceable where plaintiff failed to show how discovery restrictions prevented her from presenting her employment discrimination claims); *see also Gilmer*, 500 U.S. at 31 (finding that discrimination claims under the Age Discrimination in Employment Act of 1967 are arbitrable despite discovery limitations); *Arnold v. Arnold Corp. Printed Commc’ns for Bus.*, 920 F.2d 1269, 1278–79 (6th Cir. 1990) (“We do not believe that amendment of the complaint to include a charge that the arbitration clause was intended to effect a larger fraudulent scheme by limiting discovery is sufficient to constitute a ‘well-founded claim’ that the arbitration clause itself, standing apart from the agreement as a whole, was induced by fraud.”); *Hires Parts Serv., Inc. v. NCR Corp.*, 859 F. Supp. 349, 355 (N.D. Ind. Aug. 5, 1994) (refusing to find the arbitration agreement unenforceable where plaintiff alleged arbitration clause was intended to prevent discovery of fraudulently induced contract); *Guyden v. Aetna, Inc.*, No. 3:05cv1652, 2006 WL 2772695, at \*8 (D. Conn. Sept. 25, 2006), *aff’d*, 544 F.3d 376 (2d Cir. 2008) (granting defendant’s motion to compel arbitration over plaintiff’s complaints that arbitration’s limited discovery would hinder her ability to prove whistleblower claim). *But see Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 545 (E.D. Pa. 2006) (finding that restrictive discovery provisions in an adhesion contract signed by the plaintiff, a resident at an assisted living facility, put plaintiff “at a distinct disadvantage in arbitration.”).

50. *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1158–59 (11th Cir. 2019) (“Arbitration is a creature of contract and ‘an arbitrator’s authority over the parties to an arbitration is limited by the contours of the parties’ agreement and those enumerated in the [FAA].”); *see also Teresa Snider, The Discovery Powers of Arbitrators and Federal Courts Under the Federal Arbitration Act*, 34 TORT & INS. L.J. 101, 102 (1998) (explaining that arbitrators may order discovery from third parties pursuant to the Federal Arbitration Act); *Darnall & Bales, supra* note 33, at 324 (“The nature of arbitration is thus contractual . . . . The power of discovery given to an arbitrator is limited to those powers given by the parties. Obviously, non-parties are not bound by this agreement . . . . The power to compel non-party participation is derived from the FAA.”) (footnote omitted).

51. *EBR Holding Ltd. v. Hollywood Woodwork, Inc.*, No. 05-60990-CIV, 2005 WL 8155311,

Therefore, third parties should generally be spared the “notorious burdens of pre-hearing discovery.”<sup>52</sup>

At the same time, there is no question that § 7 of the FAA empowers arbitrators to compel testimonial and documentary evidence at a hearing, including from third parties.<sup>53</sup> The FAA also grants arbitrators “great discretion—in many instances more discretion than trial courts—regarding procedural matters such as discovery.”<sup>54</sup> Therefore, it would be consistent with the purpose and spirit of the FAA for courts to defer to arbitrators’ evidentiary decisions, including those related to discovery from third parties. Moreover, discovery can be advantageous in the arbitration context.<sup>55</sup> While fishing expeditions should be avoided, limited discovery “puts some teeth into the arbitration clause and fulfills the policy behind the federal arbitration act”<sup>56</sup> because parties’ ability to present their case fully, and arbitrators’ ability to resolve disputes effectively, ultimately depends on the evidence. After all, if pre-trial discovery is intended “as an aid in reaching the truth and as a means of reducing both the length of trials and the element of surprise,” it would be “of equal help in arbitration.”<sup>57</sup>

Some view § 7 as resolving this “thorny question”<sup>58</sup> of discovery from third parties by allowing such discovery but limiting it to a hearing.<sup>59</sup> Yet this compromise also means that “[a]rbitration right now is not working to

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at \*8 n.3 (S.D. Fla. Oct. 17, 2005).

52. Odfjell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004); see also *Next Level Plan. & Wealth Mgmt., LLC*, 2019 WL 585672, at \*5 (rejecting the proposition that “a third party who never agreed to be subject to arbitration can be forced to devote the time and expense of compelled disclosure of documents.”).

53. Richard J. Tyler, *Discovery in Arbitration*, 35 CONSTR. L. 5, 12 (2015).

54. *EBR Holding Ltd.*, 2005 WL 8155311, at \*4.

55. Strader, *supra* note 21, at 929–30.

56. Block 175 Corp. v. Fairmont Hotel Mgmt. Co., 648 F. Supp. 450, 454 (D. Colo. 1986).

57. Bigge Crane & Rigging Co. v. Docutel Corp., 371 F. Supp. 240, 246 (E.D.N.Y. 1973); see also Hiro N. Aragaki, *Constructions of Arbitration’s Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 158 (2016) (“[L]imited discovery may also help promote the cause of justice—that is, it may play an important role in ensuring that disputes get resolved on their substantive merits rather than get abandoned or compromised.”); *Dodson Int’l Parts, Inc. v. Williams Int’l Co. LLC*, No. 20-3193, 2021 WL 4142693, at \*13 (10th Cir. Sept. 13, 2021) (noting that “one cannot expect full discovery in arbitration proceedings” but not “foreclos[ing] the possibility that failure to provide discovery could make an arbitration fundamentally unfair.”).

58. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 872 (8th Cir. 2000).

59. Snider, *supra* note 50, at 102 (“The FAA balances these competing concerns by permitting nonparties to be subpoenaed, but (1) requiring that nonparty witnesses be summoned by the arbitrators rather than by the parties; (2) requiring the payment of witness fees; (3) limiting nonparty witness participation to testimony before the arbitrators; and (4) limiting the subpoena of documents to ‘the proper case’ where the documents sought ‘may be deemed material as evidence.’”) (footnote omitted).

achieve the full exposition of the facts necessary in complex cases requiring third-party evidence,<sup>60</sup> particularly when the FRCP are applied to it. In the next Part, I discuss the circuit split that has emerged with respect to the scope of arbitrators' powers to order pre-hearing discovery from third parties under § 7, before turning in Part 3 to the enforcement gap that may result from the application of FRCP 45(c) and the dominant narrow interpretation of § 7.

## 2. THIRD-PARTY DISCOVERY UNDER § 7 OF THE FAA

Courts are in general agreement that arbitrators' power to compel evidence pursuant to § 7 of the FAA extends to third parties in the context of an arbitral hearing<sup>61</sup> or proceeding,<sup>62</sup> whether such hearing concerns the merits or is of a preliminary nature.<sup>63</sup> At the same time, there is

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60. Eichel & Adler, *supra* note 20, at 59. Commentators are also divided on the question of the proper scope of arbitral power under § 7 with regard to third parties. *See* Ho, *supra* note 3, at 200–01 (arguing that the scope of discovery in commercial arbitrations should be limited); Darnall & Bales, *supra* note 33 (arguing that arbitrators' powers to order discovery under § 7 of the FAA should be interpreted broadly); Strader, *supra* note 21, at 912 (“Greater discovery will lead to more just results because both the parties and the arbitrators will have access to critical factual information.”); Sara Rosenberg, *Toward a Functional Alternative to Courtroom Adjudication: The Federal Arbitration Act and Third Party Document Discovery*, 79 *FORDHAM L. REV.* 1333, 1361 (2010) (“[T]he FAA, correctly interpreted, permits arbitrators to compel prehearing document production from third parties.”); Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S. Law and Practice*, 14 *AM. REV. INT’L ARB.* 197, 214–15 (2003) (“If Section 7 were restricted to its narrow meaning, arbitrators would not have the power to order pre-hearing discovery even of *parties*, assuming that the arbitral agreement were silent on this question.”).

61. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577–78 (2d Cir. 2005) (“Any rule there may be against compelling non-parties to participate in discovery cannot apply to situations . . . in which the non-party is ‘summon[ed] in writing . . . to attend before [the arbitrators] or any of them as a witness and . . . to bring with him . . . [documents] which may be deemed material as evidence in the case,’” as provided in § 7); *see also* *All. Healthcare Servs., Inc. v. Argonaut Priv. Equity, LLC*, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011) (quoting *Stolt-Nielsen SA*, 430 F.3d at 577–78) (agreeing with the Second Circuit’s conclusion that arbitrators may compel third parties to attend arbitral hearings); *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216 (2d Cir. 2008); *Neal v. Asta Funding, Inc.*, No. 13-6981, 2016 WL 3566960, at \*20 (D.N.J. June 30, 2016); *e-Merging Mkt. Techs., LLC v. ELK Auto. Components*, No. 08-15150, 2011 WL 3440470, at \*2 (E.D. Mich. Aug. 8, 2011); *McGreal v. AT & T Corp.*, 892 F. Supp. 2d 996, 1019 n.6 (N.D. Ill. 2012); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009).

62. *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, No. 12 Civ. 5959, 2014 WL 3605606, at \*2 (S.D.N.Y. July 18, 2014) (holding that the “semantic line” drawn by the third party between an arbitration “proceeding” and a “hearing” was “a distinction without a difference.”).

63. *Stolt-Nielsen SA*, 430 F.3d at 578–79 (2d Cir. 2005) (noting that the mere fact that a session before the arbitrators is preliminary to later hearings that the panel intends to hold does not transform that session into “a discovery device . . . [t]o the contrary, the language of Section 7 is broad, limited only by the requirement that the witness be summoned to appear ‘before [the arbitrators] or any of them’ and that any evidence requested be material to the case.”) (internal citation omitted). Since in this case, all of the arbitrators “participated in a hearing in which they received testimony and

disagreement among the courts as to whether this power also extends to pre-hearing third-party discovery. In this regard, a circuit split has emerged. The Courts of Appeals for the Second,<sup>64</sup> Third,<sup>65</sup> Ninth,<sup>66</sup> and Eleventh<sup>67</sup> Circuits have categorically refused to enforce arbitral subpoenas compelling pre-hearing discovery from third parties.<sup>68</sup> In

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documents, took evidence, and considered matters of admissibility and privilege,” the Second Circuit found that “[p]reliminary or not . . . [this] was the sort of hearing to which Section 7 authorizes arbitrators to summon non-party witnesses.” *Id.* at 580; *see also* *Odffjell ASA v. Celanese AG*, 348 F. Supp. 2d 283, 287 (S.D.N.Y. 2004) (“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.”).

64. *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216–17 (2d Cir. 2008); *see also* *Odffjell ASA*, 328 F. Supp. 2d at 507 (quoting *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 408 (3d Cir. 2004)) (agreeing with the Third Circuit’s conclusion that had Congress intended to grant arbitrators the authority to compel pre-hearing depositions and document production from third parties, “the drafters would have said so.”); *see generally* *Bermann, Smit & JurisNet, LLC*, *supra* note 15 (discussing a federal-state split in New York on this issue).

65. *Hay Grp., Inc.*, 360 F.3d at 411; *see also* *Neal v. Asta Funding, Inc.*, No. 13-6981, 2016 WL 3566960, at \*20 (D. N.J. June 30, 2016) (“[A]n arbitrator cannot order document production as such, but the arbitrator can compel a third party to appear before the arbitrator and to produce documents at that time simultaneously with that appearance.”). *Hay Group*, however, involved a subpoena issued by a party to the arbitration, not by the arbitrators. 360 F.3d at 405. The district court in *EBR Holding Limited v. Hollywood Woodwork, Inc.*, has therefore suggested that “the Third Circuit only had to look to that fact to quash the subpoena . . . the Third Circuit’s discussion of arbitrators’ general powers to require pre-hearing document production by non-parties was therefore unnecessary, and . . . *Hay Group* is factually distinguishable from actions . . . in which an arbitrator instead of a party to the arbitration issues a discovery subpoena. However, nothing in *Hay Group* suggests that the court would have reached a contrary result if the arbitrators instead of a party had issued the relevant subpoena.” No. 05-60990-CIV, 2005 WL 8155311, at \*2 n.1 (S.D. Fla. Oct. 17, 2005).

66. *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 705 (9th Cir. 2017); *see also* *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1343 (S.D. Fla. 2009) (quoting *Shimek v. Weissman, Nowack, Curry & Wilco, P.C.*, 374 F.3d 1011, 1013–14 (11th Cir. 2004)) (“[T]he ability of an arbitrator to order pre-hearing discovery must be explicitly found in the language of the FAA, if it exists at all . . . The plain language of a statute will be followed unless it will lead to a ‘truly absurd interpretation.’”); *Barnell v. Shumard*, No. 1:11-mi-0107-WSD, 2011 WL 13322977, at \*6 (N.D. Ga. Dec. 8, 2011) (finding “persuasive the reasoning and decisions of the Second Circuit Court of Appeals in *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, and of the Third Circuit Court of Appeals in *Hay Group, Inc. v. E.B.S. Acquisition Corp.* holding that the express provisions of 9 U.S.C. § 7 do not allow for pre-hearing production of discovery from non-parties to the arbitration.”) (internal citations omitted).

67. *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019).

68. Federal district courts in the Fifth and Seventh Circuits have adopted a similar approach. *See* *Empire Fin. Grp., Inc. v. Penson Fin. Servs., Inc.*, No. 3:09-CV-2155-D, 2010 WL 742579, at \*3 (N.D. Tex. Mar. 3, 2010) (“§7 of the FAA does not authorize arbitrators to compel production of documents from a non-party, unless they are doing so in connection with the non-party’s attendance at an arbitration hearing.”); *Chi. Bridge & Iron Co. N.V. v. TRC Acquisition, LLC*, No. 14-1191, 2014 WL 3796395, at \*3 (E.D. La. July 29, 2014) (citing *Life Receivables Tr.*, 549 F.3d at 214–17) (“This Court agrees with the Second, Third, and Fourth Circuits that Section 7 provides only for the issuance and enforcement of a subpoena *duces tecum* against non-parties who are compelled to testify as witnesses before the arbitrator, not for a subpoena seeking merely the production of documents by a

contrast, the Court of Appeals for the Eighth Circuit has enforced such arbitral subpoenas, at least for the production of documents,<sup>69</sup> and the Court of Appeals for the Fourth Circuit has expressed a willingness to do so where the petitioner shows a “special need or hardship.”<sup>70</sup>

The Second Circuit in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London* refused to enforce arbitral subpoenas for the pre-hearing production of evidence by third parties based on the text of § 7 of the FAA, finding it to be “straightforward and unambiguous.”<sup>71</sup> Since the statute’s language is clear, the only role of the courts, according to the Second Circuit, “is to enforce that language ‘according to its terms.’”<sup>72</sup> It is then up to Congress to expand arbitral subpoena authority if it wishes to do so.<sup>73</sup> The Ninth Circuit similarly held in *CVS Health Corporation v. Vividus* that “[t]he text of section 7 grants an arbitrator no freestanding power to order third parties to produce documents other than in the context of a hearing.”<sup>74</sup> The Third Circuit in *Hay Group, Inc. v. E.B.S. Acquisition Corp.* reached the same conclusion as the Second and Ninth Circuits, but relied on an “implication-by-silence” analysis of § 7 rather than a textual analysis. The Third Circuit found that since § 7 explicitly confers on arbitrators the power to compel a third-party witness to bring documents

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non-party who is not summoned to testify as a witness before the arbitrator.”); *Next Level Plan. & Wealth Mgmt., LLC v. Prudential Ins. Co. of Am.*, No. 18-MC-65, 2019 WL 585672, at \*4 (E.D. Wis. Feb. 13, 2019) (“In the face of an unambiguous statute, it is inappropriate for a court to read in an implied power simply because in the court’s judgment it may make good sense to include such authority.”); *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1080 (N.D. Ill. 2008) (citing *Hay Grp., Inc.*, 360 F.3d at 410) (“By its own terms, the FAA’s subpoena authority is defined as the power to compel non-parties to appear before them; that is, to compel testimony by non-parties at the arbitration hearing.’ A deposition simply does not fall within those terms.”).

69. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 872 (8th Cir. 2000).

70. *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999).

71. 549 F.3d at 216.

72. *Id.* (quoting *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 236 (2d Cir. 2006)).

73. *Id.*

74. *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017); *see also* *McTammany v. Found. Cap. Partners L.P.*, No. 8:15-mc-0006, 2015 WL 12781404, at \*2 (C.D. Cal. May 1, 2015) (citing *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406, 410–11 (3d Cir. 2004)) (“The Court also finds persuasive the Second and Third Circuits’ reasoning that an arbitrator’s authority over non-parties, particularly non-parties to the arbitration proceeding who are also non-parties to the arbitration agreement, is limited because the arbitrator’s power ultimately stems from a contractual agreement to arbitrate. Non-parties, by definition, have not agreed to abide by the arbitrator’s decisions. Thus, even though the FAA represents a congressional policy in favor of arbitration, which is perceived to be more efficient than litigation, and even though having the courts enforce arbitral subpoenas for pre-hearing discovery may in some ways serve the goal of efficiency, the most appropriate interpretation of § 7 is a narrow one.”); *Harris v. T-Mobile US, Inc.*, No. ED MC 20-4-JGB, 2020 WL 4032289, at \*2 (C.D. Cal. May 5, 2020) (following Ninth Circuit precedent mandating the rejection of petitions to enforce arbitral subpoenas requiring third parties to produce documents prior to a hearing).



to an arbitration hearing, but is silent on the power to compel the production of documents without summoning the custodian to testify, the FAA “implicitly withholds the latter power.”<sup>75</sup> Finally, the Eleventh Circuit in *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.* recently joined the above circuits, holding that “the plain language of the statute is unambiguous in requiring witnesses to appear before an arbitrator and bring any documents with them, thus prohibiting pre-hearing discovery from non-parties.”<sup>76</sup>

At the other end of the spectrum is the Court of Appeals for the Eighth Circuit. The Eighth Circuit in *In re Security Life Insurance Company of America* interpreted § 7 of the FAA as authorizing arbitrators to subpoena pre-hearing document production from third parties on the basis of a “power-by-implication” analysis.<sup>77</sup> The Eighth Circuit recognized that § 7 does not “explicitly authorize the arbitration panel to require the production of documents for inspection by a party” and that “the efficient resolution of disputes through arbitration necessarily entails a limited discovery process . . .”<sup>78</sup> Nevertheless, the court went on to find that efficiency is also served by “permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing.”<sup>79</sup> Accordingly, the court held 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.”<sup>80</sup>

It should be noted that in *Security Life*, the Eighth Circuit enforced an arbitral subpoena for the pre-hearing production of documents by a third party that “[wa]s not a mere bystander pulled into this matter arbitrarily,” but rather a party to the underlying contract and therefore “integrally related to the underlying arbitration, if not an actual party.”<sup>81</sup> Moreover,

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75. *Hay Grp.*, 360 F.3d at 408.

76. *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159 (11th Cir. 2019).

77. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870–71 (8th Cir. 2000).

78. *Id.* at 870–71.

79. *Id.* Some commentators have expressed a similar position. See, e.g., Edgar A. Jones, Jr., *The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery*, 116 U. PA. L. REV. 830, 883 (1968) (“Since there is no provision in the [FAA] for the taking of depositions, it would seem to follow that the power to order depositions of persons unable to attend is implicit in the power to summon persons to attend as witnesses.”).

80. *In re Sec. Life*, 228 F.3d at 870–71.

81. *Id.* at 871. A district court in the Sixth Circuit similarly found that “[t]he power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing.”

some district courts in the Eighth Circuit have interpreted the Circuit Court's decision in *Security Life* as limited to arbitrators' implicit power to order the production of relevant documents prior to a hearing, noting that an arbitral tribunal's authority to compel third-party deposition testimony remains "unsettled."<sup>82</sup> Other district courts, however, have concluded that, under *Security Life*, an arbitrator also has the authority to issue pre-hearing deposition subpoenas.<sup>83</sup>

The Court of Appeals for the Fourth Circuit has chartered a middle course between the Second, Third, Ninth, and Eleventh Circuits, on the one hand, and the Eighth Circuit, on the other. In *COMSAT Corp. v.*

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*Meadows Indem. Co., Ltd. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994). The third parties in this case were also "intricately related to the parties involved in the arbitration and are not mere third-parties who have been pulled into this matter arbitrarily." *Id.* Moreover, the court recognized that the arbitral tribunal in this case had issued the subpoena to the third party "as a method of dealing with complex and voluminous discovery matters in an orderly and efficient manner" since to require the third party to appear before the arbitration panel and bring all of the documents at issue to a hearing would be "quite fantastic and practically unreasonable" in light of the "sheer number of documents addressed by the subpoena." *Id.* at 44–45. The court therefore concluded that the third party's argument against enforcing the arbitral subpoena required adopting "an unnecessarily constrictive and unreasonable reading of Section 7 which would limit the ability of the arbitration panel to deal effectively with a large and complex case such as the one at hand, and generally hamper the use of arbitration as a forum for dispute resolution." *Id.* at 45; *see also* *Int'l Union of Painters & Allied Trades, Dist. Council 91 v. Clearview Glass & Glazing*, No. 3:20-MC-00021, 2020 WL 7260934, at \*2 (M.D. Tenn. Dec. 10, 2020) (dismissing an objection to an arbitral subpoena issued in a labor arbitration on the ground that the subpoenaed party was a non-signatory to the collective bargaining agreement. The court noted that "[i]n the Sixth Circuit, a district court's enforcement of an arbitral subpoena is not predicated on a determination of the propriety of the underlying arbitration."). The court in *Clearview* relied on *Meadows* as well as on *American Federation of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Commc'ns of Detroit, Inc.)*, the only decision of the Sixth Circuit in this regard. 164 F.3d 1004 (6th Cir. 1999). In *American Federation*, the Sixth Circuit authorized a subpoena to a third party for pre-hearing documents in a labor arbitration pursuant to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. *Id.* at 1009. The court found "guidance in the FAA's provisions and in court decisions concerning a district court's power to enforce subpoenas under the FAA," but cautioned that "this decision should not be read to mean that a party to the arbitration is entitled to any such discovery, only that a labor arbitrator may issue such a subpoena." *Id.* Indeed, a district court in the Sixth Circuit has since noted that "the Sixth Circuit has not definitely weighed in on the circuit split." *Westlake Vinyls, Inc. v. Resolute Mgmt., Inc.*, No. CV318MC00013CHBLLK, 2018 WL 4515997, at \*3–4 (D. Ky. Aug. 21, 2018). In that case, the district court refused to enforce an arbitral subpoena that sought document production directly to a party rather than to the arbitrators themselves at a hearing, finding that "Section 7 appears to authorize only subpoenas commanding attendance at a live arbitration hearing, for document production to the arbitrators or for witness testimony before the arbitrators." *Id.* at \*3.

82. *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. CIV. 02-4304PAMJSM, 2004 WL 67647, at \*1 (D. Minn. Jan. 9, 2004).

83. *Int'l Seaway Trading Corp. v. Target Corp.*, No. 020MC00086NEBKMM, 2021 WL 672990, at \*4 (D. Minn. Feb. 22, 2021) ("[E]ven though *Security Life Insurance* specifically addressed only an arbitrator's authority to issue a pre-hearing subpoena for documents, nothing in the Eighth Circuit's essential reasoning permits a different outcome when considering whether Section 7 authorizes a pre-hearing deposition subpoena.").

*National Science Foundation*,<sup>84</sup> the Fourth Circuit agreed with the majority of circuit courts that “[b]y its own terms, the FAA’s subpoena authority is defined as the power of the arbitration panel to compel nonparties to appear ‘before them;’ that is, to compel testimony by nonparties at the arbitration hearing.”<sup>85</sup> The court also recognized that

[p]arties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes. A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process.<sup>86</sup>

However, the Fourth Circuit noted that in a complex case, efficiency cannot be achieved “if the parties are unable to review and digest relevant evidence prior to the arbitration hearing.”<sup>87</sup> Therefore, the court suggested that a party may, “under unusual circumstances,” petition the district court to compel pre-arbitration discovery upon a showing of “special need or hardship.”<sup>88</sup> Unlike the majority of circuit courts, therefore, the Fourth Circuit “did not limit its analysis to a reading of the plain, explicit language of the FAA, and did not conclude that with regard to pre-hearing discovery from nonparties, arbitrators possess only those powers *explicitly* set forth in the FAA.”<sup>89</sup>

The Fourth Circuit did not define what a “special need or hardship” might entail other than noting that, “at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.”<sup>90</sup> In another case decided the same year as *COMSAT*, the Fourth Circuit held that a risk that the evidence in question would be altered or removed from the United States constituted a “special need” within the meaning of *COMSAT*.<sup>91</sup> Several federal district courts in the Fourth Circuit have also

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84. 190 F.3d 269 (4th Cir. 1999) (involving an arbitral subpoena of witnesses and documents from a third-party federal agency for the purpose of pre-hearing discovery. In addition to its interpretation of Section 7 of the FAA, the court found that “if the non-party recipient of a subpoena is a government agency, principles of sovereign immunity apply.” *Id.* at 278. Ultimately, the court did not enforce the arbitral subpoena to the third party on the facts of this case).

85. *Id.* at 275.

86. *Id.* at 276.

87. *Id.*

88. *Id.*

89. *EBR Holding Ltd. v. Hollywood Woodwork, Inc.*, No. 05-60990-CIV, 2005 WL 8155311, at \*5 (S.D. Fla. Oct. 17, 2005).

90. *COMSAT Corp.*, 190 F.3d at 276.

91. *Application of Deiuemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 481 (4th Cir. 1999) (concerning a motion for discovery “in aid of arbitration” pursuant to FRCP 27,

had occasion to interpret the “special need or hardship” exception. One court refused to apply the exception in a case where the arbitrator could issue a subpoena requiring the third party to testify at the arbitration hearing, and thus produce the required documents at that time.<sup>92</sup> Another federal district court found that the “special need or hardship” standard was satisfied in a case involving a subpoena of phone records that the court found were “essential” to the requesting party’s arbitration claims and were “otherwise unavailable.”<sup>93</sup>

The position adopted by the majority of circuit courts categorically rejecting arbitral power to order pre-hearing evidence from third parties undoubtedly has merit. Allowing arbitrators to compel evidence from third parties to the arbitration only as part of a hearing would force the arbitrator and the party seeking the third-party discovery to consider whether production is “truly necessary,”<sup>94</sup> thereby furthering “arbitration’s goal of ‘resolving disputes in a timely and cost efficient manner.’”<sup>95</sup> Moreover, because of the high costs of collecting and transporting documents, a “slight redistribution of bargaining power” from the party seeking the documents to the third party that is subpoenaed may “facilitate

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rather than enforcement of an arbitral subpoena).

92. *Gresham v. Norris*, 304 F. Supp. 2d 795, 797 (E.D. Va. 2004).

93. *Robertson v. T-Mobile US, Inc.*, No. CV RDB-19-2567, 2019 WL 5683455, at \*2 (D. Md. Nov. 1, 2019). According to the court, the requesting party’s uncontested representations in this regard sufficed to establish that “unusual circumstances justify the enforcement of the arbitration subpoena against a nonparty.” *Id.* A federal district court in the Tenth Circuit reached a similar conclusion, finding that “[a]s a general rule, discovery as to arbitrable disputes is denied except upon a showing of need . . . [it should be allowed] where the taking of the discovery would not unnecessarily delay the arbitration proceedings and the plaintiff could obtain evidence to prove his case to the arbitrators that was otherwise unavailable.” *Block 175 Corp. v. Fairmont Hotel Mgmt. Co.*, 648 F. Supp. 450, 453 (D. Colo. 1986) (citing *Drulcrest PTY. Ltd. v. Jamar Prods., Inc.*, No. 85 CIV. 2174, 1986 WL 4547, at \*3 (S.D.N.Y. Apr. 11, 1986)).

94. *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 218 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004) (“The requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large-scale subpoenas upon non-parties. This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. Under a system of pre-hearing document production, by contrast, there is less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration.”).

95. *Hay Grp.*, 360 F.3d at 409 (citing *Painewebber Inc. v. Hofmann*, 984 F.2d 1372, 1380 (3d Cir. 1993)); *see also CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 708 (9th Cir. 2017) (“Practical constraints on document production during an arbitration hearing may often result in lower production demands upon third parties.”); *Next Level Plan. & Wealth Mgmt., LLC v. Prudential Ins. Co. of Am.*, No. 18-MC-65, 2019 WL 585672, at \*5 (E.D. Wis. Feb. 13, 2019) (“[P]arties seeking documents are likely to be more circumspect and disinclined to engage in fishing expeditions if a third-party subpoena *duces tecum* requires appearance at a hearing.”).

efficiency by reducing overall discovery in arbitration.”<sup>96</sup> Ultimately, parties cannot “successfully urge a preference for a unique combination of litigation and arbitration”<sup>97</sup> by arguing for the expansion of arbitral powers to order evidence from third parties.

Nevertheless, the more nuanced approach of the Fourth Circuit and the “power-by-implication” approach of the Eighth Circuit seem preferable to the dominant narrow view in at least one aspect.<sup>98</sup> These approaches prevent the gap that may result from combining the dominant narrow view of § 7 and FRCP 45(c) with respect to third-party arbitral subpoenas. I turn to this enforcement gap in the next Part and propose ways to close it in Part 4.

### 3. FAA § 7 AND FRCP 45(C)

As the language of § 7 of the FAA indicates, arbitral subpoenas “shall be served in the same manner” as court-ordered subpoenas and enforced “in the same manner provided by law” with respect to court-ordered subpoenas.<sup>99</sup> Accordingly, arbitral subpoenas issued to third parties should be served and enforced in the same manner as court-ordered subpoenas under the FRCP.<sup>100</sup> In this Part, I examine the interplay between § 7 and FRCP 45(c) in this regard. I first discuss the enforcement gap that existed under FRCP 45(b)(2) in terms of service of arbitral subpoenas prior to its amendment in 2013, and how some courts went about closing this gap.<sup>101</sup> I then turn to the enforcement gap that may arise

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96. *Hay Grp.*, 360 F.3d at 411; *see also CVS Health Corp.*, 878 F.3d at 708 (“[T]hird parties ‘did not agree to [the arbitrator’s] jurisdiction’ and this limit on document discovery tends to greatly lessen the production burden upon non-parties.”).

97. *Com. Solvents Corp. v. La. Liquid Fertilizer Co.*, 20 F.R.D. 359, 361 (S.D.N.Y. 1957).

98. For other grounds on which these approaches are preferable, *see, e.g.*, *Darnall & Bales*, *supra* note 33, at 331–32 (arguing that pre-hearing discovery from third parties should be permitted in arbitration, *inter alia*, on grounds of fairness, lower burden on third parties than in litigation, and promoting settlement).

99. 9 U.S.C. § 7.

100. *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1157–58 (11th Cir. 2019) (holding that “without specifically citing the rule by name,” § 7 references FRCP 45 with respect to compelling the enforcement of arbitral summonses); *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 95 (2d Cir. 2006) (“[T]he language of Section 7 specifically suggests that the ordinary rules applicable to the district courts apply.”); *see also All. Healthcare Servs., Inc. v. Argonaut Priv. Equity, LLC*, 804 F. Supp. 2d 808, 813 (N.D. Ill. 2011) (“The express terms of FAA section 7 limit this Court’s arbitration subpoena enforcement authority to the authority it has under existing law. That authority is limited to the power conferred by [FRCP] 45; there is no other rule or statutory provision that applies in this case.”).

101. On the 2013 amendment to FRCP 45 generally, *see*, for example, Natasha Breaux, *Analysis of the Proposed Amendments to Federal Rule of Civil Procedure 45 Pertaining to Nonparty Subpoenas*

under FRCP 45(c) in terms of compliance with arbitral subpoenas to third parties given the narrow interpretation of § 7 of the FAA adopted by the majority of circuit courts. I argue that the interplay between § 7, narrowly interpreted, and a strict application of the geographic restriction of FRCP 45(c) may make the enforcement of arbitral subpoenas to third parties impossible in some circumstances, thereby frustrating the effectiveness of arbitration and the goals of the FAA.

a. *FRCP 45(b)(2)*

Pursuant to its amendment in 2013, FRCP 45(b)(2) now provides that a subpoena may be served “at any place within the United States.”<sup>102</sup> Since § 7 of the FAA states that arbitral summonses “shall be served in the same manner as subpoenas to appear and testify before the court,” it has largely been interpreted as permitting nationwide service of arbitral subpoenas.<sup>103</sup>

However, prior to the 2013 amendment, FRCP 45(b)(2) provided that a “subpoena may be served at any place: . . . within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection . . .”<sup>104</sup> This geographic limitation prevented the service of a subpoena on a third party who was located beyond the district court’s subpoena authority under FRCP 45(b)(2).<sup>105</sup> At the same time, FAA interstate arbitrations are

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for Documents, 50 HOUS. L. REV. 191 (2012).

102. FRCP 45(b)(2) concerns service of summons, which is “the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.” *Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (citing *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444–45 (1946)).

103. Pursuant to FRCP 4(k)(1)(C), a federal court may exercise personal jurisdiction over a party where a federal statute so permits. Whether the FAA provides an independent statutory basis for federal courts to exercise personal jurisdiction over service of subpoenas depends on whether it is viewed as incorporating by reference FRCP 45(b)(2) as it existed at the time § 7 was passed, limiting service of subpoenas to 100 miles of the place of compliance (the so-called “static” approach), or as it exists at the time the question arises (the so-called “dynamic” approach). The “dynamic” approach was followed by the Eleventh Circuit in *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.* 939 F.3d 1145, 1157 (11th Cir. 2019). The “dynamic” approach was also followed by the Southern District of New York in *Broumand v. Joseph*. 522 F. Supp. 3d 8, 17 (S.D.N.Y. 2021). In contrast, the Second Circuit has followed the “static” approach, stating that § 7 does not permit nationwide service of process even after the amendment to FRCP 45(b)(2). *Wash. Nat’l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126, 140 (2d Cir. 2020). However, the district court in *Broumand* noted that this statement was made by the Second Circuit in dicta as the case “did not present the question whether Section 7 permitted nationwide service of process.” *Broumand*, 2021 WL 771387, at \*5.

104. *Barnell v. Shumard*, No. CV111MI0107WSDJFK, 2011 WL 13322977, at \*4 (N.D. Ga. Dec. 8, 2011).

105. See, e.g., *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 95 (2d Cir. 2006); *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 F. App’x. 26, 28 (3d Cir. 2002); *Ray v. Transurban USA, Inc.*, No. CV H-12-3321, 2012 WL 12887716, at \*2, \*4 (S.D. Tex. Dec. 20, 2012); *Fazio v.*

“likely to involve parties and witnesses located in more than one district or state.”<sup>106</sup> Therefore, the geographic restrictions of FRCP 45(b)(2) resulted in an “enforcement gap”<sup>107</sup> in serving arbitral subpoenas to third parties located more than 100 miles from the place of the hearing, creating “a serious problem in the enforcement of witness subpoenas under the FAA.”<sup>108</sup>

Prior to the 2013 amendment to FRCP 45, courts allowed an attorney to issue a deposition subpoena out of the district court where the deposition would take place, and the deposition could then be used at trial as an alternative to live testimony.<sup>109</sup> Some courts also applied this process in the enforcement of arbitral subpoenas. For instance, in one case before a district court in Illinois, the parties explicitly agreed to arbitrate their dispute pursuant to the FRCP.<sup>110</sup> The court found that by so doing, they agreed to apply this mechanism for “preserving the testimony of witnesses unavailable at trial because they are outside the district, by use of evidence depositions.”<sup>111</sup> The court noted that not applying this mechanism to arbitral subpoenas would leave “a gap in the law, which is contrary to congressional intent, and unnecessary.”<sup>112</sup> Indeed, to limit the FAA to the service of arbitral subpoena on witnesses located only within the district in which the arbitrators are sitting, the court found, “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.”<sup>113</sup> In another case involving an arbitration conducted in Missouri and arbitral subpoenas requiring third parties to produce documents for inspection in Louisiana, the district court in Missouri found that the procedure used to get around FRCP 45(b)(2) in litigation “appears to be the only means by

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Lehman Bros., Inc., No. 1:02CV157, 2004 WL 5613816, at \*2 (N.D. Ohio June 21, 2004); *Barnell*, 2011 WL 13322977, at \*4; *All. Healthcare Servs., Inc. v. Argonaut Priv. Equity, LLC*, 804 F. Supp. 2d 808, 813 (N.D. Ill. 2011).

106. *Amgen Inc. v. Kidney Ctr. of Del. Cnty., Ltd.*, 879 F. Supp. 878, 882 (N.D. Ill. 1995).

107. *All. Healthcare Servs.*, 804 F. Supp. 2d at 813.

108. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 872 (8th Cir. 2000).

109. *Fazio*, 2004 WL 5613816, at \*3. This practice was allowed pursuant to FRCP 45(a)(3).

110. *Amgen Inc.*, 879 F. Supp. at 878.

111. *Id.* at 883. This decision was appealed to the Seventh Circuit, which instructed the district court to determine whether it had subject matter jurisdiction in this matter. *Amgen, Inc. v. Kidney Ctr. of Del. Cnty., Ltd.*, 95 F.3d 562, 568–69 (7th Cir. 1996). The Circuit Court did not otherwise opine on the district court’s decision. The district court ultimately found it had no subject matter jurisdiction and the case was dismissed. *Amgen, Inc. v. Kidney Ctr. of Del. Cnty., Ltd.*, 101 F.3d 110 (7th Cir. 1996).

112. *Amgen Inc.*, 879 F. Supp. at 882.

113. *Id.*

which an arbitrator's subpoena may be enforced" in such circumstances.<sup>114</sup>

However, the Second Circuit questioned the use of this procedure to enforce arbitral subpoenas in *Dynegy Midstream Services v. Trammochem*.<sup>115</sup> The court found that there was "no textual basis in the FAA for [this] compromise" and . . .

. . . 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.<sup>116</sup>

Another way of getting around the incompatibility between FRCP 45(b)(2) prior to its 2013 amendment and § 7 of the FAA was proposed by the Eighth Circuit in *Security Life*. The court found that arbitral subpoenas for the production of documents from third parties did not need to comply with FRCP 45(b)(2)'s geographic limit because, unlike witness subpoenas, the burden of producing documents "need not increase appreciably with an increase in the distance those documents must travel."<sup>117</sup> Other federal district courts have similarly found that because "[t]he jurisdiction conferred by the FAA is broader than jurisdiction based upon the Federal Rules,"<sup>118</sup> personal jurisdiction under FRCP 45(b)(2) is not relevant to the

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114. *Ferry Holding Corp. v. GIS Marine, LLC*, No. 4:11-MC-687 CEJ, 2012 WL 88196, at \*3 (E.D. Mo. Jan. 11, 2012).

115. *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89 (2d Cir. 2006). In this case, an arbitral tribunal sitting in New York City issued a document subpoena to a third party headquartered in Houston, Texas. *Id.* at 91. The district court in the Southern District of New York ordered the third party to comply with the subpoena. *Id.* The Second Circuit reversed and held that even though the arbitrators were located in New York City, the district court had no personal jurisdiction to enforce the subpoena because the subpoena was served on the third party in Houston and not within the territorial limits of FRCP 45(b)(2). *Id.* at 96. The Second Circuit's reasoning in this case has been described as "the most wooden and dysfunctional reading of the FAA possible." Rau, *supra* note 25, at 53.

116. *Dynegy Midstream Servs.*, 451 F.3d at 96.

117. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 872 (8th Cir. 2000). In this case, the arbitral tribunal was sitting in Minnesota and issued a subpoena to a third party at its offices in Los Angeles, requiring it to produce documents and to provide the testimony of a certain employee. *Id.* at 868. The third party complied with the witness subpoena but refused to produce the required documents. *Id.* It argued that the subpoena violated the 100-mile territorial limit contained in FRCP 45(b)(2). *Id.* at 869.

118. *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1378 (N.D. Ga. May 23, 2006). The same court refused to follow this decision in *Barnell v. Shumard*. No. CV111MI0107WSDJFK, 2011 WL 13322977, at \*6 (N.D. Ga. Dec. 8, 2011) (noting "the District Court's decision was issued shortly before the issuance of the *Trammochem* opinion . . . The District Court, therefore, did not have the benefit of the Second Circuit's well-reasoned opinion. Also, the District Court in *Festus & Helen Stacy Foundation* stated that, in reaching



service of a document subpoena under the FAA. According to this approach, FRCP 45(b)(2) did not restrict the courts' ability to enforce the service of arbitral subpoenas, at least for the production of documents, beyond its geographic limits.<sup>119</sup>

As noted above, FRCP 45(b)(2) was amended in 2013 to provide that “[a] subpoena may be served at any place within the United States.”<sup>120</sup> This seems to have largely resolved the conflict with § 7 of the FAA concerning the service of arbitral subpoenas.<sup>121</sup> The amendments to FRCP 45(b)(2) may also result in “more extensive proposed and actual use of arbitral subpoenas than was the case when an arbitrator could compel attendance only of a witness found within 100 miles of the place of arbitration.”<sup>122</sup> However, an enforcement gap remains with respect to FRCP 45(c) in terms of compliance with arbitral subpoenas issued to third parties.

*b. FRCP 45(c)*

FRCP 45(c)(1) provides that a subpoena may command a person to attend a trial, hearing, or deposition only “within 100 miles of where the person resides, is employed, or regularly transacts business in person.”<sup>123</sup>

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its decision, it relied in part on the district court opinion that was later reversed by the Second Circuit in *Trammochem*. For these reasons, the court declines to adopt the decision in *Festus & Helen Stacy Foundation*.”).

119. SchlumbergerSema, Inc. v. Xcel Energy, Inc., No. CIV. 02-4304PAMJSM, 2004 WL 67647, at \*3 (D. Minn. Jan. 9, 2004); see also *Festus & Helen Stacy Found.*, 432 F. Supp. 2d at 1378 (“[T]he territorial limits of personal jurisdiction do not apply to the enforcement of a subpoena for documents under the FAA.”). But see *Me. Cmty. Health Options v. Walgreen Co.*, No. 18-MC-0009, 2018 WL 6696042, at \*2 (W.D. Wis. Dec. 20, 2018) (“Although this is not entirely clear from the FAA or case law,” a district court must have personal jurisdiction over a third party in order to enforce an arbitral subpoena.).

120. FED. R. CIV. P. 45(b)(2).

121. Courts will still consider the burden on the subpoenaed party even in the face of a statute authorizing nation-wide service. However, “[w]hen nationwide service is involved, ‘it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern.’” *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1156 (11th Cir. 2019) (citing *Republic of Pan. v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 938–39, 947 (11th Cir. 1997)).

122. *Bermann, Smit & JurisNet, L.L.C.*, *supra* note 15, at 157.

123. FED. R. CIV. P. 45(c)(1)(A). The rule further allows for a subpoena to command a person to attend a trial, hearing, or deposition “within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party’s officer; or (ii) is commanded to attend a trial and would not incur substantial expense.” Courts have generally calculated the 100-mile distance “as the crow flies,” that is, by measuring a straight line between the relevant locations. *FED. R. CIV. P. 45(c)(1)(B)*; *Me. Cmty. Health Options v. Walgreen Co.*, No. 18-MC-0009, 2018 WL 6696042, at \*3 (W.D. Wis. Dec. 20, 2018) (discussing that the advantages of using a straight-line distance calculation over driving distance are: “(1) it modestly expands the reach of civil trial subpoenas, thus promoting the favored policy of affording the trier an opportunity to hear

FRCP 45(c)(2) similarly provides that a subpoena may command the “production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person.”<sup>124</sup>

Pursuant to the narrow interpretation of arbitral powers under § 7 of the FAA adopted by the majority of circuit courts, arbitral subpoenas may only compel witness testimony in person at a hearing and the production of documentary evidence at that time.<sup>125</sup> However, third-party witnesses who possess material evidence in an FAA arbitration may well reside more than a 100 miles from the place of the arbitration hearing, and thus fall beyond the geographic limit imposed by FRCP 45(c). Therefore, the concurrent application of FRCP 45(c)’s geographic restriction and the limited interpretation of arbitral power concerning pre-hearing evidence from third parties under § 7 effectively places some third-party witnesses and documentary evidence beyond arbitrators’ subpoena powers.

The enforcement gap that may result is evident in *Ping-Kuo Lin v. Horan Capital Management*, a New York district court case involving a third party who was subpoenaed to produce documents and appear at an arbitration hearing in New York City.<sup>126</sup> The third party did not regularly conduct business in New York, and its only offices were located in Maryland and Florida.<sup>127</sup> Faced with the geographic restriction of FRCP 45(c), the party requesting the evidence argued that the third party should be compelled to testify at the New York arbitration hearing by videoconference from Maryland.<sup>128</sup> The district court rejected the request, holding that the third party could not be made to testify by any means, including videoconference.<sup>129</sup> The court also denied petitioner’s motion

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witnesses in person; (2) it avoids trivial disputes over the ordinary, usual, and shortest routes of travel; and (3) it eliminates the anomaly that would otherwise exist of a plaintiff’s being able to sue a person within 100 air miles of the courthouse, but not being able to present that defendant’s live testimony to the trier when the defendant lives more than 100 travel miles away.”)

124. FED. R. CIV. P. 45(c)(2). “Production” refers to the delivery of documents, not their retrieval; therefore, the place of “production” is not the district in which the documents are housed but the district in which the subpoenaed party is required to turn them over. *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 412 (3d Cir. 2004). Subpoenas are issued from the court where the case is pending. FED. R. CIV. P. 45(a)(2). Subpoenas are generally enforced by the court where compliance is required. FED. R. CIV. P. 45(d)(1). Under FRCP 45(f), the compliance court may in some circumstances transfer subpoena-related motions to the court where the case is pending. *See, e.g., Gensler & Mulligan, supra* note 13.

125. 9 U.S.C. § 7.

126. No. 14 CIV. 5202(LLS), 2014 WL 3974585, at \*1 (S.D.N.Y. Aug. 13, 2014).

127. *Id.*

128. *Id.* at \*2.

129. *Id.*

with respect to documents subpoenaed from the third party because “[d]ocuments are only discoverable in arbitration when brought before arbitrators by a testifying witness.”<sup>130</sup> The court thus adopted the narrow view of arbitral subpoena powers under § 7 of the FAA, requiring the third-party evidence to be produced at a hearing. Simultaneously, the court also refused to eliminate the “geographic obstacle” created by FRCP 45(c) by allowing, for instance, virtual appearance or for the documents to be mailed without requiring a personal appearance.<sup>131</sup>

The enforcement gap that may result from the application of FRCP 45(c) is also evident in *In re Managed Care Litigation*, a recent Florida district court decision.<sup>132</sup> The case was heard following the Eleventh Circuit’s decision in *Managed Care*, in which the court subscribed to the dominant, narrow interpretation of § 7 and held that where third-party witnesses do not attend the arbitral hearing in person, document production is prohibited.<sup>133</sup> In addition, the Eleventh Circuit refused to enforce the arbitrators’ order that the testimony of out-of-state third parties be taken in their respective locations across the country and transmitted via videoconference to the arbitrators sitting in Miami, Florida.<sup>134</sup> According to the Eleventh Circuit, § 7 of the FAA prohibits such long-distance testimony by videoconference since the third parties would not be “in the physical presence of the arbitrator,” as the section requires.<sup>135</sup>

In light of the Eleventh Circuit’s finding that the arbitrators could not compel the third-party witnesses to testify remotely by videoconferencing, the arbitral subpoenas were revised to require the third parties to attend the hearing in Miami in person. However, the district court then refused to enforce these revised subpoenas because they required third parties who resided “thousands of miles away from Miami, Florida, to provide testimony and documents in [that location],” thereby violating the geographical limits of FRCP 45(c).<sup>136</sup>

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130. *Id.* (quoting *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216 (2d Cir. 2008)).

131. *Westlake Vinyls, Inc. v. Resolute Mgmt., Inc.*, No. 3:18-MC-00013-CHB-LLK, 2018 WL 4515997, at \*7 n.3 (W.D. Ky. Aug. 21, 2018) (quoting *In re SII Liquidation Co.*, No. 10-60702, 2015 WL 1365591, at \*2 (N.D. Ohio Mar. 20, 2015)).

132. No. 00-01334-MD, 2020 WL 3643042, at \*1 (S.D. Fla. July 6, 2020).

133. *Managed Care Advisory Grp., LLC, v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1161 (11th Cir. 2019).

134. *Id.* at 1160.

135. *Id.*

136. *In re Managed Care Litig.*, 2020 WL 3643042, at \*8. The district court recognized that the Eleventh Circuit had not addressed the 100-mile geographic limit under FRCP 45(c) because the original arbitral subpoenas directed the out-of-state third parties to appear via videoconference where

The *Ping-Kuo Lin* and *Managed Care* decisions<sup>137</sup> therefore demonstrate the enforcement gap that may result from the concurrent application of FRCP 45(c)'s geographic restriction for compelling subpoenas and the narrow interpretation of arbitral power to order pre-hearing, third-party evidence under § 7 of the FAA adopted by the majority of circuit courts. Absent amendments to FRCP 45(c), similar to those of FRCP 45(b)(2), or to § 7 of the FAA,<sup>138</sup> it is largely up to the courts to close this gap and eliminate the lingering confusion surrounding the enforcement of third-party arbitral subpoenas. In the next Part, I suggest several ways in which courts, as well as arbitrators, may do so.

#### 4. CLOSING THE ENFORCEMENT GAP: RECONCILING FRCP 45(C) AND § 7 OF THE FAA

Where applying the FRCP negates one of the fundamental objectives of the FAA—the fair and effective resolution of disputes by arbitration pursuant to the agreement of the parties—the courts must find ways to reconcile the two instruments.<sup>139</sup> Under § 7 of the FAA, arbitrators are authorized to subpoena third parties to appear “before” them to testify and produce documentary evidence.<sup>140</sup> Most circuit courts have interpreted this section to mean that summoning a third party to appear in person at a hearing is the *only* way in which arbitrators may compel third-party evidence.<sup>141</sup> Whereas such arbitral subpoenas may now be served on third parties nationwide, compliance with them is restricted to 100 miles from where the third party is located if FRCP 45(c) is strictly applied. This

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they reside. *Id.* at \*7. Nonetheless, the district court found that the Eleventh Circuit “did not hold that the arbitrator can compel attendance nationwide.” *Id.*

137. Other courts have reached similar conclusions. *See, e.g.,* Broumand v. Joseph, No. 20-CV-9137, 2021 WL 771387, at \*10 (S.D.N.Y. Feb. 27, 2021) (holding that the arbitral subpoenas in this case, which required remote video testimony, were unenforceable “because they seek to compel respondents to ‘attend’ an evidentiary hearing that is located outside the geographical limits set forth in Rule 45(c)” and “because they seek to compel respondents to produce documents without also requiring respondents to testify in-person at an evidentiary hearing” in violation of § 7).

138. Amending the FAA in this regard has been suggested. *See, e.g.,* Eichel & Adler, *supra* note 20, at 60; *see also* Strader, *supra* note 21, at 928–40; Timothy C. Krsul, *The Limits on Enforcement of Arbitral Third-Party Subpoenas*, 57 DISP. RESOL. J. 30, 34–35 (2003).

139. *Wash. Nat’l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126, 138 (2d Cir. 2020) (discussing how imposing Rule 45’s obligations on arbitral tribunals “does not square with the ‘strong federal policy favoring arbitration as an alternative means of dispute resolution’ that is embedded in and furthered by the FAA.”).

140. 9 U.S.C. § 7.

141. *See, e.g.,* Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216–17 (2d Cir. 2008); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017).

location, however, may be far away from the place where the arbitration is being conducted. Therefore, the concurrent application of FRCP 45(c) and the narrow interpretation of § 7 means third parties cannot be compelled to appear in person at an arbitral hearing that is located outside FRCP 45(c)'s geographic limit, and that they also cannot be compelled to testify or produce documents absent such an appearance.

As a result of this conflict, arbitrators are granted authority under the FAA only for that authority to be taken away under FRCP 45(c). A better approach would be to adopt the broader interpretation of § 7 with respect to pre-hearing discovery from third parties. Courts may do so either by finding an implicit power under § 7 (the Eighth Circuit's approach), or by requiring a showing of special need (the Fourth Circuit's approach). Pursuant to the Eighth Circuit's approach, pre-hearing arbitral subpoenas to third parties to appear or produce documents at their place of residence would be enforced without requiring appearance in person at a hearing.<sup>142</sup> Pursuant to the Fourth Circuit's approach, the inability to obtain material evidence from a third party due to the geographic restrictions of FRCP 45(c) may arguably constitute in some circumstances a "special need or hardship" that justifies the enforcement of an arbitral subpoena for pre-hearing discovery without requiring the third party to appear in person at a hearing.<sup>143</sup>

Courts that refuse to adopt the broader interpretation of § 7 of the FAA could close the enforcement gap arising from the concurrent application of FRCP 45(c) and the narrow interpretation of arbitral power under § 7 (requiring evidence production at a hearing) in at least two other ways. First, courts could hold that FRCP 45(c)'s geographic limit regarding compliance with subpoenas is inapplicable to FAA arbitrations.<sup>144</sup> The

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142. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 872 (8th Cir. 2000). While the Eighth Circuit's decision concerned only the production of documents, this approach could also be extended to pre-hearing depositions. *Int'l Seaway Trading Corp. v. Target Corp.*, No. 0:20-MC-00086-NEB-KMM, 2021 WL 672990, at \*4 (D. Minn. Feb. 22, 2021) ("[n]o line can be drawn between the [FAA's] application to pre-hearing written discovery or pre-hearing deposition subpoenas.")

143. *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999). Under either approach, the enforcement of the pre-hearing arbitral subpoena could arguably be compelled by the district court where the arbitrators "are sitting," as required by § 7, since the geographic limitation in FRCP 45(c) is relevant only to "the place of *compliance*; not the location of the court from which the subpoena issued." *Int'l Seaway Trading Corp.*, 2021 WL 672990, at \*5, *appeal filed*, Lawrence Satz v. Target Corp., No. 21-2036 (8th Cir. May 7, 2021) (refusing to quash a subpoena ordering the deposition to be taken by "virtual means" when the arbitration hearing was held in Minnesota and the third party whose deposition was sought resided in Missouri). On the "are sitting" requirement of § 7, *see supra*, note 28.

144. Courts have at times also disregarded the geographic limitations of FRCP 45(c) when enforcing court-ordered subpoenas, at least for document production. *Gensler & Mulligan*, *supra* note

FRCP should be applied to proceedings under the FAA only “to the extent to which they are mutually consistent.”<sup>145</sup> Although § 7 of the FAA may be read as incorporating FRCP 45 with respect to the service and enforcement of arbitral subpoenas, this does not necessarily mean that the Rule is to be applied strictly, or even in its entirety, in the arbitral context.<sup>146</sup> The suggestion that courts should not apply a provision of FRCP 45 to arbitral subpoenas is not unprecedented. As already noted, some courts dispensed with the geographic limits of FRCP 45(b)(2) prior to its amendment with respect to the service of arbitral subpoenas to third parties.<sup>147</sup>

Furthermore, courts have held that other FRCP, such as FRCP 26 and FRCP 45(d), are inapplicable to arbitration. FRCP 45(d) requires a district court to quash or modify a subpoena that, *inter alia*, “requires a person to comply beyond the geographical limits specified in Rule 45(c),” “requires disclosure of privileged or other protected matter, if no exception or waiver applies,” or “subjects a person to undue burden.”<sup>148</sup> The Second Circuit recently held that § 7 does not “impose Rule 45’s obligations on district courts in proceedings to enforce arbitration summonses.”<sup>149</sup> Rather, § 7 merely “indicates that summonses are to be enforced in the same manner that a subpoena is to be enforced *i.e.*, by compulsion or

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13 (referring to cases in which the travel restrictions set forth in Rule 45 were held not to apply to “production only subpoenas because the producer need not travel with the documents.”).

145. Penn Tanker Co. of Del. v. C. H. Z. Rolimpex, Warszawa, 199 F. Supp. 716, 718 (S.D.N.Y. 1961).

146. FRCP 81 provides that the FRCP, “to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures . . . 9 U.S.C., relating to arbitration.” FED R. CIV. P. 81(a)(6). This rule has been interpreted as applicable to judicial proceedings under the FAA, such as motions to stay arbitration, compel arbitration agreements, or vacate arbitration awards, rather than to “the actual proceedings on the merits before the arbitrators.” *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995); *see also* *Application of Deiuemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 483 (4th Cir. 1999) (discussing FRCP 81 “does not affirmatively authorize application of the federal rules to matters that are incident to an arbitrable dispute because Rule 81 does not apply to an underlying arbitration proceeding”). It is arguable, however, that motions to serve and enforce arbitral subpoenas under § 7 of the FAA are not the type of judicial proceedings subject to FRCP 81. Such judicial proceedings generally include a stay of a suit pursuant to § 3 of the FAA, an order to compel arbitration pursuant to § 4, appointment of arbitrators pursuant to § 5, confirmation of an arbitration award pursuant to § 9, vacation of an arbitration award pursuant to § 10, and modification or correction of an arbitration award pursuant to § 11. Arthur R. Miller & Charles Alan Wright, 4 FED. PRAC. & PROC. CIV. § 1015 n.4 (4th ed. 2021).

147. *See, e.g.*, *Ferry Holding Corp. v. GIS Marine, LLC*, No. 4:11-MC-687, 2012 WL 88196, at \*3 (E.D. Mo. Jan. 11, 2012); *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1378 (N.D. Ga. May 23, 2006).

148. FED. R. CIV. P. 45(d)(3)(A)(ii)–(iv).

149. *Wash. Nat’l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126, 138 (2d Cir. 2020).

contempt.”<sup>150</sup> It does not impose FRCP 45’s general provisions dictating where subpoenas “can require a person to go,”<sup>151</sup> *i.e.*, FRCP 45(c). Similarly, FRCP 26 governs the scope of discovery and allows parties to obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense.”<sup>152</sup> Since § 7 of the FAA empowers arbitrators to determine the materiality of evidence, most courts have held that it effectively replaces FRCP 26 in this regard.<sup>153</sup>

Second, courts could close the enforcement gap created by a strict application of FRCP 45(c) and the narrow interpretation of arbitral power under § 7 of the FAA by applying FRCP 43(a), which permits “testimony in open court by contemporaneous transmission from a different location . . . [f]or good cause in compelling circumstances and with appropriate safeguards.”<sup>154</sup> This would mean that, while arbitrators cannot order pre-hearing third-party evidence absent an appearance at a hearing, third parties located more than 100 miles from the place of the hearing could be compelled to appear at the hearing remotely. Indeed, taken together, FRCP 43 and 45 “might be read to allow a judge to serve a subpoena on a witness located anywhere in the United States and order the person to appear at a place within the person’s local area and testify via remote transmission.”<sup>155</sup>

Both the district court in *Ping-Kuo Lin* and the Eleventh Circuit in

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150. *See id.*

151. *Id.*

152. FED. R. CIV. P. 26(b)(1).

153. *See, e.g., In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 871 (8th Cir. 2000) (discussing how to require courts to assess the materiality of evidence subject to an arbitration panel’s subpoena “is antithetical to the well-recognized federal policy favoring arbitration, and compromises the panel’s presumed expertise in the matter at hand.”); *see also, e.g., Westlake Vinyls, Inc. v. Resolute Mgmt., Inc.*, No. 3:18-MC-00013-CHB-LLK, 2018 WL 4515997, at \*6 (W.D. Ky. Aug. 21, 2018) (“The general rule is that, when individuals have moved to quash an arbitrators’ subpoena or have objected to enforcement of an arbitrators’ subpoena on grounds of immateriality of the evidence sought, attorney-client privilege, or confidentiality, courts have ‘denied these motions or objections on the basis that the determination of these matters in the first instance is left to the arbitrators.’”). *But see Shasha for Violet Shuker Shasha Living Tr. v. Malkin*, No. 14-CV-9989, 2018 WL 3323818, at \*3 (S.D.N.Y. July 5, 2018) (rejecting a claim that the court was to determine whether testimony ordered by the arbitral tribunal was “duplicative,” however seeming to leave open the possibility that the court would entertain a claim that the testimony was irrelevant).

154. Steven S. Gensler & Lumen N. Mulligan, *Rule 43. Taking Testimony*, in FED. RULES CIV. PROC., RULES & COMMENT. (2021) [hereinafter Gensler & Mulligan, *Rule 43*]; FED. R. CIV. P. 43(a); *see also* Gensler & Mulligan, *supra* note 13 (“Some courts have interpreted Rule 45(c)(1)(A) to authorize a party to subpoena a witness to appear at a courthouse within 100 miles of where the witness lives or works to testify remotely, under Rule 43(a), in a trial being conducted outside the district.”).

155. Gensler & Mulligan, *Rule 43*, *supra* note 154; *see also* Bermann, Smit & JurisNet, L.L.C., *supra* note 15, at 170.

*Managed Care* rejected the possibility of contemporaneous transmission of third-party witness testimony or remote production of documentary evidence in the arbitration context. However, there is arguably “good cause and compelling circumstances,” as required by FRCP 43(a), that justify permitting contemporaneous transmission of live testimony by third parties located more than 100 miles from the place of the hearing.<sup>156</sup> This good cause is not grounded in mere travel inconvenience, which does not by itself justify transmitted testimony in the litigation context.<sup>157</sup> Rather, the justification is grounded in the enforcement gap that may otherwise arise from the concurrent application of FRCP 45(c) and the narrow interpretation of arbitral powers under § 7 of the FAA.

Applying FRCP 43(a) would comply with this narrow interpretation of § 7, as the witnesses are still “attend[ing] before” the arbitrators, but they are simply doing so by way of contemporaneous transmission of live testimony. Some commentators recognize that “it is not inevitable that the physical presence of the arbitrator and the witness in the same place is necessary,” and have suggested that § 7’s testimonial requirement could be satisfied via telephonic or video-conferenced hearing.<sup>158</sup> This recognition is particularly appropriate and important during emergencies such as the COVID-19 pandemic, which has forced arbitrations to be held virtually.<sup>159</sup> Virtual attendance at a witness’s place of residence is also consistent with Rule 45(c) because witnesses can attend the deposition within 100 miles of where they reside. As for documentary evidence, any document that would have otherwise been submitted in person by the third-party witness at an arbitral hearing could be submitted electronically<sup>160</sup> or mailed in advance to the arbitrators for their consideration simultaneously with the live transmitted testimony.

If courts refuse to adopt these suggested ways of closing the

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156. FED. R. CIV. P. 43.

157. Gensler & Mulligan, *Rule 43*, *supra* note 154.

158. Bermann, Smit & JurisNet, L.L.C., *supra* note 15, at 170 (suggesting § 7 is “reasonably read not to impose any requirement that the arbitrator appear in the physical presence of the witness—that *adjudicative* presence of the arbitrator (to rule on objections and declare evidence admitted) is the touchstone of Section 7;” and additionally noting “if a subpoena does call for video-linked hearing, enforceability of the subpoena might be supported by reference to FRCP 43.”).

159. This argument has been rejected by some courts. *See, e.g.*, Schottenstein v. Wells Fargo Bank, N.A., No. 20-MC-81924, 2020 WL 7399003, at \*6 n.1 (S.D. Fla. Dec. 17, 2020); Broumand v. Joseph, No. 20-CV-9137, 2021 WL 771387, at \*11 (S.D.N.Y. Feb. 27, 2021).

160. Bermann, Smit & JurisNet, L.L.C., *supra* note 15, at 164. A discussion of issues associated with electronically stored information (“ESI”) is beyond the scope of this article. *See* Tyler, *supra* note 52, at 17–18; Kevin Mason, *Will Discovery Kill Arbitration?*, 2020 J. DISP. RESOL. 207, 213–19 (2020).



enforcement gap created by the concurrent application of FRCP 45(c) and the narrow interpretation of arbitral powers under § 7 of the FAA, there are also ways in which parties and arbitrators could get around it with respect to third-party subpoenas. They could, for instance, conduct the merits hearing in several stages and/or places, according to the location of third parties whose testimony is material to the dispute or who possess material documents. This would allow the arbitrators to subpoena third parties to appear before them and provide evidence in compliance with both § 7 of the FAA and FRCP 45(c).<sup>161</sup> Alternatively, arbitral proceedings short of a full hearing on the merits could be conducted before a single arbitrator in accordance with § 7 where the third-party witness resides. Such proceedings might deal with preliminary questions such as admissibility or privilege before the full arbitral tribunal convenes to hear the merits of the dispute.<sup>162</sup>

However, depending on the arbitration agreement, the consent of all parties may be required for conducting multiple hearings in different locations, and the cost of the arbitration would undoubtedly increase.<sup>163</sup> Moreover, a third-party subpoena to attend a hearing at a different location than the contractual seat of the arbitration may be unenforceable. Section 7 provides that the proper court to enforce such a subpoena is “the United States district court for the district in which such arbitrators, or a majority of them, *are sitting*.”<sup>164</sup> Some courts have interpreted this language to mean that an arbitrator cannot “sit” in more than one location and therefore that a motion to enforce a subpoena must be brought in the district court at the seat of the arbitration and not in the district court where the third party is summoned to appear, if the two locations are different.<sup>165</sup>

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161. See, e.g., *Seaton Ins. Co. v. Cavell USA*, No. 3:07-CV-356, 2007 WL 9657277, at \*2 (D. Conn. Mar. 21, 2007) (enforcing arbitral subpoenas against third parties even though the location of the hearing was different than that designated in the contract and was selected in order to enable the arbitrators to issue the subpoenas against the third parties).

162. *Guyden v. Aetna, Inc.*, No. 3:05CV1652, 2006 WL 2772695, at \*7 (D. Conn. Sept. 25, 2006) (“Although plaintiff may be precluded from taking depositions of non-party witnesses [under § 7 of the FAA,] she may obtain necessary information through a pre-merits hearing before the arbitrator.”); *Odfjell Asa v. Celanese AG*, 348 F. Supp. 2d 283, 287 (S.D.N.Y. 2004) (“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.”).

163. *Snider*, *supra* note 50, at 105, 108.

164. 9 U.S.C. § 7 (emphasis added).

165. *Jones Day v. Orrick, Herrington & Sutcliffe LLP*, No. 21-MC-80181, 2021 WL 4069753, at \*2 (N.D. Cal. Sept. 7, 2021). The court’s rationale for this interpretation of § 7 is that:

[T]he structure of the statute indicates that there is but one place where the arbitrators, or a majority of them, are sitting. Omitted from the statutory text is any indication that ‘the

Therefore, unless all parties agree on a new seat at the location of the third-party witness,<sup>166</sup> it might be impossible to enforce a third-party subpoena in these circumstances.

Arbitrators may also be able to persuade the parties that it would be in their best interests to obtain documents from a third party, failing which adverse inferences might be drawn.<sup>167</sup> In addition, where the subpoenaed third party is a party to the underlying arbitration agreement (but not to the dispute), formal joinder of that party to the arbitration proceedings may be possible.<sup>168</sup> Finally, the inconvenience of making a personal appearance may prompt a third-party witness to deliver the sought-after documents and waive presence.<sup>169</sup>

## 5. CONCLUSION

FAA arbitration is intended to be an effective, efficient, and fair alternative to litigating disputes involving interstate commerce in federal courts. Parties agreeing to submit their dispute to arbitration therefore

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district in which such arbitrators, or a majority of them, are sitting' is a flexible term meaning wherever the arbitrators or a majority of them happen to be at the time of a hearing. In order to convey the meaning that the district could be multiple districts where the arbitrators choose to have a particular hearing at the time, would require additional words that are not present in the statute.

*Id.* (quoting *Rembrandt Vision Techs., L.P. v. Bausch & Lomb, Inc.*, No. 1:11-CV-2829-JEC, 2011 WL 13319343, at \*3 (N.D. Ga. Oct. 7, 2011)); *see also, e.g.*, *All. Healthcare Servs., Inc. v. Argonaut Priv. Equity, LLC*, 804 F. Supp. 2d 808, 811–12 (N.D. Ill. 2011) (refusing to enforce the subpoena where the arbitration proceedings were conducted in Chicago and the arbitrators issued a subpoena to a non-party to produce evidence and give oral testimony in San-Francisco before one of the arbitrators; additionally finding that it was the only court with jurisdiction to enforce the subpoena but that it could not exercise this jurisdiction with respect to parties located in California); *In re Beck's Superior Hybrids, Inc.*, 940 N.E.2d 352, 364 (Ind. Ct. App. 2011) (refusing to enforce the subpoena finding that § 7 confers jurisdiction only on the district court where “all of the arbitrations” or at least a “majority of them” are sitting and not on the district court where “only a single arbitrator will hold the hearing” when the arbitration proceedings were conducted in New York and the arbitrators issued a subpoena to a non-party to appear at a preliminary hearing in Indiana before one of the arbitrators and to produce documents).

166. *Jones Day*, 2021 WL 4069753, at \*3 (distinguishing *Seaton Insurance Co.*, 2007 WL 9657277 on the ground that the parties in that case had agreed to move the arbitration to the location of the third-party witness).

167. *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, No. MISC. 01-162, 2001 WL 1159852, at \*2 (E.D. Pa. Sept. 5, 2001).

168. *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008).

169. *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413–14 (3d Cir. 2004) (Chertoff, J., concurring); *see also* *Bermann, Smit & JurisNet, L.L.C.*, *supra* note 15, at 164 (“the non-party often will elect to avoid the inconvenience of a testimonial appearance by a documents custodian by delivering the requested documents to counsel for the parties.”).

limit the courts' ability to intervene in the arbitral process.<sup>170</sup> These parties will also not be able to utilize, for better or for worse, the full gamut of procedures that typically accompanies litigation in the federal courts, including discovery. After all, arbitrators are "bound neither by the Rules that govern discovery nor by courts' interpretations of discovery rules."<sup>171</sup> But arbitration is not entirely detached from the federal court system and its rules of procedure either. Rather, courts have the authority and responsibility to apply the federal policy favoring arbitration by enforcing arbitration agreements and awards, staying judicial proceedings, as well as compelling uncooperative witnesses to comply with arbitral subpoenas.

Nonetheless, courts continue to disagree on the scope of arbitral subpoena power under § 7 of the FAA with respect to third parties, turning arbitration into a "game of chess" rather than a "pursuit of practical ends."<sup>172</sup> Several circuit courts have held that this arbitral power is limited to compelling third parties to appear in person at an arbitral hearing and bring material documents with them, interpreting § 7 narrowly. The Eighth Circuit has read into § 7 an implicit power of arbitrators to compel pre-hearing documentary evidence from third parties, and the Fourth Circuit has envisioned third-party pre-hearing discovery to be possible upon showing a special need or hardship. While the dominant judicial approach is not without merit, this article argues in support of the minority approach interpreting § 7 broadly.

This argument is rooted in FRCP 45(c)'s geographic limit concerning compliance with arbitral subpoenas. If the narrow interpretation of arbitral

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170. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) ("[P]rocedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."); *First Pres. Cap., Inc. v. Smith Barney, Harris Upham & Co.*, 939 F. Supp. 1559, 1563 (S.D. Fla. 1996) ("Deference given to arbitrators' decisions accompanies not only a review of the final order itself, but also arbitrators' decisions to control the order, procedure, and presentation of evidence . . . Their proceedings are in no way constrained by formal rules of procedure or evidence.").

171. *EBR Holding Ltd. v. Hollywood Woodwork, Inc.*, No. 05-60990-CIV, 2005 WL 8155311, at \*6 (S.D. Fla. Oct. 17, 2005); *see also* *Application of Deiuemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 479 (4th Cir. 1999) ("Federal discovery rules typically do not apply to disputes governed by arbitration provisions."); *Suarez-Valdez v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648, 649 (11th Cir. 1988) ("An agreement to arbitrate is an agreement to proceed under arbitration and not under court rules."); *Oriental Com. & Shipping Co. v. Rosseel, N.V.*, 125 F.R.D. 398, 400 (S.D.N.Y. 1989) ("As a general rule, the discovery provisions of the Federal Rules of Civil Procedure are not available as an incident to an arbitration proceeding."); *Moeller v. D.E. Frey & Co.*, No. 4:03 MC7-SPM, 2004 WL 1173397, at \*4 (N.D. Fla. May 10, 2004) ("The arbitrators were not constrained by formal rules and retained broad discretion to control the order, procedure, and presentation of evidence.").

172. This statement was originally made by Justice Frankfurter regarding litigation in *City of Indianapolis v. Chase National Bank of City of New York*. 314 U.S. 63, 69 (1941) ("Litigation is the pursuit of practical ends, not a game of chess.").

power under § 7 is accepted, the concurrent application of FRCP 45(c) stands to create an enforcement gap that could render § 7 ineffective in many instances. This is because the narrow interpretation of § 7 requires third-party witnesses to appear in person at an arbitral hearing, disallowing pre-hearing depositions or document production, while FRCP 45(c) restricts compliance with subpoenas to 100 miles from the subpoenaed person's location. As a result, a third party who is located more than 100 miles from the location of the arbitral hearing—as many third parties are likely to be in FAA arbitrations—cannot be compelled either to appear in person at the hearing or to testify or produce documents in lieu of such appearance.

Notwithstanding § 7's reference to the enforcement of arbitral subpoenas “in the same manner” as court-ordered subpoenas, courts should interpret the FAA “so as to further rather than impede, arbitration.”<sup>173</sup> Courts could, for instance, adopt the broader interpretation of § 7 advocated by the Fourth and the Eighth Circuits, not apply FRCP 45(c)'s geographic restrictions to arbitral subpoenas at all, or apply also FRCP 43 to allow third parties to submit evidence remotely. Any one of these approaches would “account for the realities of arbitration and for the pro-arbitration purpose of the FAA.”<sup>174</sup>

Ultimately, whether third-party discovery in arbitration is “good” or “bad” depends on the particular dispute, the arbitration agreement, the evidence and scope of discovery sought, and the identity of the third party. When considering these factors, courts should defer to the arbitrators, who are versed in the dispute and have a stake in conducting efficient and effective arbitration proceedings, as well as an interest in issuing a fair and enforceable arbitral award.<sup>175</sup> Doing so would provide parties to FAA arbitrations with certainty and predictability, and reduce costs associated with litigation intended to undermine arbitrators' evidentiary decisions.<sup>176</sup>

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173. *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y. 1973).

174. *Friedland & Martinez*, *supra* note 60, at 215.

175. *Strader*, *supra* note 21, at 934–36 (noting several reasons why arbitrators should decide how much third-party discovery to allow, including that this would not give parties the *right* to such discovery, that it would prevent delays, that the parties themselves serve as a “market-based check” on an arbitrator's subpoena power, and that the parties are free to restrict this power in their agreement); *Friedland & Martinez*, *supra* note 60, at 213–14 (“the arbitral system operates most effectively if arbitrators have the power to issue non-party discovery subpoenas where the circumstances warrant, and courts should permit arbitrators to decide in the first instance whether the exceptional circumstances justifying a discovery subpoena to a non-party are present.”).

176. *Eichel & Adler*, *supra* note 20, at 56 (noting that the ambiguity surrounding arbitrators' power to subpoena pre-hearing evidence from third parties and the territorial reach of such subpoenas “make predictions impossible; raise costs; and, most of all, affect arbitration adversely.”); *Friedland*

Accordingly, where the arbitrators determine that evidence in the possession of a third party is material to the resolution of the dispute and issue a subpoena, courts should approach its enforcement favorably, absent evidence of due process violations. Courts should avoid enforcement gaps resulting from a restrictive reading of the powers of arbitrators under § 7 of the FAA together with a strict application of FRCP 45(c). Indeed, courts should recall that they have “an extremely limited role in reviewing arbitral decisions in order to preserve arbitration’s function of promptly resolving disputes.”<sup>177</sup>

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& Martinez, *supra* note 60, at 216 (arguing against “a construction of the FAA which would force parties to seek judicial assistance to obtain non-party subpoenas in arbitration.”).

177. Shasha for Violet Shuker Shasha Living Tr. v. Malkin, No. 14-CV-9989, 2018 WL 3323818, at \*1 (S.D.N.Y. July 5, 2018); *see also* Bailey Shipping Ltd. v. Am. Bureau of Shipping, No. 12 CIV.5959, 2014 WL 3605606, at \*2 (S.D.N.Y. July 18, 2014) (“the ‘cardinal principles’ of deference that guide federal court review of arbitral decisions do not permit review ‘of orders governing discovery, the introduction of evidence, or hearing format’; doing so would challenge the ‘strong federal policy in favor of arbitration’ enshrined in the [FAA].”).