The Pre-Hearing “Subpoena Powers” of the Modern-Day Arbitrator

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At the time of the completion of this paper the scope of an arbitrator’s power to force a third party to comply with a pre-trial subpoena has yet to be conclusively resolved. In the litigation forum the Judge has broad powers over discovery matters thanks to the federal rules\(^1\) and most state rules\(^2\) of civil procedure. Although there are certain requirements Judges are allowed to issue subpoenas commanding a party or non-party to attend a deposition and give testimony in a method stated in the subpoena.\(^3\) Judges usually favor liberal discovery, meaning they will allow parties to “take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the action.”\(^4\)

Discovery in the arbitration forum is different in several respects. It is usually quicker and less in depth in order to accommodate the goals of the arbitral process. For instance, since the arbitrators are usually individuals with industry experience certain evidence that would normally be used to lay a foundation for inexperienced jury members is unnecessary. As stated by the Supreme Court of Texas, “the purpose of arbitration is providing a rapid, inexpensive alternative to traditional litigation.”\(^5\) It is generally accepted that the arbitral panel has substantial discretion regarding discovery matters and “when contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated

\(^{1}\) Fed. R. Civ. P. 26
\(^{2}\) Idaho R. Civ. P. 45, Fla. R. Civ. P. 1.410
\(^{3}\) Fed. R. Civ. P. 45
\(^{4}\) Ill. Sup. Ct. R. 202
with a formal trial. One of these accouterments is the right to pretrial discovery.”

Another systemic difficulty comes from the nature of the process itself; because “arbitration is a creature of contract” each arbitration can be different from the next in many aspects. The applicable rules can come from any of the arbitral organizations available, although certain rules can be excluded by agreement and parties can even agree to exclude certain claims from arbitration.

One might come to the conclusion that because arbitration is so flexible parties could simply define the scope of discovery to their needs and give the arbitrators power to compel such pre-hearing discovery as they think necessary. To some extent this is true as parties can agree on the scope of discovery as it applies to the various parties to the dispute; the problems arise when considering non-parties. Whereas Judges have the power to subpoena parties or non-parties to give deposition testimony calculated to reveal relevant evidence at any time, arbitrators are not seized of the same ability. Due to the consent based contractual nature of arbitration one must ask if the arbitrators can compel a non-signatory to do anything. One side of the argument implores the thoughtful practitioner to examine the relevant statutory authority of the Uniform Arbitration Act (UAA) and Federal Arbitration Act (FAA). Under the most recent version of the UAA:

> The arbitrators may issue (cause to be issued) 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. Subpoenas so issued shall be served, and upon application to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

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7 _Cat Charter, LLC v. Schurtenberger_, 646 F.3d 836, 843 (11th Cir. 2011)
The FAA provides that arbitrators may:

“Summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”

If a party or non-party refuses to comply then the arbitrators may:

“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.”

Rules promulgated by two large US arbitration services, the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc. (JAMS) are equally as vague on this issue. “Several provisions of the American Arbitration Association Rules may be read to permit the issuance of interrogatories and deposition of key non-party witnesses in more complex matters, but the enforcement of such rules is problematic.”

AAA Complex Commercial Arbitration Rule 9 states that “the arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute.” Rule L-4(c) says that the arbitrator “may establish the extent of the discovery.” The AAA Employment Arbitration principles also state that parties should acknowledge “broad arbitrator authority to order and control discovery, including depositions.”

The discovery protocols of JAMS are more specific and seem to caution participants to be mindful of “whether there are necessary witnesses and/or

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9 9 U.S.C.A. § 7
10 Id.
11 J. Timothy Eaton, Patricia S. Spratt, Discovery in Arbitrations, CBA Rec., November 2009, at 34, 36
12 See AAA Commercial Arbitration Rule 9 (June, 1, 2009), available at: http://www.adr.org/
13 See AAA Complex Commercial Arbitration Disputes Procedures Rule L-4(c) (June 1, 2009), available at: http://www.adr.org/
documents that are beyond the tribunal’s subpoena power.”¹⁵ At first glance the pre-hearing discovery powers of the arbitrator from the FAA and arbitration rules may look broad enough to accomplish pre-hearing discovery, but after further examination several difficult and unresolved issues present themselves. The exploration of several key cases below describes the path upon which the opinions of modern Courts have shifted and perhaps, lays a foundation for the Supreme Court to rely on in a future decision over this issue.

I. Support for pre-hearing non-party subpoenas in arbitration

While the statutes above appear to allow an arbitrator only to compel third party testimony at an arbitration hearing, as opposed to a pre-hearing deposition, some Courts have held that within the power to compel testimony and documents for purpose of a hearing lies the ability to compel such testimony and documents for discovery purposes before a hearing. For instance, in 2000 the Eighth Circuit Court of Appeals 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.”¹⁶ A succinct and well-reasoned opinion by Magistrate Judge Kent Sandidge sitting for the Federal District Court for the Middle District of Tennessee explains this view in detail.

Meadows Indemnity Co., Ltd. V. Nutmeg Insurance Co.

This case arises from a larger complex dispute between several insurance companies over conduct related to a large casualty insurance/reinsurance pool

¹⁶ In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870-71 (8th Cir. 2000)
and at the time of this decision had spurred litigation between several players in several states. In 1989 Meadows Indemnity Co. (Meadows) filed suit against Baccala & Shoop Insurance Services ("BSIS") alleging that BSIS and other companies managing the pool engaged in conduct which allowed them to gain "excessive commissions and fees from the pool and fraudulently concealed information from reinsurers participating in the pool."\(^{17}\) Litigation in New York and California stemming from the same conduct was stayed pending the results of the arbitration that was the focal point of this case. Willis Corroon (Willis) was the successor in interest to a company which had previously worked with BSIS in managing the pool and received a subpoena from the arbitral panel at its Nashville, TN office. However, after initial investigation Willis stated that the documents requested by the subpoena were located in a warehouse in California.

The Court summarized the issue in this case as "whether Willis Corroon [a non-party to the arbitration] must comply with an order from the arbitration panel requiring it to produce numerous documents [. . .] for inspection and copying by Meadows prior to a hearing before the panel."\(^{18}\) Willis had moved for a protective order to prevent it from having to comply with the pre-hearing order of the arbitral panel and argued that the arbitral panel had acted beyond its authority by issuing a pre-hearing subpoena to a nonparty. Un-persuaded, Judge Sandidge cited § 7 of the FAA and reasoned that "the power of the panel to compel production of documents from third parties for the purposes of a hearing implicitly authorizes

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\(^{18}\) *Id.* At 44.
the lesser power to compel such documents for arbitration purposes prior to a hearing.”

Despite the opinion of the Eighth Circuit, cited above, and the opinion in *Meadows* the current trend seems to be against the enforcement of pre-hearing subpoenas of non-parties by arbitrators. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.* and *COMSAT Corp. v. Nat'l Sci. Found.* the Third and Fourth Circuits respectively disagreed with the enforcement of such subpoenas by arbitrators against third parties. The holdings of these two cases make a textual argument that “by conferring the power to compel a non-party witness to bring items to an arbitration proceeding while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power.”

II. Opposition of pre-hearing non-party subpoenas in arbitration

While some Courts have enforced pre-hearing discovery orders of arbitrators directed at non-signatory third parties, most modern Courts seem to focus their analysis on the circumstances and procedural issues that can make enforcement difficult. A prime example of this majority view comes from a licensing dispute between Amgen Inc. and Ortho Pharmaceutical Corp. In this instance after the arbitrators’ pre-hearing subpoena to appear for deposition of a third party was held valid the Seventh Circuit Court of Appeals reversed due to the lack of subject matter jurisdiction of the underlying dispute.

19 Id. At 45.
20 *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004)
21 *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999)
22 *Hay Group* at 408.
Amgen Inc. v. Kidney Center of Delaware County, Ltd.

In the mid-80’s Amgen Inc. and Ortho Pharmaceutical Corp. entered into a limited licensing agreement that allowed Ortho to use and sell erythropoietin (a genetically engineered substance on which Amgen held a patent) for certain uses. Ortho was not permitted to sell the substance for use by persons receiving kidney dialysis and a dispute arose over this condition in 1989. Both parties agreed to submit any disputes arising from the licensing agreement to arbitration in Chicago, Illinois pursuant to the Federal Rules of Civil Procedure. During the course of the arbitration the arbitrator decided that he needed evidence from certain parties who were non-signatories to the Amgen-Ortho licensing agreement. One such third party was Kidney Center of Delaware County, Ltd. (KCDC), to whom the arbitrator issued a summons requiring it to appear at a Pennsylvania deposition with certain specified relevant documents.

After KCDC refused to appear Amgen filed a petition (formed as a motion) pursuant to § 7 of the FAA, in the Federal District Court for the Eastern District of Pennsylvania requesting the Court to compel KCDC to comply. The Court concluded that § 7 only grants such authority to the District Court for the district in which the arbitrator(s) or a majority of them are located. Because the arbitrator in this case was in Chicago the Pennsylvania Court concluded that it had no authority “but it did note that a district court for the Northern District of Illinois could issue the order that Amgen sought. Hence, it sent its case file to Chicago and gave Amgen leave to re-file its petition there.”23 The Federal Court for the Northern District of Illinois disagreed with KCDC’s argument that an arbitrator’s

23 Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd., 95 F.3d 562, 564 (7th Cir. 1996)
subpoena power reaches only as far as the subpoena power of the District Court, i.e. that district or 100 miles from the courthouse. KCDC had primarily relied on the holding of *Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co.*24 where the Court stated, “for matters of procedure relating to the hearings before the arbitrators we refer not to the Rules of Civil Procedure but to the [rules] which the parties agreed should control.”25

The Court distinguished this holding because, unlike the parties in *Commercial Solvents* who had agreed to use AAA rules, Amgen and Ortho had agreed to arbitrate pursuant to the Federal Rules of Civil Procedure. The Court finds the argument of Amgen, “that Section VII of the FAA gives the court the power to order any person, no matter where he or she may be located or resides, to appear before the arbitrator (or at least appear for a deposition)”26 equally unconvincing. Although § 7 does say ‘any person’ it also states that the Court may enforce the arbitrator’s subpoena only “in the same manner provided by law for [ . . . ] refusal to attend in the courts of the United States.”27

Despite the unconvincing arguments of both parties the Court concluded that using part of Federal Rule of Civil Procedure 45 an attorney may issue a subpoena as an officer of “a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.”28 Therefore, an attorney for Amgen authorized to practice in Illinois (the Court where the action is pending) could issue a subpoena

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25 *Id.*
27 9 U.S.C.A. § 7
acting as an officer of the District Court for the Eastern District of Pennsylvania (the district where the deposition will be made). According to the Federal Rules such a subpoena could be enforced by the District Court for the Eastern District of Pennsylvania over KCDC and allowed the Court to hold the arbitrator’s subpoena valid and enforceable.

However, before Amgen’s attorneys could issue such a subpoena KCDC appealed this ruling to the Seventh Circuit Court of Appeals arguing that the order of the Federal District Court for the Northern District of Illinois was an advisory opinion and therefore improper under Article 3 of the US Constitution. The Court of Appeals avoids a direct discussion of this argument but does conclude that the order is final and appealable, thus giving them proper jurisdiction over the appeal. The Court proceeds to discuss a deficiency of Amgen’s argument concerning subject matter jurisdiction. The FAA “itself does not create subject matter jurisdiction for independent proceedings, whether they involve § 4 or § 7. When a party to an arbitration initiates an independent proceeding, it must establish that the dispute that underlies the arbitration would come within the jurisdiction of the district court.”

Because Amgen failed to prove that subject matter jurisdiction existed over its dispute with Ortho the Court of Appeals retained jurisdiction over the case and “directed the district court to make and certify to us, within sixty days, its findings on whether subject matter jurisdiction exists for the district court with respect to the underlying dispute between Amgen, Inc. and Ortho

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Pharmaceutical Corp.” The District Court, based on a stipulation of facts by the parties, found that it lacked such jurisdiction and the Court of Appeals dismissed the case.

III. Modern views on pre-hearing non-party subpoenas in arbitration

Despite the conflicting views from the mid-90’s Courts in Meadows and Amgen “there has been a growing trend that recognizes that the arbitrator's subpoena power does not extend to third party pre-hearing discovery.” The bulk of recent cases have been heard in circuits opposed to enforcement and in 2008, the Second Circuit Court of Appeals described the modern day majority view in Life Receivables Trust v. Syndicate 102: “The FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted. The fact that the Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so. [. . .] A statute's clear language does not morph into something more just because courts think it makes sense for it to do so. Thus, we join the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings.”

The view of the Second Circuit in Life Receivables is akin to the prevailing view in the Third and Fourth Circuits. The Third Circuit upheld similar reasoning

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30 Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd., 101 F.3d 110 (7th Cir. 1996)
33 Id. at 216-217.
in the *Hay Group*\(^{34}\) case as did the Fourth Circuit in the *COMSAT*\(^{35}\) case. Since the Fourth Circuit decided *COMSAT* in 1999, only one of its District Courts has addressed the 'special need' standard it created. The Federal District Court for the Eastern District of Virginia held that although “the Fourth Circuit has yet to define the contours of the “special need” exception, it has observed that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable. Moreover, it is clear that a petitioner's “special need” must be more than simply a general desire to conduct discovery.”\(^{36}\) The strongest opposition to the holding in *Life Receivables* comes from the Eighth Circuit which held that “the panel's exercise of this implicit power was proper whether or not Transamerica is ultimately determined to be a party to the arbitration.”\(^{37}\) The Sixth Circuit has agreed with this view as recently as 2000 when it held that “just as the subpoena power of an arbitrator under the FAA extends to non-parties, a labor arbitrator conducting an arbitration under a collective bargaining agreement should also have the power to subpoena third parties.”\(^{38}\)

The validity of pre-hearing subpoenas issued by arbitrators has not yet been considered in the Courts of the First, Fifth, Seventh, Ninth, Tenth, or D.C. Circuits. The issue has been addressed by Courts of states in the Ninth Circuit in cases brought under federal labor laws and the results have been conflicting. The current view in the Federal District Courts in the Fifth Circuit was recently stated by the Federal District Court for the Northern District of Texas as adopting

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\(^{34}\) *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004)

\(^{35}\) *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999)


\(^{37}\) *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 871 (8th Cir. 2000)

\(^{38}\) *Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999)
“the reasoning of the Third and Second Circuits and holds that § 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.”

Although the Seventh Circuit did not enforce the subpoena in Amgen, it did so on jurisdictional grounds and did not decide the scope of § 7 of the FAA. However, the Federal District Court for the Northern District of Illinois has addressed the issue after Amgen in an opinion favoring the analysis in Hay Group. The Court performed a textual analysis of the FAA and held that “Congress could not have intended when it enacted § 7 of the FAA in 1925 to have authorized arbitrators and district courts to require pre-hearing production in arbitrations when such production was not authorized by § 724 in actions at law.” Similarly in the Eleventh Circuit the Federal District Court for the Southern District of Florida held “that an arbitrator is not statutorily authorized under the FAA to issue summonses for pre-hearing depositions and document discovery from non-parties. [citing Hay Group] To be clear, an arbitrator may do so at a hearing, but he may not order such production before the hearing.”

Until the Supreme Court decides this issue the Circuits will remain split between the text-based ‘express authorization’ analysis of the Second Circuit in Life Receivables, and the ‘power-by-implication’ analysis of the Eighth Circuit in In re Sec. Life Ins. Co. of Am. To date the Supreme Court has remained cryptic concerning pre-hearing subpoenas under § 7 of the FAA acknowledging only that

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40 Matria Healthcare, LLC v. Duthie, 584 F. Supp. 2d 1078, 1081 (N.D. Ill. 2008)
§ 7 empowers “arbitrators to compel attendance of witnesses.”\textsuperscript{42} While the Court was speaking about attendance of witnesses at the arbitration hearing in the above quotation they have never expressly discussed the arbitrator’s ability to compel a witness to submit to a pre-hearing subpoena.

IV. Solutions to the pre-hearing non-party subpoena problem

The Federal Courts have recognized that “arbitration’s principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.”\textsuperscript{43} Therefore, in order to circumvent such conflicts the thoughtful practitioner must carefully plan and organize their pre-hearing discovery needs. “Where a subpoena for the deposition of an out-of-state witness is needed, the deposing party should seek a district court subpoena in the district of the deposition under Rule 45 of the Federal Rules of Civil Procedure.”\textsuperscript{44} This approach, detailed by the Federal District Court for the Northern District of Illinois in \textit{Amgen} has recently been supported by several other Federal Courts.\textsuperscript{45}

The International Institute for Conflict Prevention and Resolution has suggested an alternative co-operative method, parties trading written witness statements. These statements are akin to an affidavit that an attorney might receive in response to an interrogatory. Such statements would be signed by the prospective witness and contain citations to any relevant documents and, provided the parties are cooperative with one another, could save the process

\textsuperscript{43} \textit{Republic of Kazakhstan v. Biedermann Int'l}, 168 F.3d 880, 883 (5th Cir. 1999)
\textsuperscript{44} 1 Alt. Disp. Resol. § 8:22 (3d ed.)
\textsuperscript{45} \textit{Fazio v. Lehman Bros., Inc.}, 2004 WL 5613816 (N.D. Ohio 2004), \textit{Ferry Holding Corp. v. GIS Marine, LLC}, 2012 WL 88196 (E.D. Mo. 2012)
substantial time.\textsuperscript{46} The UNCITRAL Arbitration Rules employ and approve of this method. However, despite such alternatives the thoughtful practitioner need only look to the Second Circuit which has posited an enforceable method to obtain pre-hearing discovery.

The ‘Preliminary Discovery Hearing’ Method

Coupled with the Rule 45 mechanism (if a necessary witness is out of the arbitrator’s jurisdiction) from \textit{Amgen} the Second Circuit has approved of calling an arbitration hearing geared only towards discovery. In the \textit{Stolt-Nielsen}\textsuperscript{47} case the Court held that “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.”\textsuperscript{48} The Second Circuit even acknowledged this approach in \textit{Life Receivables} where it held that “arbitrators may, consistent with section 7, order any person to produce documents so long as that person is called as a witness at a hearing. [. . .] In \textit{Stolt-Nielsen}, we held that arbitral section 7 authority is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters.”\textsuperscript{49}

Because § 7 of the FAA does not prohibit arbitrators from subpoenaing testimony or require such testimony be given at the final arbitral hearing \textit{Stolt-Nielsen} “opens the possibility that, in a proper case, the parties could convince

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\item \textsuperscript{46} See generally CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, § 2(a) (International Institute for Conflict Prevention & Resolution 2009) available at: http://www.cpradr.org/
\item \textsuperscript{47} \textit{Stolt-Nielsen SA v. Celanese AG}, 430 F.3d 567, 577-78 (2d Cir. 2005)
\item \textsuperscript{48} Id. at 577-78.
\item \textsuperscript{49} \textit{Life Receivables} at 218.
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the arbitrator to hold a hearing solely to take testimony from a nonparty witness.” Of course the burden of proving that the witness has important information or is not likely to attend the final arbitration hearing will be on the party requesting the arbitrator(s) convene a discovery hearing. The Second Circuit even put forth three factors that will help the thoughtful practitioner establish the need for a discovery hearing. Although not an exclusive list, the Stolt-Nielsen Court stated:

i.) The parties deposed “were directed to appear at a hearing before the arbitrators, and all three arbitrators were present at that hearing.”

ii.) “The arbitrators heard testimony directly from [the party deposed], and unlike a deposition, the panel ruled at the hearing on evidentiary issues such as admissibility and privilege and reserved on other evidentiary issues.”

iii.) “The testimony provided at the hearing became part of the arbitration record, to be used by the arbitrators in their determination of the dispute before them.”

Assuring that these three factors are satisfied when conducting an arbitration hearing on discovery issues, such as subpoenas issued by the arbitrator(s), is paramount to enforcingability.

V. Conclusion

Until the Supreme Court speaks, it does not matter whether the arbitration is located in the textual Second Circuit, the special need Fourth Circuit, the implied power Eighth Circuit, or anywhere else because the thoughtful practitioner can obtain pre-hearing discovery from third parties. The ‘preliminary discovery hearing’ method is the best strategy for obtaining testimony/evidence from a non-signatory third party and it can be summarized in four parts. First, demonstrate good faith by attempting to trade written witness statements with the

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51 Stolt-Nielsen at 578.
52 Id.
53 Id.
opposing party to eliminate non-essential witnesses and minimize the amount of
discovery subpoenas necessary. Second, demonstrate that your case has a
special need for the specified third parties, i.e. that the information those parties
posses is otherwise unavailable. Third, determine if the non-signatory is located
outside the jurisdiction of the applicable Federal District Court. If so, employ the
Rule 45 method from the Amgen case to subpoena the non-signatory using the
enforcement power of their local Federal District Court. Fourth, ask the arbitral
panel to convene a preliminary discovery hearing in order to address any
remaining third party subpoenas. Make sure that the hearing satisfies the Stolt-
Nielsen factors, i.e. all arbitrators are present, the panel hears directly from the
deponent and rules on any evidentiary issues, and the hearing becomes part of
the arbitral record. As long as a practitioner complies with the four steps of the
preliminary discovery hearing method obtaining pre-hearing discovery from third
parties by subpoena should not be a concern.