

## THE CASE FOR NON-PARTY DISCOVERY UNDER THE FEDERAL ARBITRATION ACT

Under the Federal Arbitration Act (FAA),<sup>1</sup> does an arbitrator have the power to compel the pre-hearing production of documents by a non-party or the appearance at a deposition of a non-party witness? A March 2004 decision from the U.S. Court of Appeals for the Third Circuit, *Hay Group v. E.B.S. Acquisition Corp.*,<sup>2</sup> holds that arbitrators can never compel production of documents under the FAA. This decision is likely to reinvigorate this unresolved issue. After *Hay*, the Third and Fourth Circuits now hold that an arbitrator has no power to compel discovery from non-parties,<sup>3</sup> while the Eighth Circuit holds that an arbitrator does.<sup>4</sup> District court opinions have generally, but not uniformly, found that arbitrators can compel production of documents or depositions by non-parties.<sup>5</sup>

This paper argues that the Third and Fourth Circuits are wrong in their conclusion that the subpoena power under the FAA does not extend to producing non-party documents and witnesses for depositions. Those courts first erred in concluding that the statutory text of section 7 of the FAA unambiguously limits the arbitrator's power. The better view is that the drafters of

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<sup>1</sup> United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. secs. 1-307 (2000) (commonly referred to as the "Federal Arbitration Act")).

<sup>2</sup> 360 F.3d 404 (3d Cir. March 12, 2004).

<sup>3</sup> The Fourth Circuit so ruled in *COMSAT Corp. v. Nat'l Science Foundation*, 190 F.3d 269 (4<sup>th</sup> Cir. 1999).

<sup>4</sup> *In re Security Life Ins. Co. of America*, 228 F.3d 865 (8<sup>th</sup> Cir. 2000).

<sup>5</sup> *In re Brazell*, 2000 WL 364997 (S.D.N.Y. April 6, 2000) (holding that arbitrator had authority to issue document subpoena to non-party); *Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995) (holding that arbitrator had power under FAA to subpoena a non-party to produce documents and to testify at a deposition); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994) (holding that because the burden was minimal, the non-party would have to produce documents pursuant to arbitrator's subpoena under FAA); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988) (upholding subpoena issued by arbitrator that non-parties must appear at pre-hearing conference and arbitration hearing). *But see Gresham v. Norris*, 304 F. Supp.3d 795 (E.D. Va. 2004) (relying totally on *COMSAT* to deny enforcement of deposition subpoena); *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995) (arbitrator did not have authority to issue deposition subpoena).

the FAA did not contemplate non-party discovery, and left the statute silent on that point. Having made the initial error of finding the FAA unambiguous, the Third and Fourth circuits then failed to properly consider the basic purpose of the FAA and the strong policy arguments in favor of interpreting the ambiguous statute to grant arbitrators such powers. Ultimately, this paper concludes that arbitrators have the power to compel non-party depositions and document productions, and that this power is both consistent with the Supreme Court’s interpretation of the FAA and critical to modern arbitration practice.

## **I. The Statutory Text, Ambiguity and “Implicit Powers”**

### **A. The Text of Section 7**

The FAA was enacted in 1925 for the express purpose of making arbitration contracts enforceable by their terms.<sup>6</sup> The only provision that touches on discovery, and the one that has spawned the case law summarized above, is section 7. It reads, in pertinent part:

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.*<sup>7</sup>

### **B. The Third and Fourth Circuits “Unambiguous” Analysis**

Of course, the threshold question in construing a federal statute is to determine whether the text is ambiguous.<sup>8</sup> The ambiguity question requires a careful parsing of the statute. The first sentence of section 7 clearly authorizes an arbitrator to issue a summons to non-parties (“the arbitrators. . . may summon in writing *any person*”). What activity, then, may the summons compel from the non-party? The plain text permits the arbitrators to summon the non-party “to

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<sup>6</sup> 9 U.S.C. sec. 2.

<sup>7</sup> 9 U.S.C. sec. 7 (emphasis added).

*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.” (Emphasis added). The reference in the statutory text to attendance “before them” led the Third and Fourth Circuits to conclude that the summons power permits arbitrators to summon witnesses to appear only *at the hearing* and not at a deposition. Equally, the reference to “bring with him any book, record, document, or paper” led the Third and Fourth Circuits to conclude that the summons power permits arbitrators to require the production of documents only *at the hearing* and not before it.

*Hay* involved only the production of documents, not witnesses.<sup>9</sup> David Hoffrichter had been an employee of the Hay Group.<sup>10</sup> He resigned and went to work for PriceWaterhouseCoopers.<sup>11</sup> His severance agreement from Hay barred him from soliciting Hay clients.<sup>12</sup> Hay alleged a violation of the agreement (an arbitrable dispute under the severance agreement) and in the arbitration proceeding sought documents from PriceWaterhouseCoopers.<sup>13</sup>

The Third Circuit held that Hay could not obtain the documents. After quoting section 7, the *Hay* court immediately and without elaboration found that the language “unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.”<sup>14</sup> In addition to the plain text of the statute, the court contended that requiring document production in the physical presence of the arbitrator would discourage large-scale subpoenas of

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<sup>8</sup> *Hay*, *supra* note 2, 360 F.3d at 406 (“The Supreme Court has repeatedly explained that recourse to legislative history or underlying legislative intent is unnecessary when a statute’s text is clear and does not lead to an absurd result.”).

<sup>9</sup> *Id.*, at 405.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

non-parties, would protect non-parties from discovery burdens, and would promote efficiency in arbitration proceedings.<sup>15</sup>

The Fourth Circuit's decision in *COMSAT* is similar.<sup>16</sup> *COMSAT, Inc.*, had a contract with Associated Universities, Inc. (AUI), which in turn had a contract with the National Science Foundation (NSF).<sup>17</sup> *COMSAT* and AUI got into a dispute over a telescope; the dispute was subject to mandatory arbitration.<sup>18</sup> At *COMSAT*'s request, the arbitrator issued a subpoena to NSF for all documents related to the telescope.<sup>19</sup>

As in *Hay*, the *COMSAT* court immediately concluded that section 7 is unambiguous: "By its own terms, the FAA's subpoena power is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing."<sup>20</sup> The discussion of policy was terse: "The rationale for constraining an arbitrator's subpoena power is clear. Parties to a private arbitration agreement forego certain procedural rights attendant to more formal litigation in return for a more efficient and cost-effective resolution of their disputes."<sup>21</sup> Despite its apparent fidelity to the unambiguous text of section 7, the *COMSAT* court crafted an exception to the bar on non-party discovery subpoenas for "unusual circumstances" and upon a "showing of special need."<sup>22</sup> The court made no effort to connect the special need exception to the text of section 7, and no such connection exists.

*Hay* and *COMSAT* are wrong on two scores: (1) both opinions erroneously concluded that section unambiguously bars discovery subpoenas; and (2) both failed to consider the purpose

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<sup>14</sup> *Id.*, at 407.

<sup>15</sup> *Id.*

<sup>16</sup> *COMSAT*, *supra* note 3, 190 F.3d 269.

<sup>17</sup> *Id.*, at 271-72.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, at 272.

<sup>20</sup> *Id.*, at 275.

<sup>21</sup> *Id.* at 276.

of the FAA and the strong policy reasons that arbitrators should have the power to issue such subpoenas. The first error is discussed in the next paragraphs; the second is are discussed in the next section.

*Hay* and *COMSAT* are wrong in the conclusion that the statutory phrase “before them” is unambiguous, for three reasons.

First, both cases appear to hold that the statutory text “before them” unambiguously means the hearing on the merits.<sup>23</sup> But parties might appear “before” an arbitrator in any number of circumstances other than the hearing on the merits. For example, arbitrators frequently conduct pre-hearing conferences.<sup>24</sup> A pre-hearing conference is “before” the arbitrator, even though it is not the merits hearing. Thus, *Hay* and *COMSAT* are simply wrong that the statutory text compels the conclusion that the subpoena power is limited to the hearing. At a minimum, the statutory text “before them” is ambiguous as to the type of proceeding to which it applies.

Second, *Hay* expressly adopts a physical presence requirement: “Section 7’s language unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the *physical presence of the arbitrator.*”<sup>25</sup> This concept is implicit in *COMSAT*’s reference to “the arbitration hearing.” The reference to “physical presence” appears to forbid the arbitrator’s presence by telephone or videoconference, though such appearances are

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<sup>22</sup> *Id.*

<sup>23</sup> *COMSAT* does so explicitly ( arbitrator’s power is limited to authority “to compel testimony by non-parties at the arbitration hearing”). 190 F.3d 275. It is not absolutely clear whether the *Hay* court would do so or not. At one point, the opinion references “document production at the actual hearing.” 360 F.3d at 409. The concurring opinion of Judge Chertoff in *Hay* expressly holds that an arbitrator could compel a witness to appear for testimony or document production at a proceeding other than the merits hearing. 360 F.3d at 413. Since the majority opinion did not adopt Judge Chertoff’s approach, the logical conclusion is that it did not agree with him, and would hold that the phrase “before them” means the merits hearing.

<sup>24</sup> *See, e.g.*, American Arbitration Association Commercial Arbitration Rules, Rule 20 (authorizing preliminary hearing).

common.<sup>26</sup> The term “before them” is, at a minimum, ambiguous as to whether telephone or video conferences are covered.

Third, the definition of the word “before” is not nearly as obvious as *Hay* and *COMSAT* suggest. Both opinions appear to adopt a definition something like this: “In front of so as to be in the sight of; in presence of.”<sup>27</sup> In other words, those courts equate “before” with a physical presence. This definition, if adopted, does support the notion that the phrase “before them” in section 7 requires the arbitrator to be physically in the room. But the very next definition of the word “before” in the Oxford English Dictionary is this: “Said in reference to a tribunal, of the persons or matters of which it has cognizance.”<sup>28</sup> This definition, in the context of a tribunal, connotes a concept much more like jurisdiction. If one used this definition, the statutory phrase “before them” would not require the physical presence of the arbitrators because it would mean anyone over whom the arbitrator has power. For purposes of the ambiguity analysis, one need not choose which definition to adopt. The important point is that the presence of competing definitions shows that the term “before them” as used in section 7 is not unambiguous.

### **C. The Eighth Circuit’s “Implicit Powers” Analysis**

While the *Hay/COMSAT* effort to cast section 7 as an unambiguous bar to non-party discovery subpoenas is unconvincing, the Eighth Circuit’s textual analysis is not much better, in my view. As noted above, the Eighth Circuit held in *In re Security Life Insurance Co.*<sup>29</sup> that section 7 gives the arbitrator the power to summon production of documents by a non-party. In

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<sup>25</sup> 360 F.3d 407 (emphasis added).

<sup>26</sup> *See, e.g.*, American Arbitration Association Commercial Arbitration Rules, Rule 20 (authorizing preliminary hearing by telephone); National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, Principle 12 (authorizing hearing on the merits to be conducted by telephone or electronic means).

<sup>27</sup> OXFORD ENGLISH DICTIONARY, definition of “before,” definition 3b, available at <http://dictionary.oed.com>.

<sup>28</sup> *Id.*, definition 3c.

*Security Life* the court acknowledged that section 7 does not expressly authorize production of documents.<sup>30</sup> It went on to hold that “implicit in an arbitration panel’s power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.”<sup>31</sup>

Though it did not expressly say so, the Eighth Circuit’s implicit powers analysis is likely derived from the maxim that an express grant by the legislature of a greater power necessarily implies a lesser one. The Supreme Court of the United States has endorsed this maxim, at least in some contexts.<sup>32</sup> The most recent discussion of the maxim, however, is plainly skeptical and could be read as an outright rejection.<sup>33</sup> In any event, the maxim provides a weak basis for deciding the scope of section 7. In *Hay*, the Third Circuit expressly rejected the implicit powers approach, not on the grounds that the maxim has been repudiated or is illogical, but on the theory that the greater power is the power to compel depositions and document productions, not the power to compel attendance at a hearing.<sup>34</sup>

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<sup>29</sup> *Supra* note 4, 228 F.3d 865.

<sup>30</sup> *Id.*, at 870-71. The court in *Security Life* did not expressly rule on whether section 7 is ambiguous, but there would have been no reason to construct the implicit powers analysis if it read section 7 to be unambiguous.

<sup>31</sup> *Id.*; *see also Meadows Indemnity*, *supra* note 5, at 45 (“The 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.”).

<sup>32</sup> *See Posadas de Puerto Rico Associates v. Tourism Commission of Puerto Rico*, 478 U.S. 328, 345-46 (1986) (“[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling”).

<sup>33</sup> *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996). In one sentence the Court says that “the ‘greater-includes-the-lesser’ argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine.” In the very next sentence, it says, “we do not dispute the proposition that greater powers include lesser ones.” For purposes of this paper it is not necessary to reconcile whether the “greater-includes-the-lesser” argument has been totally rejected or is merely suspect. In either case, the Eighth Circuit’s implicit reliance on the argument provides a weak basis for its holding in *Security Life*.

<sup>34</sup> *Hay*, 360 F.3d at 408.

#### **D. Some Final Thought on the Textual Analysis**

*Hay*, *COMSAT*, and *Security Life* are each unsatisfactory in their textual analysis because they are looking for something that is not there. Simply, the drafters of the FAA did not contemplate arbitration as it is conducted today, and likely did not consider the power to issue subpoenas for discovery of non-parties.<sup>35</sup> Thus, any effort to find the answer in the text of section 7, whether by an ambiguity analysis, an implicit powers analysis, or some other analysis, is likely to be unsatisfactory. The best that can be said is that the text is ambiguous and the legislative history unenlightening. With that understanding, we must necessarily turn to the question of the overall purpose of the FAA and then what policy considerations might dictate a result.

### **II. The Statutory Purpose and Policy Considerations**

#### **A. The FAA's Central/Main Purposes Favor a Broader Reading of Section 7**

Where the specific statutory text is ambiguous, the next analysis is to look at the overall purpose of the statute.<sup>36</sup> It is often said that the "central purpose" of the FAA is "to ensure that private agreements to arbitrate are enforced according to their terms."<sup>37</sup> This aim "requires that [the Court] rigorously enforce agreements to arbitrate,"<sup>38</sup> in order to "give effect to the

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<sup>35</sup> A detailed review of the legislative history of section 7 is beyond the scope of this paper. A recent student note looked at that issue and concluded that the legislative history does nothing to illuminate the legislative intent about section 7 and discovery. Gabriel Herrmann, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 800-01 (2003).

<sup>36</sup> *Board of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2357, 2383 (1990).

<sup>37</sup> *Green Tree Financial Corp. v. Bazzle*, 123 S.Ct. 2402, citing *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52, 53-54 (1995); see also *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

<sup>38</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

contractual rights and expectations of the parties.”<sup>39</sup> On other occasions, the Court has stated the purpose of the FAA as follows: “As we have explained, its ‘purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.’”<sup>40</sup> Under this second purpose, courts have promoted arbitration in many contexts.<sup>41</sup>

Do these purposes of the FAA shed any light on the proper reading of section 7? In my view, the purposes of ending judicial hostility and promoting arbitration cut strongly toward an expansive reading of section 7, giving arbitrators the power to issue document and deposition subpoenas to non-parties.

If arbitration is to be promoted, some discovery of non-parties is undoubtedly a practical reality. As an example of the increasing complexity of modern arbitrations, a recent article described two arbitration cases involving confirmed arbitration awards of \$41 million and \$27 million, with the hearings lasting up to fifty days.<sup>42</sup> Cases of this complexity demand at least the possibility of non-party discovery.<sup>43</sup>

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<sup>39</sup> *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 109 S.Ct. 1248, 1255 (U.S. 1989).

<sup>40</sup> *EEOC v. Waffle House, Inc.*, 122 S.Ct. 754, 761 (U.S. 2002), quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

<sup>41</sup> *Gilmer*, 500 U.S. at 24 (FAA “manifest[s] a “liberal federal policy favoring arbitration agreements”), quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

<sup>42</sup> Ronald Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring Against a Failure of Professional Responsibility*, 8 HARV. NEG. L. REV. 271, 271 (2003).

<sup>43</sup> See Uniform Arbitration Act-2000, section 17(c), comment 5 (“sometimes arbitrations involve outside, third parties who may be required to give testimony or produce documents”), reprinted at 3 PEPP. DISP. RESOL. J. 323, 383 (2003); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 48 (“a party to an arbitration often needs knowledge or testimony from a nonparty to prove or defend against a claim”); Timothy C. Krsul, *The Limits on Enforcement of Arbitral Third-Party Subpoenas*, 57-JAN DISP. RESOL. J. 30, 32 (2003) (“In arbitration proceedings involving complex commercial disputes, third parties often possess material records and other evidence that are highly material to the issues in dispute”).

This necessity is demonstrated by the *Meadows Indemnity*<sup>44</sup> case. The arbitrable dispute there was between an insured and several insurance companies. Willis Corroon was a non-party insurance agency, but had possession of relevant documents. The arbitration panel issued a subpoena to Willis Corroon listing 53 categories of documents to be produced, and the district court upheld it. Its reasoning was as follows: (1) the arbitrators could clearly compel production of the documents at the hearing; (2) “considering the sheer number of documents addressed by the subpoena, however, this scenario [production at the hearing] seems quite fantastic and practically unreasonable”; (3) the subpoena promoted a full and fair determination of the issues while reducing cost; and (4) denying the subpoena would hamper the use of arbitration in complex cases.<sup>45</sup>

*Meadows Indemnity* makes the point that some non-party discovery is a practical necessity in commercial disputes. In any number of cases, non-parties are likely to have critical information. In *Meadows*, the non-party was an insurance agent in a dispute between an insured and insurers. In *Hay*, the non-party was a competitor who hired an employee with a non-competition agreement. In *COMSAT*, the non-party was a third-party beneficiary of a contract. None of these situations is particularly unusual. Permitting non-party discovery, at the discretion of the arbitrator, would advance the purpose of the FAA of promoting arbitration.

## **B. The Goal of Flexibility in Arbitration Proceedings Favors a Broader Reading of Section 7**

Courts often state that flexibility of procedure is one of the main benefits of arbitration. The Supreme Court so stated in one of its earliest arbitration cases:

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<sup>44</sup> *Meadows Indem. Co. v. Nutmeg Ins. Co.*, *supra* note 5, 157 F.R.D. at 42.

<sup>45</sup> 157 F.R.D. at 44-45; *see also Stanton*, *supra* note 5, 585 F. Supp. at 1242 (noting that quashing subpoena duces tecum issued to non-parties would “vitate” the purposes of the FAA to facilitate and expedite resolution of disputes, ease court congestion, and provide a cheaper alternative to litigation).

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.<sup>46</sup>

The same principle applies in the context of the FAA: “Arbitration is a dispute resolution process designed, at least in theory, to respond to the wishes of the parties more flexibly and expeditiously than the federal courts' uniform rules of procedure allow.”<sup>47</sup>

The unduly strict reading of section 7 in *Hay* and *COMSAT* is totally inconsistent with the policy that arbitration is to be more flexible than litigation. Under those cases, an arbitrator may *never* issue a document or deposition subpoena to a non-party (absent the *COMSAT* exceptional circumstances exception), no matter how compelling the need for it, no matter how much the parties might want it.

Moreover, the strict *Hay* and *COMSAT* reading makes non-party discovery in arbitration substantially *less* flexible than the current practice under the Federal Rules of Civil Procedure. Rule 45 permits parties to issue subpoenas for depositions or document production by non-parties.<sup>48</sup> *Kyocera*, quite properly, suggests that arbitrators need *more* procedural flexibility than do federal judges. Yet *Hay* and *COMSAT* provide arbitrators *no* flexibility to issue non-party subpoenas. Under *United Steelworkers* arbitrators have substantial flexibility as to the remedy—the outcome of the case. It is hard to see why they cannot and should not be trusted with equal flexibility as to procedure.

### **C. A Broader Reading of Section 7 is Consistent with the Trend in Arbitration**

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<sup>46</sup> *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960). *Steelworkers* arose under section 301 of the Taft-Hartley Act, but there is no reason that its endorsement of flexibility would not apply under the FAA.

<sup>47</sup> *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 998 (9<sup>th</sup> Cir. 2003)(en banc); see also *SG Cowen Securities Corp. v. Messih*, 224 F.3d 79, 84 (2000)(“arbitration is frequently marked by great flexibility in procedure, choice of law, legal and equitable analysis, evidence, and remedy”).

<sup>48</sup> Fed. R. Civ. P. 45(a)(1)(2).

The *Hay* and *COMSAT* decisions are against the grain of the general trend of broader discovery in arbitration proceedings. For example, 1955 Uniform Arbitration Act is silent about discovery.<sup>49</sup> The 2000 Revised Uniform Arbitration Act (RUAA) includes several explicit discovery provisions. Under section 17(c) of the RUAA, arbitrators “may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective.”<sup>50</sup> This provision, by referencing “the needs of . . . other affected parties” makes clear that the arbitrator can order non-party discovery. It also establishes a standard for discovery (that it be “fair, expeditious and cost effective”) that is consistent with the need for flexibility. Section 17(d) explicitly states that an arbitrator can “issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding.”<sup>51</sup> This provision makes explicit that the arbitrator can compel attendance for purposes other than the merits hearing.

These provisions in the RUAA reflect the need for non-party discovery in modern arbitration practice.<sup>52</sup> Similar provisions are present in arbitration rules in different contexts. For example, CPR Institute for Dispute Resolution rules for business disputes give arbitrators

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<sup>49</sup> See Uniform Arbitration Act-2000, Prefatory Note (“The UAA did not address many issues which arise in modern arbitration cases [including] whether arbitrators have the discretion to order discovery”), reprinted at 3 PEPP. DISP. RESOL. J. 323, 328 (2003).

<sup>50</sup> RUAA, section 17(c).

<sup>51</sup> RUAA, section 17(d).

<sup>52</sup> Uniform Arbitration Act-2000, section 17(c), comment 5 (“sometimes arbitrations involve outside, third parties who may be required to give testimony or produce documents”), reprinted at 3 PEPP. DISP. RESOL. J. 323, 383 (2003).

powers to administer discovery that are sufficiently broad to permit non-party depositions and document production.<sup>53</sup>

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<sup>53</sup> CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration (September 15, 2000) (“The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.”).

#### **D. A Broader Reading of Section 7 is Necessary for Statutory Rights Cases**

In 1991, in *Gilmer v. Interstate/Johnson Lane Corporation*, the Supreme enforced a compulsory arbitration clause, holding that arbitration agreements would be upheld even as to claims arising under employment statutes such as the Age Discrimination in Employment Act.<sup>54</sup> The *Gilmer* holding was not an unlimited endorsement of all arbitration agreements in the employment context, however. Arbitration clauses are to be upheld “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.”<sup>55</sup> Put another way, *Gilmer* “cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives” but rather “require[s only] the enforcement of arbitration agreements that do not undermine the statutory scheme.”<sup>56</sup>

What procedures, then, are necessary to effectively vindicate the statutory cause of action? Robert Gilmer argued that the arbitration procedure to which he had agreed was insufficient because it was more limited than that permitted under the Federal Rules of Civil Procedure. The Supreme Court quite properly rejected the claim that discovery in arbitration must be the same as in litigation, but noted that Gilmer could seek document production, make information requests, take depositions, and obtain subpoenas under the arbitration rules at issue.<sup>57</sup> The *Gilmer* decision thus contemplates that discovery will sometimes be necessary to vindicate statutory rights.

In the wake of *Gilmer*, a major effort was made to establish due process protocols for certain types of cases. The employment protocol states:

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<sup>54</sup> *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991).

<sup>55</sup> *Gilmer*, 500 U.S. at 29, quoting *Mitsubishi Motors*, *supra* note 37, at 637.

<sup>56</sup> *Cole v. Burns International Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1996).

<sup>57</sup> *Gilmer*, 500 U.S. at 31.

Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to ...arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation. Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available.<sup>58</sup>

The protocol does not expressly authorize non-party discovery, but the reference to “all information” strongly implies it. Another major effort to establish standards for arbitration of statutory employment claims developed a similar standard: “[I]f private arbitration is to serve as a legitimate form of private enforcement of public employment law, these systems must provide . . . a fair and simple method by which the employee can secure the necessary information to present his or her claim.”<sup>59</sup>

It is easy to think of a situation where an employee would need access to non-party discovery to vindicate statutory rights. Imagine a case with these facts: An employee has been fired, and claims that he has been the victim of unlawful age discrimination. There is a mandatory arbitration agreement, broad enough to cover this dispute. The employee has been told that on the day he was fired a high-ranking official (Mr. Jones, we will call him) of the Company made disparaging age-related comments and send a memorandum to the Company president (Mr. Big) with similar comments. The employee's knowledge of the conversation is rank hearsay, and might well not be admitted. The employee has never seen the memorandum. Jones and Big no longer work for the Company, and the memorandum is not in documents the Company produced. Plainly, the employee would like to know before the hearing whether Jones

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<sup>58</sup> Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, par. B.2 (1995).

<sup>59</sup> Department of Labor Commission on the Future of Worker-Management Relations, quoted in *Cole*, *supra* note 55, at 1483 n. 11.

made the remarks, whether Jones wrote and Big received the memorandum, and all the details about the conversation and memorandum.<sup>60</sup>

If the employee's claim were in a federal court, he plainly would be entitled to obtain a subpoena to depose Jones and Big and obtain a copy of the memorandum from them (if one of them has it).<sup>61</sup> But since our hypothetical employee's claim is arbitral and subject to the FAA, under the *Hay/COMSAT* reading of section 7 the employee's only option is to subpoena the witnesses to the hearing on the merits and ask them to bring the document with them. At that point, the employee can do nothing but put the witnesses on the stand, for better or worse.<sup>62</sup>

In my judgment, this is not sufficient to vindicate our hypothetical employee's statutory rights. First, it is essentially a return to the long-discredited "trial by ambush" approach.<sup>63</sup> It is totally inconsistent with trend of discovery under the Federal Rules of Civil Procedure toward more liberal discovery.<sup>64</sup> Second, in employment cases it is likely to systematically disadvantage plaintiffs because they bear the burden of proof. To expect plaintiffs to bear the burden of proof, then to bar them from any pre-hearing discovery from non-parties, no matter how critical the evidence might be to meet that burden, simply cannot be squared with *Gilmer's* directive that arbitration clauses will be upheld only where the procedures permit effective vindication of the statutory rights. Finally, language in *Gilmer* supports the argument that pre-hearing discovery ought to be evaluated on a case-by-case basis, not with the one-size-fits-all bar that *Hay* and *COMSAT* adopt. The *Gilmer* court rejected a series of arguments by Robert Gilmer that attacked

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<sup>60</sup> For another situation in which a plaintiff might seek non-party discovery in an employment case, see *Gresham, supra* note 5, 304 F. Supp. 3d at 795-96 (plaintiff claiming sexual harassment, wrongful discharge and other torts sought to depose non-party who plaintiff believed had suffered similar treatment from the defendant in the arbitration case).

<sup>61</sup> Fed. R. Civ. P. 45.

<sup>62</sup> Although there might be a way around that, as discussed in the next section.

<sup>63</sup> *NLRB v. Robbins Tire & Rubber Co.*, 98 S.Ct. 2311, 2332 (1978) (noting that trial by ambush is inconsistent with the Federal Rules of Civil Procedure and "may well disserve the cause of truth").

the arbitration procedures he was entitled to, finding that “claimed procedural inadequacies . . . [are] best left for resolution in specific cases.”<sup>65</sup>

**E. The Result of *Hay* and *COMSAT* Might be Subject to Evasion, but to do so Produces an Absurd Result**

The ill-founded nature of the *Hay* and *COMSAT* decisions can be further shown by demonstrating that they can be evaded, but only at significant and unwarranted expense. Go back for a moment to our hypothetical employee who wants to depose Mr. Jones and Mr. Big and obtain a copy of the critical memorandum. Assume he is in the geographical boundaries of the Third or Fourth Circuit, so *Hay* or *COMSAT* applies. Is there anything he can do?

Perhaps yes. He can ask the arbitrator to convene something called “a hearing” for the sole purpose of reviewing documents and deposing Jones and Big. There is nothing in the FAA that would prohibit an arbitrator from convening “a hearing” for that limited purpose. The plain text of section 7, on which *Hay* and *COMSAT* place so much reliance, permits a summons to “any person to attend before them [the arbitrators]. . . as a witness.” A deponent is a “witness.”<sup>66</sup> Thus, under *Hay* and *COMSAT* and their plain text reading of section 7, an arbitrator could issue a summons to a non-party to appear before him, but for the sole purpose of a deposition. Equally, an arbitrator could order that witness to “bring with him”<sup>67</sup> documents. But because *Hay* and *COMSAT* rely so literally on the statutory phrase “before them,” the arbitrator would have to be present while the deposition and document review occur. Presumably most arbitrators would be happy to receive their hourly rate to observe a deposition or watch attorneys review documents.

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<sup>64</sup> See, e.g., the 1993 amendments to Fed. R. Civ. P. 16, providing for mandatory initial disclosures.

<sup>65</sup> *Gilmer*, 500 U.S. at 33.

<sup>66</sup> See Fed R. Civ. P. 30 (using terms “deponent” and “witness” interchangeably); BLACK’S LAW DICTIONARY (7<sup>TH</sup> ED. 1999) 450 (defining “depose” as “To examine (a witness) in a deposition”).

<sup>67</sup> FAA, 9 U.S.C. sec. 7.

Does this result make any sense? Of course not. Arbitration is supposed to resolve disputes “in a timely and cost efficient manner,” as the *Hay* court acknowledged.<sup>68</sup> It is supposed to be more flexible than litigation. *Hay* and *COMSAT* invite and promote a subterfuge that is not only inconsistent with the reasons for arbitration, but is downright absurd.<sup>69</sup>

Amazingly, the concurring opinion of Judge Chertoff in *Hay* actually endorses this procedure: “arbitrators have the power to compel a third-party witness to appear with the documents before a single arbitrator, who can then adjourn the proceedings.”<sup>70</sup> He blithely dismisses the cost issue to the parties: “To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents.”<sup>71</sup> Of course, it is not the *arbitrators* who will be inconvenienced; as noted above they will hardly be “inconvenienced” by accepting their hourly rate to watch depositions or document productions. The truly inconvenienced persons are the *parties*, who will have to pay the arbitrators for wholly unnecessary activity.

#### **F. The Policy Rationales in *Hay* and *COMSAT* Do Not Warrant their Restrictive Reading of Section 7**

*Hay* and *COMSAT* advance two rationales for their restrictive reading of section 7: (1) non-parties have not consented to arbitration, so they should not have to provide discovery; and (2) arbitration procedure will be more efficient with less discovery. Both rationales warrant careful and judicious use by arbitrators of the power to issue discovery subpoenas to non-parties; neither justifies the absolute bar that *Hay* and *COMSAT* impose.

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<sup>68</sup> *Hay*, 360 F.3d at 409, quoting *Painewebber Inc. v. Hofmann*, 984 F.2d 1372, 1380 (3d Cir. 1993).

<sup>69</sup> *Hay*, 360 F.3d at 409 (noting that the court is to examine its analysis for absurd results).

<sup>70</sup> *Hay*, 360 F.3d. at 413. Judge Chertoff’s concurrence is not clear if the arbitrator must be present for the entire document review. The literal reading of “before them” in the opinion of the court and the unwillingness of its author to join in Judge Chertoff’s concurrence dictate the conclusion that the arbitrator must be present for the full document review.

<sup>71</sup> *Id.*, at 414.

## 1. Non-Consent

Both *Hay* and *COMSAT* note that non-parties have not consented to arbitration, so they should not have to produce documents or appear for depositions. As the *Hay* court said, “the authority of arbitrators with respect to non-parties who have never agreed to be involved in arbitration is severely limited.”<sup>72</sup> There is some merit to this argument, and there is no reason to permit broad, free-ranging discovery of non-parties in every case. But the proper reading of section 7 adopted by the Eighth Circuit and most district courts does not *mandate* non-party discovery, nor does it cede control of it to the parties. At most, it *permits* the arbitrator to summon non-parties, and it leaves with the arbitrator the discretion to deny such discovery or limit it. This is a sufficient safeguard on the legitimate interest of non-parties whom want to avoid being dragged into discovery in arbitration cases.

## 2. Efficiency

*Hay* argues that “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.”<sup>73</sup> The reason, according to the Court, is that “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.”<sup>74</sup>

There is plenty of reason, in both litigation and arbitration, to be wary of parties abusing requests for production of documents for fishing expeditions. But under the broader reading of section 7 advanced in this paper, there is a substantial check on abuse in that the arbitrator has

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<sup>72</sup> *Hay*, 360 F.3d at 405; *see also COMSAT*, 190 F.3d at 275.

<sup>73</sup> *Hay*, 360 F.3d at 409.

<sup>74</sup> *Id.*; *see also COMSAT*, 190 F.3d at 269 (parties to arbitration forego procedural rights in return for efficiency).

discretion to permit or deny the discovery. Under the equivalent civil rule adopted in 1991, there is no such check in litigation.

Moreover, the efficiency argument cuts both ways. *COMSAT* concedes that in some cases pre-hearing non-party discovery is efficient: “COMSAT argues quite persuasively that in a complex case such as this one, the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing.”<sup>75</sup> The court’s admission that in some cases efficiency would be promoted by pre-hearing non-party discovery shows that its total bar on such discovery is unworkable. In some cases, efficient practice might well dictate little or no non-party discovery; in others such as *COMSAT* and *Meadows* just the opposite will be the case. The arbitrator is best positioned to make that decision on a case-by-case basis.

### **3. *Hay* and *COMSAT* are Internally Inconsistent Because of the Need for Exceptions**

The *COMSAT* court’s answer to its admission that in some cases efficiency would be served by pre-hearing discovery was to graft onto section 7 a “special needs” exception; an exception that has no textual basis in section 7.<sup>76</sup> There is simply no way to square *COMSAT*’s initial facial fidelity to plain text (concluding that section 7 “by its own terms”<sup>77</sup> bars an arbitrator from ever issuing a document subpoena to a non-party), with its creation of an exception that has no textual basis at all. Clearly, the *COMSAT* court knew that its total bar on pre-hearing non-party discovery would prove unworkable in some cases, so it created a safety-valve special needs exception. It would have been far better for the Fourth Circuit to abandon its

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<sup>75</sup> *COMSAT*, 190 F.3d at 276; see also *Meadows Indemnity*, *supra* note 5, 157 F.R.D. at 45 (arbitration panel’s issuance of broad document subpoena promoted efficiency).

<sup>76</sup> *COMSAT*, 190 F. 3d at 276.

<sup>77</sup> *Id.*

strained plain text analysis, rule that the text of section 7 is ambiguous as to non-party discovery, and engage in a complete analysis of the purpose of the FAA and the policies behind arbitration.

Equally, Judge Chertoff's concurrence in *Hay* shows that he does not truly believe in the strict bar on discovery.<sup>78</sup> His advocacy of an expensive and unnecessary evasion of the majority opinion is more evidence of the fundamentally flawed nature of the strict bar on non-party discovery.

### **III. Conclusion**

The decisions of the Third and Fourth Circuits in *Hay* and *COMSAT* find in section 7 of the FAA an unambiguous bar on non-party discovery. The opinions err on several grounds. First, the textual analysis is flawed in finding section 7 unambiguous when the text is, in reality, not clear. Second, the opinions fail to give proper account to the overall purpose of the FAA. Third, the decisions ignore important policy considerations for arbitrator discretion to issue non-party discovery subpoenas in appropriate cases. Finally, the policy considerations given in the opinions simply do not warrant the conclusion reached. The better approach is to permit such discovery on a case-by-case basis at the discretion of the arbitrator, as the Eighth Circuit and most district courts have done.

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<sup>78</sup> See Section II.E, *infra*.