

Subpoenas and Summonses in Arbitration

By David Allgeyer

Congress enacted the Federal Arbitration Act (the “Act” or “FAA”) in 1925 to overcome the antipathy some judges had for private arbitration. The Act provides that an agreement to arbitrate is as enforceable as any other contract. 9 U.S.C. § 2. Any state law saying otherwise is preempted by federal law. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

One key aspect of the Act was to provide subpoena powers to arbitrators, analogous to powers bestowed on judges. Subpoenas are, after all, often necessary to allow a decision maker access to the facts needed to make informed decisions. Sometimes only non-parties have those facts.

But this is a somewhat curious state of affairs. Arbitration agreements are private contracts. And yet, federal law provides arbitrators – who are private decision-makers appointed by the parties by contract – the power to involve parties who are strangers to that contract to provide information to be used in the dispute. Still, if arbitration is to be recognized as a form of dispute resolution, subpoena powers may be required to make arbitration effective.

Even more curious is this: Although it has been more than one hundred years since the FAA was enacted, courts still don’t agree on the exact scope an arbitrator’s subpoena power. It varies by circuit and even by court.

The goal of this article is to report on some of the differences between courts’ decisions on arbitral subpoenas and suggest a practical approach to deal with them.

First things first

But before we get into all that, let’s straighten out our vocabulary. The statute that gives arbitrators the power to require non-parties to provide information allows an arbitrator to issue a “summons” to require people to provide information. While it is “served in the same manner as subpoenas to appear and testify in court,” it is, therefore, more properly called a “summons” and not a “subpoena.” So, let’s call it a summons from now on.

A practical approach to the arbitral summons

Trust me when I say all of this can get legally complicated. After all, the power to summons is limited, and parties need to eventually turn to courts to enforce arbitral summonses. Arbitrators don’t have contempt powers, federal marshals, or jails. Courts

do. So, already we begin to see the likelihood of legal complications and possible judicial intervention to enforce an arbitral summons. But court is what parties to the arbitration agreements generally hope to avoid. Court can be slow and expensive. Arbitration is supposed to be faster and cheaper.

This all leads to my thinking of a structured approach to arbitral summonses. Before seeking or issuing an arbitration summons, I think we should ask these four questions:

1. Is the information requested necessary to allow a fair and informed decision?
2. Does the arbitrator (or panel) have the power to issue the summons?
3. Is the non-party likely to comply?
4. What can we do to make compliance more likely?

Let's take them in order, starting with discovery.

Allowing a fair and informed decision

Parties generally agree to arbitrate to maximize efficiency and lower costs. The most expensive part of litigation often is discovery. Document demands, depositions, interrogatories, and requests for admission are routinely used to develop the facts, but they are expensive. Arbitrations tend to curtail this process. Documents are usually exchanged at some point, but depositions are usually limited, and other discovery methods are rarely used.

Still, some form of "information exchange," which is arbitration-speak for discovery, is necessary in most cases. Arbitration rules often require arbitrators to "manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute." *See* AAA Commercial Arbitration Rule 23(a). And arbitrators are also charged with promoting "equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses." *Id.*

That fair opportunity to present claims and defenses may require obtaining information from non-parties. But not all information a party would like to have is always necessary to fairly decide the case. And there well may be more efficient ways to get the information. Sometimes the party has the information already, the opposing party has it, or there is a cheaper and easier way to get it than demanding it from a non-party. If so, there is no need to burden non-parties with looking for and producing it.

I always require parties asking for an arbitral summons (though they usually call them "subpoenas") to first show their proposed summons to their opposing party. Occasionally, that results in an approach that can either obviate the need for the summons or reduce the scope of the summons.

But the parties' input may not be enough. Arbitrators use arbitral summonses to require non-parties to take part in the dispute by providing information. That is bound to be somewhat disruptive and expensive. And, ultimately, a court may be involved in the process. This suggests that a competent arbitrator will independently consider the need for the information and minimize the disruption to the non-parties. Maybe the facts aren't actually contested, and the parties can agree to them. Maybe the information is publicly available. There are a number of reasons it may not be necessary to trouble a non-party to get information.

So, careful analysis may obviate the need to go any further with a requested arbitral summons. But let's assume that the needs of the case and the circumstances justify issuance of an arbitral summons. That brings us to our second question: Does the arbitrator (or panel) have the power to issue the summons?

Arbitral authority

Discovery

Let's start with discovery. Arbitrators have authority to require the parties to produce documents and even witnesses for depositions, although that authority should not be taken lightly either.

Discovery from non-parties may be different story, depending on what court will be called on to enforce an arbitral summons.

The source of arbitrator authority to issue summonses to non-parties is found in the FAA, 9 U.S.C. § 7: "[A]rbitrators . . . 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." Courts enforce arbitral summonses. Section 7 says that "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."

So, what does all this mean for discovery?

No discovery allowed (sort of)

Many courts have relied on the statutory language and found arbitrators have no authority to issue summonses to non-parties to provide discovery. The FAA says a witness may be summoned to "attend before [the arbitrators] or any of them as a witness" and to bring documents. A deposition, some courts reason, is not "before" the arbitrator or panel, so arbitrators don't have the authority to require a deposition or document production. The Second, Third, Fourth, Ninth and Eleventh Circuits have so held. *Life Receivables Tr. v. Syndicate 102 at Lloyds of London*, 549 F.3d 210, 216 (2d Cir. 2008); *Hay Group, Inc. v.*

E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275-76 (4th Cir. 1999); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 708 (9th Cir. 2017); *Managed Care Advisory Group, LLC v. Cigna Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019).

Maybe in the right case

There is a nuance here we shouldn't overlook. The Fourth Circuit held in one case that the FAA does not authorize arbitrators to subpoena third parties during prehearing discovery *unless* there is a showing of special need or hardship. *Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999). But in that case, there was no such showing, so it allowed no discovery. Still, it may be that 27 years later that decision will help in the right case.

By implication, probably not

The Seventh Circuit has implied arbitral discovery summonses are beyond arbitrators' powers. In *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020), the court was dealing with discovery in an international case, governed by a different section of the FAA. But in analyzing the matter, it noted that, "[t]he FAA permits the arbitration panel—but not the parties—to summon witnesses before the panel to testify and produce documents . . ." So, that looks like a "no" on arbitral discovery summonses, although that wasn't exactly the issue before the court

Hang on, though. In a minute, we'll discuss a common workaround to the above cases.

Yes. Document discovery allowed

The Eighth Circuit has decided the power to order the production of relevant documents for review by a party prior to the hearing is implicit in an arbitrator's or panel's power to subpoena relevant documents. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000). But the Minnesota District Court later decided that power does not extend to depositions, which are more onerous. *Shlumberger Sema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647 (D. Minn. 2004).

Maybe depositions, too

Later, though, a Minnesota Magistrate Judge found that depositions by Zoom were not onerous. So, she allowed an arbitration discovery deposition. *Int'l Seaway Trading Corp. v. Target Corp.*, Case No. 0:20-mc-00086-NEB-KMM (D. Minn. Feb. 22, 2021).

So, does that mean you should assume in a jurisdiction where Eighth Circuit law applies, that arbitrators have authority for discovery?

Probably not. We'll explain why later.

The common work-around

Relying on *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577 (2d Cir. 2002), there is a well-established workaround to the law that arbitrators have no power to issue discovery summonses. The workaround is to convene a hearing to take the witness' testimony. This ticks all of the statutory boxes. The witness is called before the arbitrator or panel, and they can require the witness to bring relevant documents.

But what if the witness is outside the hearing location? Recall the summons is to be enforced like a subpoena. That brings Rule 45 of the Federal Rules of Civil Procedure into play. Non-party witnesses can be required to attend a hearing or produce documents only within 100 miles of where the person resides, is employed, or regularly transacts business in person. So, the arbitrator or panel may need to move a part of hearing to the witness's location.

Arbitrators routinely use this approach. It is even recognized by arbitral rules. For example, if a witness refuses to attend the hearing either in person or electronically, "either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so." *See* AAA Commercial Rule 36(b). JAMS Comprehensive Arbitration Rule 19(c) provides that arbitrators, "in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location."

Video hearings

Can videoconferencing solve all this? Maybe. Note the AAA rule mentions the possibility of an electronic appearance. That could be by Zoom, Teams, or some similar video platform. So, the witness could stay put and arbitrators could too, using video conferencing. But will that always work?

It worked in the Minnesota case of *Int'l Seaway Trading Corp.* as noted above. But it didn't work in a New York case, *Broumand v Joseph*, No. 20-cv-9137 (S.D.N.Y., Feb. 27, 2021). There the district court refused to enforce a subpoena which sought to compel a witness to testify remotely at an arbitration hearing being held by videoconference. Even though the hearing at issue was taking place via videoconference, the venue for the arbitration was in New York City which was more than 100 miles from where the witness was located. It didn't matter that the witness did not have to travel over 100 miles. "The site of the arbitration," said the court, "does not change simply because certain participants remotely access the proceedings from elsewhere."

How about a state statute?

One more thing to consider is whether a state arbitration statute allows discovery in an arbitration where the parties have not selected the FAA as the governing arbitration law. Many states have enacted a version of the Uniform Arbitration Act (UAA). Curiously, they aren't really uniform at all. My home state of Minnesota's version of the UAA allows arbitrators the same power to order discovery as courts have. And their subpoenas are enforced the same way a court subpoena would be. Minn. Stat. § 572B.17.

Illinois, for another example, is a little different. "Arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing." 710 ILCS 5/7. Other states have other spins on this. If you are considering a state statute as a source for authority to order non-party discovery, you will need to study the statute to determine the extent of the arbitrator's authority.

The thing is, because most commercial arbitrations involve interstate commerce, the FAA governs them unless the parties agree otherwise. But in the right case, if a state arbitration statute applies, it may be handy for pre-hearing discovery of non-parties, depending on what discovery the statute allows.

Making compliance more likely

This all brings us to the third question: Is the summonsed party likely to comply? This is important because, the more likely it is that a party will obey a summons, the more likely it is that you can avoid the expense and delay of getting a court to enforce it. Given the questions that we have seen about discovery summonses to non-parties, it seems wise to start with using the most common way to go about this: having a separate part of the hearing to take evidence from non-parties.

This has benefits. It is what folks are used to, and therefore more likely to succeed. If counsel for the non-party understands that the summons will be enforced, they are likely to comply rather than wait for a court to enforce it. And in that case, the party that wants the information will likely be able to negotiate something more efficient than a partial hearing before the arbitrator or panel. The witness may agree to sit for a deposition, perhaps by Zoom to make it easier. If all the party really wants is documents, the non-party may just provide them.

The key, though, is to use a summons format that the non-party's counsel is apt to understand will be enforced in the end. They are then more likely to forego the expense and effort of fighting it in court and negotiate a way to provide the information in a more efficient way.

Now let's turn to the last question: what can we do to make compliance more likely?

Form matters

We already saw that sticking with the more standard means of obtaining pre-hearing discovery is more likely to encourage compliance. Here is another way: focusing on the form of the summons.

Very often, summonses I am asked to issue are state subpoena forms. That doesn't really fit. They essentially provide a greeting from the people of the State and invite the subpoenaed person to put aside all business and come give testimony and/or provide documents. Most arbitrations I do are governed by the FAA, so — as I keep harping on — the “subpoenas” are actually summonses, and the state may or may not have much to do with them. True, if there isn't federal jurisdiction, a state court may enforce a summons under the FAA. But it still makes more sense to me to refer to the actual source of power, FAA § 7. And it makes sense to lay out in the document that statute and any rules that apply so summonsed non-parties can verify for themselves what the rules are. That makes them more likely to comply.

I didn't originate this idea. The New York City Bar did an excellent job on this, providing an annotated form that can be used as a starting point. *See* Report of the New York City Bar Association, A MODEL FEDERAL ARBITRATION SUMMONS TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING (2024).

You will want to have a look at that before dealing with your next arbitral summons. There is a wealth of information there.

Hearing

So far, we have focused on discovery summonses. Let's have a quick look at hearing summonses.

There is no doubt that arbitrators have authority to issue these under FAA §7. The real question is where they can order witnesses to appear. Since enforcement authority comes under Fed. R. Civ. P. 45, this means the witness can't be required to travel more than 100 miles in most cases.

So, once again, arbitrators may need to move the hearing to the witness to get the testimony or information.

The most efficient way to do that is likely to proceed by Zoom or other online conferencing apps. Still, check the law in your jurisdiction. As we already noted, at least one court said that a video conference doesn't meet the “before the arbitrator”

requirement of FAA § 7. *Broumand v. Joseph*, No. 20-cv-9137 (S.D.N.Y., Feb. 27, 2021).

But that case may be an outlier. Courts have become increasingly receptive to video conferencing in recent years. So, many issues with non-party witnesses can be efficiently handled using online conferencing and electronic provision of documents. The witness can remain in his or her office and the arbitrators can remain in their hearing room.

And, of course, it still makes sense for hearing summonses to be in the right form, as discussed above.

In summary

Arbitral summonses can get complicated unless you plan ahead and understand the law and rules that apply. But if you do, you should be able to get the information needed for a fair hearing without the delay and expense of judicial intervention.

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