

BRIDGING THE GAP: AMENDING THE FEDERAL ARBITRATION ACT TO ALLOW DISCOVERY OF NONPARTIES

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I. INTRODUCTION

Congress enacted the Federal Arbitration Act¹ (FAA) in 1925 to ensure the validity of arbitration agreements,² which had frequently gone unenforced by American courts.³ In enacting such broad legislation mandating the enforcement of arbitration agreements, “Congress declared a national policy favoring arbitration.”⁴ Despite Congress’ intent to promote uniformity in enforcing arbitration agreements, the FAA has failed to achieve this goal within the realm of arbitral discovery. Instead, courts have adopted widely divergent views of arbitral-discovery limitations.⁵ The underlying reasons for a lack of uniformity in the way courts have treated arbitral discovery may be that the arbitration process guarantees no right to discovery at all,⁶ and the FAA does not mandate a discovery process.⁷ Ideally, the parties will stipu-

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1. The Federal Arbitration Act is codified as 9 U.S.C. §§ 1–16 (2006).

2. H.R. Rpt. No. 68-96 at 1 (Jan. 24, 1924) (“The purpose of this bill is to make valid and [enforceable] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts.”).

3. *See id.* at 1–2 (discussing how American courts adopted the English common-law practice of refusing to honor arbitration agreements out of jealousy because courts wanted to retain power within their own jurisdiction).

4. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

5. Domke has noted that arbitral discovery “has not received uniform or even consistent acceptance in statutory or judge-made law.” Martin Domke, Gabriel Wilner & Larry E. Edmonson, *Domke on Commercial Arbitration* vol. 1, § 32:1, 32-1 (3d ed., Thomson West 2008).

6. John W. Cooley & Steven Lubet, *Arbitration Advocacy* § 3.6, 91 (2d ed., NITA 1997).

7. The FAA gives arbitrators the power to compel witness attendance, but it does not grant the parties any affirmative right to discovery. 9 U.S.C. § 7.

late in their contract whether and to what degree to allow arbitral discovery, and the courts will always enforce such agreements.⁸ When the parties fail to provide for discovery matters in their arbitration agreement, however, arbitrators generally decide how much discovery to allow in each case.⁹

The greater problem—and the one that has received inconsistent treatment in the federal courts—is defining the scope of discovery of individuals or entities that are not parties to the agreement. Because nonparties are not subject to the underlying arbitration agreement, they are not contractually bound to comply with arbitral discovery. Thus, any power an arbitrator holds to order nonparty discovery must derive from the FAA or another statute.¹⁰ This problem comprises two related yet distinct issues, both stemming from the vague language found in Section 7 of the FAA regarding discovery.¹¹

The first issue arises from a fundamental disagreement among the federal courts as to whether the FAA authorizes nonparty subpoenas outside of an actual arbitration hearing.¹² Some

8. Joseph L. Forstadt, *Discovery in Arbitration*, in Am. Arb. Ass'n, *ADR & the Law* 53–54 (Ted E. Pons et al. eds., 20th ed., Juris Publ'g, Inc. 2006). Assuming an arms-length transaction, courts will honor the parties' agreements regarding arbitral discovery with the exception of "fraud, duress, coercion[,] or the like." *Id.* at 54.

9. *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242–1243 (S.D. Fla. 1988).

10. *See Hay Group, Inc. v. E.B.S. Acq. Corp.*, 360 F.3d 404, 406 (3d Cir. 2004) (stating that "[a]n arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the [FAA]").

11. In relevant part, the FAA provides that

[A] majority of [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 Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, . . . and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons

9 U.S.C. § 7. Courts may punish a witness for contempt of court if he or she fails to comply with such a court order. *Id.*

12. Courts are in near-universal agreement that the FAA authorizes the subpoena of nonparty witnesses at a preliminary hearing. *Infra* n. 46; see R. Doak Bishop et al., *Discovery*, in *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* 129 (Curtis E. von Kann et al. eds., JurisNet, LLC 2006) (discussing an arbitrator's "undoubted authority to subpoena the witness to appear at an arbitration hearing").

circuit courts have ruled that the FAA's plain language only authorizes arbitrators to subpoena a witness to appear before them in person, and the witness may provide any documents or testimony only at that time.¹³ Under this view, the FAA does not authorize any prehearing nonparty discovery whatsoever. On the other hand, some circuit courts have read Section 7 of the FAA to contain an implied power allowing arbitrators to order prehearing discovery. These courts have reasoned that if arbitrators can summon a witness to bring documents to a hearing, then they also have the less-intrusive power to order document production or deposition testimony outside of a hearing.¹⁴ Other federal circuits have not addressed the question at all, which leaves the extent of an arbitrator's nonparty subpoena power uncertain.

The second discovery problem under Section 7 is how to enforce a properly issued subpoena against a witness residing outside the territorial jurisdiction of the district court where the arbitration is taking place. This problem arises from a gap between the FAA and the Federal Rules of Civil Procedure (Federal Rules). The FAA provides that if a witness does not comply with an arbitral subpoena, then the "United States district court for the district in which such arbitrators, or a majority of them, are sitting" must enforce the subpoena.¹⁵ The Federal Rules, however, only allow a district court to enforce a subpoena "within the district of the issuing court [or] . . . within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection . . ."¹⁶ In the context of ordinary litigation, the Federal Rules further provide that a district court in the witness' jurisdiction may enforce a subpoena directed at a witness residing more than one hundred miles away.¹⁷ The FAA, however, does not provide

13. *E.g. Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 212 (2d Cir. 2008) (holding that the FAA unambiguously limits nonparty-document discovery to the context of a hearing, where the nonparty may be summoned as a witness).

14. *E.g. In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870–871 (8th Cir. 2000) (holding that Section 7 of the FAA grants arbitrators an implicit power to order a nonparty to produce documents in advance of a hearing).

15. 9 U.S.C. § 7.

16. Fed. R. Civ. P. 45(b)(2).

17. *See id.* at 45(a)(3)(B) (providing that an attorney can issue a subpoena for "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").

this procedural mechanism. Instead, the local district court must enforce all arbitral subpoenas.¹⁸

The gap between the FAA and the Federal Rules can (and often does) result in the absurd scenario where an arbitrator has the unquestioned authority to issue a subpoena directed at a non-party witness but has no way of enforcing it.¹⁹ While some courts have flatly refused to enforce subpoenas against a witness residing more than one hundred miles from the arbitration site,²⁰ other courts have used a variety of creative procedural mechanisms in an attempt to bridge this enforcement gap.²¹ Unfortunately, the latter system only creates further jurisdictional inconsistency.

This Article argues that the jurisdictional inconsistencies outlined above should be reconciled through a legislative amendment to the FAA. With regard to the first issue, Congress should amend the FAA to expressly allow for expanded nonparty discovery. Greater discovery will lead to more just results because both the parties and the arbitrators will have access to critical factual information. This will ultimately reduce the time wasted on turning arbitration hearings into “a series of glorified depositions.”²² This Article further argues that expanded discovery will not, as some critics have claimed, override the benefits of arbitration by exponentially increasing the time and expense involved.²³ Not only are such claims greatly exaggerated, but they also ignore the other substantial benefits that the arbitration process offers.²⁴

18. 9 U.S.C. § 7.

19. *E.g. Dynegy Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 95 (2d Cir. 2006) (declining to enforce a valid arbitral subpoena issuing from the Southern District of New York against a nonparty residing in Texas).

20. *E.g. id.*

21. *E.g. Amgen Inc. v. Kidney Ctr. of Del. Co.*, 879 F. Supp. 878, 883 (N.D. Ill. 1995) (invoking Rule 45(a)(3)(B) to allow an attorney licensed to practice in the district where the arbitration is pending to issue and sign a subpoena on behalf of the district court in the witness' jurisdiction, which is where the deposition, hearing, or production of documents must take place); *see infra* pt. III(B)(3) (discussing *Amgen* and other creative approaches to the enforcement problem).

22. Cooley & Lubet, *supra* n. 6, at 91.

23. One of the most common criticisms of allowing more expansive arbitral discovery is that it would defeat the primary advantages that the arbitration process offers over traditional litigation by increasing both the cost and time required to resolve the dispute. *E.g. Wendy Ho, Discovery in Commercial Arbitration Proceedings*, 34 Hous. L. Rev. 199, 205 (1997).

24. *See infra* pt. IV(A)(2) (detailing arbitration's various benefits).

Furthermore, this Article suggests a simple amendment to the FAA that will eliminate the gap between the FAA and the Federal Rules. Merely adding language to Section 7 of the FAA to allow subpoena enforcement in the same manner as that provided by the Federal Rules could close this gap and allow arbitrators to seek enforcement from a district court in the witness' jurisdiction.

Part II of this Article briefly discusses arbitration's historical background and the FAA's enactment. Part III provides an in-depth treatment of the recent caselaw interpreting Section 7 of the FAA to illustrate properly the nature of the dispute and the depth of the problem that it poses. Part IV proposes amendments to the FAA, discusses why alternative proposed solutions are inadequate, and explains how the benefits of expanded discovery will far outweigh any potentially negative consequences.

II. HISTORICAL OVERVIEW

Some have called arbitration "the oldest known method of settlement of disputes between men."²⁵ Arbitration dates back several thousands of years to the time of King Solomon and the kings of ancient Greece.²⁶ In medieval England, arbitration was the preferred dispute-resolution method of various trade guilds and mariners.²⁷ Early American settlers, including the Puritans and the Shakers, used arbitration to settle their disputes outside of the judicial system.²⁸ Later, arbitration found a firm proponent in George Washington, who specified that arbitration was his chosen method for resolving any disputes related to his last will and testament.²⁹

Despite this long history, however, "American courts viewed arbitration with judicial hostility"³⁰ prior to the FAA's enactment. This hostility was a carryover from English courts' tradition of

25. Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* ch. 1.1, 3 (Alan Miles Ruben ed., 6th ed., BNA Books 2003) (quoting *McAmis v. Panhandle E. Pipe Line Co.*, 273 S.W.2d 789, 794 (Mo. App. Kan. City Dist. 1954)).

26. *Id.* at 3–4.

27. Gabriel Herrmann, Student Author, *Discovering Policy under the Federal Arbitration Act*, 88 Cornell L. Rev. 779, 783 (2003).

28. *Id.* at 783–784.

29. Elkouri & Elkouri, *supra* n. 25, at 4.

30. Jon O. Shimabukuro, *The Federal Arbitration Act: Background and Recent Developments* 2 (Cong. Research Serv. Aug. 15, 2003) (available at http://digital.library.unt.edu/ark:/67531/metacrs2223/m1/1/high_res_d/RL30934_2002Jun17.pdf).

refusing to recognize and enforce arbitration agreements.³¹ This tradition of hostility was based in part on the fact that judges had an economic incentive to discourage arbitration because they were paid “based on the number of cases they decided.”³² Additionally, English courts may have resented being ousted from their own jurisdiction by private contracts.³³

Whatever the source of judicial hostility, early American courts were known to be “unfriendly to executory arbitration agreements,”³⁴ and such agreements often went unenforced. Indeed, Congress’ primary purposes in enacting the FAA were to combat the courts’ refusal to enforce arbitration agreements and to unequivocally overturn the common law anti-arbitration attitude.³⁵ Congress enacted the FAA to combat the courts’ illogical and unjust policy³⁶ and to place arbitration agreements “upon the same footing as other contracts, where [they] belong[.]”³⁷ Additionally, the United States Supreme Court has held that in enacting the FAA, Congress intended to promote “a national policy favoring arbitration . . . [that] was applicable in state and federal court.”³⁸ Practical concerns regarding public “agitation

31. *Id.*; H.R. Rpt. No. 68-96 at 1.

32. Shimabukuro, *supra* n. 30, at 2 (citing Preston Douglas Wigner, *The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. Rich. L. Rev. 1499, 1502 (1995)).

33. H.R. Rpt. No. 68-96 at 1–2. Congress cited the entrenchment of this jealousy as an established legal precedent that made it necessary to overturn through legislative enactment, as opposed to judicial ruling. *Id.* at 2.

34. *Kulukundis Ship. Co. v. Amtorg Trading Corp.*, 176 F.2d 978, 984 (2d Cir. 1942).

35. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270–271 (1995); see H.R. Rpt. No. 68-96 at 1 (stating that “[t]he purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce”); see also 9 U.S.C. § 2 (stating that written provisions related to maritime transactions or contained in contracts involving interstate commerce “shall be valid, irrevocable, and enforceable”).

36. H.R. Rpt. No. 68-96 at 2.

37. *Id.* at 1.

38. *Southland Corp.*, 465 U.S. at 10, 12; see also *Allied-Bruce Terminix Co.*, 513 U.S. at 274 (noting that the legislative history of the FAA “indicates an expansive congressional intent”); Thomas E. Carbonneau, *Arbitration in a Nutshell* 1–9 (2d ed., West 2009) (discussing the development of the Court’s arbitration jurisprudence since the enactment of the FAA, which has been highly favorable to arbitration agreements, making them “nothing less than the means for remedying the ineffectiveness of judicial adjudication in American society”). Other courts, however, have argued that Congress did not intend for the FAA to promote arbitration per se, but instead intended for it to ensure that arbitration agreements were enforceable in the same manner as other contracts. See *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 666 (7th Cir. 2009) (stating that “[t]here is no such policy. Arbitration agreements are optional and enforced just like other contracts.”); accord *Ware v. C.D. Peacock, Inc.*, 2010 WL 1856021 at *4 (N.D. Ill. May 7, 2010).

against the costliness and delays of litigation” also motivated Congress.³⁹

At least partially because of the stability brought about by the FAA, arbitration has become increasingly popular over the last century, particularly in the realms of employment and consumer credit.⁴⁰ Arbitration has also become a favored alternative to traditional litigation in resolving international commercial disputes⁴¹ and is now the “primary remedy for the resolution of civil disputes in American society and international commerce.”⁴² Arbitration’s rising popularity in the commercial context is likely also because it offers parties various benefits over traditional litigation.⁴³

III. JUDICIAL INTERPRETATION OF THE FAA

Despite arbitration’s increasing popularity and the FAA’s goal of furthering “a national policy favoring arbitration,”⁴⁴ the statute’s vague language⁴⁵ has given rise to a wide variety of judicial interpretations regarding an arbitrator’s ability to subpoena nonparty witnesses, documents, and records. There are two distinct issues related to nonparty subpoenas that have been subject to judicial interpretation. The first issue is whether an arbitrator has any power to subpoena the production of documents, other records, or witness testimony outside of an arbitration hearing—in other words, the power to order prehearing nonparty discovery.⁴⁶ The second issue prompting judicial interpretation is

39. H.R. Rpt. No. 68-96 at 2.

40. Shimabukuro, *supra* n. 30, at 1.

41. See e.g. C. Ryan Reetz & Pedro J. Martinez-Fraga, *As Arbitration Gains in Popularity, Courts Ponder Challenged Awards*, 49 *Broward Daily Bus. Rev.* 14 (Sept. 9, 2008) (discussing the “rising number of international arbitrations”).

42. Carbonneau, *supra* n. 38, at 1. Carbonneau further noted that “[u]nder United States law, nearly all civil disputes are arbitrable.” *Id.*

43. For a discussion of some of these benefits, see *infra* Part IV(A)(2).

44. *Southland Corp.*, 465 U.S. at 10.

45. 9 U.S.C. § 7; *supra* n. 11.

46. Even courts that have declined to find that arbitrators are authorized to order prehearing nonparty discovery have agreed that such “discovery” is authorized within the context of a proceeding before one or more arbitrators, even if this occurs at a preliminary hearing. See e.g. *Hay Group, Inc.*, 360 F.3d at 413 (Chertoff, J., concurring) (noting that “arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings”). This practice functions as a de facto discovery process that may compel nonparties to provide information, but will

procedural—how to enforce a valid subpoena against a noncompliant witness outside of the territorial jurisdiction of the district court for the district in which the arbitrators are sitting.⁴⁷

A. The Existence of Subpoena Power over Nonparties

The dispute over whether arbitrators have the authority to issue subpoenas for prehearing nonparty discovery stems from a fundamental disagreement over the FAA's language.⁴⁸ Section 7 of the FAA authorizes arbitrators to “summon . . . before them . . . a witness and . . . to bring with him or them any book, record, document, or paper”⁴⁹ This simple language has given rise to a jurisdictional split. Some circuits have focused on the statute's express language,⁵⁰ which does not authorize prehearing nonparty discovery, while other circuits have found an implied power to do just that.⁵¹

1. *The Express-Language Approach*

The first court to apply the express-language approach at the circuit level was the Fourth Circuit Court of Appeals in *COMSAT Corp. v. National Science Foundation*.⁵² In that case, COMSAT (one of the parties to the arbitration) attempted to enforce an arbitral subpoena that sought prehearing document production from a nonparty.⁵³ The Fourth Circuit ruled against COMSAT, holding that federal courts did not have the power to compel a nonparty to comply with an arbitrator's subpoena for prehearing discovery.⁵⁴ The court created an exception to this general rule “upon a showing of special need or hardship.”⁵⁵ This exception has

inconvenience all individuals involved by requiring them to make a personal appearance before an arbitrator.

47. See *supra* Part I for a further discussion of this issue.

48. See *supra* n. 11 and accompanying text (stating that two distinct discovery issues arise from the vague language in Section 7 of the FAA).

49. 9 U.S.C. § 7.

50. *E.g. Hay Group, Inc.*, 360 F.3d at 407, 409.

51. *E.g. In re Sec. Life Ins. Co.*, 228 F.3d at 870–871.

52. 190 F.3d 269, 275 (4th Cir. 1999).

53. *Id.* at 272.

54. *Id.* at 278.

55. *Id.* at 276. The court declined to specify exactly what it meant by “special need,” except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.” *Id.*

not been widely followed, however, and has in fact received criticism for having no basis in the statutory text.⁵⁶

In reaching its holding, the court focused on the FAA's express language, noting that "[n]owhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery."⁵⁷ The court reasoned that to hold otherwise would be "[i]n disregard of the plain language of the statute."⁵⁸ The court further justified its holding by noting that parties to arbitration choose to forego the procedural rights of traditional litigation in favor of a speedier and less-costly dispute resolution.⁵⁹

The Third Circuit Court of Appeals was the next circuit court to address the prehearing nonparty-discovery issue, in *Hay Group, Inc. v. E.B.S. Acquisition Corporation*.⁶⁰ This decision has been widely cited by other courts⁶¹ and commentators⁶² who have addressed the question.⁶³ In addressing the primary issue in the case,⁶⁴ the court held that a nonparty could not be compelled to produce documents outside of a hearing before an arbitrator.⁶⁵ The court noted that looking beyond the statutory text to sources such as legislative intent is not necessary when the text itself is

56. *E.g. Hay Group, Inc.*, 360 F.3d at 410 (stating that "[w]hile we agree with COMSAT's holding, we cannot agree with this dicta because there is simply no textual basis for allowing any 'special need' exception").

57. *COMSAT Corp.*, 190 F.3d at 275.

58. *Id.*

59. *Id.* at 276.

60. 360 F.3d 404.

61. *See e.g. Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009) (citing *Hay Group* in reaching a similar holding).

62. *See e.g. Alan Scott Rau, Evidence and Discovery in American Arbitration: The Problem of "Third Parties"*, 19 *Am. Rev. Intl. Arb.* 1, 8–9 (2008) (criticizing the express-language approach and citing heavily to *Hay Group*).

63. *Hay Group* has become a sort of flagship case on this issue due to its frequent mention in court opinions and in academic literature. This is unsurprising for two reasons: (1) it is a very well-written, logically structured, and textually supported opinion; and (2) current United States Supreme Court Justice Samuel Alito authored the opinion, perhaps lending it additional persuasive authority.

64. The case also addressed whether a properly issued subpoena could be enforced beyond the territorial jurisdiction of the district court in the district where the arbitrators are sitting, but since this topic is also addressed *infra* Part III(B), it is absent from the present discussion. *See Hay Group, Inc.*, 360 F.3d at 411–413 (discussing the enforcement of arbitral subpoenas).

65. *Id.* at 406.

“clear and does not lead to an absurd result.”⁶⁶ Turning to Section 7 of the FAA’s language, the court concluded that the statute was unambiguous on its face and that the FAA only authorizes an arbitrator to order nonparty document production if such production accompanies the nonparty’s physical attendance at a hearing before the arbitrator.⁶⁷ The court flatly rejected the implied-power approach used by other courts⁶⁸ as contrary to the statute’s express language.⁶⁹

After establishing that the FAA’s language unambiguously restricts an arbitrator’s nonparty subpoena power to the confines of a hearing, the court next discussed several reasons why this was not an absurd result. First, it noted that under the original version of the Federal Rules, which were not adopted until twelve years after the FAA’s enactment in 1937, federal courts were not authorized to issue prehearing subpoenas on nonparties.⁷⁰ The court noted that this power did not even exist within the confines of formal litigation until its eventual inclusion in the Federal Rules’ 1991 amendments. As a result, the court argued that there was strong evidence that the contemporary understanding at the time of the FAA’s enactment was that such a power did not exist in the arbitration context. Second, the court noted that a strict reading of the FAA may actually further arbitration goals⁷¹ by discouraging unnecessarily issued subpoenas. Because document production at a hearing would require subpoenaing parties to spend more time, money, and effort, a strict reading of the FAA would force them to strongly consider their need for the requested materials.⁷² Lastly, the court stated that even if prehearing document production did further the goal of efficiency in arbitration,

66. *Id.* (quoting *United States ex rel. Mistick PBT v. Hous. Auth. of City of Pitt.*, 186 F.3d 376, 395 (3d Cir. 1999)).

67. *Id.* at 407.

68. See e.g. *In re Sec. Life Ins. Co.*, 228 F.3d at 870–871 (holding that the power to order prehearing document production by nonparties was implicit in the power to order document production at a hearing). For a full discussion of the implied-power approach, see *infra* Part III(A)(2).

69. *Hay Group, Inc.*, 360 F.3d at 408–409. Interestingly, in light of this Article’s viewpoint, the court stated that “if it is desirable for arbitrators to possess [the power to subpoena nonparties for prehearing discovery], the way to give it to them is by amending Section 7 of the FAA.” *Id.* at 409.

70. *Id.* at 407.

71. Predictably, the court cited efficiency and lower cost as arbitration’s main goals. *Id.* at 409. See *infra* Part IV(A)(2) for a further discussion of arbitration’s benefits.

72. *Hay Group, Inc.*, 360 F.3d at 409.

efficiency concerns were ultimately irrelevant to the analysis because the FAA's principal goal was not to promote efficiency, but to "give effect to private agreements."⁷³

The Second Circuit Court of Appeals recently addressed this issue in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,⁷⁴ where the court reached a holding similar to that of the Third and Fourth Circuits.⁷⁵ The *Life Receivables* holding is unique because the nonparty against whom the arbitral-subpoena enforcement was sought was the opposing party's affiliate and was intimately connected to the arbitration circumstances.⁷⁶ Despite this relationship to the proceedings, the court followed the Third Circuit⁷⁷ in holding that as a nonparty, Section 7's express language did not permit subpoena enforcement against the nonparty for prehearing document production.⁷⁸ Indeed, the court did little to alter the *Hay Group* opinion except extend it to apply equally to all nonparties regardless of any affiliation they may have with a party to the arbitration.⁷⁹

These three circuit court decisions all reason that any authority over nonparties that the FAA did not expressly confer upon arbitrators does not exist.⁸⁰ This approach finds ample justification within the basic rules of statutory construction, and several district courts located in circuits that have not ruled on this issue have also followed suit.⁸¹

73. *Id.* at 410.

74. 549 F.3d 210 (2d Cir. 2008).

75. *Id.* at 218.

76. *Id.* at 212–213. The subpoenaed party in this case, Peachtree Life Settlements, was actually a party to the underlying contract and arbitration clause, but was not named as a party to the arbitration proceedings and refused joinder when later requested. Thus, Peachtree was a nonparty for purposes of Section 7. *Id.* at 213.

77. The court in the *Life Receivables* opinion quoted heavily from *Hay Group*. *Id.* at 215–216.

78. *Id.* at 216–217.

79. *Id.* at 217. The Second Circuit echoed many of the same arguments that the Third Circuit made in *Hay Group*, notably that the statute is "straightforward and unambiguous," that such a construction made sense in the FAA's historical context, and that Congress could expand arbitral subpoena authority if it desired. *Id.* at 216. The court also cited Justice Chertoff's concurrence in *Hay Group* to show that arbitrators had other methods for gathering evidence. *Id.* at 218.

80. *E.g. Hay Group, Inc.*, 360 F.3d at 406. Of course, the contract binds the parties to whatever discovery terms it contains or in the absence of such terms, to the discovery rulings the arbitrator makes. *See Forstadt, supra* n. 8, at 53–54 (explaining that courts will honor parties' arbitral-discovery agreements if they were made in good faith).

81. *E.g. Kennedy*, 646 F. Supp. 2d at 1344–1346 (holding that Section 7's language does not grant an arbitrator authority over prehearing nonparty discovery).

2. The Implied-Power Approach

The implied-power approach, which the Sixth and Eighth Circuits have adopted, stands in opposition to the express-language approach.⁸² This approach states that although the FAA does not expressly authorize prehearing nonparty discovery, it contains an implied power to do so.⁸³

The Sixth Circuit Court of Appeals was the first circuit court to adopt the implied-power approach in *American Federation of Television and Radio Artists v. WJBK-TV*.⁸⁴ In analyzing Section 7's language, the court held that the "provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing . . . implicitly include[s] the authority to compel the production of documents for inspection by a party prior to the hearing."⁸⁵ The court offered no justification for this conclusion, but the court's reasoning is inferable through the cases cited in its holding. In the first cited case, *Meadows Indemnity Co. v. Nutmeg Insurance Co.*,⁸⁶ the court employed a "greater-includes-the-lessor" argument, holding that document production outside of a hearing was inherently less burdensome to the nonparty than being forced to produce the same documents in person before the arbitrator. Therefore, the court concluded that this lesser power must necessarily be included in the FAA.⁸⁷ In the second cited case, *Stanton v. Paine Webber Jackson & Curtis, Inc.*,⁸⁸ the court emphasized a general premise of the FAA, which is that federal courts should not become overly involved in arbitration disputes, and held that "the arbitrators may order and conduct such discovery as they find

82. The remaining circuits, the First, Fifth, Seventh, Ninth, Tenth, and Eleventh, have not ruled on this question at all. See *infra* Part III(A)(3) for a brief discussion of the existing district court rulings within those circuits.

83. *E.g. Am. Fed. of TV & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999) (stating that Section 7 of the FAA contains an implied power allowing an arbitrator to subpoena nonparties).

84. *See id.* at 1010 n. 1 (Clay, J., dissenting) (explaining that this court was the first federal court to enforce an arbitral subpoena against a nonparty).

85. *Id.* at 1009 (citing *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton*, 685 F. Supp. 1241).

86. 157 F.R.D. 42 (1994).

87. *Id.* at 44–45.

88. 685 F. Supp. 1241 (S.D. Fla. 1988).

necessary.”⁸⁹ The Sixth Circuit did not provide any additional justification for its decision beyond the cases it cited, which leads to the conclusion that the court intended to adopt the reasoning of these lower courts by reference.⁹⁰

The Sixth Circuit tempered its ruling somewhat by emphasizing that the decision should not be interpreted to grant parties a right to demand prehearing nonparty discovery, but only that arbitrators had the authority to issue such a subpoena if they chose to do so.⁹¹ Further, the court explicitly limited its holding to apply to subpoenas for prehearing document and record production, but not to subpoenas for prehearing deposition testimony.⁹² The court did express confidence, however, in arbitrators’ professionalism and competence to determine what evidence was relevant to the proceeding and to issue subpoenas accordingly.⁹³

The Eighth Circuit Court of Appeals adopted the implied-power approach in *In re Security Life Insurance Company of America*.⁹⁴ This case was similar to *Life Receivables*, in that the plaintiff insurer sought enforcement of an arbitral subpoena against a reinsurer that was technically not a party to the proceedings, but was a party to the underlying reinsurance contract and was intimately involved in the dispute.⁹⁵ In *In re Security Life Insurance Company of America*, however, the Eighth Circuit reached the opposite conclusion, holding that “implicit in an arbitration panel’s power to subpoena relevant documents for pro-

89. *Id.* at 1242.

90. *See id.* at 1243 (reaching its holding allowing the arbitrators to conduct nonparty discovery without further justifying its decision).

91. *Am. Fed. of TV & Radio*, 164 F.3d at 1009.

92. *Id.* at 1009 n. 7 (citing *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995)). Although the Sixth Circuit stated that it would not rule on the issue of prehearing deposition testimony, the fact that it chose to cite *Integrity Ins. Co.* may be a clue that it was inclined to rule against an implied power to compel prehearing depositions, as that case held that “an arbitrator may *not* compel attendance of a non-party at a pre-hearing deposition, although the arbitrator may compel pre-hearing document production.” *Id.* (emphasis in original).

93. *Id.* at 1010 (citing *Local Lodge 1746, Int’l Ass’n of Mechanics v. Pratt & Whitney*, 329 F. Supp. 283, 287 (D. Conn. 1971)).

94. 228 F.3d 865 (8th Cir. 2000).

95. *Id.* at 868. Whether the reinsurer was actually a party to the dispute was a contested matter that the court determined was unnecessary to decide the case. The court emphasized, however, that the reinsurer was “not a mere bystander pulled into [the] matter arbitrarily, but [was] a party to the contract that [was] the root of the dispute, and [was] therefore integrally related to the underlying arbitration, if not an actual party,” so the court may have considered this relationship despite denying its relevance. *Id.* at 871.

duction at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.”⁹⁶ The court reasoned that efficiency was one of arbitration’s primary goals and that a limited discovery process allowing parties to review relevant documentary evidence in advance of an arbitration hearing would further efficiency.⁹⁷ The arbitrator had issued a subpoena for deposition testimony as well as document production, but the court addressed only the latter issue because the reinsurer had already complied with the deposition subpoena, thus rendering the deposition question moot.⁹⁸

3. *Summing Up the Dispute*

Given the wide variety of judicial opinions on whether to allow arbitral subpoenas for prehearing nonparty discovery, drawing any firm conclusions regarding the overall scope of the power on a national scale is difficult, if not impossible. Three circuits firmly oppose the power, relying on the FAA’s express language.⁹⁹ Two other circuits find an implied power using a “greater-includes-the-lesser” reading of the statute—though even here the power’s precise scope is unclear.¹⁰⁰ Three other circuits have widely divergent rulings from multiple districts,¹⁰¹ some-

96. *Id.* at 870–871.

97. *Id.* at 870.

98. *Id.* Although the reinsurer had already complied with the deposition subpoena after being held in contempt by a California district court, it had appealed that decision to the Ninth Circuit Court of Appeals, and the Eighth Circuit seemed hesitant to get involved in an issue of the pending appeal. *Id.* at 870, 872 (“[We are] [m]indful of the limits of our jurisdiction in this case.”).

99. *E.g. Hay Group, Inc.*, 360 F.3d at 407; *Life Receivables Trust*, 549 F.3d at 216; *COMSAT Corp.*, 190 F.3d at 275.

100. *Compare Am. Fed. of TV & Radio*, 164 F.3d at 1009 n. 7 (finding an implied power to order prehearing document production from a nonparty, yet declining to address whether a prehearing deposition could be properly ordered from a nonparty) *with In re Sec. Life Ins. Co.*, 228 F.3d at 872 (declining to address whether a prehearing deposition could be properly ordered from a nonparty, as the question had been rendered moot by the nonparty’s compliance, but suggesting in dicta that a deposition would be okay if enforcement complied with the Federal Rules).

101. *Compare e.g. In re Meridan Bulk Carriers, Ltd.*, 2003 WL 23181011 at *2 (E.D. La. July 17, 2003) (upholding an arbitral subpoena for prehearing document production from a nonparty) *with e.g. Empire Fin. Group, Inc. v. Penson Fin. Servs., Inc.*, 2010 WL 742579 at *3 (N.D. Tex. Mar. 3, 2010) (following the express-language approach).

times within a single district.¹⁰² Finally, three circuits have no significant district court rulings on the question at all.¹⁰³ The only clear conclusion one can draw from this inconsistent patchwork of rulings is that the scope of an arbitrator's discovery powers under the FAA will depend entirely on where the arbitration proceedings take place.

B. Enforcement of a Valid Subpoena

As discussed in Part I, situations often arise where an arbitrator has issued a valid subpoena against a nonparty, but has no means to enforce it in the event of noncompliance.¹⁰⁴ The subpoena may be valid because it orders a nonparty to appear at a hearing,¹⁰⁵ because it has been upheld under the implied-power approach,¹⁰⁶ or simply because its validity was never challenged before the court.¹⁰⁷ The Federal Rules do not allow for the enforcement of an arbitral subpoena, however, when the nonparty resides outside of the one-hundred-mile territorial jurisdiction¹⁰⁸ of the district court in the arbitrator's jurisdiction, where all arbitral subpoenas must be enforced.¹⁰⁹ Courts have dealt with this gap between the FAA and the Federal Rules in a variety of ways, which may be divided roughly into three categories: a strict approach, a middle-ground approach, and a creative approach.

102. Compare *e.g. Stanton*, 685 F. Supp. at 1242 (upholding arbitral subpoenas for prehearing document production from various nonparties) with *e.g. Kennedy*, 646 F. Supp. 2d at 1344 (adopting the express-language approach).

103. The Author is unaware of any district court cases in either the First, Ninth, or Tenth Circuits that are directly on point.

104. *Supra* pt. I.

105. *E.g. Hay Group, Inc.*, 360 F.3d at 411–413 (discussing enforcement of a valid subpoena calling for a nonparty to appear at a hearing and bring documents located beyond the court's territorial jurisdiction).

106. *E.g. Amgen Inc.*, 879 F. Supp. at 881–883 (discussing enforcement of a subpoena calling for a nonparty to produce documents and appear at a deposition outside of the court's territorial jurisdiction, after first concluding that the FAA contained the implied power to issue such a subpoena).

107. *E.g. Dynegy Midstream Servs., LP*, 451 F.3d at 94–96 (discussing enforcement of a subpoena calling for a nonparty to produce documents without addressing whether the arbitrators possessed the authority to issue such a subpoena).

108. Fed. R. Civ. P. 45(b)(2); *supra* pt. I.

109. 9 U.S.C. § 7; *supra* pt. I.

1. *The Strict Approach*

The strict approach, which as the name suggests is the most unyielding of the three, refuses to allow courts to enforce an arbitral subpoena against a nonparty residing outside of the one-hundred-mile radius of the district court (or state court) in the district where the arbitrators are sitting.¹¹⁰ Courts applying this approach have reasoned that “Congress knows how to authorize nationwide service of process when it wants to provide for it,”¹¹¹ and that “nothing in the language of FAA Section 7 suggests that Congress intended to authorize nationwide service of process” for arbitral subpoenas against nonparties.¹¹² This approach obviously arises from the strictest possible reading of Section 7 and the Federal Rules, and either ignores or attempts to justify the absurd result produced by the gap existing between the two statutes.¹¹³

2. *The Middle Path*

The second category of methods that courts have used to deal with the enforcement gap falls into a gray area between complete enforcement and no enforcement at all (i.e., the strict approach). Courts have most often adopted this middle-path approach to allow enforcement of subpoenas for documents or other records, but not for enforcement of a subpoena for a deposition or a witness’ personal attendance at a hearing.¹¹⁴ The commonly cited line of reasoning used in this approach is that unlike the burden on a witness who must physically travel to attend a hearing or deposi-

110. See *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 Fed. Appx. 26, 28 (3d Cir. 2002) (holding that an arbitral subpoena may not be enforced by a federal court against “a nonparty for the production of documents located outside the geographic boundaries specified in Rule 45”); accord *Dynegy Midstream Servs., LP*, 451 F.3d at 95 (stating that “enforcement proceedings have clear territorial limitations”).

111. *Dynegy Midstream Servs., LP*, 451 F.3d at 95 (citing *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987)).

112. *Id.*

113. See *id.* at 96 (criticizing the *Amgen* decision for attempting to bridge the gap in the rules because it may “reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas”).

114. E.g. *Hay Group, Inc.*, 360 F.3d at 412 (explaining that when a nonparty witness residing within the arbitrator’s territorial jurisdiction is properly subpoenaed to testify at a hearing, he or she may “also be directed to bring documents that are not located within the territorial limits set out in Rule 45(b)(2)”).

tion, “the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel.”¹¹⁵ The courts adopting this approach seem to struggle with the obvious tension between strictly construing the FAA and the Federal Rules and avoiding a ridiculous result.

3. The Creative Approach

No common thread binds all of these cases together, except that they all involve some creative judicial solution to bridge the rules gap and enforce any type of arbitral subpoena. Certainly, the court in *Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner & Smith, Inc.*¹¹⁶ took the most straightforward approach. Here, the district court quite simply stated that the Federal Rules “only appl[y] to subpoenas issued by the district court; here, the [arbitration panel] issued the subpoenas and merely seeks the court’s assistance in compelling compliance. Accordingly, it is not established that a conflict between Rule 45 and the FAA exists.”¹¹⁷ This creative yet remarkably simple approach bridges the gap by claiming that there is no gap; the district court’s territorial reach is boundless when it seeks to enforce a properly issued arbitral subpoena.

Perhaps the most creative and often-cited¹¹⁸ solution to this problem was crafted in *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*¹¹⁹ The *Amgen* court seemed troubled by the existence of such a problematic gap between the FAA and the Federal Rules, stating that “[t]o find that the wording of the FAA precludes issuance and enforcement of an arbitrator’s subpoena of a witness outside the district . . . would be contrary to the intent

115. *In re Sec. Life Ins. Co.*, 228 F.3d at 872; accord *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647 at *2 (D. Minn. Jan. 9, 2004) (“[T]he Court holds that it has the power to compel compliance with the arbitration panel’s document subpoena . . . [but] does not have the power to enforce the panel’s subpoena purporting to compel the pre-hearing deposition of a non-party witness.”).

116. 432 F. Supp. 2d 1375 (N.D. Ga. 2006).

117. *Id.* at 1378 (citations omitted) (emphasis in original).

118. *Amgen* is cited often in both negative and positive capacities. Compare e.g. *Dynegy Midstream Servs., Inc.*, 451 F.3d at 96 (stating that “[w]e see no textual basis in the FAA for the *Amgen* compromise”) with *Fazio v. Lehman Bros., Inc.*, 2004 WL 5613816 at **2–3 (N.D. Ohio June 21, 2004) (discussing and adopting a slightly modified version of the *Amgen* compromise).

119. 879 F. Supp. 878 (N.D. Ill. 1995).

of Congress in enacting a national policy favoring arbitration.”¹²⁰ To avoid what the court clearly viewed as an undesirable result, it fashioned a compromise under Federal Rule 45(a)(3)(B).¹²¹ This rule allows an attorney authorized to practice in the arbitration-site district to issue and sign a subpoena on behalf of the court where the deposition or discovery is to take place—in other words, in the witness’ jurisdiction.¹²² The district court in the witness’ jurisdiction could then enforce the subpoena. This compromise would not offend the FAA, the court reasoned, because the district court in the witness’ jurisdiction would not be enforcing an *arbitrator’s* subpoena;¹²³ rather, the court would only be enforcing the attorney-issued subpoena as specified by the Federal Rules.¹²⁴

The court in *Fazio v. Lehman Brothers, Inc.*¹²⁵ largely followed this creative solution to the problem. After summarizing the *Amgen* compromise, the court ultimately concluded that the exact same route was not available in this case, where, unlike in *Amgen*, the parties had not agreed to be bound by the Federal Rules.¹²⁶ Still, the *Fazio* court cited Rule 81,¹²⁷ which governs the Federal Rules’ general applicability to various legal proceedings.¹²⁸ Specifically, the court noted that Rule 81(a)(3)¹²⁹ applies to arbitration proceedings under the FAA “to the extent that mat-

120. *Id.* at 882.

121. The rule states in relevant part that

[A]n attorney as officer of the court may also issue and sign a subpoena on behalf of . . . a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

Fed. R. Civ. P. 45(a)(3).

122. *Amgen Inc.*, 879 F. Supp. at 883.

123. *Id.* at 883. The *Amgen* court considered but rejected the plaintiff’s argument that “the territorial limits of a district court’s subpoena do not apply to an arbitrator’s subpoena.” *Id.* at 882. The court did not agree that no territorial limits applied, but it nonetheless fashioned a creative compromise within the confines of the Federal Rules. *Id.* at 882–883.

124. *Id.* at 883.

125. 2004 WL 5613816 (N.D. Ohio June 21, 2004).

126. *Id.* at **2–3.

127. Fed. R. Civ. P. 81.

128. *Fazio*, 2004 WL 5613816 at *3.

129. The Federal Rules have been amended since this decision, so the currently applicable rule is Rule 81(a)(6)(B), which is identical in substance to the version of the rule the court cited.

ters of procedure are not provided for”¹³⁰ under that law. The court then reasoned that the existence of this enforcement gap meant that the FAA does not provide a procedure for enforcing a subpoena against a nonparty witness outside the territorial jurisdiction of the district court where the arbitration is located.¹³¹ Therefore, the court held that the Federal Rules should apply to that scenario.¹³² Finally, the court used the *Amgen* approach to call for the plaintiff’s attorney to issue his own subpoena from the district court in the witness’ jurisdiction.¹³³ For reasons that the court did not fully explain, it denied enforcement of the subpoenas for live witness testimony at a hearing before the arbitrators, but it allowed for subpoena enforcement to secure deposition testimony.¹³⁴

4. Subject-Matter Jurisdiction

There is one additional procedural hurdle to enforcing an arbitral subpoena. While the rule gap just discussed is an issue of a court’s personal jurisdiction over a nonparty, this other hurdle is one of subject-matter jurisdiction, without which no matter can proceed in federal court. Anyone seeking to enforce a subpoena issued under the FAA must face the threshold problem that the FAA does not itself “create any independent federal-question jurisdiction.”¹³⁵ Some courts have held that this jurisdictional restriction applies specifically to arbitration parties’ ability to enforce a subpoena in federal court under Section 7 of the FAA.¹³⁶ Therefore, a party to arbitration may not enforce a subpoena in federal court unless there is another basis for subject-matter

130. *Fazio*, 2004 WL 5613816 at *3. This is an exact quote from the case, but as a result of the amendments to the Federal Rules, the quote is no longer accurate. The substance of the rule, however, remains the same. See Fed. R. Civ. P. 81(a)(6)(B) to compare the current rule with the quoted language.

131. *Fazio*, 2004 WL 5613816 at *3.

132. *Id.*

133. *Id.*

134. *Id.* Although the court did not expressly state its reasons for this distinction, it most likely lies in the fact that a district court normally cannot compel a witness residing outside the court’s hundred-mile jurisdiction to appear in person, but it can compel the same witness’ attendance at a deposition in his or her own jurisdiction.

135. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983).

136. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005).

jurisdiction, such as diversity of citizenship or an underlying federal question that is the basis for the dispute.

Fortunately, the United States Supreme Court has provided a way around this conundrum by holding that the FAA is “applicable in state and federal courts.”¹³⁷ The Court examined the legislative history of the FAA and reasoned that “since the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe [that] Congress intended to limit the [FAA] to disputes subject only to *federal* court jurisdiction.”¹³⁸ This holding clearly seems to allow arbitration parties to seek enforcement of an arbitral subpoena in state court as they may seek enforcement of other FAA provisions.¹³⁹ Of course, state courts do not utilize the Federal Rules for subpoena enforcement; thus, a state’s relevant procedural law will govern whether a comparable gap exists.¹⁴⁰

IV. AMENDING THE FAA¹⁴¹

This Article has thus far illustrated the highly dysfunctional and inconsistent manner in which the federal courts have applied and enforced the FAA’s discovery provisions. This inconsistency thwarts Congress’ original intent to promote a truly “*national* policy favoring arbitration”¹⁴² and results in an unsustainable system in which the application of a federal law varies wildly depending on one’s jurisdiction.

Part IV of this Article argues that amending the FAA is the proper solution to this problem and that expansive, rather than restrictive, discovery should be the goal of the newly amended

137. *Southland Corp.*, 465 U.S. at 12 (citing *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 25).

138. *Id.* at 15 (emphasis in original).

139. See e.g. *Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed*, 405 So. 2d 790, 793 (Fla. 4th Dist. App. 1981) (holding that “a litigant must often rely on the state courts to enforce his rights under the [FAA]”).

140. In drafting proposed language to amend Section 7 (see *infra* Appendix), the Author has attempted to address this issue by specifically providing for enforcement in state courts according to local procedural rules, but ultimately, the availability of a state court procedure to enforce an interstate subpoena is beyond the authority of federal law. As a result, there may be individual states in which interstate enforcement of an arbitral subpoena remains impossible.

141. For the proposed text that could be used to achieve the goals outlined in this Part, see *infra* Appendix.

142. *Southland Corp.*, 465 U.S. at 10 (emphasis added).

FAA. First, Part IV discusses amending the FAA to allow for greater nonparty discovery and specifically addresses the benefits of discovery and the reasons why this change will not, as some have predicted,¹⁴³ negate arbitration's advantages. Next, it discusses creating a uniform procedure for enforcing a subpoena against a nonparty witness residing outside the arbitrator's district. Finally, the Article concludes by explaining why amending the FAA, and not some alternative solution, is the proper and most effective way to remedy these inconsistencies.

A. Allowing for the Discovery of Nonparties

1. *Benefits of Expansive Discovery*

Allowing expansive nonparty discovery under the FAA would have several benefits including more just results in arbitration proceedings. In the absence of adequate discovery, "parties cannot uncover key information relevant to the arbitrator's decision, and therefore injustice occurs."¹⁴⁴ It is understandable that the FAA must weigh the competing interests of a fair dispute resolution against the burden on a nonparty witness who has to comply with potentially onerous discovery requests. The current system heavily favors the nonparty's burden, however, which inevitably produces unfair results for arbitration parties.

In addition to promoting more just outcomes, expanding the current arbitral-discovery framework will promote efficiency, one of the most often-cited benefits of arbitration.¹⁴⁵ Although it may seem counterintuitive that expanding the discovery process will actually shorten the time spent on arbitration, the current system promotes inefficiency by increasing the risk of surprise evidence being offered during an arbitration hearing. This causes interruptions while lawyers argue about the admissibility of evidence and the opportunity to obtain and present counter-evidence.¹⁴⁶ By increasing the time spent on arbitral discovery, both parties will

143. *E.g.* Ho, *supra* n. 23, at 205.

144. Cooley & Lubet, *supra* n. 6, at 91.

145. *See e.g.* *COMSAT Corp.*, 190 F.3d at 276 ("Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes.").

146. Cooley & Lubet, *supra* n. 6, at 91.

be better prepared to present their evidence and arguments, which may reduce the length of arbitration in the long run.

The current discovery framework's greatest delay stems from an arbitrator's "undoubted authority to subpoena [a] witness to appear at an arbitration hearing."¹⁴⁷ This power allows the arbitrators to order advance document production and witness testimony, albeit within the confines of a hearing before them. Therefore, even the current law allows for nonparties to produce necessary information eventually, but requiring witnesses' and arbitrators' physical attendance for a process that could be accomplished much more easily and cheaply utilizing traditional discovery procedures runs contrary to arbitration's efficiency goals. To conduct nonparty discovery under the current framework, arbitrators must be compensated for time spent conducting a preliminary hearing, and the arbitrators, the witness, or both must be compensated for traveling to the hearing location. Obviously, this presents scheduling issues as well because a greater number of people must be involved than if a single lawyer were to travel to depose a witness or review documents.

Judge Chertoff detailed the counterargument to the above proposal in his concurrence in *Hay Group*.¹⁴⁸ Judge Chertoff pointed out that even in the absence of prehearing subpoena power over nonparty witnesses, arbitrators were not powerless to conduct discovery because they could instead utilize their authority to summon witnesses to a preliminary hearing.¹⁴⁹ Judge Chertoff reasoned that the inconvenience of this procedure to all parties involved would "induce the arbitrators and [the] parties to weigh whether advance production is really needed,"¹⁵⁰ thereby acting as a check on the tendency to conduct overly zealous discovery.

Setting aside for the moment the question of whether retaining this tedious procedure is truly the most effective solution¹⁵¹ to the problem, at the very least, it is inconvenient to the

147. Bishop et al., *supra* n. 12, at 129; *see supra* n. 46 (discussing arbitrators' power to subpoena witnesses for preliminary hearings).

148. 360 F.3d at 413–414 (Chertoff, J., concurring).

149. *Id.* at 413; *see supra* n. 46 (discussing Judge Chertoff's concurrence).

150. *Hay Group, Inc.*, 360 F.3d at 414 (Chertoff, J., concurring); *see supra* n. 46 (discussing Judge Chertoff's concurrence).

151. Judge Chertoff's "solution" is not really a solution at all, but rather, it simply describes a naturally occurring structural limitation on arbitrators' uses of their subpoena

nonparty witness. In fact, Judge Chertoff and others have suggested that the threat of this procedure may be used as a sort of bargaining chip to coax a noncompliant witness into submitting to an ordinary deposition or producing documents for prehearing inspection simply to avoid the “inconvenience of making such a personal appearance.”¹⁵² The goal of discovery should not be to inconvenience nonparty witnesses, but rather to reduce the burden on nonparties as much as possible while still providing arbitrators with the information they need to reach a reasonable and just result. After all, it is not the nonparties’ dispute that the arbitration proceeding seeks to resolve, and thus it seems unfair that the current discovery framework places such a burden on them. This type of discovery turns arbitration proceedings into “a series of glorified depositions”¹⁵³ that greatly inconvenience those involved and hinder the just resolution of the underlying dispute. Instead, the FAA should seek to truly promote efficiency by allowing for prehearing document discovery and deposing of nonparty witnesses.

2. Benefits of Arbitration

The most often-cited benefit of arbitration is that it has historically been a speedier, less-costly alternative to traditional litigation.¹⁵⁴ Arbitration also offers a myriad of other benefits that will allow it to remain a preferred dispute-resolution method even if more expansive discovery results in some slight increase in time and cost. These less-acknowledged yet considerable benefits negate the most common argument against allowing expansive discovery in arbitration, which is that additional discovery slows

power. More effective, alternative structural limitations will be addressed *infra* Part IV(A)(3).

152. *Hay Group, Inc.*, 360 F.3d at 413 (Chertoff, J., concurring); see Bishop et al., *supra* n. 12, at 129 (suggesting that arbitrators take advantage of this power to convince a non-compliant witness to respond to a subpoena for prehearing discovery).

153. Cooley & Lubet, *supra* n. 6, at 91.

154. See e.g. Edna Sussman, *Why Arbitrate? The Benefits and Savings*, 81 N.Y. St. B. Assn. J. 20, 21 (Oct. 2009) (citing statistics showing that arbitration proceedings are typically resolved much faster than formal litigation in federal court); *contra* Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer’s Perspective*, 25 ABA J. Lab. & Empl. L. 227, 233–236 (2010) (arguing that despite the persistence of this efficiency argument, it may no longer be true that arbitration represents a significant savings of time or resources).

the process and defeats arbitration's main goal of efficiency.¹⁵⁵ On the contrary, placing heavy restrictions on arbitral discovery inevitably limits arbitrators' access to the information they need to achieve just results.¹⁵⁶ Clearly, the arbitral-discovery issue involves competing interests that the courts must consider carefully. Rather than attempting to settle the argument on this sole issue of efficiency, this Part seeks to point out that arbitration's other benefits, aside from speed and cost savings, must also be considered when making a policy determination regarding the scope of arbitral discovery.

Perhaps one of arbitration's greatest benefits is the parties' ability to select an arbitrator who has expertise in a given field.¹⁵⁷ Arbitrators with particular knowledge can be tremendously valuable in terms of time and cost savings. They can help parties reach a more just result because of the arbitrators' ability to apply "industrial common law—the practices of the industry and the shop,"¹⁵⁸ which is an implicit and essential part of any business contract. As the United States Supreme Court noted about a properly selected arbitrator's technical expertise, "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he [or she] cannot be similarly informed."¹⁵⁹ With greater fact-finder expertise comes increased result predictability,¹⁶⁰ which is also advantageous to the parties.

Arbitration offers other benefits that are of particular concern to businesses, such as privacy.¹⁶¹ Arbitration proceedings are generally private, and business associates, competitors, and clients are generally unaware of the results. This privacy "allows commercial parties to maintain a competitive position despite transactional problems."¹⁶² Arbitration is the preferred method of resolving international commercial disputes because it is a neu-

155. Cooley & Lubet, *supra* n. 6, at 91; Forstadt, *supra* n. 8, at 52 (citing Ho, *supra* n. 23, at 205 for a more thorough discussion); *but see* Rau, *supra* n. 62, at 25 (refuting this argument and labeling it "the shiniest and smelliest of red herrings").

156. Cooley & Lubet, *supra* n. 6, at 91.

157. Carbonneau, *supra* n. 38, at 18.

158. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581–582 (1960).

159. *Id.* at 582.

160. Coleman, *supra* n.154, at 228.

161. Carbonneau, *supra* n. 38, at 18.

162. *Id.*

tral proceeding that is not influenced by local legal traditions and precedents.¹⁶³ Businesses also benefit because arbitration is “more flexible and less adversarial” than traditional litigation,¹⁶⁴ which provides additional advantages. First, arbitration’s less rigid procedural framework reduces cost and increases speed.¹⁶⁵ Second, the less adversarial nature of arbitration is “less destructive of business relationships,”¹⁶⁶ which allows the parties to continue as business partners after the dispute has ended.¹⁶⁷ Finally, the mere existence of arbitration as an option for resolving disputes may help to encourage parties to reach a settlement.¹⁶⁸

Another important advantage of arbitration is that the results are almost always final, and the arbitrator’s substantive

163. *Id.* at 19–20.

164. *Id.* at 19. Carbonneau argues that arbitration promotes trust in the arbitrator’s ability to reach a just result and “reduce[s] the prospect of tactical litigious warfare.” *Id.*

165. *Id.* These savings, admittedly, are partially due to reduced discovery, but significant savings also accrue by “eliminat[ing] the need for complex rules of evidence, . . . the use of experts, and other informational trial procedures.” *Id.* Additional savings may be found due to the relative ease of scheduling arbitration proceedings, where the chosen arbitrator is more likely to be available, as compared with litigation, where the parties are at the mercy of the judge’s trial calendar and where criminal proceedings take precedent. See Elkouri & Elkouri, *supra* n. 25, at 14 (stating that arbitration continues to offer a speedier option than litigation); Sussman, *supra* n. 154, at 21 (explaining that abbreviated arbitration schedules amount to significant cost savings). Edna Sussman compared the median duration of certain arbitration proceedings with the median duration of a civil trial in select United States courts. Sussman, *supra* n. 154, at 21. For example, Sussman stated that the median time for resolution of an arbitration proceeding conducted by the American Arbitration Association in 2008 was 7.9 months, as compared with a median duration of 30.7 months (for jury trials) or 27 months (for bench trials) in the Southern District of New York during the same period. *Id.* For more detailed statistics, see Sussman, *supra* n. 154. On the other hand, Coleman cited empirical studies suggesting that arbitration, at least in the employment context, may no longer produce significant time or cost savings over traditional litigation. Coleman, *supra* n. 154, at 233–236. Coleman posited that at least part of the reason for this shift is due to the heightened pleading standards articulated in the United States Supreme Court’s decisions in *Twombly* and *Iqbal*, which allow a trial judge to more easily dismiss a complaint for failure to plead specific factual allegations. *Id.* at 236–237.

166. Carbonneau, *supra* n. 38, at 20.

167. *Id.*

168. Herrmann, *supra* n. 27, at 789 n. 37 (citing Subcomms. of the Comms. on the Jud., *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646*, 68th Cong. 10–11 (1924) (statements of Mr. W.H.H. Piatt, Chairman of the Committee on Commerce, Trade, and Commercial Law, American Bar Association) (“[I]nstead of creating controversies between those who might become litigants, [arbitration] has created a spirit of conciliation and settlement. Men have found that if they must arbitrate at once they proceed to carry out their contracts.”)); see also Coleman, *supra* n. 154, at 228–229 (citing “enhanced settlement potential” as a benefit of employment arbitration).

decision is not generally appealable.¹⁶⁹ Although the award itself can be appealed, courts rarely overturn arbitration rulings and parties usually do not even seek to dispute them in court. Because of this phenomenon, losing parties comply with award disbursements more quickly than in traditional litigation.¹⁷⁰ There is little reason to deny parties access to the important information gleaned from discovery because the numerous and varied benefits of arbitration over traditional litigation will offset any increase in the costs or time that more expansive discovery requires.

3. *Structural Limitations on Arbitral Nonparty Subpoenas*

Claims that granting arbitrators expansive authority to order nonparty discovery will inevitably result in unreasonable delay and increased cost are greatly exaggerated. This is true even if one assumes that efficiency and low cost are the two most important arbitration benefits. Such claims rest on “the assumption that arbitrators are not capable of controlling discovery in a way that both promotes the substantive outcomes of cases *and* preserves the cost and time advantages of arbitration over litigation.”¹⁷¹ On the contrary, the United States Supreme Court has expressed “overwhelming confidence in the competence of arbitrators.”¹⁷² There are a number of reasons why it makes sense to adopt the Supreme Court’s attitude and let arbitrators decide how much nonparty discovery to allow.¹⁷³ In this scenario, various existing structural limitations will prevent discovery from becoming unmanageable.

First, it is important to remember that allowing an arbitrator the *authority* to order nonparty discovery does not grant the parties a *right* to such discovery. This demonstrates a critical distinction between arbitration and litigation, where the parties themselves have the authority to issue discovery requests to

169. Forstadt, *supra* n. 8, at 52, 60–61.

170. See Elkouri & Elkouri, *supra* n. 25, at 14 (explaining that voluntary arbitration rarely requires court action to enforce compliance with award disbursement).

171. Jason F. Darnall & Richard Bales, *Arbitral Discovery of Non-Parties*, 2001 J. Dis. Res. 321, 333 (emphasis added).

172. *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–627 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 n. 5 (1991)).

173. See *Stanton*, 685 F. Supp. at 1242 (holding that the arbitrators should decide how much arbitral discovery to allow).

parties and nonparties alike. Under an expanded discovery framework, arbitrators will still need to determine that the evidence sought is material to the case.¹⁷⁴ Even under the existing discovery framework, courts have generally avoided second-guessing arbitrators' determinations about the relevance or admissibility of evidence. Further, courts have only struck down arbitral subpoenas based on a lack of authority to issue them, not because the information sought was irrelevant.¹⁷⁵ If the FAA is amended to grant arbitrators the express authority to order nonparty discovery, there is no reason not to continue to trust arbitrators' ability to determine the relevance of the sought-after information. This approach is sensible because an arbitrator has the best first-hand knowledge of the issues in a case. Thus, an arbitrator is in the best position to make determinations regarding the materiality of evidence.

Amending the FAA to adopt this approach will also prevent delays caused by parties seeking to challenge arbitral-discovery subpoenas in district courts. As previously mentioned, under the current framework, these challenges are frequently based on the arbitrators' authority to issue subpoenas and not on the relevance of those subpoenas. Challenges to the relevance of a properly issued subpoena under the current FAA—a subpoena issued to a party, for example—are rarely mounted “because courts invariably affirm arbitral decisions.”¹⁷⁶ Thus, it is reasonable to expect that the same trend will emerge in federal court challenges to nonparty subpoenas if the FAA is amended to permit them, reducing delay as arbitration parties stop bringing such challenges.¹⁷⁷

174. See 9 U.S.C. § 7 (authorizing an arbitrator to subpoena witnesses to produce evidence at a hearing “which may be deemed material”).

175. See *Am. Fed. of TV & Radio Artists*, 164 F.3d at 1010 (“[T]he relevance of the information and the appropriateness of the subpoena should be determined in the first instance by the arbitrator.”); *Nat'l Post Off. Mailhandlers v. United States Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985) (“[A]n arbitrator’s judgment as to whether evidence is or is not relevant . . . is part of the bargain.”); see also *Empire Fin. Group, Inc.*, 2010 WL 742579 at *3 (adopting the express-language approach in declining to enforce an arbitral subpoena against a nonparty, while still acknowledging that the information sought “may be relevant to the arbitration”).

176. Darnall & Bales, *supra* n. 171, at 334.

177. Certainly, one could make a counterargument that the trend of upholding arbitrators' determinations as to the relevance of subpoenas may not extend to nonparty subpoenas, because courts may be more protective of nonparties' rights than of the rights of parties who voluntarily entered into an arbitration agreement. Given the courts' general

Another structural limitation on arbitrators' power to order prehearing nonparty discovery is the parties themselves. Because arbitration parties select and pay the arbitrators, unlike district court judges, "an arbitrator who lets discovery get out of control will frustrate . . . both parties and will not receive future appointments."¹⁷⁸ Therefore, the parties themselves serve as a market-based check on an arbitrator's subpoena power, and it is in an arbitrator's own financial interest to limit the scope of discovery and use expanded discovery powers sparingly.¹⁷⁹ The professional culture of arbitrators also points to this outcome. The training, literature, and guiding ethos of the arbitral profession constantly emphasize the importance of "protect[ing] the original bargain of the parties," including the desire to avoid the "abuses of litigation behavior."¹⁸⁰

A final point to remember is that the parties to the arbitration agreement are fully capable of drafting their agreement to limit or restrict nonparty discovery entirely. Because arbitration is ultimately a creature of contract, and Section 7 of the FAA operates only to fill in gaps in the agreement, this drafting freedom would remain even under an amended FAA. Therefore, the final responsibility for avoiding delay due to nonparty discovery rests with the drafters themselves. The fact that drafters so often fail to draft in such a way as to limit discovery is evidence that they are "unwilling to foreclose the possibility that [discovery] might ultimately turn out to be to their advantage."¹⁸¹ The FAA should give arbitration parties greater options for discovery of nonparties; of course, parties remain free to draft otherwise should greater discovery prove undesirable.

unwillingness to second-guess the arbitrators' judgment regarding the importance of evidence, however, the existing trend is likely to continue. *See id.* at 328–330 (citing court opinions deferring to arbitrators' decisions on relevancy).

178. *Id.* at 334.

179. Although market forces will likely limit overly expansive discovery, certain classes of arbitration parties may select arbitrators who allow more liberal discovery. Because many arbitration clauses allow each party to select one arbitrator, this may result in a range of styles in the marketplace. If this variety better suits the parties' needs, however, then this would not be a bad outcome.

180. Rau, *supra* n. 62, at 44.

181. *Id.* at 25.

B. Enforcement of Subpoenas

Starting from the premise that the FAA should be amended to authorize greater discovery, the argument in favor of amending the FAA to create a procedure for enforcing a valid arbitral subpoena is self-evident: of what use is the power to issue subpoenas if those subpoenas cannot be enforced? A power without an enforcement mechanism is illusory. Thus, the arguments in favor of creating a valid enforcement procedure are identical to those detailed in Part IV(A).

The question, therefore, is not *whether* to create an enforcement mechanism, but what that enforcement mechanism should look like. The most straightforward solution seems to be allowing arbitrators to enforce their subpoenas in the same manner as provided by the Federal Rules.¹⁸² This would have two benefits. First, the Federal Rules provide a procedure with which most attorneys and arbitrators are likely to be familiar. There is no need to fashion the type of novel and inconsistent approaches that several courts have used to bridge this gap.¹⁸³ Instead of being forced by the FAA to seek enforcement of an arbitral subpoena in the district court where the arbitrators are sitting, enforcement could be sought in the witness' jurisdiction, as provided by Rule 45(a)(3)(B).¹⁸⁴ This solution would essentially allow an arbitrator to use the compromise outlined in *Amgen*¹⁸⁵ and *Fazio*,¹⁸⁶ but with the FAA's express textual support.

The second benefit of this approach is eliminating the ridiculous notion that Congress intentionally created a process for arbitrators to issue a valid subpoena but chose not to give them a method for enforcing it. Although it is admittedly true that "Congress knows how to authorize nationwide service of process when it wants to provide for it,"¹⁸⁷ it does not logically follow that the

182. This change will not apply to enforcement in state courts. *See supra* n. 140 and accompanying text in pt. III(B)(4) (discussing state enforcement and how the issue is addressed in the proposed language contained in the Appendix). The exact enforcement mechanism in each state is beyond the scope of this Article.

183. *E.g. Amgen Inc.*, 879 F. Supp. at 883.

184. Fed. R. Civ. P. 45(a)(3)(B); *see supra* pt. III(B)(3) (discussing this approach as applied by the *Amgen* court).

185. 879 F. Supp. at 883.

186. 2004 WL 5613816 at *3.

187. *Omni Capital Int'l*, 484 U.S. at 106.

enforcement gap “reflect[s] an intentional choice on the part of Congress.”¹⁸⁸ There is no mention of such a gap in any of the legislative history surrounding the FAA, nor of any intent to avoid nationwide arbitral-subpoena enforcement.

It is much more likely that the members of the Sixty-eighth Congress did not even consider this issue. Given that Congress enacted the FAA several years prior to the Federal Rules,¹⁸⁹ during a time when “[t]o require the disclosure to an adversary of the evidence that is to be produced would be repugnant to all sportsmanlike instincts,”¹⁹⁰ the Sixty-eighth Congress could not have envisioned that any prehearing discovery subpoenas would have even been issued, let alone enforced. It is perhaps instructive that none of the cases addressing this issue occurred until more than fifty years after the FAA’s enactment. The lack of congressional foresight of the commonplace nature of pretrial discovery in litigation and arbitration was the likely cause of the enforcement gap. In light of the increasing importance and value of discoverable information in the modern legal arena, however, legislative amendment can close this gap for good.

C. Why a Non-Legislative Solution Is Inadequate

This Article is by no means the first to recognize problems with nonparty discovery under the FAA.¹⁹¹ Several other commentators have advocated some form of judicial approach to the problem,¹⁹² but ultimately these approaches do not focus on the root of the underlying problem. These proposals have mostly involved some method for dealing with the existing framework or, at most, suggested that courts should construe the FAA broadly to allow for nonparty discovery.¹⁹³

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

189. *Life Receivables Trust*, 549 F.3d at 216; *Hay Group Inc.*, 360 F.3d at 407, 409; *supra* pt. III(A)(1).

190. *Matria Healthcare*, 584 F. Supp. 2d at 1080 (quoting 6 Wigmore, *Discovery* § 1845, 490 (3d ed., 1940)).

191. *E.g.* Rau, *supra* n. 62, at 1–3, 9.

192. *Compare* Herrmann, *supra* n. 27, at 811 (arguing that the arbitrator should determine what nonparty discovery is relevant to the case, but that the burden on nonparties of such discovery should be subject to judicial review) *with* Darnall & Bales, *supra* n. 171, at 331–336 (arguing that courts should adopt the broad-power approach to interpreting the FAA).

193. Darnall & Bales, *supra* n. 171, at 331–336.

The problem with other commentators' proposals is that they would ultimately leave interpretation of arbitral subpoena power to the discretion of individual courts. No matter how well defined a judicial test might be, it will still inevitably create further confusion and inconsistency across jurisdictions, because absent a definitive ruling from the United States Supreme Court, any circuit will remain free to ignore such an approach. Further, any proposal involving judicial review of an arbitrator's decisions regarding discovery¹⁹⁴ is counter to judicial culture because courts are generally hesitant to become involved in arbitral-discovery disputes.¹⁹⁵

The FAA, of course, is not common law but an act of Congress. Therefore, the best solution is one that calls upon Congress to state very clearly and purposefully how broad it intends the scope of nonparty discovery under the FAA to be. Hopefully, Congress will choose to adopt the sort of reforms that have been suggested in this Article, but even a more limited approach would be preferable to the inconsistent patchwork of rules that exists today.

Another reason that a judicial solution to this problem is undesirable is that it necessarily requires creating bad law. Although the arguments made in this Article certainly align with the end results achieved in the cases adopting the implied-power approach¹⁹⁶ and the creative approach,¹⁹⁷ those cases involved a distressing degree of judicial activism and misconstruction of the FAA.¹⁹⁸ Instead, courts should construe a statute according to its plain meaning and remember that "[a] statute's clear language does not morph into something more just because courts think it makes sense for it to do so."¹⁹⁹ Indeed, consistent with this proposition, the cases adopting the express-language approach²⁰⁰ are the better-reasoned group of opinions on this issue. Frankly, there

194. *E.g.* Herrmann, *supra* n. 27, at 811.

195. Forstadt, *supra* n. 8, at 58–59 (“Courts generally take a ‘hands-off’ approach when it comes to discovery conducted in an arbitration. They do not want to interfere with the arbitration proceeding and the role of the arbitrator in controlling discovery.”) (footnotes omitted).

196. *Supra* pt. III(A)(2).

197. *Supra* pt. III(B)(3).

198. *See e.g. In re Sec. Life Ins. Co.*, 228 F.3d at 870–871 (finding an implicit power to issue nonparty subpoenas based on efficiency goals rather than statutory construction).

199. *Life Receivables Trust*, 549 F.3d at 216.

200. *E.g. Hay Group, Inc.*, 360 F.3d at 408–410.

is no textual basis in the FAA supporting the idea that arbitrators possess an implied power to subpoena nonparty witnesses for prehearing discovery. When considering the historical context in which the FAA was passed²⁰¹ and the cultural aversion to expansive discovery in formal litigation that existed at that time,²⁰² it seems highly unlikely that Congress intended to include an implied authority for expansive discovery. Rather than encouraging courts to mold the existing law to fit their individual concepts of the FAA, the more effective and legally justifiable way to allow for broad discovery in arbitration is to amend the FAA to expressly allow it.²⁰³

V. CONCLUSION

Since Congress enacted the FAA in 1925, the nature of litigation and arbitration practice in the United States has changed considerably, particularly in terms of the scope of discovery. While some courts have attempted to adapt the FAA to conform to modern understandings of arbitral-discovery needs, other courts have steadfastly adhered to Congress' original intent behind adopting the FAA. Over the past two decades, this difference in approaches has produced an inconsistent patchwork of court rulings regarding the extent of an arbitrator's authority to order prehearing nonparty discovery and a court's ability to enforce a properly issued subpoena.

While the traditionalist approach is more consistent with principles of statutory construction and deference to Congress' intent, it produces undesirable results. Specifically, the traditionalist approach has produced unjust results in arbitration proceedings, needless delay while parties (and nonparties) challenge discovery requests, and a glaring inconsistency between the procedural operation of the FAA and the Federal Rules of Civil Procedure. While Congress may have intended to limit nonparty discovery in 1925, this objective seems increasingly outdated and problematic today.

201. See *supra* pts. II, III(A)(1), IV(B) (discussing the FAA's historical context).

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

203. See *Hay Group, Inc.*, 360 F.3d at 409 (“[I]f it is desirable for arbitrators to possess [the power to subpoena nonparties], the way to give it to them is by amending Section 7 of the FAA . . .”).

The only viable, long-term solution to this problem is for Congress to amend the FAA to reflect arbitration's increasingly critical role in the modern commercial context and discovery's importance in providing arbitrators with the information needed to settle disputes accurately and fairly. As arbitration's popularity continues to grow, it becomes increasingly difficult to justify its inconsistent treatment in federal circuits across the country, especially in light of the FAA's original goal of promoting uniformity in how courts view arbitration agreements. Regardless of which policy Congress chooses to pursue in amending the FAA—expansive versus limited discovery—either approach will provide much-needed judicial consistency across jurisdictions, promote certainty in contracting, and truly result in a “national policy favoring arbitration.”²⁰⁴

204. *Southland Corp.*, 465 U.S. at 10.

APPENDIX

For all of the reasons detailed above, Congress should amend Section 7 of the FAA to read as follows:²⁰⁵

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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. **Additionally, the arbitrators, or a majority of them, may summon any person to produce any evidence or provide deposition testimony in advance of a hearing, to take place at a time and location reasonably convenient for the witness. Prior to issuing such a subpoena, the arbitrators shall make an independent determination as to the materiality of the evidence sought. The fees and costs for such production or deposition shall be borne by the party seeking the evidence.** Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them and shall be directed to the said person and shall be served in the same manner **specified in the Federal Rules of Civil Procedure for subpoenas to appear and testify before the court, or as provided by law for the service of subpoenas in a civil action in the appropriate State;** if any person or persons so summoned to testify, **produce evidence, or provide deposition testimony** shall refuse or neglect to obey said summons, **the arbitrators, or a majority of them, may petition the appropriate United States district court, as specified by the Federal Rules of Civil Procedure, or the appropriate State court,** to compel the attendance of such person or persons before said arbitrator or arbitrators, **or to compel the production of evidence or participation in a deposition,** or punish

205. For the relevant portion of the existing text, see *supra* n. 11. In the proposed statutory language, the portions that differ from the original text are in bold type.

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 **or in the appropriate State courts.**