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Dean W. Sattler

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Is There A Compelling Interest to Compel? Examining Pre-Hearing Subpoenas Under the Federal Arbitration Act

Dean W. Sattler*

I. Introduction

This comment examines the power of an arbitrator to issue pre-hearing subpoenas upon non-parties to an arbitration. While traditional litigation affords the benefits (and, at times, the pitfalls) of expansive discovery through broad subpoena powers, arbitration under the Federal Arbitration Act (“FAA”)¹ does not. Although the FAA makes it clear that an arbitrator can compel non-parties to the arbitration to bring relevant documents with them when they appear before the arbitral panel during the actual arbitration, the FAA is ambiguous with respect to the arbitrator’s power to issue pre-hearing subpoenas compelling the production of documents before the arbitral hearing.² Due to this ambiguity, the courts are in disagreement when issues pertaining to pre-hearing subpoenas arise. Some courts hold that pre-hearing subpoenas are necessary and enforceable, others view them as outside the scope of the arbitrator under the FAA. Indeed, the federal circuits are split, and as arbitration clauses become more and more common in everyday transactions—as well as complex agreements involving commerce and labor—final determination of this unsettled point of law will bear greatly on the success of arbitration as an effective alternative means of dispute resolution.

* J.D. Candidate 2007, Pace University School of Law; B.A. Political Science, 2003, College of the Holy Cross. The author thanks Professor Vanessa Merton for her insight during the writing of this note, and Roland A. Baroni for his invaluable guidance and advice. The author is grateful for the encouragement and support of his friends and family, especially his parents and Dana. Finally, this article could not have been completed without the hard work and dedication of the *Pace Law Review* editorial board and staff. Any mistakes, however, are the author’s own.

1. 9 U.S.C. § 7 (1994).

2. *Id.*

Section II of this comment outlines the current state of the law regarding non-party subpoenas with regard to the various interpretations of the FAA. It then discusses the split in the federal circuits on whether an arbitrator has the power to issue non-party subpoenas prior to the hearing, including commentary on the holdings of the various circuits.

Section III.A addresses the policy-interpretation dichotomy that has developed since the FAA was enacted in 1925. It explores whether the FAA was adopted to give effectiveness and legitimacy to arbitration agreements, or to provide a streamlined and efficient means of dispute resolution. Subsection III.B discusses whether it is appropriate for district courts to compel non-party subpoenas issued prior to an arbitral hearing. Subsection III.C is a critique of the jurisdictional problems that have grown out of the vague language of Section 7 of the FAA ("Section 7"). Subsection III.D outlines an attractive five-part test that could be used by district courts when deciding whether to enforce non-party, pre-hearing subpoenas.

Section IV concludes that while pre-hearing subpoenas issued upon non-parties prior to an arbitral hearing may be appropriate under certain circumstances in particular cases, given the policy considerations of the FAA as well as recent Supreme Court decisions, a new system must be developed (such as the five-part test proposed in III.D) that can be used by the district courts in deciding whether to compel such subpoenas.

II. The Nature of the Problem

A. *The Federal Arbitration Act Does Not Specifically Define an Arbitrator's Subpoena Power*

Arbitration is a creature of contract. It provides an alternative means of dispute resolution that parties to a transaction can agree upon in advance, should a dispute arise in the future. While the parties may tailor an arbitration agreement as they see fit given a particular transaction, most do not specify unique parameters for discovery.³ Instead, it is common practice for

3. See *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995) (holding that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties"); see also *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (holding that the parties to an arbitration

parties to designate one of several sets of uniform rules for arbitration, for example, the American Arbitration Association Rules for Commercial Arbitration (“AAA Rules”).⁴ This is problematic, however, because many uniform rules do not specifically set limits upon the subpoena power of an arbitrator. Instead, they tend to broadly define the arbitrator’s power in that respect.⁵ Compounding the problem is the fact that the FAA is silent on an arbitrator’s specific power with regard to pre-hearing discovery.⁶ In fact, the language in the FAA only empowers the arbitrator to compel the production of documents at the actual hearing.⁷

When the issue of pre-hearing discovery arises with respect to non-parties in the weeks or months leading up to the arbitral hearing, the arbitrator may or may not choose to issue such a subpoena compelling discovery. Thus, it is often the case that the only remedy available to a party seeking production of documents before an upcoming arbitral hearing is to petition the local district court to compel the non-party to comply with the arbitrator’s subpoena.⁸ In some cases, the district courts side with the proponent and enforce the pre-hearing subpoenas by broadly construing the language in Section 7;⁹ in other cases, however, the district courts have not, narrowly interpret the same language.¹⁰

This precise disagreement has been the subject of appellate review by several circuit courts. Naturally, because of the degree of ambiguity involved, the circuits are split.

“may pre-arrange discovery mechanisms directly or by selecting an established forum or body of governing principles in which the conventions of discovery are settled”).

4. American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* (Sept. 15, 2005), <http://www.adr.org/sp.asp?id=22440> (last visited Sept. 6, 2006).

5. See, e.g., *id.* at R-31(d).

6. 9 U.S.C. § 7 (1994).

7. *Id.* (providing in pertinent part, “[t]he arbitrators selected either as prescribed in this title [9 USCS §§ 1 et seq.] 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” (emphasis added)).

8. See, e.g., *In re Arbitration Between Brazell v. Am. Color Graphics*, No. M-82 AGS, 2000 WL 364997 (S.D.N.Y. Apr. 7, 2000).

9. See, e.g., *id.*

10. See, e.g., *Gresham v. Norris*, 304 F. Supp. 2d 795 (E.D. Va. 2004).

B. *The Federal Circuits are Split in Their Interpretations of the Subpoena Power Vested in an Arbitrator by the FAA*

According to the Sixth¹¹ and Eighth¹² Circuits, an arbitrator does have the power to issue pre-hearing discovery subpoenas on non-parties under Section 7. The Third¹³ and Fourth¹⁴ Circuits, however, hold that the language of Section 7 falls short of empowering the arbitrator to issue pre-hearing discovery subpoenas on non-parties.

In *American Federation of Television & Radio Artists v. WJBK-TV*, the plaintiff, an employee of WJBK-TV, appealed the district court's ruling to quash his motion to compel enforcement of a subpoena duces tecum issued by the arbitrator in a grievance proceeding upon A&M Specialists, Inc. ("A&M"), which is in the business of maintaining and providing vehicles to media personalities on behalf of several manufacturers.¹⁵ A&M was a non-party to the underlying grievance proceeding.¹⁶ The subpoena called for A&M to produce records concerning the use of its vehicles by media personalities, which the plaintiff contended was central to his claim that he was wrongfully terminated based upon his use of the provided vehicles.¹⁷ The district court, however, held that the information sought by the subpoena was not relevant to the determination of the underlying arbitration.¹⁸

Reversing the district court's ruling, the Sixth Circuit held that the arbitrator was in fact vested with the power to issue a judicially-enforceable subpoena on A&M under Section 7.¹⁹ In so doing, the Court cited with approval *Meadows Indemnity*

11. *Am. Fed'n of Television & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999).

12. *Sec. Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865, 870 (8th Cir. 2000).

13. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

14. *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999).

15. *See Am. Fed'n of Television*, 164 F.3d at 1006.

16. *Id.*

17. *Id.*

18. *See Am. Fed'n of Television & Radio Artists v. WJBK-TV*, No. 97-70889, 1997 U.S. Dist. LEXIS 17303 (E.D. Mich. 1997).

19. *See Am. Fed'n of Television*, 164 F.3d at 1009.

*Company, Ltd. v. Nutmeg Insurance Co.*²⁰ *Meadows* held that the provision in Section 7 authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitral hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing.²¹ The Sixth Circuit then went on to consider whether the district court erred in refusing to enforce the subpoena based upon its conclusion that the information sought was not relevant to the outcome of the underlying arbitration.²² The Court held that the issue of relevance is to be determined in the first instance by the arbitrator, and that it is not the function of the district court to determine what an arbitrator “would or should find relevant in resolving a dispute.”²³ The Court then ordered the district court to enter judgment compelling A&M to produce the documents directly to the arbitrator for *in camera* inspection, in order to determine the relevance of the documents sought by the plaintiff.²⁴

Similarly, the Eighth Circuit also held that an arbitrator may issue a subpoena duces tecum on a non-party under Section 7 in *Security Life Insurance Co. v. Duncanson & Holt, Inc.*²⁵ Security Life Insurance Co. (“Security Life”), a small Minnesota-based insurance company that underwrites health and life insurance policies in 41 states, launched a new group health insurance product.²⁶ In order to facilitate the launch of their new insurance product, Security Life entered into a reinsurance contract with Transamerica Occidental Life Insurance Company (“Transamerica”) in 1992.²⁷ Duncanson & Holt (“D&H”) managed the reinsurance contract, which provided that the reinsurers would cover 85% of Security Life’s risk, in exchange for 85% of the insurance premiums.²⁸ When Security Life lost a judgment for \$14 million in 1998 and could not collect from the rein-

20. *Meadows Indem. Co., Ltd. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1993).

21. *Id.* at 45.

22. *Am. Fed’n of Television*, 164 F.3d at 1009-10.

23. *Id.* at 1010 (quoting *Wilkes-Barre Publ’g Co. v. Newspaper Guild of Wilkes-Barre*, 559 F. Supp. 875, 882 (D. Pa. 1982)).

24. *Am. Fed’n of Television*, 164 F.3d at 1010.

25. *Security*, 228 F.3d at 868.

26. *Id.* at 867.

27. *Id.*

28. *Id.*

surers because the reinsurers claimed that Security Life was in breach of a "counsel and concur" clause in their contract, Security Life demanded arbitration with D&H to resolve the issue of its failure to counsel and concur.²⁹

In preparation for the arbitration, Security Life petitioned the arbitral panel to issue a subpoena requiring Transamerica, a non-party to the arbitration, to produce one witness and several documents pertaining to Transamerica's refusal to provide Security Life with reinsurance coverage with respect to the 1998 judgment.³⁰ Security Life claimed that attaining the information sought was necessary for them to make the case that Transamerica acted improperly by withholding important information from Security Life when it litigated the case that resulted in the judgment against them.³¹ Upon Transamerica's opposition to the subpoena, Security Life petitioned the district court to enforce, which it did.³² Transamerica then appealed to the Eighth Circuit claiming that the subpoena was improper under Section 7.³³

The Eighth Circuit recognized, in dicta, that Section 7 does not "explicitly authorize the arbitration panel to require the production of documents for inspection by a party."³⁴ It went on to reason, however, that while efficient dispute resolution through arbitration requires a limited discovery process, efficiency can also be promoted by permitting a party to review and digest relevant documentary evidence before the arbitral hearing.³⁵ The Court thus construed the language of Section 7 to include an implied empowerment to issue pre-hearing subpoenas as part of an arbitrator's power to subpoena relevant documents at an actual arbitral hearing, for the sake of efficiency during the actual hearing.³⁶

Both the Sixth and Eighth Circuits held that an arbitrator has the power to issue pre-hearing subpoenas on non-parties under Section 7. While arriving at the same conclusion, it is

29. *Id.*

30. *Security*, 228 F.3d at 870.

31. *Id.*

32. *Id.* at 869.

33. 9 U.S.C. § 1 (1994).

34. *Id.* at 870.

35. *Id.*

36. *Id.* at 870-71.

important to note that they rely on slightly different reasoning. In *American Federation of Television & Radio Artists v. WJBK-TV*, the Sixth Circuit placed emphasis on the need for the arbitrator to decide whether or not the materials sought via subpoena were relevant or material to his ability to render a decision in the arbitration.³⁷ Thus, the Sixth Circuit suggests that the decision is somewhat subjective – that is, it is to be based upon whether the particular arbitrator (or arbitral panel) believes she can adequately adjudicate in the absence of the documents subject to the subpoena.³⁸ On the other hand, the Eighth Circuit took a different approach in *Security Life Insurance Co. v. Duncanson & Holt, Inc.*³⁹ Their decision to enforce the pre-hearing subpoena on non-parties was grounded in the interest of promoting the efficiency of the arbitral hearing by allowing the parties to familiarize themselves with the relative documentary evidence in order to be better prepared to proceed on the day of the hearing.⁴⁰ In *Security*, the Eighth Circuit was less concerned with adequate adjudication – and perhaps the degree of subjectivity such a standard might introduce into the calculus – and more inclined to promote efficient dispute resolution.⁴¹

As mentioned above, in contrast to the holdings of the Sixth and Eighth Circuits, the Third and Fourth Circuits have held that pre-hearing subpoenas issued on non-parties are improper under the FAA.

The Third Circuit had occasion to rule on the issue in *Hay Group, Inc. v. E.B.S. Acquisition Corporation*.⁴² The issue in *Hay* arose from underlying employment arbitration between Hay Group, Inc. (“Hay”), a management consulting firm, and one of its former employees, David A. Hoffrichter, regarding a non-competition clause in Hoffrichter’s separation agreement that forbade him from soliciting any of Hay’s clients for one year after he left Hay.⁴³ At issue in the arbitration between Hay and Hoffrichter was whether he breached the non-competition

37. See *Am. Fed’n of Television*, 164 F.3d at 1004.

38. *Id.*

39. See *Security*, 228 F.3d at 865.

40. *Id.*

41. *Id.*

42. *Hay Group*, 360 F.3d at 406.

43. *Id.* at 405.

clause of the separation agreement.⁴⁴ To prepare for the arbitral hearing, Hay attempted to obtain information from E.B.S. Acquisition Corp. (“EBS”) and PriceWaterhouseCoopers (“PwC”) by serving both with subpoenas for pre-hearing document production.⁴⁵ EBS and PwC refused to comply, and Hay petitioned the district court for the Eastern District of Pennsylvania to compel EBS and PwC to produce the requested documents.⁴⁶ Over continued objections from EBS and PwC, the District Court enforced the subpoenas, accepting the Eighth Circuit’s reasoning.⁴⁷ EBS and PwC then appealed to the Third Circuit.⁴⁸

The Third Circuit reversed the district court’s holding, persuaded by EBS’s and PwC’s arguments that a non-party witness may be compelled to bring documents to an arbitral proceeding but may not simply be subpoenaed to produce documents prior to the hearing.⁴⁹ The Court then applied a strict construction of the language of Section 7.⁵⁰ The Court concluded that “the power to require a non-party ‘to bring’ items ‘with him’ clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier.”⁵¹ Thus, the court held that “Section 7’s language unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.”⁵² The Court also noted that if pre-hearing subpoenas were desirable with respect to non-parties, the proper remedy for the ambiguity of Section 7 is through amend-

44. *Id.*

45. *Id.*

46. *Id.*

47. *Hay Group*, 360 F.3d at 406.

48. *Id.*

49. *Id.*

50. *Id.* at 407 (declaring that the language of Section 7 “speaks unambiguously to the issue before us. The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party 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.” [emphasis in original]).

51. *Id.*

52. *Id.*

ment of the statute, not an activist interpretation of the existing language.⁵³

Furthermore, in *Hay*, the Third Circuit favored the Sixth Circuit's policy interpretation of the FAA over that of the Eighth Circuit.⁵⁴ The *Hay* Court held that while efficiency is "certainly an objective of parties who favor arbitration over litigation,"⁵⁵ efficiency is not the principal goal of the FAA.⁵⁶ Rather, the Court declared that the purpose of the FAA is to give effect to private agreements.⁵⁷

The Fourth Circuit has also weighed in on the power of an arbitrator to issue pre-hearing subpoenas on non-parties prior to the hearing, and like the Third Circuit, has held in the negative. In *COMSAT Corp. v. National Science Foundation, Associated Universities, Inc. ("AUI")*, a not-for profit organization, entered into a cooperative agreement with the National Science Foundation ("NSF") in 1988.⁵⁸ Under the agreement, AUI agreed to administer a network of telescopes for the NSF.⁵⁹ In connection with that agreement, AUI contracted with COMSAT Corp. ("COMSAT") in 1990 to build a then state-of-the-art telescope costing \$55 million.⁶⁰ In 1997, a dispute arose over AUI's liability to pay COMSAT for several cost overruns allegedly caused by acts and omissions committed by AUI, such as after-the-fact change orders, which led the parties to commence arbitration.⁶¹

In preparation for the hearing, COMSAT requested that the arbitrator issue pre-hearing subpoenas upon the NSF, a non-party to the telescope contract, to produce all documents in its possession related to the telescope.⁶² After a series of written correspondences between COMSAT and the NSF, the latter party refused to comply with the subpoenas.⁶³ The parties ar-

53. *Hay Group*, 360 F.3d at 409.

54. *See id.* at 404.

55. *Id.* at 410 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974) and *Painewebber, Inc. v. Hofmann*, 984 F.2d 1372, 1380 (3d Cir. 1993)).

56. *Hay Group*, 360 F.3d at 410.

57. *Id.* (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

58. *COMSAT*, 190 F.3d at 271.

59. *Id.*

60. *Id.* at 272.

61. *Id.*

62. *Id.*

63. *Id.*

gued orally before a magistrate, who issued an order requiring the NSF to comply with the COMSAT subpoenas.⁶⁴ The NSF appealed to the district court, which interpreted the FAA to include a broad grant of subpoena power to arbitrators, and accordingly upheld the magistrate's order.⁶⁵ The NSF then appealed to the Fourth Circuit.⁶⁶

In its decision, the Fourth Circuit noted that the FAA neither grants an arbitrator the authority to order non-parties to appear at depositions, nor grants the authority to demand that non-parties procure documents prior to the hearing.⁶⁷ The Court stated, "by its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them,' that is, to compel testimony by non-parties at the arbitration hearing."⁶⁸ In its holding, the Fourth Circuit declared that "[t]he rationale for constraining an arbitrator's' subpoena power is clear. 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."⁶⁹

The Fourth Circuit's holding is strikingly similar to the Eighth Circuit's policy considerations. For example, the Fourth Circuit specifically stated that "[a] hallmark of arbitration – and a necessary precursor to its efficient operation – is a limited discovery process."⁷⁰ It is notable, however, that the Fourth Circuit did leave open the possibility that judicially enforceable pre-hearing subpoenas could be issued on non-parties in cases of "special need or hardship."⁷¹ Nevertheless, the Court refrained from defining the sort of situation or circumstances that might give rise to that proverbial "special need" exception.⁷² The Court reversed the district court's order to enforce the sub-

64. *COMSAT*, 190 F.3d at 273.

65. *Id.* at 274.

66. *Id.*

67. *Id.* at 275.

68. *Id.*

69. *Id.* at 276 (citing *Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980) (holding "[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial.")).

70. *COMSAT*, 190 F.3d at 276.

71. *Id.*

72. *Id.*

poena, noting that once COMSAT and AUI entered into an agreement that contained an arbitration clause, they could no longer reasonably expect to be afforded the benefit of the sort of in-depth and expansive discovery enjoyed by those litigating their disputes in the courts.⁷³

All told, it appears that the Federal Circuits are split on two main issues. First, whether Section 7 grants the arbitrator the power to issue pre-hearing subpoenas on non-parties, and second, whether the predominant policy consideration driving the FAA is to promote efficient means of dispute resolution as an alternative to traditional litigation, or whether the principle goal of the FAA is to give effect to private agreements to arbitrate, and to ensure that an arbitrator's decision is informed, on the merits, final and thus, effective.

III. The Policy Dichotomy: Effectiveness or Efficiency?

A. *Is it Efficiency that the Drafters of the FAA Were Really After?*

As demonstrated in section II, the plain language of the FAA concerning subpoena power is vague at best. The pertinent language is found in Section 7, which states “[the] arbitrators selected . . . 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.”⁷⁴ In spite of this uncertain language, however, it has not been substantively revised since it was adopted in 1925.⁷⁵ Instead, Section 7 has been interpreted by the courts over the years, resulting in the two prevailing, yet difficult to reconcile, policy considerations.

Courts have long contended that the primary policy consideration of the FAA is to place arbitration agreements on the same footing as other contracts, counteracting the longstanding

73. *Id.* at 277.

74. 9 U.S.C. § 7.

75. In fact, even the House and Senate reports acknowledge that effectiveness and efficiency are implicit goals of the FAA, however Congress did not necessarily suggest that one should be favored over the other. See Gabriel Hermann, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 786-88 (2003); see also S. REP. NO. 68-536, at 3 (1924), H.R. REP. NO. 68-96, at 2 (1924).

common law rule that arbitration agreements were avoidable by either party.⁷⁶ In *Green Tree Financial Corp. v. Randolph*, plaintiff-respondent Larketta Rudolph financed a purchase of a mobile home through Green Tree Financial Corporation ("Green Tree").⁷⁷ Her agreement with Green Tree contained an arbitration clause, which provided that all disputes relating to the contract, arising out of either case law or statutory law, would be resolved by binding arbitration.⁷⁸ Rudolph later sued Green Tree on grounds that it violated the Truth in Lending Act ("TILA")⁷⁹ and Equal Credit Opportunity Act ("ECOA")⁸⁰ because Green Tree failed to disclose certain finance charges and by requiring her to arbitrate any statutory claims that might arise from the agreement.⁸¹

Rather than answering Rudolph's complaint, Green Tree filed a motion to compel arbitration, which the District Court granted.⁸² Rudolph appealed to the Eleventh Circuit, which deemed the District's ruling to compel as "final" under Section 16 of the FAA⁸³, and thus subject to appeal.⁸⁴ The Eleventh Circuit then considered Rudolph's claims, in particular that the arbitration clause violated her rights under TILA by failing to provide her minimum guarantees to vindicate her statutory claims, because the arbitration clause was "silent with respect to payment of filing fees, arbitrators' costs, and other arbitration expenses,"⁸⁵ and could result in Rudolph incurring "steep" arbitration costs.⁸⁶ The United States Supreme Court granted Rudolph's writ of certiorari, and affirmed the Eleventh Circuit's holding that the District Court's ruling to compel was "final" under Section 16 of the FAA, but reversed the Eleventh Circuit's holding that the lack of specificity in the arbitration

76. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942).

77. *Green Tree*, 531 U.S. at 82.

78. *Id.* at 82-83.

79. 15 U.S.C. § 1601 (2005).

80. 15 U.S.C. §§ 1691(a)-(e) (2005).

81. *Green Tree*, 531 U.S. at 83.

82. *Id.*

83. 9 U.S.C. § 16 (1994).

84. 9 U.S.C. § 16(a)(3) (1994).

85. *Green Tree*, 531 U.S. at 84.

86. *Id.*

clause regarding filing fees, arbitrators' costs, and other arbitration expenses made the arbitration unenforceable.⁸⁷

In considering whether the arbitration was unenforceable, the Supreme Court turned to Section 2 of the FAA, which states, in pertinent part, "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁸⁸ Taking that language, in conjunction with the Court's declaration in *Gilmer v. Interstate/Johnson Lane Corp.*,⁸⁹ which declared that the FAA's purpose was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts,"⁹⁰ the Court held that Rudolph was required to proceed to arbitration with Green Tree pursuant to the terms of their agreement.⁹¹ Demonstrating its strong inclination to uphold arbitration agreements, the Court held that arbitration is appropriate even in cases that involve claims arising under a statute that was passed to promote important social policies, such as TILA or ECOA.⁹² The dispute may be arbitrated, and the statute still serves its function, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum."⁹³

In another recent case, *Equal Employment Opportunity Commission v. Waffle House, Inc.*, the Supreme Court reaffirmed that the FAA was enacted to give effect to arbitration agreements, and to quell the hostility toward alternative dispute resolution that was inherited by the American judiciary from its English roots.⁹⁴ This case is particularly demonstrative of the Supreme Court's endorsement of arbitration. The Court

87. *Id.* at 89, 92.

88. 9 U.S.C. § 2 (1994).

89. *See Gilmer*, 500 U.S. at 24.

90. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000); *see also Gilmer*, 500 U.S. at 24.

91. *Green Tree*, 513 U.S. at 90.

92. *Id.*

93. *Id.* (citing *Gilmer*, 500 U.S. at 28).

94. *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *see also Circuit City Stores v. Adams*, 532 U.S. 105, 111 (2001).

held that the arbitral case could go forward, despite the contentions of the respondent, Waffle House, Inc., ("Waffle House") and the Fourth Circuit, who argued that that an Equal Employment Opportunity action such as this, which has bearing on broader public policy under the Americans with Disabilities Act of 1990 ("ADA"), should be adjudicated in a public forum rather than by private dispute resolution.⁹⁵ Essentially, the Court rejected the claim that because a case involving the ADA is not simply a private action to compensate an individual, but rather seeking to vindicate a public interest, the proper means of adjudication is through the courts.⁹⁶ Rather, the Court suggested that when parties choose arbitration, they resign the resolution of *any* dispute that may arise to the adjudicatory power of the arbitrator—regardless of whether it represents an individual or private dispute, or one promoting an important social policy.⁹⁷

Despite the long-standing policy that recognizes promotion of legitimate adjudication through arbitration, the Supreme Court has also alluded to the other policy outlined in section II.B of this article: efficiency. According to the Supreme Court in *Alexander v. Gardner-Denver Co.*, the FAA was enacted primarily to encourage efficient and expeditious dispute resolution, and arbitral findings are not as reliable as judicial findings resulting from litigation.⁹⁸

In *Alexander*, the plaintiff, an African American, filed a wrongful termination grievance against Gardner-Denver Company ("Gardner").⁹⁹ Pursuant to the controlling collective bargaining agreement, the grievance was referred to arbitration, and the arbitrator held that the plaintiff had been discharged for just cause.¹⁰⁰ The plaintiff filed an action for vacatur of the arbitrator's decision, which was dismissed by the district court, which held that the plaintiff was bound by the arbitrator's decision because he voluntarily pursued his claim in arbitration pursuant to the collective bargaining agreement.¹⁰¹ The Tenth Circuit affirmed the district court's holding, and the United

95. 42 U.S.C. § 12101 (2005).

96. *Waffle House*, 534 U.S. at 284-85.

97. *Id.* at 285.

98. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

99. *Id.* at 39.

100. *Id.* at 42.

101. *Id.* at 43.

States Supreme Court granted certiorari.¹⁰² The Supreme Court held, in contradiction to its current controlling policy interpretation, that the employee should be entitled to pursue his grievance in arbitration under the collective bargaining agreement as well as in the courts, under Title VII of the Civil Rights Act of 1964.¹⁰³ In so doing, the Supreme Court declared that arbitration is an informal procedure that “enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.”¹⁰⁴

While efficiency is indeed an attractive feature that arbitration has to offer, it seems to place the two policy arguments at odds with each other. If making arbitration agreements effective was the driving principle behind enacting the FAA, then a primary goal of efficiency would run counter to that policy. If arbitration is to endure as a legitimate, attractive alternative to traditional litigation in the courts, great weight must be given to the FAA policy giving arbitration agreements equal footing to other contracts, and providing for a legitimate means of dispute resolution on the merits of any particular dispute.

The Supreme Court’s decision in *Dean Witter Reynolds Inc. v. Byrd*, a 1985 case that specifically addressed the conflicting policy interpretations, echoes this contention.¹⁰⁵ In that case, the Court held, “[t]he House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs,’ . . . and to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.”¹⁰⁶ Thus, the Court declared that the conflict between the two policy arguments must be resolved in favor of the enforcement of agreements to arbitrate, promoting a legitimate forum for alternative dispute resolution.¹⁰⁷ Reasserting that claim, the Court wrote, “the preemi-

102. *Id.*

103. 42 U.S.C. § 2000(e) (2005).

104. *Alexander*, 415 U.S. at 58.

105. 470 U.S. 213 (1985).

106. *Id.* at 219; see also *Gilmer*, 500 U.S. at 24.

107. *Byrd*, 470 U.S. at 221.

ment concern of Congress in passing the Act was to enforce private agreements into which parties had entered¹⁰⁸

The Supreme Court has thus made it clear that the primary policy concern of the FAA is to give effect to arbitration agreements and provide legitimacy to the policy. Necessary to giving effect to arbitration agreements is affording each side adequate means to build its case. Thus, the primary concern is not to ensure efficient and expedient means for dispute resolution, although that may frequently be an attractive ancillary benefit.

B. *The Pre-Hearing Subpoena: Is There a Compelling Interest to Compel?*

In certain cases, particularly those involving a complex issue or a large volume of documentary evidence, some degree of pre-hearing discovery is necessary. As this article has already suggested, parties who enter into a private arbitration agreement under the FAA should reasonably expect that if a dispute should arise, each party will have the benefit of effective arbitration of their dispute. When Congress adopted the FAA, its goal was to enforce arbitration agreements so that an arbitral body could render a fair and well-reasoned award, on the merits.¹⁰⁹ Adding weight to this policy argument, the Supreme Court's holding in *Dean Witter Reynolds Inc. v. Byrd*,¹¹⁰ reaffirmed the policy favoring effectiveness and legitimacy in arbitration.¹¹¹ Disallowing arbitrators to subpoena non-parties for pre-hearing discovery would, in some cases, undercut that policy concern by precluding a party from making a clear and concise presentation of the facts and having their case properly decided on the merits by an arbitrator. Moreover, denial of pre-hearing discovery in the name of efficiency raises concerns about the legitimacy of the entire process.

For example, in *Security Life Insurance Company*, implicit in the Eighth Circuit's holding was the recognition that if it quashed the non-party, pre-hearing subpoenas, it would have deprived Security Life of a legitimate means of dispute resolu-

108. *Id.*

109. *Gilmer*, 500 U.S. at 24.

110. *Byrd*, 470 U.S. at 221.

111. *Id.*

tion.¹¹² Furthermore, the Court demonstrated that both policy interpretations of the FAA are not mutually exclusive, and it is possible to propound a hybrid reading of the statute, depending on the facts of each specific case. Indeed, if denied the opportunity to subpoena Transamerica, Security Life would be effectively precluded from gathering material facts and evidence, which were necessary for them to investigate Transamerica's non-payment of the reinsurance, and whether they could even proceed with their claim of malfeasance.¹¹³ If they could not effectively present their side of the case, they would not have enjoyed their contractual rights to a legitimate means of dispute resolution through arbitration set forth by the FAA.

Returning to the holding in *COMSAT*, where the Fourth Circuit declined to enforce the pre-hearing subpoenas at issue, but held in dicta that under certain circumstances, particularly where the requesting party demonstrates some "special need or hardship," a federal court may enforce a subpoena for pre-hearing discovery served on a non-party, there seems to be a certain degree of willingness on the part of the courts to allow pre-hearing subpoenas, even if only on a limited basis.¹¹⁴ By including that "special need or hardship" discussion, the *COMSAT* court recognized that there is always potential for certain circumstances to arise that call for such subpoenas to be enforced.¹¹⁵

According to Paul D. Friedland and Lucy Martinez, this particular issue can be reduced to three overarching principles.¹¹⁶ First, Friedland and Martinez contend that pre-hearing subpoenas should be the "exception, not the rule."¹¹⁷ This seems to fit within the "special need or hardship" exception suggested by the Fourth Circuit in *COMSAT*.¹¹⁸ Second, the first principle should not be construed to preclude the subpoena power entirely.¹¹⁹ Rather, "the arbitral system operates most

112. See *Sec. Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865, 870-71 (8th Cir. 2000).

113. *Id.* at 868.

114. *COMSAT*, 190 F.3d at 275.

115. *Id.* at 276.

116. Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197, 213-14 (2003).

117. *Id.*

118. *COMSAT*, 190 F.3d at 275-76.

119. See Friedland & Martinez, *supra* note 118, at 213.

effectively if arbitrators have the power to issue non-party discovery subpoenas where the circumstances warrant, and courts should permit arbitrators to decide in the first instance whether the exceptional circumstances justifying a discovery subpoena to a non-party are present.”¹²⁰ The second principle seems to be in line with the Sixth Circuit’s holding in *American Federation of Television & Radio Artists v. WJBK-TV*, that the issue of relevance is to be determined in the first instance by the arbitrator, and that it is not the function of the district court to determine what an arbitrator “would or should find relevant in resolving a dispute.”¹²¹ The third principle offered by Friedland and Martinez suggests that while the ambiguous language of “[s]ection 7 of the FAA cannot fully be accounted for . . . [it] can be interpreted to give flexibility to arbitrators, in a manner consistent with case law recognizing that powers may be read into the FAA by implication in order to account for the realities of arbitration.”¹²²

Based upon the controlling case law, and according to Friedland and Martinez, it seems that the language of the FAA is malleable enough to be interpreted to allow pre-hearing subpoenas upon non-parties, at least in special circumstances and at the discretion of the arbitrator who is familiar with the case.¹²³ There is, however, one important consideration that must be taken into account before such a proposition can be accepted.

C. *The 100 Mile Jurisdictional Boundary of Rule 45 of the Federal Rules of Civil Procedure: Should the Arbitrator (and the Parties to an Arbitration) Have a Longer Arm Than a Federal District Judge When Issuing Subpoenas?*

If arbitrators are allowed to issue subpoenas on non-parties under certain circumstances, specific limits on that power must be established. Because the FAA contains no such limiting language, some courts have held that an arbitrator’s subpoena

120. *Id.* at 213-14.

121. *Am. Fed’n of Television*, 164 F.3d at 1009-10.

122. See Friedland & Martinez, *supra* note 118, at 214.

123. *COMSAT*, 190 F.3d at 276; Friedland & Martinez, *supra* note 118, at 213-14.

power should be no greater than that of the federal district courts set forth in Rule 45 of the Federal Rules of Civil Procedure.¹²⁴ Using Rule 45 as a yardstick to measure an arbitrator's subpoena power on non-parties is both logical and fair. It uses a set of rules that is tried, true and familiar. It specifically defines the discovery power parties will have in a future arbitration, and places a lid on extreme or malicious tactics. Alarming, however, there are some cases in which the courts have held that Section 7 vests the arbitrator with broad and unlimited subpoena power, beyond that set forth in Rule 45.

In a recent case, *Matter of Trammochem v. A.P. Moller*, the District Court for the Southern District of New York held that Section 7 not only empowers an arbitrator to issue a pre-hearing subpoena upon non-parties, but also that, irrespective of Rule 45, such a subpoena may be issued nationwide.¹²⁵ In that case, A.P. Moller, a worldwide shipping company, issued a subpoena duces tecum upon Dynergy Midstream Services, LP ("Dynergy"), and a non-party to the arbitration.¹²⁶ The subpoena was issued by the arbitral panel, which was sitting within the jurisdiction of the Southern District of New York, and was served on Dynergy in Houston, Texas.¹²⁷ Dynergy refused to comply with the subpoena on the grounds that it was jurisdictionally improper. That refusal provoked parties on both sides of the arbitration, including Trammochem and A.P. Moller, to file a motion to compel compliance in the District Court for the Southern District of New York.¹²⁸

In their motion, the moving parties argued that, according to Section 7, there are "no territorial boundaries [that] restrict the service and compliance with subpoenas issued by arbitrators."¹²⁹ The Court agreed.¹³⁰ In so doing, it distinguished between a subpoena issued by a court, which must be issued

124. See FED. R. CIV. P. 45 (e). See, e.g., *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 F. App'x. 26 (3d Cir. 2002).

125. See *Trammochem Div. of Transammonia, Indem. Ins. Co. of N. Am. v. A.P. Moller*, 05 Misc. M8-85, 2005 U.S. Dist. LEXIS 11544 (S.D.N.Y. June 15, 2005) (

126. *Id.* at *2.

127. *Id.* at *2-*3.

128. *Id.* at *3.

129. *Id.* at *4.

130. *Id.* at *1.

within the bounds set forth in Rule 45, and a subpoena issued by an arbitrator, to which Rule 45 does not apply.¹³¹ It reasoned, “[h]ad Congress intended to restrict arbitrators’ authority to issue a subpoena duces tecum to those enumerated in the Federal Rules of Civil Procedure, as it does the courts, the FAA would have explicitly included such language.”¹³² It continues, “Section 7 implicitly grants arbitrators greater authority to issue subpoenas than it does this Court.”¹³³ Quoting *Integrity Ins. v. American Centennial Ins.*,¹³⁴ the court continued, “[s]uch authority is commensurate with the intended purpose of the FAA,”¹³⁵ “to facilitate and expedite the resolution of disputes, ease court congestion, and provide disputants with a less costly alternative to litigation.”¹³⁶

The holding in *Trammochem* is troubling. It is difficult to explain the Court’s eagerness to endorse such a broad subpoena power. It is apparent that the Court was driven by three goals: to promote efficiency, to divert cases from the courts, and to provide a cheaper means of dispute resolution. However, by vesting this sort of “super subpoena power” in an arbitrator, the Court accomplished the opposite of all three goals.

First, the Court’s decision to ignore Rule 45 is illogical. It allows a district court to enforce a subpoena issued in the context of an arbitration that it would not be allowed to enforce if the case was actually being litigated before it. Second, such a holding is likely to increase motion practice contesting the outcome of a particular arbitration. That, in turn, would make arbitration a less efficient process, and make it more like traditional litigation—the very thing the parties wished to avoid by agreeing to arbitration in the first place, and one of the consequences Congress sought to avoid by creating the FAA.¹³⁷ Finally, such a holding could potentially increase the litigation

131. *Id.* at *8, *9.

132. *Id.* at *9-*10.

133. *Id.* at *10.

134. *Integrity Ins. v. Am. Centennial Ins.*, 885 F. Supp. 69, 72 (S.D.N.Y. 1995).

135. *Trammochem*, 2005 U.S. Dist. LEXIS 11544, at *10.

136. *Integrity*, 885 F. Supp. 72.

137. H.R. REP. NO. 68-96, at 2 (1924) (stating that one goal of the FAA was to provide an alternative means for dispute resolution that can be expeditious, efficient and economically viable).

related to arbitration as parties increasingly seek to enforce non-party subpoenas in court. Each time a party runs into court with a motion to enforce, the arbitration process is delayed and the courts are unduly burdened. Moreover, allowing parties to appeal to the local district court to enforce things normally within the jurisdiction of the arbitrator undercuts the legitimacy of the arbitral award. Doing so demonstrates the courts' lack of faith in arbitration.

Notwithstanding the illogical nature of the holding, it is also unfair on several levels. Foremost, it is unfair to the parties to the arbitration. Giving arbitrators vast subpoena power enables parties to embark on "fishing expeditions" to dig up evidence they would not otherwise have been able to access. Such a vast and far reaching power vested in the arbitrator could be used as a tactical device to issue burdensome requests designed to bleed the opponent's resources dry.

It is also unfair to the non-party upon which the subpoena is served. A party located in Texas, as was the case for *Dynergy*,¹³⁸ could not possibly be on notice that some day it could be haled by a court hundreds of miles away, and therefore would be overly burdensome on an otherwise disinterested and separate entity. Indeed, such exposure could make parties reluctant to do business with other corporations or individuals who include arbitration clauses in their business agreements – the simple process of doing business would exponentially expose otherwise disinterested parties to the risk of being compelled to produce documents and to travel great distances to testify at proceedings in which they are minimally involved, peripheral players.

Not surprisingly, the *Trammochem* ruling was appealed and overturned by the Second Circuit.¹³⁹ In so holding, the Second Circuit sounded in accord with the fairness analysis above, stating "[h]aving made one choice for their own convenience, the parties should not be permitted to stretch the law beyond the text of Section 7 and Rule 45 to inconvenience witnesses."¹⁴⁰ The Court continued, "[Dynergy] is not a party to the [arbitration agreement], and not even the strong federal policy favoring

138. *Trammochem*, 2005 U.S. Dist. LEXIS 11544, at *1.

139. *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89 (2d Cir. 2006).

140. *Id.* at 96.

arbitration can lead to jurisdiction over a non-party without some basis in federal law.”¹⁴¹

D. *An Attractive Alternative to Rule 45 of the Federal Rules of Civil Procedure for District Courts to Use in Finding Jurisdiction to Enforce a Pre-Hearing Subpoena on Non-Parties*

One reasonable alternative to implementing the 100-mile boundary set forth in Rule 45, which would recognize that arbitration often involves parties and non-parties that are located far away, is a particularly workable five-part test set forth by Cathleen A. Roach, which was developed as part of her proposed alternative to Rule 45 of the Federal Rules of Civil Procedure.¹⁴² Roach suggests that even for litigation, Rule 45 and its 100-mile boundary is archaic in the modern world.¹⁴³ She notes that strict adherence to Rule 45 can lead to absurd results, decreased judicial efficiency, outrageous costs and unwarranted burdens upon the federal district courts,¹⁴⁴ such as the effect of the *Trammochem* decision that effectively sidestepped Rule 45 in deciding it had the jurisdiction to enforce A.P. Moller’s subpoena.¹⁴⁵

Recognizing that the rules of discovery must change as society changes, technology increases, and the virtual “distance” between businesses and individuals who interact is shrinking thanks to those advances, Roach proposed the following five-part test to be considered by a district court when petitioned to enforce a subpoena:

- 1) To distinguish between types of witnesses (party or non-party) and types of litigation (complex single district and multidistrict litigation or simpler diversity actions); 2) to acknowledge that certain types of litigation may benefit more from live testimony and cross-examination than other types of litigation; 3) to provide fed-

141. *Id.*

142. Cathleen A. Roach, *It’s Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81, 113 (1990) (although this five-part test was developed with reformation of Rule 45 in mind, it squarely addresses many of the issues related to arbitration under the same compass of procedural law).

143. *Id.*

144. *Id.* at 90, 95.

145. *Trammochem*, 2005 U.S. Dist. LEXIS 11544, at *8-*9.

eral courts with nationwide trial subpoena power for three categories of witnesses—multidistrict litigation party witnesses, multidistrict litigation non-party witnesses, and single district litigation party witnesses; 4) to retain satellite testimony as an option for any of the four categories of witnesses, subject to a proper showing of necessity; and 5) to maintain a fairness element by authorizing the court to conduct a balancing test in order to deny or vacate a subpoena when undue hardship to the witness is shown.¹⁴⁶

Of course, in the case of arbitral subpoenas on non-parties, Roach's proposal would have to be amended to eliminate the first step because the test in such cases would only concern subpoenas issued upon non-parties to the arbitration. Roach's second step is readily applicable to the "special need or hardship" situation anticipated by the Fourth Circuit in *COMSAT*.¹⁴⁷ Steps three and four under Roach's proposed framework match well with both policy considerations – in one sense, giving the district court the flexibility needed to determine whether a particular witness is so important as to warrant an order to compel production to preserve the effectiveness of the arbitration, or, in the alternative, allowing the court to refrain from compelling production of documents that are deemed too inconsequential or unnecessary to justify the potential delay in the arbitration. Finally, Roach's fifth step would allow the district court to balance the two policy considerations with the particular facts of each case, which could help avoid arbitrary or unexplained orders to compel.

Of course, the decision whether to compel a pre-hearing subpoena upon a non-party should be the arbitrator's in the first place. Heeding the Sixth Circuit's concern in *American Federation of Television & Radio Artists v. WJBK-TV*,¹⁴⁸ the district court should yield with great deference to the arbitrator's decision to either issue or deny the non-party subpoena. The decision of whether or not the materials sought via subpoena are relevant or material to an arbitrator's ability to render a decision in the arbitration is wholly within the scope of the arbitrator's role.

146. Roach, *supra* note 142, at 113.

147. *COMSAT*, 190 F.3d at 269.

148. *Am. Fed'n of Television*, 164 F.3d at 1010.

Nevertheless, Roach's test sets forth an adaptable, fair and reasonable framework for the district courts to use in those cases where the arbitrators decision to either issue or deny the non-party subpoena is challenged by one of the parties. The test is flexible enough to allow the district courts to examine the facts and circumstances of each particular petition to compel non-party, pre-hearing subpoenas, while allowing the district court a means to quickly resolve whether it would be proper to enforce. More importantly, the test allows the district court to consider the two policy principles driving the FAA, giving weight and legitimacy to the arbitration process as an alternative means of dispute resolution, and efficiency, which is, of course, a major factor when parties decide to include an arbitration clause in their contract.

IV. Conclusion

While pre-hearing subpoenas issued upon non-parties prior to an arbitral hearing may be appropriate under certain circumstances in particular cases, given the policy considerations of the FAA as well as recent Supreme Court decisions, a new system must be developed (such as the five-part test proposed in III.D) that can be used by the district courts in deciding whether to compel such subpoenas. While each individual case presents different issues and discrete nuances, it seems that arbitral subpoenas issued on non-parties for pre-hearing discovery should not become common practice. Rather, arbitrators should issue such subpoenas after weighing the value of the evidence against the language of Section 7 and the dual policy purposes of the FAA. This weighing test must be conducted in such a way that the unique facts of the particular case can be applied to the analysis so that the arbitrator can make an informed decision that does not undermine the arbitral process.

In spite of the ambiguity of the FAA and the uncertainty demonstrated by the split in the circuit courts, one observation is clear. Regardless of how such a new system will operate, and irrespective of which argument such a new system favors, it must provide a clear and practical standard that is readily applicable at the trial court level. This will ensure consistency and, hopefully, promote the existing policy promoting the utilization of arbitration as a means for dispute resolution.