Arbitral Discovery of Non-Parties

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I. INTRODUCTION

The discovery of relevant information is a vital part of arbitration, as it is with any dispute resolution process. Parties in arbitration need to gather the relevant information to present their best case to the arbitrator. Access to the relevant information enables the arbitrator to better render a just decision. The Federal Arbitration Act (hereinafter FAA), which authorizes specific enforcement of arbitration agreements,[1] also contains language dealing with the power of arbitrators to order discovery.[2] This language gives force to the arbitrator's discovery orders, whereas otherwise there would be none.

The federal courts are, however, split regarding the scope of these powers when one party seeks discovery of a non-party.[3] The Fourth Circuit Court of Appeals and the United States District Court for the Southern District of New York have limited arbitrators' power to compel non-party participation to the actual hearing. On the other hand, three federal district courts give arbitrators broad discovery powers, including the ability to compel non-parties to participate in pre-hearing discovery.

This article argues that the broad power approach is the better reasoned of the two. Timely discovery of important information is vital in any dispute. Further, fair results should be the goal of any dispute resolution process. The possessor of the pertinent information, i.e., whether it is held by parties or non-parties, should be irrelevant.

Part II of this article describes the differences between discovery in litigation and discovery in arbitration. Part III examines the limited power approach to pre-hearing discovery, which restricts the power of an arbitrator to compel non-party participation in discovery to the actual hearing. Part IV examines the broad power approach, which gives arbitrators the power to compel non-parties to participate in pre-hearing discovery. Part V analyzes each approach, highlighting the weaknesses of the limited power approach and the strengths of the broad power approach. Part VI proposes that courts adopt the broad power approach. Recognizing, however,

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1. 9 U.S.C. §§ 1-16 (1994).

2. *Id.* § 7.

3. *See generally Natl. Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 188 (2d Cir. 1999) (noting but not resolving the split of authority); *Am. Fedn. of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 n.7 (6th Cir. 1999) (noting, but not resolving, the issue); Robert E. Benson, *The Power of Arbitrators and Courts to Order Discovery in Arbitration*, 25 Colo. Law. 55, 59 (1996); Teresa Snider, *The Discovery Powers of Arbitrators and Federal Courts Under the Federal Arbitration Act*, 34 Tort & Ins. L.J. 101, 114 (1998); Charlotte Warr et al., *Recent Developments in International Tort and Insurance Law and Practice*, 35 Tort & Ins. L.J. 435, 454 (2000).

that the advantages of arbitration over litigation derive in large part from the curtailing of discovery, Part VI also proposes that arbitrators be given the discretion to limit non-party discovery as they deem appropriate.

II. BACKGROUND

The discovery powers of the courts in conventional litigation and the powers of arbitrators are very different. Parties to a civil suit in federal court are afforded broad discovery under the Federal Rules of Civil Procedure. Conversely, with arbitration, broad discovery is less certain since arbitral rules are contractual and are established by the parties themselves. The discovery powers of the courts, and the discovery powers of arbitrators, are discussed in turn.

A. Discovery Powers of the Courts in Litigation

The Federal Rules of Civil Procedure control the process of discovery in all civil trials in the federal courts.[4] One goal of these Rules is to provide for broad discovery.[5] The United States Supreme Court endorsed broad discovery in the case of *Hickman v. Taylor*,[6] as illustrated by the oft quoted language of Justice Murphy: "Civil trials no longer need be carried on in the dark. The way is now clear for the parties to obtain the fullest possible knowledge of the issues and the facts before trial."[7] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.[8]

An important component of the availability of broad discovery powers is the ability of the parties (through the courts) to compel pre-trial, non-party participation. Rule 26(b)(1) permits discovery of any information relevant to the claim or defense of a case that is not privileged.[9] Rule 30(b)(1) allows the parties to schedule depositions upon providing reasonable notice.[10] Rule 45 permits a party to compel a non-party to participate in these depositions through the use of subpoenas.[11] Further, Rule 30(b)(5) allows parties to compel non-parties to provide any pertinent documents they might have in their possession.[12] These non-party discovery orders are enforced with the full power of the court. The failure of a non-party to participate in discovery can lead to that non-party being in contempt of court, and subject to various penalties.[13]

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4. Fed. R. Civ. P. 1 (2001).
5. Fed. R. Civ. P. 26(b)(1) (2001).
6. 329 U.S. 495 (1947).
7. *Id.* at 501.
8. *Id.* at 506. *See e.g. Roebling v. Anderson*, 257 F.2d 615, 620 (D.C. Cir. 1958); *Crowe v. Chesapeake & O. Ry. Co.*, 29 F.R.D. 148, 150 (E.D. Mich. 1961); *U.S. v. Meyer*, 398 F.2d 66, 72 (9th Cir. 1968) (quoting the policy of broad discovery endorsed in *Hickman*).
9. Fed. R. Civ. P. 26(b)(1).
10. Fed. R. Civ. P. 30(b)(1) (2001).
11. Fed. R. Civ. P. 45 (2001).
12. Fed. R. Civ. P. 30(b)(5).
13. Fed. R. Civ. P. 45(e).

These broad discovery powers are illustrated by the case of *Truswal Systems Corporation v. Hydro-Air Engineering, Inc.*[14] Truswal sued Gang-Nails Systems for infringement on Truswal's patent.[15] Truswal accused Hydro-Air of the same infringements, but could not sue Hydro-Air in its case against Gang-Nails because of venue statutes.[16] Part of Truswal's pre-trial discovery involved a court-issued subpoena asking that Hydro-Air designate a spokesperson to testify, and also to produce documents.[17] Hydro-Air moved to quash on ground that the request was unlikely to result in the discovery of pertinent information in Truswal's suit against Gang-Nails.[18] The Eighth Circuit, affirming the trial court's discovery order, ruled that in cases where the relevance of the evidence may be in doubt, all doubts should be resolved in favor of disclosure.[19]

In addition to providing for broad discovery of parties and non-parties alike, the Rules also contain procedural safeguards designed to protect non-parties from overly burdensome discovery. Rule 45(c)(3)(A)(ii) requires that subpoenas to non-parties be quashed if they impose undue burdens regarding the time and expense involved in travel.[20] Similarly, Rule 26(c) provides the courts with ample discretion to balance competing interests, such as burden on the non-party and availability of information elsewhere. Protective orders can be issued by the court to protect the non-party if necessary.[21] In some cases, Rule 26(c)(2) gives the courts the power to compel the party seeking discovery to reimburse the non-party for expenses.[22]

The *Hydro-Air* case and the Federal Rules themselves reflect the broad power approach federal courts consistently take with regard to pre-trial discovery of non-parties. Unlike conventional litigation however, arbitration is contractual as well as statutory. Therefore, the rules governing discovery in arbitration are likely to vary with each case.[23]

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14. 813 F.2d 1207 (8th Cir. 1987).
15. *Id.* at 1208.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1212. *See e.g. Heat & Control, Inc. v. Hester Indus. Inc.*, 785 F.2d 1017, 1024 (4th Cir. 1986) (explaining that relevance is a broader term when dealing with discovery matters as compared to relevance for trial and stating that where relevance is in doubt, courts should be permissive in allowing the discovery); *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 566 (7th Cir. 1984) (interpreting the federal rules governing discovery as permitting the broadest possible scope of discovery).
20. Fed. R. Civ. P. 45(c)(3)(A)(ii).
21. Fed. R. Civ. P. 26(c).
22. Fed. R. Civ. P. 26(c)(2).
23. *See Republic of Kazakhstan v. Biedermann Intl.*, 168 F.3d 880, 883 (5th Cir. 1999) ("[A]s a creature of contract, both the substance and procedure for arbitration can be agreed upon in advance. The parties 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").

B. Discovery Powers of Arbitrators

In arbitration, the parties themselves are allowed to set the rules concerning the discovery phase of the dispute.[24] The case of *Williams v. Kattin* is an example.[25] In *Williams*, the appellant sought to vacate an arbitrator's award.[26] The appellant sought to do so on the basis that the arbitrator erroneously deprived her of the right to discover relevant information.[27] The Federal District Court for the Northern District of Illinois disagreed, noting that American Arbitration Association rules governing discovery had been incorporated into the arbitration agreement.[28] Those rules allow arbitrators to subpoena witnesses and documents, but leave the scope of discovery to the arbitrator's discretion.[29] The mere fact that Williams was not able to discover information she had hoped for was irrelevant.[30] A consequence of the arbitration agreement was that the parties had "traded" the guarantees of conventional discovery for the expedience of arbitration.[31]

The nature of arbitration is thus contractual. Parties to arbitration agree between themselves what the ground rules will be.[32] The power of discovery given to an arbitrator is limited to those powers given by the parties. Obviously, non-parties are not bound by this agreement. The arbitrator's power over non-parties must therefore come from another source.

The power to compel non-party participation is derived from the FAA.[33] The FAA attempts to preserve the contractual nature of arbitration. In addition to providing the baseline legal rules governing arbitration, the statute governs in areas where the parties have failed to agree, or where the agreement would be ineffective without assistance from the courts.[34] Since non-parties are not bound by the underlying arbitration agreement, an arbitrator has no power to compel non-party participation in discovery absent authority derived from the FAA.[35]

The FAA, in addition to applying in the federal court system, also applies in state courts.[36] In *Circuit City Stores, Inc. v. Adams*, the United States Supreme Court addressed the intended scope of the FAA.[37] The Court referred to its holding

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24. *See Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd.*, 879 F. Supp. 878, 883 (N.D. Ill. 1995).
25. 1996 WL 717447 (N.D. Ill. Dec. 9, 1996).
26. *Id.* at *2.
27. *Id.*
28. *Id.* at *4.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Biedermann*, 168 F.3d at 883.
33. 9 U.S.C. §§ 1-16; *see COMSAT v. Natl. Science Found.*, 190 F.3d 269, 275 (4th Cir. 1999).
34. Benson, *supra* n. 3, at 55.
35. *COMSAT*, 190 F.3d at 275.
36. *See e.g. Merrill, Lynch, Pierce, Fenner, & Smith, Inc. v. Melamed*, 405 S.2d 790, 793 (Fla. App. 1981); *R. J. Palmer Const. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127, 129 (Kan. App. 1982) ("The Federal Arbitration Act applies in state courts as well as federal, and the act requires state courts to enforce an applicable arbitration clause despite contrary state law or policy").
37. 121 S. Ct. 1302 (2001) (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)); *see Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the language in the FAA enforcing written arbitration provision in "a contract evidencing a transaction involving commerce," was written broadly extending the FAA's reach to the far limits of Congress' commerce clause power). *See also* 9

in *Southland Corp. v. Keating*, stating that "Congress intended the FAA to apply in state courts, and to preempt state anti-arbitration laws to the contrary."[38] It is evident then that not only is the FAA applicable to the state courts, but state laws contrary to the objective of the FAA are preempted.[39] The FAA's impact is therefore far-reaching.

Section 7 of the FAA provides, "the arbitrators selected . . . may summon in writing any person to attend before them . . . 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."[40] Courts agree that this language confers authority only on *arbitrators*; the *parties* to an arbitration agreement may not use this provision to subpoena documents or witnesses.[41]

Most courts agree that arbitrators may compel non-party participation in discovery at the actual hearing.[42] The federal courts are, however, split when it comes to the power of an arbitrator to compel non-party participation in discovery before the hearing. Some courts take a limited power approach, exemplified by *COMSAT*.[43] Other courts take a broad power approach, as in *Stanton v. Paine Webber Jackson & Curtis Inc.*[44] The two approaches are discussed in turn.

III. THE LIMITED POWER APPROACH TO ARBITRAL DISCOVERY

The courts adhering to the limited power approach provide two basic rationales for their decisions. One rationale is based on a textual interpretation of the FAA. The second rationale is based on contract law principles. The two rationales are discussed in sequence.

U.S.C. § 1.

38. *Adams*, 121 S. Ct. at 1305 (citing *Southland Corp. v. Keating*, 465 U.S. 1).

39. *Id.*

40. 9 U.S.C. § 7.

41. *Natl. Broad. Co. v.Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (distinguishing section seven of the FAA from 28 U.S.C. § 1782 (1994)); *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) ("While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege"); Beth H. Friedman, *The Preclusive Effect of Arbitral Determinations in Subsequent Federal Securities Litigation*, 55 Fordham L. Rev. 655, 672 n.126 (1987) ("While an arbitration panel has the power to subpoena documents or witnesses, the parties to the arbitration lack the advantage of discovery").

42. *See generally COMSAT*, 190 F.3d at 276 (limiting arbitrator's power over non-parties to the actual appearance before the arbitrators); *In re Arb. Brazell*, 2000 WL 364997 at *1 (S.D.N.Y. Apr. 7, 2000) (distinguishing the availability of discovery on non-parties before the arbitration hearing and at the arbitration hearing); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995) (limiting the compelling of the presence of non-party witnesses to the actual hearing); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44 (M.D. Tenn. 1994) (explaining that arbitrator could clearly compel non-parties to appear or produce documents at the hearing).

43. *COMSAT*, 190 F.3d 269.

44. 685 F. Supp. 1241 (S.D. Fla. 1988).

A. The Textual Rationale

The Fourth Circuit Court of Appeals and the United States District Court for the Southern District of New York have adhered to this limited power approach concerning the subpoena powers of arbitrators. In *COMSAT*, the plaintiff COMSAT contracted with Associated Universities, Incorporated (AUI), to build a state-of-the art telescope for AUI.[45] The National Science Foundation (NSF) was a government sponsor of AUI's research projects.[46] A dispute arose between COMSAT and AUI regarding unexpected costs associated with the telescope.[47] There was a mandatory arbitration clause between COMSAT and AUI.[48] Before the hearing and at COMSAT's request, the arbitrator subpoenaed NSF requesting documents related to the telescope, but NSF refused to comply.[49]

Following NSF's refusal to comply, COMSAT petitioned the United States District Court for the Eastern District of Virginia to compel NSF to produce the requested documents.[50] The district court interpreted the FAA as granting broad powers of discovery to arbitrators.[51] Further, NSF had failed to seek judicial relief from the subpoenas in a timely manner.[52] The district court ruled in favor of COMSAT and ordered NSF to comply. NSF then appealed.[53]

The Fourth Circuit Court of Appeals reversed and held the subpoena powers of an arbitrator should be strictly limited to those explicitly provided in the FAA. The court emphasized section seven of the FAA, which provides that "[a]rbitrators . . . may summon in writing any person to appear before them . . . as a witness . . . and to bring with him or them any book, record, document, or paper which may be deemed material."[54] According to the Fourth Circuit, the words "before them" meant before the arbitrator at the hearing, and not during any pre-hearing discovery.[55] Coupling this language along with the absence of any expressly stated authority to compel pre-hearing discovery on non-parties, the Fourth Circuit limited the arbitrator's power over non-parties to the actual hearing.[56]

In addition to the textualist reading the Fourth Circuit gave to the FAA, the court offered another reason as to why the power should be limited. The court concluded that parties in arbitration have essentially waived their right to rely on the discovery devices available in conventional litigation.[57] This is part of the price the parties paid in exchange for a less expensive and more efficient means of dispute resolution.[58] Often, discovery can be very lengthy and expensive, which is contrary to the purpose

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45. *COMSAT*, 190 F.3d at 272.
46. *Id.* at 271.
47. *Id.* at 272.
48. *Id.*
49. *Id.*
50. *Id.* at 273.
51. *Id.* at 274.
52. *Id.*
53. *Id.*
54. *Id.* at 275.
55. *Id.*
56. *Id.*
57. *Id.* at 276.
58. *Id.*

of arbitration.[59] The court therefore concluded that neither party to an arbitration agreement may expect full-blown discovery from third parties, or even from each other, in arbitration.[60]

The Fourth Circuit did not, however, impose a blanket rule prohibiting non-party discovery in arbitration. Instead, the court stated that there could be cases where "special needs" would require an exception to the general rule prohibiting discovery.[61] In these cases, the Fourth Circuit stated, the party seeking discovery should petition the district court for a discovery subpoena. The Fourth Circuit did not attempt to define what might constitute a special need, but noted that at an absolute minimum, a party would need to show an inability to get that information elsewhere.[62] The court did not explain what, if anything, else would have to be shown to meet the "special needs" exception.

B. The Contract Rationale

The Federal District Court for the Southern District of New York offered an additional rationale for the limited power approach. In *Integrity Insurance Co. v. American Centennial Insurance Co.*, the court looked to the contractual nature of the arbitration proceeding.[63] Since non-parties never bargained for the arbitration agreement, nor agreed to participate in the arbitration proceedings, the non-parties should not be compelled to participate in pre-hearing discovery.[64] The parties themselves could not compel non-parties to participate, and likewise they could not grant that power to the arbitrator.[65] The arbitrator's discovery power over non-parties is therefore derived exclusively from the FAA, which, according to this court, limits that power to the arbitration hearing.[66]

The *Integrity* court was also fearful of potential harassing and abusive discovery on non-parties.[67] Pre-hearing depositions would not be held in the presence of the arbitrator, whereas testimony presented at the hearing permits the arbitrator to protect the interests of the non-party and serve as a "check" on the two sides.[68] If a non-party felt harassed at a pre-hearing deposition, the party likely would look to the courts for relief.[69] This, reasoned the court, would defeat the purpose of arbitration, which is to resolve the dispute outside of the courtroom.[70] The court then concluded that pre-hearing depositions of non-parties should not be permitted in arbitration proceedings.

Unlike the Fourth Circuit, however, the *Integrity* court permitted pre-hearing *paper* discovery from non-parties. The court distinguished what would be involved

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59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. 885 F. Supp. 69, 73 (S.D.N.Y. 1995).
64. *Id.*
65. *Id.* at 71.
66. *Id.*
67. *Id.* at 73.
68. *Id.*
69. *Id.*
70. *Id.*

in compelling non-parties to submit to depositions, from that of ordering non-parties to produce pertinent documents.[71] The court stated that a document would only have to be produced once, whereas a deposition requiring the non-party's presence might need to be taken on more than one occasion.[72] The difference lay in the potential burden on the non-party.[73] The rule then in the Southern District of New York seems to be that arbitrators may compel non-parties to provide documents prior to a hearing, but may not order non-parties to submit to depositions.[74]

At least one legal scholar, Robert Benson, has criticized this distinction. Benson has pointed out that nothing in the FAA authorizes either the compelled attendance of non-parties or the production of documents prior to the actual hearing.[75] He argues that if the Fourth Circuit's textualist interpretation is to be applied consistently, neither depositions nor document productions should be permitted.[76]

The courts adopting the limited power approach have left arbitrators with little discovery power over non-parties. If information is held by non-parties, compelled discovery will have to wait until the scheduled hearing. However, not all federal courts have interpreted the FAA this way.

IV. THE BROAD POWER APPROACH TO ARBITRAL DISCOVERY

In contrast to the limited power courts, other courts have given arbitrators much more freedom in compelling non-party participation in discovery. Three federal district courts have adopted the broad power approach when it comes to the availability of pre-hearing discovery. In these jurisdictions, discovery of information held by non-parties is not limited to the actual hearing.

A. Deference to Arbitrator's Discretion

The broad power approach is exemplified by the case of *Stanton v. Paine Webber Jackson & Curtis Inc.*[77] In that case, Richard Stanton sued various defendants alleging violations of the Commodities Exchange Act and other securities laws.[78] Upon a motion filed by the defendants, the United States District Court for the Southern District of Florida ordered arbitration pursuant to the FAA and an

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71. *Id.*
72. *Id.*
73. *Id.*
74. *See In re Arb. Brazell*, 2000 WL 364997 at *3 (permitting pre-hearing document production of non-party); *but see In re Application of Medway Power Ltd.*, 985 F. Supp. 402, 404 (S.D.N.Y. 1997) (implying in dicta that document production of non-parties would not be available in American arbitration proceedings); *Frenkel v. Old Dominion Dairy Prods. Inc.*, 398 N.Y.S.2d 816, 817, 91 Misc.2d 849, 851 (N.Y. App. Div. 1977) (denying pre-hearing deposition of non-party because state law standard, which permitted discovery in aid of arbitration "only upon a showing of extraordinary circumstances," had not been met); *Commonwealth Ins. Co. v. Beneficial Corp.*, 1987 WL 17951 at *5 (S.D.N.Y. Sept. 29, 1987) (stating in dicta that the FAA gives arbitrators "a subpoena power which extends over non-parties as well as parties, and may in appropriate circumstances compel the production of documents and discovery").
75. Benson, *supra* n. 3, at 58.
76. *Id.*
77. 685 F. Supp. 1241 (S.D. Fla. 1988).
78. *Id.* at 1242.

arbitration agreement the parties had signed.[79] The various defendants then requested documents from non-parties before the hearing, hoping the documents would disprove Stanton's allegations.[80] Stanton then sought an injunction to prevent this discovery, claiming that the FAA limited discovery on non-parties to the actual hearing.[81]

The district court denied Stanton's request for an injunction and held that an arbitrator "may order and conduct such discovery as [the arbitrator] find[s] necessary."[82] The court rejected Stanton's contention that arbitrators were limited under the FAA to compelling non-party participation at the hearing, saying that such an allegation was "unfounded."[83] Unfortunately, the district court gave no reasons as to exactly why it was unfounded.

The court did, however, give strong weight to the overall purpose of the FAA. The purpose of the arbitration was to "facilitate and expedite the resolution of disputes, ease court congestion, and provide disputants with a less costly alternative to litigation."[84] The court reasoned, therefore, that judicial control over the proceedings should be kept to a minimum.[85]

B. Textualist Inference of Broad Powers

Similarly, the United States District Court for the Middle District of Tennessee conferred broad powers on arbitrators in the case of *Meadows Indemnity Co. v. Nutmeg Ins. Co.*[86] In addition to citing *Stanton* as authority, the court offered two additional rationales.[87] First, the court found that non-party discovery was vital for the arbitrator to be able to make a full and fair determination of the issues in the dispute.[88] Second, the court held that because the arbitrator had the statutory authority to compel non-parties to appear or produce documents at the hearing, the arbitrator implicitly had the power to do the same prior to the hearing through discovery.[89] This court also expressed a willingness to defer to the arbitrator's judgment in weighing the potential burdens and benefits of pre-hearing discovery.[90]

The *Meadows* decision illustrates the three key issues that divide the broad-power courts from the limited-power courts. The first is that the broad-power courts consider broad discovery an integral part of a fair dispute resolution process; the limited-power courts see discovery as less important. Second, the broad-power courts interpret section seven of the FAA as permitting arbitrators to order non-party

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79. *Id.*
80. *Id.*
81. *Id.*
82. *Id. See also Miss. Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558, 564 (S.D. Miss. 1976) (explaining that arbitrators may, in their discretion, permit and supervise discovery as they deem appropriate).
83. *Stanton*, 685 F. Supp. at 1243.
84. *Id.* at 1242.
85. *Id.*
86. 157 F.R.D. 42 (M.D. Tenn. 1994).
87. *Id.* at 45.
88. *Id.*
89. *Id.*
90. *Id.* at 44-45.

discovery; the limited-power courts interpret section seven as prohibiting arbitrators from ordering such discovery. Third, the broad-power courts express confidence in arbitrators' ability to balance the need for non-party discovery against the arbitral goal of resolving disputes quickly and inexpensively; the limited-power courts assume that by permitting non-party discovery, arbitration will devolve into the very process (litigation) that it was designed to replace.

C. Broad Discovery by Agreement

Still another example of broad discovery of non-parties in arbitration is found in *Amgen*, from the United States District Court for the Northern District of Illinois.[91] The parties in this case had signed an arbitration agreement and had agreed that the Federal Rules of Civil Procedure would govern the arbitral discovery process.[92] The court held that the parties had agreed to the broad discovery requirements of the Federal Rules, including the provisions permitting non-party discovery. The court cited both *Stanton* and *Meadows* in its opinion and concluded that the FAA permits an arbitrator to compel non-party participation in pre-hearing discovery.[93] Since the language of the FAA permitted pre-hearing discovery, and because the Federal Rules provided for a policy of broad discovery, the arbitrator's subpoenas to the non-parties were valid and enforceable.[94]

The rationale of these courts indicates a willingness to defer to the judgment of the arbitrator in ordering the proper amount of discovery.[95] Information held by non-parties that is deemed relevant by the arbitrator should be discoverable to ensure fair outcomes. These courts see the arbitrators as capable decision-makers when it comes to weighing the benefits versus the burdens of non-party discovery.[96]

V. ANALYSIS OF THE CONFLICTING APPROACHES

The main difference between the two approaches of the circuits seems to be a difference in interpreting section seven of the FAA. Some courts have strictly limited the words "before them" to mean that non-parties can be compelled to participate in discovery only at the arbitration hearing. Pre-hearing discovery of non-parties therefore is limited or nonexistent. Other courts have allowed broad discovery based upon implied authority within the FAA. This latter group of decisions permits arbitrators to make informed judgments about what discovery is necessary for a fair result. If a non-party holds that information, the information is discoverable at or before the hearing.

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91. 879 F. Supp. 878.
92. *Id.* at 881 n. 2.
93. *Id.* at 880.
94. *Id.*
95. *See Stanton*, 685 F. Supp. at 1242 (explaining that judicial interference with arbitrator's decisions would undermine the purposes of arbitration which is a quick resolution of the dispute); *Meadows*, 157 F.R.D. at 45 (holding that arbitrator's discovery orders on non-parties was entirely reasonable and saying that such orders must be enforced or else risk hampering the arbitrator's ability to deal with complex cases).
96. *See Stanton*, 685 F. Supp. at 1242; *Meadows*, 157 F.R.D. at 45.

Of the two approaches, the broad-power approach is the better reasoned. As the *Stanton* court stated, the purpose of arbitration is to provide a quick, efficient, and fair resolution of disputes.[97] An important element of fairness is that the parties should have the ability to discover the important information regarding the case.

A. Weaknesses of the Limited Power Approach

There are three weaknesses of the limited-power approach. First, it compromises the ability of arbitration to result in fair outcomes because it denies parties the ability to discover facts before the hearing that may be essential to preparing and proving their case. Imagine a dispute involving the most elementary set of facts, such as a routine fender-bender accident. Assume further that an injured party has brought an action against the insurance company of the negligent driver. In a situation such as this, key witnesses need to be deposed as soon as possible while the facts of the accident are still fresh in their minds. Forcing the parties to delay deposing their witnesses might jeopardize the effectiveness and credibility of that testimony. The inability to depose key witnesses prior to a hearing could hamper either party's chance of a fair result. For example, in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, the California Supreme Court held that implicit in an arbitration agreement is an agreement to such discovery as may be necessary to adequately arbitrate the claim.[98]

Second, the contract theory rationale of the limited-power approach is suspect. Although it is true that non-parties did not agree to become a part of the arbitration agreement, it is equally true that most non-parties are reluctant participants in conventional litigation under the Federal Rules. Further, were it not for the arbitration agreement, the dispute likely would be litigated, and the non-parties would be subject to the extremely broad discovery permitted by the federal and state rules of civil procedure. The non-parties will experience no more of a burden in pre-arbitration discovery than they would if they had been compelled to participate in pre-litigation discovery. If anything, the non-parties will experience less of a burden in arbitration due to the fact that arbitrators have the discretion to exclude discovery of information that is only marginally relevant and/or particularly burdensome to produce.

Third, proponents of the limited-power approach might argue that since subpoenas may be issued in cases where the information held by a non-party is absolutely necessary, unfair results are less likely. Yet, the courts adhering to this approach have provided little guidance as to exactly what is required to show such a hardship. For example, in *COMSAT*, the Fourth Circuit stated that at a minimum, a party would need to show an inability to get that information elsewhere.[99] The court did not explain what would be required in addition to this requirement.[100]

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97. *Stanton*, 685 F. Supp. at 1242.

98. 6 P.3d 669, 683-84 (Cal. 2000). For a thorough discussion of this case, *see* S. Kathleen Isbell, Student Author, *Compulsory Arbitration of Employment Agreements: Beneficient Shield or Sword of Oppression? Armendariz v. Foundation Health Psychcare Services, Inc.*, 22 Whittier L. Rev. 1107 (2001).

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

100. *Id.*

Moreover, requiring the party to petition a court before seeking to compel discovery defeats the purpose and expediency of the out-of-court dispute resolution process to which the parties contractually agreed.

B. Strengths of the Broad Power Approach

For the same reasons as to why the limited power approach is susceptible to unjust results, the broad-power approach is better suited to avoid those results. First, the broad-power approach promotes substantively fair outcomes. Applied to the hypothetical car accident, upon selecting an arbitrator, each party would be immediately able to gather important information. Witnesses could be deposed while the details of the accident were still fresh in the witnesses' minds. As more accurate information is made available, the chances of a fair result and ultimately the chances of settlement, are increased.

Second, in some cases, deposing before the hearing might actually prove to be less burdensome for the non-parties. For example, the parties could arrange the depositions to take place at a time that is more convenient for the non-parties, and the parties could agree that depositions would be used at the hearing in lieu of live testimony. One can imagine any number of reasons why setting a hearing date that suits everyone's schedule could be difficult. Depositions could be scheduled at the witnesses' convenience, helping to alleviate this problem.

Third, increased discovery promotes settlement by enhancing the parties' ability to predict the arbitrator's ultimate decision. For example, if the evidence adduced through discovery strongly favors one party or the other, then the parties can go into the actual hearing with reasonable expectations of the outcome. George L. Priest and Benjamin Klein have concluded that litigation rates are higher when decisional uncertainty is greater.[101] When the parties agree upon the likely outcome of a case, they are likely to settle to save court costs.[102] Conversely, if the parties do not find out until the arbitration hearing what the key witnesses will say, they will not be able to predict the outcome and therefore are less likely to settle.

Fourth, the broad-power approach permits the parties to present their case most effectively to the arbitrator. This is unlikely to occur when the parties do not know until the hearing what the key witnesses will say. Permitting limited pre-hearing discovery from key witnesses gives the parties a chance to organize the material in a way to present their best argument to the arbitrator. If a party believes its best arguments were presented, the party is more likely to perceive the ultimate result as being fair.

Fifth, the broad-power approach is consistent with the parties' agreement to submit the case to the authority of the arbitrator. For example, in *National Post Office v. U. S. Postal Service*,[103] a case decided under section 301 of the Labor

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101. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Leg. Stud. 1 (1984).

102. *Id.*

103. 751 F.2d 834, 841 (6th Cir. 1985).

Management Relations Act[104] rather than the FAA, the Sixth Circuit Court of Appeals held that when a labor arbitrator is construing a collective bargaining agreement, "an arbitrator's judgment as to whether evidence is or is not relevant to his determination is part of the bargain, and a court's power to disturb such discretionary determinations is quite limited."[105] Similarly, parties in civil arbitration have contracted for the judgment of the arbitrator they have selected. This judgment should extend to the issue of whether non-party discovery is appropriate. The courts should be reluctant to interfere with the judgment of the arbitrator that the parties themselves have selected.

Sixth, the rationale for the broad power approach is supported by language in several arbitration cases decided by the United States Supreme Court. Implicit in the limited-power approach is 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. By contrast, the broad-power approach assumes that arbitrators are capable of, and should be given the authority to do, just that.

Recent decisions of the Supreme Court have indicated the Court's overwhelming confidence in the competence of arbitrators. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[106] the issue before the Court was the enforceability of an arbitration clause to a claim arising under the Sherman Antitrust Act. The party urging non-enforcement argued that arbitrators were not competent to decide statutory claims. The Supreme Court disagreed, and enforced the arbitration clause. The Court stated: "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[107] Similarly, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court quoted *Mitsubishi* with approval, and noted that the historical "'mistrust of the arbitral process' has been undermined by our recent arbitration decisions."[108]

One potential drawback of giving arbitrators the power to permit non-party discovery is that it will lead to an increased role of the judiciary in arbitration proceedings. Recall that section seven of the FAA provides that an arbitrator's subpoenas are enforceable in federal district courts.[109] If parties opposing discovery, or non-parties from whom discovery is sought, routinely challenge arbitral subpoenas related to discovery, then federal district courts must be called upon to enforce the subpoenas.[110]

The solution, however, is for courts to give arbitrators wide discretion in the decision of whether to authorize non-party discovery. As the *National Post Office* case discussed above illustrates, courts currently give arbitrators wide discretion

104. 29 U.S.C. § 185 (1994).
105. *Natl. Post Off.*, 751 F.2d at 841.
106. 473 U.S. 614 (1985).
107. *Id.* at 626-27.
108. 500 U.S. 20, 34 n. 5 (1991).
109. 9 U.S.C. § 7.
110. *Id.*

concerning the admissibility of evidence.[111] Arbitral decisions on this issue are rarely challenged in court. This is because courts invariably affirm arbitral decisions, on the theory that the parties bargained for and received an arbitral, not a judicial, determination of the issue. The same should be true for issues involving non-party discovery.

A second potential drawback to the broad-power approach is that expanding the availability of arbitral discovery increases cost and delay, and thereby obviates the purpose and advantages of arbitration. Again, however, the solution is to give the arbitrator the discretion to determine whether non-party discovery is warranted in a particular case. Professor Martin Malin, discussing the availability of arbitral discovery between parties, has pointed out that market forces serve as a check on arbitral discovery: an arbitrator who lets discovery get out of control will frustrate counsel for both parties and will not receive future appointments.[112] The same is true for non-party discovery.

C. The Importance of Fair Results

The hypothetical fact pattern of the car accident is very simple, but it shows how a lack of pre-hearing non-party discovery could possibly result in unfair outcomes. Such results are bad enough for the parties involved, but the consequences do not stop there. Successful arbitration proceedings are vital to an already backlogged court system. If all of the relevant information were made available, parties would be more inclined to perceive that the results were fair and accept the outcome. Conversely, if a party were denied access to facts that the party believed were crucial to her case, the party is more likely to turn to the courts for relief thereby undermining the purpose of arbitration. Similarly, if the courts begin to perceive that arbitration is not reaching fair results, they may become less willing to enforce arbitration agreements.[113]

It seems counter-intuitive to say there is a need for out-of-court dispute resolution and then expect it to be done effectively without crucial information. Even with the exceptions that are allowed in cases of hardships, the limited-power approach leaves too much room for the possibility of the exclusion of key evidence. Granted, the broad-power approach does not allow for the discovery that one would have available in litigation. Nonetheless, it does allow the parties to decide what information they need, obtain that information, and organize it in preparation for the

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111. *Natl. Post Off.*, 751 F.2d at 841; *see* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 403-06 (Marlin M. Volz & Edward P. Goggin eds., 5th ed., BNA Books 1997).

112. Martin H. Malin, *Privatizing Justice – But By How Much? Questions Gilmer Did Not Answer*, 16 Ohio St. J. on Dis. Res. 589, 614-15 (2001).

113. *See e.g. Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (refusing to enforce arbitration agreement that gave to one party the unilateral authority to select the pool from which the arbitrator would be chosen); *Prevot v. Phillips Petrol. Co.*, 133 F. Supp. 2d 937 (S.D. Tex. 2001) (refusing to enforce arbitration agreement written in English that had been signed by employees who could not read English and who were not provided with translations of the document); *see also* Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 Baylor L. Rev. 591, 605 (1995).

hearing. Important information is then less likely to be jeopardized because of time restraints.

At a broader level, the Supreme Court's arbitration cases over the last fifteen years indicate the Court's approval of arbitration as a substitute for litigation.[114] When arbitration procedures suffice to create a fair outcome, arbitration offers a myriad of advantages over litigation, including cost and time savings, the possibility of resolving the dispute while preserving an amicable relationship between the parties, and access to justice for those who are unable to afford litigation.[115] These advantages will prove fruitless, however, if arbitration procedures are perceived as inadequate to ensure the fair substantive outcome of cases: parties will refuse to sign arbitration agreements, courts will refuse to enforce the agreements that are signed, and Congress may amend the FAA to make access to arbitration more restrictive.[116]

VI. A PROPOSAL FOR ARBITRAL DISCRETION

The authors of this article believe that the broad discovery approach discussed in Part IV is the better approach. The authors also recognize that the principal advantages of arbitration – quick resolution and low cost – would be undermined by discovery as extensive as discovery under the Federal Rules of Civil Procedure. Therefore, this article argues that the broad discovery approach should be tempered in two respects.

First, the arbitrator should have the discretion to refuse discovery of facts that are only marginally relevant, that can await discovery until the arbitration hearing itself, or that would be particularly burdensome to the non-parties. Discovery in arbitration should not be as extensive as discovery in litigation or many of the advantages of arbitration will be lost. The arbitrator is in the best position to balance the discovery needs of the parties, the integrity of the arbitration process itself, and the relative burdens of discovery on non-parties. Consequently, the arbitrator should have the discretion to limit non-party discovery as the arbitrator deems appropriate.

Second, the arbitrator should have the authority to shift the cost of discovery from the non-parties to either the party seeking discovery or to all the parties collectively. This would have the salutary effect of protecting non-parties from overly-burdensome discovery, and of discouraging the parties from engaging in excessive discovery.

The benefits of this proposal can be seen by applying it to the hypothetical car accident. First, immediately after the accident, the attorneys for each side would confer with the parties and determine which of the witnesses are the most important. The short list of witnesses and topics of questioning would then be submitted to the arbitrator for his or her approval. The arbitrator, after determining the relevance of the information sought, would rule on which witnesses could be deposed and on the

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114. In addition to the *Mitsubishi* and *Gilmer* cases discussed above, *see also Adams*, 532 U.S. 105; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

115. *See* Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell U. Press 1997) (discussing the advantages of arbitration in the employment context).

116. *See generally* Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 Lab. L.J. 627, 634-35 (1994) (discussing employment arbitration).

scope of each deposition. A date could be set convenient for all of the parties, and the depositions would then be taken. Finally, the parties could find a mutually convenient date and schedule depositions.

This entire "approval" process could be completed in a brief amount of time, allowing each side to depose their witnesses as soon as possible. Upon obtaining the necessary information, each side has a chance to organize the material, weed out the unimportant information, and present their best case to the arbitrator. The arbitrator, confident that the parties have had ample time to gather the evidence they need, can render a decision based upon the facts presented.

VII. CONCLUSION

Federal courts currently are divided over whether arbitrators have the authority to authorize pre-hearing discovery of non-parties. One group of courts holds that arbitrators do not. The United States District Court for the Southern District of New York has held that arbitrators may authorize pre-hearing document production, but not pre-hearing depositions. Another group of courts has held that arbitrators have the discretion to authorize all types of pre-hearing discovery from non-parties.

This article argues that arbitrators should have the discretion to authorize all types of pre-hearing discovery from non-parties. This approach is consistent with the language and the purpose of the FAA. It promotes substantively fair outcomes by enabling the parties to better organize their cases. It promotes settlement by enhancing the parties' ability to predict the ultimate outcome of the case. It is consistent with the parties' agreement to submit the case to the authority of the arbitrator. Finally, it is consistent with the Supreme Court's endorsement of arbitration as a dispute resolution process and the Court's overwhelming confidence in the competence of arbitrators.

Perhaps most importantly, third-party discovery preserves party confidence in the arbitral process. A party is unlikely to perceive the arbitration process as fair if she is surprised at the arbitral hearing by evidence to which she did not have pre-hearing access, particularly if that surprise impairs her ability to effectively present her case to the arbitrator. A party that perceives the arbitration process as unfair is unlikely to agree to engage the arbitration process in the future.

The benefits of arbitration - the expeditious, inexpensive, and often amicable resolution of disputes - cannot be realized unless the parties contractually agree to use the process. Parties are likely to do so only if they perceive the process as fair. Permitting non-party discovery is an important component of guaranteeing that parties to an arbitration agreement have the real and perceived ability to present their case to an arbitrator.