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## Toward a Functional Alternative to Courtroom Adjudication: The Federal Arbitration Act and Third Party Document Discovery

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# TOWARD A FUNCTIONAL ALTERNATIVE TO COURTROOM ADJUDICATION: THE FEDERAL ARBITRATION ACT AND THIRD PARTY DOCUMENT DISCOVERY

Sara Rosenberg\*

*Since the early twentieth century, arbitration has been increasingly recognized by Congress and the courts as an efficient alternative to courtroom adjudication. The circuit courts of appeals differ in their interpretations of the third party discovery authority that the Federal Arbitration Act (FAA) grants to an arbitrator. The conflict among the circuits reveals a tension between the courts' desire to uphold individual rights by treating arbitration agreements as private contracts and the desire to maintain arbitration as an efficient alternative to litigation.*

*This Note surveys the unresolved circuit split and argues that, above all, it is imperative that the rules governing arbitration set forth clear default procedures for conducting discovery. The U.S. Courts of Appeals for the Fourth, Sixth, and Eighth Circuits assert that, in the interest of efficiency, the FAA authorizes an arbitrator to fully realize the rights of the contracting parties, including compelling prehearing document production from a third party. In contrast, the U.S. Courts of Appeals for the Second and Third Circuits, focusing on the plain meaning of the statute's language, have held that an arbitrator may not compel a third party to produce documents prior to the arbitral hearing. Examining the issue in the context of the history and development of the FAA, this Note analyzes the arguments set forth in each Circuit and ultimately advocates that an arbitrator should be able to use his time most efficiently and with the aid of all documents relevant to the dispute.*

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#### INTRODUCTION

“Investors have their ups and downs in the market, but when it comes to resolving disputes with Wall Street brokers, they seldom win . . . .”<sup>1</sup>

Arbitration is “[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.”<sup>2</sup> Since the early twentieth century, arbitration has been increasingly recognized by courts and utilized in both private and commercial settings as an alternative to time-consuming and costly courtroom adjudication.<sup>3</sup> Additionally, the U.S. Supreme Court has recognized a “strong federal policy in favor of enforcing arbitration agreements.”<sup>4</sup> One motivation for this policy is arbitration’s potential to reduce judicial congestion.<sup>5</sup>

1. Joseph A. Giannone, *Wall Street Arbitration Stacked Against Investors: Study*, REUTERS (June 7, 2007, 7:42 PM), <http://www.reuters.com/article/idUSN0741372120070608>.

2. BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

3. See KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 4 (2000) (“The use of [Alternative Dispute Resolution] has . . . grown dramatically in the private domain. The American Arbitration Association had 92,000 arbitration requests filed in 1998, an increase of 21% over those filed in 1994.”).

4. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985); see *infra* notes 50–53 and accompanying text.

5. See, e.g., S. REP. NO. 68-536, at 3 (1924) (“The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses

One common use of arbitration is to resolve disputes between brokerage firms and their clients. Often, however, consumers find themselves disadvantaged when forced to arbitrate against their brokerage firms<sup>6</sup> because such firms have the resources to “easily outmuscle and outmaneuver their clients when conflicts arise.”<sup>7</sup> Consumers are particularly disadvantaged by the vagueness of rules governing discovery in arbitration because it is the firms who hold the majority of the documents relevant to the dispute. In response, recent legislation has sought to replace mandatory arbitration clauses with a private right of action.<sup>8</sup> In May 2007, Senator Patrick J. Leahy of Vermont and then-Senator Russell D. Feingold of Wisconsin wrote to Christopher Cox, then-chairman of the Securities and Exchange Commission (SEC), citing a lack of a “court-supervised discovery process” among other reasons investors should be permitted the right to bring their claims to court.<sup>9</sup> Since then, the Financial Industry Regulatory Authority (FINRA) has tried “to make the arbitration process more investor-friendly.”<sup>10</sup> These efforts were enhanced on July 21, 2010 when the U.S. Congress passed, and President Barack Obama signed, a financial regulatory reform bill which, in part, authorized the SEC to prohibit or limit investment and brokerage firms’ use of mandatory arbitration clauses.<sup>11</sup>

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increase.”); H.R. REP. NO. 68-96, at 2 (1924) (“It is practically appropriate that the action [to enact the Federal Arbitration Act (FAA)] should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.”); John F. Wagner, Jr., Annotation, *Validity and Effect of Local District Court Rules Providing for Use of Alternative Dispute Resolution Procedures as Pretrial Settlement Mechanisms*, 86 A.L.R. FED. 211, 212 (1988) (identifying “lessening docket congestion” as one reason for the growing number of court-sponsored arbitration programs).

6. See, e.g., Giannone, *supra* note 1 (illustrating the relative disparity between individual investors and brokerage houses in a review of 14,000 cases between 1995 and 2004 in which investors recovered about thirty-four percent of their claims); Peter J. Henning, *Examining a Move To Change Securities Litigation*, DEALBOOK’S WHITE COLLAR WATCH (Dec. 16, 2009, 9:18 AM) <http://dealbook.blogs.nytimes.com/2009/12/16/examining-a-move-to-change-securities-litigation>; Bob Van Voris & Holly Rosenkrantz, *Arbitration Abuses “Deeply Disturbing,” Kucinich Says (Update2)*, BLOOMBERG (July 22, 2009, 5:07 PM) <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aeSRAtP1IRrE> (quoting Vice President of the American Arbitration Association (AAA) Richard Naimark, stating: “A series of important fairness and due process concerns must be addressed and resolved before [the AAA] will proceed with the administration of any future debt collection arbitrations.”).

7. Gretchen Morgenson, *Dear S.E.C., Reconsider Arbitration*, N.Y. TIMES, May 6, 2007, <http://select.nytimes.com/2007/05/06/business/yourmoney/06gret.html>.

8. See Henning, *supra* note 6; Morgenson, *supra* note 7.

9. Morgenson, *supra* note 7.

10. Henning, *supra* note 6 (describing the Financial Industry Regulatory Authority’s (FINRA) attempts to make arbitration more “investor-friendly”).

11. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (to be codified at 15 U.S.C. § 78(o)) (stating that the SEC may “prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them . . . if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors”).

This Note analyzes the split among the federal circuit courts of appeals in their interpretation of the discovery provision of the Federal Arbitration Act (FAA), which supplies a body of substantive federal law governing arbitration proceedings.<sup>12</sup> Specifically, § 7 of the FAA provides, in pertinent part: “[A]rbitrators . . . or a majority of them, may summon in writing any person to attend before them or any of them as a witness in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”<sup>13</sup> Courts differ as to whether this language grants an arbitrator authority to compel prehearing document production from an outside party.<sup>14</sup> The courts differ primarily in their interpretation of Congress’s goal in enacting the FAA. Some courts, such as the U.S. Courts of Appeals for the Fourth, Sixth, and Eighth Circuits, have found that the provision authorizes prehearing subpoena power in order to promote arbitration generally as an efficient alternative to litigation.<sup>15</sup> Other courts, such as the U.S. Courts of Appeals for the Second and Third Circuits, emphasize the “plain meaning” of the statute’s language in limiting arbitrators’ powers over third parties.<sup>16</sup> Within this interpretive split are still further divisions, each circuit having constructed situations in which an arbitrator may or may not compel prehearing document production.<sup>17</sup> As a result of this circuit split, the outcomes of similar disputes may differ dramatically depending on the jurisdiction in which they are arbitrated.<sup>18</sup> Further, disputes involving prehearing discovery frequently end in costly litigation.<sup>19</sup> This is problematic—due to gross differences in access to evidence, those with greater negotiating power may seek to gain an unfair advantage by artificially shifting the

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12. United States Arbitration Act, 9 U.S.C. §§ 1–307 (2006) (commonly referred to as the Federal Arbitration Act (FAA)).

13. *Id.* § 7.

14. *See infra* Part II.A–C.

15. *See infra* Part II.A–B.

16. *See infra* Part II.C.

17. *Compare* COMSAT Corp. v. Nat’l Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999) (contemplating an arbitrator’s authority to compel prehearing document production from a third party only “upon a showing of special need or hardship”), with *In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 871 (8th Cir. 2000) (allowing for third party production of relevant documents so long as the third party is “integrally related to the underlying arbitration, if not an actual party”).

18. *See, e.g.*, Sean T. Carnathan, *Discovery in Arbitration? Well, it Depends . . .*, 10 BUS. L. TODAY, Mar./Apr. 2001, at 24–25 (“Given the unsettled state of the law, you cannot be confident of your right to enforce a . . . subpoena during the arbitration proceeding.”); J.S. “Chris” Christie, Jr., *Preparing for and Prevailing at an Arbitration Hearing*, 32 AM. J. TRIAL ADVOC. 265, 287–88 (2009) (suggesting the only “safe” solution to the potential for different applications in different jurisdictions is to subpoena third party testimony at a “mini-hearing”).

19. *See infra* Part II.A–C (presenting examples of disputes over arbitral procedure requiring judicial resolution).

jurisdiction governing the arbitration agreement.<sup>20</sup> Parties may even choose to forego arbitration altogether.<sup>21</sup>

This Note argues that courts must adopt more streamlined practices to enforce individuals' rights in arbitration. Rules setting clear default standards for conducting discovery in arbitration are imperative to maintaining the parties' rights. This Note begins by analyzing the current ambiguity regarding an arbitrator's discovery authority over third parties. Part I of this Note provides an overview of the history, purposes, and process of arbitration, as well as the enactment of the FAA. Part II discusses the three distinct approaches taken by the federal circuit courts of appeals and explains how the approaches differ. Part III suggests that, although some may consider the approach taken by the Second and Third Circuits to be the "emerging rule,"<sup>22</sup> it is not necessarily the best rule because it is in the public interest for an arbitrator to use his time most efficiently and with the aid of all documents relevant to the dispute, regardless of an outsider's minor privacy interest.

## I. AN OVERVIEW OF THE ARBITRATION PROCESS AND RELATED SUPREME COURT JURISPRUDENCE

Part I of this Note provides background on the nature and purposes of arbitration as a form of alternative dispute resolution. Part I.A defines arbitration and discusses its governing federal statute, the FAA. Part I.B outlines the process of arbitration, from the selection of the panel to the conduct of the hearing.

### A. Arbitration: What, Why, and How

#### 1. History and Purpose

As mentioned in the Introduction, arbitration is "[a] method of dispute resolution involving one or more neutral third parties . . . whose decision is

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20. *Cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938) (establishing a doctrine to avoid the problem of forum shopping, in which parties might seek diversity jurisdiction merely to have their claim adjudicated under more favorable federal law).

21. *See, e.g.,* John H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration? Or Through the Courts*, 59 DISP. RESOL. J. 34, 36 (2004) (noting that, though arbitration has become increasingly popular since the 1990s, "if documents or other information in the hands of a third party is likely to be critical to a resolution of a [business-to-business] dispute, then arbitration will be less attractive than courtroom litigation"); Lowell Pearson, *The Case For Non-party Discovery Under the Federal Arbitration Act*, 59 DISP. RESOL. J. 46, 50 (2004) (illustrating the necessity of "discovery of non-parties . . . in large, complex cases" such as those "confirm[ing] arbitration awards of \$41 million and \$27 million, with the hearings lasting up to 50 days" (citing Ronald Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring Against a Failure of Professional Responsibility*, 8 HARV. NEGOT. L. REV. 271, 271 (2003))); *see also* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 790 (2002) (suggesting the adoption of a broader discovery process as a potential improvement to arbitration).

22. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008) (quoting THOMAS H. OEHMKE, 3 COMMERCIAL ARBITRATION § 91:5 (2008)).

binding.”<sup>23</sup> Arbitration is considered an efficient alternative to litigation, in part because its procedures are less formalized.<sup>24</sup>

With a written record dating back to about 2550 B.C.,<sup>25</sup> arbitration “survived the dark ages” and now underlies much of international dispute resolution.<sup>26</sup> However, in the eighteenth century, English courts began viewing arbitration with suspicion, wary that extra-judicial dispute resolution sought to “‘oust the jurisdiction’ of the courts.”<sup>27</sup> This suspicion continued as “American courts felt compelled to follow their English counterparts.”<sup>28</sup> In 1874, the U.S. Supreme Court held that “agreements in advance to oust the courts of the jurisdiction conferred by law” were “illegal and void.”<sup>29</sup> The FAA was enacted in part to reverse this attitude, and a House Committee Report accompanying the FAA’s enactment in 1925 specifically highlighted judicial misgivings about arbitration.<sup>30</sup> As such, Supreme Court decisions subsequent to the FAA’s enactment have facilitated arbitration’s current position as the “alternative dispute settlement procedure of choice” in commercial disputes.<sup>31</sup>

23. BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

24. *See, e.g.,* Lefkovitz v. Wagner, 395 F.3d 773, 780 (7th Cir. 2005) (“Parties that opt for arbitration trade the formalities of the judicial process for the expertise and expedition associated with arbitration, a less formal process of dispute resolution by [one] who . . . brings to the assignment knowledge of the commercial setting in which the dispute arose.”); JOHN W. COOLEY WITH STEVEN LUBET, ARBITRATION ADVOCACY § 1.3, at 5, 7 (2d ed. 2003) (counseling those who seek to represent a party to arbitration in the relative advantages of the arbitral process, including an “enhanc[ement of] the potential for a more expeditious resolution”).

25. 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 2:1 (3d ed. 2009) (citing WILLIAM F. ALBRIGHT, FROM THE STONE AGE TO CHRISTIANITY: MONOTHEISM, AND THE HISTORICAL PROCESS (Ditzion Press 2008) (1940); ANCIENT NEAR-EAST TEXTS RELATING TO THE OLD TESTAMENT (James B. Pritchard ed., 3d ed. 1969)).

26. *Id.* § 2:3.

27. Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942) (quoting Kill v. Hollister (1746) 1 Wils. 129 (Gr. Brit.)); *accord* 1 DOMKE, *supra* note 25, § 2:3.

28. 1 DOMKE, *supra* note 25, § 2:4.

29. *Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

30. H.R. REP. NO. 68-96, at 1–2 (1924) (“The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it.”); S. REP. NO. 68-536, 2 (1924) (offering a similar explanation for the need to eradicate judicial hesitancy towards arbitration); *see also* *Kulukundis*, 126 F.2d at 985 n.24A (citing Congress’s mandate, in 1860, that foreign service officers encourage the use of arbitration to settle disputes as evidence that “Congress was not in sympathy with judicial hostility to arbitration”).

31. 1 DOMKE, *supra* note 25, § 2:5; *see, e.g.,* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985) (“[W]e 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.”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218–20 & 220 n.6 (1985) (finding that “agreements to arbitrate must be enforced, absent a ground for revocation of the contractual

Arbitration is not the only form of alternative dispute resolution. Other forms include negotiation, conciliation, facilitation, appraisal, mediation, and court-annexed hybrids.<sup>32</sup> Arbitration is distinguishable from appraisal in that “[a]n arbitration ‘ordinarily . . . dispos[es] of the entire controversy between the parties, and judgment may be entered upon the award, whereas an appraisal establishes only the amount of loss and not liability.’”<sup>33</sup> Arbitration is similarly distinguishable from mediation in that a mediator’s determination is not binding on the parties.<sup>34</sup> In other words, “[m]ediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides.”<sup>35</sup>

Arbitration is primarily used to prevent much of the time and costs associated with litigation.<sup>36</sup> The Supreme Court has noted that, by submitting to arbitrate a claim, a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”<sup>37</sup> Arbitration also serves to relieve the courts of docket congestion.<sup>38</sup>

## 2. Governance

Arbitration is usually “a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”<sup>39</sup> Disputes decided through arbitration are not subject entirely to the whim of the arbitral panel, however—arbitration procedure is governed by statutory law.<sup>40</sup> The FAA is the federal statute providing default rules

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agreement”); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974) (noting that the FAA was “designed to allow parties to avoid ‘the costliness and delays of litigation,’ and to place arbitration agreements ‘upon the same footing as other contracts’” (quoting H.R. REP. NO. 68-96, at 1, 2 (1924))).

32. See generally COOLEY, *ARBITRATION ADVOCACY*, *supra* note 24, § 1.1 (discussing the relative formality involved in various forms of dispute resolution). These other forms of alternative dispute resolution are outside the scope of this Note.

33. *Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc.*, 454 F.3d 1128, 1136 (10th Cir. 2006) (alterations in original) (quoting *Elberon Bathing Co. v. Ambassador Ins. Co.*, 389 A.2d 439, 446 (N.J. 1978)).

34. 1 DOMKE, *supra* note 25, § 1:3.

35. *Id.* (quoting J.D. MOORE, 7 DIG. INT’L L. 25 (1906)).

36. See *supra* notes 5, 24 and accompanying text. The Supreme Court has repeatedly identified this as a positive aspect of arbitration. See *Preston v. Ferrer*, 128 S. Ct. 978, 986 (2008) (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results.’” (quoting *Mitsubishi*, 473 U.S. at 633)); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 278 (1995).

37. *Mitsubishi*, 473 U.S. at 628.

38. See *supra* note 5 and accompanying text; see also *Pest Mgmt., Inc. v. Langer*, 250 S.W.3d 550, 556 (Ark. 2007) (“Arbitration is strongly favored . . . as a matter of public policy and is looked upon with approval by courts as a less expensive and more expeditious means of settling [disputes] and relieving docket congestion.”).

39. *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 876 (1998) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

40. See generally United States Arbitration Act, 9 U.S.C. §§ 1–307 (2006). The FAA does not preclude the parties from “structur[ing] their arbitration agreements as they see fit.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *accord Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)

governing arbitration proceedings.<sup>41</sup> This section presents a brief history of the FAA, with a discussion of the circumstances surrounding its enactment and insight into the FAA's current standing in Supreme Court jurisprudence.

Congress enacted the FAA in 1925.<sup>42</sup> Congressional reports reviewing the Act detailed judicial distrust of arbitration throughout the eighteenth and nineteenth centuries.<sup>43</sup> The Senate report named three concerns used to perpetuate such distrust: first, the courts feared arbitration tribunals did not have the "means to give full or proper redress" to wronged individuals;<sup>44</sup> second, the courts feared ouster of their jurisdiction;<sup>45</sup> and third, the courts felt compelled to follow a long-established precedent of distrust, regardless of whether it was rational in modern legal proceedings.<sup>46</sup> The House report stated: "The purpose of [the FAA] is to make valid and enforceable agreements for arbitration . . . which may be the subject of litigation in the Federal courts,"<sup>47</sup> thus relieving the courts of the need to continue a policy with great precedential value but little practical value.<sup>48</sup> Moreover, the reports noted that enforcing agreements to arbitrate would help all parties avoid the "costliness and delays of litigation."<sup>49</sup>

The Supreme Court's FAA jurisprudence has generally focused on the congressional intent to promote arbitration as an alternative to litigation.<sup>50</sup>

("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties."); *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 151 (1968) (White, J., concurring) (describing the parties as "the architects of their own arbitration process"). Pursuant to the Supreme Court's interpretation of the FAA, "[a]bsent some ambiguity in the agreement . . . it is the language of the contract that defines the scope of disputes subject to arbitration." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).

41. Forty-nine states have also adopted, in some derivation, the Uniform Arbitration Act (UAA) of 1955, as amended in 1956, or the Revised Uniform Arbitration Act (RUAA) of 2000. *See* 1 DOMKE, *supra* note 25, § 7:2. Similar to the FAA, the purpose of these model codes is to "reduce the caseloads in the courts and to promote judicial economy." 1 DOMKE, *supra* note 25, § 7:2.

42. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-307).

43. S. REP. NO. 68-536, at 2 (1924); H.R. REP. NO. 68-96, at 1 (1924); *see supra* note 30 and accompanying text.

44. S. REP. NO. 68-536, at 2.

45. *Id.*

46. *Id.* at 3.

47. H.R. REP. NO. 68-96, at 1; *accord* S. REP. NO. 68-536, at 1.

48. H.R. REP. NO. 68-96, at 2.

49. *See id.*; S. REP. NO. 68-536, at 3.

50. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (noting that "the FAA . . . ensures the enforceability of private agreements to arbitrate"); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *accord* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). *But see* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 216-17 (1985) (resolving a circuit split in concluding that the FAA, "both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and 'not to substitute [its] own views of economy and efficiency' for those of Congress" (quoting *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 646 (7th Cir. 1981))).

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>51</sup> Justice William J. Brennan, writing for the majority, declared the FAA a “congressional declaration of a liberal federal policy favoring arbitration agreements.”<sup>52</sup> Since then, the Supreme Court has continually interpreted the FAA as a policy-oriented statute, meant to “guarantee[] the enforcement of private contractual arrangements” as well as to promote arbitration as an alternative to litigation.<sup>53</sup>

*B. Arbitration Procedure: Maintaining Parties’ Rights Without the Formality of Litigation*

The previous section noted that parties to arbitration forego the formality of courtroom procedures in favor of the perceived efficiencies of arbitration.<sup>54</sup> This section discusses the procedures involved in the selection of arbitrators, notice and discovery in arbitration, and the arbitral hearing.

An “arbitrator” is “[a] neutral person who resolves disputes between parties” that have an arbitration agreement.<sup>55</sup> If the appointment or the method for selecting the arbitrator or arbitrators is set forth in the arbitration agreement, that appointment or method must be followed.<sup>56</sup> In the absence of a provision defining the method for selection—if one of the parties fails to cooperate, if there is an unreasonable lapse in time, or where an appointed arbitrator fails to act—the FAA provides that “upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators . . . who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein.”<sup>57</sup>

While almost anyone who is not a party to the dispute may be appointed as an arbitrator, the arbitrator is often expected to have some expertise in the subject matter of the dispute.<sup>58</sup> An arbitrator does, however, have an

51. 460 U.S. 1 (1983).

52. *Id.* at 24.

53. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

54. *See supra* note 24 and accompanying text.

55. BLACK’S LAW DICTIONARY 120 (9th ed. 2009).

56. *See* 9 U.S.C. § 5 (2006).

57. *Id.* The FAA further provides that “unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.” *Id.* The RUAA contains a similar provision—it does not explicitly state that there shall be a single arbitrator, though it may be implied through its use of the singular form of “arbitrator.” *See* REVISED UNIFORM ARBITRATION ACT § 11(a) (2000).

58. *See, e.g.*, *Sch. Dist. No. 46 v. Del Bianco*, 215 N.E.2d 25, 31 (Ill. App. Ct. 1966) (finding that the Illinois Uniform Arbitration Act “contemplate[d] that arbitrators will be men who understand the terminology, practices, customs and usages of the trade, business or profession involved in the dispute—men, who can bring knowledge, expertise and understanding to the solution of the controversy”); UNIF. ARBITRATION ACT § 11, cmt. 1 (2000) (“Parties oftentimes choose an arbitrator because of that person’s knowledge or experience . . .”); COOLEY, ARBITRATION ADVOCACY, *supra* note 24, § 2.6.3, at 41 (advising potential arbitral advocates that “many arbitrators are chosen from different business fields based on their professional experience”).

affirmative duty to disclose any information relevant to his or her inability to be fair or impartial.<sup>59</sup> Similarly, an arbitrator's authority is limited by the arbitration agreement.<sup>60</sup> The FAA explicitly provides for vacatur of the arbitral award "where the arbitrators exceeded their powers."<sup>61</sup>

However, the Supreme Court has long provided broad deference to arbitral panels in determining questions of law and fact.<sup>62</sup> The Court has similarly upheld a standard of deference with regard to arbitrators' procedural determinations, noting that "[q]uestions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it."<sup>63</sup> The Court has interpreted § 10(a)(3) of the FAA<sup>64</sup> to provide for vacatur of a procedural determination only in the case of "affirmative misconduct."<sup>65</sup> Further,

[e]ven in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the . . . agreement.<sup>66</sup>

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59. See 9 U.S.C. § 10(a)(2) ("[T]he United States court . . . may make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators . . ."); *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968) (interpreting § 10 of the FAA as evidence of Congress's "desire . . . to provide not merely for *any* arbitration but for an impartial one"); JOHN W. COOLEY, *THE ARBITRATOR'S HANDBOOK* § 1.3 (1st ed. 1998) (discussing arbitrator ethics).

60. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (noting that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties"); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) ("[T]he scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement . . . . Such an agreement . . . serves not only to define, but to circumscribe, the authority of arbitrators." (quoting 6 C.J.S. *Arbitration* § 69, at 280–81 (1975))); *MBNA Am. Bank, N.A. v. Boata*, 926 A.2d 1035, 1040 (Conn. 2007) ("[I]t is the province of the parties to set the limits of the authority of the arbitrators . . . ." (quoting *Nussbaum v. Kimberly Timbers, Ltd.*, 856 A.2d 364, 369 (Conn. 2004))).

61. 9 U.S.C. § 10(a)(4).

62. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement." (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987))); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.").

63. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556–57 (1964).

64. 9 U.S.C. § 10(a)(3) ("[T]he United States court . . . may make an order vacating the award . . . where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy . . .").

65. *United Paperworkers*, 484 U.S. at 40.

66. *Id.* at 41 n.10; see also UNIF. ARBITRATION ACT § 15(a) (2000) ("An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.").

Arbitration proceedings differ from those of traditional courtroom adjudication in two ways. First, arbitration proceedings are generally far less formal.<sup>67</sup> Second, in arbitration “lawyers are merely helping the arbitrator to create a complete record upon which to reach an unbiased and knowledgeable decision” rather than seeking to prolong discovery for strategic reasons.<sup>68</sup>

It is generally advised in cases dealing with complex issues that the parties hold a prehearing conference with the arbitrators, either in person or by telephone.<sup>69</sup> It is at this conference that the parties may clarify their expectations and present to the arbitrator any discovery-related disagreements.<sup>70</sup> Absent an agreement to the contrary, most federal courts interpret § 7 of the FAA<sup>71</sup> to allow arbitrators to determine the proper conduct of discovery.<sup>72</sup>

Arbitrators are given broad discretion in the conduct and proceedings of the hearing.<sup>73</sup> After a hearing in front of the appointed arbitrators whereby evidence is introduced and representatives for both sides present their cases, the arbitrators decide the dispute.<sup>74</sup> Generally, “[t]he arbitrator may grant any just and equitable relief within the scope of her authority.”<sup>75</sup>

## II. CONFLICTING INTERPRETATIONS: DOES § 7 AUTHORIZE AN ARBITRATOR TO COMPEL PREHEARING DOCUMENT PRODUCTION FROM A THIRD PARTY?

Part I outlined the history, purpose, and process of arbitration under the FAA. Part II examines the current split in authority over whether an arbitrator can compel prehearing document production from a third party.

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67. See COOLEY, ARBITRATION ADVOCACY, *supra* note 24, § 1.1, at 3.

68. 1 DOMKE, *supra* note 25, § 28:2.

69. See COOLEY, ARBITRATION ADVOCACY, *supra* note 24, § 3.5, at 63.

70. See *id.*

71. 9 U.S.C. § 7 (2006); see *supra* note 13 and accompanying text.

72. See, e.g., Hires Parts Serv., Inc. v. NCR Corp., 859 F. Supp. 349, 353 (N.D. Ind. 1994) (making discovery available in arbitration proceedings); Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241, 1242 (S.D. Fla. 1988) (authorizing arbitrators to order and conduct any discovery they find necessary); Miss. Power Co. v. Peabody Coal Co., 69 F.R.D. 558, 567 (S.D. Miss. 1976) (giving arbitrator discretion to permit and supervise discovery).

73. See *Evans v. Centerstone Dev. Co.*, 35 Cal. Rptr. 3d 745, 749 (Ct. App. 2005) (“Public policy supports minimal judicial participation in arbitration proceedings. Courts do not review arbitration awards for factual or legal errors.” (citing *Moncharsh v. Heily & Blase*, 832 P.2d 899, 903 (Cal. 1992); *Jones v. Humanscale Corp.*, 29 Cal. Rptr. 3d 881, 886–87 (Ct. App. 2005))).

74. See generally *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 648–49 (1986) (“[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.” (citing *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974))); *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910) (“An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied.”).

75. See COOLEY, ARBITRATION ADVOCACY, *supra* note 24, ch. 5, § 6.2, at 208 (noting also that “[t]he parties may, however, limit the scope of the allowable remedies or relief available to the arbitrator, and by agreement may exclude specific remedies”).

These disparate outcomes have turned largely on conflicting views regarding which legislative objective properly controls the FAA.<sup>76</sup>

Part II.A introduces the Sixth and Eighth Circuit's view, which emphasized Congress's goal of furthering more "efficient" procedures in arbitral discovery.<sup>77</sup> Part II.B discusses the rationale underlying the Fourth Circuit's approach, which provides that a third party may be compelled to produce documents in certain special circumstances.<sup>78</sup> Part II.C tracks the Second and Third Circuits, which restricts arbitrators' subpoena authority to only that which § 7 expressly grants.<sup>79</sup>

*A. The Sixth and Eighth Circuits: Recognizing an Arbitrator's Implicit Power Through a Broad Construction of § 7*

In *American Federation of Television & Radio Artists v. WJBK-TV (New World Communications of Detroit, Inc.)*,<sup>80</sup> the Sixth Circuit held that the Labor Management Relations Act authorized an arbitrator to compel a third party to produce documents he deemed material.<sup>81</sup> The court emphasized the necessity of judicial deference to arbitrators' decisions, stating that federal courts may not second-guess an arbitrator's determination as to the relevance of requested documents.<sup>82</sup> In *In re Security Life Insurance Co. of America*,<sup>83</sup> the Eighth Circuit focused on a reinsurer's connection to "the root of the dispute" in finding third party prehearing document production to be an appropriate exercise of an arbitrator's implicit authority.<sup>84</sup> This part outlines each court's analysis.

1. Sixth Circuit

This section explains the Sixth Circuit's rationale in *American Federation*. In that case, WJBK-TV, a Michigan-based television station, terminated Warren Pierce, a news anchor whose employment contract contained a mandatory arbitration clause.<sup>85</sup> WJBK-TV alleged that Pierce violated his contract and the code of business conduct when he misused certain vehicles that the station had provided to him as a media personality.<sup>86</sup> Pierce subsequently initiated a grievance proceeding,

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76. See *supra* notes 42–49 and accompanying text. Compare *Am. Fed'n of Television & Radio Artists v. WJBK-TV (New World Commc'ns of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999) (relying on the potentially efficient result of giving subpoena authority to arbitrators), with *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) (finding "unambiguous[] restrict[ion]" of an arbitrator's subpoena authority in the plain meaning of § 7).

77. See *infra* Part II.A.

78. See *infra* Part II.B.

79. See *infra* Part II.C.

80. 164 F.3d 1004 (6th Cir. 1999).

81. See *id.* at 1008–10.

82. See *id.* at 1010.

83. 228 F.3d 865 (8th Cir. 2000).

84. *Id.* at 871.

85. See *Am. Fed'n*, 164 F.3d at 1006. The clause contemplated an arbitration conducted pursuant to the Voluntary Labor Arbitration Rules of the AAA. See *id.* at 1006 n.2.

86. *Id.* at 1006.

claiming that other media personalities had not been discharged for similar actions.<sup>87</sup> The arbitrator, at Pierce's request, subpoenaed a third party, A&M Specialists, Inc. (A&M),<sup>88</sup> to appear at the office of Pierce's counsel and produce documents relating to other media personalities' use of company-provided vehicles.<sup>89</sup> In response, A&M, which was not involved in the original employment contract, moved the U.S. District Court for the Eastern District of Michigan to quash the subpoena.<sup>90</sup> The district court ultimately dismissed the action because the information Pierce sought through the subpoena would be irrelevant to the arbitrator's ultimate decision.<sup>91</sup> The court explained that the information sought would only show that other WJBK employees were similarly misusing vehicles, not, as would be necessary to have any probative value, that WJBK was aware of such behavior.<sup>92</sup>

After establishing that the district court had proper subject matter jurisdiction over the claim, the Sixth Circuit considered the district court's authority to enforce the arbitrator's subpoena.<sup>93</sup> The court found that, because the underlying dispute involved a collective bargaining agreement, the case arose under § 301 of the Labor Management Relations Act, which provided that the district court could properly enforce an arbitrator's subpoena of a third party.<sup>94</sup> The court noted that federal courts may also look to the FAA for "guidance" to determine an arbitrator's subpoena authority.<sup>95</sup> Extrapolating from the FAA's express authorization to arbitrators to compel document production from a third party at the hearing, the Sixth Circuit concluded that the FAA "implicitly include[s] the authority to compel the production of documents for inspection by a party prior to the hearing."<sup>96</sup> In support, the court cited a number of district court

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87. *See id.*

88. A&M Specialists, Inc. (A&M) supplied vehicles to media personalities on behalf of various automobile manufacturers. *Id.*

89. *See id.* The subpoena also directed A&M to appear at a hearing scheduled to occur the next week. *Id.*

90. *See id.* at 1006–07.

91. *Id.* at 1007.

92. *See id.*

93. *Id.* at 1007–10.

94. *Id.* at 1008.

95. *Id.* at 1009 (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987)). Though the FAA does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (2006), the Supreme Court has held that the Labor Management Relations Act (LMRA) § 301, 29 U.S.C. § 185 (2006), contemplates that federal courts will consider the FAA for guidance where the Labor Management Relations Act lacks express statutory direction. *See United Paperworkers*, 484 U.S. at 40 n.9 (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 449 (1957)). In *United Paperworkers*, the Court acknowledged that labor arbitrators often limit "their considerations to the facts known to the employer at the time of the discharge." *Id.* at 40 n.8 (citing OWEN FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 303–06 (2d ed. 1983); FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 634–35 (3d ed. 1973)). The Sixth Circuit refrained from deciding whether the FAA actually applied to the arbitration at hand, instead allowing the FAA's underlying federal policies to inform its decision. *See Am. Fed'n*, 164 F.3d at 1009.

96. *Am. Fed'n*, 164 F.3d at 1009.

cases extrapolating from the FAA's authorization to compel document production from a third party at the hearing that the FAA impliedly authorizes the same authority prior to the hearing.<sup>97</sup>

However, this authority is not unlimited. The court limited the arbitrator's authority to documents that the arbitrator deemed relevant.<sup>98</sup> As to whether the requested documents were material to the underlying dispute in that case, the Sixth Circuit found error in the district court's refusal to enforce the subpoena.<sup>99</sup> The court emphasized that "a court's power to disturb such discretionary determinations is quite limited."<sup>100</sup> This was so even though the court found no evidence that the arbitrator had actually considered the requested documents' relevance to whether Pierce's use of the vehicles in fact violated the code of business conduct or to whether others in similar positions were or were not similarly penalized.<sup>101</sup> As a result, the Sixth Circuit ordered the district court to compel production of all documents for the arbitrator's inspection.<sup>102</sup>

Judge Eric L. Clay dissented from the majority's finding of federal subject matter jurisdiction.<sup>103</sup> Judge Clay agreed that federal courts have authority to enforce arbitration agreements pursuant to § 301 of the Labor Management Relations Act, but he argued that the majority incorrectly extended that authority to the enforcement of subpoenas against a third party.<sup>104</sup> The dissent distinguished the district court cases that the majority

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97. *See id.* (citing *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44-45 (M.D. Tenn. 1994) (deferring to an arbitration panel's determination of relevance and finding the panel's decision to subpoena documents prior to the hearing reasonable "as a method of dealing with complex and voluminous discovery matters in an orderly and efficient manner"); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988) (finding that "arbitrators may order and conduct . . . discovery as they find necessary," not limited to appearances at hearing); *Wilkes-Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 559 F. Supp. 875, 880 (M.D. Pa. 1982) ("[A] decision to enforce an arbitrator's subpoena will promote the goals of labor policy if it will foster the effective operation of arbitration machinery.")).

98. *See Am. Fed'n*, 164 F.3d at 1009. The court specifically circumvented the question of whether an arbitrator is authorized to subpoena a third party to a prehearing deposition, deciding only that arbitrators could subpoena relevant prehearing document production. *Id.* at 1009 & n.7.

99. *See id.* at 1010 (noting that "the relevance of the information and the appropriateness of the subpoena should be determined in the first instance by the arbitrator").

100. *Id.* (quoting *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985)); *see also United Paperworkers*, 484 U.S. at 36 (discussing the courts' "limited role" in reviewing the substantive decisions of arbitrators). For a more detailed discussion of judicial deference to arbitral decision-making, *see supra* notes 62-66 and accompanying text.

101. *See Am. Fed'n*, 164 F.3d at 1010. The court stated that "[i]t must be assumed that the presiding arbitrator is an experienced person well versed in evaluating . . . the objections of A&M, and is capable of screening the material for what is relevant and ordering proper safeguards for the information." *Id.* (quoting *Local Lodge 1746, Int'l Ass'n of Machinists v. Pratt & Whitney Div. of United Aircraft Corp.*, 329 F. Supp. 283, 287 (D. Conn. 1971)).

102. *See id.* Because the record indicated that A&M had not raised its objections directly to the arbitrator, the Sixth Circuit ordered A&M to immediately provide the requested documents (and any objections) for a proper determination of relevance. *Id.*

103. *See id.* at 1011-13 (Clay, J., dissenting).

104. *Id.* *But see supra* note 97 and accompanying text.

relied upon, noting that those allowing an arbitrator to enforce document subpoenas did so in the context of subpoenas directed at parties only, and those finding federal court authority to enforce a subpoena directed at a third party did so under the aegis of the FAA, not the Labor Management Relations Act.<sup>105</sup> Nevertheless, Judge Clay found that “the FAA [would] mandate[] enforcement of the subpoena at issue” had the action been raised in state court due to the deference owed to an arbitrator’s judgment.<sup>106</sup>

## 2. Eighth Circuit

This section discusses the Eighth Circuit’s reasoning in *In re Security Life Insurance Co. of America*.<sup>107</sup> To underwrite its new group health insurance product, Security Life Insurance Company (Security) entered into a reinsurance contract to be managed by Duncanson & Holt, Inc. (D&H).<sup>108</sup> The contract contemplated that the reinsurers, Transamerica Occidental Life Insurance Company (Transamerica) among them, would assume eighty-five percent of the risk and eighty-five percent of the liability for all loss adjustment expenses (including “extra-contractual” fees associated with legal actions or negligence claims) in exchange for eighty-five percent of the premiums.<sup>109</sup> However, after Security lost a series of state court actions,<sup>110</sup> D&H and Transamerica refused to cover its liabilities, claiming that Security had not completed the “counsel and concur” part of the contract.<sup>111</sup> Security initiated an arbitration proceeding to settle the dispute.<sup>112</sup> Transamerica refused to recognize itself as a party to the

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105. *See Am. Fed’n*, 164 F.3d at 1010 n.1. *See also* Laufman v. Anpol Contracting Inc., 94 Civ. 5362 (CSH), 1995 WL 360015, at \*1 (S.D.N.Y. June 13, 1995) (enforcing subpoena against third party under FAA); Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (same); Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241, 1242 (S.D. Fla. 1988) (same); Wilkes-Barre Publ’g Co. v. Newspaper Guild of Wilkes-Barre, Local 120, 559 F. Supp. 875, 882 (M.D. Pa. 1982) (enforcing subpoena against party to the arbitration); *Local Lodge 1746*, 329 F. Supp. at 283–84 (enforcing subpoena against party to the arbitration); *supra* note 97 and accompanying text.

106. *See Am. Fed’n*, 164 F.3d at 1014–15 (citing Nat’l Post Office Mailhandlers v. U.S. Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985) (“[A] court’s power to disturb such discretionary determinations [of arbitrators] is quite limited.”)). The Eighth Circuit similarly rejected the argument that § 7 of the FAA authorizes district court review of the propriety of an arbitral panel’s subpoena, finding such review to be “antithetical to the well-recognized federal policy favoring arbitration, and compromises the panel’s presumed expertise in the matter at hand.” *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 871 (8th Cir. 2000).

107. 228 F.3d 865 (8th Cir. 2000).

108. *Id.* at 867.

109. *Id.* The assumption of liability also required Security Life Insurance Company (Security) to “counsel[] with and obtain[] the concurrence of [Duncanson & Holt, Inc. (D&H)] ‘with respect to the actions giving rise to the extra contractual obligation.’” *Id.* (citations omitted).

110. *See, e.g.*, Clark v. Sec. Life Ins. Co. of Am., 509 S.E.2d 602, 603 (Ga. 1998) (entering a \$14 million judgment against Security for liabilities relating to Georgia’s Racketeering and Corrupt Organizations Act). Security was similarly implicated in four other cases which D&H and the other reinsurers refused to cover. *See In re Sec. Life Ins. Co.*, 228 F.3d at 867.

111. *In re Sec. Life Ins. Co.*, 228 F.3d at 867.

112. *Id.* at 868.

arbitration for two reasons: first, the reinsurer argued that the “counsel-and-concur” clause was not an arbitrable issue; second, even if arbitrable, it would not arbitrate the issue with D&H, but rather would arbitrate it alone.<sup>113</sup> Seeking testimony from a Transamerica employee<sup>114</sup> as well as document discovery, “Security petitioned the [arbitral] panel for a subpoena.”<sup>115</sup> Transamerica refused to comply with the subpoena, further contesting its position as a party to the arbitration.<sup>116</sup> Security then petitioned the U.S. District Court for the District of Minnesota to compel Transamerica’s compliance, which referred the case to a magistrate judge.<sup>117</sup> Rejecting Transamerica’s argument that Federal Rule of Civil Procedure 45(b)(2) limited the court’s ability to enforce the arbitral panel’s subpoena to a 100-mile radius from the court’s situs,<sup>118</sup> the magistrate judge concluded that the “federal policy in favor of arbitration” supported enforcement of an arbitrator’s full subpoena power.<sup>119</sup> The magistrate determined that Security’s attorney could properly issue the subpoena on behalf of the court “as an officer of the court.”<sup>120</sup> On review, the district court affirmed the magistrate’s order, finding it “neither clearly erroneous nor contrary to law.”<sup>121</sup> Security, pursuant to the magistrate judge’s order, served a subpoena on Transamerica and moved the California district court to hold Transamerica in contempt upon refusal to comply with the new subpoena.<sup>122</sup> Transamerica then complied, and an employee was deposed.<sup>123</sup>

Transamerica appealed to the Eighth Circuit arguing, in part, that because Security had not demonstrated the “materiality of the information [] sought” in its subpoena, the district court had improperly compelled Transamerica

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113. *Id.*

114. Security sought testimony from a Transamerica Occidental Life Insurance Company (Transamerica) employee regarding a meeting, unknown to Security at the time it was embroiled in litigation, in which the reinsurers instructed D&H to deny coverage to Security for its liability stemming from the *Clark* litigation. *See id.* at 868.

115. *See In re Sec. Life Ins. Co.*, 228 F.3d at 868.

116. *See id.*

117. *Id.*

118. Federal Rule of Civil Procedure 45(b)(2) states, in pertinent part, “[A] subpoena may be served at any place . . . outside that district [in which the issuing court sits] but within 100 miles of the place specified for the deposition [or] hearing.” FED. R. CIV. P. 45(b)(2)(B). Transamerica claimed the arbitral panel’s subpoena was improperly served because Transamerica’s Los Angeles office was more than 100 miles away from the Minnesota federal court in which the arbitration was to proceed. *See In re Sec. Life Ins. Co.*, 228 F.3d at 869.

119. *In re Sec. Life Ins. Co.*, 228 F.3d at 869.

120. *See id.* (citing *Amgen Inc. v. Kidney Ctr. of Del. Cnty., Ltd.*, 879 F. Supp. 878, 883 (N.D. Ill. 1995)) (finding, due to the FAA’s language likening service of an arbitral subpoena to one calling a witness to court, that a federal court could not enforce a subpoena issued by an arbitrator, though it could enforce a subpoena issued by a party’s attorney under Rule 45(a)(3)(B) of the Federal Rules of Civil Procedure). Rule 45(a)(3)(B) states, in pertinent part: “An attorney also may issue and sign a subpoena as an officer of . . . a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.” FED. R. CIV. P. 45(a)(3)(B).

121. *In re Sec. Life Ins. Co.*, 228 F.3d at 869.

122. *See id.* at 869 n.2.

123. *See id.*

to comply.<sup>124</sup> Security responded, in part, that the district court was correct in compelling compliance because Transamerica was a party to the “underlying arbitration.”<sup>125</sup> Alternatively, Security argued that, “even if Transamerica [were] not a party to the underlying arbitration,” an arbitrator has the authority to compel prehearing discovery, the relevance of which “is a matter entrusted to the arbitration panel.”<sup>126</sup>

The Eighth Circuit affirmed the district court’s enforcement of the subpoena.<sup>127</sup> The court initially considered whether it was even capable of providing relief, given that Transamerica had already complied with the subpoena.<sup>128</sup> As recognized by the Supreme Court in *Church of Scientology v. United States*,<sup>129</sup> the “partial-relief doctrine” allows a court to render an opinion so long as “there is some means by which [it can] effectuate a partial remedy.”<sup>130</sup> The Eighth Circuit therefore found that, though the deposition issue was rendered moot when the Transamerica employee was deposed,<sup>131</sup> Transamerica still had “sufficient interest in maintaining the secrecy of the documents in question that it [would be] possible for [the instant] appeal to lead to meaningful relief in the form of the return of those documents or copies thereof.”<sup>132</sup>

Turning to the merits of the case, the Eighth Circuit found that, in the interest of efficient dispute resolution, the FAA implicitly authorized an arbitral panel to compel production of relevant documents for prehearing review.<sup>133</sup> The court deemed Transamerica’s status as a party to the arbitration irrelevant, as it was “a party to the contract that [was] the root of the dispute, and [was] therefore integrally related to the underlying arbitration.”<sup>134</sup> Finally, the court refused to “saddle” district courts with the

124. *Id.* at 869.

125. *Id.*

126. *Id.*

127. *See id.* at 872.

128. *Id.* at 869–70. The court did so because “[f]ederal courts are not empowered ‘to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.’” *Id.* at 870 (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)).

129. 506 U.S. at 9.

130. *In re Sec. Life Ins. Co.*, 228 F.3d at 870 (citing *Church of Scientology*, 506 U.S. at 13).

131. *Id.* (citing *John Roe, Inc. v. United States*, 142 F.3d 1416, 1422 (11th Cir. 1998); *Office of Thrift Supervision v. Dobbs*, 931 F.2d 956, 957–59 (D.C. Cir. 1991)).

132. *Id.*

133. *See id.* at 870–71 (“Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing.”). The U.S. Court of Appeals for the Seventh Circuit has similarly interpreted arbitral power broadly, stating: “Stricter rules cabin the generalist [judge] because he is more apt to be led astray . . . . When disputants repose their trust in a specific individual rather than . . . tak[ing] the luck of the draw, . . . they should have to take the bad with the good unless” the arbitrator acts contrary to the law. *Lefkovitz v. Wagner*, 395 F.3d 773, 780 (7th Cir. 2005).

134. *In re Sec. Life Ins. Co.*, 228 F.3d at 871. This conclusion limited the arbitral panel’s prehearing authority to those essential third parties, leaving the possibility that a third party not “integrally related to the underlying arbitration” may not be required to produce documents for prehearing review by the parties. Like the Sixth Circuit in *American*

“burden” of independently determining whether the subpoenaed documents contained material information, noting that it would be “antithetical to the well-recognized federal policy favoring arbitration, and [would] compromise[] the panel’s presumed expertise in the matter at hand.”<sup>135</sup>

*B. The Fourth Circuit: The Special Need Exception*

In *COMSAT Corp. v. National Science Foundation*,<sup>136</sup> the Fourth Circuit left open the prospect that a party to arbitration may, “under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship.”<sup>137</sup>

In 1988, the National Science Foundation (NSF), an independent agency created by Congress in 1950 “to initiate and support basic scientific research,”<sup>138</sup> entered into an agreement with Associated Universities, Inc. (AUI), a non-profit organization specializing in “scientific research and education.”<sup>139</sup> The agreement provided that AUI would operate the National Radio Astronomy Observatory, the operations of which the NSF would fund, subject to congressional appropriations.<sup>140</sup> AUI also entered into a contract, containing a mandatory arbitration clause, with COMSAT Corp. (then Radiation Systems, Inc.) to build an advanced radio telescope for \$55 million.<sup>141</sup> Seven years into the contract, COMSAT claimed entitlement to \$29 million in additional costs.<sup>142</sup> The parties consequently began arbitration proceedings.<sup>143</sup>

Following an unsuccessful Freedom of Information Act (FOIA) request, COMSAT moved the arbitrator to issue subpoenas to both the NSF’s “Document Custodian” to produce all documents related to the telescope and to two NSF employees to appear and produce all relevant documents in their possession.<sup>144</sup> The NSF refused, citing both federal agency subpoena

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*Federation*, the Eighth Circuit cited *Meadows Indemnity Co. v. Nutmeg Insurance Co.* in support of its holding. *Id.* (citing *Meadows Indem. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994)) (focusing on a third party’s “intricate[] relat[ion] to the parties involved in the arbitration” as opposed to “mere third-parties who have been pulled into [the] matter arbitrarily” in finding arbitral subpoena authority); see *supra* note 97 and accompanying text.

135. *In re Sec. Life Ins. Co.*, 228 F.3d at 871.

136. 190 F.3d 269 (4th Cir. 1999).

137. *Id.* at 276 (upholding *Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980)). This was arguably dicta, given that the U.S. Court of Appeals for the Fourth Circuit found no such showing in the case at hand. *Id.* The court’s analysis in this case is nevertheless a significant addition to the debate over an arbitrator’s third party subpoena power.

138. 42 U.S.C. § 1862(a)(1) (2006); see also National Science Foundation, <http://www.nsf.gov/about> (last visited Nov. 11, 2010).

139. See *COMSAT*, 190 F.3d at 271.

140. See *id.* at 271–72.

141. See *id.* at 272 & n.2.

142. See *id.* at 272. COMSAT claimed that AUI requested changes in its telescope specifications amounting to \$29 million more than the parties initially anticipated. *Id.*

143. *Id.*

144. *Id.*

regulations and COMSAT's current outstanding balance on the photocopying fees associated with its FOIA request.<sup>145</sup>

In describing its considerations in deciding not to comply with the subpoenas, the NSF implicated its federal agency "housekeeping" regulations as established by the Supreme Court in *Touhy v. Ragen*.<sup>146</sup> These considerations included: (1) whether compliance would "serve the stated purposes of the regulation" (which include promoting efficiency, avoiding controversy, maintaining impartiality, and protecting sensitive information); (2) whether compliance "is necessary to prevent a miscarriage of justice"; (3) "[w]hether NSF has an interest in the decision that will be rendered"; and (4) whether compliance "is in the best interests of NSF and the United States."<sup>147</sup> The NSF's General Counsel concluded that COMSAT could access many of the requested documents through its FOIA request or from AUI, and, therefore, it was unnecessary for the NSF to comply with the document subpoena; the agency did not make a determination as to whether to honor the deposition subpoenas.<sup>148</sup>

In support of its motion to compel compliance, COMSAT argued before a magistrate judge that its naming of the NSF in the motion's caption had effectively made the NSF a "party to the underlying dispute" and subject to Federal Rule of Civil Procedure 45.<sup>149</sup> The magistrate judge agreed, ordering the NSF to comply with the subpoenas.<sup>150</sup> The NSF appealed to the U.S. District Court for the Eastern District of Virginia, arguing, *inter alia*, that arbitrators are not authorized to subpoena third parties for prehearing discovery.<sup>151</sup> The district court affirmed the magistrate judge's

145. *See id.* Specifically, the National Science Foundation (NSF) stated that there were 40 feet of files containing responsive documents, totaling more than \$20,000 in processing fees. *See id.* at 272 n.4.

146. 340 U.S. 462 (1951); *see also COMSAT*, 190 F.3d at 272, 272 n.3. In *Touhy*, the Supreme Court held that, consistent with 5 U.S.C. § 22 (now 5 U.S.C. § 301), it was within the province of agency discretion to refuse compliance with certain subpoenas, considering the complexity, sensitivity, and sheer amount of information potentially contained in government agency files. 340 U.S. at 468. These regulations are often referred to as "housekeeping" regulations. *COMSAT*, 190 F.3d at 272 n.3.

The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, or property. This section does not authorize withholding information from the public or limiting the availability of records to the public.  
5 U.S.C. § 301 (2006). Upon application for a motion to compel, the magistrate judge ruled that the NSF had been properly made a party to the underlying dispute by virtue of its being named in the caption of COMSAT's motion to compel. *See COMSAT*, 190 F.3d at 273. The U.S. District Court for the Eastern District of Virginia affirmed, finding the FAA provided "a broad grant of full subpoena power to arbitrators." *Id.* at 274.

147. *See COMSAT*, 190 F.3d at 273; *see also* 45 C.F.R. § 615.5(b) (2009) (granting the NSF General Counsel discretion over whether to permit NSF employees to testify or produce documents upon consideration of the four factors listed in the text).

148. *COMSAT*, 190 F.3d at 273. The NSF's General Counsel also noted that the NSF had not agreed to indemnify AUI, "so production would not further the goal of maintaining NSF's neutrality as a third party." *Id.*

149. *Id.*

150. *Id.* at 273-74.

151. *Id.* at 274.

order, finding that the NSF violated its *Touhy* regulations by failing to seek judicial relief prior to the subpoenas' return date and had thus waived its right to object to them.<sup>152</sup>

On appeal, the Fourth Circuit reviewed the NSF's decision under the Administrative Procedure Act's<sup>153</sup> deferential standard of review.<sup>154</sup> The court disagreed with the magistrate judge's ruling that the NSF was properly made a party to the underlying dispute.<sup>155</sup> Rather, the court decided that the NSF was not a party to the original contract, not accountable for any applicable arbitral awards, and thus not a "party-in-interest in the arbitration proceeding."<sup>156</sup>

In its discussion, the Fourth Circuit first analyzed the language of the FAA, noting that the "subpoena powers of an arbitrator are limited to those created by the express provisions" of the Act.<sup>157</sup> The court held that the language of § 7 authorized an arbitral panel to compel third party testimony and discovery only at the arbitration hearing, not before.<sup>158</sup> In so doing, the court rejected COMSAT's argument that the FAA's enforcement provision,<sup>159</sup> authorizing a federal district court to enforce an arbitral subpoena, also expanded the arbitrator's subpoena authority to be on par with that of a federal court.<sup>160</sup> Instead, the court found that the provision "simply [reiterated the arbitrator's] power to compel non-parties to appear before the arbitration tribunal."<sup>161</sup> The court further found that the NSF had not waived its right to object to the subpoenas as the FAA requires no such affirmative action.<sup>162</sup> According to the Fourth Circuit's interpretation, only

152. *Id.*

153. Administrative Procedure Act § 1, 5 U.S.C. § 551 (2000).

154. The Administrative Procedure Act provides for judicial review of final agency actions in cases where relief other than monetary damages is sought. *See* 5 U.S.C. § 702 (2006). The Act allows the reviewing court to "compel agency action unlawfully withheld" or set aside agency decisions in certain specified situations. *Id.* § 706.

155. *See COMSAT*, 190 F.3d at 274–75; *supra* note 146 and accompanying text.

156. *See COMSAT*, 190 F.3d at 275. Associated Universities, Inc.'s (AUI) board of trustees meeting minutes stated that "while litigation and award expenses are an 'allowable cost' under the cooperative agreement, NSF's obligation to secure funding for these costs 'is subject to the requirement that the Director [of the NSF], in his or her sole discretion, shall determine the appropriateness of the reimbursement.'" *Id.* at 275 n.7 (citations omitted).

157. *See id.* at 275.

158. *See id.* ("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." (quoting 9 U.S.C. § 7)).

159. The FAA's enforcement provision states that a federal court "may compel the attendance of [a subpoenaed person] before said arbitrator." 9 U.S.C. § 7.

160. *See COMSAT*, 190 F.3d at 275.

161. *Id.* at 276.

162. *See id.* at 276 n.8. In response to the district court's determination that the NSF had waived its right to challenge the subpoenas, the Fourth Circuit noted that a federal agency's *Touhy* regulations are meant to "protect its employees from contempt proceedings" and "has no bearing on the agency's right to object to the arbitrator's subpoena." *Id.* (citing *Smith v. Cromer*, 159 F.3d 875, 880 (4th Cir. 1998); 45 C.F.R. § 615.1(d) (2009) (regulations "'may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States'")).

the party attempting to enforce the subpoena is required to affirmatively petition the federal court to compel compliance.<sup>163</sup>

The court founded its analysis on its understanding of arbitral parties' interests in preserving time and cost in resolving their disputes. In entering an arbitration agreement, parties necessarily sacrifice certain procedural rights.<sup>164</sup> "A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process" because parties entering into an arbitration agreement reasonably expect to "relinquish the right to certain procedural niceties which are normally associated with a formal trial," including "full-blown discovery from the other or from third parties."<sup>165</sup>

Nevertheless, in the second step of its analysis, the court determined that "the much-lauded efficiency of arbitration [would] be degraded if the parties [were] unable to review and digest relevant evidence prior to the arbitration hearing."<sup>166</sup> The court relied on *Burton v. Bush*<sup>167</sup> and maintained the possibility that a party, "under unusual circumstances," might petition a federal district court to compel discovery from a third party prior to an arbitral hearing "upon a showing of special need or hardship."<sup>168</sup> The court declined to define "special need" except that, "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable."<sup>169</sup>

The Fourth Circuit concluded that COMSAT would be unable to make such a showing for two reasons: (1) COMSAT had failed to demonstrate that it could not obtain many of the relevant documents through AUI, a party to the arbitration; and (2) COMSAT had already obtained a plethora of responsive documents from the NSF through its FOIA request.<sup>170</sup> Even if COMSAT could demonstrate special need, the Fourth Circuit decided

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

164. *Id.* ("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." (citing *Burton v. Bush*, 614 F.2d 389, 390–91 (4th Cir. 1980))).

165. *Id.* (quoting *Burton*, 614 F.2d at 390).

166. *Id.*

167. 614 F.2d 389 (4th Cir. 1980). In *Burton*, the Fourth Circuit first recognized an arbitrator's authority to compel discovery "upon a showing of special need." *Id.* at 390.

168. *COMSAT*, 190 F.3d at 276 (citing *Burton*, 614 F.2d at 391).

169. *Id.* In *In re Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra*, the Fourth Circuit returned to the "special need" exception, finding it applicable where a party sought "time-sensitive" documents and was in danger of losing access to the documents, based on the "evanescent nature of the evidence sought." 198 F.3d 473, 480 (4th Cir. 1999). A similarly muddled line of cases interpreted the "substantial need" language in Rule 26(b)(3) of the Federal Rules of Civil Procedure. See Carnathan, *supra* note 18, at 24. Rule 26(b)(3) permits discovery of trial preparation materials upon a showing that the party seeking discovery "has substantial need of the materials [and is unable] without undue hardship to obtain the substantial equivalent of the materials by other means." FED. R. CIV. P. 26(b)(3). An interpretation of substantial need under Rule 26(b)(3) has considered the "nature of the documents (i.e., their relevance and importance)" and "the ability to obtain the facts . . . from other sources." *Suggs v. Whitaker*, 152 F.R.D. 501, 507 (M.D.N.C. 1993) (citing *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 985 (4th Cir. 1992)); see Carnathan, *supra* note 18, at 24.

170. See *COMSAT*, 190 F.3d at 276–77.

that a court could not reverse the NSF's decision on review, regardless of that court's interpretation of the FAA, unless that decision had no rational basis.<sup>171</sup> This was because the agency's decisions fell within the protection of sovereign immunity, which the Administrative Procedure Act only waives in cases where the non-party agency has acted arbitrarily or capriciously.<sup>172</sup> Because the NSF acted reasonably when it considered the costs, benefits, and public interests involved in compliance with the subpoenas, the Fourth Circuit was required to defer to the agency's judgment.<sup>173</sup> Holding otherwise, according to the court's analysis, would potentially submit the NSF to a floodgate of requests for documents and testimony, an unacceptably massive prospective burden.<sup>174</sup> The court also noted that such deference was required to maintain the proper balance between the legislative and judicial branches of government, stating that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do . . . [because o]ur Constitution vests such responsibilities in the political branches."<sup>175</sup>

*C. The Second and Third Circuits: Interpreting § 7 Narrowly To Restrict Arbitral Authority*

This section analyzes the Second and Third Circuit's rejection of an arbitrator's authority to compel prehearing document production from a third party. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,<sup>176</sup> the Third Circuit held that the language of § 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."<sup>177</sup> In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,<sup>178</sup> the Second Circuit followed the Third Circuit holding in *Hay Group*.<sup>179</sup> The Second Circuit acknowledged concerns

171. *See id.* at 277 (reviewing the NSF's decision for evidence of "arbitrary and capricious agency action"). The court declined to follow the Ninth Circuit in holding that "non-party federal agencies must produce evidence in response to the subpoenas of private litigants, subject only to the court's discretionary right to limit burdensome discovery" under Rules 26 and 45 of the Federal Rules of Civil Procedure. *Id.* (citing *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 778–79 (9th Cir. 1994)).

172. *Id.* (citing *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989)).

173. *Id.* at 277–78.

174. *See id.* at 278 ("Compliance with the third-party subpoenas issued in this single case, where the litigant sought a tremendous number of agency documents and demanded the presence of agency employees at depositions, would measurably strain agency resources and divert NSF personnel from their official duties. Multiply the cost of compliance by the number of NSF grantees—almost twenty thousand—who might become embroiled in similar disputes, or by the limitless number of private litigants who might seek to draw upon NSF's expertise, and the potential cumulative burden upon the agency becomes alarmingly large.").

175. *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984)).

176. 360 F.3d 404 (3d Cir. 2004).

177. *Id.* at 407.

178. 549 F.3d 210 (2d Cir. 2008).

179. *Id.* at 217–18. The decision of the U.S. Court of Appeals for the Second Circuit came after having twice declined to answer the question. *See id.* at 212 n.2; *see also Stolt-*

regarding “timeliness and efficiency,” but ultimately determined that, had Congress wished to grant arbitrators the authority to compel prehearing document production of non-parties, it would have written the statute to include such power more clearly.<sup>180</sup> The court further rejected the idea that the language of § 7 carried any implication of an exception for “closely related entities.”<sup>181</sup>

### 1. Third Circuit

Hay Group, Inc. (Hay), a management consulting firm, initiated an arbitration proceeding against David A. Hoffrichter, a former employee, for his violation of a non-solicitation clause in his employment separation agreement.<sup>182</sup> The agreement contained a provision forbidding Hoffrichter from “soliciting any of Hay’s employees or clients for one year” following separation and a mandatory arbitration clause.<sup>183</sup> Hay sought document production from PriceWaterhouseCoopers L.L.P. (PwC) and E.B.S. Acquisition Corp. (E.B.S.), third parties to the arbitration proceeding, for review prior to the hearing.<sup>184</sup> Both PwC and E.B.S. refused to comply with the subpoena.<sup>185</sup> Hay petitioned the U.S. District Court for the Eastern District of Pennsylvania, which enforced the subpoena over PwC’s and E.B.S.’s contention that the FAA did not authorize prehearing document production from third parties.<sup>186</sup> The court noted that the subpoenas were valid and enforceable, even under the Fourth Circuit’s “special need” requirement.<sup>187</sup> The district court also rejected PwC’s and E.B.S.’s argument that the territorial limitations of Federal Rule of Civil Procedure

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Nielsen SA v. Celanese AG, 430 F.3d 567, 569 (2d Cir. 2005) (“We decline to decide whether Section 7 [of the FAA] authorizes arbitrators to issue subpoenas to non-parties to compel prehearing discovery, because there is no occasion to do so . . . . [T]he subpoenas in question did not compel prehearing . . . document discovery . . . .”); Nat’l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 187–88 (2d Cir. 1999) (declining to reach the issue due to the court’s determination that 28 U.S.C. § 1782, implicating “broader evidence-gathering mechanisms” in public arbitrations, was inapplicable in a private setting, thus eliminating the need to reconcile a conflict between the statutes). The *Life Receivables* decision also abrogated two decisions by the U.S. District Court for the Southern District of New York. See *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005) (differentiating between prehearing appearances and prehearing document production, noting that the “power to compel production of documents at a hearing implies the lesser power to require the documents to be produced in advance of the hearing”); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995) (“Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content . . . .”).

180. *Life Receivables*, 549 F.3d at 216 & n.9.

181. *Id.* at 217. This is in direct contradiction to the Eighth Circuit’s opinion in *In re Security Life Insurance Co. of America*. See *supra* Part II.B.2.

182. See *Hay Group*, 360 F.3d at 405. In 2002, three years after Hoffrichter left Hay for PriceWaterhouseCoopers L.L.P. (PwC), PwC sold Hoffrichter’s division to E.B.S. Acquisition Corp. (E.B.S.). *Id.*

183. *Id.*

184. See *id.*

185. *Id.*

186. *Id.* at 405–06.

187. *Id.* at 406.

45 applied, precluding them from having to respond to the subpoena due to improper service.<sup>188</sup> Instead, the court held that it had the power to enforce the subpoenas regardless of the documents' location.<sup>189</sup> PwC and E.B.S. appealed to the Third Circuit.<sup>190</sup>

The Third Circuit held that non-parties may not be subpoenaed to produce documents in advance of an arbitration hearing because the text of the FAA "strictly limited" an arbitrator's authority "over parties that are not contractually bound by the arbitration agreement."<sup>191</sup> In so doing, the court adopted the rationale that the U.S. District Court for the Southern District of New York used in *Integrity Insurance Co. v. American Centennial Insurance Co.*<sup>192</sup> There, the Southern District of New York determined that, if parties themselves are unable to bind non-parties, then the arbitral panel should be similarly restricted.<sup>193</sup> However, to promote an efficient resolution, that court ultimately granted review of the third party documents prior to the hearing.<sup>194</sup>

The Third Circuit further explained the rationale behind its textual approach, noting that Supreme Court statutory interpretation jurisprudence favored such analysis over considerations of legislative intent "when a statute's text is clear and does not lead to an absurd result."<sup>195</sup> The Third Circuit also based its analysis on the premise that "a court's policy preferences cannot override the clear meaning of a statute's text."<sup>196</sup> First, focusing on an excerpt of § 7, which states that "[t]he arbitrators . . . may summon . . . any person to attend before them or any of them as a witness *and* in the proper case to bring with him or them any . . . document . . . which may be deemed material as evidence,"<sup>197</sup> the Third Circuit concluded that an arbitrator's power "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."<sup>198</sup> The court construed the use of the connective word "and" to suggest that documents could only be compelled

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188. *Id.*

189. *Id.* Ultimately, the U.S. Court of Appeals for the Third Circuit rejected PwC's argument because, among other reasons, the rule applied only to a subpoena that is "separate from a subpoena commanding the attendance of a person" which the court decided the FAA did not authorize. *Hay Group*, 360 F.3d at 412 (quoting FED. R. CIV. P. 45(a)(2)).

190. *Hay Group*, 360 F.3d at 406. The Third Circuit granted PwC's and E.B.S.'s emergency motion to stay the district court's order pending its own decision. *Id.*

191. *Id.*

192. 885 F. Supp. 69 (S.D.N.Y. 1995).

193. *Integrity*, 885 F. Supp. at 71; *accord Hay Group*, 360 F.3d at 406.

194. *Integrity*, 885 F. Supp. at 73.

195. *Hay Group*, 360 F.3d at 406 (quoting *United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 395 (3d Cir. 1999)). The *Mistick PBT* court cited, among others, *Rubin v. United States*, 449 U.S. 424, 429-30 (1981) ("We begin by looking to the language of the Act. . . . When we find the terms of the statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 n.33 (1978))).

196. *Id.* (citing *Eaves v. County of Cape May*, 239 F.3d 527, 531-32 (3d Cir. 2001)).

197. *United States Arbitration Act*, 9 U.S.C. § 7 (2006) (emphasis added).

198. *Hay Group*, 360 F.3d at 407.

“when the non-party is summoned ‘to attend before [the arbitrator] as a witness.’”<sup>199</sup> In support, the court presented two adaptations of the Uniform Arbitration Act to illustrate “how a law can give authority to an arbitrator to issue prehearing document-production orders on third parties.”<sup>200</sup>

Next, the court examined the former version of Federal Rule of Civil Procedure 45, in effect from 1937 to 1991, which precluded federal courts from compelling prehearing document production from third parties.<sup>201</sup> Committee Notes accompanying the 1991 Amendments explained that the new version was amended to “spare[] the necessity of a deposition of the custodian of evidentiary material required to be produced.”<sup>202</sup> The Third Circuit noted that, prior to 1991, a court’s subpoena power did not extend to compelling a non-party to produce documents without also subpoenaing a witness to testify.<sup>203</sup> Therefore, the court determined, as the pre-1991 version of Rule 45 “was framed in terms quite similar to Section 7 of the FAA,” courts should refrain from extending more power to arbitrators.<sup>204</sup> As to the Eighth Circuit’s recognition of an implicit power, the Third Circuit stated that, if anything could be implied from the language of the FAA, it would be that it “withholds” the power to compel prehearing production.<sup>205</sup>

Having found the language of the statute straightforward, the court then considered whether the result was absurd and found two reasons it was not.<sup>206</sup> First, the court determined that the result of its restrictive interpretation of the FAA was not absurd because it was the same standard under which federal courts had operated for over fifty years.<sup>207</sup> Second, the court believed its literal interpretation would “actually further[] arbitration’s

199. *Id.* (quoting 9 U.S.C. § 7).

200. *Id.* at 407 n.1 (excerpting DEL. CODE ANN. tit. 10, § 5708(a) (2003) (“The arbitrators may compel the attendance of witnesses and the production of . . . documents . . . .”) and 42 PA. CONS. STAT. § 7309 (2007) (“The arbitrators may issue subpoenas . . . for the attendance of witnesses and for the production of . . . documents and other evidence.”) to demonstrate that those statutes “explicitly” grant prehearing subpoena power to arbitrators); *see supra* note 41 and accompanying text.

201. *Hay Group*, 360 F.3d at 407–08 (citing FED. R. CIV. P. 45 (1990) (repealed 1991)).

202. FED. R. CIV. P. 45, advisory committee’s note; *see also* David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 205–06 (1992) (“Under the new Rule 45, a subpoena . . . seeking the production of documents . . . from a nonparty may be used independently of the regular testimonial subpoena; the two are no longer wedded, as they were under the prior version of Rule 45.”).

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

204. *Id.* at 408–09. *But see* 6 C.J.S. *Arbitration* § 111 (2004) (noting that arbitral proceedings are less formal than judicial proceedings and that the “Federal Rules of Civil Procedure do not apply to arbitration proceedings”).

205. *Hay Group*, 360 F.3d at 408 (“By conferring the power to compel a non-party witness to bring items to an arbitration proceeding while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power.”).

206. *Id.* at 409 (citing *United States ex rel. Mistick PBT v. Hous. Auth. Of Pittsburgh*, 186 F.3d 376, 395 (3d Cir. 1999)).

207. *Id.*; *see supra* notes 201–05 and accompanying text.

goal of ‘resolving disputes in a timely and cost efficient manner’<sup>208</sup> because the requirement that a third party appear before the arbitrators with the requested documents would force parties to limit discovery and take the time to consider whether the documents they are requesting “justify the time, money, and effort” involved.<sup>209</sup> Without this requirement, parties have no reason not to “engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration.”<sup>210</sup> The Third Circuit explained that proponents of the efficiencies gained from allowing the parties to review third party documents prior to an arbitral hearing went “against Supreme Court precedent regarding the role of [such] considerations in interpreting the [FAA]”<sup>211</sup> because “the central purpose of the FAA is to give effect to private agreements” rather than efficient dispute resolution.<sup>212</sup> Emphasizing the Supreme Court’s “rigorous enforcement of agreements to arbitrate,” in *Dean Witter Reynolds, Inc. v. Byrd*, the Third Circuit stated that “Congress’s failure explicitly to consider an inefficient byproduct of the [FAA] does not render the text ambiguous.”<sup>213</sup> Further, the court recognized the costs and efforts in convening an arbitration panel for purposes of discovery, but determined that “the costs will be slight in comparison to amassing and transporting a huge volume of documents.”<sup>214</sup> The court also recognized that its result may redistribute the balance of power towards the third party because the party seeking discovery must appear at a proceeding to examine the documents.<sup>215</sup> However, it determined that such an “ambiguous efficiency effect” would be “insufficient to overcome a textual command.”<sup>216</sup> Ultimately, the Third Circuit held that § 7 did not authorize an arbitrator to compel prehearing document production from a third party, and, had Congress meant to confer such power, it would have done so explicitly.<sup>217</sup>

*Hay Group* addressed the views of other circuits that had reached this same issue. In the course of the majority opinion, then-Judge Samuel A. Alito, Jr. reviewed and distinguished the opinions of the Fourth and Eighth

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208. *Hay Group*, 360 F.3d at 409 (quoting *Painewebber Inc. v. Hofmann*, 984 F.2d 1372, 1380 (3d Cir. 1993)).

209. *Id.*

210. *Id.* (citing *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999)).

211. *Id.* at 410.

212. *Id.* (“The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims.” (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985))).

213. *Id.* at 411.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See id.* at 408–09 (“[I]f it is desirable for arbitrators to possess that power, the way to give it to them is by amending Section 7 of the FAA, just as Rule 45 of the Federal Rules of Civil Procedure was amended in 1991 to confer such a power on district courts.”); *supra* note 200–05 and accompanying text.

Circuits.<sup>218</sup> The court accepted the Fourth Circuit's proposition that "[a] hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process."<sup>219</sup> However, the Third Circuit diverged from the Fourth's Circuit "special need" exception, finding "no textual basis" for a court to confer such power.<sup>220</sup> The court also deviated from the Eighth Circuit's holding in *Security Life*, finding the policy argument, though potentially desirable, nevertheless incongruous with the statutory text.<sup>221</sup> In his concurring opinion, Judge Michael Chertoff sought to reconcile the Fourth Circuit's "special need" exception with the Third's Circuit narrow textual analysis.<sup>222</sup> He explained that the Third Circuit's interpretation of § 7 permitted a "single arbitrator" to compel a "third-party witness to appear with documents" before him, effectively allowing the parties to review the documents in advance of the formal hearing because "the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence."<sup>223</sup> Though this formality might be inconvenient, Judge Chertoff anticipated that it might "induce the arbitrators and parties to weigh whether advance production is really needed," thus limiting such production to instances of true necessity.<sup>224</sup>

## 2. Second Circuit

On behalf of Life Receivables Trust (Life Receivables), Peachtree Life Settlements (Peachtree) purchased two life insurance policies of a third-party insured to be underwritten by a five million dollar contingent cost insurance (CCI)<sup>225</sup> policy from Syndicate 102 at Lloyd's of London (Syndicate 102).<sup>226</sup> Peachtree's business consisted of offering cash payments to elderly individuals in exchange for their life insurance policies, profiting from the difference in the event that the individual passed away before his or her policy expired.<sup>227</sup> To "hedge against the possibility that the insured might live [two or more years] past his or her projected life expectancy," Peachtree purchased CCI policies, receiving a pre-determined

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218. *Hay Group*, 360 F.3d at 409–10.

219. *See Hay Group*, 360 F.3d at 409 (quoting *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999)); *see supra* notes 164–66 and accompanying text.

220. *Hay Group*, 360 F.3d at 410; *see supra* notes 166–69 and accompanying text.

221. *Hay Group*, 360 F.3d at 408–10; *see supra* notes 127–35 and accompanying text.

222. *See Hay Group*, 360 F.3d at 413–14 (Chertoff, J., concurring); *supra* Part II.B.

223. *Hay Group*, 360 F.3d at 413–14 (citing David M. Heilbron, *The Arbitration Clause the Preliminary Conference and the Big Case*, 45 *ARB. J.* 38, 43–44 (1990)).

224. *Id.* at 414.

225. Contingent cost insurance (CCI) "mitigates the risk in purchasing the life insurance policies of still-living individuals." *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 212 (2d Cir. 2008).

226. *See id.* at 212–13.

227. *See id.* at 212 (noting that Peachtree Life Settlements (Peachtree) becomes the owner of the insurance policy, paying premiums until the insured dies).

“net death benefit . . . upon the insured’s demise.”<sup>228</sup> These policies contained mandatory arbitration clauses.<sup>229</sup>

When the elderly individual in this case outlived his life insurance policy by more than two years, Life Receivables sought payment of the net death benefit on his CCI policy.<sup>230</sup> Syndicate 102 refused, claiming that Life Receivables’ calculations regarding the insured’s life expectancy were fraudulent.<sup>231</sup> Life Receivables initiated an arbitration proceeding.<sup>232</sup> In response, Syndicate 102 requested document production from both Life Receivables and Peachtree and sought to join Peachtree in the arbitration.<sup>233</sup> Life Receivables produced documents “to the extent that they were directed at Peachtree in its role as ‘servicer,’ but not in its role as ‘provider of life settlements or as originator’ of the CCI policy;” Peachtree refused both requests.<sup>234</sup> Peachtree explained its position that it was “not a party to the arbitration . . . and that the arbitration panel . . . has *no power or jurisdiction* over [Peachtree]. Consequently, [Peachtree] [was] not bound by the arbitration panel’s rulings and orders, and [would] not consider them.”<sup>235</sup>

After unsuccessfully ordering Life Receivables to obtain the remainder of the documents from Peachtree, the arbitral panel issued a subpoena to Peachtree directly.<sup>236</sup> Peachtree then moved the Southern District of New York to quash the arbitrators’ subpoena.<sup>237</sup> The court enforced the subpoena, citing as support Peachtree’s status as “a party to the [underlying] arbitration agreement,” if not to the “specific arbitration at issue.”<sup>238</sup> After complying with the district court’s order, Peachtree appealed to the Second Circuit, again arguing that arbitrators do not have the authority to compel prehearing document production from a third party.<sup>239</sup>

After summarizing the holdings of the Fourth, Sixth, and Eighth Circuits, the Second Circuit ultimately adopted the Third Circuit’s approach because, “[w]hen placed in historical context, [FAA] section 7’s narrow subpoena power makes sense” due to its resemblance to the pre-1991 version of Federal Rule of Civil Procedure 45.<sup>240</sup> The court noted that a “growing

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228. *Id.*

229. *Id.* at 213.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 213–14.

236. *Id.* at 214.

237. *Id.* at 212, 214.

238. *Id.* at 214. This rationale is similar to that used by the Eighth Circuit in *In re Sec. Life Ins. Co.* See *supra* Part II.A.2.

239. *Life Receivables*, 549 F.3d at 214 & n.5.

240. See *id.* at 215–16 (“The fact that the Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so.”). This is the same sentiment offered by the Third Circuit in *Hay Group*. See *supra* Part II.C.1.

consensus” of district court decisions had followed *Hay Group*.<sup>241</sup> The Second Circuit explained that courts “must interpret a statute as it is, not as it might be.”<sup>242</sup> In so doing, the court rejected Syndicate 102’s argument that Peachtree was “intimately related” to Life Receivables and the arbitration because Life Receivables was merely a “special purpose vehicle lacking any permanent employees of its own.”<sup>243</sup> Rather, the court found “no discovery exception for closely related entities.”<sup>244</sup> In passing, the court addressed efficiency concerns, noting that “[s]ection 7’s presence requirement . . . forces the party seeking non-party discovery—and the arbitrators authorizing it—to consider whether production is truly necessary.”<sup>245</sup>

### III. COURTS SHOULD INTERPRET § 7 TO AFFORD ARBITRATORS GREAT DISCRETION IN DISCOVERY

Part I summarized the history, governance, and process of arbitration. Part II outlined the split among the federal circuit courts over whether FAA § 7 authorizes arbitrators to compel prehearing document production from a third party.

Part III asserts that the broad policy approach, adopted by the Sixth and Eighth Circuits, better promotes arbitration as a functional alternative to traditional courtroom adjudication than does the strict textual approach used by the Second and Third Circuits. As such, Part III argues that the FAA, correctly interpreted, permits arbitrators to compel prehearing document production from third parties.

Part III.A explains how the Second, Third, and Fourth Circuits’ interpretations, emphasizing speculative privacy rights, fail to protect the parties’ actual interest in the full and fair extra-judicial resolution of their disputes. In so doing, Part III.A argues that, to give meaning to the federal policy favoring arbitration, it must garner consideration at least equal to that

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241. *Life Receivables*, 549 F.3d at 216 (citing *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1081 (N.D. Ill. 2008) (“The fact that Congress has not changed the language of § 7 in eighty years is compelling evidence that the original limitations inherent in § 7 were intended to remain undisturbed.”); *Guyden v. Aetna, Inc.*, No. 3:05cv1652, 2006 WL 2772695, at \*8 (D. Conn. Sept. 25, 2006) (refusing a party the “full range of discovery afforded in federal court”); *Odfjell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) (finding it “particularly inappropriate to subject parties who never agreed to participate in the arbitration in any way to the notorious burdens of pre-hearing discovery”).

242. *Life Receivables*, 549 F.3d at 216 (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says.” (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992))).

243. *Id.* at 217.

244. *Id.* The court did recognize Peachtree’s “close relationship” with Life Receivables such that it might have been joined in the arbitration proceeding but noted that it could not second-guess the panel’s refusal to join Peachtree as a party. *Id.* at 217 n.10.

245. *Id.* at 218 (citing *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 414 (3d Cir. 2004) (Chertoff, J., concurring)); *supra* note 217 and accompanying text. This was so even though an arbitral panel could compel a witness’s appearance with documents before a single arbitrator who would then adjourn the proceeding, thus gaining access to the documents prior to the formal hearing, although in an admittedly roundabout manner. *See Life Receivables*, 549 F.3d at 218.

given to the text of the FAA. Part III.B maintains that any interest a third party may have merits little concern in the procedural rules governing arbitration. Part III.B also considers the efficiency interests implicated by a party's choice to arbitrate its disputes in order to illustrate that efficient dispute resolution is more readily promoted if arbitrators are permitted to compel prehearing document production from third parties.

*A. The Federal Policy Favoring Arbitration Supports a Full Discovery Process*

Legal analysis does not arise in a vacuum. Supreme Court jurisprudence regarding arbitration has consistently considered two interpretations of Congress's goal in enacting the FAA: promotion of (1) contractual freedom, and (2) the "liberal federal policy favoring arbitration."<sup>246</sup> Distinct from the analyses conducted by the federal courts of appeal, the Supreme Court has not found these twin functions mutually exclusive.<sup>247</sup> In each of the circuit court cases analyzed above, the courts were compelled to choose one goal over the other.<sup>248</sup> For example, the Eighth Circuit emphasized the necessity of efficient arbitral operations, making no mention of the language of the parties' contract to arbitrate.<sup>249</sup> Likewise, the Third Circuit considered efficiency interests, but only to explain how they were not controlling in the court's decision.<sup>250</sup>

The Second and Third Circuits' limitation on arbitrators' subpoena powers is inconsistent with legislative intent for two reasons. First, as opposed to the Second and Third Circuits' view, blindly following the plain language of § 7 does lead to an absurd result; the practical effect of such an interpretation results in a significant disadvantage to parties seeking third party document discovery for the mere fact that they have agreed to arbitrate their disputes. The efficiencies to be gained by arbitration do not arise solely from a relaxed set of discovery rules, but rather from a plethora of sources. Even allowing an arbitrator to compel prehearing document production from a third party, arbitration remains a cheap, efficient alternative to courtroom litigation and helps prevent court dockets from becoming even more congested than they already are. Additionally, as discussed above, some parties are forced to enter contracts with mandatory arbitration agreements—for example, most security brokerage firms require that disputes be resolved in an arbitral forum. These parties have not actively relinquished their rights in hopes to gain efficiency; such forfeiture is merely a byproduct of the party's decision to invest in securities.

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246. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see supra* notes 50–53 and accompanying text.

247. In its FAA jurisprudence, the Court generally follows a predictable pattern of first noting that the purpose of the FAA was to reinforce the validity of private agreements to arbitrate disputes and then noting the federal policy favoring such agreements. *See supra* notes 50–53 and accompanying text. *But see infra* note 257 and accompanying text.

248. *See supra* Part II.

249. *See supra* Part II.A.2.

250. *See supra* Part II.C.1.

The existence of a federal policy favoring arbitration necessarily includes the promotion of its use.<sup>251</sup> Arbitration has many advantages over litigation, not the least of which is the increased efficiency of its operation.<sup>252</sup> However, parties are less likely to choose to arbitrate their disputes if they anticipate an inadequate resolution, regardless of the time or cost savings.<sup>253</sup> Given that the documents requested from third parties are often at the crux of the dispute,<sup>254</sup> it is in the public interest to promote as full a discovery process in arbitration as is necessary for the arbitral panel to award a fully informed remedy.<sup>255</sup> Further, arbitrators' determinations as to the relevance of these documents should garner deference from any reviewing judge.<sup>256</sup>

This does not, as the Third Circuit has suggested, take away from the parties' freedom to negotiate their own arbitration contract.<sup>257</sup> The FAA is only meant to act as a gap-filler, providing default rules for arbitration proceedings in the event the parties failed to contract to do so themselves.<sup>258</sup> The parties remain free to negotiate over issues such as third party discovery if they so wish—it is only in the absence of such negotiations that § 7 arises.

*B. Section 7 Does Not Consider Third Party Interests and Neither Should Courts*

The interpretation of § 7 most consistent with congressional intent authorizes an arbitrator to compel prehearing document production from third parties because third parties do not have privacy or fiscal interests that trump those of the parties themselves. The mere fact of choosing to arbitrate disputes should not create a windfall of lesser discovery burdens to outsiders.<sup>259</sup> As discussed in Part III.A, the prospect of promoting

251. *See supra* notes 50–53 and accompanying text.

252. *See supra* notes 24, 36–38 and accompanying text.

253. *See supra* notes 6–21 and accompanying text.

254. *See, e.g.,* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 215 (2d Cir. 2008) (refusing to compel production of documents intricately related to parties' complex insurance agreements); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 405 (3d Cir. 2004) (refusing to compel production of documents crucial to parties' disputed non-solicitation clause). Likely, the majority of potential third parties will be linked to the underlying dispute, given that parties to arbitration are presumably uninterested in expensive and protracted discovery from unrelated parties. *See supra* notes 24, 36–38 and accompanying text. This connection creates an inference of relevance in these documents and thus demands respect.

255. *See* COOLEY, THE ARBITRATOR'S HANDBOOK, *supra* note 59, § 1.3.4 (noting that the Code of Ethics for Arbitrators in Commercial Disputes—Revised 2004 requires that arbitrators consider evidence from each party).

256. *See supra* notes 62, 175 and accompanying text.

257. *See supra* Part II.C.1. In *Hay Group*, the Third Circuit noted that Supreme Court precedent held the “central purpose of the FAA is to give effect to private agreements.” *Hay Group*, 360 F.3d at 410 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

258. *See* H.R. REP. NO. 68-96, at 1 (1924) (stating that the FAA is meant “simply to make the contracting party live up to his agreement”).

259. In *In re Sec. Life Ins. Co.*, the Eighth Circuit noted that it would only have jurisdiction to decide the case if there were still some partial relief to be considered, given

arbitration as an alternative to litigation must remain at the forefront of any FAA analysis.<sup>260</sup> Courts' concerns regarding the burdens potentially placed on third parties normally focus on the perceived inefficiency that a full discovery process would impose on arbitration as a whole.<sup>261</sup> However, excessive concern over third party interests may cause even greater inefficiency, particularly on the front end.<sup>262</sup> Parties may spend inordinately large amounts of time speculating as to which documents may be relevant to some future dispute in order to avoid the hassle of waiting to review such documents at a formal hearing. Interpreting § 7 to authorize an arbitrator to compel prehearing third party document production instead allows the parties to focus on conducting their businesses. Concerns over discovery will only materialize in the event of an actual dispute.

An efficiency calculus weighs in favor of providing arbitrators with fuller discovery authority for other reasons. Courts agree that § 7 authorizes an arbitrator to compel a third party to produce documents at a hearing.<sup>263</sup> The main result of drawing a line between prehearing production and production at the hearing, however, is simply to delay document transfer. In the House report accompanying the FAA's enactment, the enacting legislators stated that the FAA was meant to provide a "very simple" procedure for enforcement of arbitration agreements in federal courts, noting that it was meant to "follow[] the lines of ordinary motion procedure, reducing technicality . . . to a minimum and at the same time safeguarding the rights of the parties."<sup>264</sup> The expediency in allowing arbitrators fuller prehearing discovery authority reveals itself in time and cost savings to the parties and arbitrators, as well as to any relevant third parties.

Parties to arbitration will benefit if arbitral subpoena authority is expanded because they—and their attorneys—will have extra time to review documents relevant to their argument. This will similarly save the arbitrators' time in two ways. First, simply authorizing arbitrators to compel prehearing document production from third parties avoids the needless formality that Judge Chertoff envisioned, in which arbitrators could call a hearing, requiring a third party to present documents requested

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that Transamerica had already complied with the court-ordered document production. *See supra* note 126 and accompanying text. The Eighth Circuit identified such potential relief as copies to be returned, taking into account Transamerica's property and privacy interests. *See supra* note 126 and accompanying text. In consideration of Transamerica's real interest, however, returned copies of the documents it provided to the arbitrators seems to be a rather useless remedy, as it neither protects Transamerica's privacy—the parties will have reviewed the documents—nor restores Transamerica to the position it once had. This implies that Transamerica's interests are not as important as the court suggests. Therefore, there is no need to protect this third party interest to the detriment of the parties in dispute.

260. *See supra* Part III.A.

261. *See supra* Part II.B–C.

262. *See* COOLEY, ARBITRATION ADVOCACY, *supra* note 24, § 3.6 ("[W]ithout discovery, there is a high risk that surprise evidence will be offered for introduction at the hearing and that the hearing will be interrupted to permit counsel to argue the admissibility of such evidence. . . . These interruptions and delays . . . may take up more time than limited prehearing discovery.").

263. *See supra* notes 102, 158, 198, 245 and accompanying text.

264. H.R. REP. NO. 68-96, at 2 (1924).

by one of the parties, and then adjourn the hearing to allow time for review.<sup>265</sup> Second, arbitrators will benefit from more streamlined hearings, the parties having had ample time to review new information. Just as the parties and the arbitrators are relieved of attending a faux hearing to obtain documents, third parties will no longer be forced through the lengthy process of locating the physical documents and transporting them (along with themselves) to the site of the arbitral hearing.<sup>266</sup> Rather, a broader interpretation of § 7 allows third parties to sidestep this disturbance and send copies of the requested documents ahead of the hearing date.

A broad interpretation of § 7 would also result in significant cost savings for parties, arbitrators, and any related third parties. The parties may save costs as discussed above, through lesser uncertainty in the initial arbitration clause negotiation process.<sup>267</sup> Eliminating the fictional legal distinction between compelling third party document production before the hearing and at the hearing will lead to cost savings for arbitrators because they will be saved the effort involved in appearing at unnecessary hearings. Third parties will likely save in transportation costs and the cost of the time they would have spent appearing at a needless hearing.

#### CONCLUSION

This Note discusses the interpretive split among the federal circuit courts of appeals over § 7 of the FAA. After analyzing the approaches taken by each court, this Note concludes that the stated federal policy favoring arbitration requires courts to take steps necessary to ensure its utilization as a functional alternative to courtroom adjudication. The approach advocated by this Note would allow parties, arbitrators, and also potential third parties to properly realize the efficiencies that the arbitration process offers. Therefore, arbitrators should be granted fuller discovery authority.

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265. *See supra* notes 222–24 and accompanying text.

266. *See supra* notes 222–24 and accompanying text.

267. *See supra* Part III.A. If a clearer standard existed, parties to arbitration could anticipate as much and try to determine the relevance of certain documents in the custody of third parties when initially negotiating their arbitration agreements. Understandably, this would most likely only arise in commercial settings; however, the commercial setting is also where most of the time and cost savings can be realized.