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Overcoming Hurdles to Enforcing Third-Party Subpoenas for Documents in Construction Arbitration

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Your client is a party in arbitration. They need documents from a third party to support their claims. While you can issue a subpoena duces tecum, whether you have a mechanism to enforce that subpoena can greatly vary. Many construction-industry clients enter agreements with arbitration clauses. Thus, attorneys in a construction arbitration should be aware of the potential enforcement issues related to such subpoenas.

Arbitration rules typically allow either counsel or the arbitrator to issue subpoenas. For example, under the American Arbitration Association (AAA) Construction Industry Arbitration Rules and Mediation Procedures ("Construction Rules"), an arbitrator or "other person authorized by law to subpoena witnesses or documents" may do so upon the request of a party or independently.^[1]

If a subpoenaed third party fails to comply with the subpoena, then the party who issued the subpoena must petition to have it enforced. Under the AAA Construction Rules, the arbitrator has authority to issue any "enforcement orders which the arbitrator is empowered to issue under applicable law."^[2] What the arbitrator is empowered to do under the law with respect to third parties could be limited in practice.

Under section 7 of the Federal Arbitration Act (FAA), 9 U.S.C. § 7, an arbitrator has the authority to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." If the subpoenaed person refuses to obey this summons, the FAA also allows a party to petition the federal district court in which the

arbitrator is sitting to “compel the attendance” of the subpoenaed person before the arbitrator.^[3] Federal circuit courts are split on the interpretation of the breadth of this section.^[4] The Sixth Circuit, however, has not directly ruled on this issue but it did look to the FAA in interpreting the Labor Management Relations Act as authorizing labor arbitrators to compel third parties to produce documents the arbitrator deemed material either before or at an arbitration hearing.^[5]

That said, federal courts have upheld the enforcement of subpoenas that require the third party to appear at a preliminary hearing and bring documents. In this situation, the hearing testimony becomes part of the arbitration record; it is not a deposition.^[6] The Second Circuit acknowledged that the “inconvenience of making a personal appearance may cause the testifying witness to deliver the documents and waive presence.”^[7] But the Eleventh Circuit has held that a summons to appear at a hearing before the arbitrators via video conference, rather than in person, did not comply with the FAA.^[8] There is also some question on whether such a pre-arbitration hearing must be within 100 miles of the subpoenaed party pursuant to Fed. R. Civ. P. 45(c)(1).^[9] And at least three Circuits have held that only arbitrators, and not the parties, have the power to summon witnesses under the FAA in the first place.^[10]

Ohio’s statutory provisions on arbitrators’ subpoena powers largely mirror the FAA: arbitrators “may subpoena in writing any person to attend before any of them as a witness and in a proper case to bring with him any book, record, document, or paper which is deemed material as evidence in the case.”^[11] If the subpoenaed person refuses to comply, it also allows a party to petition the court of common pleas in the county in which the arbitrator is sitting to “compel the attendance” of the subpoenaed person before the arbitrator.^[12] Ohio’s appellate courts have not yet decided a case seeking to enforce third-party documents subpoenas issued in arbitration.

In light of this uncertainty, attorneys wishing to subpoena documents from third parties should consider that they will have to justify to the arbitrator the burden imposed on third parties who are

outside the arbitration agreement, as well as why the documents cannot be obtained from the parties to the case. They should also consider the possibility that their third-party document subpoena may ultimately be unenforceable.

A party can maximize their chances of having an enforceable subpoena for documents by requesting that the arbitrator issue a subpoena that summons the third party to appear before them, in person, at a hearing which will become part of the arbitration record, to which they will bring the requested documents, and that is held within 100 miles of the subpoenaed third party. You will also likely need to provide the arbitrator with a written explanation of the importance and necessity of the documents that you seek and why they cannot be obtained from any other party to the arbitration.

For more information, contact the authors of this article or any attorney with Frost Brown Todd's [Construction](#) and [Business & Commercial Litigation](#) practice groups.

[1] Construction Rule R-35(d).

[2] Construction Rule R-25(e).

[3] 9 U.S.C. § 7.

[4] Narrow construction: *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159 (11th Cir. 2019); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017); *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-17 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquis. Corp.*, 360 F.3d 404, 411 (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (with exception for "special need or hardship").

Broad construction: *In re Sec. Life Ins Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000) (arbitrators have implicit authority under the FAA to compel third parties to produce documents in pre-hearing discovery.)

[5] *Am. Fedn. of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.)*, 164 F.3d 1004, 1009

(6th Cir.1999).

[6] *Life Receivables Tr.*, 549 F.3d at 218.

[7] *Id.*

[8] *Managed Care Advisory Group*, 939 F.3d at 1161.

[9] *Compare, e.g., Broumand v. Joseph*, 522 F. Supp. 3d 8, 24 (S.D.N.Y. 2021) (finding that “arbitral subpoenas, even as modified to require video testimony, are unenforceable because they seek to compel respondents to ‘attend’ an evidentiary hearing that is located outside the geographical limits set forth in Rule 45(c)” *with Int’l Seaway Trading Corp. v. Target Corp.*, No. 020MC00086NEBKMM, 2021 WL 672990, at *5 (D. Minn. Feb. 22, 2021), appeal dismissed, No. 21-2036, 2021 WL 5365242 (8th Cir. June 30, 2021) (finding the third-party could “comply with the deposition from his home or anywhere else he chooses that is within 100 miles of his residence. Virtual attendance of this nature is consistent with the plain language of Rule 45(c)(1)(A) because he has been commanded to attend the deposition within 100 miles of where he resides.”).

[10] *Natl. Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir.1999), citing *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir.1980); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020).

[11] R.C. 2711.06.

[12] R.C. 2711.06.

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