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by
Thomas F. Bush

Freeborn & Peters LLP
Chicago, IL

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Commentary

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Thomas F. Bush

[Editor's Note: Thomas F. Bush is a partner in the Litigation Practice Group and a member of the Insurance/Reinsurance Industry Group at Freeborn & Peters LLP in Chicago. He has extensive experience in complex litigation involving antitrust, insurance and reinsurance matters, and, in particular, has been very actively involved in the representation of significant lawsuits and arbitrations for global reinsurers in disputes arising from large scale losses. He is a commercial arbitrator listed on the American Arbitration Association's National Roster of Arbitrators. He also represents and counsels insurance companies and investment firms on antitrust compliance and on competition issues arising in mergers and acquisitions. Any commentary or opinions do not reflect the opinions of Freeborn & Peters LLP or LexisNexis®, Mealey Publications™. Copyright © 2021 by Thomas F. Bush. Responses are welcome.]

When parties to an arbitration require documents or testimony from a non-party, they can request that the arbitrator issue a subpoena to the non-party. While arbitrators usually have authority to issue subpoenas, compelling the non-party to comply with the subpoena can be a challenge. Arbitrators derive their authority from the parties' agreement to arbitrate their dispute. A non-party target of a subpoena is by definition not a party to that agreement. A party seeking to enforce an arbitral subpoena must enlist the aid of a court with jurisdiction to enforce the subpoena. Both federal and state laws authorize courts to enforce arbitral subpoenas. The jurisdictional and procedural rules applicable to the enforcement of arbitral subpoena are complicated, and courts are not unanimous in how they apply. This article is an attempt to clarify those rules.

Arbitral subpoenas under the Federal Arbitration Act

The Federal Arbitration Act ("FAA") applies to any arbitration arising from "a contract evidencing a transaction involving commerce," with "commerce" defined as interstate and foreign commerce. FAA § 7 provides that the arbitrators "may summon in writing any person to attend before them or any of them as a witness" and may order the 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." It further provides for enforcement of arbitral subpoenas in "the United States district court for the district in which such arbitrators, or a majority of them, are sitting . . . in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." The full text of FAA § 7 is set out in Appendix 1. Several issues have arisen in the application of this section.

Subpoenas for pre-hearing discovery

Section 7 authorizes the arbitrators to summon a witness "to attend before them or any of them as a witness." This language contemplates a witness summoned to testify at the hearing. Section 7 contains no language authorizing a subpoena that commands a witness to appear for a typical deposition in which no arbitrator is present or involved. Courts generally have declined to enforce subpoenas issued under this statute for depositions or any other form of pre-hearing discovery. Some courts have allowed arbitral subpoenas for preliminary hearings convened for the limited purpose of obtaining subpoenaed testimony and documents.

In *Stolt-Nielsen SA v. Celanese AG,* a subpoena required witnesses to appear before the arbitrators with 300 boxes of documents. The witnesses appeared, the arbitrators heard some testimony and then suspended further compliance with the subpoena to allow the parties to review the documents. The witnesses complained that this was "a thinly disguised effort to obtain pre-hearing discovery," but the Court of Appeals found the process proper, citing three reasons: the subpoenas did not expressly require the witnesses to appear "at a deposition;" the arbitrators did hear some testimony; and that testimony "became part of the arbitration record, to be used by the arbitrators in their determination of the dispute before them." The Court held that "the mere fact that the session before the arbitration panel . . . was preliminary to later hearings that the panel intended to hold does not transform" that session "into a discovery device."

In *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*, a three-member arbitration panel issued a subpoena compelling a witness to testify and to produce documents at a "preliminary hearing" before just one of the arbitrators. The court found that this process satisfies Section 7, which authorizes arbitrators to compel the attendance of witnesses "before them or any of them."

In *Westlake Vinyls, Inc. v. Cooke* the court declined to enforce an arbitral subpoena requiring a witness to appear to testify at a proceeding, because the subpoena expressly referred to the proceeding as a "deposition" and was "silent on the role(s), if any, of the arbitrator(s) during that proceeding." Among "the many unanswered questions," the court stated, "is whether Respondent would be required to answer questions under reservation, notwithstanding its objections on confidentiality grounds, subject to subsequent ruling (in writing) by the arbitrator(s)." No court has held that an arbitral subpoena can compel attendance only at the main or final hearing on the merits. There remains uncertainty on which features of a hearing are necessary to enable arbitrators to compel attendance at a preliminary hearing.

Subpoenas duces tecum

Section 7 provides that a witness summoned to testify at an arbitration hearing may be required "to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." The statute contains no language authorizing a subpoena for documents apart from the appearance of a witness. The Eighth Circuit has held that "the power to order the production of relevant documents for review by a party prior to the hearing" is "implicit."

Most federal courts have disagreed with the Eighth Circuit and have held that arbitrators can compel non-parties to produce documents only in connection with a witness appearing to testify. The Fourth Circuit has held that subpoenas *duces tecum* generally are not available under FAA Section 7 but has added that "a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship."

Nothing prevents a party from agreeing with the non-party to waive the requirement of an appearance by a witness, provided that the subpoena initially required the appearance. The Second Circuit has ruled: "A properly issued summons is not rendered invalid by a claimant's offer, a respondent's offer, or a joint agreement to produce documents without a hearing." One Magistrate Judge has observed that "under some circumstances an arbitrator may order a third-party to appear at a hearing with documents and, for the sake of that non-party's convenience, permit the third-party to waive his appearance if he produces the documents as ordered."

Contents and service of the subpoena

Section 7 requires that the subpoena "shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them." This is a difference from the practice in civil actions in federal courts, where counsel issue and sign subpoenas. The practical effect of this distinction is that a party to an arbitration cannot decide to issue a subpoena on its own, or even by agreement with other parties. The decision to issue a subpoena lies with the arbitrators.

Section 7 further provides that a subpoena "shall be served in the same manner as subpoenas to appear and testify before the court." The service of subpoenas in federal court is governed by Federal Rule 45, which provides: "Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance," as

every arbitral subpoena under FAA § 7 does, "tendering the fees for 1 day's attendance and the mileage allowed by law." The required fees, according to Section 7 are "shall be the same as the fees of witnesses before masters of the United States courts." Currently, witness fees are $40 per day, plus travel expenses.

Federal courts authorized to enforce arbitral subpoenas Section 7 empowers "the United States district court for the district in which such arbitrators, or a majority of them, are sitting" to enforce the subpoena. This language has been read to preclude a different federal court from enforcing or quashing an arbitral subpoena, such as the court for the district where the witness will appear.

Only a few courts have addressed how to determine where the arbitrators "are sitting." Those courts have found that it is where the hearing on the merits is being held, or where the arbitration agreement calls for the hearing to be held, or where the arbitrators were located when a party is seeking to enforce the subpoena. The Second Circuit has found that the arbitrators were "sitting" in the district where the non-party was summoned to appear at a preliminary hearing and produce documents. The court did not find relevant that the arbitrators had previously issued a subpoena to a different witness to appear at a preliminary hearing in a different district: "Nothing in Section 7 requires an arbitration panel to sit in only one location."

Geographic limitations

Section 7 does not state any limitations on where arbitrators can command a witness to appear to testify or produce documents. Geographic limitations are imposed effectively by the passages in Section 7 that authorizes a court to enforce the subpoena "in the same manner provided by law for securing the attendance of witnesses . . . in the courts of the United States." If the arbitrators wish to issue a subpoena that can be enforced by a federal court, if necessary, the subpoena must comply with the geographic limitations applicable to subpoenas in civil actions.

Under amendments to Federal Rule 45 adopted in 2013, a "subpoena may be served at any place within the United States." The court can command a person served anywhere in the United States to comply with the subpoena within the following geographic limits:

> (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
>
> (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
>
> (i) is a party or a party's officer; or
>
> (ii) is commanded to attend a trial and would not incur substantial expense.

Applying these same rules to arbitral subpoenas, the arbitrators can issue a subpoena to be served on a witness anywhere in the United States, provided that the subpoena requires the witness to appear before one or more arbitrators at a hearing, a part of a hearing, or a preliminary hearing, that is being held within the territorial limits set by Rule 45. A subpoena requiring the witness to travel to a place beyond these limitations is not enforceable.

Prior to 2013, Rule 45 did not authorize nationwide service of subpoenas. A court issuing a subpoena could enforce it only within a limited geographical area, generally a 100-mile radius around the courthouse. This placed a significant limitation on the geographic reach of arbitral subpoenas, because only the district court for the district where the arbitrators were sitting had authority to enforce the subpoena. Witnesses located more than 100 miles from that court usually were beyond the reach of arbitral subpoenas. With the amendment of Rule 45 in 2013, these cases should no longer have any effect.

A federal court also can enforce a subpoena for testimony or documents from "a national or resident of the United States" who is located in a foreign country. Under a statute known as the Walsh Act, the court must first find that the testimony or documents sought by the subpoena are "necessary in the interest of justice" and "that it is not possible to obtain" the testimony or documents "in any other manner."

Foreign nationals can be served with subpoenas, if service is made within the United States. A federal court has no authority to enforce a subpoena on a foreign national who is not served in the United States.

Testimony by video or telephone conference

Some courts have ruled that arbitrators cannot compel a witness to testify by video or telephone

conference, because the passage in Section 7 that the witness "attend before them or any of them" requires the "physical presence" of at least one arbitrator with the witness. All of these cases predate the Covid-19 pandemic, which has led courts and arbitrators to expand their use of videoconferencing for hearings. Arbitration organizations have recently developed rules and protocols for videoconference hearings. It is possible that recent experience will lead courts to conclude that Section 7 does not require the "physical presence" of an arbitrator. Until that happens, no federal court decision can be cited as support for an arbitral subpoena requiring a non-party to testify by video. The non-party can, however, waive the requirement of the physical presence of an arbitrator.

Judicial review of arbitral subpoenas

The Supreme Court has held that once it is determined "that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." Based on this principle, courts have held that objections to an arbitral subpoena challenging the materiality of the testimony or documents sought by a subpoena are issues for the arbitrators to decide.

Some courts have taken a different view of objections to arbitral subpoenas based on burden and expense, due to the requirement of Section 7 that a court enforce an arbitral subpoena "in the same manner provided by law" for the enforcement of subpoenas in civil actions. Federal Rule 45 provides that a "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." The Rule further provides that the court enforcing compliance with the subpoena "must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply." Based on these provisions in Rule 45, several courts have determined that they have the authority to consider the burden and expense imposed on the non-party and in appropriate cases to quash the subpoena in whole or in part or to require reimbursement of the non-party's cost of compliance.

A court's authority to review an arbitral subpoena arguably extends beyond considerations of burden and expense. Rule 45 states that the district court "must quash or modify a subpoena that: . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies." If Section 7 is read to incorporate all of the potentially relevant parts of Federal Rule 45, then a district court would be obligated to consider and rule on privilege objections to a subpoena.

However, not all courts agree that Federal Rule 45 authorizes a court to rule on any objections to arbitral subpoenas. In *Washington National Insurance Co. v. OBEX Group LLC,* both the District Court and the Court of Appeals ruled that all objections to arbitral subpoenas, including those based on burden, expense, and privilege, are for the arbitrators to decide. According to the Court of Appeals, the language of Section 7 calling for enforcement of arbitral subpoenas "in the same manner" as subpoenas in civil cases simply means that they are to be enforced "by compulsion or contempt."

Personal jurisdiction over the non-party witness

To enforce the subpoena, the court must have jurisdiction over the non-party witness. "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." Because Federal Rule 45 authorizes nationwide service of subpoenas, this element of personal jurisdiction can be satisfied by serving the witness with a subpoena somewhere in the United States.

Personal jurisdiction further requires that the exercise of jurisdiction over the non-party witness comports with the due process clause of the fifth amendment. In cases involving federal laws authorizing nationwide service of process, due process requires that the person served have sufficient "minimum contacts" with the United States, not the forum state of the district court enforcing subpoena, and that the person is not unreasonably burdened by the requirement to litigate in a distant place. So long as the arbitral subpoena is served within the United States and requires the non-party witness to appear within the territory defined by Rule 45, due process issues will not commonly arise.

Subject matter jurisdiction of the federal court

The Supreme Court has described the FAA as "something of an anomaly in the field of federal-court jurisdiction in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis."

Court have held that Section 7 in particular requires an independent jurisdictional basis. Some commentators have argued that Section 7 is different from other parts of the FAA and should be interpreted as conferring jurisdiction on a federal court to enforce any subpoena issued under the authority of the FAA, but no federal court has reached that conclusion. Unless and until the caselaw on this issue changes, a party petitioning in federal court to enforce an arbitral subpoena must established one of the grounds for federal court jurisdiction.

The easiest way to establish federal jurisdiction is to find that the court already has it. If a district court orders the parties to arbitrate their dispute, it retains jurisdiction to hear any petitions arising from that arbitration, including petitions to enforce arbitral subpoenas. In any case where a federal court has not previously established its jurisdiction to enforce the arbitration agreement, the court's jurisdiction to enforce an arbitral subpoena will have to be established separately.

Federal question jurisdiction

A party might attempt to establish federal jurisdiction under 28 U.SC§ 1331, which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The courts have yet to address how federal question jurisdiction is established on a petition to enforce an arbitral subpoena. Two approaches are conceivable. One is the "look through" approach: if the dispute in the arbitration involves federal questions that would be sufficient to give a federal court jurisdiction over a lawsuit involving that dispute, then a federal court would have jurisdiction over a petition to enforce a subpoena issued in that arbitration. The other approach is to consider whether the petition itself establishes federal question jurisdiction. This approach effectively precludes federal question jurisdiction. The only federal law at issue on the petition is Section 7 of the FAA, which has been held not to confer federal jurisdiction.

Some guidance is available in the caselaw involving other provisions of the FAA. *Vaden v. Discover Bank,* involved a petition to compel arbitration under Section 4 of the FAA. The Supreme Court held that federal question jurisdiction is determined by a "look through" to the dispute to be arbitrated. Following *Vaden,* the Courts of Appeal have considered how to determine federal question jurisdiction on a petition to confirm an arbitration award under FAA Section 9, to vacate an award under Section 10, or to modify the award under Section 11. The result has been a split among the circuits.

The First, Second, Fourth and Fifth Circuits have held that the "look through" approach determines federal question jurisdiction on Section 9, 10 and 11 petitions. The reasoning of these courts is that the different provisions of the FAA require a uniform provision, so the "look through" process that *Vaden* adopts for Section 4 petitions also applies to petitions under Sections 9, 10, and 11. This reasoning leads to the conclusion that the "look through" process also applies to petitions to enforce arbitral subpoenas under Section 7.

The Third and Seventh Circuits read *Vaden* differently. These courts note that the FAA provision involved in *Vaden*, Section 4, authorizes a petition to compel arbitration in "any United States district court which, save for such [arbitration] agreement, would have jurisdiction" over the dispute to be arbitrated. Because that unique language is not found in Sections 9, 10, or 11 of the FAA, these courts hold that the "look through" approach is inapplicable and that federal question jurisdiction must be determined on the basis of the petition before the court. The District of Columbia Circuit reached the same conclusion in decisions that were issued prior to *Vaden.* If the reasoning of these cases were applied to an arbitral subpoena under Section 7, the outcome would be the same, because the unique language of Section 4 also is not found in Section 7. Until this circuit split is resolved, the process for establishing federal question jurisdiction under FAA Section 7 will vary with the circuit where the petition is filed.

Diversity Jurisdiction

Where a party seeks to establish jurisdiction to enforce an arbitral subpoena based on a complete diversity of citizenship, courts have considered only the citizenship of the non-party witness and the parties petitioning to enforce the subpoena. If a party to the arbitration does not join the petition to enforce the subpoena, that party's citizenship will not destroy complete diversity.

Diversity jurisdiction also requires that the amount at stake exceed $75.000. The caselaw applying this requirement to arbitral subpoenas follows a few dif-

ferent paths. In *Washington National Insurance, supra,* the Second Circuit found the jurisdictional amount satisfied where the petitioner in the arbitration sought an award of $134 million and "documents responsive to the summonses that are the subject of this Section 7 petition are relevant to whether [the petitioner] is entitled to all or part of that award. Other courts have concluded that the amount at stake in the underlying arbitration is irrelevant, but they do not state how the jurisdictional amount can be satisfied.

In *Maine Community Health Options v. CVS Pharmacy, Inc.*, the magistrate judge found two bases for satisfying the jurisdictional amount. First, the amount was satisfied under the *Washington National* approach because the subpoenaed documents were needed to resolve a dispute with millions of dollars at stake. Second, the cost to the non-party witness of complying with the subpoena allegedly exceeded $75,000.

Jurisdiction under New York Convention

Finally, a federal court might have jurisdiction to enforce arbitral subpoenas if the arbitration has an international dimension and falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is known as the "New York Convention." The statute implementing the New York Convention in the United States provides that an "action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States" and that United States District Courts "shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." The statute provides that an "arbitration agreement or arbitral award . . . falls under the Convention" when it arises from a commercial relationship and the agreement satisfies one of the following criteria:

- Is not entirely between citizens of the United States,
- Involves property located abroad,
- Envisages performance or enforcement abroad, –or–
- Has some other reasonable relation with a foreign state.

This statute is ambiguous. It confers jurisdiction in federal court over an "action or proceeding" falling under the Convention but does not define when an "action or proceeding" falls under the Convention. Rather it defines when an "arbitration agreement or arbitral award" falls under the Convention. The judicial enforcement an arbitral subpoena arguably is not a "proceeding falling under the Convention," because the New York Convention has no provisions relating to subpoenas or the production of evidence. Alternatively, the statute could be interpreted to confer jurisdiction on the federal court for any proceeding that arises from an agreement that falls under the Convention. That interpretation would allow a federal court to enforce subpoenas so long as the arbitration agreement between the parties satisfies the statutory definition. In *Tang Energy Group, Ltd. v. Catic U.S.A.*, the district court found jurisdiction to enforce an arbitral subpoena based on the arbitration agreement falling under the Convention.

Appellate review

Under 28 U.S.C. § 1291, the federal circuit courts of appeals "have jurisdiction of appeals from all final decisions of the district courts." In a civil lawsuit, the decision of a district court to either enforce or quash a subpoena is not considered a "final decision" and generally is not appealable until a final judgment is entered in the lawsuit. The non-party subject to the subpoena can obtain appeal immediately only if it refuses to comply with the subpoena and the court finds it in contempt. The contempt order is immediately appealable.

Section 16 of the FAA provides that an appeal can be taken from "a final decision with respect to an arbitration that is subject to this title." Notwithstanding the similarity in the language to § 1291, the Seventh Circuit held in *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.,* that the decision of a district court to enforce or quash an arbitral subpoena is a final, appealable order. The Court reached that holding by finding that the petition to enforce or quash a subpoena is "an independent proceeding" that ends with the district court's order. *Amgen* has been followed by the Eleventh and Second Circuits. The Third and Fourth Circuits have each heard an immediate appeal from a district court decision on an arbitral subpoena without addressing the issue of whether a final, appealable order was present. No circuit court has found that the decision of a district court to enforce or quash an arbitral subpoena is not immediately appealable.

Arbitral subpoenas under state arbitration laws

Arbitral subpoenas can also be enforced in state court. The Supreme Court has held that "the substantive law" of the FAA is "applicable in state and federal court." The FAA's grant of authority to arbitrators to issue subpoenas is a rule of substantive law that is applicable in state court. However, the Supreme Court has also held that provisions of the FAA that establish procedures for federal courts to follow do not apply to proceedings in state court. A party seeking to enforce an arbitral subpoena in state court must proceed under the procedures established by state law.

Every state and the District of Columbia has adopted an arbitration act. Each of these acts authorizes an arbitrator to issue subpoenas and bestows jurisdiction on the state's courts to enforce those subpoenas. These laws are compiled in Appendix 2.

Some differences exist between the laws of different, but the differences are limited. A few of the state provisions are modeled on FAA § 7. The vast majority of the state laws follow the provision for subpoenas in one of two uniform laws. The first is the Uniform Arbitration Act (UAA), which was promulgated in 1955 and is set out in Appendix 3. The second is the Revised Uniform Arbitration Act (RUAA), which was promulgated in 2000 and is set out in Appendix 4.

Differences between state arbitration statutes and the FAA

The provisions of the state laws on arbitral subpoenas are broadly the same as those in the FAA, with a few notable differences. UAA § 7(a), RUAA § 17(a), and most of the state statutes implementing one of them expressly authorize arbitrators to issue subpoenas *duces tecum.* This authority contrasts with the FAA, which as noted above, has been interpreted by most federal courts to permit arbitral subpoenas for documents only in connection with a subpoena for a witness to testify. In addition, the state provisions generally do not require testimony before at least one arbitrator, as the FAA does.

No court has considered whether a state's arbitration law authorizes the enforcement of a subpoena for testimony by video conference. Neither of the uniform acts contains language that can reasonably be understood to require the witness's physical presence before the arbitrators, such as the words "attend before them" in the FAA. The absence of such language could provide grounds for a state court to enforce an arbitral subpoena for testimony by video conference. On each of these points, the state arbitration laws give broader scope to arbitral subpoenas than the FAA. In particular cases, they might be reason for a party to choose to enforce an arbitral subpoena in state rather than federal court.

State court subpoenas for pre-hearing discovery

Under some state arbitration laws, subpoenas are available only to compel evidence for a hearing and not to compel pre-hearing discovery. In California, arbitrators may order discovery in cases involving personal injury and wrongful death claims. In all other cases, the arbitrator may order pre-hearing discovery only "if the parties by their agreement so provide." On the basis of these statutory provisions, California's Court of Appeal upheld a trial court's refusal to enforce a subpoena for the prehearing production of documents.

New York has no statutory provisions that expressly limit discovery in arbitration, but the courts have generally been hesitant to enforce subpoenas for pre-hearing discovery. CPLR § 2302 and § 7505, which confer general authority on arbitrators to issue subpoenas, have been interpreted to authorize only subpoenas for evidence at the hearing. Another provision of New York law allows a party to request a court to order disclosure of evidence "to aid in arbitration." The Court of Appeals has held that "it is a measure of the different place occupied by discovery in arbitration that courts will not order disclosure 'except under extreme circumstances.'" Disclosure ordered by a New York Court in aid of arbitration "is not justified except where it is absolutely necessary for the protection of the rights of a party."

The UAA is ambiguous on whether arbitral subpoenas are available to compel pre-hearing discovery. It authorizes the arbitrators to permit the deposition "of a witness who cannot be subpoenaed or is unable to attend the hearing." That language can be read as permitting depositions only for the purpose of obtaining testimony for the hearing record of a witness who will not attend the hearing, but it also can be read more broadly to permit depositions for the purpose of discovery. There are no published judicial decisions addressing this issue under the UAA.

The RUAA removes the ambiguity. It provides that an "arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances," and may "issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding." The availability of pre-hearing discovery under the RUAA is another possible reason for a party to choose to enforce an arbitral subpoena in state court.

Territorial reach of subpoenas under state arbitration laws

The subpoena powers of a state court do not extend beyond the borders of the state. If a party to an arbitration needs to compel testimony or the production of documents from a non-party located outside of the state where the arbitration is proceeding, then the party should seek enforcement, if possible, in a federal court and take advantage of nationwide service of process available under Federal Rule 45. If federal jurisdiction cannot be established for the enforcement action, then the party must, if possible, have a subpoena issued or enforced by a court in the state where the witness can be found.

This task can be accomplished if the witness can be found in a state that has adopted the RUAA. Section 17(g) of the RUAA provides:

> The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective.

The RUAA has been adopted so far in only 22 states. Neither the UAA nor any other state arbitration laws contain provisions with express authorizations for a court to enforce arbitral subpoenas issued in out-of-state arbitrations.

Most states have enacted laws authorizing the state's courts to enforce subpoenas issued by the courts of other states, such as the Uniform Interstate Deposition and Discovery Act (UIDDA), which has been adopted by 43 states and the District of Columbia. However, most of these laws apply only to subpoenas issued under the authority of a court. The UIDDA authorizes the enforcement of a "foreign subpoena," which it defines as "a subpoena issued under authority of a court of record of a foreign jurisdiction." Comments to the UIDDA make clear that a subpoena issued by an arbitrator does not meet the definition. Enforcement under the UIDDA is nonetheless possible for arbitrations pending in California. The California Arbitration Act includes the following provisions:

> If the neutral arbitrator orders the taking of the deposition of a witness who resides outside the state, the party who applied for the taking of the deposition shall obtain a commission, letters rogatory, or a letter of request therefor from the superior court in accordance with Chapter 10 (commencing with Section 2026.010) of Title 4 of Part 4.

Under this statute, a party to an arbitration proceeding in California can obtain an order of a California court for a commission to enforce an arbitral subpoena. This order should satisfy the requirement of the UIDDA that the subpoena be "issued under the authority of a court of record."

No other state's general arbitration laws include a provision, comparable to California's provision, that expressly includes arbitrations in the category of proceedings for which a court can issue a commission for the out-of-state enforcement of an arbitral subpoena. The UAA provides: "All provisions of law compelling a person under subpoena to testify are applicable." A party might argue that a provision in the state's laws authorizing commissions tor out-of-state depositions is one of the "provisions of law" referenced by this language. So far, no court has considered that issue.

Commissions for out-of-state enforcement can also be obtained for international arbitrations proceeding in certain states. These states have adopted the UNICTRAL Model Law on International Commercial Arbitration. Article 27 of the Model Law, titled "Court assistance in taking evidence, has been adopted by ten states identified in Appendix 5. This Article provides:

> The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Article 27 allows a court to issue its own subpoena, or a commission to take evidence, which can then be used to obtain a subpoena from a court in another state.

An example of the application of the Model Law is *Roche Molecular Systems, Inc. v. Gutry.* In an arbitration pending in California, a party invoked California's version of the Model Law to obtain a commission from a California trial court to take the deposition of a non-party witness in New York. The party's counsel then served a subpoena in New York and moved in a New York trial court for an order compelling the witness to appear for a deposition. In enforcing the subpoena, the New York trial court held that New York's version of the Uniform Deposition and Discovery Act authorized the subpoena because it was issued not on the authority of an arbitrator but the authority of the California trial court.

A final option would be to serve the witness with the subpoena while he or she is visiting a state where the subpoena can be enforced, invoking so-called "tag jurisdiction." If that final option is not possible, the witness may simply be beyond the reach of the subpoena.

Preemption issues

The fact that a proceeding to enforce an arbitral subpoena is pending in state court does not mean that the FAA is entirely inapplicable. The substantive provisions of the FAA apply to every arbitration "involving commerce." The phrase "involving commerce," according to the Supreme Court, "signals an intent to exercise Congress' commerce power to the full." The specific transaction at issue in the arbitration need not occur in interstate or foreign commerce. If "in the aggregate the economic activity in question would represent a general practice" that is "subject to federal control," then only "that general practice need bear on interstate commerce in a substantial way." It would be the exceptional arbitration case that would not involve commerce sufficiently to be subject to the FAA. Most arbitrations are subject to the substantive laws of both the FAA and at least one state's arbitration laws.

The applicability of the FAA does not mean that the state law is necessarily preempted. The Supreme Court has held that the "FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." The FAA preempts a state arbitration statute only "to the extent that it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

To the extent that a state court is asked to enforce an arbitral subpoena that would be enforceable in federal court but for the absence of federal jurisdiction, no issue of preemption should arise. In enacting the FAA, Congress plainly intended that arbitrators would have a certain amount of power to subpoena testimony and documents from non-parties. If a state court is enforcing the same measure of subpoena power, the purposes and objectives of Congress are not being frustrated.

Some state arbitration statutes grant marginally broader subpoena powers to arbitrators, by authorizing subpoenas *duces tecum,* and subpoenas for depositions, pre-hearing discovery and potentially for video testimony. Although the FAA does not provide for these types of subpoenas, nothing in the language of the statute or its legislative history suggests a policy of preventing them. A court should not find that the FAA preempts state authorization of these types of subpoenas.

Some state arbitration laws impose limits on the arbitrator's authority to issue subpoena that are narrower than the authority conferred by FAA § 7. For example, the arbitration acts of Alabama and Mississippi have no language authorizing subpoenas that compel a witness to bring documents to the hearing. A plausible argument could be made that these state laws are preempted, because they purport to deny arbitrators the full range of authority that Congress intended to bestow on them. No court has considered whether the FAA preempts a state arbitration act due to limitations placed on the subpoena powers of the arbitrators.

Only one court has found that FAA § 7 preempts the enforcement of an arbitral subpoena in state court.

Beck's Superior Hybrids. Inc. v. Monsanto Co., involved an arbitration panel sitting in New York that issued a subpoena compelling an Indiana company to appear at a preliminary hearing in Indiana before one member of the panel and to produce documents. The party seeking the documents obtained an order compelling compliance with the subpoena from an Indiana trial court, pursuant an Indiana procedural rule authorizing the court to order compliance with a demand for testimony and documents "for use in a proceeding in a tribunal outside of this state." It is not clear that this rule authorizes the court to enforce subpoenas from out-of-state arbitrations, but the Indiana Court of Appeals did not address that issue.

Instead the Court of Appeals held that FAA § 7 preempts this use of the Indiana rule. It read Section 7 to reflect a congressional intention that a party "must petition a federal district court for enforcement of the subpoena." In so ruling, the court misunderstood the caselaw on federal preemption. The Supreme Court has held that in "considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction." This "presumption of concurrent jurisdiction can be rebutted," the Court held, "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." FAA § 7 contains no "explicit statutory directive" to limit the enforcement of arbitral subpoenas to federal courts. The statute authorizes the federal court to enforce the subpoena "upon petition" of the party seeking enforcement but does not say that the petition must be filed in federal court. The legislative history of the FAA says nothing about an exclusive federal forum.

And there is not "clear incompatibility between state-court jurisdiction and federal interests." *Id.* Congress plainly intended that arbitral subpoenas be enforced in court. That intention is not frustrated by a state court undertaking the enforcement.

The Indiana court reasoned that the "limited federal jurisdiction for enforcement is a reflection of Congress' desire to keep arbitration simple and efficient." If Congress had that intention, it would have placed meaningful restrictions on the enforceability of all arbitral subpoenas. Instead, it authorized federal courts to enforce arbitral subpoenas to the full extent that subpoenas for civil actions can be enforced. Allowing arbitral subpoenas to be enforced in those proceedings that happen to satisfy the requirements of federal court jurisdiction while prohibiting enforcement in proceedings that do not is a crude way to keep arbitrations "simple and efficient." It is not a plausible reading of congressional intent.

The Indiana court also was concerned that enforcement of the subpoena in state court "is to confer nationwide jurisdiction on an arbitration panel, since parties to arbitration could ask any state court to enforce" the subpoena. The court assumed that every state court in the nation has the authority to enforce subpoenas issued by out-of-state arbitrators, which probably is not true. Even if it were true, nationwide enforcement of arbitral subpoenas is not incompatible with any policy expressed in the language or legislative history of the FAA. Nationwide enforcement of arbitral subpoenas was not available at the time of the *Beck's Hybrid* decision because Fed. R. Civ. P. 45 generally limited enforcement to the 100-mile radius around the court. That was a restriction imposed by Rule 45, not by the FAA, which simply provides that arbitral subpoenas are to be enforced "in the same manner provided by law for securing the attendance of witnesses . . . in the courts of the United States." Now that Rule 45 has been amended to allow nationwide service of subpoenas by federal courts, no federal interest can be found in a geographic restriction on arbitral subpoenas, and no incompatibility can be found in the enforcement of an arbitral subpoena in any state court in the nation.

Unless and until *Beck's Superior Hybrids* is overturned, parties may be unable to obtain enforcement in Indiana state courts of subpoenas issued by arbitrators sitting in other states. The decision should carry little weight in other states.

Subpoena forms

Appendix 6 is a form for a subpoena issued under the FAA. The form uses the title "summons" to conform to the language of FAA § 7. Appendix 7 is a form of a subpoena issued under Illinois' version of the Uniform Arbitration Act. For subpoenas issued under the laws of other states, the form should be modified to conform with the state's arbitration act and its statutes and rules on subpoenas in civil actions.

Appendix 1: Federal Arbitration Act § 7

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Appendix 2: State arbitration laws on arbitral subpoenas

State	Provisions on arbitral subpoenas	Model
Alabama	Ala. Code §§ 6-6-7, -8	
Alaska	AK Stat § 09.43.440	RUAA
Arizona	AZ Rev Stat § 12-3017	RUAA
Arkansas	CO Rev Stat § 13-22-217	RUAA
California	CA Civ Pro Code §§ 1283-1283.1	
Colorado	CO Rev Stat § 16-108-214	RUAA
Connecticut	CT Gen Stat § 52-407qq	RUAA
Delaware	10 DE Code § 5708	UAA
District of Columbia	DC Code § 16–4417	RUAA
Florida	FL Stat § 682.08	RUAA
Georgia	GA Code § 9-9-9	UAA
Hawaii	HI Rev Stat § 658A-17	RUAA
Idaho	ID Code § 7-907	UAA
Illinois	710 ILCS 5/7	UAA
Indiana	IN Code § 34-57-2-8	UAA
Iowa	IA Code § 679A.7	UAA
Kansas	KS Stat § 5-439	RUAA
Kentucky	KY Rev Stat § 417.110	UAA
Louisiana	LA Rev Stat § 9:4206	FAA
Maine	14 ME Rev Stat § 5933	UAA
Maryland	MD Cts & Jud Pro Code § 3-217	
Massachusetts	MA Gen L ch 251 § 7	UAA
Michigan	MI Comp L § 691.1697	RUAA
Minnesota	MN Stat § 572B.17	RUAA

State	Provisions on arbitral subpoenas	Model
Mississippi	MS Code §§ 11-15-13, -17	
Missouri	MO Rev Stat § 435.380	UAA
Montana	MT Code § 27-5-215	UAA
Nebraska	NE Code § 25-2608	UAA
Nevada	NV Rev Stat § 38.233	RUAA
New Hampshire	NH Rev Stat § 542:5	
New Jersey	NJ Rev Stat § 2A:23B-17	RUAA
New Mexico	NM Stat § 44-7A-18	RUAA
New York	NY CPLR §§ 2302(a), 2308(b), 7505	
North Carolina	NC Gen Stat § 1-569.17	RUAA
North Dakota	NDCC § 32-29.03-17	RUAA
Ohio	Ohio Rev Code § 2711.06	FAA
Oklahoma	12 OK Stat § 12-1868	RUAA
Oregon	OR Rev Stat § 36.675	RUAA
Pennsylvania	42 PA Cons Stat § 7321.18	RUAA
Rhode Island	RI Gen Laws § 10-3-8	FAA
South Carolina	SC Code § 15-48-80	UAA
South Dakota	SD Codified L § 21-25A-12, -13	UAA
Tennessee	TN Code § 29-5-308	UAA
Texas	TX Civ Prac & Rem Code § 171.051	
Utah	UT Code § 78B-11-118	RUAA
Vermont	12 V.S.A. § 5662	UAA
Virginia	VA Code § 8.01-581.06	UAA
Washington	WA Rev Code § 7.04A.170	RUAA
West Virginia	WV Code § 55-10-19	RUAA
Wisconsin	WI Stat §§ 788.06(2), 788.07	
Wyoming	WY Stat § 1-36-109	UAA

Appendix 3: Uniform Arbitration Act § 7

(a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the _____ Court.

Appendix 4: Revised Uniform Arbitration Act § 17

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the

production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

Appendix 5: UNCITRAL Model Law on International Commercial Arbitration

State	Article 27 enacted
California	CA Civ Pro Code § 1297.271
Connecticut	CT Gen Stat § 50a-127
Florida	FL Stat § 684.0038
Illinois	710 ILCS 30/20-55
Louisiana	LA Rev Stat § 9:4267
North Carolina	NC Gen Stat § 1-567.57
Ohio	Ohio Rev Code § 2712.51
Oregon	OR Rev Stat § 36.506(1)
Texas	TX Civ Prac & Rem Code § 172.172
Washington	WA Rev Code § 7.05.380

Appendix 6: Model FAA subpoena

[Case Caption]

To: [Name]
[Place of service]

SUMMONS TO TESTIFY IN AN ARBITRATION

This Summons is issued by the Arbitrator in the above-referenced proceeding under the authority of the Federal Arbitration Act, 9 U.S.C. § 7, which authorizes arbitrators to summon witnesses to appear to testify before them in the same manner as a subpoena to appear and to testify before a federal court and to bring with them any books, records, documents, or papers that are deemed material as evidence in the case.

You are hereby commanded to appear to give your testimony before the Arbitrator at [address] on [date] at [time], and to bring with you the documents listed on the attached Rider.

*** See attached Rider ***

A check for $___.__, covering witness fees and mileage expenses, is being delivered to you with this Summons. Your testimony will be recorded by:_____.

Your appearance for testimony is waived if you deliver to [name and address] before [time] on [date], a complete copy of the documents listed on the attached Rider, a certification that the production of documents complies fully with the attached Rider and that each of the documents produced is to the best of your knowledge, information, and belief, authentic.

Your response to this Summons is governed by Rule 45 of the Federal Rules of Civil Procedure, relevant subparts of which are set out below.

This Summons may be enforced by the United States District Court for the [federal district], upon the application of a party, in the same manner as a judicially issued subpoena.

If you have any questions about this summons, please contact the counsel named below.

Prepared by:

[Counsel's name]
[Address]
[Telephone]
[Email]

Issued by:

_____

[Arbitrator's name]
Arbitrator

Date: _____

Rule 45 of the Federal Rules of Civil Procedure (excerpts)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

. . . .

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

. . . .

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of

business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

Proof of Service

I served this Summons by delivering a copy to _____ on _____, 20__, at _____. I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $_____.

I declare under penalty of perjury of the laws of the United States of America that this information is true.

_____

Name: _____

Date: _____

Appendix 7: Model UAA subpoena

[Case Caption]

To: [Name]
[Place of service]

SUPOENA TO TESTIFY IN AN ARBITRATION

This Subpoena is issued by the Arbitrator in the above-referenced proceeding under the authority of the Illinois Uniform Act, 510 ILCS 5/7(a), which authorizes arbitrators to summon witnesses to appear to testify before them in the same manner as a subpoena to appear and to testify before a federal court and to bring with them any books, records, documents, or papers that are deemed material as evidence in the case.

You are hereby commanded to appear to give your testimony before the Arbitrator at [address] on [date] at [time], and to bring with you the documents listed on the attached Rider.

*** See attached Rider ***

A check for $___.__, covering witness fees and mileage expenses, is being delivered to you with this Subpoena. Your testimony will be recorded by:_____.

Your appearance for testimony is waived if you deliver to [name and address] before [time] on [date], a complete copy of the documents listed on the attached Rider, a certification that the production of documents complies fully with the attached Rider and that each of the documents produced is to the best of your knowledge, information, and belief, authentic.

This Subpoena may be enforced by an Illinois court with proper jurisdiction, upon the application of a party, in the same manner as a judicially issued subpoena. **Your failure to respond to this subpoena may subject you to punishment for contempt of an Illinois court.**

If you have any questions about this subpoena, please contact the counsel named below.

Prepared by:

[Counsel's name]
[Address]
[Telephone]
[Email]

Issued by:

_____
[Arbitrator's name]
Arbitrator

Date: _____

Proof of Service

I served this Summons by delivering a copy to _____ on _____, 20__, at _____. I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $_____.

I declare under penalty of perjury, as provided in 735 ILCS 5/1-109, that this information is true.

_____

Name: _____

Date: _____

Endnotes

1. 9 U.S.C. §§ 1, 2.
2. *See, e.g., CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017).
3. 430 F.3d 567 (2nd Cir. 2005).
4. *Id.* at 577.
5. *Id.* at 577-78.
6. *Id.*
7. 804 F. Supp. 2d 808 (N.D. Ill. 2011).
8. *Id.* at 811. *See also Next Level Planning & Wealth Management, LLC v. Prudential Insurance Co. of America*, 2019 U.S. Dist. LEXIS 23375, 2019 WL 585672, at *4 (E.D. Wis. Feb. 13, 2019) ("arbitrators may conduct preliminary hearings during which witnesses may be ordered to appear and produce documents").
9. 2018 U.S. Dist. LEXIS 221033, 2018 WL 4868993, at *5 (W.D. Ky. Aug. 21, 2018).
10. *Id.*
11. *In re Security Life Insurance Co.*, 228 F.3d 865, 870–71 (8th Cir. 2000).
12. *See Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159-60 (11th Cir. 2019); *CVS Health Corp. v. Vividus*, LLC, 878 F.3d 703, 707 (9th Cir. 2017); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London,* 549 F.3d 210, 216–17 (2nd Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3rd Cir. 2004).
13. *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269, 276 (4th Cir. 1999).
14. *Washington National Insurance Co. v. OBEX Group LLC*, 958 F.3d 126, 136 (2nd Cir. 2020).
15. *Next Level Planning & Wealth Management., LLC v. Prudential Insurance Co.*, 2019 U.S. Dist. LEXIS 23375, 2019 WL 585672, at *4 (E.D. Wis. Feb. 13, 2019); *See also Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413 (3rd Cir. 2004) (Chertoff, J. concurring) ("Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings"); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2nd Cir. 2008).
16. Fed. R. Civ. P. 45(a)(3).
17. Fed. R. Civ. P. 45(b)(1).
18. 28 U.S.C. § 1821.
19. *See Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1158 (11th Cir. 2019); *Tang Energy Group, Ltd. v. Catic U.S.A.*, 2015 U.S. Dist. LEXIS 104051, 2015 WL 4692459, at *2-3 (N.D. Cal. Aug. 6, 2015); *Alliance Healthcare*

Services, Inc. v. Argonaut Private Equity, LLC, 804 F. Supp. 2d 808, 811-12 (N.D. Ill. 2011).

20. *See Next Level Planning & Wealth Management, LLC v. Prudential Insurance Co.*, 2019 U.S. Dist. LEXIS 23375, 2019 WL 585672, at *1 (E.D. Wis. Feb. 13, 2019).

21. *Rembrandt Vision Technologies, L.P. v. Bausch & Lomb, Inc.*, 2011 U.S. Dist. LEXIS 172498, 2011 WL 13319343, at *2 (N.D. Ga. Oct. 7, 2011).

22. *Washington National Insurance Co. v. OBEX Group LLC,* 2019 U.S. Dist. LEXIS 9300, 2019 WL 266681, at *5 (S.D.N.Y. Jan. 18, 2019), *aff'd,* 958 F.3d 126, 139 (2nd Cir. 2020),

23. *Id., aff'd*, 958 F.3d at 139.

24. Fed. R. Civ. 45(b)(2).

25. Fed. R. Civ. P. 45(c)(1).

26. *See In re Managed Care Litigation*, 2020 U.S. Dist. LEXIS 117788, 2020 WL 3643042 at *7-9 (S.D. Fla. Jul. 2, 2020).

27. *See, e.g., Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89, 94-96 (2nd Cir. 2006); *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 811-13 (N.D. Ill. 2011).

28. *See Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1157 (11th Cir. 2019).

29. 28 U.S.C. § 1783.

30. *In re Edelman*, 295 F.3d 171, 179 (2nd Cir. 2002).

31. *See Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159-61 (11th Cir. 2019); *Dodson International Parts, Inc. v. Williams International Co.*, 2019 U.S. Dist. LEXIS 195193, 2019 WL 5680811, at *2 (E.D. Mich. June 26, 2019); *Next Level Planning & Wealth Mgt., LLC v. Prudential Insurance Co.*, 2019 U.S. Dist. LEXIS 23375, 2019 WL 585672, at *5 (E.D. Wis. Feb. 13, 2019); *Westlake Vinyls, Inc. v. Cooke*, 2018 U.S. Dist. LEXIS 221033, 2018 WL 4868993, at *4-5 (W.D. Ky. Aug. 21, 2018).

32. *See, e.g.* AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference.

33. *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 557 (1964).

34. *See In re Security Life Insurance Co.*, 228 F.3d 865, 871 (8th Cir. 2000); *Bailey Shipping Ltd. v. American Bureau of Shipping*, 2014 U.S. Dist. LEXIS 98338, 2014 WL 3605606, at *2 (S.D.N.Y. July 18, 2014); *Federal Insurance Co. v. Law Offices of Edward T. Joyce, P.C.*, 2008 U.S. Dist. LEXIS 20713, 2008 WL 4348604, at *1 (N.D. Ill. Mar. 13, 2008); *Festus & Helen Stacy Foundation v. Merrill Lynch, Pierce Fenner, & Smith Inc.*, 432 F. Supp. 2d 1375, 1379-80 (N.D. Ga. 2006).

35. Fed. R. Civ. P. 45(d)(1).

36. *Id.*

37. *See Maine Community Health Options v. CVS Pharmacy, Inc.*, 2020 U.S. Dist. LEXIS 40313, 2020 WL 1130057, at *4 (D.R.I. Mar. 9, 2020); *Neo Ivy Capital Management LLC v. Savvysherpa LLC*, 2019 U.S. Dist. LEXIS 55579, 2019 WL 1435058, at *4 (D. Minn. Mar. 8, 2019); *Maine Community Health Options v. Walgreen Co.*, 2018 U.S. Dist. LEXIS 214029, 2018 WL 6696042, at *5 (W.D. Wis. Dec. 20, 2018).

38. Fed. R. Civ. P. 45(d)(3)(iii).

39. 2019 U.S. Dist. LEXIS 9300, 2019 WL 266681, at *137 (S.D.N.Y. Jan. 18, 2019), aff'd, 958 F.3d 126, 137 (2nd Cir. 2020).

40. 958 F.3d at 138.

41. *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

42. *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 297-99 (3rd Cir. 2004); *Medical Mutual of Ohio v. deSoto*, 245 F.3d 561, 567-68 (6th Cir. 2001); *Board of Trustees, Sheet Metal Workers' National Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035-37 (7th Cir. 2000); *Peay v. BellSouth Medical Assistance Plan*, 205 F.3d 1206, 1211-14 (10th Cir. 2000).

43. *See Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1158 (11th Cir. 2019).

44. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581–82 (2008).

45. *See Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 572 (2nd Cir. 2005); *Amgen, Inc. v. Kidney Center.*

of Delaware County, Ltd., 95 F.3d 562, 567 (7th Cir. 1996).

46. *See, e.g.*, Harris, Enforcing Arbitral Subpoenas: Reconsidering Federal Question Jurisdiction under FAA Section 7, 66 Dispute Resolution Journal no. 3 (2011).

47. *See Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 573 (2nd Cir. 2005); *Amgen, supra at 566; Golden State Bank v. First-Citizens Bank & Trust Co.*, 2011 U.S. Dist. LEXIS 158905, 2011 WL 13047425, at *3 (C.D. Cal. Jul. 7, 2011).

48. *See Barnell v. Shumard*, 2011 WL 13322977 at *2 (N.D. Ga. 2011).

49. 556 U.S. 49 (2009).

50. 9 U.S.C. § 4.

51. 556 U.S. at 62-65.

52. 9 U.S.C. §§ 9, 10, 11.

53. *See Quezada v. Bechtel OG & C Construction Services, Inc.*, 946 F.3d 837, 842-43 (5th Cir. 2020); *McCormick v. America Online, Inc.*, 909 F.3d 677, 682-85 (4th Cir. 2018); *Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc.*, 852 F.3d 36, 46 (1st Cir. 2017); *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372, 388 (2nd Cir. 2016).

54. *Goldman v. Citigroup Global Markets Inc.*, 834 F.3d 242, 252-56 (3rd Cir. 2016); *Magruder v. Fidelity Brokerage Services LLC*, 818 F.3d 285, 288 (7th Cir. 2016).

55. 9 U.S.C. § 4.

56. *See Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999).

57. 28 U.S.C. § 1332(a)(1).

58. *See Hermès of Paris, Inc. v. Swain*, 867 F.3d 321, 323-26 (2nd Cir. 2017); *Maine Community Health Options v. CVS Pharmacy, Inc.*, 2020 U.S. Dist. LEXIS 40313, 2020 WL 1130057, at *2 (D.R.I. Mar. 9, 2020).

59. *See Washington National Insurance Co. v. OBEX Group LLC*, 958 F.3d 126, 133-36 (2nd Cir. 2020).

60. 28 U.S.C. § 1332(a)(1).

61. 958 F.3d at 135; s*ee also Next Level Planning & Wealth Management,, LLC v. Prudential Insurance Co.*, 2019 U.S. Dist. LEXIS 23375, 2019 WL 585672, at *2 (E.D. Wis. Feb. 13, 2019); *Federal Insurance Co. v. Law Offices of Edward T. Joyce, P.C.*, 2008 U.S. Dist. LEXIS 20713, 2008 WL 4348604, at *1 (N.D. Ill. Mar. 13, 2008).

62. *See Merchant Holdings, LLC v. Traeger Pellet Grills, LLC*, 2019 U.S. Dist. LEXIS 101546, 2019 WL 2502937, at *3-5 (D. Utah June 17, 2019); *Zurich Insurance PLC v. Ethos Energy (USA) LLC*, 2016 U.S. Dist. LEXIS 108622, 2016 WL 4363399, at *2 (S.D. Tex. Aug. 16, 2016); *Chicago Bridge & Iron Co.. v. TRC Acquisition, LLC*, 2014 U.S. Dist. LEXIS 103287, 2014 WL 3796395, at *2 (E.D. La. July 29, 2014).

63. 2020 U.S. Dist. LEXIS 40313, 2020 WL 1130057 (D.R.I. Mar. 9, 2020).

64. *Id.* at *3.

65. *Id.* at *3-4.

66. 9 U.S.C. § 203.

67. 9 U.S.C. § 202.

68. 2015 U.S. Dist. LEXIS 104051, 2015 WL 4692459, at *1 n.2 (N.D. Cal. Aug. 6, 2015).

69. *See Alexander v. United States*, 201 U.S. 117 (1906).

70. 9 U.S.C. § 16(a)(3).

71. 95 F.3d 562, 565-7 (7th Cir. 1996),

72. *Id.* at 566-67.

73. *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1154 (11th Cir. 2019); *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89, 92 (2nd Cir. 2006); *Nielsen SA v. Celanese AG*, 430 F.3d 567, 575-76 (2nd Cir. 2005).

74. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004); *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999).

75. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

76. *Id*. at 16 n. 10; s*ee also Aixtron, Inc. v. Veeco Instruments Inc*., 2020 Cal. App. LEXIS 667, 2020 WL 4013981 at *15 (Cal. App. Jul. 16, 2020).

77. CA Civ. P. Code § 1283.05, 1283.1(a).

78. *Id*. § 1283.1(b).

79. *Aixtron, Inc. v. Veeco Instruments, Inc.*, 2020 Cal. App. LEXIS 667, 2020 WL 4013981 at *18 (Cal. App. Jul. 16, 2020).

80. *See Empire State Building v. New York Skyline*, Inc., 2014 WL 572942 (N.Y. Sup. Ct. Feb. 11, 2014).

81. CPLR § 3102(c).

82. *De Sapio v. Kohlmeyer*, 320 N.E.2d 770, 773 (N.Y. 1974) (*quoting Matter of Katz*, 160 N.Y.S.2d 159, 160-61 (N.Y App. Div. 1957).

83. *International Components Corp. v. Klaiber*, 387 N.Y.S.2d 253, 254 (N.Y. App. Div. 1976).

84. UAA § 7(b).

85. RUAA § 17(c).

86. RUAA § 17(d).

87. *See Quinn v. Eight Judicial District Court*, 410 P.3d 984, 987-88 (Nev. 2018); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440, 443-44 (Va. 2015); *Colorado Mills, LLC v. Sunopta Grains & Foods, Inc.*, 269 P.2d 731 (Col. 2012).

88. UIDDA §§ 2(2), 3(b).

89. UIDDA, Comments to § 3.

90. CA Civ Pro Code § 1283.

91. UAA § 7(c).

92. The Model Law applies only to "international commercial" arbitrations. Article 1(3) defines an arbitration as "international" when:

> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> > (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> >
> > (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
>
> (d) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Under the Model Law, the United States would be regarded as a single "State."

93. 76 N.Y.S.3d 752 (N.Y. Sup. Ct. 2018).

94. NY CPLR § 3119.

95. 76 N.Y.S.3d at 756.

96. *See In re Edelman*, 295 F.3d 171, 179 (2nd Cir. 2002).

97. 9 U.S.C. § 2.

98. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

99. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003).

100. *Volt Information Sciences., Inc. v. Trustees of the Leland Stanford Junior University,* 489 U.S. 468, 476 (1989).

101. *Id.*

102. Ala. Code § 6-6-7; MS Code § 11-15-13.

103. 940 N.E.2d 352 (Ind. App. 2011),

104. *Id.* at 361 (quoting Indiana Trial Rule 28(E).

105. *Id.* at 362.

106. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

107. *Id.*

108. 940 N.E.2d at 363.

109. *Id.* at 367.

110. FAA § 7. ■

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Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
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