Nonparty Discovery in Domestic Arbitration Proceedings (U.S.)

A Practical Guidance® Practice Note by Theodore K. Cheng, ADR Office of Theo Cheng

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This practice note discusses the process and procedure for obtaining nonparty discovery in domestic arbitration proceedings in the United States. Specifically, this note covers the governing authority to issue subpoenas in arbitration, the standards for obtaining nonparty discovery, service of process, the requirement to appear before the tribunal, enforcement in cases of noncompliance, and various strategic considerations.

The need to obtain discovery from a nonparty can be as common in an arbitration proceeding as in a civil court action. Imagine the following scenarios:

- Testimony from a former co-worker, who has now left the company, about the office atmosphere could be material to the veracity of the claimant's hostile work environment claim.
- Cell phone records from a mobile carrier could help corroborate a witness' testimony about calls that were made during the relevant period.
- Documents and testimony from an independent contractor engaged by the claimant could establish whether the claimant fulfilled its obligations under the parties' contract.
- Documents from the claimant's new employer regarding his or her conduct in connection with a non-solicitation covenant he or she entered into with the respondent may be relevant to whether those obligations were breached.
- Sales information from downstream customers could be relevant to the damages analysis in an intellectual property dispute.

Obtaining nonparty testimony, information, and documents in a domestic arbitration proceeding, however, is an often overlooked and misunderstood aspect of arbitration practice. This practice note explains the legal frameworks governing this practice and addresses what practitioners can expect when faced with the need to obtain nonparty discovery. Of particular importance are the limitations that the arbitral forum places on nonparty discovery as compared to U.S. civil court practice, which can differ markedly based upon jurisdiction and/or applicable arbitration procedural statute. This note will also provide practical tips on how to prepare nonparty subpoenas to maximize the ability to obtain the discovery needed to prosecute and defend the proceeding.

For more information on domestic arbitration proceedings managed by arbitral organizations in the United States, see JAMS Arbitration Resource Kit, AAA Arbitration Resource Kit, and CPR Arbitration Resource Kit.

Governing Authority

In an arbitration proceeding, much like in a civil court action, a party may obtain legal process—like a subpoena—to secure discovery (e.g., testimony, information, and documents) from a nonparty individual or entity. However, the nature and scope of that legal process in the arbitral forum are markedly different. Initially, you must clearly identify the authority governing the issuance of a subpoena because that legal framework can lead to very different outcomes. The principal governing authority addressed in this practice note are:

- The Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.)
- State arbitration statutes, including:
  - The Uniform Arbitration Act (1955)
  - The Revised Uniform Arbitration Act (2000) –and–
  - New York law (N.Y. C.P.L.R. Article 75)

Process under the FAA

Section 7 of the FAA provides that "the arbitrators . . . 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. . . . 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."

When obtaining a subpoena under the FAA, keep in mind the following key points:

- The authority to issue the subpoena
- The standard for obtaining nonparty discovery
- Service of process
- The requirement to appear before the tribunal –and–
- Enforcement in cases of noncompliance

For information on issuing subpoenas governed by the FAA, see Compelling Evidence from Nonparties in Arbitration (U.S.) and Subpoena in Arbitration Checklist (U.S.).

The Authority to Issue the Subpoena

Unlike in typical civil litigation practice where attorneys are generally permitted free rein to issue subpoenas to relevant nonparties, under the FAA, it is the tribunal (either a sole arbitrator or a majority of the arbitration panel)—and only the tribunal—that may issue a subpoena (or, as it is called under the FAA, a summons) compelling an individual or entity to produce relevant and material testimony, information, or documents. See, e.g., Nat'l Broadcasting Co. v. Bear Stearns & Co., 165 F.3d 184, 187 (2d Cir. 1999) (holding that Section 7 of the FAA "explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents or witnesses"). Thus, you should expect to engage in a fair amount of advance coordination and communication with the tribunal before any process is issued to nonparties.

The Standard for Obtaining Nonparty Discovery

Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Moreover, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." The 2015 amendments to the rules deleted a former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence." Many attorneys, however, continue to misunderstand and misapply this standard as equivalent to a broad scope of discovery available in federal litigation.

By contrast, Section 7 of the FAA refers to the issuance of a summons to "any person to attend before [the tribunal] 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." Although a testimonial appearance is not explicitly referenced, the FAA contemplates a witness complying with the summons by testifying and providing evidence in the case, accompanied by any requested documents. Said differently, the FAA does not contemplate mere prehearing discovery of information or documents by nonparties as would be the case in civil litigation. Tribunals will be inclined to permit discovery from nonparties on noncumulative evidence that is:

- Known or reasonably believed to exist
- Not available within the party's control –and–
- Necessary to establish some fact in dispute

The standard, however, is a far narrower scope of discovery than Fed. R. Civ. P. 26(b)(1). The "material evidence" requirement focuses on evidence that is relevant and material to a resolution of the proceeding. Accordingly, you should draft requests seeking the production of documents or information with a reasonably high degree of specificity so that a tribunal can assess the significance of the evidence you seek. As you draft your document requests, be sure to avoid:

- Resorting to broad categories of subject matter
- Merely identifying sources or repositories of potential evidence –and–
- Using sweeping phrases such as "any and all" in favor of targeted categories or the identification of specific documents

See also Strategic Considerations below.

Service of Process

Section 7 of the FAA also provides that the summons should be served "in the same manner as subpoenas to appear and testify before the court." Rule 45 of the Federal Rules of Civil Procedure governs subpoena procedure in federal court actions and provides for nationwide service of process of a judicial subpoena. See Fed. R. Civ. P. 45(b)(2) ("A subpoena may be served at any place within the United States."). Thus, you may issue the summons to a witness who resides a considerable distance away from the place (or seat) of the arbitration.

However, compelling a witness to appear has certain geographical limitations. Under Fed. R. Civ. P. 45(c)(1), a summons can only command an individual to attend and testify at a hearing or deposition:

- Within 100 miles of where the person resides, is employed, or regularly transacts business in person –or–
- Within the state where the person resides, is employed, or regularly transacts business in person, if the person is:
    - A party or a party's officer –or–
    - Commanded to attend a trial and would not incur substantial expense

For example, although a tribunal is without authority to compel a Chicago resident to come to New York to testify, it could require that witness to travel within the state of Illinois if the witness would not incur substantial expense. Alternatively, a New York-based arbitrator could travel to Chicago to hear the witness' testimony.

Similarly, for the production of documents, electronically stored information, or other tangible things, the summons can only command an individual to appear and produce the requested items "within 100 miles of where the person resides, is employed, or regularly transacts business in person." See Fed. R. Civ. P. 45(c)(2)(A). Additionally, a summons can command inspection of premises only at the premises to be inspected. See Fed. R. Civ. P. 45(c)(2)(B).

The Requirement to Appear before the Tribunal

At least three federal circuit courts—the Second, Third, and Ninth Circuits—have interpreted Section 7 of the FAA to require that the individual or entity being subpoenaed appear at a hearing before one or more of the members of the tribunal. Under that interpretation, you may not serve a summons seeking the production of documents from a nonparty without an appearance in advance of the hearing (i.e., a discovery subpoena). See, e.g., CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017); Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004). An extension of this interpretation is that Section 7 also bars the issuance of prehearing discovery deposition subpoenas, although that issue was not squarely presented in those circuit court cases.

In reaching their respective conclusions, the Second, Third, and Ninth Circuits rejected the Eighth Circuit's view that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents . . . prior to the hearing," despite Section 7's silence on this matter. In re Sec. Life Ins. of Am., 228 F.3d 865, 870–71 (8th Cir. 2000); accord Am. Fed. of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Comm. of Detroit, Inc.), 164 F.3d 1004, 1009 (6th Cir. 1999) ("[T]he FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing.").

Those courts also rejected the view adopted by the Fourth Circuit that, although Section 7 generally precludes discovery subpoenas, "a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship." COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999). The Fourth Circuit declined to define "special need or hardship," aside from "observ[ing] that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." COMSAT Corp., 190 F.3d at 276.

Assuming the tribunal accepts the majority view, the parties would not engage in any prehearing discovery of nonparties using summonses. Rather, under the FAA, the tribunal may only compel testimony and the production of documents from a nonparty in the context of a scheduled evidentiary hearing. Section 7 of the FAA contemplates that the tribunal will convene a hearing to secure the testimony of a witness or receive documents into evidence (accompanied by the testimony of a nonparty records custodian witness to authenticate the documents) at or near the place where:

- The witness is located –and–
- Counsel, the parties, and one or more members of the tribunal are present

However, the FAA does provide that the individual or entity may appear before one or more of the members of the tribunal, thereby affording flexibility as to scheduling when multiple arbitrators are serving on the tribunal. Accordingly, when preparing the summons, you must coordinate with

at least one of the arbitrators on the tribunal so you can schedule an evidentiary hearing date—likely on a day different from, and in advance of, the merits hearing—for when one of the arbitrators can be present.

The simplest way to comply with Section 7's requirements is to schedule a separate hearing date for the nonparty witness at a physical location within the FAA's geographic constraints. See, e.g., AAA Commercial Arbitration Rule R-12 ("The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process."). At least one member of the tribunal must physically travel to that location to preside over the hearing and accept the testimony, information, and/or documents into evidence. But see AAA Commercial Arbitration Rule R-35(a) (arguably barring the convening of a hearing with less than all tribunal members present because "[a]ll evidence shall be taken in the presence of all of the arbitrators"); AAA Employment Arbitration Rule 30 (same).

Because the tribunal retains the discretion to conduct the hearing in any fashion that comports with due process, the presence of the tribunal member(s), counsel, parties, and the nonparty witness in the same physical location may not be necessary—particularly if the time and costs associated with scheduling an additional hearing date at a remote location are overly burdensome. For example, to address any logistical or cost concerns, the parties could agree—with the nonparty witness' consent—to schedule a hearing for the nonparty's testimony using the following protocol:

- The witness will appear and testify via an audio or video teleconferencing platform (e.g., Zoom, Microsoft Teams, or WebEx)
- The testimony will be taken at a location that complies with the FAA
- The parties will receive documents electronically –and–
- Some or all of the other participants will be located at the seat of arbitration and will participate remotely

But see, e.g., Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1160–61 (11th Cir. 2019) (holding that the trial court did not have the authority to compel nonparties to comply with a summons to appear for a live hearing and video conference and to bring with them certain documents because the nonparty was not being compelled to attend in the physical presence of the arbitrator); Broumand v. Joseph, 522 F. Supp. 3d 8, 21-25 (S.D.N.Y. 2021) (declining to enforce arbitral subpoena because the witness would appear remotely via video teleconferencing and electronically submit documents); Dodson Int'l Parts, Inc. v. Williams Int'l Co., 2019 U.S. Dist. LEXIS 195193, at *4-5 (E.D. Mich. Oct. 23, 2019) (dismissing a petition to enforce an arbitral summons commanding a nonparty to appoint a representative to testify and transmit documents through a "remote uplink" from Connecticut and holding that such a proceeding was not the same as appearing before the arbitrator in Michigan).

If the parties waive cross-examination, the nonparty witness' testimony could also be taken through a sworn witness' statement, affidavit, or declaration.

For a summons seeking only the production of documents, nonparties often choose to avoid the inconvenience of having a records custodian testify by instead delivering the requested documents to counsel for the parties in lieu of an appearance. In this way, prehearing nonparty discovery functions like a subpoena for the production of documents in a civil action.

However, if the parties accomplish the production, the tribunal will receive the documents as evidence—not discovery—in the proceeding, and that evidence may then be relied upon by the tribunal, counsel, and the parties.

Enforcement in Cases of Noncompliance

Recipients can simply ignore or decline to comply with a summons because they are not self-enforcing. Thus, you must undertake separate enforcement proceedings to compel compliance. Section 7 of the FAA provides that "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."

Note that you must file any enforcement proceedings in federal court (or a competent state court if there is no basis for subject matter jurisdiction) in the judicial district where the arbitrators are located (unless that court transfers the enforcement case to the federal district where the seat is located). See Fed. R. Civ. P. 45(d)(3). If the tribunal (or a majority of the arbitrators) chooses to convene a hearing in the district where the witness resides, the local federal district court may exercise personal jurisdiction over the witness and—assuming it can also exercise subject matter jurisdiction—enforce the summons under Section 7 because the tribunal is "sitting" in that district.

However, in a situation where the tribunal is participating remotely—either by telephone or video teleconferencing—

you may have limited options to enforce the summons if the enforcing court construes the term "sitting" as requiring the physical presence of the tribunal. Cf., e.g., Westlake Vinyls, Inc. v. Cooke, 2018 U.S. Dist. LEXIS 220196, at *7-18 (W.D. Ky. Aug. 20, 2018) (recommending that a petition to enforce an arbitral summons compelling a nonparty to appear in Massachusetts to sit for a deposition in support of an arbitration seated in Kentucky be denied where the arbitrator would attend by telephone or video because, although pre-hearing discovery is permitted in the Sixth Circuit, the summons did not comply with the requirement that the arbitrator be physically present); Dynegy Midstream Servs. v. Trammochem, 451 F.3d 89, 95 (2d Cir. 2006) (noting that, under an earlier version of Rule 45, enforcement of a summons issued by a tribunal "sitting in the Southern District of New York" and requiring the nonparty "to produce documents in Houston," which was served on the nonparty "in Houston, presumably within 100 miles of where the production was to take place," "required that any enforcement action be brought" in the Southern District of New York, not the Southern District of Houston).

Additional helpful guidance is also available in a report by the New York City Bar Association entitled "A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing (2015)" and The College of Commercial Arbitrators' Guide to Best Practices in Commercial Arbitration, Chapter 9 ("Summoning Nonparty Witnesses") (4th ed. 2017).

Process under State Arbitration Statutes

Most states' arbitration statutes are:

- Modeled after the FAA
- Adopt one or both of the Uniform Arbitration Act or the Revised Uniform Arbitration Act –or–
- Pre-date the FAA itself (e.g., New York's statute)

Accordingly, state statutes can differ markedly in both the nature and scope of permissible nonparty discovery. Some provide minimal guidance and authority, while others are more detailed. Be sure to research existing decisional law interpreting your applicable statute for additional guidance and practice limitations.

Process under the Uniform Arbitration Acts

Both the Uniform Arbitration Act and the Revised Uniform Arbitration Act provide for the issuance of arbitral subpoenas, with notable differences between the two statutory frameworks.

The Uniform Arbitration Act (UAA)

Since the UAA was promulgated in 1955, 21 states and the District of Columbia enacted the UAA as their governing arbitration statute.

Section 7(a) of the UAA provides that "[t]he 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." UAA, § 7(a). Moreover, Section 7(b) of the UAA provides that, "[o]n 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." UAA, § 7(b). Subpoenas must "be served . . . in the manner provided by law for the service and enforcement of subpoenas in a civil action." UAA, § 7(a).

The express language of Section 7 thus provides an arbitrator with authority only to require the attendance of witnesses and the production of documents at the evidentiary hearing or to depose a witness who is unable to attend an evidentiary hearing. State courts are divided on whether the UAA (or statutes substantially similar to the UAA) permits an arbitrator to compel nonparties to produce documents or provide testimony outside of the context of an evidentiary hearing. For example:

- Most courts have permitted prehearing discovery at the discretion of the tribunal. See, e.g., Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp 1241 (S.D. Fla. 1988); Transwestern Pipeline Co. v. Blackburn, 831 S.W.2d 72 (Tex. Ct. App. 1992).
- On discovery matters, states with statutes substantially similar to the UAA have also left these issues to the discretion of the tribunal. See, e.g., Mass. Gen. Laws. Ann. ch. 251, § 7(e) (providing that only the arbitrators can enforce a request for production of documents and entry upon land for inspection and other purposes); Tex. Civ. Prac. & Rem. Code Ann. § 171.050(a)(2) (providing that the arbitrator "may authorize a deposition . . . for discovery or evidentiary purposes to be taken of an adverse witness"); see also Hay Group, 360 F.3d 404, 407 n.1 (referring to the version of the UAA enacted by Delaware and Pennsylvania and noting in dicta that "[t]he language of these state statutes clearly shows how a law can give authority to an arbitrator to issue pre-hearing document-production orders on third parties").
- Other courts require a showing of extraordinary circumstances before allowing any discovery. See, e.g., In re Deiulemar di Navigazione S.p.A., 153 F.R.D. 592 (E.D. La. 1994), or impose other requirements; see, e.g.,

Aixtron, Inc. v. Veeco Instruments Inc., 52 Cal. App. 5th 360, 397 (Cal. Ct. App. 2020) (holding that, aside from arbitrations that arise out of a claim for either wrongful death or personal injury, an arbitrator may grant discovery "[o]nly if the parties by their agreement so provide," quoting Cal. Code Civ. P. § 1283.1(b)).

- Some other courts conclude that prehearing discovery is simply unavailable. See, e.g., Rippe v. West Am. Ins. Co., 1993 Conn. Super. LEXIS 3197 (Conn. Sup. Ct. Dec. 2, 1993).

In states where prehearing discovery appears to be limited or constrained by the requirement of an evidentiary hearing, you should consider:

- Adopting one or more of the alternatives discussed above under Section 7 of the FAA –or–
- Seeking an agreement between the parties to conduct prehearing discovery

The Revised Uniform Arbitration Act (RUAA)

The RUAA was promulgated in 2000 as an update to the UAA, reflecting developments in arbitration law in the intervening decades. It was endorsed by the American Arbitration Association and the National Academy of Arbitrators, and approved by the American Bar Association in 2001. Currently, 23 states (not necessarily the same ones who enacted the UAA) and the District of Columbia have enacted the RUAA.

In states that have enacted both the UAA and RUAA, you should pay particular attention to the RUAA's effective date (usually in the statute's preamble or opening provisions). See, e.g., 42 Pa. C.S.A. § 7321.4 (providing that the RUAA "governs an agreement to arbitrate made on or after the effective date of this subchapter [July 1, 2019]" or, for agreements to arbitrate made before that date, "[i]f all the parties to the agreement or to the arbitration proceeding agree in a record that this subchapter governs the agreement," otherwise, the UAA governs).

The RUAA provides for more robust management of the discovery process by the tribunal. Absent the parties' agreement to the contrary, the RUAA empowers an arbitrator to "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." RUAA at § 17(b). More generally, the arbitrator is empowered to "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." RUAA at § 17(c). In doing so, "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." RUAA at § 17(d).

Because the RUAA expressly leaves the nature and scope of discovery to the discretion of the arbitrator, it provides sufficient flexibility for parties to conduct nonparty prehearing discovery and avoids the limitations found in both the FAA and the UAA.

Enforcement in Cases of Noncompliance

In most cases, you must enforce an arbitral subpoena through an application or petition in the relevant state court. This method is consistent with the enforcement mechanism provided under the UAA. See UAA, § 7 ("[U]pon application to the Court by a party or the arbitrators," arbitral subpoenas will be "enforced[ ] in the manner provided by law for the service and enforcement of subpoenas in a civil action.").

However, unlike the UAA, the RUAA expressly refers to discovery-related subpoenas. See RUAA at § 17(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."). Notably, the last clause in Section 17(d) of the RUAA—"the arbitrator may . . . 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"—also seemingly vests arbitrators with jurisdiction to enforce noncompliance with arbitral, prehearing discovery subpoenas.

Some state arbitration statutes also permit arbitrators to enforce prehearing discovery subpoenas in the same manner as in a civil proceeding, which would include subpoenas to nonparties. See, e.g., Cal. Civ. Proc. Code § 1283.05(b); Tex. Civ. Prac. & Rem. Code Ann. § 171.051(d); Utah Code Ann. § 78B-11-118(6).

Process under New York Law

New York has not adopted either the UAA or the RUAA. Rather, Article 75 of the New York Civil Practice Law and Rules (C.P.L.R.) governs arbitral subpoenas. The original version of this statutory scheme was adopted in 1920 and became the model for the FAA, which was enacted in 1925.

The C.P.L.R. provides that "[a]n arbitrator and any attorney of record in the arbitration proceeding has the power to

issue subpoenas." N.Y. C.P.L.R. 7505; see also N.Y. C.P.L.R. 2302(a) ("Subpoenas may be issued without a court order by . . . an attorney of record for a party to an action, an administrative proceeding or an arbitration, an arbitrator . . . in relation to which proof may be taken or the attendance of a person as a witness may be required."). However, the statute provides no further guidance for tribunals or practitioners on how nonparty discovery should be conducted.

Four key points are:

1. The authority to issue the subpoena
2. Service of process
3. The requirement to appear before the tribunal –and–
4. Enforcement in cases of noncompliance

The Authority to Issue the Subpoena

Notably, unlike the FAA, the New York statute authorizes both the arbitrator and any attorney of record to issue subpoenas. Because most tribunals believe that practitioners are not as well versed in nonparty subpoena practice in the arbitral forum, arbitrators will likely prefer to exert control over the process and dissuade practitioners from issuing subpoenas on their own without the tribunal's consultation or pre-approval. Thus, even though the C.P.L.R. empowers you to issue nonparty subpoenas, it is wise to discuss this issue with the tribunal in advance. See Strategic Considerations below.

For a relevant template, see Subpoena (Arbitration Hearing Testimony) (NY). For information on subpoenas in New York state court litigations, see Discovery Subpoenas: Drafting, Issuing, and Serving (NY).

Service of Process

Unlike the FAA, which provides for nationwide service of process, you may only serve subpoenas under C.P.L.R. 7505 within the geographical boundaries of New York. See, e.g., Siemens & Halske, GmbH v. Gres, 37 A.D.2d 768 (1st Dep't 1971); see also N.Y. Judiciary Law, § 2-b. To serve a subpoena outside the state, you must obtain an order from the tribunal allowing you to seek either a commission (for service in another state) or letters rogatory (for service in another country) from the state courts. Cf., e.g., N.Y. C.P.L.R. 3108 ("A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state.").

The Requirement to Appear before the Tribunal

Like the FAA, the C.P.L.R. only allows parties to compel the production of documents from a nonparty in connection with a scheduled evidentiary hearing and does not permit prehearing production of documents or depositions. See Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 7505.06 ("[T]he arbitrator does not have authority to order the parties to provide pre-hearing disclosure.").

To comply with the C.P.L.R., you should consider adopting one or more of the alternatives discussed above under Section 7 of the FAA. The tribunal could also direct the parties to seek court intervention to obtain an order allowing nonparty discovery in aid of arbitration. See N.Y. C.P.L.R. 3102(c) ("Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order."); but see Shannon Contracting LLC v. Equinox Fitness 92nd St., Inc., 2018 N.Y. Misc. LEXIS 6191, at *2–3 (N.Y. Sup. Ct. Dec. 12, 2018) (dismissing petition under N.Y. C.P.L.R. 3102(c) as premature because the petitioner "made no attempt to obtain discovery through the arbitration, and none of the nonparties have been served with subpoenas").

A New York court will order discovery in aid of arbitration only under extraordinary circumstances. See De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 406 (1974); In re Progressive Northeastern Ins. Co., 870 N.Y.S.2d 478, 481 (3d Dep't 2008); In re Moock, 473 N.Y.S.2d 793, 794 (1st Dep't 1984). Parties can likely satisfy this standard more easily by agreeing on the need for nonparty discovery. See, e.g., In re ACE Am. Ins. Co., 6 Misc. 3d 1005(A) (N.Y. Sup. Ct. 2004) (noting that the parties had stipulated to nonparty discovery and denying nonparty's motion to quash on ground that nonparty had not shown that it will "suffer unreasonable annoyance or expense by appearing for depositions and also testifying at the arbitration proceeding"); Textron, Inc. v. Unisys Corp., 138 Misc. 2d 124, 126 (N.Y. Sup. Ct. 1987) (holding that, where the parties had agreed to sought-after nonparty discovery, "the party seeking the nonparty witness need only show a legitimate basis for the requested examination"); but cf., e.g., Sigmond v. Bd. of Managers of Parc Vendome Condominium, 951 N.Y.S.2d 872, 872–73 (1st Dep't 2012) ("The court properly denied the petition seeking discovery from respondent Bright Horizons, a nonparty in the underlying arbitration proceeding, because the parties to the arbitration did not stipulate to conduct discovery of Bright Horizons.").

Enforcement in Cases of Noncompliance

Like other arbitral subpoenas, prehearing discovery subpoenas issued under the C.P.L.R. are not self-enforcing. Moreover, Article 75 does not include any provision for a tribunal to enforce its own subpoenas. Thus, enforcement proceedings need to be undertaken separately by bringing an appropriate application or petition in New York state court. See N.Y. C.P.L.R. 2308(b) ("Unless otherwise provided, if a person fails to comply with a subpoena which is not

returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance.").

For a relevant template, see Petition (Compel Compliance with Arbitrator's Subpoena) (NY). For related information on enforcing subpoenas in a New York state court litigation, see Discovery Subpoenas: Enforcing (NY).

Strategic Considerations

In practice, many tribunals routinely execute any summons or subpoena the parties submit, viewing their role as merely facilitating the production of relevant, material evidence necessary for the parties' prosecution and defense of the proceeding. However, tribunals may decline to issue subpoenas that are—on their face—unenforceable to:

- Avoid or minimize unnecessary disputes over the subpoena's validity and enforceability
- Uphold the integrity of the final award

After all, legal processes—even if they would be quashed as unenforceable—impose a legal threat (i.e., an *in terrorem* effect) on nonparties to coerce compliance.

Where the governing arbitration statute allows attorneys to issue subpoenas, tribunals should exercise oversight over how and to whom the subpoenas are issued. To facilitate this process, consider discussing the need for nonparty subpoenas during the preliminary hearing or initial case management conference. See Preliminary Hearings in Arbitration: The Arbitrator's Perspective (U.S.). Identifying your discovery needs early in the proceeding will help the tribunal better manage the case, particularly since nonparty discovery can significantly impact the cost and efficiency of the arbitration proceeding.

Even if you have agreed on a timetable or a procedure for handling nonparty subpoenas, complexities surrounding the nature and scope of arbitral subpoena power and enforcement can lead to delays and disruptions. Accordingly, when setting your arbitration timetable, consider scheduling additional days and times for separate evidentiary hearings to obtain testimony, information, or documents from nonparties.

Objections to the issuance of a subpoena and collateral enforcement proceedings may also negatively impact the:

- Proceeding's efficiency and cost
- Evidence the parties may ultimately present at the evidentiary hearing

To keep the proceeding on track, consider setting a firm deadline for the submission of nonparty subpoenas and any objections thereto during the information and document exchange phase. The parties should also discuss a framework for handling any questions, objections, or applications to quash or modify the subpoena, in the first instance, through a conference call with the tribunal and counsel. This will reduce the need for later court intervention to enforce compliance. As a courtesy, be sure to apprise the nonparty of the appropriate forum in which they should submit a motion to quash the subpoena as unenforceable.

Additionally, the parties should cooperate to make reasonably available all necessary testimony, information, or documents from nonparty individuals or entities whose cooperation they can secure based on existing relationships or influence. Doing so may obviate the need for an arbitral subpoena. Only when you cannot voluntarily obtain the nonparty discovery should you submit a subpoena to the tribunal for signature or request an appropriate order.

In the event a nonparty subpoena is necessary, you should provide the document to the tribunal in a word processing format so the tribunal can make any necessary revisions in compliance with the governing statute or tailor the subpoena to your particular case. Be sure to draft any production requests with specificity and not with broad subject matter categories or sweeping phrases such as "any and all."

Finally, the parties should consider requiring the requesting party to disclose to all other parties their intent to issue the subpoena before requesting it and to indicate to the tribunal whether any party opposes the issuance. A party objecting to the issuance of the subpoena or its contents would then need to present its contentions to the tribunal within a relatively short period, after which the tribunal would either overrule the objection (thereby issuing the subpoena) or sustain the objection (thereby declining to issue the subpoena).

Theodore K. Cheng, Arbitrator and Mediator, ADR Office of Theo Cheng

Theo Cheng is an independent, full-time mediator and arbitrator, focusing on commercial, intellectual property, entertainment, technology, and employment disputes. Among other rosters, he is a member of Resolute Systems' Commercial and Employment panels of arbitrators and mediators, the Commercial and Employment arbitration and mediation rosters of the American Arbitration Association and the International Centre for Dispute Resolution, and the Panel of Distinguished Neutrals of the CPR Institute. He was also appointed to the American Intellectual Property Law Association's List of Arbitrators and Mediators and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. In 2019, he was inducted into the National Academy of Distinguished Neutrals, and in 2022, he was inducted as a Fellow into the College of Commercial Arbitrators.

Theo has conducted over 600 arbitrations and mediations involving commercial and business disputes, breach of contract and negligence actions, trade secret theft, employment discrimination claims, wage-and-hour disputes, and intellectual property infringement contentions. The New Jersey State Bar Association Dispute Resolution Section presented Theo with the 2020 James B. Boskey ADR Practitioner of the Year Award, and the *National Law Journal* named him a *2017 ADR Champion*. He was also voted in the Top 3 of the 2022 Best Individual Arbitrators by the readers of the *New York Law Journal* and the 2021 Best Mediator/Arbitrator by the readers of the *New Jersey Law Journal*.