

Discovering Policy under the Federal Arbitration Act

Gabriel Herrmann

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NOTE

DISCOVERING POLICY UNDER THE FEDERAL ARBITRATION ACT

Gabriel Herrmann†

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INTRODUCTION

When Congress enacted the Federal Arbitration Act (FAA) in 1925,¹ the event marked the culmination of a revolutionary shift in the legal treatment of arbitration in the United States. The FAA was a concrete expression of the new federal policy favoring arbitration, a policy that has since come to be cited in almost every arbitration-related case in the federal courts. However, although courts make frequent reference to the strong federal policy favoring arbitration that is articulated in the FAA, the contours of this policy are often quite unclear. Beyond Congress's express purpose of making arbitration agreements enforceable by their terms,² in many contexts the federal policy concerning arbitration seems to lack a concrete form.

As arbitration becomes an increasingly utilized alternative forum for the resolution of disputes,³ the contours of arbitration law are challenged more frequently. Thus, it is important to give concrete

¹ United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-307 (2000) (commonly referred to as the Federal Arbitration Act)).

² See 9 U.S.C. § 2.

³ See, e.g., KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 4-5 (2000). Professor Stone provides the following statistical evidence of the growing use of arbitration and other forms of alternative dispute resolution (ADR):

The use of ADR has . . . grown dramatically in the private domain. The American Arbitration Association had 92,000 arbitration requests filed in 1998, an increase of 21% over those filed in 1994. The Center for Public Resources, an organization formed by the general counsels of 500 major corporations and law firms to promote the use of alternative dispute resolution, obtained pledges from 4000 corporations to explore ADR options before resorting to litigation. JAMS, a for-profit ADR provider that utilizes primarily retired judges to hear arbitration cases, has offices in 30 cities and handled over 20,000 cases in 1996. The use of industry-specific arbitration

form to the policies underlying the FAA. When disputes arise that resist easy application of the law, a well-articulated policy can give force and meaning to otherwise ambiguous legislative mandates. It is essential that courts preserve the FAA's underlying goals even where appropriate action is not clearly defined by the law. The fundamental nature and purpose of arbitration must always guide and give shape to arbitration law.

This Note attempts to elucidate this broad point by examining the policy goals underlying the FAA and applying them to an analysis of a hard question in the current landscape of federal arbitration law: whether and to what extent § 7 of the FAA empowers arbitrators to compel pre-hearing depositions and document discovery from non-party witnesses to the arbitration proceeding. The Note argues that, in the absence of a clearly defined statutory rule, courts and arbitrators must resolve this question through careful consideration of the fundamental policy goals underlying the FAA as a body of law.

As arbitration agreements become more commonplace across a wide range of contexts, complex disputes can arise that may require discovery in various forms and from various sources to reach fair resolution. Although arbitration is generally recognized as an expedited form of adjudication that usually involves only limited discovery procedures and little or no pre-hearing discovery,⁴ more extensive exchanges of information may be necessary in certain cases, including discovery from persons or entities not party to the arbitration.⁵ De-

systems and international arbitration systems has also expanded dramatically.

Id. at 4. The increase in the volume of arbitration practice correlates with an expanded breadth of the types of disputes submitted to arbitration. *See, e.g.*, Thomas J. Stipanowich, *Introduction to ARBITRATION NOW: OPPORTUNITIES FOR FAIRNESS, PROCESS RENEWAL AND INVIGORATION*, at ix (Paul H. Haagen ed., 1999) (noting that "binding arbitration" is "a term which comprehends an amazing variety of processes," including arbitration in the commercial sector, in labor and employment disputes, and in the international sphere).

⁴ *See, e.g.*, *Koch Fuel Int'l Inc. v. M/V S. Star*, 118 F.R.D. 318, 320-21 (E.D.N.Y. 1987) (noting that "arbitration should not generally be encumbered by protracted discovery or other procedural mechanisms").

⁵ *See, e.g.*, *Commonwealth Ins. Co. v. Beneficial Corp.*, No. 87 Civ. 5056, 1987 WL 17951, at *4-*5 (S.D.N.Y. Sept. 29, 1987). As the court in *Commonwealth Insurance Co.* noted:

[F]ull scale discovery is not automatically available in arbitration, as it is in litigation. Everyone knows that is so; thus the unavailability of the full panoply of discovery devices, with their attendant burdens of time and expense, may fairly be regarded as one of the bargained-for benefits (or burdens, depending on one's subsequent point of view) of arbitration.

Nevertheless, discovery is not totally unavailable in arbitration. . . .

Within the context of the Federal Arbitration Act, 9 U.S.C. § 7 gives the arbitrators, or a panel majority, a subpoena power which extends over non-parties as well as parties, and may in appropriate circumstances compel the production of documents and discovery.

Id.

spite the potential need for such discovery in arbitrations, the FAA is unclear as to the scope of discovery it authorizes. While § 7 clearly empowers arbitrators to subpoena non-parties to appear or produce documents at an arbitration hearing,⁶ courts have disagreed as to whether § 7 authorizes non-party discovery prior to the hearing.⁷

The discovery question cuts to the heart of the policies underlying legislation that attempts to establish arbitration as a viable alternative to litigation. The scope of discovery available in a given forum directly impacts the fundamental balance between two competing concerns in any forum: the need for efficiency of procedure and finality of result on the one hand, and pursuit of institutional competency—adequate assurances that a forum will render just results—on the other. Part I of this Note examines the historical context surrounding the enactment of the FAA and identifies two critical features of the policies underlying the Act: (1) that arbitration strikes a unique and delicate balance between efficiency and competency concerns, the preservation of which is critical to the fundamental nature of arbitration, and (2) that the largely procedural differences giving arbitration its unique balance give rise to an adjudicative forum that is both substantively distinct from traditional litigation and better suited to the resolution of certain disputes.

The fundamental assertion of this Note is that the unresolved question of pre-hearing discovery from non-parties, like any hard question under the regime of the FAA, must be resolved through a careful consideration of the fundamental tension between efficiency and competency concerns, a tension that gives arbitration its unique identity. Arbitration law must be construed to further the strong federal policy favoring arbitration, which requires that the distinct features of the arbitral forum be preserved. This Note first argues, in Part II.A, that the text of the FAA does not provide a clear answer to the discovery question, and that the legislative history provides no spe-

⁶ See, e.g., *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870 (8th Cir. 2000) (acknowledging “an arbitration panel’s power [under the FAA] to subpoena relevant documents for production at a hearing”); *Comsat Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (“By its own terms, the FAA’s subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear . . . at the arbitration hearing.”).

⁷ Compare, e.g., *Comsat*, 190 F.3d at 275 (“Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery.”), with, e.g., *In re Sec. Life Ins.*, 228 F.3d at 870–71 (“[I]mplicit 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 for review by a party prior to the hearing.”), and *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242–43 (S.D. Fla. 1988) (“[T]he court finds that under the Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary. . . . Plaintiffs’ contention that § 7 . . . only permits the arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances, is unfounded.”).

cific guidance as to the scope of arbitral discovery powers under § 7. In Part II.B, this Note asserts that careful consideration of the balance between efficiency and competency concerns is critical to the resolution of such hard questions. In Part II.C, this Note observes that the cases addressing this issue have failed to address adequately the fundamental tension between efficiency and competency, and, thus, have failed to forge a doctrine that preserves the distinctive qualities of the arbitral forum. Finally, in Part II.D, this Note suggests a scheme for resolving the discovery question in a manner that adequately accounts for the tension between these competing concerns and furthers the policy goals underlying the FAA. The analysis and suggested resolution of the discovery question presented in this Note are offered not only to determine when pre-hearing arbitral discovery from non-parties should be authorized, but also, more importantly, to frame the debate surrounding any hard question of arbitration law in terms of its impact on the policy goals underlying the FAA and arbitration in general.

I

ARBITRATION UNDER THE FAA: HISTORY, POLICY, AND PROCESS

A. Historical Developments, the Early Common-Law Approach, and the Emerging Legislative Response

Arbitration has long been utilized as a method of dispute resolution that offers willing parties an alternative to litigation within the established legal systems of state and national governments.⁸ For hundreds of years, members of particular industries and interest groups have used arbitration to avoid judicial resolution of disputes and to select specially qualified decision makers. Arbitration was frequently used in England by the medieval guilds and in early maritime transactions,⁹ and early American settlers (such as the Puritans and Shakers)

⁸ Arbitration is essentially a creature of contract, arising out of the parties' agreement to submit a dispute to arbitral resolution. *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 10 (1st Cir. 2000) ("At bottom, arbitration remains 'simply a matter of contract between the parties; it is a way to resolve the disputes—but only those disputes—that the parties have agreed to submit to arbitration.'" (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995))); *see also* *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274 (7th Cir. 1995) (noting that 9 U.S.C. § 4 "requires that district courts enforce arbitration agreements 'in accordance with the terms of the agreement'"); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995) ("Arbitrators can exert no more control over parties than that which the parties, through their agreements, granted to the arbitrators."); 6 C.J.S. *Arbitration* § 2 (1975).

⁹ *See Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982 n.5 (2d Cir. 1942). Arbitration continues to be used frequently in maritime disputes. The FAA makes specific provision for the application of the Act to maritime disputes, *see* 9 U.S.C. § 1 (2000), and the case law is replete with resolutions of such disputes, *see, e.g.,* *Deiulemar*

used arbitration and other methods of alternative dispute resolution (ADR) to preserve their community values and avoid established legal systems with which they did not identify.¹⁰

Before the twentieth century, many courts evinced a pronounced hostility toward arbitration and agreements to arbitrate. As early as the late seventeenth century, English courts made little effort to enforce executory agreements to arbitrate, refusing to grant requests for specific enforcement and awarding only nominal damages for breach of those agreements.¹¹ Similarly, at common law in the United States, agreements to arbitrate were revocable at any time prior to issuance of an award, and the only remedy for breach of such agreements was an action for actual damages arising from the breach.¹² Courts in the United States were "unfriendly to executory arbitration agreements."¹³ The frequent justification offered was that arbitration agreements were contrary to public policy because they "'oust[ed] the jurisdiction'" of the courts.¹⁴

The historical bias against arbitration in the United States shifted in the early twentieth century, when both state and federal legislatures began enacting statutes aimed at bringing about judicial enforcement of arbitration agreements.¹⁵ Early in the twentieth century, lower federal courts began to take a critical view of the judicial hostility towards arbitration, but refused to veer from established precedent in the absence of a mandate from the Supreme Court.¹⁶ Legislatures, however, did not cling to the established legal outlook on arbitration. New

Compagnia di Navigazione v. M/V Allegra, 198 F.3d 473 (4th Cir. 1999); *Kulukundis*, 126 F.2d 978; *Koch Fuel*, 118 F.R.D. 318.

¹⁰ See 4 AM. JUR. 2D *Alternative Dispute Resolution* § 1 (1995) (citing Corinne Cooper, *Justice Without Law? A Search Through History for Contemporary Solutions*, 48 ALB. L. REV. 741 (1984) (reviewing J. AUERBACH, *JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS* (1983))). Furthermore, in the nineteenth century, marginalized religious and ethnic groups such as Mormons, Chinese, and Jews developed their own dispute resolution systems to avoid perceived biases against them held by society at large. *Id.*

¹¹ See *Kulukundis*, 126 F.2d at 982-83. This judicial hostility to arbitration agreements may have arisen in part because of the practice among religious dissident pilgrims in Colonial America of avoiding colonial courts in favor of communal ADR practices. See *supra* note 10 and accompanying text.

¹² 6 C.J.S. *Arbitration* § 49 (1975); see *Kulukundis*, 126 F.2d at 984 ("Th[e] English attitude [toward arbitration agreements] was largely taken over in the 19th century by most courts in [the United States].").

¹³ *Kulukundis*, 126 F.2d at 984.

¹⁴ *Id.* at 983 (quoting *Kill v. Hollister*, 1 Wils. 129 (1746)). However, as Judge Frank noted in *Kulukundis*, this claim of judicial ouster was logically indefensible in light of the availability of damages actions for breach of such agreements and the judicial respect for similar agreements, such as releases and covenants not to sue. See *id.*

¹⁵ Cf. 6 C.J.S. *Arbitration* § 51 (1975) ("The common law power of revocation may be modified or abrogated by statutes making statutory arbitration agreements or submissions irrevocable, or relating to all submissions whether at common law or under the statutes." (citations omitted)).

¹⁶ See *Kulukundis*, 126 F.2d at 984.

York, for example, enacted the first meaningful state arbitration statute in 1920,¹⁷ and in 1925, Congress enacted the Federal Arbitration Act (FAA).¹⁸ The FAA, building on the reform efforts of the New York statute that preceded it, announced a new federal policy with respect to arbitration.

B. The FAA: Policy and Process

1. *The Act, Its Foundations, and the Policy Favoring Arbitration*

Congress's explicit purpose in enacting the FAA was to alter deliberately the established judicial bias against arbitration agreements and to "overcome courts' refusals to enforce agreements to arbitrate."¹⁹ The report of the House Committee reviewing the Act stated, in part:

The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.²⁰

Congress intended that the FAA place arbitration agreements on equal footing with other contractual agreements, and that it facilitate enforcement of such agreements between parties.²¹

In addition, Congress enacted the FAA to provide an expeditious method of dispute resolution that would alleviate the burden on the federal court system.²² At the time the FAA was enacted, congestion

¹⁷ *Id.*; see FRANCES KELLOR, AMERICAN ARBITRATION 10–11 & n.4 (1948). The enactment of the New York arbitration law was spawned largely from the initiative of the New York Bar Association and the support of the Chamber of Commerce of the State of New York. KELLOR, *supra*, at 10–11. Among those at the forefront of this movement were the founders of the Arbitration Society of America (which later became the American Arbitration Association), see *id.* at 11–14, 17, including Julius Henry Cohen, who is credited with drafting the proposed Federal Arbitration Act, see, e.g., *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 10, 15 (1924) [hereinafter *Joint Hearings*] (statements of Mr. W.H.H. Piatt, Chairman of the Committee on Commerce, Trade, and Commercial Law, American Bar Association, and Mr. Julius Henry Cohen, General Counsel, New York State Chamber of Commerce).

¹⁸ United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925). The act was codified as Title 9 of the United States Code in 1947. See Act of July 30, 1947, Pub. L. No. 80-282, 61 Stat. 669.

¹⁹ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); see *Kulukundis*, 126 F.2d at 985; Shelly Smith, Note, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1196 (2001).

²⁰ H.R. REP. NO. 68-96, at 2 (1924).

²¹ *Allied-Bruce Terminix*, 513 U.S. at 271; Smith, *supra* note 19, at 1197.

²² See, e.g., *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 745–46 (11th Cir. 1988) (quoting *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir.

in the federal courts had developed into a considerable problem. As the House Committee report on the FAA noted, "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."²³

Indeed, courts applying the FAA have frequently focused on its role in promoting judicial economy by clearing court dockets and expediting resolution of disputes. For instance, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court noted that "Congress' clear intent [in enacting the FAA was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."²⁴ And in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court made reference to the "unmistakably clear congressional purpose that the arbitration procedure . . . be speedy and not subject to delay and obstruction in the courts."²⁵

The goal most clearly and forcefully announced in the Act's legislative history was to create an avenue for enforcement of arbitration agreements and, thereby, to provide through arbitration an efficient, economical, and expedited method of dispute resolution.²⁶ However, the members of both houses of Congress also clearly intended to ensure that the Act provided for an arbitration system possessed of sufficient institutional competency to protect the rights of the parties to

1981)); Smith, *supra* note 19, at 1179; cf. Karon A. Sasser, Comment, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 342 (2001) ("By providing extremely narrow grounds for judicial review of arbitration awards, the Federal Arbitration Act protects the efficiency and finality that arbitration is intended to provide parties. Without a limitation on . . . judicial review . . . , parties to an arbitration agreement could always avoid . . . finality . . . by appealing to the courts.").

²³ H.R. REP. NO. 68-96, at 2.

²⁴ 460 U.S. 1, 22 (1983). The Court also noted that the provisions of the Act empowering district courts to stay litigation pending arbitration (9 U.S.C. § 3 (2000)) and to compel arbitration (9 U.S.C. § 4) both provide for expedited summary proceedings with limited factual inquiry. *Id.* In practical terms, district judges probably feel the strain of overloaded court dockets more acutely than the members of the High Court, but the foundation of their arguments is analogous. See *Block 175 Corp. v. Fairmont Hotel Mgmt. Co.*, 648 F. Supp. 450, 453-54 (D. Colo. 1986). As the court in *Block 175 Corp.* stated:

To prevent this strategy [of denying defendant's request to stay discovery] from backfiring, I will put a time limit on the arbitration. . . . As a result of sad experience with delay in other arbitrations, I will probably continue to impose time limits.

. . . .
 . . . The pivotal consideration is that controlled arbitration promotes judicial economy. As my motion list grows despite my best efforts to the contrary, I have come to see new meaning in that term. The more the arbitrators do, the less I have to do.

Id.

²⁵ 388 U.S. 395, 404 (1967).

²⁶ See S. REP. NO. 68-536, at 3 (1924); H.R. REP. NO. 68-96, at 2 (1924).

arbitration proceedings. The Report of the Senate Committee on the Judiciary notes that early courts' hostility to arbitration may have been based in part on concerns that arbitration "did not possess the means to give full or proper redress" or that "arbitration tribunals could not do justice between the parties."²⁷ The Report further points out that the proposed Act provided adequate safeguards for the constitutional right to a jury trial by allowing for court proceedings to determine whether a valid arbitration agreement exists.²⁸ Similarly, the Report of the House Committee on the Judiciary asserts that the procedure set forth in the proposed Act "safeguard[ed] the rights of the parties," noting that the Act's provisions served to ensure that courts would not enforce invalid or nonexistent arbitration agreements or give improper awards the force of judicial judgments.²⁹ It also notes that the Act required service of process in person, which ensured that parties would not be unfairly compelled to arbitrate disputes in distant and disadvantageous venues.³⁰

Furthermore, the House Report clearly indicates that the legislature (or at least one house thereof) was cognizant of and sensitive to the fundamental tension in arbitration between competing concerns, that is, between interests in enhanced efficiency, economy, and speed on the one hand, and the need to preserve institutional competency and just results on the other.³¹ The House Report asserts that the procedural framework for court proceedings under the Act itself served to balance and advance these competing interests.³² The Act protected the parties' rights by providing for judicial review of both arbitration agreements and awards, and simultaneously preserved the efficiency and economy of the arbitral process by following summary motion procedure rather than protracted trial procedure, and by limiting the grounds of review to issues beyond the merits of the dispute. As the Report notes:

The procedure is very simple, following the lines of ordinary motion procedure, *reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties*. There is provided a method for the summary trial of any claim that no arbitration agreement ever was made, and there is also provided a hearing if the defeated party contends that the award was secured by

²⁷ S. REP. NO. 68-536, at 2-3. The report concludes, however, that this hostility may not have been supported by reason or justice. *Id.* at 3.

²⁸ *See id.* This procedure is sufficient to protect the right to a jury trial because a party who has agreed to arbitrate a dispute on the merits has waived that right. Thus, the court's determination on the validity of the agreement to arbitrate is dispositive of the question of waiver of the jury right as to the merits of the claim at issue.

²⁹ *See* H.R. Rep. No. 68-96, at 2.

³⁰ *See id.*

³¹ *See id.*

³² *See id.*

fraud or other corruption or undue influence, or that some evident mistake not affecting the merits exists in the award. If the parties to the arbitration are willing to proceed under it, they need not resort to the courts at all. If one party is recalcitrant he can no longer escape his agreement, but his rights are amply protected. At the same time the party willing to perform his contract for arbitration is not subject to the delay and cost of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court. The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.³³

This passage clearly evinces a sensitivity to the interplay between procedural efficiency and institutional preservation of substantive rights.

2. *The Early Proponents' Arbitration Sales Pitch and Its Echoes in the Courts*

The early proponents of arbitration law reform³⁴ understood arbitration as much more than an adjudicative system that abandoned the procedural rigors of litigation to produce an expedited result. These advocates viewed arbitration as a substantively unique mode of dispute resolution, which was tailored specifically to apply to particular classes of conflicts.³⁵ Arbitration could provide specialized relief through an impartial tribunal with a well-developed understanding of the particular industrial or business context in which a given dispute arose.³⁶ They also asserted that the mere existence of arbitration as an established system would lead to an increase in the amicable resolution of disputes between parties without resort to arbitration or the courts, because arbitration systems provided greater incentives to set-

³³ *Id.* (emphasis added). The Senate Report may also have recognized (albeit implicitly) arbitration's fundamental tension in its discussion of the proposed Act. See S. REP. NO. 68-536, at 2-3. The Report suggests that early judicial fears of unjust arbitral results were unfounded, citing a favorable review of the work of the Arbitration Society of America. *Id.* at 3. The cited review highlights both the expedited nature of the Society's arbitration proceedings and reports that both winning and losing parties expressed satisfaction with the results that they obtained. The Report then notes that "[t]he record made under the supervision of this society shows not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into." *Id.*

³⁴ See *supra* note 17.

³⁵ See Julius Henry Cohen, Commercial Arbitration—Its Scope and Limits, Address Delivered at Dinner—Arbitration Educational Week 6-8 (May 17, 1923) (transcript available in the Cornell Law Library). Cohen quoted Herbert Harley of the American Judicature Society, who described commercial arbitration as "a special method of adjudication adapted to certain modern needs, a new arm of the law," and noted that "[n]ew ways of living and transacting business imply new machinery in the law." *Id.* at 7-8.

³⁶ See *Joint Hearings*, *supra* note 17, at 27 (statement of Alexander Rose, representing the Arbitration Society of America).

tle disputes and an atmosphere more conducive to settlement.³⁷ The early proponents relied heavily on these points as central arguments in their campaign for the proposed Act.³⁸

More recently, courts have echoed this vision of arbitration as a unique system for resolving disputes, recognizing that, in some contexts, arbitration systems can provide substantive benefits in addition to their procedural efficiencies.³⁹ Most notably, in the realm of labor arbitration,⁴⁰ the Supreme Court has recognized that arbitration is not simply a substitute for judicial trial, but rather that the right to recourse in an arbitral forum relates fundamentally to the substantive rights underlying a party's cause of action.⁴¹ The Court has also noted

³⁷ See *id.* at 10–11 (statement of W.H.H. Piatt, Chairman of the Committee on Commerce, Trade, and Commercial Law, American Bar Association) (“[I]nstead of creating controversies between those who might become litigants, [arbitration] has created a spirit of conciliation and settlement. Men have found that if they must arbitrate at once they proceed to carry out their contracts.”). See generally KELLOR, *supra* note 17 (discussing the ideological outlook of the early pro-arbitration movement); Cohen, *supra* note 35 (same).

³⁸ See generally *Joint Hearings*, *supra* note 17; *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. (1923) [hereinafter *Hearing*].

³⁹ See, e.g., *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (“The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance [as the parties’ chosen arbitrator], because he cannot be similarly informed.”).

⁴⁰ The FAA applies to labor arbitration in some circumstances and with respect to some issues. However, much of the law of labor arbitration stems from provisions of the Labor Management Relations Act or other federal laws, see, e.g., 29 U.S.C. §§ 141–187 (2000), and as such is analytically distinct from arbitration under the FAA. Nonetheless, arguments highlighting the unique adjudicatory features of labor arbitration apply with much of the same force to commercial arbitration under the FAA, insofar as industries or groups of related industries compose common communities and bodies of expertise analogous to those found in the labor setting. Cf., e.g., Robert Eli Rosen, “We’re All Consultants Now”: *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 679–80 (2002). As Rosen notes:

Until recently, each of the professional service industries thought of itself as distinct from others, and so looked primarily to its direct peers and competitors in learning how to confront key business challenges. . . .

This pattern is rapidly changing as professional service firms realize not only that the fundamental nature of their businesses is the same as those in other professional industries; but also that they are facing essentially the same competitive pressures, and sometimes even the same competitors. Given their common foundation, each professional service industry has a tremendous opportunity to learn from the methods of all other professional fields. From now on the greatest innovation in professional service firms will come from that cross-pollination.

Id.

⁴¹ See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202–03 (1956). The Court in *Bernhardt* rejected the lower court’s assertion that arbitration was merely a substitute for courtroom litigation:

The Court of Appeals . . . held that, “Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an ‘advisory trial’ under Federal Rules of Civil Procedure”

that arbitration systems can serve to create a sort of “industrial self government,”⁴² an “industrial common law” based on “the practices of the industry and the shop,”⁴³ and that an arbitration system allowing “[t]he processing of even frivolous claims may have therapeutic values of which those who are not part of the [particular] environment may be quite unaware.”⁴⁴

3. *The Mechanics of Arbitration and Arbitral Discovery Under the Act*

The FAA, by its terms, applies to contracts concerning maritime transactions and transactions “involving commerce,” and mandates that written arbitration agreements in such contexts “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴⁵ The authority for the Act is derived from Congress’s power over interstate commerce and admiralty.⁴⁶ To enforce its mandate, the Act authorizes district courts, on the motion of one of the parties, to stay proceedings in any action on an arbitrable issue where a valid arbitration agreement exists,⁴⁷ or to compel arbitration in any dispute over which the court otherwise would have jurisdiction and where a valid arbitration agreement exists.⁴⁸ The Act also establishes procedures for confirmation, vacation, and modification of arbitral awards.⁴⁹ Furthermore, in ap-

We disagree with that conclusion. . . . For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.

Id. (quoting *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381, 383 (2d. Cir. 1944)).

⁴² See *Warrior & Gulf Navigation Co.*, 363 U.S. at 580.

⁴³ *Id.* at 581–82.

⁴⁴ *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960).

⁴⁵ 9 U.S.C. § 2 (2000). Section 1 of the Act establishes that its provisions do not apply to employment contracts of “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” *Id.* § 1. Although the Supreme Court has recently determined that the § 1 exception applies only to employment contracts of transportation workers, not employment contracts generally, see *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 114–15 (2001), lower courts continue to disagree as to the precise contours of the exception, see, e.g., Gary Furlong, Comment, *Fear and Loathing in Labor Arbitration: How Can There Possibly Be a Full and Fair Hearing Unless the Arbitrator Can Subpoena Evidence?*, 20 WILLAMETTE L. REV. 535, 555 & n.145 (1984) (describing a circuit split regarding the applicability of the § 1 exception to labor disputes arising under collective bargaining agreements).

⁴⁶ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967). The scope of the FAA’s authority is coextensive with the full exercise of Congress’s commerce clause powers. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274–77 (1995).

⁴⁷ 9 U.S.C. § 3.

⁴⁸ *Id.* § 4.

⁴⁹ *Id.* §§ 9–11. The FAA allows for judicial vacation of an award only in narrow circumstances, such as fraud, arbitral bias or corruption, arbitral misconduct prejudicing the

plying the provisions of the FAA, courts must give due consideration to Congress's declarations that the Act is an embodiment of the "liberal federal policy favoring arbitration agreements,"⁵⁰ and that arbitration agreements are to be enforced according to their terms.⁵¹

Discovery in arbitration proceedings under the FAA is governed by § 7, which empowers arbitrators to compel the appearance of witnesses and the production of documents, and provides for enforcement of such arbitral orders in the district courts.⁵² Section 7 states, in pertinent part:

The arbitrators . . . 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 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 . . . are sitting may compel the attendance of such person or persons before said . . . 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.⁵³

Although, by its terms, § 7 empowers arbitrators only to order appearance and document production "before them" (often interpreted to

rights of a party, and abuse of arbitral power. *See id.* § 10. Although some courts have entertained the concept of additional, so-called judicially established grounds for vacation, these grounds are generally understood as, in essence, mere re-articulations of the statutory grounds enumerated in § 10. *See Wilko v. Swan*, 346 U.S. 427, 436 (1953); *infra* note 164.

⁵⁰ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

⁵¹ *See Allied-Bruce Terminix Cos.*, 513 U.S. at 271.

⁵² *See* 9 U.S.C. § 7. Generally speaking, the parties are always free to enter into agreements concerning the method and scope of discovery. *See* Robert E. Benson, *The Power of Arbitrators and Courts to Order Discovery in Arbitration* (pt. 1), *COLO. LAW.*, Feb. 1996, at 55, 55. Compulsory non-party discovery, however, is unavailable in the absence of an enabling statute, because the contractual provisions giving force to arbitral procedures cannot create obligations on non-parties to the contract. *See id.*; Seth E. Lipner, *The Use and Abuse of Subpoenas in Arbitration: A Primer on Third Party Discovery*, in *SECURITIES ARBITRATION 2001*, at 853, 838 (PLI Corporate Law & Practice Course, Handbook Series No. B-1264, 2001) ("[N]on-parties have not, by contract, subjected themselves to the jurisdiction of the arbitrators . . .").

⁵³ 9 U.S.C. § 7. In certain contexts (such as international and labor arbitration), arbitral discovery powers and procedures are supplemented by other legislation and case law. *See, e.g., In re Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994) (noting that 28 U.S.C. § 1782(a) (1988), which authorizes domestic enforcement of discovery rulings issued by foreign tribunals, applies to foreign arbitration proceedings). *But see Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881-83 (5th Cir. 1999) (holding that § 1782(a) does not apply to private international arbitrations). Where the procedural contours of an arbitration are subject to external law, this Note's analysis of § 7 of the FAA may not apply.

mean "at the hearing"),⁵⁴ courts have generally construed the provision as granting arbitrators the power to order the parties to submit to pre-hearing discovery as well.⁵⁵ However, the extent of an arbitrator's pre-hearing discovery powers is facially unclear, particularly with respect to discovery against non-parties.

C. An Open Question: Pre-Hearing Non-Party Discovery Under the FAA

The true scope of arbitral discovery powers under § 7 remains an unsettled matter in the courts. The issue does not often arise in litigation, and the few cases addressing the question to date have yielded inconsistent results. Specifically, courts have split on the question of whether § 7 authorizes arbitrators to order pre-hearing discovery against non-parties to the arbitration.⁵⁶ Although at least one court has upheld an arbitral subpoena ordering a non-party to appear at a pre-hearing deposition,⁵⁷ most courts have held that pre-hearing non-party depositions are beyond the scope of § 7.⁵⁸ A handful of district and circuit courts have recently addressed the issue of pre-hearing document discovery from non-parties, but none has forged a unified doctrine or yielded consistent results.

1. *Comsat Corp. v. National Science Foundation: Refusing Pre-Hearing Discovery Against Non-Parties*

In *Comsat Corp. v. National Science Foundation*, the Fourth Circuit held that the FAA's discovery provision does not grant arbitrators the power to order pre-hearing depositions or document discovery against non-parties absent a showing of "special need" by the party seeking discovery.⁵⁹ Rather, § 7 empowers arbitrators to compel appearance

⁵⁴ See *infra* notes 60, 67 and accompanying text.

⁵⁵ See, e.g., *Brazell v. Am. Color Graphics, Inc.*, No. M-82 AGS, 2000 WL 364997, at *2 (S.D.N.Y. April 7, 2000).

⁵⁶ See *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999) (noting that "open questions remain as to whether § 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties"); Benson, *supra* note 52, at 56 & 60 nn.13-14.

⁵⁷ See *Amgen Inc. v. Kidney Ctr. of Del. County, Ltd.*, 879 F. Supp. 878, 880, 883 (N.D. Ill. 1995) ("[T]he court . . . concludes that the arbitrator's subpoena [ordering the pre-hearing deposition of a non-party] is both valid and enforceable."). The issue in *Amgen* did not involve the arbitrator's authority to compel non-parties to appear at pre-hearing depositions, but rather concerned the territorial limits on the enforcement of arbitral subpoenas. See *id.* at 880. *Amgen* highlights an inconsistency in the law regarding the territorial scope of arbitral subpoena power and the territorial authority of the district courts charged with enforcing arbitral subpoenas. In any event, *Amgen* raises issues beyond the scope of this Note.

⁵⁸ See, e.g., *Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275-76 (4th Cir. 1999); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995).

⁵⁹ See *Comsat*, 190 F.3d at 275-78.

and production of documents only at the hearing itself.⁶⁰ *Comsat* was a dispute arising out of a contract to construct a radio telescope.⁶¹ *Comsat*'s predecessor corporation contracted to build the telescope for Associated Universities, Inc. (AUI), a not-for-profit corporation receiving funding from the National Science Foundation (NSF).⁶² *Comsat* eventually incurred \$29 million in costs over the initial estimate, and a dispute arose between *Comsat* and AUI regarding liability for cost overruns.⁶³ At arbitration, *Comsat* sought depositions and document production from a non-party, the NSF, to support its allegation that certain acts and omissions by AUI and changes in the telescope's specifications made after the contract was entered into were the cause of the increased costs.⁶⁴ The arbitrator issued subpoenas against the NSF, and, when the NSF refused to comply, *Comsat* sought and obtained from a district court an order compelling discovery.⁶⁵

On appeal, the Fourth Circuit reversed.⁶⁶ Reading § 7 narrowly, the court held that, by its terms, the FAA does not authorize pre-hearing discovery against non-parties, and that arbitrators can order non-parties to appear and present testimony or produce documents only at the arbitration hearing itself.⁶⁷ The court reasoned that arbitration is a creature of limited procedural rigor, in which the parties agree to forego certain procedural rights, such as formal discovery, in exchange for "a more efficient and cost-effective resolution of their disputes."⁶⁸ Thus, neither *Comsat* nor AUI (the parties to the arbitration agreement) could "reasonably expect to obtain full-blown discovery from [each] other or from third parties."⁶⁹ The court found that "a limited discovery process" was fundamental to ensuring that arbitration maintained its efficiency advantages over courtroom litigation,⁷⁰ and concluded that pre-hearing discovery against non-parties should not be compelled absent a showing of "special need or hardship" by the party seeking such discovery.⁷¹ Although the court did not define the contours of the "special need" exception, it did recognize that, in some cases, refusal to compel such discovery would act to frustrate the

⁶⁰ *See id.* at 275–76.

⁶¹ *Id.* at 272.

⁶² *Id.* at 271–72.

⁶³ *Id.* at 272.

⁶⁴ *See id.* at 272–73.

⁶⁵ *Id.* at 273–74.

⁶⁶ *Id.* at 278.

⁶⁷ *See id.* at 275. The court construed narrowly the language of § 7 authorizing arbitrators to summon witnesses "to attend before them or any of them," reading it as authorizing arbitral subpoenas only for attendance at the hearing. *See id.*

⁶⁸ *Id.* at 276.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

“much-lauded efficiency” of arbitration, and thus would justify enforcement.⁷² The court held, however, that such circumstances did not obtain in the case at bar, because Comsat was attempting to use arbitral subpoenas to avoid the expense of an alternate avenue of access to the information sought.⁷³

2. *In re Security Life Insurance Co. of America and Integrity Insurance Co. v. American Centennial Insurance Co.: Compelling Pre-Hearing Document Discovery Against Non-Parties, Refusing Pre-Hearing Depositions*

One year after the *Comsat* decision, the Eighth Circuit held in *In re Security Life Insurance Co. of America* that arbitrators can compel pre-hearing document production from non-parties.⁷⁴ The dispute in *Security Life Insurance* arose out of a reinsurance contract, which was managed by Duncanson & Holt, Inc., and entered into by Security Life Insurance Co. of America (Security) and a group of seven major insurers.⁷⁵ Security entered into this contract to enable it to sell a new group health insurance product that it had developed, but could not sell without a reinsurance contract.⁷⁶ Under the contract, the reinsurers collectively agreed to assume a percentage of Security’s liabilities and certain costs Security incurred in administering the group plan.⁷⁷ After Duncanson & Holt and the reinsurers refused to acknowledge liability for their share of certain verdicts and costs incurred by Security, Security brought an arbitration action against Duncanson & Holt to recover those amounts under the contract.⁷⁸ Duncanson & Holt submitted to the arbitration, but Transamerica, one of Security’s reinsurers under the contract, refused to respond to a subpoena *duces tecum* issued by the arbitrator, claiming it was not a party to the arbitration.⁷⁹ Security petitioned the district court for the District of Minnesota to compel Transamerica to comply with the subpoena or

⁷² *Id.*

⁷³ *See id.* The court noted that, at a minimum, the special need exception required a party seeking discovery to show that the information sought is otherwise unavailable. *Id.* In *Comsat*, the documents sought from the NSF were accessible to Comsat by way of a Freedom of Information Act (FOIA) request, which the NSF originally honored until Comsat failed to pay the required photocopying charges, *id.* at 272 & n.4, and Comsat never explained why information it would obtain from depositions of NSF officers was otherwise unavailable from AUI. *Id.* at 276–77.

⁷⁴ 228 F.3d 865, 870–71 (8th Cir. 2000).

⁷⁵ *Id.* at 867.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 867–68.

⁷⁹ *Id.* at 868.

participate in the arbitration.⁸⁰ The district court took steps to enforce the subpoena.⁸¹

On appeal, the Eighth Circuit affirmed the district court's decision. Although the court noted that § 7 does not explicitly authorize arbitrators to compel pre-hearing document inspection, it nonetheless held that implicit in the arbitrator's power to subpoena relevant documents for production at the hearing is the power to subpoena such documents for review by a party prior to the hearing.⁸² The court asserted that "[a]lthough the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."⁸³ The court further noted that enforcement of the subpoena was proper regardless of whether the court later deemed Transamerica to be a party to the arbitration—another disputed issue in the case—because Transamerica was a party to the underlying contract and, thus, integrally related to the underlying dispute.⁸⁴ The court also rejected Transamerica's argument that the language of § 7 authorizing document production "in a proper case"⁸⁵ required the district court to conduct an independent assessment of the materiality

⁸⁰ *Id.*

⁸¹ *See id.* at 868–69. Enforcement of the subpoena raised a complex issue with respect to the territorial limits of both the arbitrator's and the district court's subpoena powers. Although the arbitrator's subpoena was deemed valid under the FAA, Transamerica was seated in Los Angeles, outside the territorial jurisdiction of the Minnesota district court in whose jurisdiction the arbitration was to be conducted. *See id.* at 869 (citing 9 U.S.C. § 7 (2000) (authorizing the district court for the district in which the arbitrators are sitting to enforce arbitral subpoenas) and FED. R. Civ. P. 45(b)(2) (imposing territorial limits on effective service of judicial subpoenas)). The district court resolved the problem by directing Security's attorneys, as officers of the court, to file a subpoena in the district where Transamerica was seated, on behalf of the Minnesota court. *Id.* On appeal, the Eighth Circuit declined to address this issue with respect to the depositions sought because Transamerica had rendered the issue moot by complying with another subpoena, *see id.* at 869–70, 872, but upheld the district court with respect to the document discovery, *id.* at 872. The Eighth Circuit held that the territorial limits of FED. R. Civ. P. 45(b)(2) did not apply to document discovery under § 7 because "the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel." *Id.* For a more thorough discussion of this conundrum and the solution advanced, *see Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995). The territorial enforcement issue raised in these cases is beyond the scope of this Note.

⁸² *See Life Ins.*, 228 F.3d at 870–71.

⁸³ *Id.* at 870. The court did not address the issue of whether the arbitrators were empowered to compel pre-hearing depositions from non-parties because the question had been rendered moot in the case at bar. *See id.* The witnesses had already submitted to depositions under force of another subpoena. *Id.*

⁸⁴ *Id.* at 871 (citing *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994)). *Meadows Indemnity Co.* held that a non-party who is intricately related to the parties involved in the arbitration can be required under § 7 to produce documents prior to the hearing. *See* 157 F.R.D. at 45.

⁸⁵ 9 U.S.C. § 7.

of the discovery sought, and found that independent judicial review of the merits of an arbitral discovery order "is antithetical to the well-recognized federal policy favoring arbitration, and compromises the panel's presumed expertise in the matter at hand."⁸⁶

A 1995 case from the Southern District of New York, *Integrity Insurance Co. v. American Centennial Insurance Co.*, implicitly reached the same result as *Security Life Insurance* regarding document discovery, holding that pre-hearing depositions against non-parties were not within the scope of § 7.⁸⁷ *Integrity Insurance* involved a petition to quash arbitral subpoenas ordering former officers of Integrity Insurance Co. to appear at depositions and produce documents.⁸⁸ The court reasoned that the subpoenas were unenforceable as to the depositions for two reasons: (1) although arbitral power over parties derives from both the FAA and the arbitration agreement, power over non-parties derives solely from the FAA, which authorizes only appearances before the arbitrators;⁸⁹ and (2) the increased burden of compelling depositions, as opposed to document production, should not be imposed on non-parties.⁹⁰

II

WHAT POLICY DISCOVERS: THE SCOPE OF ARBITRAL SUBPOENA POWER

A. Textual Analysis Cannot Resolve the Question of Pre-Hearing Discovery Against Non-Parties

Much of the reasoning supporting the case law on the question of pre-hearing non-party discovery rests on textual analysis of § 7 itself. Textual analysis, however, cannot provide an adequate answer because the text of § 7 is inherently ambiguous; its express language either yields internally inconsistent constructions of the scope of authorized arbitral discovery⁹¹ or produces absurd results.⁹² Furthermore, the legislative history surrounding the enactment of the FAA, as well as the contemporaneous writings of the early proponents of federal arbitration legislation, provide little or no context for resolving the discovery question. It is clear that the drafters and advocates of

⁸⁶ *Sec. Life Ins.*, 228 F.3d at 871.

⁸⁷ 885 F. Supp. 69, 73 (S.D.N.Y. 1995). *Integrity Insurance* held that arbitrators could not compel pre-hearing non-party depositions, and ordered that subpoenas issued by the arbitrator be modified in accordance with that holding. *Id.* The subpoenas called for both depositions and document production. *Id.* at 70.

⁸⁸ *Id.* at 70.

⁸⁹ *Id.* at 71-72.

⁹⁰ *Id.* at 73.

⁹¹ The internal inconsistency of § 7 is illustrated by the lack of consistency in courts' constructions of the provision. See *supra* note 7 and accompanying text.

⁹² See *infra* Part II.A.1.

the proposed Act, as well as the congressional committees that held hearings on it, were not directly concerned with the precise contours of the scope of § 7. Because neither the text nor the history of the FAA offers a clear picture of the scope of § 7, it becomes necessary to acknowledge the failure of textual analysis and turn instead to an examination of underlying policies.⁹³

1. *The Text of the Provision Is Facially Ambiguous*

On its face, the grant of arbitral discovery power in § 7 is ambiguous because the scope of that power is not clearly defined in the provision itself. Thus, strict textual analysis cannot answer the question at hand because § 7 does not state whether arbitrators have the power to order pre-hearing discovery against non-parties.⁹⁴ The critical language of § 7 that gives rise to the provision's inherent ambiguity is the following:

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.⁹⁵

The ambiguity arises largely from the phrase "to attend before them or any of them," which some courts have read to exclude pre-hearing discovery.⁹⁶ Although the "attend before them" language can be read to place limits on the scope of arbitral subpoena power, a fair reading of the entire provision does not warrant the conclusion that all pre-hearing discovery against non-parties is specifically excluded by the terms of § 7. Such a reading would produce either internal literal inconsistency or absurd results. Even assuming that the "attend before them" language does limit arbitral subpoena power, the contours of that limitation are not clearly identifiable.

An example from the case law highlights the problems with a literal reading of § 7. In *Comsat Corp. v. National Science Foundation*, the Fourth Circuit held that arbitral subpoena power under § 7 does not include the power to compel pre-hearing discovery from non-parties.⁹⁷ The court reasoned that "[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear '*before them*;' that is, to compel testimony

⁹³ Cf., e.g., *United States v. 916 Douglas Ave.*, 903 F.2d 490, 492 (7th Cir. 1990) ("[W]e will look beyond the express language of a statute only where that statutory language is ambiguous or where a literal interpretation would lead to an absurd result or thwart the purpose of the overall statutory scheme.").

⁹⁴ See 9 U.S.C. § 7 (2000).

⁹⁵ *Id.*

⁹⁶ See, e.g., *Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999).

⁹⁷ See *id.* at 275-76; *supra* Part I.C.1.

by non-parties *at the arbitration hearing*.⁹⁸ The *Comsat* court thus read the “attend before them” language to mean *before them at the hearing*.⁹⁹ Therefore, because § 7 empowers discovery only to be compelled at the hearing, pre-hearing discovery is beyond the scope of the arbitrator’s authority under § 7.¹⁰⁰

There are two problems with the “literal” reading advanced by the *Comsat* court. First, the reading is misleading and internally inconsistent because it is only selectively literal. The “attend before them” language in its complete form reads “attend before them *or any of them*.”¹⁰¹ This language, when read in its totality, implicates a scope of contexts broader than just the arbitration hearing itself. In particular, the “or any of them” language suggests that the rule contemplates appearances other than those at the hearing itself because, presumably, all of the arbitrators would be present at the hearing. Furthermore, arbitrator-supervised depositions or discovery conferences involving arbitral review of document discovery would seem to fall within the literal language of § 7.¹⁰² However, this more expansive reading of § 7 is itself problematic because it does not define a clear and workable outer boundary to arbitral discovery powers.¹⁰³ The ambiguity resulting from this “literal” interpretation of § 7 suggests that the analysis of arbitral discovery powers under § 7 should not be driven solely by a literal reading.¹⁰⁴

Second, a literal reading such as that advanced by the *Comsat* court is problematic in that it would lead to absurd results. The literal language of § 7 authorizes arbitrators to order any person to “attend before them or any of them” and, where proper, to order such persons “*to bring with him or them*” any document discovery the arbitrators deem appropriate.¹⁰⁵ Read literally, § 7 produces an absurd result because it would require all document discovery to be produced incidentally to the in-person appearance of a witness. Documents could not be produced for discovery purposes if the person producing those documents did not appear before an arbitrator. Such a result is pa-

⁹⁸ *Comsat*, 190 F.3d at 275 (emphasis added).

⁹⁹ *See id.*

¹⁰⁰ Of course, the arbitrator may have the power to compel pre-hearing discovery from the parties by virtue of other sources of authority, such as the arbitration agreement itself. *See, e.g.*, *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995).

¹⁰¹ 9 U.S.C. § 7 (2000) (emphasis added).

¹⁰² Admittedly, such arbitrator-supervised discovery proceedings are not common practice. However, the expansion of arbitration into a widening range of dispute contexts has also expanded the range of procedural devices necessary and available to the just resolution of those disputes. Although these practices may not be the norm, they certainly are foreseeable.

¹⁰³ To say that the language of § 7 contemplates discovery in contexts other than the hearing itself is not to say that those contexts are clearly defined.

¹⁰⁴ *See supra* note 93 and accompanying text.

¹⁰⁵ 9 U.S.C. § 7 (emphasis added).

tently absurd in light of the discovery practices available in traditional litigation and the clear congressional intent to further arbitration as a more expedient alternative to litigation. In virtually every court system in the United States, litigants are afforded a discovery device enabling direct requests for the production of documents by other persons.¹⁰⁶ An in-person appearance requirement imposed on every arbitral document request would greatly increase the expense and burden on all persons involved and would inject significant delay and inefficiency into the arbitration process.¹⁰⁷ Indeed, both the burden and delay would exceed those imposed in traditional litigation. Because Congress intended the FAA to promote arbitration as a speedy, efficient, and cost-effective alternative to traditional litigation,¹⁰⁸ it is implausible to suggest that Congress would impose such a requirement on arbitral discovery procedures.¹⁰⁹

The absurd result that such a literal reading of § 7 would produce clearly counsels against applying literal, textual analysis in determining the scope of arbitral subpoena powers under § 7. Courts have

¹⁰⁶ See, e.g., FED. R. CIV. P. 34 (authorizing requests for production of documents from opposing parties); FED. R. CIV. P. 45(a)(1)(C) (authorizing, inter alia, subpoenas for production of documents from non-parties).

¹⁰⁷ See *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44–45 (M.D. Tenn. 1994). As the court noted:

There is little dispute [that] the arbitration panel, pursuant to its authority under Section 7, could require a witness . . . to appear before the panel and bring all of the documents at issue to a hearing. Considering the sheer number of documents addressed by the subpoena, however, this scenario seems quite fantastic and practically unreasonable. With this in mind, the arbitration panel issued the disputed subpoena as a method of dealing with complex and voluminous discovery matters in an orderly and efficient manner.

Id.

¹⁰⁸ See, e.g., *id.* at 45 (“[T]he underlying policies behind arbitration include the resolution of issues in an efficient and less costly manner . . .”); *supra* notes 24–27 and accompanying text (discussing evidence of the congressional concern for efficiency interests in arbitration). The policy concerns for efficiency and economy (as well as the concerns for competency) were clearly expressed in a brief that was incorporated into the record at the congressional hearings on the proposed Arbitration Act:

The evils at which arbitration agreements in general are directed are three in number. (1) The long delay usually incident to a proceeding at law, in equity or in admiralty (2) The expense of litigation. (3) The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world.

Joint Hearings, *supra* note 17, at 34–35 (brief submitted by Julius Henry Cohen).

¹⁰⁹ This argument holds true even assuming, arguendo, that Congress intended § 7 to grant arbitrators the power to compel attendance and production only at the hearing (*i.e.*, that Congress intended no pre-hearing discovery). Putting aside problems of authentication, see, e.g., FED. R. EVID. 901–903, and the so-called Best Evidence Rule, see, e.g., FED. R. EVID. 1001–1008, there is no requirement that documents be produced at trial in conjunction with an in-person appearance of the party producing such documents. Thus, even if discovery under § 7 was meant to be limited to the arbitration hearing itself, a literal reading of the statute would mandate a less efficient and more burdensome procedure than that available to courtroom litigants.

consistently recognized that statutory language should not be applied literally if doing so would produce absurd results.¹¹⁰ Moreover, where a literal reading of a statute produces odd results that conflict with legislative intent, courts may look to external evidence to give force to the statute.¹¹¹ Furthermore, the Supreme Court has noted that “[i]n determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”¹¹² Thus, § 7 should not be read literally. Rather, courts should look to the Act’s legislative history for guidance in interpreting § 7 in accordance with relevant policy concerns.

2. *The Historical Context Does Not Support a Textual Analysis that Yields Concrete Results*

Although the legislative history provides insight into the fundamental policy concerns underlying Congress’s enactment of the FAA,¹¹³ a review of that history does nothing to illuminate the legislative intent with respect to the particular contours of arbitral discovery under § 7. In essence, the legislative history is silent on the scope and mechanics of the discovery powers Congress intended to grant arbitrators. For instance, the Senate Report recommending enactment of the FAA notes only that “Section 7 gives the arbitrators power to summon witnesses.”¹¹⁴ The corresponding House Report is silent on the issue of discovery, noting only that “[t]he bill declares simply that . . . agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.”¹¹⁵

Furthermore, the records of congressional hearings concerning the proposed Act reveal at most only cursory references to the scope of § 7 discovery powers. A brief entitled *The Proposed Federal Arbitration Statute*, which was incorporated into the record of the Joint Hearing Before the Subcommittees of the Committees on the Judiciary, states that “[t]he arbitrators are given powers to call witnesses and require the production of papers, to assure that a full and fair consideration

¹¹⁰ See *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1188 (11th Cir. 1997) (citing *Rowland v. California Men’s Colony*, 506 U.S. 194, 200 & n.3 (1993) and *United States v. Oboh*, 92 F.3d 1082, 1085 (11th Cir. 1996)); *Nesovic v. United States*, 71 F.3d 776, 778 & n.3 (9th Cir. 1995) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring)); *United States v. 916 Douglas Ave.*, 903 F.2d 490, 492 (7th Cir. 1990).

¹¹¹ See *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1088–89 (D.C. Cir. 1996). Where evidence shows that Congress intended something other than the literal interpretation of the statute, that interpretation “need not rise to the level of ‘absurdity’ before recourse is taken to the legislative history.” *Id.* at 1088.

¹¹² *Crandon v. United States*, 494 U.S. 152, 158 (1990).

¹¹³ See *supra* Part I.B.1.

¹¹⁴ S. REP. NO. 68-536, at 3 (1924).

¹¹⁵ H.R. REP. NO. 68-96, at 2 (1924). It can be assumed that this statement in part refers to the FAA’s provision for judicial enforcement of arbitral subpoenas.

of the controversy may be had despite the possible recalcitrance of one or more parties to the dispute."¹¹⁶ Moreover, the record of the Senate Hearing considering the proposed Act, held during the sixty-seventh Congress (the term before the proposed Act was enacted), is completely silent on the issue of discovery procedures.¹¹⁷ Because the legislative history provides no insight into the intended scope and mechanics of arbitral discovery under § 7, and because the text of the statute itself is unclear on this question,¹¹⁸ it is necessary to look to the policies underlying the FAA to give force and meaning to § 7's grant of arbitral discovery powers.

B. Adequate Resolution of the Question Requires Careful Consideration of Its Relation to the Fundamental Tension in Arbitration

Part I.B.1 of this Note identified two critical policy concerns underlying the FAA, namely, the concern for preserving the procedural efficiency and economy of arbitration as compared to traditional litigation, and the interest in maintaining the institutional competency of arbitration to ensure that it renders just results. Part I.B.1 also argued that Congress carefully designed the FAA to strike a balance between these two competing concerns. Part I.B.2 asserted that the early proponents of federal arbitration law saw this balance as creating in arbitration a substantively unique and independently valuable system for resolving disputes, and that the courts have to some extent recognized and adopted this view of arbitration. Part II.A showed that the statutory text and legislative history cannot establish the contours of non-party subpoena powers under § 7. This subpart asserts that the question of pre-hearing discovery against non-parties must be answered through a careful consideration of the effect a proposed rule would have on the fundamental tension between efficiency and competency concerns. Where statutory language and legislative intent fail, it becomes necessary to look to policy to preserve the delicate balance between the competing concerns that defines the arbitral process.

Although parties who choose arbitration are often looking for an expedited resolution of their disputes, their selection of arbitration does not signal an abandonment of the desire for just results.¹¹⁹ Unfortunately, when considering the policy implications of a given course of action, many courts focus solely on arbitration's efficiency

¹¹⁶ *Joint Hearings, supra* note 17, at 36 (brief submitted by Julius Henry Cohen).

¹¹⁷ *See Hearing, supra* note 38.

¹¹⁸ *See supra* Part II.A.1.

¹¹⁹ *See infra* notes 132, 137–39 and accompanying text.

and procedural streamlining.¹²⁰ This is true largely because procedural streamlining is the most immediately ascertainable feature distinguishing arbitration from traditional litigation.¹²¹ However, as some courts have recognized, a more thorough consideration of policy concerns must account for competency interests and strike a balance between speed and accuracy of result.

In *Koch Fuel International Inc. v. M/V South Star*, the court recognized that "arbitration should not generally be encumbered by protracted discovery or other procedural mechanisms. . . . However, in deferring to the arbitration forum in accordance with the parties' agreement, the Court should not blindfold the arbitrators and frustrate, perhaps irreparably, the fact-finding process"¹²² Furthermore, the court in *Meadows Indemnity Co. v. Nutmeg Insurance Co.* explicitly recognized both "that one of the ultimate goals of the arbitration panel is to make a *full and fair determination* of the issues involved,"¹²³ and that "the underlying policies behind arbitration include the resolution of issues in an efficient and less costly manner."¹²⁴ The court then held that § 7 authorized the arbitrators to order a non-party to produce pre-hearing document discovery.¹²⁵ The court asserted that the argument against arbitral authority to order pre-hearing discovery "requires adoption of an unnecessarily constrictive and unreasonable reading of Section 7 which would limit the ability of the arbitration panel to deal effectively with a large and complex case such as the one at hand, and generally hamper the use of

¹²⁰ See, e.g., *Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).

¹²¹ See *id.* On the exact question considered in this Note, the *Comsat* court reasoned as follows:

The rationale for constraining an arbitrator's subpoena power is clear. Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes. . . . A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process. . . . Consequently, because COMSAT and AUI have elected to enter arbitration, neither may reasonably expect to obtain full-blown discovery from the other or from third parties.

Id. (citations omitted).

¹²² 118 F.R.D. 318, 320–21 (E.D.N.Y. 1987). The issue in *Koch Fuel*, a maritime dispute, centered around one party's attempt to secure depositions of non-citizen witnesses who were sure to leave the country and thus were only temporarily within the jurisdictional reach of either the arbitrators or the court. See *id.* at 320. *Koch Fuel* was not a case involving the application of § 7 to non-party arbitral discovery.

¹²³ 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (emphasis added).

¹²⁴ *Id.*

¹²⁵ *Id.* ("The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing.").

arbitration as a forum for dispute resolution."¹²⁶ Moreover, other courts have recognized implicitly the need to preserve this balance.¹²⁷

The failure of many courts to consider arbitral efficiency as an element that must be balanced against competency concerns is also problematic because parties may choose arbitration to achieve other systemic advantages unrelated to procedural speed.¹²⁸ Arbitration's particular balance of these competing concerns (and other structural elements of the arbitral forum) can create unique, substantive characteristics that make arbitration better suited to the resolution of certain classes of disputes.¹²⁹ This fact was recognized by the early proponents of federal arbitration legislation, who made it a central plank in their lobbying platform before Congress, and, more recently, by the Supreme Court on numerous occasions.¹³⁰ An analytic focus that centers on arbitral efficiency alone threatens to undermine this potential benefit of the arbitral forum.

One commentator, Eric Schwartz, has addressed explicitly the fundamental relationship between efficiency and competency in the realm of international arbitration, and has suggested that it is crucial to maintain the balance of these interests and to consider how this balance relates to the intentions of the parties who agree to arbitration.¹³¹ As Schwartz notes:

In considering matters of procedure in international arbitration, the international arbitration community . . . has a responsibil-

¹²⁶ *Id.* Although one could argue that *Meadows Indemnity* is an example of a court properly applying the relevant policy concerns to the pre-hearing, non-party discovery question, *but see infra* Part II.C (arguing that the courts addressing this question have failed to adequately consider the relevant policy concerns), the validity of the court's analysis is ultimately undermined by its focus on the fact that the non-parties subpoenaed, while technically not parties to the proceeding, were "intricately related to the parties involved in the arbitration and . . . not mere third-parties who have been pulled into this matter arbitrarily," *Meadows Indemnity*, 157 F.R.D. at 45; *see also infra* note 152 and accompanying text (discussing a similar flaw in another court's reasoning).

¹²⁷ *See, e.g.*, *Blanchard & Co. v. Heritage Capital Corp.*, No. 3:97-CV-0690-H, 2000 WL 1281205, at *3 (N.D. Tex. Sept. 11, 2000) ("Because an arbitration proceeding is much less formal than a trial in court, '[i]n handling all the evidence an arbitrator need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing.'" (citation omitted)).

¹²⁸ *See, e.g.*, *supra* notes 35-38 and accompanying text.

¹²⁹ *See supra* Part I.B.2.

¹³⁰ *See supra* Part I.B.2.

¹³¹ *See* Eric A. Schwartz, *Reconciling Speed with Justice in International Arbitration*, in *IMPROVING INTERNATIONAL ARBITRATION: THE NEED FOR SPEED AND TRUST* 44 (Benjamin G. Davis ed., 1998). Schwartz asserts that:

[T]he relationship between speed and justice is, of course, a necessary consideration in relation to all procedures for the resolution of disputes. Indeed, it is always necessary to consider how much speed a process can reasonably bear, and this, in turn, will normally depend upon the parties' objectives and expectations.

ity to ensure that the process offers sufficient safeguards so that justice can be done and be seen to be done and that considerations of due process and fairness are not emasculated solely in the interest of achieving greater levels of speed. . . . Insofar as arbitrations can be conducted rapidly, this is obviously to be welcomed by all those who participate in the process. But, at the same time, we must never lose sight of the special role that arbitration plays in the international legal order, and of the need to ensure that parties . . . can feel confident that, through that process, justice can be obtained.¹³²

Schwartz further asserts that speed and procedural streamlining should not be confused with “the overall efficacy of the process” of arbitration.¹³³ He points out that a result quickly rendered is not necessarily a just result, and thus that a speedy arbitration proceeding may in fact lead to a more protracted overall process for adjudicating claims, producing a net loss in total efficacy.¹³⁴ As Schwartz states:

A speedy arbitration will accomplish little if the award is not respected, *i.e.*, if it is set aside by the courts or otherwise tied up in judicial proceedings for years thereafter. What therefore counts more than the speed of the arbitration process itself is the time required to obtain effective relief.¹³⁵

Schwartz’s arguments indicate that arbitration policy and practice must be informed by careful consideration of the tension between efficiency and competency concerns. Moreover, his arguments suggest that some courts addressing the pre-hearing discovery issue under § 7 have not given adequate consideration to competency concerns.¹³⁶

Although Schwartz suggests that his analysis of the tension between efficiency and competency (or, in his words, the need to “reconcil[e] speed with justice”)¹³⁷ is based on particular characteristics of international—as distinguished from domestic—arbitration, his arguments apply with equal force in the context of domestic arbitration. For example, Schwartz suggests that competency concerns are crucial in international arbitration because the parties may choose arbitration for reasons other than a desire for procedural efficiency.¹³⁸ Similarly, parties in the domestic sphere often choose arbitration for reasons other than efficiency.¹³⁹ Moreover, even when efficiency is

¹³² *Id.* at 45.

¹³³ *Id.* at 47.

¹³⁴ *Id.* at 47–48.

¹³⁵ *Id.* at 47.

¹³⁶ *See infra* Part II.C.

¹³⁷ *See* Schwartz, *supra* note 131, at 44.

¹³⁸ *Id.* at 44–45 (“In the absence of an international commercial judicial system, international arbitration . . . may be the only available dispute resolution mechanism with which all of the parties to a transaction may feel comfortable.”).

¹³⁹ Indeed, parties may choose arbitration to achieve the therapeutic process values described by the Supreme Court and the early proponents of the FAA, or, in the interest of

the parties' explicit rationale in selecting arbitration, there is no reason to assume that institutional competency is a non-issue. In addition, Schwartz's assertion that a speedy award actually hurts overall efficiency if it leads to post-award delay applies with equal force in the domestic context.¹⁴⁰ Thus, in both the domestic and international spheres, sound arbitration practice necessitates a careful consideration of the balance between efficiency interests and competency concerns.

C. Case Law Fails to Address Adequately How Pre-Hearing Discovery Against Non-Parties Relates to the Fundamental Tension Underlying Arbitration

In addressing the issue of pre-hearing discovery against non-parties, the cases discussed above¹⁴¹ fail to consider adequately the full scope of the underlying policy concerns framing the fundamental tension between efficiency and competency interests at play in arbitration.¹⁴² These cases usually focus only on how the discovery at issue affects the speed or economy of the proceeding and the burden on the parties.¹⁴³ A one-sided analysis of the discovery question cannot produce a doctrinal result that gives force and meaning to the full scope of policy concerns underlying the FAA. Furthermore, cases such as *Comsat* rely on an overly textual analysis of § 7. As discussed above, textual analysis cannot provide a satisfactory answer to the question at hand.

To begin with, although the *Comsat* court may have reached the right result on the facts of the case, especially in light of the alternate source of the information sought by *Comsat*, the decision is doctrinally problematic and yields an incorrect result in terms of the rule it establishes. By focusing solely on the efficiency goals of arbitration, the decision completely fails to address how competency concerns impact the issue at hand, and produces a rule that does not reflect a careful and considered balance of efficiency against competency. Fur-

competency, to have their disputes settled by arbitrators with a particular expertise. See *supra* Part I.B.2. Furthermore, to the extent that arbitrations arise out of comprehensive, pre-dispute agreements to arbitrate claims, parties are largely in the same position as disputants in the international sphere in that they have no other alternative fora in which to resolve their disputes. See Schwartz, *supra* note 131, at 45.

¹⁴⁰ See, e.g., 9 U.S.C. § 10 (2000) (listing grounds for vacating an improper arbitral award). The grounds for vacation of an arbitral award under the FAA include procedural misconduct (such as denial of requests with good cause for continuance or refusal to hear material evidence) that prejudices the rights of a party. *Id.* § 10(a)(3).

¹⁴¹ See *supra* Part I.C.

¹⁴² See *supra* Part II.B; see also *supra* Part I.B.I (identifying in the legislative history of the FAA evidence of the congressional sensitivity to both efficiency and competency concerns).

¹⁴³ See, e.g., *supra* notes 68–72 and accompanying text.

thermore, the court's narrow reading of § 7 is not supported by the text or the legislative history of the Act, both of which are ambiguous with respect to the scope of arbitral discovery. Contrary to the Fourth Circuit's reading in *Comsat*,¹⁴⁴ § 7 does not by its terms authorize subpoenas only for production at the hearing; in precise terms, § 7 authorizes arbitrators to "summon . . . any person" to appear or to produce documents "before [the arbitrators] or any of them."¹⁴⁵ Clearly, an arbitrator-supervised deposition or discovery conference in which documents or witnesses were reviewed for potential production would comport with the language of § 7.¹⁴⁶ Moreover, the language referring to appearance or production before the arbitrators "or any of them" further suggests that the rule contemplates discovery appearances in contexts other than the hearing itself, which, presumably, all of the arbitrators would attend.¹⁴⁷ Finally, the legislative history reveals no thorough discussion of the intended contours of non-party discovery under the FAA that would support this or any other rule as to the scope of pre-hearing, non-party discovery.¹⁴⁸

In addition, the reasoning supporting the *Comsat* court's exclusionary rule and special need exception is facially flawed. The court first asserted that the FAA does not grant arbitrators the power to compel pre-hearing testimonial and document discovery against non-parties.¹⁴⁹ The court then held that, despite this explicitly articulated lack of arbitral power, it will enforce arbitral subpoenas ordering pre-hearing, non-party discovery if a party can show a special need.¹⁵⁰ However, if arbitrators lack the fundamental power to issue non-party subpoenas for pre-hearing discovery (as the court asserts), then courts should never compel non-parties to comply with such a subpoena, because the document is void on its face.

Although the *Security Life Insurance* court reached a different result, it replicated one of the critical flaws embedded in the *Comsat* court's analysis. Accordingly, *Security Life Insurance* raises the same problems with respect to underlying policy. The court based its decision primarily on its determination that permitting pre-hearing docu-

¹⁴⁴ See *Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999).

¹⁴⁵ 9 U.S.C. § 7.

¹⁴⁶ See *supra* notes 101-02 and accompanying text.

¹⁴⁷ See *supra* notes 101-02 and accompanying text.

¹⁴⁸ See *supra* Part II.A.2. The committee hearings' discussions of discovery provisions reveal only the most cursory references to the intended scope of discovery powers under the FAA. See, e.g., *Joint Hearings*, *supra* note 17, at 33-34, 36 (brief submitted by Julius Henry Cohen) ("The arbitrators are given powers to secure the attendance of witnesses and to bring before them such documents as are necessary.").

¹⁴⁹ *Comsat*, 190 F.3d at 275 ("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide . . . prehearing [document] discovery.").

¹⁵⁰ See *id.* at 276 (citing *Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980)).

ment discovery would promote overall efficiency in the arbitration proceeding.¹⁵¹ Thus, the court failed to reconcile efficiency concerns with competency concerns; indeed, it failed even to identify competency as a relevant concern. Furthermore, it appears that the court's opinion may have been influenced by the fact that Transamerica, though purportedly not a party to the arbitration, was a party to the underlying contract, and therefore not a bystander to the litigation.¹⁵²

The court in *Integrity Insurance*, like the courts in *Comsat* and *Security Life Insurance*, lost sight of the relevant policies underlying the FAA and misinterpreted the law itself.¹⁵³ The court's assertion that § 7 by its terms authorizes only subpoenas for appearance at the hearing is flawed for the same reasons set out in the discussion of the *Comsat* case. In addition, the court seemed to reason from the proposition that, because there is no contractual basis for the arbitrator's power over non-parties, the extent or scope of that power must necessarily be less than the correlative power over parties.¹⁵⁴ However, § 7 does not condition its grant of power to order discovery on any contractual authorization by the party to be subpoenaed; rather, it extends the arbitrator's power by its terms to "any person."¹⁵⁵ Furthermore, the court's burden-based analysis, while relevant, does not address either the efficiency effects or the competency effects of the court's refusal to enforce non-party subpoenas for pre-hearing depositions. Nor does it account for an arbitrator's specialized understanding of the dispute submitted for arbitration and of the discovery necessary to the just resolution of that dispute.¹⁵⁶

D. A Suggested Resolution: Let Arbitrators Resolve Internal Issues, but Preserve Judicial Review of External Issues

The preceding sections of this Note identified the FAA's fundamental policy concern for preserving the delicate balance between efficiency and competency interests in arbitration,¹⁵⁷ and argued that

¹⁵¹ See *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870 (8th Cir. 2000) ("Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that [arbitrators can order pre-hearing document discovery].").

¹⁵² See *id.* at 871 ("Transamerica is not a mere bystander pulled into this matter arbitrarily, but is a party to the contract that is the root of the dispute, and is therefore integrally related to the underlying arbitration, if not an actual party.").

¹⁵³ See *supra* notes 87-90 and accompanying text.

¹⁵⁴ See *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995). This rationale would suggest, for instance, that arbitrators cannot compel pre-hearing depositions of non-parties because they *can* compel pre-hearing party depositions. Such an argument lacks logical integrity.

¹⁵⁵ See 9 U.S.C. § 7 (2000).

¹⁵⁶ See, e.g., *infra* note 180.

¹⁵⁷ See *supra* Part I.B.

the concern for this balance must inform the resolution of any hard questions under the Act (questions for which, as here, the text of the statute fails to provide clear answers).¹⁵⁸ Furthermore, this Note has argued that the courts have failed to consider adequately these issues.¹⁵⁹ This Subpart suggests a possible resolution of the ambiguity surrounding the scope of § 7 that attempts to give form to the balance of efficiency and competency concerns by appropriating the structure of another mechanism under the FAA—judicial review of arbitral awards. Like discovery, the scope of available review inherently reflects a balance of efficiency and competency because it directly impacts both of these concerns.¹⁶⁰ Review of arbitral awards under the FAA divides the potential challenges to an award into two categories: internal issues relating to the merits of an award, as to which the arbitrator's decision is final,¹⁶¹ and external issues such as fraud or other improper bases of an award, which give courts the authority to intervene.¹⁶² This structure can apply by analogy to the question of pre-hearing discovery under § 7.

1. *The Scheme for Judicial Review of Arbitration Agreements and Awards: The Internal/External Dichotomy*

The FAA grants arbitrators final authority to resolve the internal merits of any disputed issue that falls within the scope of a lawful arbitration agreement.¹⁶³ Courts, however, have the power under the FAA to vacate an award that is invalid or improper with respect to an enumerated set of concerns external to the merits of the dispute.¹⁶⁴

¹⁵⁸ See *supra* Part II.A–B.

¹⁵⁹ See *supra* Part II.C.

¹⁶⁰ Review impacts efficiency insofar as it creates avenues for delay and increases the time required to achieve final resolution of a dispute. On the other hand, it affects competency in that it provides a significant safeguard against the rendering of unjust results.

¹⁶¹ See 9 U.S.C. §§ 2, 10 (2000).

¹⁶² See *id.* § 10.

¹⁶³ See *id.* § 2 (providing that agreements to arbitrate are enforceable unless invalid under contract law); *id.* § 10 (establishing limited grounds for vacation of arbitral awards). Courts should not disturb an externally valid arbitral award. See, e.g., *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (explaining that, where an arbitral decision is even arguably based on the arbitrator's contractual authority to resolve disputes, courts should not disturb the award). Courts do, however, attempt to sidestep this rule in some circumstances. For example, in *Bruce Hardwood Floors v. UBC Southern Council of Industrial Workers*, 103 F.3d 449, 453 (5th Cir. 1997), the Fifth Circuit struck down an arbitral award ordering reinstatement of a terminated employee. The case involved an employee who was caught lying to obtain a short leave from work. *Id.* at 450. Her employer, Bruce Hardwood, terminated her, citing a provision in the collective bargaining agreement that established "immoral conduct" as grounds for termination. See *id.* at 450–51 & n.1. The court held that the arbitrator's award was not based on his authority under the arbitration contract, essentially by reasoning that, as a matter of law, lying is an immoral act under the terms of the collective bargaining agreement. See *id.* at 452.

¹⁶⁴ See 9 U.S.C. § 10. Courts also recognize a judicially established ground for vacation when the award is manifestly contrary to the law. See *Wilko v. Swan*, 346 U.S. 427, 436

For instance, a court may vacate an award if the award “was procured by corruption, fraud, or undue means,”¹⁶⁵ if the arbitrators were clearly biased¹⁶⁶ or were guilty of misconduct with respect to granting postponement of the hearing or admitting material evidence,¹⁶⁷ or if the arbitrators exceeded their powers.¹⁶⁸ In reviewing arbitral awards, courts should apply the statutory grounds for vacation narrowly and refuse to intrude upon the arbitrator’s determinations on other grounds.¹⁶⁹ In the absence of external flaws, the arbitrator’s decision on the subject matter of the dispute is final.¹⁷⁰

This review scheme evinces a careful balancing of the concerns for efficiency and competency. By starting from the assumption that the arbitrator’s decision is final, and allowing only narrowly defined avenues to challenge an award’s validity, the review structure acts to “further the objective of arbitration, . . . to enable parties to resolve disputes promptly and inexpensively, without resort to litigation.”¹⁷¹ However, the procedure also provides an efficient and accessible mechanism for ensuring that awards are not enforced if there is “clear evidence of a gross impropriety.”¹⁷² Thus, the review scheme, which authorizes courts to correct external flaws in an award but protects the legitimate exercise of the arbitrator’s decisional authority, promotes efficient dispute resolution while providing a critical safeguard against the danger of unjust results.¹⁷³

(1953). However, some commentators have suggested that this judicially established ground is simply a re-articulation of § 10(d)’s bar on arbitrators exceeding their powers. See 4 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 40.1.3.2 (1994 & Supp. 1999).

¹⁶⁵ 9 U.S.C. § 10(a)(1).

¹⁶⁶ See *id.* § 10(a)(2).

¹⁶⁷ See *id.* § 10(a)(3).

¹⁶⁸ *Id.* § 10(a)(4).

¹⁶⁹ See MACNEIL ET AL., *supra* note 164, § 40.1.4.

[T]he court’s function in review is “severely limited . . . being confined to determining whether one of the grounds specified by 9 U.S.C. § 10 for vacation of an award exists.” . . .

. . . “The statute does not allow courts to roam unbridled in their oversight of arbitral awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways.”

Id. (quoting *Office of Supply, Gov’t of Republic of Korea v. N.Y. Navigation Co.*, 469 F.2d 377, 379–80 (2d Cir. 1972) and *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990)).

¹⁷⁰ See *id.* (“However they may articulate the results, courts generally refuse to second guess the arbitrator’s determination.” (citing *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 703 (2d Cir. 1978))).

¹⁷¹ *Office of Supply*, 469 F.2d at 379.

¹⁷² MACNEIL ET AL., *supra* note 164, § 40.1.4.

¹⁷³ It is important to note that other structural elements of the FAA also act to ensure the competency of the arbitrator’s decision. See, e.g., 9 U.S.C. § 7 (authorizing arbitral subpoenas); *id.* § 16 (authorizing limited appellate review of judicial orders issued under the provisions of the FAA).

2. *The Non-Party Discovery Question Should Be Resolved Using an Analogous Internal/External Distinction*

The factors weighing on the question of an arbitrator's authority to order pre-hearing discovery against a non-party in a given case similarly can be broken down into internal and external concerns. Section 7 provides that arbitral subpoenas shall be served and enforced in the same manner as judicial subpoenas incident to federal court litigation.¹⁷⁴ Rule 45 of the Federal Rules of Civil Procedure provides the primary framework for enforcement of subpoenas.¹⁷⁵ A subpoena must seek relevant discovery and must be sought for good cause;¹⁷⁶ if it meets those requirements it should be enforced unless the material is privileged or "the subpoenas are unreasonable, oppressive, annoying, or embarrassing."¹⁷⁷ In determining the reasonableness of a subpoena, the court must balance "the interests served by complying with the subpoena against the interests served by quashing it."¹⁷⁸ In other words, to decide whether a subpoena should be enforced, a court must balance "the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena."¹⁷⁹

In the context of the § 7 question regarding compelled, pre-hearing discovery from non-parties, the question of relevance is internal to the arbitration in that it is a function of the subject matter of the dispute. That is, the relevance of a particular piece of information depends on the matters at issue.¹⁸⁰ In addition, a party's substantive need to obtain particular information bearing on the proof of that party's case is internal to the extent that it depends upon the issues being adjudicated and the other forms of available proof. On the

¹⁷⁴ See *id.* § 7; *Amgen Inc. v. Kidney Ctr. of Del. County, Ltd.*, 879 F. Supp. 878, 881-82 (N.D. Ill. 1995).

¹⁷⁵ FED. R. CIV. P. 45.

¹⁷⁶ "Good cause" generally means that the discovery sought is necessary to establish an element of the party's claim or that denial of the discovery request "would cause the moving party 'undue hardship or injustice.'" See *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 659 (D.C. Cir. 1960) (citation omitted).

¹⁷⁷ *Covey Oil Co. v. Cont'l Oil Co.*, 340 F.2d 993, 997 (10th Cir. 1965) (citing *Boeing Airplane Co.*, 280 F.2d at 659); see FED. R. CIV. P. 26(b), 30(b), 45(c).

¹⁷⁸ *In re Duque*, 134 B.R. 679, 683 (S.D. Fla. 1991).

¹⁷⁹ *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1024 (Fed. Cir. 1986) (citation omitted).

¹⁸⁰ See *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44 (M.D. Tenn. 1994). The court in *Meadows Indemnity* acknowledged that the arbitrator was more capable of ascertaining the magnitude of the internal issue of relevance:

[T]he arbitration panel has already determined that the documents to be provided are relevant to the arbitration proceedings. Given this Court's minimal contact with the issues involved in the litigation . . . and the arbitration panel's expertise in this matter, there is no reason to second guess the panel's determination as to relevance.

other hand, the burden placed on the non-party subject to a subpoena is external; that party suffers the same hardship in being forced to appear or produce documents, regardless of the matters at issue in the case. Moreover, the requesting party's procedural need to obtain the information specifically from the subpoenaed non-party is also external because the requesting party's ability to obtain the material from other sources is independent of the subject matter of the dispute being arbitrated.¹⁸¹

This Note suggests that courts should review the validity of arbitral subpoenas by allocating the decisional responsibility for internal and external elements of the inquiry according to a scheme that approximates the allocation in the FAA's judicial review scheme.¹⁸² Courts should defer to arbitrators in determining both the relevance of the requested discovery to the matters at issue and the requesting party's substantive need for access to the information, but should make an independent inquiry into both the hardship a subpoena would impose upon the subpoenaed non-party and the requesting party's procedural need to obtain the information from that particular non-party (that is, its inability to obtain the information from other sources). Relevance and substantive need are both internal functions of the matter in dispute, but the burden on the non-party under subpoena and the requesting party's procedural need are external. The scheme recognizes the internal/external distinction and places responsibility for evaluating internal interests with the arbitrators. Although the court would still bear the ultimate responsibility for balancing these competing interests under the subpoena enforcement inquiry,¹⁸³ it would look to the arbitrator's determination of the magnitude of the internal interests favoring enforcement.¹⁸⁴

This scheme would preserve the critical balance in arbitration between efficiency and competency concerns and would serve to advance the "liberal federal policy favoring arbitration."¹⁸⁵ The scheme

181 Thus, a requesting party's need, *see supra* note 179 and accompanying text, can be divided into an internal, substantive component (*i.e.*, whether and to what extent the requesting party needs the information to prove an element of its case) and an external, procedural component (*i.e.*, whether and to what extent the requesting party can obtain the information from sources other than the subpoenaed non-party).

182 *See supra* Part II.D.1.

183 *See supra* note 179 and accompanying text.

184 In practice, judicial deference to the arbitrator's determination of internal issues might take the form of a legal presumption both that the information is relevant and that the requesting party has a substantive need for the information. The subpoenaed non-party could rebut the presumption by establishing that the arbitrator's determination was clearly based on improper considerations. In essence, this presumption would itself approximate the FAA's standard for judicial review of awards, which requires a showing that the arbitrator's award clearly exceeded the proper scope of his authority. *See supra* notes 163-64.

185 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

would provide considerable latitude to arbitrators to order whatever discovery they deem appropriate, which would further both efficiency and competency interests by providing arbitrators a mechanism for obtaining valuable information in an appropriate case.¹⁸⁶ Furthermore, the scheme would allow courts to quash arbitral subpoenas where the burden on the party under subpoena grossly outweighed the benefits of production or where the requesting party had reasonable alternative sources from which to obtain the information sought.¹⁸⁷ This procedure would serve to increase overall efficiency by providing a safeguard against imprudently ordered, inefficient, and unproductive arbitral discovery, and would also increase competency by protecting the independent rights of non-party witnesses against unjust intrusion by the arbitrators. In addition, by increasing arbitrators' freedom to exercise their § 7 subpoena powers, and limiting judicial intrusion on the arbitral forum to cases of gross error, the scheme would promote the strong federal policy in favor of arbitration.¹⁸⁸

Although this scheme would likely subject non-parties to some additional intrusion into their affairs, the overall increase will not likely result in significant unjust infringement of non-party rights. To begin with, arbitrators already have the power to compel non-party discovery at the hearing; thus, non-parties are already subject to some degree of arbitral intrusion into their affairs. Moreover, common arbitral practice and general institutional limitations on the use of arbitral discovery¹⁸⁹ suggest that pre-hearing discovery devices will not frequently be employed against non-parties. And in most cases, par-

¹⁸⁶ See *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 871 (8th Cir. 2000) ("Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."); *Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999) ("[I]n a complex case . . . the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing."); *Koch Fuel Int'l v. M/V S. Star*, 118 F.R.D. 318, 321 (E.D.N.Y. 1987) ("[T]he Court should not blindfold the arbitrators and frustrate, perhaps irreparably, the fact-finding process . . ."). As the court in *Meadows Indemnity* noted, the arbitrators are better able to ascertain when discovery is relevant to the dispute. 157 F.R.D. at 44; see *supra* note 180.

¹⁸⁷ Indeed, the scheme would enable courts to deny enforcement of discovery subpoenas in cases like *Comsat*, 190 F.3d 269, without holding that pre-hearing non-party discovery is never available under § 7. A court could resolve the *Comsat* scenario under this scheme simply by holding that *Comsat* had a reasonable alternative source of the information sought, and thus that the subpoena was overly burdensome. See *supra* note 73 and accompanying text (discussing the alternate availability of the requested information through FOIA requests).

¹⁸⁸ See *Sec. Life Ins.*, 228 F.3d at 871 ("Transamerica further contends that § 7 required the district court to make an independent assessment of the materiality of the information sought by Security We disagree. . . . [W]e believe it is antithetical to the well-recognized federal policy favoring arbitration, and compromises the panel's presumed expertise in the matter at hand.")

¹⁸⁹ See, e.g., *supra* notes 4-5.

ties who oppose a particular discovery request will act as surrogates who can assert the rights of non-parties to be free from unjust intrusion. Indeed, parties to an arbitration will often have an interest in challenging discovery requests because discovery directly affects the speed of an arbitration, and can reduce its overall efficiency. Thus, to give meaning to the policy concerns underlying the FAA, the arbitrator's legitimate evaluation of internal matters, such as the relevance and the substantive necessity of discovery sought in a particular dispute, should be final, but the court should have the last word on matters outside the scope of the dispute to be resolved.

CONCLUSION

The scope of arbitral subpoena power under § 7 is not easily ascertained. The statute itself is unclear, and courts have not agreed on its precise meaning. This Note suggests a new construction of the statute that is as of yet untested and unproven. As the outer bounds of arbitration practice continue to expand, new situations will arise that will further obscure this issue. Moreover, the growth of arbitration over time will doubtless expose additional issues as to which the scope of the FAA is unclear. However, one thing is clear: arbitration is meant to offer parties increased efficiencies over traditional litigation, and at the same time to ensure just results and encourage faith in the competence of the system. These two goals are essential elements of the arbitral forum, and the balance between them must always be preserved. Thus, as difficult issues arise, and easy answers elude us, it becomes necessary to approach these issues with the self-conscious purpose of preserving the balance between efficiency and competency concerns. This crucial balance of sometimes divergent policy concerns awaits discovery.