*Hay Group, Inc. v. E.B.S. Acquisition Corp.**

I. INTRODUCTION

In an attempt to clarify the reach of an arbitration panel's authority, the Third Circuit compounded the confusion regarding an arbitrator's ability to issue subpoenas to non-parties for pre-hearing document production. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, the Third Circuit held that, under the Federal Arbitration Act (FAA), an arbitrator or arbitration panel does not have the authority to issue subpoenas compelling the production of documents without also compelling an appearance by parties not involved in the arbitration proceeding.[1] The impact of this decision is the creation of a clear split in the federal circuits, with the Third and Eighth Circuits in direct conflict.[2]

Prior to *Hay Group*, the Eighth Circuit was one of the few circuits that uniformly addressed the issue of pre-hearing document discovery from non-parties.[3] In addressing the issue, the Eighth Circuit recognized the grant of arbitral discovery powers under the FAA to be quite broad in scope.[4] The

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* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004).

[1] *Id.* at 407 ("The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party '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.'") (citing 9 U.S.C. § 7 (2000) (emphasis original)).

[2] *See Hay Group*, 360 F.3d at 410; *see also In re* Security Life Ins. Co. of Am., 228 F.3d 865, 870–71 (8th Cir. 2000) (holding that arbitrators can compel pre-hearing documents from non-parties). Prior to the *Hay Group* decision which split the circuits, another decision existed that, while falling in accordance with the Third Circuit, did give recognition to the broad grant of authority of the Eighth Circuit. *See* COMSAT Corp. v. National Sci. Found., 190 F.3d 269, 275–78 (4th Cir. 1999) (holding that the FAA's discovery provision does not grant arbitrators the power to compel pre-hearing discovery against non-parties absent a showing of "special need" by the party seeking discovery).

[3] Gabriel Herrmann, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 792 (2003) (noting that while a handful of district and circuit courts had addressed the issue, none of the results were consistent).

[4] *See Security Life Ins.*, 228 F.3d at 870–71 (holding that, while § 7 of the FAA does not explicitly authorize arbitrators to compel pre-hearing document production, implicit in the arbitrator's power to subpoena relevant documents at the hearing is the power to subpoena the same documents for review prior to the hearing). The relevant language behind the circuits' dispute regarding arbitral discovery powers is 9 U.S.C. § 7. The text of § 7 provides:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a

Third Circuit's narrow interpretation of § 7 of the FAA in *Hay Group*, when contrasted with the broad interpretation of the section in *In re Security Life Ins. Co. of Am.*, leaves arbitrators and non-parties to arbitration proceedings around the country clueless with regard to interpreting the scope of non-party discovery granted by the FAA.

II. FACTS AND PROCEDURAL HISTORY

David Hoffrichter was an employee of Hay Group, a Philadelphia-based management consulting firm.[5] In 1999, Hoffrichter left Hay Group and began to work for PricewaterhouseCoopers (PwC).[6] Upon leaving Hay Group, Hoffrichter was required to sign a separation agreement, which contained a clause that forbade him from soliciting any of Hay's employees or clients for one year.[7] Also included in the agreement was a provision stating that any disputes arising under the agreement were to be resolved through arbitration.[8] In 2000, Hay Group, claiming that Hoffrichter had violated the non-solicitation clause, commenced an arbitration proceeding in Philadelphia, Pennsylvania. During the period of Hoffrichter's employment with PwC, the division in which he worked was sold to E.B.S.[9] Hay Group, in an attempt to obtain information for the arbitration, served subpoenas for documents on both PwC and E.B.S. Both companies objected to the subpoenas, as Hay Group sought to have the documents produced prior to the arbitration hearing.[10] The district court, in line with the Eighth Circuit, issued a decision enforcing them.[11] In enforcing the issuance of subpoenas for pre-

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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.

See 9 U.S.C. § 7.

[5] *See Hay Group*, 360 F.3d at 405.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* The objections of PwC and E.B.S. were based on the claim that the FAA did not authorize an arbitration panel to issue subpoenas to non-parties for the pre-hearing production of documents. *See id.* at 405–06. They also claimed that the Federal Rules of Civil Procedure prohibited a district court from enforcing a subpoena on a non-party for documents outside the court's jurisdiction. *Id.* at 406.

[11] *Id.* The district court's decision fell in line with the Eighth Circuit and several other district court decisions, which found that the FAA authorized arbitration panels to issue subpoenas on non-parties for pre-hearing document production. *See, e.g., In re* Security Life Ins. Co. of Am., 228 F.3d 865, 870–71 (8th Cir. 2000); Meadows Indem.

hearing documents on the non-parties, the district court held that the arbitral subpoena power applied in virtually all circumstances.[12]

III. THIRD CIRCUIT'S HOLDING

The Third Circuit held that under § 7 of the FAA, a party seeking documents cannot obtain a subpoena simply by requiring a non-party to produce those documents; the non-party must appear at an arbitration proceeding where the documents may then be produced.[13] PwC and E.B.S, both non-parties, could not be compelled to comply with Hay Group's subpoena requesting production of documents prior to a hearing before the arbitration panel.

In reaching its holding, the court relied on its textual interpretation of the language of § 7, as well as the underlying purpose of the FAA.

A. *Textual Interpretation of § 7 of the Federal Arbitration Act*

In addressing whether an arbitrator may issue a subpoena requiring pre-hearing document production by a non-party, the court looked first to the text of the FAA.[14] In its analysis of § 7, the court interpreted the language "to bring [items] with him"[15] to apply only to situations in which the documents accompany the non-party to the arbitration proceeding.[16] In support of this interpretation, the Third Circuit relied on a previous version of Federal Rule of Civil Procedure 45, which did not give the court power to issue pre-hearing documents; the only power granted was the issuance of subpoenas on

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Co. v. Nutmeg Ins. Co., 157 F.R.D. 42, 44–45 (M.D. Tenn. 1993); Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241, 1242 (S.D. Fla. 1988).

[12] The district court addressed the Fourth Circuit view, which permits issuance of subpoenas for pre-hearing document production on non-parties only upon special need, holding that the subpoenas would be valid even under this more narrow view. *See Hay Group*, 360 F.3d at 406. In addition, the district court also held that "it had the power to enforce subpoenas on non-parties for document production, even if the documents were located outside the territory within which the court's subpoenas could be served." *Id.*

[13] *Id.*

[14] *Id.* The Third Circuit recognized that, in exercising authority over non-parties, arbitrators are strictly limited to the authority granted by the FAA. *Id.* The Third Circuit chose to first analyze the text of the FAA in deference to a Supreme Court explanation that "recourse to legislative history or underlying legislative intent is unnecessary when a statute's text is clear and does not lead to an absurd result." *Id.*

[15] *See supra* note 4 (reciting the language of § 7).

[16] *See Hay Group*, 360 F.3d at 407.

non-parties.[17] The Third Circuit rejected the implicit authorization of power argument used by the Eighth Circuit in *Security Life Ins.* by deciding that the FAA, in its explicit grant of power to compel a non-party witness to provide discovery materials at the arbitration proceeding, while saying nothing about the power to compel production without summoning the non-party, implicitly withholds the latter power.[18]

Upon finding that the text of § 7 of the FAA was straightforward, the next step the Third Circuit took in its textual interpretation was an analysis of whether the reading of the text leads to an absurd result.[19] The court held that a literal reading of § 7 could reasonably be found to further one of the primary goals of arbitration: to resolve disputes "in a timely and cost efficient manner."[20] In making this determination, the Third Circuit relied once again on the Federal Rules of Civil Procedure. Pursuant to the rules prior to 1991, federal courts were not permitted to compel pre-hearing document production by non-parties.[21] As federal courts were left with this restriction for decades, the court reasoned that a similar restriction, as interpreted by the language of § 7, was not absurd.[22]

The court further based its conclusion that their interpretation did not lead to an absurd result on the classification of the parties. The court reasoned that it was not absurd to protect non-parties who never agreed to be involved in the arbitration, and the restriction on pre-hearing document production could also discourage the use of overbearing requests.[23]

B. *Underlying Purpose of the Federal Arbitration Act*

Covering all of its bases, the Third Circuit also looked outside of the statutory text to solidify its holding that the subpoena of pre-hearing documents from non-parties was invalid. The court focused on the central purpose of the FAA—giving effect to private agreements—and reasoned that

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[17] *Id.* "Every subpoena . . . shall command each person to whom it is directed to attend and give testimony . . . . A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein . . . . " FED. R. CIV. P. 45 (1990).

[18] *See Hay Group*, 360 F.3d at 408–09.

[19] *Id.* at 409; *see also supra* text accompanying note 14.

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

[21] *Id.*

[22] *Id.*

[23] *Id.*

efficiency concerns, while an objective of arbitration, could not override the terms of § 7.[24] The United States Supreme Court had previously addressed the issue of balancing efficiency considerations with the textual interpretation of the FAA.[25] Drawing on the Supreme Court's conclusion that the enforcement of private agreements, not efficiency, was the key concern of the FAA, the Third Circuit reasoned that efficiency considerations fell short of dominating the terms of § 7.[26]

IV. DISCUSSION: THE IMPACT OF THE THIRD CIRCUIT'S HOLDING

Sure to follow the Third Circuit's *Hay Group* decision is a mass of confused parties, arbitrators, non-parties, and other courts. Individuals outside of the Eighth, Third, and Fourth Circuits are left clueless as to what the rules of pre-hearing non-party discovery are, and how § 7 of the FAA should be interpreted.[27] There is a clash between the limited power approach of the Third and Fourth Circuits and the broad power approach of the Eighth Circuit, with each having definitive strengths and weaknesses. In addition to the conflict between the allocations of power, the *Hay Group* decision will likely result in an increased tension between efficiency concerns and the arbitration process as a whole.

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[24] *Id.* at 410; *see also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) (stating the purpose behind the passage of the FAA is "to ensure judicial enforcement of privately made agreements to arbitrate").

[25] *See Byrd*, 470 U.S. at 219. In *Byrd*, the Supreme Court rejected an argument that a district court had the authority to refuse to compel arbitration due to pendent claims which would result in wasteful proceedings. *Id.* at 218–19. The Court rejected the suggestion that the overriding goal of the FAA focused on the expeditious resolution of claims. *Id.* at 219.

[26] *See Hay Group*, 360 F.3d at 411.

[27] Some commentators argue that even the Fourth Circuit has not set a clear precedent for future disputes, as it has provided very little guidance as to what is required in a showing of "special need," which is the qualifying term for gaining access to pre-hearing non-party discovery. *See* Jason F. Darnall & Richard Bales, *Arbitral Discovery of Non-Parties*, 2001 J. DISP. RESOL. 321, 321–27 (2001). In its decision, the Fourth Circuit in *COMSAT* stated, "We do not now attempt to define 'special need,' except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." *See* COMSAT Corp. v. National Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999).

A. *The Limited Power Approach*

The limited power approach, resulting in a narrow interpretation of the pre-hearing discovery authority over non-parties, rests primarily on two distinct rationales: textual and contractual.[28]

1. *The Textual Rationale*

The textual rationale, one strongly relied upon in *Hay Group*,[29] focuses solely on the statutory text of § 7 of the FAA. A detailed focus on statutory text plays a key role in a court's interpretive powers, and the Supreme Court has often employed this method of interpretation.[30] In analyzing § 7, focus is drawn to the phrase "the arbitrators . . . may summon in writing any person to attend before them . . . *and* . . . to bring with him or them any [books, records and documents] . . . ."[31] Both the Third and Fourth Circuits, when focusing on this language, found the language to apply only when non-parties were before arbitrators at a hearing, not during pre-hearing

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[28] *See* Darnall & Bales, *supra* note 27, at 325.

[29] *See Hay Group*, 360 F.3d at 406–09. The Fourth Circuit has also relied on the textual rationale. *See COMSTAT*, 190 F.3d at 275. Other courts, in contexts outside of non-party discovery, have also focused on the great weight of statutory text. *See* United States v. 916 Douglas Ave., 903 F.2d 490, 492 (7th Cir. 1990) ("[W]e will look beyond that express language of a statute only where the statutory language is ambiguous or where a literal interpretation would lead to an absurd result or thwart the purpose of the overall statutory scheme.").

[30] *See, e.g.*, Darby v. Cisneros, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history of [a provision of the APA] is unnecessary in light of the plain meaning of the statutory text."); *see also* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 37 (1998) ("The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical."); Rubin v. United States, 449 U.S. 424, 429–30 (1981) ("We begin by looking to the language of the Act . . . . When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." (citing Ernst v. Hochfelder, 425 U.S. 185, 197 (1976); TVA v. Hill, 437 U.S. 153, 187 n.33 (1978))). The Supreme Court has instructed courts to begin with a statute's text when discerning its meaning, and to "assume that the legislative purpose is expressed by the ordinary meaning of the words used." American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

[31] *See* 9 U.S.C. § 7 (2000) (emphasis added).

discovery.[32] In the eyes of the Third and Fourth Circuits, the text alone exerted a clear denial to the issue of pre-hearing discovery power.

Opposition to the textual rationale arises both from the strict interpretation of the language of § 7, and the Third Circuit's belief that the straight-forward textual interpretation does not give way to absurd results.[33] The Eighth Circuit's ruling in *Security Life Ins.*, which occurred prior to the *Hay Group* decision, expressed a clear distaste for the strict and straight-forward textual approach.[34] Combating the interpretations of the Third and Fourth Circuits, the Eighth Circuit held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[35] Using an analysis of power-by-implication, the Eighth Circuit held that the grant of one power by the FAA—the power of an arbitration panel to subpoena documents for production at a hearing—should apply in a larger context.[36] Additionally, other circuits, in a more generalized manner, have objected to the type of logic employed by the Third Circuit and have held that a straight-forward interpretation of the text does not lead to absurd results.[37]

2. *The Contract Rationale*

The contract rationale, predictably, focuses on the contractual nature of arbitration proceedings. It is becoming standard practice in commercial

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[32] *See Hay Group*, 360 F.3d at 407; *COMSAT*, 190 F.3d at 275. It must not be forgotten, however, that the Fourth Circuit conditioned this finding with the availability of pre-hearing, non-party discovery upon a showing of special need. *Id.* at 278.

[33] *See supra* note 14 and accompanying text discussing the sufficiency of textual interpretation where the end result is not absurd.

[34] *See In re* Security Life Ins. Co. of Am., 228 F.3d 865, 870–71 (8th Cir. 2000).

[35] *Id.*

[36] *Id.* The Third Circuit distinctly disagreed with the "power-by-implication" analysis of the Eighth Circuit, and instead asserted that the FAA, by conferring the specific power to compel a non-party to produce documents at hearing, implicitly withheld the power to compel a non-party to produce documents *prior* to a hearing. *See Hay Group*, 360 F.3d at 408–09.

[37] While totally unrelated to the cause of action before the Third Circuit in *Hay Group*, the D.C. Circuit has expressed a distaste for such a straightforward interpretation. Engine Mfrs. Ass'n v. United States EPA, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (holding that, 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").

settings to automatically incorporate arbitration clauses into a variety of contracts.[38] Non-parties, however, do not bargain for the effects of an arbitration agreement, nor have they agreed to participate in the proceeding at all. When a non-party has neither bargained for nor consented to an arbitration agreement, an agreement that is contractual in nature, it should not be compelled to participate in a pre-hearing discovery deposition.[39] The contract rationale can be concretely summed up: "Compulsory non-party discovery . . . is unavailable in the absence of an enabling statute, because the contractual provision giving force to arbitral procedures cannot create obligations on non-parties to the contract."[40] An obvious and relevant critique of the contract rationale is that, while it is true that non-parties do not agree to participate in arbitration proceedings, it is also true that most non-parties in conventional litigation are also reluctant to participate.[41]

B. *The Broad Power Approach*

The broad power approach to arbitral discovery, as utilized by the Eighth Circuit in *Security Life Ins.*, gives arbitrators much more freedom in compelling non-party participation in discovery. Jurisdictions adopting this approach hold that the discovery of information held by non-parties *may* be obtained prior to the arbitration hearing.[42] Under this approach, arbitrators

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[38] *See* Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199, 215–17 (1997) (discussing the increase in arbitration clauses due to the Supreme Court's shift regarding the viability of arbitration clauses).

[39] *See* Integrity Ins. Co. v. American Centennial Ins. Co., 885 F. Supp. 69, 73 (S.D.N.Y. 1995). Ironically, even though the *Integrity* court recognized that non-parties should not be compelled to participate in pre-hearing discovery depositions, the court did permit pre-hearing discovery of documents from non-parties. *Id.* This suggests that the Southern District of New York falls somewhere in between the Fourth and Eighth Circuits, as arbitrators are permitted to compel non-parties to provide documents prior to hearings, but may not order non-parties to attend depositions. *Id.*; *see also* Commonwealth Ins. Co. v. Beneficial Corp., 1987 WL 17951, at *5 (S.D.N.Y. Sept. 29, 1987) (stating in dicta that the FAA gives arbitrators "a subpoena power which extends over non-parties as well as parties, and may in appropriate circumstances compel the production of documents and discovery").

[40] Robert E. Benson, *The Power of Arbitrators and Courts to Order Discovery in Arbitration –Part I*, COLO. LAW., Feb. 1996, at 55.

[41] *See* Darnall & Bales, *supra* note 27, at 331. "The non-parties will experience no more of a burden in pre-arbitration discovery than they would if they had been compelled to participate in pre-litigation discovery." *Id.*

[42] *See generally In re* Security Life Ins. Co. of Am., 228 F.3d 865 (8th Cir. 2000); Stanton v. Paine Webber Jackson & Curtis Inc., 685 F. Supp. 1241 (S.D. Fla. 1988); *see*

possess much more decisionmaking power in discovery.[43] The broad power approach also relies on the implied authority of the FAA; because § 7 does not expressly prohibit pre-hearing, non-party discovery, authority permitting this form of discovery is implicit in the grant of general subpoena power.[44] One commentator argues that the broad power approach is better reasoned and results in the following: less susceptibility to an unjust result, less burden on non-parties, promotion of settlement, and a more effective way to present a case to the arbitrator.[45]

The Eighth Circuit recognized the contention that the efficient resolution of disputes through arbitration necessarily entails a limited discovery process.[46] However, implicit in the broad power approach is a belief that the interest of upholding the efficiency of arbitration "is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."[47]

Much of the opposition to the broad power approach stems from the above referenced belief that permitting pre-hearing discovery upholds the efficiency goals of arbitration. Opponents of the broad power approach strongly believe that the expanding reach of discovery in arbitration cuts against a major goal of the arbitration process.[48]

C. *Efficiency Concerns and the Potential Erosion of Arbitration*

One of the major goals of the FAA was to provide an expeditious method of dispute resolution that would alleviate burdens on the federal court system.[49] The FAA provided for an efficient method of settling disputes

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also Mississippi Power Co. v. Peabody Coal Co., 69 F.R.D. 558, 564 (S.D. Miss. 1976) (explaining that arbitrators may use discretion in the decision to permit and supervise discovery).

[43] *See Stanton*, 685 F. Supp. at 1242 (holding that arbitrators "may order and conduct . . . discovery as they find necessary.").

[44] *See supra* note 36 and accompanying text.

[45] *See* Darnall & Bales, *supra* note 27, at 332.

[46] *See Security Life Ins.*, 228 F.3d at 870.

[47] *Id.*

[48] For a detailed analysis of this criticism, *see infra* Part IV.C.

[49] *See* Herrmann, *supra* note 3, at 785. While this focus on efficiency and burden is one component of the FAA, another objective of Congress in passing the FAA was to place arbitration agreements on equal footing with other contractual agreements. *See also* Allied-Bruce Terminix Cos. Inc. v. Dobson, 513 U.S. 265, 271 (1995) (citing Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 469, 474 (1989)).

outside of the traditional realm of litigation. Proponents of arbitration have found it to have many advantages, including speed, lowered cost, efficiency, and flexibility.[50] As the battle between the broad power and limited power approaches continues to divide the circuits, efficiency and a lack of judicial interference, two major components of arbitration,[51] may be sacrificed.

Implicit in arbitration is a party's agreement to forego certain procedural rights which are standard in formal litigation in return for a more efficient and cost-effective resolution of their disputes.[52] However, the Eighth Circuit's broad power approach subscribes to the belief that an in-person appearance requirement imposed on every arbitral document request would greatly increase the burden on all persons involved, and would inject significant inefficiency into the arbitration process.[53] If parties are unable to review and digest relevant materials and evidence prior to an arbitration hearing in a complex case, the "much-lauded efficiency of arbitration will be degraded."[54]

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[50] Sarah E. Larson, *An Examination of the Broad Scope of the Federal Arbitration Act and Binding Mandatory Consumer Arbitration Agreements: Not the Answer to Racial Bias in the United States Legal System*, 24 HAMLINE J. PUB. L. & POL'Y 293, 301 (2003). Proponents have found that arbitration is usually cheaper and faster than litigation, and is considered more time efficient because it has simpler rules than litigation. *Id.*; *see also* Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275 (1999).

> Arbitration is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . .

Id. at 276 (quoting congressional report summarizing the benefits of arbitration, H.R. REP. NO. 97-542 at 13 (1982)).

[51] *See* Herrmann, *supra* note 3, at 785.

[52] COMSAT Corp. v. National Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999).

[53] *See In re* Security 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 that this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."); *see also* Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42, 44–45 (M.D. Tenn. 1994) (recognizing that an arbitration panel has the authority under § 7 to require a non-party to appear before the panel and bring all documents at issue to a hearing, but in situations involving complex and voluminous discovery, a subpoena of the documents alone is an efficient method of dealing with discovery).

[54] See COMSAT, 190 F.3d at 276.

However, courts in line with the view of the Third Circuit see the "efficient" broadly-granted discovery powers as a direct attack on the underpinnings of arbitration.[55] As a party to arbitration implicitly waives her right to rely on the discovery devices available in conventional litigation, the use of arbitration as an alternative method of dispute resolution loses strength as it becomes more and more like litigation.[56]

V. CONCLUSION

Which approach is best? That question will seemingly be left to the United States Supreme Court. The Third Circuit's holding in *Hay Group*, while drawing attention to the limited power approach, did not effectually strike down the Eighth Circuit's position of a broad grant of arbitral authority in pre-hearing, non-party discovery. While the Third Circuit's decision may currently serve to compound the confusion plaguing the pre-hearing discovery issue, perhaps the conflict will ultimately lead the Supreme Court to impose uniformity upon the circuits. Until then, cross-circuit head-butting will continue as arbitrators and non-parties struggle with gauging their rights and authority associated with pre-hearing discovery.

Lisa Thomas

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[55] *Id.*

> 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 [the parties] have elected to enter arbitration, neither may reasonably expect to obtain full-blown discovery from the other or from third parties.

Id. (citations omitted).

[56] *See* Herrmann, *supra* note 3, at 785 (discussing the fact that Congress enacted the FAA to provide an expeditious method of dispute resolution that would alleviate the burden litigation places on the federal court system).