

Houston Maritime Arbitrators Association Newsletter

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Holiday Issue 2008

News from the Bridge

We're off to a good start with the new Board of Directors and Officers. There is a nice momentum but as always, there is still plenty to be done and you're invited to be active as little or as much as you like.

Please feel free at any time to phone and discuss issues with me or send an email with something you'd like the HMAA to do or investigate.

Special thanks going out to Captain Dave Scruton for running the HMAA's First Annual Golf Tournament at Tour 18. It was a fun day that was enjoyed by all starting with lunch and into a wonderful dinner buffet with lots of door prizes. Most importantly we raised scholarship money for the Maritime and Transportation industry. I'm pleased with the comments I heard from all who attended, we will be back next year and hope you will either attend or be a sponsor/volunteer.

On another note, The West Gulf Maritime Association extended an opportunity for me to address their monthly luncheon on November 12th at the Houston International Seafarers' Center. People from many sides of the Maritime industry including Owners (mostly tanker side), operators, agents, stevedores, truckers, oil companies, container and breakbulk were in attendance. It was quite an interesting group and my talk ended up being along the lines of the food chain we are all part of and the potential for arbitrations and mediations increasing.

One of the attendees, Father Rivers Patout, Port Minister, asked me if I would deliver a speech at the International Seafarers Conference coming in June and on behalf of the HMAA to which gladly accepted.

The WGMA also asked if we could work together more and we discussed the potential of a Transportation & Energy Town Hall evening in March or April. The idea is to collect concerns on various subjects from the WGMA membership and for the HMAA to put together a panel of speakers to address the subjects. If you would be willing to participate in this meeting or write an article on a subject of concern or a passion of yours, please do it. If we can have members write articles of interest, and don't mind sharing, or better said, educating others. We do have a lot of interest from local business to hear what the HMAA has to say. Educating the maritime community on subjects educates them to our existence. Give me a call at 281-360-5165 or email me at steves@samtael.com.

Steve Stapleton

President

SAVE THE DATE FOR THE HMAA SOCIAL JANUARY 24, 2009

Bring a *friend*, bring a *client*, bring a *prospective member*—just don't forget to bring yourself.

WHEN, WHERE, WHAT: January 24, 2009 will be the First Annual HMAA Social complete with fun, food, and entertainment at the Hilton Post Oak. For those football fans out there, this is on the "dark" weekend between the final play-off games and the Superbowl—so now you have no excuse not to join us.

Dust off your dancing shoes, break out your best stories and come share an evening with the HMAA. Want to get away from the daily grind? Well we are working to get a special room rate from the hotel so you won't even need a designated driver.

We'll have more details later, but this is definitely one party you do not want to miss.

HMAA TRAINING

The next HMAA arbitrator training seminar will be presented in Houston, Texas on March 5-6 2009. Course descriptions and invitations will be distributed after the first of the year."

LAW COMMITTEE PREHEARING DISCOVERY TO NON-PARTIES

The Second Circuit Court of Appeals issued its opinion in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, ___ F.3d ___ 2008 WL 4978550 (2nd Cir. 2008) on November 25, 2008 which held that the Federal Arbitration Act does not allow arbitrators to issue subpoenas to third parties or non-parties for production of documents prior to a hearing. This is in conformity with the Third Circuit Court of Appeals, *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004), and contrary to the Eighth Circuit in which the Court of Appeals determined that Arbitrators can order prehearing production of documents, *In re Security Life Insurance Co. of America*, 228 F.3d 865 (8th Cir. 2000), and the Fourth Circuit which has concluded that under special need circumstances, prehearing production of documents can be required, *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999). There are no reported cases where any of the local Federal Courts or the Fifth Circuit Court of Appeals has addressed this issue.

The reasoning of the Courts which have held that the Federal Arbitration Act does not allow for prehearing production of documents by non-parties is that the Federal Arbitration Act does not specifically provide this power within the Act. The controlling provision is 9 U.S.C. § 7 of the Federal Arbitration Act which 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 witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

The Act further allows for the enforcement of this provision where a petition may be made to "the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons

before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." 9 U.S.C. § 7. In *Hay Group, Inc.* the judge, Samuel Alito who is now an Associate Judge of the United States Supreme Court held that the clear language of the statute prevented obtaining documents from a non-party before a hearing. Judge Alito stated [t]his language speaks unambiguously to the issue before us. The only power conferred on arbitrators with respect to 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." 9 U.S.C. § 7 (emphasis added [in original]). The power to require a non-party "to bring" items "with him" clearly applies on situations in which the non-party accompanies the items to the arbitration proceedings, not situations when the items are simply sent or brought by courier. In addition, the use of the word "and" makes it clear that a non-party may be compelled "to bring" items "with him" only when the non-party is summoned "to attend before [the arbitrator] as a witness." Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.

Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3rd Cir. 2004).

In its holding that prehearing production of documents can be subpoenaed from a non-party, the Eighth Circuit held

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 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.

In re Security Life Insurance Co. of America, 228 F.3d 865, 870-71(8th Cir. 2000).

The Fourth Circuit Court of Appeals has taken the view that the plain language of 9 U.S.C. § 7 provides that the documents be produced at a hearing may be allowed under "a special need" exception to assist in the "much lauded efficiency of arbitration". The Court does not go on to define a "special need", but says that it must at least be that the information sought is otherwise unavailable. *Comsat Corp. v. National Science Foundation*, 190 F.3d 269, 276 (4th Cir. 1999).

The Rules of Arbitration of the Houston Maritime Arbitrators Association provides “[u]pon the Arbitrator’s own initiative, or at the request of any party, witnesses or documents may be summoned by subpoena under such conditions as may be prescribed by the Arbitrator.” Rule 5.4.2.

In following the approach by the Third Circuit Court of Appeals, the Second Circuit Court of Appeals concluded

When a statute’s language is clear, our only role is to enforce that language “according to its terms”. *Arciniaga v. General Motors Corp.*, 460 F.3d 231, 236 (2nd Cir. 2006) (quoting *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006)). The language of section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness. The FAA was enacted at a time when prehearing discovery in civil litigation was generally not permitted. The fact that Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so. There may be valid reasons to empower arbitrators to subpoena documents from third parties, but we must interpret the statute as it is, not as it might be, since “courts must presume that a legislature says in a statute what it means and means in a statute what it says...” *Conn. National Bank v. Germain*, 503 U.S. 249, 243, 54 (1992). A statute’s clear language does not morph into something more just because courts think it makes sense for it to do so. Thus, we join the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings.

Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, supra.

In obtaining documentation from a non-party, the Court in *Life Receivables Trust* goes on to recognize that its interpretation that Section 7 of the Federal Arbitration Act does not allow for prehearing subpoenas for production, but that it does not leave the arbitration panel powerless. The Court went on to discuss the proper procedure for the Panel:

Interpreting section 7 according to its plain meaning “does not leave arbitrators powerless” to order the production of documents. *Hay Group*, 360 F.3d at 413 (Chertoff, J., concurring). On the contrary, arbitrators may, consistent with section 7, order “any person” to produce documents as long as that person is called as a witness in a hearing. 9 U.S.C. § 7. Peachtree concedes as much, admitting that “Syndicate 102 could obtain access to requested documents by having the arbitration panel subpoena Peachtree to appear before the panel and produce the documents.” In *Stolt-Nielsen*, we held that arbitral section 7 authority is not limited to witnesses at merits hearing, but extends to hearings covering a variety of preliminary matters. 430 F.3d at 577-79. As then—Judge Chertoff noted in his concurring opinion in the

Hay Group, the inconvenience of making a personal appearance may cause the testifying witness to “deliver the documents and waive presence.” 360 F.3d at 413 (Chertoff, J., concurring). Arbitrators also “have the power to compel a third- party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings.” *Id.* at 413. Section 7’s presence requirement, however, forces the party seeking the non-party discovery—and the arbitrators authorizing it—to consider whether production is truly necessary. See *Id.* at 414. Separately, we note that where the non-party to the arbitration is a party to the arbitration agreement, there may be instances where formal joinder is appropriate, enabling arbitrators to exercise their contractual jurisdiction over parties before them. In sum, arbitrators process a variety of tools to compel discovery from non-parties. However, those relying on section 7 of FAA must do so according to the plaint text which requires that documents be produced by a testifying witness.

Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, supra.

HMAA Law Committee

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**HAPPY HOLIDAYS FROM THE
HMAA BOARD
And the entire Newsletter Staff**