Arbitration Law—Second Circuit Holds Section 7 of the Federal Arbitration Act Does Not Permit Arbitration Panels to Issue Prehearing Document Subpoenas to Nonparties—*Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008)

The Federal Arbitration Act (FAA) ensures judicial enforcement and validity of private arbitration agreements.[1] Section 7 of the FAA is the only section that deals with discovery, and grants arbitration panels the authority to summon persons before the panel as witnesses and bring with them materials to be used as evidence in the case.[2] In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,[3] the United States Court of Appeals for the Second Circuit (Second Circuit) considered whether section 7 of the FAA authorizes arbitrators to compel prehearing document discovery from entities not parties to the arbitration proceedings.[4] The Second Circuit, relying on the plain language of section 7, reversed the order enforcing a prehearing subpoena for documents from entities not parties to the arbitration proceedings.[5]

Peachtree Life Settlements (Peachtree) purchases life insurance policies from elderly policyholders (insureds), offering them a cash payment at a discount to the policy's face value.[6] Peachtree generally purchases these

1. *See* Congressional Research Service, The Federal Arbitration Act: Background and Recent Developments, at CRS-1 (2003) (summarizing purpose of FAA); *see also* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (acknowledging congressional intent of FAA).

2. *See* 9 U.S.C. § 7 (2006) (addressing discovery and judicial enforcement). Section 7 provides in pertinent part:

> 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. . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Id.

3. 549 F.3d 210 (2d Cir. 2008).

4. *See id.* at 212 (noting issue presented on appeal). The court explained that there was a split among the circuits regarding the scope of the FAA's power to compel third parties to produce documents. *Id.* (listing other circuits addressing scope of section 7).

5. *See id.* at 212, 218 (limiting third-party prehearing discovery based on Third Circuit's rationale); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004) (holding section 7 does not permit third-party prehearing discovery).

6. 549 F.3d at 212 (describing Peachtree's business operation). Using actuarial estimates, Peachtree would determine the approximate life expectancy of the insured person and assume the policy in exchange for a lump sum payment to the insured. *Id.* The goal of viatical settlements is to provide terminally ill patients with

policies on its own account; however, Peachtree occasionally purchases policies for related entities such as Peachtree's special purpose vehicle, Life Receivables Trust (the Trust).[7] In these instances, Peachtree performs the financial and actuarial research to purchase the policy, but transfers its interest in the policy to the Trust in exchange for a fee.[8] To mitigate the risk that the insureds live beyond Peachtree's actuarial projections, Peachtree purchases contingent cost insurance (CCI) to pay the death benefit to the Trust in the event the insured lives longer than the projection.[9]

In 2000, Peachtree purchased two life insurance policies and obtained, on behalf of the Trust, CCI from Lloyd's of London Syndicate 102 (Syndicate 102).[10] The policies required Syndicate 102 to pay the death benefit to the Trust and to assume the policies themselves once the insured outlived his estimated life by two years.[11] After the insured outlived the estimate by two years, Syndicate 102 refused to pay the death benefit, claiming the Trust fraudulently misrepresented the date when it acquired the policy and fraudulently calculated the insured's life expectancy.[12] The Trust initiated an arbitration demand to resolve the conflict because the CCI policy included a mandatory arbitration clause.[13] As part of the arbitration, Syndicate 102 submitted discovery requests to the Trust and Peachtree.[14] The Trust produced the requested documents, but notified Syndicate 102 that it had no way of producing Peachtree's documents because it did not control Peachtree.[15]

In response, the arbitration panel ordered the Trust to produce all responsive documents, including all documents in its possession relating to Peachtree.[16] When Peachtree responded to the arbitration panel's discovery order, it asserted that the panel had no authority or jurisdiction over Peachtree because it was not

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lump-sum payments, so they may benefit from improvements in their final days. *See* Neil A. Doherty & Hal J. Singer, *The Benefits of a Secondary Market for Life Insurance Policies*, 38 REAL PROP. PROB. & TR. J. 449, 451 (2003).

7. 549 F.3d at 212 (discussing Peachtree's relationship with Trust). Companies often use special purpose vehicles (SPV) as liability shields. *See* Ariella Gasner, Note, *Your Death: The Royal Flush of Wall Street's Gamble*, 37 HOFSTRA L. REV. 599, 602 (2009) (describing use of SPVs in context of securitization).

8. *See* 549 F.3d at 212 (detailing arrangement between Peachtree and its SPV).

9. *See id.* (expanding on use of CCI as hedge against risk-insured lives longer than expected).

10. *See id.* at 212-13 (outlining Peachtree's purchase of life insurance policies and CCI). Peachtree purchased a CCI policy with a net death benefit of five million dollars. *Id.* at 213. Although the Trust was the beneficiary, Peachtree signed the policy as the originator and servicer. *Id.*

11. *See id.* at 213 (stating terms of CCI policy).

12. *See* 549 F.3d at 213 (highlighting Syndicate 102's rationale for denying coverage).

13. *See id.* (pointing to mandatory arbitration clause). The Trust also contended that Syndicate 102 violated the "pay first" provision, which required the payment of the claim before resolving the dispute through arbitration. *Id.* at n.3.

14. *Id.* at 213 (asserting Trust's arbitration defense and Syndicate 102's discovery request).

15. *See id.* (summarizing Trust's response to discovery order).

16. *See* 549 F.3d at 213 (explaining Trust's rationale for failing to produce documents pursuant to order). After the Trust informed Syndicate 102 that it could not compel production for an entity it did not control, the Trust produced all documents relating to Peachtree as the "servicer," but not in its role as "provider of life settlements or as originator." *Id.*

a party to the arbitration.[17] The panel issued a formal subpoena on Peachtree, which responded by filing suit in federal court to quash the subpoena, arguing that an arbitration panel cannot compel prehearing discovery from a third party.[18] The district court denied Peachtree's motion to quash the subpoena, and Peachtree complied with the order pending appeal.[19] On appeal, the Second Circuit reversed the district court's order and joined the Third Circuit in holding that the plain language and history of section 7 did not envision authorizing prehearing discovery from third parties.[20]

Congress enacted the FAA in 1925 in an attempt to reverse judicial hostility to arbitrations and encourage parties to submit to arbitration.[21] By enacting the FAA, Congress sought to place arbitration agreements "upon the same footing as other contracts."[22] Although the FAA facilitates the enforcement of discovery requests in federal court, because arbitration agreements are contractual in nature the parties can tailor the procedure and power of arbitration panels to order discovery.[23] As such, the power of an arbitration agreement stems from the agreement itself, not from the FAA.[24] Section 7 of the FAA is the only provision in the FAA to address discovery.[25] It permits an arbitration panel to summon any person to appear before the panel as a witness,

17. *See id.* (describing events leading up to arbitration panel's formal discovery order). Before the arbitration panel issued the discovery order, Syndicate 102 served on Peachtree a separate Notice of Arbitration, seeking to join Peachtree formally in the proceeding. *Id.* Peachtree refused the joinder request and the arbitration panel did not order joinder. *Id.*

18. *See id.* at 214 (outlining Peachtree's response to arbitration panel's discovery order). The Trust did not object to the arbitration panel's issuance of the subpoena. *Id.*

19. *See id.* (observing district court's order). The district court reasoned that while Peachtree was not a party to the arbitration, it was a party to the arbitration agreement. *Id.* As such, the district court determined that it could not interfere with the arbitration panel's final order. *Id.*

20. *See* 549 F.3d at 216-17 (reversing district court's order).

21. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (reviewing enactment of FAA). After Congress initially enacted the FAA in 1925, it reenacted the FAA in 1947 and codified the laws as Title 9 of the United States Code. *Id.*; *see also* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (acknowledging enactment of FAA demonstrates national policy favoring arbitration); Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 387 (2d Cir. 1961) (stating purpose of FAA as ensuring federal judges did not undermine those wanting arbitration).

22. *See* H.R. REP. NO. 68-96, at 1 (1924) (tracing purpose behind enactment of FAA). Before 1925, the courts treated arbitration agreements with hostility, a view that appears to have carried over from English common law. *See* Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995).

23. *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585-86 (2008) (acknowledging parties can tailor arbitration agreements and procedure); *In re* Integrity Ins. Co. v. Am. Centennial Ins. Co., 885 F. Supp. 69, 71 (S.D.N.Y. 1995) (discussing contractual nature of arbitrations), *abrogated by* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008).

24. See Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (noting FAA permits parties to tailor many features of arbitration by contract).

25. *See* 9 U.S.C. § 1, *et seq.* (2006) (addressing enforcement of arbitrations in federal court); *see also* 15 COUCH ON INS. § 211:64 (2009) (noting parties to arbitration have no unilateral recourse to discovery absent statutory or contractual provisions). *But see* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (addressing need to refrain expanding statutory language although logical).

and to produce documents relevant to the dispute at such time.[26]

Frequently, parties contractually agree to abide by standardized arbitration rules, such as the American Arbitration Association Rules (AAA).[27] The AAA contains a subpoena provision that authorizes arbitrators to issue subpoenas to parties and nonparties to the arbitration, but which is subject to the voluntary compliance of the nonparty.[28] Nevertheless, when a nonparty refuses to comply with a subpoena, under the AAA or otherwise, the only means of enforcing the subpoena is section 7 of the FAA.[29]

The Circuit Courts of Appeal are divided on the scope of section 7's authority.[30] The Eighth Circuit, relying on a "power-by-implication analysis," determined that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order their production for review prior to the hearing.[31] In a narrower reading, the Fourth Circuit

26. *See* 9 U.S.C. § 7 (2006) (delineating discovery in arbitration and enforcement of discovery orders in federal court). Although section 7 states that the panel may order persons to appear before it to produce documents, most arbitrations include a limited form of discovery before the hearing begins. *Id.*; *see also* 15 COUCH ON INS. § 211:64 (2009) (discussing right to obtain evidence in arbitrations).

27. *See, e.g.*, Contec Corp. v. Remote Solution Co., 398 F.3d 205, 211 (2d Cir. 2005) (arbitrating under AAA); *see also* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585-86 (2008) (discussing ability to tailor arbitration procedure).

28. *See* AAA COMMERCIAL ARBITRATION RULE 31(d) (stating arbitrator's authorization under rules to subpoena nonparties). The rule provides that, "[a]n arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." *Id.* Courts generally interpret this unrestricted rule to permit arbitrators to issue subpoenas to nonparties. *See* Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197, 200 (2003) (reviewing scope of subpoena powers under AAA). Although the scope of the subpoena power under the AAA may be broadly construed to permit subpoenaing third parties, it is only at the consent of all parties. *Id.*; *see also* 9 U.S.C. § 7 (defining judicial enforcement of arbitration discovery requests).

29. *See* 9 U.S.C. § 7 (providing means of judicial enforcement of arbitration panel subpoenas).

30. *See* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004) (holding section 7 does not extend to nonparties); *In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 870-71 (8th Cir. 2000) (holding section 7 extends to third parties); COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999) (holding section 7 applies to third parties where special need for documents exists). The Second Circuit has twice deferred on the question of section 7's scope. *See* Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 569 (2d Cir. 2005) (declining to address scope issue because subpoena compelled nonparties to appear, not just produce); NBC v. Bear Stearns & Co., 165 F.3d 184, 184-88 (2d Cir. 1999) (leaving open question of section 7's application to nonparties and prehearing discovery). Nevertheless, several district courts within the Second Circuit have adopted the Third Circuit's limited view. *See, e.g.*, Matria Healthcare, LLC v. Duthie, 584 F. Supp. 2d 1078, 1080 (N.D. Ill. 2008) (applying *Hay Group* interpretation of section 7); Guyden v. Aetna Inc., No. 3:05cv1652, 2006 WL 2772695, at *7 (D. Conn. Sept. 25, 2006) (adopting *Hay Group* court's view); Odfjell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) (applying Third Circuit's reasoning to section 7).

31. *In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 870-71 (8th Cir. 2000) (holding section 7 implicitly permits nonparty discovery). The "power-by-implication analysis" was coined by then-Judge Alito of the Third Circuit. *See* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 408 (3d Cir. 2004) (rejecting power-by-implication analysis as unsupported by statutory language). The Eight Circuit acknowledged that although section 7 does not explicitly provide for the production of documents, implicit in the subpoena power is the power to produce documents for review before a hearing. *Id.* Several district courts within the Second Circuit have adopted this reasoning. *See* Atmel Corp. v. LM Ericsson Telefon, AB, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005) (recognizing implicit power to compel prehearing discovery), *abrogated by* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008); *In re* Integrity Ins. Co. v. Am.

concluded that the subpoena powers are limited by the express authorization of the FAA; however, the court recognized that certain circumstances might arise where a party could petition the district court to compel discovery "upon a showing of special need or hardship."[32] Finally, writing for the Third Circuit, then-Judge Alito stated that section 7's plain meaning and Supreme Court precedent indicate that the FAA does not give arbitrators the authority to subpoena production of documentary evidence from a third party, without summoning them to appear as a witness.[33] The Third Circuit reasoned that Congress modeled section 7 of the FAA after an earlier version of Rule 45 of the Federal Rules of Civil Procedure that did not even permit federal courts to issue prehearing document subpoenas to nonparties.[34]

In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, the Second Circuit reversed the district court's order compelling production of documents, and held that section 7 of the FAA does not authorize arbitration panels to compel third-party production.[35] Relying on the plain language of section 7, the court held that section 7 is "straightforward and unambiguous," and that documents are only discoverable in arbitration when brought before arbitrators

Centennial Ins. Co., 885 F. Supp. 69, 73 (S.D.N.Y. 1995) (observing arbitration panel's authority implicitly grants authority to compel documents from third parties), *abrogated by* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008). At the time the Southern District of New York decided *Integrity*, only one other court had directly addressed whether prehearing document subpoenas could be enforced against third parties. *See* Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (addressing plight of nonparty who objects to arbitrator-ordered discovery).

32. *See* COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999) (recognizing in dicta arbitral efficiency might require enforcement against third parties). The Fourth Circuit asserted that arbitral efficiency would decrease if parties could not review relevant evidence prior to an arbitration hearing, and thus a party can petition under section 7 upon showing of a special need or hardship. *Id.*; *see also* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 410 (3d Cir. 2004) (observing special showing exception only dicta).

33. *See* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004) (holding section 7 does not confer authority to compel nonparties). The court first turned to the plain language of section 7 and asserted that the "language speaks unambiguously to the issue before us." *Id.* That is, the only power conferred on an arbitrator to compel document production by a nonparty is the power to summon the nonparty to "attend before them or any of them as a witness and in a proper case to bring with him . . . any book, record, document or paper which may be deemed material as evidence in the case." *See id.* (quoting 9 U.S.C. § 7); *see also* Thomas H. Oehmke, 3 COMMERCIAL ARBITRATION § 91:5 (2008) (noting emerging view on FAA is limited subpoena of nonparties).

34. *See* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004) (referring to earlier Rule 45). The previous version of Rule 45, from its adoption in 1937 until Congress amended it in 1991, precluded federal courts from issuing prehearing document subpoenas on nonparties. *Id.* (examining prehearing discovery rules enacted at similar time to FAA); *see* FED. R. CIV. P. 45 (1990) (limiting federal court's power to subpoena nonparties). The former Rule 45 stated that "[e]very subpoena . . . shall command each person to whom it is directed to attend and give testimony" and "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(a)-(b) (1990) (amended 1991).

35. *See* 549 F.3d at 212 (reversing district court's order for Peachtree to produce requested documents). In so holding, the Second Circuit joined the Third Circuit through essentially the same analysis. *See id.* at 214-18 (analyzing discovery issue).

by a testifying witness.[36] In so holding, the Second Circuit joined the Third Circuit in rejecting the Eighth Circuit's power-by-implication analysis.[37] The Second Circuit reasoned that although there may be valid reasons to empower arbitrators to subpoena documents from third parties, the statute's clear language cannot "morph into something more just because courts think it makes sense for it to do so."[38]

In addition to relying on the plain language of the statute, the court relied on the historical context of the FAA and section 7.[39] The court noted that section 7 was similar to an earlier version of Rule 45 of the Federal Rules of Civil Procedure.[40] The court stated that this version of Rule 45 did not even permit federal courts to issue prehearing document subpoenas on nonparties.[41] Even though Congress enacted section 7 during a time when prehearing discovery was generally not permitted, the court reasoned that if Congress wants to expand arbitral subpoena authority it could do so as it did by amending Rule 45.[42]

Faced with whether to read an implicit power to subpoena third parties into the language of section 7 or follow its "straightforward and unambiguous" language, the Second Circuit correctly reversed the district court's order.[43]

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36. *See id.* at 216 (referring to plain language of section 7). The court stated that the language was clear: documents are only discoverable when brought before arbitrators by a testifying witness. *Id.*

37. *See id.* at 216-17 (adopting same view of section 7 as Third Circuit). By joining the Third Circuit, the court acknowledged an "'emerging rule' that 'the arbitrator's subpoena authority under FAA § 7 does not include the authority to subpoena nonparties . . . even if a special need or hardship is shown.'" *Id.* at 216 (quoting Thomas H. Oehmke, 3 COMMERCIAL ARBITRATION § 91:5 (2008)). Several district courts have adopted this view of section 7's authority. *See, e.g.*, Matria Healthcare, LLC v. Duthie, 584 F. Supp. 2d 1078, 1080 (N.D. Ill. 2008) (applying *Hay Group* interpretation of section 7); Guyden v. Aetna Inc., No. 3:05cv1652, 2006 WL 2772695, at *7 (D. Conn. Sept. 25, 2006) (adopting *Hay Group* court's view); Odfjell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) (applying Third Circuit's reasoning to section 7).

38. 549 F.3d at 216 (cautioning against construing statute beyond plain language). Although the court acknowledged there may be reasons for empowering arbitrators with the authority to subpoena nonparties for prehearing documents, it recognized that courts must presume the "legislature says in a statute what it means." *Id.* (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)).

39. *See id.* at 215 (tracing FAA's narrow subpoena power to earlier Federal Rules of Civil Procedure).

40. *See id.* (explaining narrow subpoena power reasonable in light of Rule 45 and historical context).

41. *See id.* at 215-16 (highlighting limits on federal courts to compel production); *see also* FED. R. CIV. P. 45 (1990) (amended 1991) (restricting prehearing document discovery). Rule 45 only enabled courts to order persons to give testimony and produce documents at that time. 549 F.3d at 216-17 (reviewing previous Rule 45's limited power to compel prehearing discovery on nonparties).

42. *See* 549 F.3d at 215-16 (reasoning Congress did not expand FAA's prehearing discovery). Congress adopted Rule 45 in 1937 and later amended the rule in 1991. *Id.* (outlining history of Rule 45). The court reviewed the Third Circuit's observation that, similar to section 7, just because under Rule 45 a court could compel a nonparty witness to bring items with him, Congress did not intend to include the power to subpoena documents without being subpoenaed to testify. *Id.* at 216 (quoting Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407-08 (3d Cir. 2004)).

43. *See supra* notes 33-34 and accompanying text (discussing plain language of statute prohibits prehearing, nonparty document subpoenas). *Compare In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 870-71 (8th Cir. 2000) (determining section 7 nonparty discovery is implicit power), *with* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 408 (3d Cir. 2004) (holding clear and unambiguous language prohibits prehearing document subpoena).

When the language of the statute is clear, as it is here, the court's role is only to enforce the language according to the statute's terms.[44] Despite the Eight Circuit's power-by-implication analysis, there has been a growing trend that recognizes that the arbitrator's subpoena power does not extend to third-party prehearing discovery.[45] Further, given the historical context of section 7 and its similarities to the former Rule 45 of the Federal Rules of Civil Procedure, the court's result was not out of line with the legislative history of the statute.[46]

Nevertheless, the Second Circuit's holding has little practical impact beyond inevitably requiring more third-party witnesses to appear before arbitration panels solely to produce documents.[47] In fact, Peachtree conceded that all that was required to obtain the documents under section 7 was to subpoena Peachtree before the panel.[48] The practical distinction between requiring a third party to appear before the panel or a single arbitrator solely to produce documents and to subpoena the documents directly is attenuated at best.[49] Although the Second Circuit noted the presence requirement forces the arbitrators to consider the necessity of the production, certainly the panel would consider the necessity before issuing a subpoena without the presence requirement.[50]

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44. *See* 549 F.3d at 216 (characterizing role of court as enforcing plain language of statute); *see also* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (stating courts must presume language means what legislature intended).

45. *See supra* note 37 and accompanying text (discussing commentator's observation of emerging view of section 7). The district courts in the Second Circuit have been split on the application of section 7. *See* Guyden v. Aetna Inc., No. 3:05cv1652, 2006 WL 2772695, at *7 (D. Conn. Sept. 25, 2006) (adopting *Hay Group* court's view); Odfjell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) (applying Third Circuit's reasoning to section 7). *But see In re* Integrity Ins. Co. v. Am. Centennial Ins. Co., 885 F. Supp. 69, 71 (S.D.N.Y. 1995) (accepting implicit power to compel prehearing discovery under section 7), *abrogated by* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008).

46. *See supra* notes 39-42 and accompanying text (discussing limited power of federal courts before 1991). The court's conclusion that nonparties can only be required to produce documents if they testify is in line with the Third Circuit and not unreasonable given the same procedural requirements in federal court before 1991. *Id.* (discussing Third Circuit's holding and historical context of section 7).

47. *See* 549 F.3d at 218 (noting that to obtain documents, arbitration panel could have subpoenaed Peachtree to testify). In fact, in *Hay Group*, Judge Chertoff's concurring opinion noted that a party might simply produce the documents in lieu of the inconvenience of making a personal appearance. Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 413 (3d Cir. 2004) (Chertoff, J., concurring) (pointing out numerous means of obtaining prehearing documents within section 7's scope).

48. *See* 549 F.3d at 218 (commenting Peachtree conceded it would have produced documents if subpoenaed to testify).

49. *See* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 413 (3d Cir. 2004) (Chertoff, J., concurring) (discussing alternative means of obtaining documents). Judge Chertoff correctly recognized that arbitrators have the power to compel nonparty witnesses to appear with documents. *Id.* Further, this witness may be ordered to appear before a single arbitrator during the preliminary phase of the arbitration. *Id.*; *see also* Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 569 (2d Cir. 2005) (observing section 7 authority not limited to merit hearings). In *Stolt*, the court held that the authority under section 7 extends to preliminary hearings as well as merit based hearings. *See* Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 577-79 (2d Cir. 2005).

50. *See* 549 F.3d at 218 (discussing standard required before issuing subpoena). The Second Circuit stated that the presence requirement permits the arbitrators authorizing it to consider whether production is truly necessary. *Id.*

Congress recognized the impracticality of barring prehearing discovery from third parties when it amended Rule 45.[51] Given the circuit court split on section 7's application, Congress should amend section 7 to permit arbitrators to issue prehearing subpoenas to third parties.[52] In doing so, Congress would remove an intermediate procedure, namely requiring presence before the panel before issuing a subpoena, which adds little procedural protection.[53] Further, by amending the statute to permit third-party subpoenas, Congress would improve arbitral efficiency, while at the same time protecting third parties by permitting them access to federal courts to quash the subpoena if inappropriate.[54]

In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, the Second Circuit considered whether section 7 of the FAA authorized an arbitration panel to subpoena a nonparty to the arbitration to produce documents. By adopting the same reasoning as the Third Circuit, the Second Circuit reasonably concluded that the plain language of section 7 does not permit prehearing discovery from nonparties. While the court held that section 7 does not enable arbitrators to issue prehearing subpoenas to nonparties, it did illustrate several ways to obtain the documents without prehearing subpoenas. Although the holding has little practical impact without amending section 7 to include prehearing discovery from nonparties, there is an incentive to arbitrate in forums that permit prehearing discovery of nonparties where related entities are involved.

51. *See* FED. R. CIV. P. 45 (permitting subpoena duces tecum for service on nonparty). Although Rule 34 addresses production of documents, it only applies against a party. *See* FED. R. CIV. P. 34(a). Where enforcement against a nonparty applies, parties must turn to Rule 45. *See* FED. R. CIV. P. 34(c). The 1991 amendment to subsection (c) of Rule 34 recognizes this with a cross reference to Rule 45. *See id.*

52. *Compare* 9 U.S.C. § 7 (2006), *and* FED. R. CIV. P. 45 (1990) (amended 1991), *with* FED. R. CIV. P. 45 (2006), *and* FED. R. CIV. P. 34(c) (2006).

53. *See supra* note 50 (addressing standard required to issue subpoena).

54. *See* FED. R. CIV. P. 45 (2006) (establishing authority for third-party discovery by federal courts).