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ARTICLES

OBTAINING AND SUBMITTING EVIDENCE IN INTERNATIONAL ARBITRATION IN THE UNITED STATES

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I. INTRODUCTION

A. *Evidence in International Arbitration*

The procedures for obtaining and submitting evidence – and the weight it should be given – play an important role in international arbitration. National courts generally follow elaborate rules governing the taking of evidence and its introduction in court proceedings. Procedures for the disclosure of evidentiary materials also play an essential role in international arbitration, as fact-finding is one of the key functions of the arbitral tribunal.¹ While many international arbitrations involve at least some measure of disclosure, views on availability and scope of disclosure vary widely among common law, civil law and other legal systems.² In addition, assistance of a domestic court at the seat of the arbitration or at the location of the information sought may be available. The availability and breadth of disclosure that a tribunal may order as well as the assistance in evidence-gathering a national court may give are important considerations when considering an arbitral seat and when developing the strategy for presenting a case in international arbitration.³

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¹ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 6.83, at 385 (5th ed. 2009); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1878, 1886 (2009).

² Within common and civil law jurisdictions, significant differences regarding disclosure also exist.

³ Because there are significant differences between the disclosure processes in litigation and arbitration, some commentators suggest that the term “discovery” should not be used in connection with international arbitration, preferring “disclosure” or “evidence taking” instead. *See, e.g.*, BLACKABY ET AL., *supra* note 1 at 393, n.65 (stating that the term “discovery” describes a process in common law countries, whereby the parties are legally obliged to produce documents that are relevant, even if prejudicial to their case, and thus “has no place in international arbitration”); JULIAN D. M. LEW, LOUKAS MISTELIS, & STEFAN KRÖLL, *Taking Evidence in International Arbitration*, in COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION Ch. 22, ¶ 51, at 567 (2003); Robert von Mehren, *Rules of Arbitral Bodies Considered from a Practical Point of View*, 9(3) J. INT’L ARB. 105, 110 (1992); Robert Smit, *Towards Greater Efficiency in Document Production*

B. *Differences in Scope and Availability of Disclosure in Civil and Common Law*

The legal training, traditions and experience of the arbitrators will inevitably influence a tribunal's approach to disclosure.⁴ Similarly, the legal backgrounds of the parties – and their counsel – will impact the parties' approach to disclosure.

Courts in most civil law jurisdictions following inquisitorial traditions largely control the evidence-taking process and do not allow for (party-initiated) disclosure.⁵ Generally, parties rely on the documents in their possession and may not compel the production of relevant materials from each other or third-party witnesses.⁶ Civil law judges actively investigate the facts of the case, while counsel for the parties play a secondary role during hearings. For instance, civil law judges appoint experts and primarily question witnesses.⁷ However, courts rarely order a party to produce additional materials it had not previously and voluntarily submitted into evidence.

Conversely, in most common law jurisdictions, a broad, party-initiated disclosure process is a central feature of dispute resolution, which is adversarial in nature.⁸ The collection and presentation of evidence is mainly in the hands of the

before Arbitral Tribunals – A North American Viewpoint, in DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION 93 (Emmanuel Jolivet ed., ICC Ct. Bull. Spec. Supp. 2006) (“‘Discovery,’ in the U.S. sense, is a dirty word in international arbitration”); Dominique d’Allaire & Rolf Trittmann, *Disclosure Requests in International Commercial Arbitration: Finding a Balance not only between Legal Traditions but also between the Parties’ Rights*, 22 AM. REV. INT’L ARB. 119, 120-21 (2011); *but see* James Gardiner, Lea Haber Kuck & Julie Bédard, *Discovery*, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 269, 269 n.1 (James Carter & John Fellas eds., 2010) (noting that the term “discovery” is commonly used in connection with U.S. arbitrations, making it appropriate for international arbitrations seated in the U.S. as well). Because the term “disclosure” more readily connotes the prohibition against U.S.-style “fishing expeditions,” it is often preferred by practitioners and will be used in this article.

⁴ BORN, *supra* note 1, at 1893; Gardiner et al., *supra* note 3, at 279.

⁵ *See, e.g.*, BORN, *supra* note 1, at 1893-94; Claude Reymond, *Civil Law and Common Law: Which Is the Most Inquisitorial? A Civil Lawyer’s Response*, 5 ARB. INT’L 357, 360 (1989); Paolo Michele Patocchi & Ian L. Meakin, *Procedure and Taking of Evidence in International Commercial Arbitration: The Interaction of Civil Law and Common Law Procedures*, 7 INT’L BUS. L.J. 884, 886-87 (1996); Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1019-22 (1998).

⁶ *See, e.g.*, BORN, *supra* note 1, at 1893-94; LEW ET AL., *supra* note 3, at Ch. 22, ¶ 51, at 567; Mauro Rubino-Sammartano, *Rules of Evidence in International Arbitration: A Need for Discipline and Harmonization*, 3(2) J. INT’L ARB. 87, 88-89 (1986); Christian Borris, *Common Law and Civil Law: Fundamental Differences and their Impact on Arbitration*, 2 ARB. & DISPUTE RES. L.J. 92, 98 (1995); Reymond, *supra* note 5, at 60 (“We react to the notion of discovery, be it English or, worse, American style, as an invasion of privacy by the court, which is only acceptable in criminal cases, where the public interest is involved.”).

⁷ BLACKABY ET AL., *supra* note 1, § 6.85, at 385.

⁸ BORN, *supra* note 1, at 1894.

parties, while common law judges serve as impartial “referees” in the taking and production of evidence. Unlike their civil law counterparts, common law judges have virtually no independent capacity to obtain additional evidence.⁹ In addition, common law systems tend to rely more heavily on oral testimony, thus providing for detailed procedures on the examination of witnesses, while civil law systems tend to give more weight to documents.¹⁰

Although an arbitral tribunal composed entirely of civil lawyers may be somewhat less likely than a tribunal composed of common lawyers to permit a substantial measure of disclosure, tribunals generally seek to make procedural decisions that are “international” rather than to replicate their local rules.¹¹ The availability and scope of disclosure will depend on the specifics of each dispute.¹² Overall, international arbitral tribunals tend to accord greater weight to contemporary documentary evidence than to oral witness testimony.¹³

C. *Differences in Availability and Scope of Disclosure in Litigation and International Arbitration Proceedings in the United States*

U.S. litigation is particularly known for its full-blown discovery, in which courts routinely grant the parties expansive disclosure requests.¹⁴ To ensure the truth is revealed, it is generally accepted that both parties should have full knowledge of every potentially relevant piece of information before presenting their case on the merits.¹⁵ The U.S. Federal Rules of Civil Procedure provide for a myriad of discovery mechanisms, including document disclosures, oral and written depositions, interrogatories and requests for admission.¹⁶ Under Rule 26, the permissible scope of discovery is extremely broad, allowing parties to “obtain

⁹ BLACKABY ET AL., *supra* note 1, § 6.84, at 385. For this reason, common law jurisdictions tend to have detailed procedural rules on disclosure and admissibility of evidence. *Id.*

¹⁰ Certainly, the distinctions between civil and common law systems should not be over-generalized. There are significant variations in the procedural rules of different common or civil law countries.

¹¹ BORN, *supra* note 1 at 1895 (noting that [j]ustice is almost always best served by a degree of transparency”).

¹² There may be instances where U.S. parties to an arbitration are disadvantaged by the disclosure process adopted in an arbitration proceeding. For instance, a civil law party may have access to the assistance of U.S. courts in taking evidence (e.g. assistance under 9 U.S.C. § 1782 where the arbitration is seated outside of the U.S.), while similar tools are not available to a U.S. party in the civil law country. Conversely, a civil law party may be disadvantaged by the disclosure process, for instance where the tribunal orders disclosure of certain documents that would not be “discoverable” under the party’s domestic law. *See d’Allaire & Trittmann, supra* note 3, at 119-20, 128.

¹³ BLACKABY ET AL., *supra* note 1, §§ 6.97-6.98, at 389.

¹⁴ Even among common law jurisdictions, U.S. discovery is unique in its breadth and significance to the proceedings. *See Gardiner et al., supra* note 3, at 279; Smit, *supra* note 3.

¹⁵ In U.S. litigation, oral examination and cross-examination of witnesses are viewed as key to uncovering the truth.

¹⁶ FED. R. CIV. P. 26

discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."¹⁷ Rule 26 also provides that "relevant information" need not be admissible at trial, as long as "the discovery appears reasonably calculated to lead to the discovery of admissible evidence."¹⁸ Similar rules can be found at the state level.¹⁹

Generally, parties may agree on the procedure of an international arbitration, including the disclosure process.²⁰ The U.S. Supreme Court has recognized the principle of party autonomy in international arbitration.²¹ Thus, the parties may include detailed provisions on the availability, scope and timing of disclosure in their arbitration agreement. If the tribunal fails to follow the procedure agreed upon by the parties, the award may not be enforceable.²² However, arbitration

¹⁷ *Id.* at 26(b)(1)

¹⁸ *Id.*

¹⁹ *See, e.g.*, New York Civil Practice Law and Rules (N.Y. C.P.L.R.), Art. 31; California Civil Discovery Act (1986), California Code of Civil Procedure, § 2017.010; *see also generally* Uniform Interstate Depositions and Discovery Act (2007) (model law establishing a uniform process for obtaining out-of-state depositions and discovery).

²⁰ *See* BLACKABY ET AL., *supra* note 1, § 6.01, at 363, § 6.08, at 365; BORN, *supra* note 1 at 1879-80 (noting that issues of disclosure fall within the parties' general procedural autonomy); *see also* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 586 (2008) ("[T]he FAA lets parties tailor some, even many, features of arbitration by contract, including . . . procedure"); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate"). This "guiding principle" of party autonomy is recognized by national arbitration laws, the New York Convention, the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985) (amended 2006) ("UNCITRAL MODEL LAW") and various arbitral rules. BLACKABY ET AL., *supra* note 1, § 6.08, at 365; *see also* UNCITRAL MODEL LAW, Art. 19(1); RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE (2012) ("ICC RULES"), Art. 19(1); ARBITRATION RULES OF THE LONDON COURT OF ARBITRATION ("LCIA RULES"), Art. 14.1. However, the parties' freedom to shape the arbitral process is not unlimited; mandatory rules and public policy requirements of the law at the seat of arbitration must be respected as well as general principles of procedural fairness. BLACKABY ET AL., *supra* note 1, at 1886; *see also* UNCITRAL MODEL LAW, Art. 18; REVISED UNIFORM ARBITRATION ACT ("RUAA"), §§ 4(a), 15; UNIFORM ARBITRATION ACT ("UAA"), § 5(b); N.Y. C.P.L.R., Art. 75.

²¹ *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995); *Volt Info. Scis.*, 489 U.S. at 478; *see also* Vera v. Saks & Co., 335 F.3d 109, 116 (2d Cir. 2003); *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 104 (2d Cir. 2006); *Glen Rauch Sec., Inc. v. Weinraub*, 768 N.Y.S. 2d 611, 611 (1st Dept. 2003) (affirming that "[t]he arbitrators properly sanctioned respondent for his failure to comply with their order directing the production of documents by precluding the testimony of a witness and the introduction of evidence to which the undisclosed documents related").

²² New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Arts. II(1) & (3), V(1)(d) (enforced in the United

clauses frequently do not address disclosure issues, as it is difficult for the parties to predict in advance the type of disclosure that would be appropriate in a future dispute.²³ More frequently, the parties adopt arbitral and other rules by reference, which may contain specific provisions on disclosure.²⁴ In addition, the arbitral tribunal's authority to order disclosure may stem from provisions in the procedural laws at the arbitral seat.²⁵ This flexibility to shape the arbitral process according to the specifics of each business relationship is one of the reasons parties choose arbitration over litigation.²⁶

As a general rule, the disclosure phase in an international arbitration tends to be much shorter and succinct. Unless the parties agree otherwise, the rules of civil procedure governing litigation in the local courts of neither the applicable substantive law (*lex causae*) nor of the seat of the arbitration (*lex arbitri*) apply to international arbitration.²⁷ While requests for disclosure are common in international arbitration, the scope of disclosure in international arbitration is much narrower compared to that permitted in U.S. litigation. Indeed, the limited availability of disclosure in international arbitration is a key difference between

States pursuant to 9 U.S.C. § 201 (1970)); BORN, *supra* note 1, at 1879-80; BLACKABY ET AL., § 6.03, at 363.

²³ See Gardiner et al., *supra* note 3, at 274.

²⁴ See, e.g., *In re Technostroyexport*, 853 F. Supp. 695, 697-98 (S.D.N.Y. 1994) (finding that by incorporating by reference into the arbitration clause arbitral rules, the parties agreed to any provisions relating to disclosure contained in those rules); *Brazell v. Am. Color Graphics, Inc.*, No. M-82, 2000 U.S. Dist. LEXIS 4482, at *3-4 (S.D.N.Y. Apr. 6, 2000); compare ICC RULES, Art. 21; LCIA RULES, Art. 22; INTERNATIONAL ARBITRATION RULES OF THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (2007) ("CPR RULES"), Art. 11. The INTERNATIONAL ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (2009) ("ICDR RULES") contain no specific provision for discovery.

²⁵ *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 (5th Cir. 2004) ("Under the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies to the arbitration"); BORN, *supra* note 1, at 1879; See d'Allaire & Trittmann, *supra* note 3, at 124-25.

²⁶ BLACKABY ET AL., *supra* note 1, § 6.01, at 363.

²⁷ *Id.* § 6.105, at 392; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("[A]lthough [discovery] procedures [may] not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration'") (quoting *Mitsubishi*, 473 U.S. at 628; *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999) ("The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness – characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011); *Ciango v. Ameriquest Mortg. Co.*, 295 F. Supp. 2d 324, 333 (S.D.N.Y. 2003); *Commonwealth Ins. Co. v. Beneficial Corp.*, No. 87 Civ. 5056, 1987 WL 17951, at *4-5 (S.D.N.Y. Sep. 29, 1987).

judicial and arbitral proceedings.²⁸ Generally, disclosure requests must be sufficiently detailed to identify specific (types of) documents and must provide reasons as to why the information requested is relevant to the dispute and material to its outcome. This disclosure standard is much more restrictive than the “relevancy” test applied by U.S. courts under Rule 26 or similar state statutes, which do not require a separate showing that the requested information is material to the outcome of the dispute.²⁹ Further, the practice of depositions, interrogatories and requests for admission is uncommon in international arbitral proceedings in the United States and elsewhere.³⁰

II. DISCLOSURE POWERS OF INTERNATIONAL ARBITRAL TRIBUNALS IN THE UNITED STATES

A. *The Relevant Federal and State Statutory Arbitration Provisions*

Due to its federalist system of government, federal and state statutory arbitration provisions potentially apply to delineate the disclosure power of an international arbitral tribunal seated in the United States.³¹ Thus, two sources of potentially relevant domestic laws for the conduct of the arbitration apply: (1) the Federal Arbitration Act (“FAA”)³² and (2) the statutory arbitration provisions of the state where the proceedings are held. These arbitration laws generally recognize the parties’ autonomy to agree upon the availability, scope and timing of disclosure in the arbitration agreement, or *ad hoc* after a dispute has arisen.³³

²⁸ Gardiner et al., *supra* note 3, at 273.

²⁹ BLACKABY ET AL., *supra* note 1, § 6.109, at 394 (noting that a tribunal may deny document requests, where, though relevant, the information requested would not affect the outcome of the proceeding).

³⁰ See, e.g., ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION (2008) (“ICDR GUIDELINES”), Art. 6(b) (“Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration”); CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2008) (“CPR PROTOCOL”), § 2(c) (requiring “exigent circumstances,” meaning “[w]itness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal”). A limited number of cases have stated in *dicta* that depositions may be available under § 7 of the FAA in “unusual circumstances.” See COMSAT Corp. v. Nat’l Sci. Found., 190 F.3d 269, 271, 275-76 (4th Cir. 1999); Nat’l Union Fire Ins. Co. v. Marsh USA, Inc., No. M-82, 2004 U.S. Dist. LEXIS 12716, at *3 (S.D.N.Y. July 9, 2004).

³¹ In the United States, both the national (federal) government and the various state governments have the power to pass, enforce and interpret laws. See U.S. Constitution, Art. II(8), Amend. X.

³² 9 U.S.C. §§ 1-16, 201-208, 301-307.

³³ See, e.g., 9 U.S.C. § 2; RUAA, §§ 4(a), 15, 17; UAA, § 5; UNCITRAL MODEL LAW, Art. 19; *Volt Info. Scis.*, 489 U.S. 478; BLACKABY ET AL., § 6.03, at 363.

1. *The Federal Arbitration Act*

At the federal level, the FAA governs arbitration, both domestic and international. The FAA was initially introduced in 1925 to eliminate judicial hostility towards arbitration and place arbitration agreements “upon the same footing” as other contracts.³⁴ The FAA now consists of three chapters: (i) General Provisions (Chapter 1, §§ 1-16); (ii) Enforcement of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) (Chapter 2, §§ 201-208),³⁵ and (iii) Enforcement of the Inter-American Convention on International Commercial Arbitration (“Panama Convention”) (Chapter 3, §§ 301-307).³⁶

Chapter 1 of the FAA governs any written arbitration provision in a “maritime contract or a contract evidencing a transaction involving commerce.”³⁷ Due to the broad definition of “commerce” under the FAA,³⁸ Chapter 1 applies to virtually all international arbitrations seated in the United States.³⁹

Chapter 2 of the FAA contains the provisions for enforcement of the New York Convention, while Chapter 3 contains the provisions for enforcement of the Panama Convention.⁴⁰ The U.S. Court of Appeals for the Second Circuit held that Chapter 2 of the FAA applies where the arbitration agreement (1) is in writing; (2) provides that the arbitration will be seated in the territory of a signatory to the

³⁴ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974)); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

³⁵ The United States acceded to the New York Convention on September 30, 1970, which entered into force for the United States on December 29, 1970. *See UNCITRAL, Status – 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

³⁶ While open to accession by any state, the Panama Convention has been ratified only by members of the Organization of American States (“OAS”), including numerous Central and South American countries and the United States. The United States signed the Panama Convention on June 9, 1978, which entered into force for the United States on October 27, 1990. *See Organization of American States, Inter-American Arbitration Convention on International Commercial Arbitration (Panama Convention)*, opened for signature Jan 30, 1975, O.A.S.T.S., No. 42, 4138 U.N.T.S. 245, available at <http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp>.

³⁷ 9 U.S.C. § 2.

³⁸ “Commerce” is defined as “commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation” 9 U.S.C. § 1.

³⁹ *See GARY BORN & PETER RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 1162-63 (5th ed. 2011).

⁴⁰ Both chapters create federal question jurisdiction in U.S. federal district courts for any case “falling under the Convention,” and permit removal of such cases from state to federal court “at any time prior to trial.” 9 U.S.C. §§ 203, 205, 302; *see also BORN & RUTLEDGE, supra* note 39, at 1163.

New York Convention; (3) has a commercial subject matter (as defined by federal law); and (4) is not entirely domestic.⁴¹ A similar test would apply to Chapter 3 by analogy.⁴² A large number of international arbitrations seated in the United States will fall under Chapters 2 or 3.⁴³ Thus, where the arbitration is not “entirely domestic,” both Chapters 1 and 2 or 3 respectively may apply simultaneously.⁴⁴ In case of a conflict, Chapter 2 or 3 prevails;⁴⁵ otherwise the parties may choose to enforce their arbitration agreement (or award) under either provision.⁴⁶

⁴¹ *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999); *Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co.*, No. 07-CV-1071, 2007 U.S. Dist. LEXIS 69732, at *12-13 (W.D. Ark. Sept. 20, 2007); *see also* 9 U.S.C. § 202. This test incorporates the reciprocity and commercial reservations, under which the United States ratified the New York Convention. The final prong of the test, “not entirely domestic,” corresponds to the New York Convention’s application to arbitration agreements and awards “not considered as domestic.” *See* New York Convention, Art. I(1). This means that an arbitration agreement or award rendered in an international arbitration seated in the United States may fall under the New York Convention and Chapter 2 of the FAA. *See, e.g., Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983) (holding that “awards ‘not considered as domestic’ denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction”); *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007); *Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 293 (S.D. Tex. 1997); *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 482 (7th Cir. 1997).

⁴² 9 U.S.C. §§ 202, 302; *see also* *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994); *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 230 F. Supp. 2d 362, 371 (S.D.N.Y. 2002) (noting that the Panama Convention incorporates the FAA terms unless they are in conflict with the Convention’s terms); *Trans Chem. Ltd.*, 978 F. Supp. at 294. The Panama Convention applies if a majority of parties to an arbitration agreement are from countries that have ratified the Panama Convention and are members of the OAS. 9 U.S.C. § 305(1); *see also* *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 802 F. Supp. 1069, 1074 (S.D.N.Y. 1992), *rev'd*, 991 F.2d 42 (2d Cir. 1993); *Banco de Seguros del Estado*, 230 F. Supp. 2d at 368, n.4; *Hernandez v. Smart & Final, Inc.*, No. 09-cv-2266, 2010 U.S. Dist. LEXIS 60755, at *9-10 n.3 (S.D. Cal. June 16, 2010). In all other cases, the New York Convention applies. 9 U.S.C. § 305(2).

⁴³ While some differences exist between the New York and Panama Conventions that may be determinative in certain cases, the conventions are largely similar, and discussion in this article will focus on the New York Convention.

⁴⁴ *See Lander Co.*, 107 F.3d at 481; *Trans Chem. Ltd.*, 978 F. Supp. at 296, n.126. However, the New York Convention’s reciprocity requirement may preclude its application in certain cases, meaning only Chapter 1 will govern the arbitration.

⁴⁵ *See Lander Co.*, 107 F.3d at 481; *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, No. 3:95 CV 2362, 2000 U.S. Dist. LEXIS 8498, at *14 n.3 (D. Conn. Mar. 14, 2000) (noting that the New York Convention trumps Chapter 1 of the FAA, to the extent that there is a conflict between their terms).

⁴⁶ 9 U.S.C. § 208; *see also* *Spector v. Torenberg*, 852 F. Supp. 201, 205 (S.D.N.Y. 1994); *Oil Basins, Ltd. v. Broken Hill Proprietary Co.*, 613 F. Supp. 483, 487 (S.D.N.Y. 1985); *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us*, 126 F.3d 15, 20 (2d Cir. 1997)

Neither the New York nor Panama Conventions specifically address the issue of disclosure in international arbitration proceedings. Section 7 of the FAA provides as follows:

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.⁴⁷

U.S. courts have held that discovery provisions applicable to litigation, such as Rule 26 of the Federal Rules of Civil Procedure, are not applicable in arbitrations seated in the United States, unless otherwise agreed by the parties.⁴⁸ The parties may also agree to preclude or significantly limit disclosure as long as fundamental principles of procedural fairness and equality are respected.⁴⁹

As discussed in more detail below,⁵⁰ U.S. courts are divided as to the power that a tribunal seated in the United States has to order pre-hearing document disclosure and the scope of disclosure and non-party disclosure available under § 7. If the tribunal's subpoena or disclosure order is not complied with, a U.S. district court at the tribunal's seat may compel compliance.⁵¹ In addition, § 1782 of Title 28 of the U.S. Code permits "foreign and international tribunals" and interested persons to apply to a U.S. federal district court for assistance in the taking of evidence "for use in a proceeding" before such a tribunal seated

(holding that the New York Convention and the FAA provide overlapping coverage, and that a petition to confirm under the Convention does not foreclose a cross-motion to vacate under the FAA); *National Educ. Corp. v. Martin*, No. 93 C 6247, 1995 U.S. Dist. LEXIS 15707, at *9 (N.D. Ill. Oct. 19, 1995).

⁴⁷ 9 U.S.C. § 7.

⁴⁸ *See, e.g.,* *Great Scott Supermarkets, Inc. v. Local Union No. 337, International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of N. Am.*, 363 F. Supp. 1351, 1354 (E.D. Mich. 1973) (holding that the Federal Rules of Civil Procedure do not apply to arbitration unless the parties agree otherwise); *Commercial Solvents Corp. v. La. Liquid Fertilizer Co.*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957); *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9, 11 (E.D. Pa. 1960); *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980); *JJ-CC, Ltd. v. Transwestern Pipeline Co.*, No. 14-96-1103-cv, 1998 Tex. App. LEXIS 7090, at *22-23 (Tex. Ct. App. Houston 14th Dist. Nov. 12, 1998); *compare* *In re Koala Shipping & Trading Inc.*, 587 F. Supp. 14, 143 (S.D.N.Y. 1984) (applying FED. R. CIV. P. 26(b) in a case where the tribunal in a related parallel arbitration referred the parties to the district court judge to obtain a subpoena and discovery order). However, the parties may expressly choose U.S.-style discovery procedures for their dispute. *See BORN, supra* note 1, at 1884 n.38; *Gardiner et al., supra* note 3, at 272-73 (noting that parties may opt for "full blown U.S. style discovery" in their international arbitration through incorporation by reference of the discovery provisions in the U.S. Federal Rules of Civil Procedure or the New York Civil Practice Law and Rules).

⁴⁹ *See BORN, supra* note 1, at 1884 n.38; UNCITRAL MODEL LAW, Arts. 1(1), 17(1), 27.

⁵⁰ *See infra* Section II(D)(2).

⁵¹ 9 U.S.C. § 7.

abroad.⁵² U.S. courts are divided as to whether this provision applies to international commercial arbitration tribunals.⁵³

2. *State Arbitration Statutes*

States have adopted their own arbitration laws on matters of domestic and international arbitration. The majority of states have implemented the Uniform Law Commission's ("ULC") Uniform Arbitration Act ("UAA") of 1956⁵⁴ or the Revised Uniform Arbitration Act ("RUAA") of 2000.⁵⁵ Both apply to arbitration in general, without specifically addressing the subject of international arbitration.⁵⁶ Some states have implemented the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("UNCITRAL Model Law"),⁵⁷ at times together with provisions taken from the New York Convention, while others, such as New York, have enacted their own statutory provisions on arbitration.⁵⁸

With regard to a tribunal's disclosure powers, Section 7 of the UAA provides that "arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence"⁵⁹ Upon application of a party, tribunals also may permit deposition of a

⁵² 28 U.S.C. § 1782.

⁵³ An analysis of § 1782 is outside of the scope of this article.

⁵⁴ Colorado, Delaware, District of Columbia, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Virginia. See Uniform Law Commission, Arbitration Act (1956) – Legislative Fact Sheet, available at [http://uniformlaws.org/Act.aspx?title=Arbitration Act \(1956\)](http://uniformlaws.org/Act.aspx?title=Arbitration Act (1956)).

⁵⁵ Alaska, Arizona, Arkansas, Colorado, District of Columbia, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington. A bill to implement the RUAA in Massachusetts was introduced in 2013. See Uniform Law Commission, Arbitration Act (2000) – Legislative Fact Sheet, available at [http://uniformlaws.org/Act.aspx?title=Arbitration Act \(2000\)](http://uniformlaws.org/Act.aspx?title=Arbitration Act (2000)).

⁵⁶ See RUAA, Prefatory Note at 6 (noting that twelve states passed arbitration statutes directed to international arbitration).

⁵⁷ California (1988), Connecticut (1989), Florida (2010) (with amendments as adopted in 2006), Illinois (1998), Louisiana (2006), Oregon (1991), Texas (1989). See UNCITRAL, Status – 1985 UNCITRAL Model Law on International Commercial Arbitration, with Amendments as Adopted in 2006, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

⁵⁸ In 2005, a conglomerate of New York bar associations recommended that the New York legislature adopt the RUAA. See *Report on the Revised Uniform Arbitration Act* (Dec. 9, 2005), available at <http://old.nysba.org/AM/Template.cfm?Section=Committees2&Template=/CM/ContentDisplay.cfm&ContentFileID=4961>. However, to date New York has not implemented the RUAA and follows its Civil Practice Law and Rules in arbitration matters. See N.Y. C.P.L.R., Art. 75 (applicable to domestic and international arbitrations).

⁵⁹ UAA, § 7(a).

witness who cannot be subpoenaed or is unwilling to attend a hearing on application of a party.⁶⁰

Section 17 of the RUAA contains a similar provision, but allows depositions upon the application of a party or witness only where they are necessary to make the “proceedings fair, expeditious, and cost effective.”⁶¹ In addition, Section 17 specifically provides that “[a]n arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.”⁶² Section 17 also details the tribunal’s authority to issue discovery-related orders, subpoenas and protective orders, and to take action against a non-complying party to the extent a court could.⁶³ Under the UAA and RUAA, either the arbitral tribunal or a party may seek judicial enforcement of a subpoena issued by the tribunal.⁶⁴ Further, either the subpoenaed (non-party) witness or the other party on behalf of that witness may file a motion to quash the subpoena or arbitral order.

The UNCITRAL Model Law recognizes the parties’ procedural autonomy in Article 19, but does not specifically address disclosure issues.⁶⁵ Thus, unless the parties have incorporated specific rules on disclosure into their arbitration agreement, the tribunal has broad authority under the Model Law to take and evaluate evidence, as long as the overarching principles of party equality and procedural fairness are respected.⁶⁶ In Model Law jurisdictions, the tribunal may also request assistance in taking evidence from a competent state court.⁶⁷

Notably, New York courts recognize an arbitral tribunal’s inherent authority to control the arbitral proceedings, including the disclosure process.⁶⁸ Under

⁶⁰ *Id.* § 7(b).

⁶¹ RUAA, § 17(a), (b).

⁶² *Id.* § 17(c).

⁶³ *Id.* § 17(d), (e).

⁶⁴ UAA, § 7(a); RUAA, § 17(a).

⁶⁵ UNCITRAL MODEL LAW, Art. 19.

⁶⁶ *Id.* Arts. 19(2), 27; *see also* BORN, *supra* note 1, at 1880-81 n.21 (noting that Article 26(1)(b) of the Model Law also “strongly implies” that an arbitral tribunal may order disclosure); d’Allaire & Trittmann, *supra* note 3, at 126; *Report of the Secretary-General on the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN Doc. A/CN.9/264, Art. 19, ¶ 6, XVI Y.B. UNCITRAL 104 (1985); *see also* *JJ-CC, Ltd.*, 1998 Tex. App. LEXIS 7090, at *24 (holding that, under the Texas Arbitration Act, the arbitral tribunal had the authority to apply the procedural law it considered applicable, absent an agreement by the parties).

⁶⁷ UNCITRAL MODEL LAW, Art. 27.

⁶⁸ *See, e.g.*, *Credit Suisse First Boston Corp. v. Pitofsky*, 824 N.E.2d 929, 932 (N.Y. 2005); *Smith Barney Shearson Inc. v. Scharaow*, 689 N.E.2d 884, 890 (N.Y. 1997); *Siegel v. Lewis*, 358 N.E.2d 484, 485 (N.Y. 1976); *Radin v. Kleinmann*, 299 A.D.2d 236, 236 (1st Dep’t 2002) (holding that “[t]he arbitrators’ limited document production directive was consistent with their ‘inherent power to control the course of the arbitration proceedings so as to permit a party to elicit relevant information’”) (quoting *Guilford Mills, Inc. v. Rice Pudding, Ltd.*, 90 A.D.2d 468, 468 (1st Dep’t 1982) (finding that the

§ 7505 of the New York Civil Practice Law and Rules (“C.P.L.R.”), an “arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas.”⁶⁹ In addition, New York courts may order disclosure “to aid in arbitration”⁷⁰ in exceptional circumstances.⁷¹

3. *The Relationship between the FAA and State Arbitration Statutes*

The Supremacy Clause of the U.S. Constitution provides that the “Constitution, and the Laws of the United States . . . shall be the supreme law of the land.”⁷² It is well-established that Congress pursued a “national policy favoring arbitration” in enacting the FAA.⁷³ Thus, the FAA’s standards and the pro-arbitration bias apply in federal and state courts alike,⁷⁴ irrespective of whether the underlying contract is governed by state or federal law.⁷⁵

tribunal “has inherent power to control the course of the arbitration proceedings so as to permit a party to elicit relevant information”); *Motor Vehicle Accident Indemnification Corp. v. McCabe*, 19 A.D.2d 349, 353 (1st Dep’t 1963); *see also Gardiner et al., supra* note 3, at 278-79.

⁶⁹ N.Y. C.P.L.R. § 7505. New York courts have interpreted this provision to enable the tribunal to issue subpoenas against third parties as well. *See, e.g., In re Sun-Ray Cloak Co.*, 256 A.D. 620, 625 (1st Dep’t 1939); *In re Landegger v. Parson & Whittemore, Inc.*, 54 N.Y.S.2d 76, 76 (Sup. Ct. Spec. Term N.Y. County 1945), *modified*, 269 A.D. 736 (N.Y. App. Div. 1945) (holding concerned the New York Civil Practice Act (CPA) §§ 406, 1456, which preceded the N.Y. C.P.L.R.); *Matter of Petry Holding Inc. v. Rural Media Group Inc.*, No. 651578/11, 2012 N.Y. Misc. LEXIS 2422, at *7-8 (Sup. Ct. N.Y. County 2012).

⁷⁰ N.Y. C.P.L.R. § 3102(c).

⁷¹ *See, e.g., Guilford Mills*, 90 A.D.2d at 468 (“Ordinarily, disclosure will not be ordered to aid in arbitration under CPLR 3102 (subd [c]) unless there are extraordinary circumstances present”); *Axa Equitable Life Ins. Co. v. Kalina*, 101 A.D.3d 1655, 1656 (4th Dep’t 2012) (noting that court-ordered disclosure should “be used sparingly in arbitration and, indeed, the availability of disclosure devices is a significant differentiating factor between judicial and arbitral proceedings”) (internal quotation marks and citation omitted); *Block v. Ghirimoldi*, No. 106697/11, 2011 N.Y. Misc. LEXIS 4721, at 7-8 (N.Y. Sup. Ct. Oct. 4, 2011) (noting that court-ordered disclosure “is not justified except where it is absolutely necessary for the protection of the rights of a party”) (internal quotation marks and citation omitted); *State Farm Mut. Auto. Ins. Co. v. Wernick*, 90 A.D.2d 519, 519 (2d Dep’t 1982); *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 125 F.R.D. 398, 400 (S.D.N.Y. 1989).

⁷² U.S. Constitution, Art. VI, § 2.

⁷³ *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011); *Compucredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

⁷⁴ *See Southland*, 465 U.S. at 12; *Volt Info. Scis.*, 489 U.S. at 477 n.6; *see also BORN & RUTLEDGE, supra* note 39, at 1163 n.48.

⁷⁵ *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (“State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U.S.C. §1 et seq., with respect to all arbitration agreements covered by that statute”); *Compucredit*, 132 S.

The U.S. Supreme Court has long held that the FAA preempts state law regarding issues related to the “front end” of arbitration – the enforcement of the arbitration agreement and issues of substantive arbitrability (§§ 2, 3 and 4 of the FAA).⁷⁶ In 2008, the Court confirmed that the FAA also preempts state law provisions on the “back end” of arbitration, such as vacatur, confirmation and modification of arbitral awards (covered in §§ 9, 10, 11 and 12).⁷⁷

However, the FAA does not “occupy” the entire field of arbitration.⁷⁸ State law may apply to international arbitrations in two ways: (1) where the specific

Ct. at 669 (noting that the FAA applies to federal law in the same way as it does to state law, absent a “contrary congressional command”); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (The FAA is “a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act[, and] enforceable in both state and federal courts”); *Southland*, 465 U.S. at 10-12; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); *see also* BORN & RUTLEDGE, *supra* note 39, at 1163.

⁷⁶ *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967) (agreeing with the Second Circuit that §§ 2, 3, and 4 together created a rule “of national substantive law [that] governs even in the face of a contrary state rule”) (internal quotations omitted); *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24 (holding that § 2 of the FAA “create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act”); *Southland*, 465 U.S. at 22 (stating in dissent that the majority’s decision “takes the facial silence of [§] 2 as a license to declare that state as well as federal courts must apply [§] 2 [and] holds that in enforcing this newly-discovered federal right state courts must follow procedures specified in [§] 3”) (Justice O’Connor, dissenting); *Perry*, 482 U.S. at 490-91 (considering a California statute that conflicted with § 2 of the FAA, and holding that Congress’ “clear federal policy” to “enforce private agreements” required invalidation of the state statute “under the Supremacy Clause”); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) (adopting a broad interpretation of the FAA’s preemptive scope that would displace even “state statutes carefully calibrated to protect consumers”) (Justice O’Connor, concurring in the decision to maintain a uniform standard between state and federal courts, but contending that the result had drawbacks).

⁷⁷ *Hall St. Assocs.*, 552 U.S. at 584, bluntly holding that §§ 10 and 11 “respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.” The Court explained that “expanding the[se] detailed categories would rub too much against the grain of the [§] 9 language, where provision for judicial confirmation carries no hint of flexibility.” *Id.* at 587. Furthermore, “[i]nstead of fighting the text, it makes more sense to see the three provisions, [§§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” *Id.* at 588. The Court opined that, indeed, “[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post-arbitration process.” *Id.* (internal quotation marks and citations omitted).

⁷⁸ *Volt Info. Scis.*, 489 U.S. at 477; *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 132 (2d Cir. 2010); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 595 (3d Cir. 2004); *Bank One, N.A. v. Shumake*, 281 F.3d 507, 514 (5th Cir. 2002); *see also* BORN & RUTLEDGE, *supra* note 39, at 1163.

state law provision is not preempted by the FAA, or (2) where the parties expressly designate a specific state arbitration law to govern the proceedings. First, state arbitration provisions may regulate ancillary matters of the arbitral process, such as consolidation of claims or arbitrator immunity, which are not addressed in the FAA.⁷⁹ These provisions may apply simultaneously with the FAA (and, if applicable, the New York or Panama Conventions), as long as they are not incompatible with the FAA's express provisions or overall purpose,⁸⁰ and do not show an anti-arbitration bias or limit the enforceability of arbitration agreements.⁸¹

Second, the principle of party autonomy allows the parties to choose the state arbitration law at the arbitral seat to govern the proceedings. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*, the U.S. Supreme Court upheld a decision by the California Supreme Court, which had to determine whether to apply a state law provision on the stay of arbitration proceedings. Based on the general choice-of-law clause in the underlying agreement containing the arbitration provision, which provided that California law would govern, the court concluded that the California provision on the stay of arbitration proceedings was applicable.⁸² By contrast, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the U.S. Supreme Court held that a general choice-of-law clause, stating that New York law will govern the underlying contract containing the agreement to arbitrate was not sufficient to allow New York's prohibition on punitive damages in arbitration to apply.⁸³

As the U.S. Supreme Court noted in *Mastrobuono*, when it decided *Volt Information Services*, it declined to review the state court's initial determination that the parties' choice-of-law provision was intended to encompass both the state's substantive law and arbitration provisions.⁸⁴ However, emphasizing that *Mastrobuono* involved a federal court's interpretation of the parties' choice-of-law provision, the Court found a general choice-of-law provision not specific to issues of arbitration to be insufficient to displace the application of the FAA.

⁷⁹ See, e.g., RUAA, §§ 10, 14; see also BORN & RUTLEDGE, *supra* note 39, at 1163.

⁸⁰ See, e.g., *Southland*, 465 U.S. at 16 ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements"); *Perry*, 482 U.S. at 489; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Preston v. Ferrer*, 552 U.S. 346, 353 (2008).

⁸¹ RUAA, Prefatory Note at 5, 6.

⁸² *Volt Info. Scis.*, 489 U.S. at 470-78 (noting that the FAA did not address the stay of arbitration and the state provision did not show anti-arbitration bias).

⁸³ *Mastrobuono*, 514 U.S. at 54-60; see also *Preston*, 552 U.S. at 362-63 (The "best way to harmonize the parties' adoption of the AAA Rules and their selection of California law is to read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not the State's special rules limiting the authority of arbitrators") (internal quotation marks and citation omitted).

⁸⁴ *Mastrobuono*, 514 U.S. at 60 n.4.

Lower federal courts have followed this approach.⁸⁵ For instance, the U.S. Court of Appeals for the Ninth Circuit recently held that there is “a strong default presumption . . . that the FAA, not state law, supplies the rules of arbitration” and that “a general choice of law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration.”⁸⁶ The Supreme Court has since confirmed that its holding in *Mastrobuono* also applies to state courts.⁸⁷

⁸⁵ See, e.g., *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (“[I]nclusion of a choice-of-law clause in an arbitration agreement does not incorporate state decisional law pertaining to the allocation of power between courts and arbitrators; rather, at most the clauses read together create an ambiguity that must be construed in favor of arbitration.”); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (“[A] general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration”); *Paine Webber Inc. v. Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) (“[We] find that the choice-of-law clause in this case is not an expression of intent to adopt New York caselaw requiring the courts to [adopt arbitration rules contained in New York caselaw]”); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1200 (2d Cir. 1996) (“[A] choice-of-law provision, when accompanied by an arbitration provision . . . encompasses substantive principles that New York courts would apply, but not . . . special rules limiting the authority of the arbitrators”) (citation omitted); *Prescott v. Northlake Christian Sch.*, 141 Fed. Appx. 263, 273-74 (5th Cir. 2005) (“We hold that the contract’s silence on limitations of damages, when contrasted with the [ICC] Rules’ express, broad provision for any manner of damages the arbitrator deems acceptable, demonstrates that the arbitrator’s award of damages, even if not available under substantive Louisiana state law, was not expressly contrary to the parties’ contract”); *ImClone Sys., Inc. v. Waksal*, 22 A.D.3d 387, 387 (1st Dep’t 2005); *but see ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307, 310 (5th Cir. 1999) (The FAA “does not preempt state arbitration rules as long as the state rules do not undermine the goals and policies of the FAA”); *Williams v. Cintas Corp.*, No. 3:03-CV-00444-L, 2003 U.S. Dist. LEXIS 11147, at *6-7 (N.D. Tex. June 30, 2003) (“In light of the choice-of-law provision contained in the Employment agreement, and considering that the Texas arbitration rules do not undermine the federal policy of the FAA, the court will apply Texas law in determining the scope and applicability of the arbitration agreement in this case”); *Vu Luong v. Circuit City Stores, Inc.*, No. 02-56522, 2001 U.S. Dist. LEXIS 16713, at *7-8 (C.D. Cal. Jan. 30, 2001) (“[T]he FAA can preempt the [application of Virginia arbitration rules] to employment contracts only to the extent that [the Virginia rules] actually conflict[] with the FAA – that is, to the extent that [the Virginia rules] stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing the FAA”) (internal quotation omitted).

⁸⁶ *Sovak*, 280 F.3d at 1269-70.

⁸⁷ In *Southland*, 465 U.S. at 16, the Supreme Court held that the FAA applies to state court as well as federal court proceedings. In *Preston*, 552 U.S. at 361-63, it specifically clarified that state courts should follow its holding in *Mastrobuono*: when a contract contains both a state choice-of-law clause and a clause providing for arbitration in accordance with the rules of a given arbitral body, the state law governs only the “substantive principles that [the state’s] courts would apply.”

As for § 7 of the FAA concerning a tribunal's disclosure power, the U.S. Supreme Court recently affirmed in *AT&T Mobility v. Concepcion* that the FAA's intended purpose includes the facilitation of "efficient, streamlined procedures tailored to the type of dispute."⁸⁸ In light of this recent decision, state law provisions allowing arbitral tribunals to order extensive U.S.-style discovery far beyond the scope of § 7 may be preempted, unless the parties expressly agreed to them.⁸⁹

Similar to the class arbitration at issue in *AT&T Mobility*, full-scale U.S.-style discovery is more formal, more costly, slower, and more likely to create procedural problems⁹⁰ compared to the limited disclosure process in arbitration. Consequently, it is unlikely that state arbitration provisions will have major application in international arbitration proceedings seated in the United States.⁹¹

B. *The Relevant Arbitration Rules*

To avoid uncertainty, parties will frequently specify that a particular set of arbitral rules will govern the proceedings.⁹² The tribunal will also look to the rules chosen by the parties to determine the appropriate disclosure process.⁹³ This

⁸⁸ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1748, 1751 (2011) (holding that class arbitration interferes with "fundamental attributes of arbitration" because it is more formal, more costly, slower, more likely to create procedural problems, and poses more risks to defendants than bilateral arbitration. Not enforcing the class arbitration waiver, in other words, interferes with arbitration); see also *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999) ("The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness – characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure").

⁸⁹ See *ImClone Sys.*, 22 A.D.3d at 387 (assuming that § 7 of the FAA preempts state law procedural rules on disclosure in arbitration); see also BORN, *supra* note 1, at 1883 n.35. Specifically as to the validity and enforceability of arbitrator subpoenas against third parties, a couple of lower federal courts have explicitly held that § 7 of the FAA "is the only source of the authority," after reviewing state arbitration provisions. See *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004); *Connectu, Inc. v. Quinn Emanuel Urquhart Oliver & Hedges*, No. 602082/08, slip op., at 10, 13 n. 6 (N.Y. Sup. Ct. Jan. 6, 2010) (stating the New York state arbitration law is inapplicable).

⁹⁰ *AT&T Mobility*, 131 S. Ct. at 1751.

⁹¹ See BORN & RUTLEDGE, *supra* note 39, at 1161.

⁹² Section 7 of the FAA arguably grants the tribunal a narrower power to order disclosure than some of the leading arbitration rules. See BORN, *supra* note 1, at 1883.

⁹³ See, e.g., *In re Technostroyexport*, 853 F. Supp. 695, 697-98 (S.D.N.Y. 1994) (finding that by incorporating arbitral rules into the arbitration by reference, the parties agreed to any provisions relating to disclosure contained in those rules); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008) (noting that an arbitrator's authority to compel discovery from the parties to an arbitration does not extend to non-parties, because only the parties "contractually agreed to abide by [the discovery rules of an arbitral association], which are incorporated by reference into the contract").

section will discuss the relevant provisions of the most frequently used arbitral rules for international arbitrations seated in the United States.

1. *The International Arbitration Rules of the International Centre for Dispute Resolution*

The International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR Rules”), the international arm of the American Arbitration Association (“AAA”), do not expressly address the tribunal’s disclosure power. However, Article 16 of the ICDR Rules provides that “the tribunal may conduct the arbitration in whatever manner it considers appropriate . . .”⁹⁴ In addition, Article 19 of the ICDR Rules enables the tribunal to “order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate” at any time during the proceedings.⁹⁵

In 2008, the ICDR also issued mandatory Guidelines for Arbitrators Concerning Exchanges of Information (“ICDR Guidelines”), which “make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings,” including the exchange of information among parties.⁹⁶ Article 3 of the ICDR Guidelines provides as follows:

[T]he tribunal may, upon application, require one party to make available to another party documents in the party’s possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.⁹⁷

The ICDR Guidelines also establish that “[d]epositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.”⁹⁸

⁹⁴ ICDR RULES (2009), Art. 16(1).

⁹⁵ *Id.* Art. 19(3). *See, e.g.*, *Chiarella v. Viscount Indus. Co.*, No. 92 Civ. 9310, 1993 WL 497967, at *4 (S.D.N.Y. Dec. 1, 1993) (holding that similar language in the arbitral rules of the AAA enabled the tribunal to order pre-hearing discovery); *Life Receivables Trust*, 549 F.3d at 218 (holding that the arbitral rules of the AAA authorize arbitrators to subpoena witnesses or documents from parties to the arbitration proceeding); *see also* BORN, *supra* note 1, at 1890; Gardiner et al., *supra* note 3, at 275.

⁹⁶ ICDR GUIDELINES (2008), Art. 3(a). The ICDR Guidelines will be reflected in the next amendment of the ICDR Rules. *Id.*

⁹⁷ *Id.* Art. 3(a). The ICDR Guidelines further address the disclosure of electronic documents as well as inspections and encourage the tribunal to “be receptive of creative solutions for achieving exchanges of information.” *Id.* Arts. 4, 5, 6(a).

⁹⁸ *Id.* Art. 6(b).

2. *The Rules of Arbitration of the International Chamber of Commerce*

Similarly, the Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”) provide that “the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.”⁹⁹ In addition, the tribunal may “establish the facts of the case by all appropriate means”¹⁰⁰ and “summon any party to provide additional evidence.”¹⁰¹ This broad grant of authority implies the tribunal’s power to “order one party to introduce certain internal documents into the arbitral proceedings upon request of the other party.”¹⁰²

3. *The Arbitration Rules of the London Court of Arbitration*

The Arbitration Rules of the London Court of Arbitration (“LCIA Rules”) are explicit on the tribunal’s power to order disclosure. Article 22.1 provides that the tribunal may “on the application of any party or its own motion . . . order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant.”¹⁰³ In addition, the tribunal may order inspection of “any property, site or thing” under a party’s control and relating to the dispute.¹⁰⁴ These provisions leave no doubt that an arbitral tribunal constituted under the LCIA Rules has broad authority to order disclosure.¹⁰⁵

⁹⁹ ICC RULES (2012), Art. 22(2).

¹⁰⁰ *Id.* Art. 25(1).

¹⁰¹ *Id.* Art. 25(5). Appendix IV of the ICC Rules on Case Management Techniques further provides tribunals with additional techniques on managing the production of documentary evidence. ICC RULES, Appx IV, at (d); *see also* ICC Commission on Arbitration, Techniques for Controlling Time and Costs in Arbitration, ¶¶ 51, 52 (recommending to limit the number and scope of document requests).

¹⁰² David W. Rivkin, ALI-ABA Course of Study, Trial Evidence in the Federal Courts: Problems and Solutions, Commentary on the New Rules of Evidence in International Commercial Arbitration, SK063 ALI-ABA 751, 758 (2004) (discussing the predecessor of Article 25 in the 1998 ICC Rules). For discussion of Article 25’s predecessor provision in the 1998 ICC Rules, *see, e.g.*, BORN, *supra* note 1, at 1889-90; YVES DERAINS & ERIC SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 281 (2d ed. 2005); MICHAEL BÜHLER & THOMAS H. WEBSTER, HANDBOOK OF ICC ARBITRATION: COMMENTARY, PRECEDENTS, MATERIALS 259-65 (2d ed. 2005); W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION ¶ 26.01, at 451 (3d ed. 2000); Bernard Hanotiau, *Document Production in International Arbitration: A Tentative Definition of “Best Practices,”* in DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION 113, 114 (ICC Ct. Bull. Spec. Supp. 2006); Gardiner et al., *supra* note 3, at 275.

¹⁰³ LCIA RULES, Art. 22.1(e).

¹⁰⁴ *Id.* Art. 22.1(d).

¹⁰⁵ *See* BORN, *supra* note 1, at 1888.

4. *The Arbitration Rules of the United Nations Commission on International Trade Law*

The Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”) provide the tribunal with broad powers regarding disclosure. Article 27 provides that “at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence.”¹⁰⁶

5. *The International Arbitration Rules of the International Institute for Conflict Prevention and Resolution*

The Rules for Non-Administered Arbitration of International Disputes of the International Institute for Conflict Prevention and Resolution (“CPR Rules”) grant discretion to the tribunal to “conduct the arbitration in such manner as it shall deem appropriate.”¹⁰⁷ For instance, the tribunal shall conduct a pre-hearing conference on “[p]rocedural matters (such as setting specific time limits for and manner of, any required discovery).”¹⁰⁸ Further, under Rule 11, the tribunal “may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.”¹⁰⁹

In addition, the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (“CPR Protocol”) clarifies the boundaries of disclosure in international arbitration. The CPR Protocol sets out general principles for document disclosure and witness testimony and provides the parties with an opportunity to adopt certain suggested modes of document disclosure.¹¹⁰ Parties may adopt these modes in arbitrations under the CPR Rules or under other institutional or *ad hoc* arbitral rules.¹¹¹ The CPR Protocol clarifies the boundaries of disclosure under Rule 11 of the CPR Rules to information for which a party has a “substantial, demonstrable need in order to present its position.”¹¹² Notably, the CPR Protocol contemplates the possibility of depositions “in exigent circumstances” in international arbitration proceedings.¹¹³

¹⁰⁶ UNCITRAL RULES (2010), Art. 27(3).

¹⁰⁷ CPR RULES (2007), R. 9(1).

¹⁰⁸ *Id.* R. 9(3)(a).

¹⁰⁹ *Id.* R. 11.

¹¹⁰ CPR PROTOCOL (2008), Preamble, ¶ 1, § 1 Sched. 1 (ranging from Mode A (no disclosure) to Mode D (extensive disclosure)).

¹¹¹ *Id.* Introduction, ¶ 1.

¹¹² *Id.* § 1(a).

¹¹³ *Id.* § 2(c) (“Depositions should be permitted only where the testimony is expected to be material to the outcome of the case and where one or more of the following exigent circumstances apply: Witness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by

6. *The International Bar Association's Rules on the Taking of Evidence in International Arbitration*

The International Bar Association's Rules on the Taking of Evidence in International Arbitration ("IBA Rules") are not arbitral rules *per se*, but are designed to be used in conjunction with institutional or *ad hoc* rules governing international arbitration.¹¹⁴ The arbitral rules discussed above, while granting implied or express authority to a tribunal to order disclosure, are mostly silent on the disclosure process itself. The IBA Rules may serve to close this gap.

The IBA Rules reflect a compromise between the procedures used in many different legal systems, and are thus particularly useful when the parties come from different legal cultures.¹¹⁵ As a result, the IBA Rules adopt a somewhat restrictive approach to disclosure and do not provide for depositions.¹¹⁶ The IBA Rules have become the commonly used procedural framework for disclosure in international arbitration and are generally recognized as "the international standard for an effective, pragmatic, and relatively economical document production regime."¹¹⁷ Short of adopting the IBA Rules, the parties frequently provide that the tribunal should be "guided" by them,¹¹⁸ allowing a tribunal to maintain its discretionary powers over the disclosure process, while providing a suggested framework for the disclosure process.¹¹⁹

There may be instances where the IBA Rules are not appropriate, and a tribunal would be inclined to adopt more restrictive disclosure. For instance, where both parties come from the same legal tradition with very limited disclosure, a tribunal may adopt more limited disclosure mechanism in accordance with both parties' expectations.¹²⁰

telecommunication, before the tribunal. The tribunal should impose strict limits on the number and length of any depositions allowed.").

¹¹⁴ IBA RULES (2010), Foreword, ¶ 2.

¹¹⁵ *Id.*; see also IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, 2000 BUS. L. INT'L 14, 19 ("These rules . . . represent a well-balanced compromise between the broader view generally taken in common law countries and the more narrow view held generally in civil law countries"); Robert von Mehren & Claudia Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer's Guide*, 20(3) J. INT'L ARB. 285, 292 (2003). However, the IBA Rules may be inappropriate where the law governing the dispute requires a party to meet a high burden of proof, and provides tools for obtaining such evidence in a domestic context that may not be available under the IBA Rules' more limited disclosure mechanism. See d'Allaire & Trittmann, *supra* note 3, at 131.

¹¹⁶ See IBA RULES (2010), Art. 3.

¹¹⁷ See BLACKABY ET AL., *supra* note 1, at § 6.107, at 393.

¹¹⁸ See IBA RULES (2010), Art. 1, ¶ 5. Even where the arbitration agreement does not reference the IBA Rules, parties and tribunals regularly refer to them for guidance. See Gardiner et al., *supra* note 3, at 278.

¹¹⁹ See d'Allaire & Trittmann, *supra* note 3, at 132.

¹²⁰ *Id.* at 125.

In sum, arbitral tribunals generally have broad implied authority to conduct the disclosure process, even where the relevant arbitral rules (and domestic arbitration legislation) do not specifically address the issue.¹²¹ This is consistent with the expectations of most parties in international arbitration.¹²² The only limitations to the tribunal's authority are the parties' arbitration agreement as well as principles of procedural fairness and due process.¹²³

C. *The Tribunal's Disclosure Power as to Parties to the Arbitral Proceedings*

1. *Document Disclosure*

Documents are usually an integral part of the evidence submitted in any arbitration.¹²⁴ Generally, a party will produce to the tribunal the documents on which it intends to rely at an early stage in the proceedings, most commonly with its written statements.¹²⁵ This is relatively uncontroversial.¹²⁶ Conversely,

¹²¹ See BORN, *supra* note 1, at 1886; Gardiner et al., *supra* note 3, at 278; see also Nat'l Boatland, Inc. v. ITT Commer. Fin. Corp., 2000 U.S. App. LEXIS 24783, at *5-6 (6th Cir. Sept. 19, 2000) (confirming that "[a]rbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing"); InterChem Asia 2000 Pte. Ltd. v. Oceana Petrochems., A.G., 373 F. Supp. 2d 340, 352 (S.D.N.Y. 2005) (confirming an arbitration award in proceedings brought before the American Arbitration Association, and observing that "any and all decisions concerning the procedure of the arbitration, including any discovery procedures, were well within the arbitrator's discretion"), *amended on other grounds*, 378 F. Supp. 2d 347 (S.D.N.Y. 2005); Mallory Factor Inc. v. W. Coast Entm't Corp., No. 99 Civ. 4819, 1999 WL 1021076, at *3 (S.D.N.Y. Nov. 9, 1999) (confirming an arbitration award in proceedings brought before the American Arbitration Association, and noting that "the Arbitrator has wide discretion in determining whether or not to hear evidence at the hearing"); Int'l Longshoremen's Ass'n v. W. Gulf Mar. Ass'n, 605 F. Supp. 723, 727 (S.D.N.Y. 1985) (confirming an arbitration award in proceedings brought before a trade-specific arbitral body known as the Emergency Hearing Panel (EHP), and stating that "[r]esolution of the procedural matters arising out of arbitration are generally left to the arbitrators").

¹²² See BORN, *supra* note 1, at 1886.

¹²³ *Id.* at 1886; BLACKABY ET AL., *supra* note 1, at 363.

¹²⁴ For a more detailed discussion of evidence categories in international arbitration, see, e.g., BLACKABY ET AL., *supra* note 1, at 386; LEW ET AL., *supra* note 3, at 564; von Mehren & Salomon, *supra* note 115, at 290-92.

¹²⁵ BLACKABY ET AL., *supra* note 1, at 390-91; von Mehren & Salomon, *supra* note 115, at 287; Gardiner et al., *supra* note 3, at 280; d'Allaire & Trittmann, *supra* note 3, at 122; see also ICDR GUIDELINES, Art. 2; ICC RULES, Art. 20(2); LCIA RULES, Art. 15.6; UNCITRAL RULES (2010), Art. 20(4); CPR RULES, Rule 12.1(e); IBA RULES (2010), Art. 3(1). Under Article 3(13) of the IBA Rules, any documents submitted or produced by a party or non-party to the arbitration must be kept confidential, unless it is in the public domain.

¹²⁶ While there are no fixed rules on admissibility, arbitral tribunals generally assess the weight of a certain piece of evidence put before them, rather than limiting its

requests to produce additional documents by the opposing party or the tribunal are much more contentious, as the information sought may be damaging to the requested party's case.

In practice, the arbitral tribunal will set forth a timetable for the proceedings, including document disclosure, in a procedural order. Document requests may consist of an informal letter request to the other party or may be made in a more formal request for production to the tribunal.¹²⁷ The IBA Rules adopt the latter approach.¹²⁸ Under the IBA Rules, document requests are generally made after the parties' initial exchange of documents.¹²⁹ The term "document" is defined broadly as any "writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means."¹³⁰

Under the IBA Rules, a request to produce must contain a "description in sufficient detail" to identify the document or "narrow and specific requested category" of documents requested.¹³¹ Further, the requesting party must state how the requested documents are "relevant to the case" and "material to its outcome."¹³² Lastly, the requesting party must state that the requested documents are not in its "possession, custody or control" and its reasons to believe that the documents are in the "possession, custody and control" of the other party.¹³³ The other party must then either produce the documents within the time indicated by the tribunal or state its objections.¹³⁴ Before ruling on the objections, the tribunal may hold a case management conference with parties' counsel to agree on a compromise for each requested document category in an attempt to limit the scope of the parties' requests for production.¹³⁵

Requests for production are generally made in form of a "Redfern Schedule," which crystallizes the issues in dispute to facilitate the tribunal's ruling.¹³⁶ A classic Redfern Schedule is completed by both parties and consists of several columns: (1) Number of Request; (2) Document(s) Requested; (3) Reasons for Request; (4) Objections by Requested Party; (5) Reply by Requesting Party; and (6) Tribunal's Ruling. Using a "Redfern Schedule" for each party's document

admissibility. For a more detailed discussion of questions of admissibility and burden of proof in international arbitration, *see, e.g.*, BLACKABY ET AL., *supra* note 1, at 386; von Mehren & Salomon, *supra* note 115, at 290-92; LEW ET AL., *supra* note 3, at 565.

¹²⁷ Gardiner et al., *supra* note 3, at 280.

¹²⁸ IBA RULES (2010), Art. 3(2).

¹²⁹ Gardiner et al., *supra* note 3, at 280; BLACKABY ET AL., *supra* note 1, at 394.

¹³⁰ IBA RULES (2010), Definitions at ¶ 3.

¹³¹ *Id.* Art. 3(3)(a).

¹³² *Id.* Art. 3(3)(b).

¹³³ *Id.* Art. 3(3)(c).

¹³⁴ *Id.* Art. 3(4), 3(5). The reasons for objecting to production are set out in Articles 3(3) and 9(2) of the IBA Rules.

¹³⁵ BLACKABY ET AL., *supra* note 1, §§ 6.111-6.112, at 395; d'Allaire & Trittmann, *supra* note 3, at 122.

¹³⁶ BLACKABY ET AL., *supra* note 1, §§ 6.113-6.116, at 395-96.

requests may help avoid the need for a case management meeting, saving costs and reducing delays.¹³⁷

As discussed above, it is generally recognized that arbitral tribunals have the power to order document disclosure, where the parties have so agreed in their arbitration agreement, by incorporating arbitral rules or otherwise.¹³⁸ However, where the parties have not agreed to grant the tribunal broad disclosure powers, § 7 of the FAA (and any relevant state-law provision) becomes determinative of the tribunal's authority to order disclosure. Importantly, there is no practice of automatic document disclosure in international arbitration.¹³⁹

Section 7 provides that a tribunal may only order "any person to attend" a hearing 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."¹⁴⁰ As for parties to the arbitration proceedings, this grant of authority is arguably narrower than that under the leading arbitral rules discussed above.¹⁴¹ However, U.S. courts have generally interpreted § 7 of the FAA broadly and beyond its strict literal meaning. Several U.S. courts have held that arbitral tribunals sitting in the United States have broad implied powers to order whatever scope of document disclosure they consider appropriate and beyond strictly "material" information.¹⁴²

¹³⁷ BLACKABY ET AL., *supra* note 1, § 6.116, at 396.

¹³⁸ *See supra* at Sec. II(B).

¹³⁹ *See d'Allaire & Trittmann, supra* note 3, at 119; ALAN REDFERN & MARTIN HUNTER WITH NIGEL BLACKABY & CONSTANTINE PARTASIDES., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* § 6-71, at 299 (4th ed. 2004) ("There is no practice of automatic discovery in international commercial arbitration. The usual practice is to limit document production as much as possible to those documents that are strictly *relevant* to the issues in dispute and *necessary* for the proper resolution of those issues.") (emphasis in original).

¹⁴⁰ 9 U.S.C. § 7.

¹⁴¹ *See BORN, supra* note 1, at 1886.

¹⁴² *See, e.g., Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242 (S.D. Fla. 1988) ("[U]nder the Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary"); *Chiarella*, 1993 WL 497967, at *4 (stating that the American Arbitration Association rules provide that "[t]he parties shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute," and that this "confers on arbitrators broad powers to ensure that evidence is presented at arbitration hearings in such a manner as to ensure that legal and factual issues are sufficiently developed;" thus, the arbitrator's pre-hearing discovery orders were permissible even though they were "unusual for an arbitration proceeding" and the "[controlling contract's] language does not specifically authorize an arbitrator to order pre-hearing discovery"); *see also United Nuclear Corp. v. Gen. Atomic Corp.*, 597 P.2d 290, 302 (N.M. 1979); *Alcatel Space SA v. Loral Space & Comm., Ltd.*, No. 02 Civ. 2674, 2002 U.S. Dist. LEXIS 11343, at *18-19 (S.D.N.Y. June 25, 2002). More generally, the Supreme Court has declared that an arbitrator may "look for guidance from many sources, [and] his award is legitimate . . . so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597; *see also Manville Forest Products Corp. v. United Paperworkers Int'l Union*, 831 F.2d 72, 75-76 (5th Cir. 1987) ("Following the lead of the Supreme Court, this

Further, U.S. courts generally interpret § 7 to enable a tribunal to order a party to the arbitration to disclose documents in advance of any hearing.¹⁴³

2. *Witness Testimony*

Witness testimony is another key element of evidence submitted in an arbitration.¹⁴⁴ As part of its disclosure powers, the tribunal generally controls the procedure in which witness testimony is given, provided general principles of equality and procedural fairness are respected.¹⁴⁵ Similar to documentary evidence, the IBA Rules provide that each party “identify the witnesses on whose testimony it intends to rely.”¹⁴⁶ Generally, parties will submit written witness statements, either in the form of a signed statement or sworn affidavit, together with or after their written submissions.¹⁴⁷ Each party and the tribunal may request the presence of party witnesses at the hearing, and ultimately the tribunal has

Circuit and others have refused to apply contract-law concepts, such as the parole evidence rule, to collective bargaining agreements . . . The arbitrator may determine that the written contract is ambiguous and then turn to extrinsic evidence”) (internal citation omitted). However, the IBA Rules require a party to show that the information is “material to the outcome” of the case. *See* IBA RULES (2010), Art. 3(3)(a).

¹⁴³ *See, e.g.*, *Arbitration between Brazell v. Am. Color Graphics*, No. M-82 AGS, 2000 WL 364997, at *2 (S.D.N.Y. April 7, 2000) (“This section [7 of the FAA] has been interpreted by the courts specifically to include subpoenas of documents, where the documents are relevant to the requesting party’s inquiry”); *In re Complaint of Koala Shipping & Trading, Inc.*, 587 F. Supp. 140, 142 (S.D.N.Y. 1984) (holding that § 7 “authorizes arbitrators to subpoena individuals and documents”); *In re Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994) (“Pre-hearing discovery between parties is ‘a matter governed by the applicable arbitration rules (as distinct from court rules) and by what the arbitrator decides’”); *Chiarella*, 1993 WL 497967, at * 1 (arbitrators did not exceed authority by ordering the parties “to mutually exchange all documents and witness lists (i.e. full discovery)”); *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 217 (2d Cir. 2008) (stating in *obiter dicta* that “[a]lthough section 7 does not distinguish between parties and non-parties to the actual arbitration proceeding, an arbitrator’s power over parties stems from the arbitration agreement, *not section 7*”) (emphasis in original).

¹⁴⁴ Parties to international arbitration proceedings may present expert witness testimony and written expert reports to the tribunal, and tribunals may appoint experts to report on a specific issue as well. *See generally* LEW ET AL., *supra* note 3, §§ 22-80 *et seq.*, at 575-78; BLACKABY ET AL., *supra* note 1, §§ 6.152 *et seq.*, at 406-10. A detailed discussion of expert witnesses is beyond the scope of this article.

¹⁴⁵ *See* LEW ET AL., *supra* note 3, § 22-62, at 570.

¹⁴⁶ IBA RULES (2010), Art. 4(1); *see also* LCIA RULES, Art. 20.1; ICDR RULES, Art. 20(2); CPR RULES (2007), Art. 12(1)(e).

¹⁴⁷ *See* IBA RULES (2010), Art. 4(4); LCIA RULES, Art. 20.3; ICDR RULES, Art. 20(5); CPR RULES (2007), Commentary on Individual Rules, Art. 12; UNCITRAL RULES, Art. 27(2); *see also* LEW ET AL., *supra* note 3, § 22-66, at 571; BLACKABY ET AL., *supra* note 1, § 6.137, at 401-02; von Mehren & Salomon, *supra* note 115, at 286-87. The IBA Rules set forth details as to the form and contents of a witness statement. IBA RULES (2010), Art. 4(5).

authority to decide whether, how, where and when witnesses may be examined.¹⁴⁸ Tribunals frequently issue a procedural order on the way in which witness examination will take place.¹⁴⁹ Where the witness has submitted a detailed witness statement, this statement will frequently serve as direct examination of the witness (occasionally tribunals will still allow a brief direct examination). At the hearing, the focus will then lie on the cross-examination and re-direct of the witness.

Most national arbitration laws do not expressly grant a tribunal the power to order a party to produce a witness within its control (such as its corporate officers, directors or employees).¹⁵⁰ Similarly, most institutional rules are silent on this issue.¹⁵¹ Section 7 of the FAA expressly grants a tribunal the power to “summon in writing any person to attend before them or any of them as a witness.”¹⁵² This is uncontroversial.¹⁵³

¹⁴⁸ See IBA RULES (2010), Art. 8(1); LCIA RULES, Art. 20.4; see also LEW ET AL., *supra* note 3, §§ 22-66 *et seq.*, at 571-72; BLACKABY ET AL., *supra* note 1, § 6.96, at 387-88; Von Mehren & Salomon, *supra* note 115, at 288.

¹⁴⁹ See LEW ET AL., *supra* note 3, §§ 22-69 – 22-70, at 572-73.

¹⁵⁰ See BORN, *supra* note 1, at 1900-1901. Notably, in international arbitration, any person (including party employees, officers and directors) may testify as a witness. See LEW ET AL., *supra* note 3, §§ 22.65, at 570; BLACKABY ET AL., *supra* note 1, § 6.141, at 403-04 (noting that the rules of court in some civil law countries forbid parties (including party officers or employees) from being treated as witnesses in their own cause, but even in the courts of these countries a party can be heard – the rule merely forbids them from being categorized as witnesses.); see also IBA RULES (2010), Art. 4(2); LCIA RULES, Art. 20.7.

¹⁵¹ See BORN, *supra* note 1, at 1900. Some rules allow a tribunal to discount or strike from the record a written witness statement, where the witness does not testify at the hearing if so requested. See, e.g., LCIA RULES, Art. 20.4; IBA RULES (2010), Art. 4(8).

¹⁵² 9 U.S.C. § 7. In any case, even absent a specific provision in the parties' arbitration agreement, the arbitral rule or the arbitration law at the seat, tribunals generally have implied power to order a party to produce a witness within its control at the hearing. See BORN, *supra* note 1, at 1901 (analogizing a tribunal's power to order a party to produce documents within its control).

¹⁵³ Indeed, the circuits seem to take it as given that § 7 grants arbitrators the power to summon any person as a witness; starting from this axiom, they go on to disagree over whether or not such summoning power implicitly empowers arbitrators to issue prehearing document subpoenas from non-parties *without* summoning them as a witness. See, e.g., *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.* (In re *Sec. Life Ins. Co. of Am.*), 228 F.3d 865, 870-71 (8th Cir.2000) (holding that although § 7 does not “explicitly authorize” arbitrators to require the production of documents from absent non-parties, such power is implicit in a tribunal's § 7 power to call any witness before it at a hearing and require him/her to produce documents at that time); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir.1999) (finding the same where there is a “special need” for the documents); compare *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008) (holding that “those relying on section 7 of the FAA must do so according to its plain text, which requires that documents be produced by a testifying witness”); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) (holding the same).

A tribunal's power to order pre-hearing party depositions may be derived from the parties' arbitration agreement, the arbitral rules or the law at the seat of the arbitration proceedings.¹⁵⁴ Depositions are "recorded sessions at which witnesses are questioned by the parties outside the presence of the tribunal, enabling the parties to obtain information from witnesses in advance of their testifying at the hearings."¹⁵⁵ However, most arbitral rules and national laws are silent on this issue.¹⁵⁶ Arguably, a tribunal's power to order party depositions is no different from its power to order a party to produce documents, and thus is implied.¹⁵⁷

While not infrequent in domestic arbitrations in the United States,¹⁵⁸ depositions generally are considered inappropriate in international arbitration proceedings.¹⁵⁹ In international arbitrations with a U.S. nexus, parties may voluntarily agree to depositions. However, tribunals are unlikely to order party depositions in international arbitrations, including in proceedings seated in the United States, when one party objects to them.¹⁶⁰ However, where a tribunal orders depositions of witnesses within a party's control, such as an employee, officer or director, there may only be limited grounds for objection.¹⁶¹

¹⁵⁴ See BORN, *supra* note 1, at 1904-05.

¹⁵⁵ CPR PROTOCOL, Art. 2(c); *see also* FED. R. CIV. P. 30, 31.

¹⁵⁶ *But see* ICDR GUIDELINES, Art. 6(b) ("Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration"); CPR PROTOCOL, Art. 2(c) (requiring "exigent circumstances," meaning "[w]itness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal").

¹⁵⁷ See BORN, *supra* note 1, at 1905.

¹⁵⁸ See, e.g., RUAA, § 17(b) ("In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing."); AAA RULES, Art. L-3(f), L-4(d).

¹⁵⁹ See BORN, *supra* note 1, at 1903; Gardiner et al., *supra* note 3, at 285; *see also* ICDR GUIDELINES, Art. 6(b) ("Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration"); CPR PROTOCOL, Art. 2(c) (requiring "exigent circumstances," meaning "[w]itness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal"). A limited number of cases have stated in *dicta* that depositions may be available under § 7 of the FAA in "unusual circumstances." See *COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269, 271, 275-76 (4th Cir. 1999); *Nat'l Union Fire Ins. Co. v. Marsh USA, Inc.* (In re Hawaiian Elec. Indus.), No. M-82, 2004, U.S. Dist. LEXIS 12716, at *3 (S.D.N.Y. July 9, 2004); *Deiulemar Compagnia di Navigazione SpA v. M/V Allegra*, 198 F.3d 473, 479-80 (4th Cir. 1999); *Gresham v. Norris*, 304 F. Supp. 2d 795, 796 (E.D. Va. 2004).

¹⁶⁰ See BORN, *supra* note 1, at 1903; Gardiner et al., *supra* note 3, at 285.

¹⁶¹ See BORN, *supra* note 1, at 1904-05.

3. *Interrogatories, Requests for Admission and Other Means of Disclosure and Presentation of Evidence*

In U.S. litigation, interrogatories (also known as requests for information) consist of written questions that may relate to any “discoverable” issue, which a party is required to answer within a specific time under the direction of a court.¹⁶² On the other hand, requests for admission consist of a written request to admit the truth of any “discoverable” issue.¹⁶³ These means of disclosure arguably fall within the tribunal’s general disclosure power and may in certain cases expedite the taking of evidence, for instance where a party is seeking an answer to a straightforward question.¹⁶⁴ However, in most international arbitration proceedings, interrogatories and requests for admission are infrequently used and likely inappropriate.¹⁶⁵

Tribunals also have the power to order a party to permit site or subject-matter inspections, considered means of presentation of evidence.¹⁶⁶ However, inspections are rare and mostly occur in construction, engineering and mining disputes, where a tribunal may have to evaluate the state of affairs of property.¹⁶⁷

D. *The Tribunal’s Disclosure Power as to Non-Parties to the Arbitral Proceedings*

The parties’ agreement to arbitrate creates *inter partes* rights and obligations, but does not generally bind third parties to the arbitration.¹⁶⁸ Thus, a tribunal’s

¹⁶² See FED. R. CIV. P. 33, and 26(b)(2). Answers to interrogatories are generally prepared by a party’s counsel in writing.

¹⁶³ See FED. R. CIV. P. 36, and 26(b)(2).

¹⁶⁴ See BORN, *supra* note 1, at 1902.

¹⁶⁵ See Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, 18 ARB. INT’L 59, 62 (2002) (noting that the IBA Rules – developed as a middle ground between common law systems (which favor liberal discovery) and civil law systems (which do not) – contain no provision for interrogatories); BORN, *supra* note 1, at 1902-03; Gardiner et al., *supra* note 3, at 285; see also ICDR GUIDELINES, Art. 6(b) (“Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration”).

¹⁶⁶ See, e.g., UNCITRAL MODEL LAW, Art. 24(2); IBA RULES (2010), Art. 7; ICDR GUIDELINES, Art. 5 (requiring a party application and a showing of good cause); CPR RULES, Art. 9(3)(a); LCIA RULES, Art. 22.1(d); UNCITRAL Notes on Organizing Arbitration Proceedings, ¶¶ 57-58, at 21; see also LEW ET AL., *supra* note 3, §§ 22.93, at 579; BORN, *supra* note 1, at 1902-03; BLACKABY ET AL., *supra* note 1, § 6.173 *et seq.*, at 411-13.

¹⁶⁷ See LEW ET AL., *supra* note 3, §§ 22.93, at 579.

¹⁶⁸ See BORN, *supra* note 1, at 1891 (“The disclosure and discovery powers of the arbitral tribunal in international arbitration are ordinarily limited to the parties to the arbitration and do not extend to non-parties. This limitation is in substantial part a result of the consensual nature of international arbitration. In principle, the powers conferred by the

disclosure power – whether based on the explicit provisions in the parties’ arbitration agreement or arbitral rules incorporated by reference – is naturally limited to the parties of the arbitration, and does not extend to non-parties, even if they are in possession of potentially relevant (and material) information (whether in the form of documents or personal knowledge).¹⁶⁹

Thus, most arbitral rules only provide for the tribunal’s disclosure power over the parties.¹⁷⁰ This is illustrated by the IBA Rules, which provide that “[i]f a Party wishes to obtain the production of Documents from a person or organization who is not a Party to the arbitration,” the party may ask the tribunal to “take whatever steps are legally available” under national laws to obtain disclosure, or seek leave from the tribunal to do so itself.¹⁷¹ Notably, the tribunal may not itself order disclosure from a non-party.

By contrast, a few arbitral rules specifically allow a tribunal to order non-party disclosure.¹⁷² Article 11 of the CPR Rules does not expressly limit the

parties’ arbitration agreement (and any institutional rules it incorporates) extend only to the parties to that agreement”); LEW ET AL., *supra* note 3, § 22.57, at 569 (“Arbitrators have no authority over parties other than those involved directly in the arbitration”); *see also* Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210, 218 (2d Cir. 2008) (observing that rules ostensibly granting subpoena powers with regard to non-parties are “best seen . . . as nothing more than authorization by the parties – binding only upon the parties – for an arbitrator to order non-party discovery, subject to the willingness of the non-party voluntarily to comply with such order”) (internal quotation omitted); NBC v. Bear Stearns & Co., 165 F.3d 184, 187 (2d Cir. N.Y. 1999) (“If discovery were to be obtained from the Third Parties – none of which was a party to the arbitration agreement at issue here – the authority to compel their participation would have to be found in a source other than the parties’ arbitration agreement”).

¹⁶⁹ BORN, *supra* note 1, at 1891, 1901; BLACKABY ET AL., *supra* note 1, § 6.17, at 399; AT&T Technologies, Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 648 (1986) (stating that because commercial arbitration is a “matter of contract,” only the parties to the arbitration contract are bound to participate); *see also* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 406 (3d Cir. 2004).

¹⁷⁰ *See, e.g.*, ICDR RULES, Art. 19; ICDR GUIDELINES, Art. 3; ICC RULES, Art. 25(5); LCIA RULES, Art. 22.1(e); UNCITRAL RULES, Art. 27(3); *see also* BORN, *supra* note 1, at 1988 n.58.

¹⁷¹ IBA RULES (2010), Art. 3(9). Some countries have taken action to strengthen arbitration procedures by providing legal options for pursuing third-party disclosure not otherwise available under contract law. *See, e.g.*, 9 U.S.C. § 7; French Code of Civil Procedure, Arts. 1467(2), 1506(3) (permitting the tribunal to hear any person, but not providing for subpoena power as to non-parties). Other countries have chosen to leave the power to order non-party disclosure to the courts, either pursuant to a request from the tribunal itself or from the parties with the tribunal’s permission. *See, e.g.*, English Arbitration Act 1996, §43; Swiss Federal Act on Private International Law, Art. 184(2) (1987).

¹⁷² *See* CPR RULES, Art. 11; CPR PROTOCOL, Schedule 1, Modes C and D; *see also* AAA RULES, Art. 31 (not explicitly limiting the arbitral tribunal’s power to order disclosure to parties to the arbitration).

tribunal's disclosure power to parties to the proceedings.¹⁷³ Indeed, Discovery Mode C (and by analogy D) in Schedule 1 of the CPR Protocol specifically provides for disclosure "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure," which includes non-parties to the arbitration.¹⁷⁴ Yet, the parties cannot bind third parties through provisions in their arbitration agreement. Thus, while they may provide for the tribunal's power to order non-party discovery in their arbitration agreement (e.g. by adopting Discovery Modes C or D under the CPR Protocol), and while such provision will be binding upon the parties, enforcement of any non-party disclosure order by the tribunal is ultimately left to the local courts.¹⁷⁵ U.S. courts have confirmed that § 7 of the FAA "is the only source of the authority for the validity and enforceability of the arbitrators' subpoena [over a nonparty]."¹⁷⁶

1. *Non-Party Witness Testimony and Document Disclosure at a Hearing*

Contrary to most national arbitration laws, which limit the tribunal's authority to parties to the arbitration proceedings, § 7 of the FAA unequivocally provides that a tribunal may order "*any person*," including non-parties, to attend a hearing and give evidence in the form of documents or testimony at the hearing.¹⁷⁷ The tribunal's disclosure power over non-parties at a hearing – though unusual compared to other countries – is relatively uncontroversial for tribunals sitting in

¹⁷³ CPR RULES, Art. 11.

¹⁷⁴ CPR PROTOCOL, Schedule 1, Mode C.

¹⁷⁵ See, e.g., *Life Receivables Trust*, 549 F.3d at 218 (holding with regard to Rule 31 of the AAA Rules, which arguably implies subpoena power against parties and non-parties alike, that "its power with regards to non-parties 'is best seen . . . as nothing more than authorization by the parties – binding only upon the parties – for an arbitrator to order non-party discovery, subject to the willingness of the non-party voluntarily to comply with such order'").

¹⁷⁶ See *Hay Group*, 360 F.3d at 406; *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co. (In re Arbitration)*, No. 01-162, 2001 U.S. Dist. LEXIS 15911, No. 01-162, at *3 (E.D. Pa. Sept. 5, 2001); see also *Integrity Ins. Co., in Liquidation, v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995) ("Because the parties to a contract cannot bind nonparties, they certainly cannot grant such authority to an arbitrator. Thus, an arbitrator's power over nonparties derives solely from the FAA."). It should be noted that several state arbitration statutes allow arbitrators to require pre-hearing disclosure from non-parties. See, e.g., RUAA, § 17 (allowing arbitrators to permit, but not compel, depositions); Witnesses, oaths and depositions, 42 PA.CON.S. STAT. § 7309 (a) (2012) ("The arbitrators may issue subpoenas in the form prescribed by general rules for the attendance of witnesses and for the production of books, records, documents and other evidence."); see generally Report of the International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Obtaining Evidence from Non-Parties in International Arbitration in the United States*, 20 AM. REV. INT'L ARB. 421, 442 (2009).

¹⁷⁷ 9 U.S.C. § 7 (emphasis added).

the United States.¹⁷⁸ Conversely, where a non-party to the arbitration proceedings refuses to comply with the tribunal's order, enforcement of the order can raise complex issues.¹⁷⁹

2. *Non-Party Document Disclosure before a Hearing*

U.S. courts are divided as to whether an arbitral tribunal may order a non-party to produce documents *before* a hearing under § 7. The Sixth and Eighth Circuits as well as several lower federal courts in these and other circuits have held that § 7 of the FAA authorizes arbitral tribunals to order pre-hearing document disclosure from non-parties to the arbitration.¹⁸⁰ In *Am. Fed. of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Comm. of Detroit, Inc.)*,¹⁸¹ the Sixth Circuit noted in *dicta* that “the subpoena power of an arbitrator under the FAA extends to non-parties,” which “implicitly includes the authority to compel the production of documents for inspection by a party prior to a hearing.”

¹⁷⁸ See BORN, *supra* note 1, at 1892; BLACKABY ET AL., *supra* note 1, § 6.127, at 399.

¹⁷⁹ See *infra* Sec. III.

¹⁸⁰ *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870-71 (8th Cir. 2000); *Am. Fed. of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Comm. of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999) (noting in obiter dicta that subpoena to a non-party for pre-hearing document disclosure may be impliedly permitted by § 7); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988) (holding that under § 7 of the FAA “arbitrators may order and conduct such discovery as they find necessary” including pre-hearing document production by non-parties); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44-45 (M.D. Tenn. 1993) (holding that “the power of the panel to compel production of documents from third parties for the purpose of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing,” where due to the number of documents the tribunal issued a subpoena “as a method of dealing with complex and voluminous discovery matters in an orderly and efficient manner”); *In re Arbitration between Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995) (noting that contrary to depositions “[d]ocuments are only produced once, whether it is at the arbitration or prior to it”); *SchlumgergerSema, Inc. v. Xcel Energy, Inc.*, No. 02-4304, 2004 WL 67647, at *1 (D. Minn. Jan. 9, 2004); *In re Meridian Bulk Carriers, Ltd.*, No. 03-2011, 2003 U.S. Dist. LEXIS 24203, at *4-5 (E.D. La. July 17, 2003); *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005); *Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006); *Jas. W. Glover, Ltd. v. Derrick Concrete Cutting & Const., Ltd.*, 2003 Haw. LEXIS 659, at *3-4, 2003 WL 22970975, at *1 (Haw. Dec. 18, 2003); *Amgen Inc. v. Kidney Ctr. of Delaware Cty, Ltd.*, 879 F. Supp. 878, 881 (N.D. Ill. 1995) (enforcing compliance with a subpoena requiring the pre-hearing document production by a nonparty, where the parties had agreed to arbitrate their dispute pursuant to the Federal Rules of Civil Procedure, which provide for broad discovery).

¹⁸¹ *Am. Fed. of Television and Radio Artists*, 164 F.3d at 1009 (analogizing a labor arbitrator's power under § 301 of the Labor Management Relations Act of 1947 to an arbitral tribunal's power under the FAA, which it did not apply).

In *Security Life Insurance Company of America v. Duncanson & Holt, Inc. (In re Security Life of America)*,¹⁸² the Eighth Circuit held that an arbitral tribunal has “implicit . . . power to order the production of relevant documents for review by a party prior to the hearing” because “the interest in efficiency is furthered by” it. The court found the requested entity to be “integrally related to the underlying arbitration” because – though not a party to the arbitration proceedings – it had signed the arbitration agreement, and was thus not a third-party.¹⁸³

On the other hand, the Second, Third and Fourth Circuits as well as lower federal courts in these and other circuits, follow a literal reading of § 7, mandating that non-party document disclosure coincide with the non-party’s attendance at a hearing.¹⁸⁴ In *COMSAT Corp. v. National Science Foundation*, the Fourth Circuit held that “[n]owhere does the FAA grant an arbitrator the authority to . . . demand that non-parties provide the litigating parties with documents during pre-hearing discovery.”¹⁸⁵ The court appears to have interpreted the phrase “before them” in

¹⁸² *In re Arbitration between Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000); *but see Hay Group*, 360 F.3d at 408-10 (specifically rejecting the Eighth Circuit’s “power-by-implication analysis”).

¹⁸³ *Sec. Life Ins. Co. of Am.*, 228 F.3d at 871; *see also Meadows Indem. Co.*, 157 F.R.D. at 45 (finding that a tribunal could order pre-hearing disclosure from non-parties to the arbitration proceedings, where they were “intricately related to the parties involved in the arbitration”); *but see Life Receivables Trust*, 549 F.3d at 217.

¹⁸⁴ *See, e.g., COMSAT Corp. v. Nat’l Science Found.*, 190 F.3d 269, 271, 275-76 (4th Cir. 1999) (“The subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA. . . . Nowhere does the FAA grant an arbitrator the authority to . . . demand that non-parties provide the litigating parties with documents during pre-hearing discovery.”); *Hay Group*, 360 F.3d at 406-07 (“An arbitrator’s authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act. . . . 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.”); *Life Receivables Trust*, 549 F.3d at 216-17 (“[S]ection 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings”); *Integrity Sys. Co.*, 885 F. Supp. at 71; *Odjfell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) (finding it “particularly inappropriate to subject parties who never agreed to participate in any way [in the arbitration] to the notorious burdens of pre-hearing discovery”); *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1083 (N.D. Ill. 2008) (noting that in 1925, when the FAA was adopted, the “Federal Rules of Civil Procedure, with their provisions for depositions and other mechanisms for discovery, were more than a decade away” and § 7 of the FAA has not been modified since); *Guyden v. Aetna, Inc.*, No. 3:05-cv-1652, 2006 U.S. Dist. LEXIS 73353, at *19-20 (D. Conn. Sept. 25, 2006), *aff’d*, 544 F.3d 276 (2d Cir. 2008); *Alliance Healthcare Servs. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009); *Empire Fin. Group, Inc. v. Penson Fin. Servs, Inc.*, 2010 WL 742579, at *1 (N.D. Tex. Mar. 3, 2010); *Ware v. C.D. Peacock*, 2010 WL 1856021, at *3 (N.D. Ill. May 7, 2010); *see also City Bar Report, supra* note 176, at 425.

¹⁸⁵ *COMSAT*, 190 F.3d at 271, 275.

§ 7 of the FAA to require a merits hearing.¹⁸⁶ The court reasoned that the parties to an arbitration chose to “forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their dispute . . . [and a] hallmark of arbitration – and a necessary precursor to its efficient operation – is a limited discovery process.”¹⁸⁷ In *COMSAT*, the court in *dicta* noted that a party may be able to obtain pre-hearing document disclosure from a non-party upon making a showing of special need or hardship.¹⁸⁸ The court did not define “special need,” but noted that “at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.”¹⁸⁹

In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, the Third Circuit, in an opinion by now U.S. Supreme Court Justice Samuel A. Alito, held that § 7 “unambiguously” provided for non-party document disclosure at a hearing, not “to situations in which the items are simply sent or brought by courier.”¹⁹⁰ The court rejected the argument that the tribunal’s power to order pre-hearing document disclosure from non-parties was implied in § 7 based on the provision’s historic background. Section 7 largely mirrors a previous version of Rule 45 of the Federal Rules of Civil Procedure that, before 1991, did not permit federal courts to issue subpoenas to non-parties for pre-hearing document discovery.¹⁹¹ The court noted that such literal reading of § 7 “actually furthers arbitration’s goal of ‘resolving disputes in a timely and cost efficient manner.’”¹⁹² Requiring non-party document disclosure at a hearing would “in the long run, discourage the issuance of large-scale subpoenas upon non-parties” because parties would “be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed.”¹⁹³ Allowing pre-hearing document disclosure from non-parties would provide “less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration.”¹⁹⁴ The court specifically noted that, while efficiency

¹⁸⁶ *Id.* at 275.

¹⁸⁷ *Id.* at 276.

¹⁸⁸ *Id.* at 271, 276; *see also* *Deiulemar Compagnia di Navigazione SpA v. M/V Allegra*, 198 F.3d 473, 479-81 (4th Cir. 1999), *cert. denied sub. nom. Pacific Eternity, S.A., v. Deiulemar Compagnia di Navigazione*, 529 U.S. 1109 (2000); *Gresham v. Norris*, 304 F. Supp. 2d 795, 797 (E.D. Va. 2004); *Nat’l Union Fire Ins. Co. v. Marsh USA, Inc. (In re Hawaiian Elec. Indus.)*, No. M-82, 2004 U.S. Dist. LEXIS 12716, at *3 (S.D.N.Y. July 9, 2004).

¹⁸⁹ *COMSAT*, 190 F.3d at 271, 276.

¹⁹⁰ *Hay Group*, 360 F.3d at 407.

¹⁹¹ *Id.* at 407.

¹⁹² *Id.* at 409.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

considerations may play a role in interpreting § 7, “efficiency is not the principal goal of the FAA.”¹⁹⁵

Similarly, in *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, the Second Circuit held that § 7 did not authorize a tribunal to order pre-hearing document disclosure from non-parties.¹⁹⁶ The court noted that while “[t]here may be valid reasons to empower arbitrators to subpoena documents from third parties, [the court] must interpret a statute as it is, not as it might be.”¹⁹⁷ The court reasoned that this authority granted to the tribunal pursuant to the arbitral rules agreed upon by the parties was “binding only upon the parties.”¹⁹⁸ Where the non-party would not voluntarily comply, the court was bound to apply § 7 of the FAA, which – in its opinion – did not allow for pre-hearing disclosure from non-parties.¹⁹⁹ To require the presence of a non-party at the hearing “forces the party seeking the non-party discovery – and the arbitrators authorizing it – to consider whether production is truly necessary.”²⁰⁰ Both the Second and Third Circuits have rejected the “special need” exception suggested by COMSAT,²⁰¹ while New York state courts seem to have adopted it, thus creating a conflict between federal and state courts in New York.²⁰²

¹⁹⁵ *Id.* at 410 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-19 (1985) (“The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.”)).

¹⁹⁶ *Life Receivables Trust*, 549 F.3d at 218.

¹⁹⁷ *Id.* at 216.

¹⁹⁸ *Id.* at 218.

¹⁹⁹ *Id.* The Second Circuit also noted that pre-hearing disclosure was not available from a non-party to the proceedings, which had signed the arbitration agreement and, thus, was not a third-party. *Id.* at 217; *but see In re Arbitration between Sec. Life Ins. Co. of Am.*, 228 F.3d at 870-71 (noting that § 7 of the FAA allows a tribunal to order pre-hearing document disclosure of an entity, which though not a party to the arbitration proceedings, had signed the arbitration agreement, and thus was “integrally related to the underlying arbitration”); *Meadows Indemn. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. at 45 (same). However, in such a case, joinder may be appropriate, thus enabling the tribunal to exercise its disclosure power over that entity. *Life Receivables Trust*, 549 F.3d at 218.

²⁰⁰ *Life Receivables Trust*, 549 F.3d at 218.

²⁰¹ *Hay Group*, 360 F.3d at 410 (finding “no textual basis for allowing any ‘special need’ exception”); *Life Receivables Trust*, 549 F.3d at 216.

²⁰² *ImClone Sys., Inc. v. Waksal*, 22 A.D.3d 387, 388 (1st Dep’t 2005) (holding that “depositions of nonparties may be directed in FAA arbitration where there is a showing of ‘special need or hardship’ such as where the information sought is otherwise unavailable”); *Connectu, Inc. v. Quinn Emanuel Urquhart Oliver & Hedges*, No. 602082/08, Slip Op., at 13 (N.Y. Sup. Ct. Mar. 11, 2010) (“The law in the First Department is that under the FAA a court may compel compliance with arbitrators’ subpoenas for pre-hearing depositions and document discovery if a ‘special need or hardship’ exists”). *ImClone*, but not *Connectu*, was decided before the Second Circuit’s decision in *Life Receivables Trust* to the contrary. In any case, the Second Circuit’s interpretation is not binding on New York state courts. *See Flanagan v. Prudential-Bache*

This split among circuit courts undermines uniformity in the application of the FAA.²⁰³ However, unless Congress clarifies the meaning of § 7 of the FAA or the U.S. Supreme Court decides the issue, the split will remain unresolved.

Several courts that follow the restrictive interpretation of § 7 of the FAA, precluding tribunals from ordering pre-hearing document disclosure from non-parties, have suggested ways to “bypass” this limitation. The Second Circuit in *Life Receivables Trust*, quoting Judge Chertoff’s concurring opinion in *Hay Group*, stated that § 7 “‘does not leave arbitrators powerless’ to order” non-party document production.²⁰⁴ Other courts have held that § 7 does not limit the tribunal’s authority to “merits hearings,” but also allows for special preliminary or procedural hearings, held solely for purposes of document disclosure.²⁰⁵ Some commentators have criticized this.²⁰⁶ In addition, the unambiguous language of

Security, Inc., 67 N.Y.2d 500, 506, 504 N.Y.S.2d 82, *cert. denied*, 479 U.S. 931 (1986) (“When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts . . . a State court required to interpret the Federal statute has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits . . .”); *see also Imclone Sys.*, 22 A.D.3d at 388 (“[I]n the absence of a decision of the United States Supreme Court or unanimity among the lower federal courts, we are not precluded from exercising our own judgment on this matter”).

²⁰³ While the First, Ninth, Tenth and D.C. Circuits have not yet addressed this issue, there are also conflicting decisions in the lower courts within the Fifth, Seventh and Eleventh Circuits. *Compare* *Empire Fin. Group, Inc. v. Penson Fin. Servs.*, No. 3:09-cv-2155, 2010 U.S. Dist. LEXIS 18782, at *2-4 (N.D. Tex. Mar. 3, 2010); *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078 (N.D. Ill. 2008); *Ware v. C.D. Peacock*, No. 10 C 2587, 2010 WL 1856021, at *3 (N.D. Ill. May 7, 2010) and *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009), *with* *Amgen Inc. v. Kidney Ctr of Delaware Cnty, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995) and *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006).

²⁰⁴ *Life Receivables Trust*, 549 F.3d at 218 (quoting *Hay Group*, 360 F.3d at 413 (Chertoff, J., concurring)).

²⁰⁵ *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577-79 (2d Cir. 2005) (noting that a preliminary hearing that is not a hearing on the merits “does not transform [the preliminary hearing] into a discovery device,” which would be prohibited, and distinguishing preliminary hearings from depositions); *Guyden v. AETNA Inc.*, No. 3:05cv1652 (WWE), 2006 U.S. Dist. LEXIS, at *20 (D. Conn. 2006); *Alliance Healthcare Servs. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).

²⁰⁶ *See, e.g.*, David A. Siegel, *Under Federal Arbitration Act, While Arbitrator Can Subpoena Nonparty as Witness, It Can’t Separately Compel Discovery: What’s N.Y. Rule?*, 204 SIEGEL’S PRAC. REV. 2 (2008) (noting that “[e]xtorting a circuitous gambol like that suggests in any event that maybe the federal cases on the other side of the conflict have the better of the argument.”); Lowell Pearson, *The Case for Non-Party Discovery under the Federal Arbitration Act*, 59 DISP. RES. J. 46, 52 (2004) (“The decisions in *Hay* and *COMSAT* invite an absurd subterfuge that is inconsistent with the purpose of arbitration”).

§ 7 providing that the arbitrators “may summon in writing any person to attend before them or *any of them*” allows for hearings before a single arbitrator, who may adjourn the proceedings as soon as the non-party appears and produces the requested documents.²⁰⁷ Ultimately, the “inconvenience of making a personal appearance” may lead a non-party to “deliver the documents and waive presence.”²⁰⁸

To ease the burden and costs of such hearings intended mainly to obtain document disclosure from non-parties, some commentators have suggested the use of telephone or video conferencing technology, allowing the hearing participants to “virtually appear” before the tribunal.²⁰⁹ Others have asked for an amendment of § 7 of the FAA to eliminate the requirement of a hearing for production of documents from non-parties.²¹⁰

3. *Non-Party Depositions before a Hearing*

Even if a tribunal may order pre-hearing document disclosure of a non-party under § 7 of the FAA, the same is not necessarily true for pre-hearing, non-party depositions. Most U.S. courts confronted with this issue have held that a tribunal does not have the power to order pre-hearing depositions of non-parties under § 7 of the FAA.²¹¹ As the U.S. District Court for the Southern District of New York explained:

²⁰⁷ See *Hay Group*, 360 F.3d at 413; *Life Receivables Trust*, 549 F.3d at 218; *Alliance Healthcare Serv.*, 804 F. Supp. 2d at 811.

²⁰⁸ *Life Receivables Trust*, 549 F.3d at 218 (quoting *Hay Group*, 360 F.3d at 413).

²⁰⁹ See Danielle C. Beasley, *Recurring Concerns in Arbitration Proceedings: Examining the Contours of Arbitral Subpoenas Issued to Nonparty Witnesses*, 87 U. DET. MERCY L. REV. 315, 330-31 (2010); Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think*, 63 DISP. RES. J. 36, 42 (2008); but see *Hay Group*, 360 F.3d at 407 (interpreting the phrase “before them” in § 7 of the FAA to require a non-party witness to “appear in the physical presence of the arbitrator,” which would exclude telephone or videoconferencing).

²¹⁰ See, e.g., City Bar Report, *supra* note 176, at 450-52.

²¹¹ See *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005); *Procter and Gamble Co. v. Allianz Ins. Co.*, No. 02-cv-5480(KMW), 2003 U.S. Dist. LEXIS 26025, at *4 (S.D.N.Y. Dec. 3, 2003); *In re Meridian Bulk Carriers, Ltd*, No. 03-2011, 2003 U.S. Dist. LEXIS 24203, at *4 (E.D. La. July 17, 2003); *Integrity Ins. Co.*, 885 F. Supp. at 73; *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1080 (N.D. Ill. 2008); *Odjfell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009). A limited number of cases have stated in *dicta* that depositions of non-parties may be available in “unusual circumstances.” See *COMSAT*, 190 F.3d at 271, 275-76; *Nat'l Union Fire Ins. Co. v. Marsh USA, Inc. (In re Hawaiian Elec. Indus.)*, No. M-82, 2004 U.S. Dist. LEXIS 12716, at *3 (S.D.N.Y. July 9, 2004); *ImClone Sys.*, 22 A.D.3d at 388; *Deiulemar Compagnia di Navigazione SpA v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999); *Gresham v. Norris*, 304 F. Supp. 2d 795, 797 (E.D. Va. 2004).

Documents are only produced once, whether it is at the arbitration or prior to it. Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The nonparty may be required to appear twice – once for deposition and again at the hearing. That a nonparty may suffer this burden in a litigation is irrelevant; arbitration is not litigation, and the nonparty never consented to be a part of it.²¹²

In addition, because depositions are not held before the tribunal, non-parties may not be protected from harassing or abusive discovery.²¹³ Notably, both the Sixth and the Eighth Circuits declined to reach the issue of a tribunal's power to order non-party depositions.²¹⁴

Very few courts have held that a tribunal may order pre-hearing depositions of non-parties under § 7 of the FAA,²¹⁵ and most of these cases did not concern international arbitration proceedings. In any case, as discussed above, depositions – whether of a party or non-party – are generally considered inappropriate in international arbitration proceedings.²¹⁶

E. *Adverse Inferences*

Where a party fails to comply with the tribunal's order to produce documentary or witness evidence without reasonable excuse, the tribunal may draw adverse inferences against that party.²¹⁷ The IBA Rules provides that a tribunal may infer that a document or other relevant evidence “would be adverse to the interests” of a party, where the party “without satisfactory explanation” failed to produce it following a request for production to which it did not object or

²¹² *Integrity Ins. Co.*, 885 F. Supp. at 73; *see also* In re Meridian Bulk Carriers, Ltd, No. 03-2011, 2003 U.S. Dist. LEXIS 24203, at *4 (E.D. La. July 17, 2003); *Procter and Gamble Co. v. Allianz Ins. Co.*, No. 02-cv-5480(KMW), 2003 U.S. Dist. LEXIS 26025, at *4-5 (S.D.N.Y. Dec. 3, 2003).

²¹³ *Integrity Ins. Co.*, 885 F. Supp. at 73.

²¹⁴ *Am. Fed. of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Comm. of Detroit, Inc.)*, 164 F.3d 1004, 1009 n.7 (6th Cir. 1999); *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870-71 (8th Cir. 2000).

²¹⁵ *See Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1243 (S.D. Fla. 1988) (holding that § 7 of the FAA does not prohibit pre-hearing witness appearances); *Amgen, Inc. v. Kidney Center of Delaware County*, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995) (enforcing compliance with a subpoena requiring the deposition of a nonparty, where the parties had agreed to arbitrate their dispute pursuant to the Federal Rules of Civil Procedure, which allow for depositions; *In re Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 1999 U.S. Dist. LEXIS 23385, at *9 (D. Minn. 1999).

²¹⁶ *See supra* at Sec. II(C)(2).

²¹⁷ BLACKABY ET AL., *supra* note 1, § 6.129, at 398-99; LEW ET AL., *supra* note 3, § 22-47, at 566; BORN, *supra* note 1, at 1919-21.

an order by the tribunal to produce.²¹⁸ Tribunals have required additional showings before drawing adverse inferences, such as that the requesting party itself produced material evidence as required, that the requested inference is reasonable, supported by *prima facie* evidence and consistent with the evidentiary record, and that the non-producing party was aware of the possibility of adverse inferences.²¹⁹

United States courts recognize a tribunal's power to draw adverse inferences.²²⁰ It is for the tribunal to decide whether an explanation that the requested evidence does not exist, or no longer exists, is satisfactory.²²¹ The tribunal's adverse inferences should be based on a "reasoned factual analysis" and take into account "the importance of the issues [and] the nature of materials requested and not disclosed."²²² However, one commentator notes that tribunals are "often overly hesitant" to draw adverse inferences, which can lead to a denial of justice.²²³

²¹⁸ IBA RULES (2010), Art. 9.5, 9.6; *see also* ICDR GUIDELINES, §8(b); UNCITRAL MODEL LAW, Art. 25(c).

²¹⁹ BORN, *supra* note 1, at 1920.

²²⁰ *See, e.g.*, Nat'l Cas. Co. v. First State Ins. Group, 430 F.3d 492, 497-99 (1st Cir. 2005) ("Here, one party was offered a choice between producing documents or having to contend with an inference about their content. This, as we have just discussed, was a choice that was within the arbitrator's power to offer."); *Life Receivables Trust*, 549 F.3d at 217 (stating that "[a]n arbitrator can enforce his or her discovery order through, among other things, drawing a negative inference from a party's refusal to produce . . ."); *In re Application by Rhodianyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at *51 (D. Kan. Mar. 25, 2011) (finding adverse inferences to be effective remedies for violations of discovery orders); *AmeriCredit Fin. Servs. v. Oxford Mgmt. Servs.*, 627 F. Supp. 2d 85, 101 (E.D.N.Y. 2008) (concluding that adverse inferences concern the weight the arbitrator accorded the evidence and are thus not grounds for vacatur of the award); *Norfolk & W. Ry. v. Transp. Comm'n Int'l Union*, 17 F.3d 696, 701 (4th Cir. 1994) (noting that the arbitration board's power to draw adverse inferences "could reasonably be understood as implicit in the powers expressly conferred upon it by the parties"); *see also generally* *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1023 n.8 (5th Cir. 1990) ("Arbitrators may, for example, devise appropriate sanctions for abuse of the arbitration process"); *Interchem Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340, 352 (S.D.N.Y. 2005) ("The handling of procedure during an arbitration is committed to the discretion of the arbitrator"); *Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha*, 102 F.2d 450, 453 (2d Cir. 1939) ("When a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt").

²²¹ BLACKABY ET AL., *supra* note 1, § 6.130, at 400 (noting that the explanation that a document was destroyed pursuant to a well-established corporate document retention policy before the dispute arose would likely be satisfactory).

²²² BORN, *supra* note 1, at 1920 n.205 (noting that a tribunal should not exercise punishment by drawing adverse "punitive inferences").

²²³ *Id.* at 1920.

Alternatively, the tribunal may impose sanctions against the non-compliant party by awarding costs and legal fees to the opposing party or seek judicial enforcement of its disclosure orders in the local courts.

III. JUDICIAL ASSISTANCE

Most disclosure in international arbitration proceedings occurs within the context of the arbitration and under the control of the tribunal.²²⁴ However, the tribunal and the parties may seek judicial assistance in accordance with national laws in obtaining disclosure.²²⁵ This may be particularly likely where disclosure is sought from third parties.

A. *Judicial Assistance to the Tribunal in Enforcing a Disclosure Order*

In the United States, courts may provide judicial assistance to the tribunal in enforcing a disclosure order.²²⁶ Section 7 of the FAA provides as follows:

Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.²²⁷

Thus, § 7 of the FAA established two procedural limitations for a tribunal's disclosure order: (1) the arbitrator's subpoena must be "served in the same manner as subpoenas to appear and testify before court," and (2) only the federal district court for the district, "in which such arbitrators, or a majority of them, are sitting," may assist with enforcing it.²²⁸ These limitations are interrelated as both

²²⁴ *Id.* at 1922-23.

²²⁵ *Id.* at 1923.

²²⁶ Such order can take the form of an interim or partial award or a mere procedural order. *See* LEW ET AL., *supra* note 3, § 22-53, at 568. While partial awards are generally enforceable under the New York Convention, a tribunal's procedural order is not normally enforceable. *Id.* § 22-58, at 569; *see also* *Publicis v. True North Commc'ns Inc.*, 206 F.3d 725, 728-29 (7th Cir. 2000) (noting that courts do not have the authority to enforce a tribunal's procedural order, but that in this case the tribunal had issued a final order subject to judicial confirmation). Either the subpoenaed (non-party) witness or the other party on behalf of that witness may file a motion to quash the subpoena or arbitral order. However, the subpoenaed party is under no obligation to move to quash a subpoena to preserve its rights to object to it. *COMSAT*, 190 F.3d at 271, 276.

²²⁷ 9 U.S.C. § 7.

²²⁸ *Id.*

the service and enforcement of subpoenas by federal courts are governed by Rule 45 of the Federal Rules of Civil Procedure, which was amended effective December 1, 2013, which thus in turn governs the service and enforcement of a tribunal's disclosure order.²²⁹

Under Rule 45(b)(2), a subpoena may now be served "at any place within the United States." However, under amended Rule 45(c)(1), a subpoena may only compel a person to attend a hearing, trial or deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person.²³⁰ Thus, a subpoena issued by a tribunal sitting in New York to a third-party witness residing in California ordering her appearance at a hearing in New York to provide testimony and documents may now be validly served and no longer faces any issues with the prior geographical limitations.

In addition, § 7 of the FAA mandates that it is for the district court where the "arbitrators, or a majority of them, are sitting" to enforce the tribunal's subpoena.

Several courts had recognized that § 7 of the FAA, read in conjunction with the prior Rule 45 of the Federal Rules of Civil Procedure, left an "enforcement gap," but considered that it is not for the courts (but for Congress) to fill it.²³¹ Yet, to "bypass" this gap some courts have suggested holding a special "document production hearing" with the majority of the arbitrators at the non-party's place of residence location or document location to issue and enforce the subpoena for the (sole) purpose of obtaining testimony and documents from a witness who would not otherwise be subject to the subpoena at the arbitral seat specified in the arbitration agreement.²³² However, relocating the hearing may be a time-

²²⁹ *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 Fed. Appx. 26, 27-28 (3d Cir. 2002); *Dynegy Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 94-95 (2d Cir. 2006); *Alliance Healthcare Servs. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 813 (N.D. Ill. 2011).

²³⁰ Fed. R. Civ. P. 45(c)(1)(A). Rule 45(a)(2) also provides that a subpoena must be issued from the district court where the action is pending.

²³¹ *See, e.g., Alliance Healthcare Servs.*, 804 F. Supp. 2d at 813 (refusing to enforce subpoena issued by tribunal seated in Chicago for production of document and attendance at hearing in San Francisco); *Dynegy Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006) (finding "no reason to . . . close a gap that may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law"); *Hunter Eng'g Co. v. Hennessy Indus.*, No. 4:08 CV 465 DDN, 2009 U.S. Dist. LEXIS 105497, at *5 (E.D. Mo. Nov. 12, 2009) (finding that based on the plain language of § 7 of the FAA, plaintiff must seek enforcement of the arbitrator-issued subpoena in the district where the arbitrator is sitting); *see also Legion Ins. Co.*, 33 Fed. Appx. at 27-28 (holding that a district court in Pennsylvania cannot enforce an arbitration subpoena directed to a non-party in Florida).

²³² *See, e.g., Seaton Ins. Co. v. Cavell USA*, No. 3:07-cv-356, at *5-6 (D. Conn. Mar. 21, 2007) (holding that there was not any statute or rule preventing the parties from "mutually agreeing to move the arbitration to a location other than the one designated in an arbitration agreement, even when the sole reason for doing so is to obtain testimony

consuming and costly task, and may be met with resistance from the opposing party.²³³

Other courts held that the prior territorial limits of service of process and thus personal jurisdiction did not apply to the enforcement of a subpoena under the FAA.²³⁴

Finally, at least one court²³⁵ read § 7 of the FAA and prior Rule 45 of the Federal Rules of Civil Procedure in a way that “plugged the gap.”²³⁶ In *Amgen v. Kidney Center of Delaware County*,²³⁷ the federal court for the Northern District of Illinois held that where the parties had adopted “liberal discovery” by agreeing to arbitrate under the Federal Rules of Civil Procedure, nationwide service was available since the court at the place of the deposition sought (here Pennsylvania) could “enforce a subpoena issued by Amgen’s attorney [under Rule 45(a)(3)(B)] with the name and number of a case pending” before the court at the seat of arbitration (here Illinois). This “compromise position” was rejected by the Second Circuit and a subsequent decision of the Northern District of Illinois because § 7

and documents from witnesses who would not be subject to subpoenas in the contractually designated location”); *In re Nat’l Fin. Partners Corp.*, No. 09-mc-0027, 2009 U.S. Dist. LEXIS 34440, at *2 (E.D. Pa. Apr. 21, 2009) (refusing to quash subpoena issued by arbitral tribunal in Pennsylvania requiring testimony and the production of documents from a non-party at a pre-merits hearing in Florida); *see also* Danielle C. Beasley, *Recurring Concerns in Arbitration Proceedings: Examining the Contours of Arbitral Subpoenas Issued to Nonparty Witnesses*, 87 U. DET. MERCY L. REV. 315, 329 (2010); Leslie Trager, *The Use of Subpoenas in Arbitration*, 62 DISP. RESOL. J. 14, 17 (2008); Teresa Snider, *The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act*, 34 TORT & INS. L.J. 101, 101 (1998); Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S. Law and Practice*, 14 AM. REV. INT’L ARB. 197, 227 (2003); Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: The Power of Arbitrators*, 35 FORDHAM URB. L.J. 83, 99 (2008). It is not uncommon for international arbitration for hearings to be held at a location other than the place of arbitration provided for in the parties’ agreement.

²³³ City Bar Report, *supra* note 176, at 455; Teresa Snider, *supra* note 232, at 101 (1998).

²³⁴ *See e.g.*, *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647, at *2 (D. Minn. Jan. 9, 2004) (holding that “a subpoena for the production of documents need not comply with ‘Rule 45(b)(2)’s territorial limit because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel” and ordering document production in New York pursuant to subpoena issued in arbitration proceedings in Minnesota); *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 872 (8th Cir. 2000); *Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006); *see also Hay Group*, 360 F.3d at 413 (holding in *dicta* that the personal jurisdiction argument is “unconvincing”); Lisa M. Eddington & Howard S. Suskin, *Enforcing Third-Party Discovery in Arbitration*, 37(2) LIT. NEWS 2 (2012).

²³⁵ *Amgen, Inc. v. Kidney Ctr. of Delaware Cty.*, 879 F. Supp. 878, 883 (N.D. Ill. 1995).

²³⁶ *Alliance Healthcare Servs.*, 804 F. Supp. 2d at 812.

²³⁷ *Amgen*, 879 F. Supp. at 882-83.

of the FAA only refers to the issuance of subpoenas “in the name of arbitrators,” not counsel.²³⁸

The new Rule 45 assumes that a subpoena can be validly served nationwide, but it has not really addressed the enforcement gap.

B. *Judicial Assistance to a Party in Taking Evidence*

Section 7 of the FAA also allows parties to an arbitration to seek judicial assistance in taking evidence without the approval or involvement of the tribunal.²³⁹ This makes § 7 the principal exception to the common approach that only the tribunal, or a party with leave from the tribunal, may seek judicial assistance with disclosure.²⁴⁰ Most courts have required a showing of “exceptional circumstances” in order to grant a party’s request for judicial assistance with evidence taking.²⁴¹ A party will have to show a compelling need

²³⁸ *Dynegy Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006); *Alliance Healthcare*, 804 F. Supp. 2d at 813.

²³⁹ BORN, *supra* note 1, at 1929.

²⁴⁰ *See, e.g.*, IBA RULES (2010), Art. 3(9) (“If a Party wishes to obtain the production of Documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available [under national law] to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself.”).

²⁴¹ *See, e.g.*, *In re Compania Chilena de Navegacion Interoceanica S.A.*, No. 03 CV 5382 (ERK), 2004 U.S. Dist. LEXIS 6408, at *9 (E.D.N.Y. Jan. 29, 2004) (finding that “extraordinary circumstances” justified a court order preserving evidence despite the existence of an arbitration agreement); *In re Deiulemar Compagnia di Navigazione SpA v. M/V Allegra*, 198 F.3d 473, 479-81 (4th Cir. 1999) (requiring “extraordinary circumstances” before permitting court-ordered pre-hearing discovery); *COMSAT Corp. v. Nat’l Science Found.*, 190 F.3d 269, 277 (4th Cir. 1999) (“A federal court may not compel a third party to comply with an arbitrator’s subpoena for prehearing discovery, absent a showing of special need or hardship”); *Koch Fuel Int’l Inc. v. M/V South Star*, 118 F.R.D. 318, 320 (E.D.N.Y. 1987) (finding “exceptional circumstances” and allowing for prehearing discovery “where a vessel with crew members possessing particular knowledge about the dispute is about to leave port”); *Vespe Contracting Co. v. Anvan Corp.*, 399 F. Supp. 516, 522 (E.D. Pa. 1975) (granting judicial assistance where continuing work on construction project would effectively destroy evidence); *Bergen Shipping Co. v. Japan Marine Servs., Ltd*, 386 F. Supp. 430, 435 n.8 (S.D.N.Y. 1974); *see also* BORN, *supra* note 1, at 1930; *Friedland & Martinez*, *supra* note 232, at 205-06. Notably, New York law contains a provision on preliminary relief in aid of arbitration, under which a party may seek the disclosure of evidence necessary to support or oppose an application for interim relief. N.Y. C.P.L.R. § 3102(c). New York courts generally require a showing of exceptional circumstances to grant such disclosure. *See, e.g.*, *Guilford Mills, Inc. v. Rice Pudding, Ltd.*, 90 A.D.2d 468, 468 (1st Dep’t 1982); *Motor Vehicle Accident Indemnification Corp. v. McCabe*, 19 A.D.2d 349, 352 (1st Dep’t 1963) (declining discovery in aid of arbitration because appellant had failed to show extraordinary circumstances); *see also* David D. Siegel, *Under Federal Arbitration Act*,

for the evidence sought that would otherwise be unavailable and that the tribunal is not yet constituted or unable to obtain the evidence itself.²⁴² Other courts have been less demanding, but emphasized that court-ordered disclosure should not delay the arbitration proceedings.²⁴³ A significant number of federal and state courts have refused requests for court-ordered disclosure at the request of a party.²⁴⁴

IV. CONCLUSION

International arbitration in the United States under § 7 of the FAA offers some unique features for the taking of evidence unknown in most other jurisdictions, such as the tribunal's subpoena power over non-parties to the arbitration. Even within the United States, the availability and breath of disclosure that a tribunal may order as well as the assistance in evidence-gathering by a national court may depend on the location of the tribunal. Thus, when drafting an arbitration agreement providing for an arbitral seat in the United States, the parties should carefully consider the likely locations of prospective witnesses or documents.

While Arbitrator Can Subpoena Nonparty as Witness, It Can't Separately Compel Discovery; What's N.Y. Rule?, 204 SIEGEL'S PRAC. REV. 2 (2008).

²⁴² See, e.g., *In re Compania Chilena de Navegacion Interoceanica S.A.*, No. 03 CV 5382 (ERK), 2004 U.S. Dist. LEXIS 6408, at *9 (E.D.N.Y. Jan. 29, 2004); *Vespe Contracting Co. v. Anvan Corp.*, 399 F. Supp. 516, 522 (E.D. Pa. 1975) (retaining jurisdiction and permitting pretrial discovery to continue until parties have chosen arbitrator or arbitral panel); see also BORN, *supra* note 1, at 1930-3 (noting that these decisions are "best understood as forms of court-ordered provisional measures in aid of arbitration").

²⁴³ See, e.g., *Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Leona Lee Corp.*, 434 F.2d 192, 194 (5th Cir. 1970) (apparently not requiring any showing of exceptional circumstances); *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 243-244 (E.D.N.Y. 1973) (focusing primarily on the size of the claim, the low cost of court-ordered discovery and the absence of any showing that arbitration would be delayed); but see BORN, *supra* note 1, at 1930-32 (cautioning that judicial assistance in the taking of evidence at the request of a party without leave from the tribunal may run counter to the parties' agreement to resolve all disputes exclusively by arbitration).

²⁴⁴ See, e.g., *Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (noting that § 7 of the FAA was consistent with the traditionally very limited discovery available in international arbitration); *Suarez-Valdez v. Shearson/American Express, Inc.*, 858 F.2d 648, 649 (11th Cir. 1988); *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) ("While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege"); *H.K. Porter Co., etc. v. United Steelworkers of Am.*, 400 F.2d 691, 695-96 (4th Cir. 1968); *Lummus Co. v. Commonwealth Oil Ref. Co.*, 273 F.2d 613, 614 (1st Cir. 1959) (finding right to discovery in arbitration "far more restricted" than in federal litigation); *Hires Parts Service, Inc. v. NCR Corp.*, 859 F. Supp. 349, 355 (N.D. Ind. 1994) ("[P]ermitting discovery on two levels, district court level and arbitration level, is a great waste of resources and frustrates the basic purpose of [the FAA]").