

CHAPTER 15

Witnesses, Subpoenas, Documents and the Relationship Between the FAA and State Law

*Claudia T. Salomon & Sandra Friedrich**

I INTRODUCTION TO DISCLOSURE IN INTERNATIONAL ARBITRATION: DIFFERENCES IN SCOPE AND AVAILABILITY

The procedures for obtaining and submitting evidence—and the weight it should be given—play an important role in international arbitration. Indeed, fact-finding is one of the key functions of an arbitral tribunal.¹ Just as national courts follow elaborate rules governing the taking of evidence and its introduction in court proceedings, arbitral tribunals have several procedures governing disclosure of evidentiary materials. 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 Local law is significant in international arbitration proceeding as domestic court at the seat of the arbitration or at the location of the evidence sought may provide assistance in obtaining evidence. Therefore, the tribunal's approach to availability and breath of disclosure as well as the assistance in evidence-gathering that

* The authors would like to thank Anne Loehner, Samuel B. de Villiers and Irina Y. Sivachenko for their ideas, editing, and research. This chapter was previously published in *The American Review of International Arbitration*, 2013, Volume 24, Issue 4, pp. 549-590, and is reprinted here by kind permission of *The American Review*.

1. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.83 at 385 (2009); G. Born, *International Commercial Arbitration* 1886 (Kluwer Law Arbitration 2009).
2. Within common and civil law jurisdictions, significant difference regarding disclosure also exist.

may be offered by a national court are important factors when considering an arbitral seat and developing the strategy for presenting a case in international arbitration.³

[A] 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.

In most civil law jurisdictions, courts follow inquisitorial traditions and largely control the evidence-taking process, thus not allowing parties to initiate disclosure.⁵ In these jurisdictions, the parties generally 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

-
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., N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.107, at 393 n. 65 (Oxford University Press 2009) (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* §22-51 at 567 (Kluwer Law International 2003); Robert von Mehren, *Rules of Arbitral Bodies Considered from a Practical Point of View*, 9(3) *J. Int'l Arb.* 105, 110 (1992); R. Smit, *Towards Greater Efficiency in Document Production before Arbitral Tribunals—A North American Viewpoint*, in *Document Production in International Arbitration* 93 (E. Jolivet ed., ICC Ct. Bull. Spec. Supp. 2006) (“‘Discovery,’ in the US sense, is a dirty word in international arbitration.”); Dominique d’Allaire & Rolf Trittman, *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., Oxford University Press 2010) (noting that the term “discovery” is commonly used in connection with U.S. arbitrations, making it appropriate for international arbitrations seated in the United States 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 chapter.
 4. G. Born, *International Commercial Arbitration* 1893 (Kluwer Law International 2009); J. Gardiner et al., *Discovery*, in *International Commercial Arbitration in New York* 269, 279 (J. Carter & J. Fellas eds., Oxford University Press 2010).
 5. See, e.g., Born, *International Commercial Arbitration* 1893-94 (Kluwer Law International 2009); Reymond, *Civil Law and Common Law: Which is the Most Inquisitorial? A Civil Lawyer's Response*, 5 *Arb. Int'l* 357, 360 (1989); Patocchi & 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); Hazard, *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, *International Commercial Arbitration* 1893-94 (Kluwer Law International 2009); Julian D. M. Lew et al., *Taking Evidence in International Arbitration*, in *Comparative International Commercial Arbitration* §22-51 at 567 (Kluwer Law International 2003); 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); Claude Reymond, *Civil Law and Common Law Procedures: Which Is the Most Inquisitorial? A Civil Lawyer's Response*, 5 *Arb. Int'l* 357, 360 (Kluwer Law International 1989) (“We react

the parties play a secondary role during hearings. For instance, civil law judges appoint experts and question witnesses.⁷ These judges, however, rarely order a party to produce additional materials it had not previously and voluntarily submitted into evidence.

To the contrary, in most common law jurisdictions dispute resolution is adversarial in nature and a broad, party-initiated disclosure process is one of its central features.⁸ The collection and presentation of evidence is mainly in the hands of the 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. Instead, civil law systems tend to give more weight to documents.¹⁰

While arbitral tribunals generally seek to make procedural decisions that reflect the international character of the process rather than to replicate their local rules, 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.¹¹ Although the availability and scope of disclosure will depend on the specifics of each dispute, international arbitral tribunals tend to accord greater weight to contemporary documentary evidence than to oral witness testimony.¹²

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. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.85 at 385 (Oxford University Press 2009).
8. G. Born, *International Commercial Arbitration* 1894 (Kluwer Law International 2009).
9. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.84, 385 (Oxford University Press 2009). 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. G. Born, *International Commercial Arbitration* 1894 (Kluwer Law International 2009).
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 United States), 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. d’Allaire & R. 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, 119-20, 128 (2011). See also N. Blackaby et al., *Redfern and Hunter on International Arbitration* §§6.97-6.98, 389 (Oxford University Press 2009).

[B] Disclosure in Litigation and International Arbitration Proceedings in the United States

United States (U.S.) litigation is particularly known for its full-blown discovery, in which courts routinely grant the parties' expansive disclosure requests.¹³ It is generally accepted in U.S. litigation proceedings that both parties should have full knowledge of every potentially relevant piece of information before presenting their case on the merits.¹⁴ 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.¹⁵ According to Rule 26, the permissible scope of discovery is extremely broad, allowing parties to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense."¹⁶ 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."¹⁷ Similar rules can be found at the state level.¹⁸

While requests for disclosure are common in international arbitration, the permissible 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 judicial and arbitral proceedings.¹⁹ In international arbitration, parties generally may agree on the governing procedure, including the specifics of the disclosure process.²⁰ The U.S. Supreme Court has

-
13. Even among common law jurisdictions, U.S. discovery is unique in its breadth and significance to the proceedings. See J. Gardiner et al., *Discovery*, in *International Commercial Arbitration in New York* 269, 279 (J. Carter & J. Fellas eds., Oxford University Press 2010); R. Smit, *Towards Greater Efficiency in Document Production Before Arbitral Tribunals—A North American Viewpoint*, in *Document Production in International Arbitration* 93 (ICC Int'l Ct. of Arb. Bull. Spec. Supp. 2006).
 14. In U.S. litigation, oral examination and cross-examination of witnesses are viewed as key to uncovering the truth.
 15. U.S. Federal Rules of Civil Procedure, R. 26.
 16. U.S. Federal Rules of Civil Procedure, R. 26(b)(1).
 17. *Id.* (emphasis added).
 18. 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).
 19. See J. Gardiner et al., *Discovery*, in *International Commercial Arbitration in New York* 269, 273 (J. Carter & J. Fellas eds., Oxford University Press 2010).
 20. See N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.01, 363, §6.08, 365 (Oxford University Press 2009); G. Born, *International Commercial Arbitration* 1879-80 (Kluwer Law International 2009) (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. See N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.08, 365 (Oxford University Press 2009); see also UNCITRAL

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 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 Generally, 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 for parties to choose arbitration over litigation.²⁶

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. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §§6.10 et seq.; G. Born, *International Commercial Arbitration* 1879, 1886-87 (Kluwer Law International 2009); 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., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); 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*, 2 A.D.3d 301, 301 (N.Y. App. Div. 1st Dep't 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), II(3), V(1)(d) (enforced in the U.S. pursuant to 9 U.S.C. §201 (1970)); G. Born, *International Commercial Arbitration* 1879-80 (Kluwer Law International 2009); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.03, 363 (Oxford University Press 2009).
23. See J. Gardiner et al., *Discovery, in International Commercial Arbitration in New York* 269, 274 (J. Carter & J. Fellas eds., Oxford University Press 2010).
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"); G. Born, *International Commercial Arbitration* 1879 (Kluwer Law International 2009); See D. d'Allaire & R. 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, 124-25 (2011).
26. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.01, 363 (Oxford University Press 2009).

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. Generally, disclosure requests in arbitration proceedings 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.²⁷ Further, the practice of depositions, interrogatories, and requests for admission is uncommon in international arbitral proceedings in the U.S. and elsewhere.²⁸

II DISCLOSURE POWERS OF INTERNATIONAL ARBITRAL TRIBUNALS IN THE U.S.

[A] Relevant Statutory Arbitration Provisions

Due to the U.S. federalist system of government, both federal and state statutory arbitration provisions potentially apply to define the disclosure power of an international arbitral tribunal seated in the U.S.²⁹ Thus, there are two sources of potentially relevant domestic laws for the conduct of an arbitration: (1) the Federal Arbitration Act (“FAA”)³⁰ 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.³¹

27. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.109 at 394 (Oxford University Press 2009) (noting that a tribunal may deny document requests, where though relevant the information requested would not affect the outcome of the proceeding).

28. 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 s. 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. Jul. 9, 2004).

29. In the U.S., 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.

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

31. See, e.g., U.S. FAA, 9 U.S.C. §2; Revised Uniform Arbitration Act (“RUAA”), §§4(a), 15, 17; Uniform Arbitration Act (“UAA”), §5; UNCITRAL Model Law, Art. 19; *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.03 at 363 (Oxford University Press 2009).

[1] *The FAA*

At the federal level, the FAA governs arbitration proceedings, both domestic and international. The FAA was initially introduced in 1925 to eliminate judicial hostility toward arbitration and place arbitration agreements “upon the same footing” as other contracts.³² 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);³³ and (iii) Enforcement of the Inter-American Convention on International Commercial Arbitration (“Panama Convention”) (Chapter 3, §§301-307).³⁴

Chapter 1 of the FAA governs any written arbitration provision in a “maritime contract or a contract evidencing a transaction involving commerce.”³⁵ Due to the broad definition of “commerce” under the FAA,³⁶ Chapter 1 applies to virtually all international arbitrations seated in the U.S.³⁷

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.³⁸ 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 New York Convention; (3) has a commercial subject matter (as defined by federal law); and (4) is not entirely

32. *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).

33. The U.S. acceded to the New York Convention on Sept. 30, 1970, which entered into force for the U.S. on Dec. 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 (last visited, Dec. 10, 2013).

34. 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 U.S.. The U.S. signed to the Panama Convention on Jun. 9, 1978, which entered into force for the U.S. on Oct. 27, 1990. See Organization of American States, SICE Foreign Trade Information System, available at <http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp> (last visited, Dec. 10, 2013).

35. U.S. FAA, 9 U.S.C. §2.

36. “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 . . .” U.S. FAA, 9 U.S.C. §1.

37. See G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1162-63 (5th ed. Wolters Kluwer Law & Business 2011).

38. 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.” U.S. FAA, 9 U.S.C. §§203, 205, 302; see also G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1163 (5th ed. Wolters Kluwer Law & Business 2011).

domestic.³⁹ A similar test would apply to Chapter 3 by analogy.⁴⁰ A large number of international arbitrations seated in the U.S. will fall under Chapters 2 or 3.⁴¹ Thus, where the arbitration is not “entirely domestic,” both Chapters 1 and 2 or 3 respectively may apply simultaneously.⁴² In case of a conflict, Chapter 2 or 3 prevails,⁴³ otherwise the parties may choose to enforce their arbitration agreement (or award) under either provision.⁴⁴

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:

-
39. *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 U.S. FAA, 9 U.S.C. §202. This test incorporates the reciprocity and commercial reservations, under which the U.S. 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 U.S. 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).
40. U.S. FAA, 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. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 294 (S.D. Tex. 1997). 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. U.S. FAA, 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 v. Mut. Marine Offices, Inc.*, 230 F. Supp. 2d 362, 368 n.4 (S.D.N.Y. 2002); *Hernandez v. Smart & Final, Inc.*, No. 09-cv-2266, 2010 U.S. Dist. LEXIS 60755, at *9-10 n.3 (S.D. Cal. Jun. 16, 2010). In all other cases, the New York Convention applies. U.S. FAA, 9 U.S.C. §305(2).
41. 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 chapter will focus on the New York Convention.
42. See *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997); *Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 296 n.126 (S.D. Tex. 1997). However, the New York Convention’s reciprocity requirement may preclude its application in certain cases, meaning only Chapter 1 will govern the arbitration.
43. See *Lander Co. Inc. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997); *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, No. 3:95cv2362, 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).
44. U.S. FAA, 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*, No. 96 Civ. 5853, 1996 U.S. Dist. LEXIS 18734, at *1-2 (S.D.N.Y. Dec. 13, 1996) (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).

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.⁴⁵

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 U.S., unless otherwise agreed by the parties.⁴⁶ The parties may also agree to preclude or significantly limit disclosure as long as fundamental principles of procedural fairness and equality are respected.⁴⁷

As discussed in more detail later in this chapter,⁴⁸ U.S. courts are divided as to the power that a tribunal seated in the U.S. has to order pre-hearing document disclosure and the scope of disclosure and nonparty disclosure available under section 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.⁴⁹ In addition, section 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 abroad.⁵⁰ U.S. courts are divided as to whether this provision applies to international commercial arbitral tribunals.⁵¹

[2] State Arbitration Statutes

States have adopted their own arbitration laws on matters of domestic and international arbitration. The majority of states have implemented either the Uniform Law

45. U.S. FAA, 9 U.S.C. §7.

46. 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. G. Born, *International Commercial Arbitration* 1884 n. 38 (Kluwer Law International 2009); J. Gardiner et al., *Discovery, in International Commercial Arbitration in New York* 269, 272-73 (J. Carter & J. Fellas eds., Oxford University Press 2010) (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.).

47. See G. Born, *International Commercial Arbitration* 1884 n. 38 (Kluwer Law International 2009); UNCITRAL Model Law, Art. 1(1), 17(1), 27.

48. See *infra* s. II[C][2].

49. U.S. FAA, 9 U.S.C. §7.

50. 9 U.S.C. §1782.

51. For a detailed discussion of s. 1782, see Chapter 17 on 28 U.S.C. Section 1782: U.S. Discovery in Aid of International Arbitration Proceedings.

Commission's ("ULC") Uniform Arbitration Act ("UAA") of 1956⁵² or the Revised Uniform Arbitration Act ("RUAA") of 2000.⁵³ Both apply to arbitration in general, without specifically addressing the subject of international arbitration.⁵⁴ Some states have implemented the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("UNCITRAL Model Law"),⁵⁵ at times together with provisions taken from the New York Convention. Other states, such as New York, have enacted their own statutory provisions on arbitration.⁵⁶

With regards 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 . . ." ⁵⁷ Upon application of a party, tribunals also may permit deposition of a witness who cannot be subpoenaed or is unwilling to attend a hearing on application of a party.⁵⁸

Section 17 of the RUAA contains a similar provision, but allows deposition upon the application of a party or witness only where they are necessary to make the "proceedings fair, expeditious, and cost effective."⁵⁹ 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."⁶⁰ The section further details the tribunal's authority to issue discovery-related orders, subpoenas and protective orders, and to take action against a noncomplying party to the extent a court could.⁶¹ Under the

52. 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%20Act%20(1956)) (last visited Dec. 10, 2013).

53. 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%20Act%20(2000)) (last visited Dec. 10, 2013).

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

55. 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/1985_Model_arbitration_status.html (last visited Dec. 10, 2013).

56. In 2003, a conglomerate of New York bar associations recommended that the New York legislator adopt the RUAA. See *Report on the Revised Uniform Arbitration Act* (Jun. 2003), *available at* <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26856> (last visited: Dec. 10, 2013). 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).

57. UAA, §7(a).

58. UAA, §7(b).

59. RUAA, §17(a), (b).

60. RUAA, §17(c).

61. RUAA, §17(d), (e).

UAA and RUAA, either the arbitral tribunal or a party may seek judicial enforcement of a subpoena issued by the tribunal.⁶² However, a subpoenaed (nonparty) witness or the other party acting on the witness' behalf 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.⁶³ 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.⁶⁴ In Model Law jurisdictions, the tribunal may also request assistance in taking evidence from a competent state court.⁶⁵

Notably, New York courts recognize an arbitral tribunal's inherent authority to control the arbitral proceedings, including the disclosure process.⁶⁶ Under section 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."⁶⁷ In addition, in exceptional circumstances, New York courts may order disclosure "to aid in arbitration."⁶⁸

62. UAA, §7(a); RUAA, §17(a).

63. UNCITRAL Model Law, Art. 19.

64. UNCITRAL Model Law, Art. 19(2), 27; *see also* G. Born, *International Commercial Arbitration* 1880-81 n. 21 (Kluwer Law International 2009) (noting that Art. 26(1)(b) of the Model Law also "strongly implies" that an arbitral tribunal may order disclosure); D. d'Allaire & R. 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, 126 (2011); *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. v. Transwestern Pipeline Co.*, No. 14-96-1103-cv, 1998 Tex. App. LEXIS 7090, at *24 (Tex. App.—Houston [14th Dist.] Nov. 12, 1998) (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).

65. UNCITRAL Model Law, Art. 27.

66. *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 (N.Y. App. Div. 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 (N.Y. App. Div. 1st Dep't 1982) (finding that the 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 (N.Y. App. Div. 1st Dep't 1963); *see also* J. Gardiner et al., *Discovery*, in *International Commercial Arbitration in New York* 269, 278-79 (J. Carter & J. Fellas eds., Oxford University Press 2010).

67. 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 (N.Y. App. 1st Dep't Div. 1939); *In re Landegger v. Parson & Whittemore, Inc.*, 54 N.Y.S.2d 76, 76 (Sup. Ct. Spec. T. 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).

68. N.Y. C.P.L.R. §3102(c). *See, e.g., Guilford Mills, Inc. v. Rice Pudding, Ltd.*, 90 A.D.2d 468, 468 (N.Y. App. Div. 1st Dep't 1982) ("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 (N.Y. App. Div. 4th Dep't 2012) (noting

[3] *The Relationship Between the FAA and State Arbitration Statutes*

The Supremacy Clause of the U.S. Constitution provides that federal laws are supreme.⁶⁹ It is well-established that Congress pursued a “national policy favoring arbitration” in enacting the FAA.⁷⁰ Thus, the FAA’s standards and the pro-arbitration bias apply in federal and state courts alike,⁷¹ irrespective of whether the underlying contract is governed by state or federal law.⁷²

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 arbitration agreement and issues of substantive arbitrability (sections 2, 3, and 4 of the FAA).⁷³ In 2008,

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 (N.Y. App. Div. 2d Dep’t 1982); *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 125 F.R.D. 398, 400 (S.D.N.Y. 1989).

69. U.S. Constitution, Art. VI, §2. (“Constitution, and the Laws of the United States ... shall be the supreme law of the land.”)
70. 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).
71. See *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989); see also G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1163 n.48 (5th ed. Wolters Kluwer Law & Business 2011).
72. 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. 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 Corp. v. Keating*, 465 U.S. 1, 10-12 (1984)); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); see also G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1163 (5th ed. Wolters Kluwer Law & Business 2011).
73. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (agreeing with the Second Circuit that ss 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) (1967); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (holding that s 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 Corp. v. Keating*, 465 U.S. 1, 22 (1984) (stating in dissent that the majority’s decision “takes the facial silence of [Section] 2 as a license to declare that state as well as federal courts must apply [Section] 2 ... [and] holds that in enforcing this newly-discovered federal right state courts must follow procedures specified in [Section] 3”) (Justice O’Connor, dissenting); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (considering a California statute that conflicted with s. 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).

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 sections 9, 10, 11, and 12).⁷⁴

However, the FAA does not “occupy” the entire field of arbitration.⁷⁵ State law may still apply to international arbitrations in two ways: first, where the specific state law provision is not preempted by the FAA and second, where the parties expressly designate a specific state arbitration law to govern the proceedings.

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.⁷⁶ 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,⁷⁷ and do not show an anti-arbitration bias or limit the enforceability of arbitration agreements.⁷⁸

Furthermore, the principle of party autonomy enables 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*, 489 U.S. 468 (1989), 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.⁷⁹ By contrast, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514

74. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008), bluntly holding that ss 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 [Section] 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, [Sections] 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).

75. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989); *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 G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1163 (5th ed. Wolters Kluwer Law & Business 2011).

76. See, e.g., RUA, §§10, 14; see also G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1163 (5th ed. Wolters Kluwer Law & Business 2011).

77. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (“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 v. Thomas*, 482 U.S. 483, 489 (1987); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Preston v. Ferrer*, 552 U.S. 346, 353 (2008).

78. RUA, Prefatory Note at 5, 6.

79. *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Univ.*, 489 U.S. 468, 470-78 (1989) (noting that the FAA did not address the stay of arbitration and the state provision did not show anti-arbitration bias).

U.S. 52 (1995), 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.⁸⁰

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.⁸¹ However, emphasizing that *Mastrobuono* involved a *federal* court's interpretation of the parties' choice-of-law provision (which the *Mastrobuono* court could review), 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. Lower federal courts have followed this approach.⁸² 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

80. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54-60 (1995); *see also Preston v. Ferrer*, 552 U.S. 346, 362-63 (U.S. 2008) (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).

81. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 60 n. 4 (1995).

82. *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"); *Painewebber 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 (N.Y. App. Div. 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. Jun. 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).

“a general choice of law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration.”⁸³ The Supreme Court has since confirmed that its holding in *Mastrobuono* also applies to state courts.⁸⁴

As for section 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.”⁸⁵ In light of this recent decision, state law provisions allowing arbitral tribunals to order extensive U.S. style discovery far beyond the scope of section 7 may be preempted, unless the parties expressly agreed to them.⁸⁶ The *Concepcion* holding has since been followed by numerous federal and state courts.⁸⁷

Compared to the limited disclosure process in arbitration, full-scale U.S. style discovery is slower, more formal, more costly, and more likely to create procedural problems.⁸⁸ Consequently, it is unlikely that state arbitration provisions will have major application in international arbitration proceedings seated in the U.S.⁸⁹

83. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269-70 (9th Cir. 2002).

84. In *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984), the Supreme Court held that the FAA applies to state court as well as federal court proceedings. In *Preston v. Ferrer*, 552 U.S. 346, 361-63 (2008), 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.”

85. *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.”).

86. See *ImClone Sys., Inc. v. Waksal*, 22 A.D.3d 387, 387 (N.Y. App. Div. 1st Dep’t 2005) (assuming that s. 7 of the FAA preempts state law procedural rules on disclosure in arbitration); see also G. Born, *International Commercial Arbitration* 1883 n. 35 (Kluwer Law International 2009). Specifically as to the validity and enforceability of arbitrator subpoenas against third parties, a couple of lower federal courts explicitly held that s. 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).

87. See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (U.S. 2012); *Mortensen v. Bresnan Commun., LLC*, 722 F.3d 1151, 1159 (9th Cir. Mont. 2013); *In re Cal. Title Ins. Antitrust Litig.*, 2011 U.S. Dist. LEXIS 71621 (N.D. Cal. Jun. 27, 2011); *Wolf v. Nissan Motor Acceptance Corp.*, 2011 U.S. Dist. LEXIS 66649 (D.N.J. Jun. 22, 2011); *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 507 (Mo. 2012); *Wallace v. Ganley Auto Group*, 2011-Ohio-2909, P19 (Ohio Ct. App., Cuyahoga County Jun. 16, 2011).

88. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 1751.

89. See G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1161 (5th ed. Wolters Kluwer Law & Business 2011).

[B] Relevant Arbitration Rules

To avoid uncertainty, parties will frequently specify that a particular set of arbitral rules will govern the proceedings.⁹⁰ The tribunal will look to those rules chosen by the parties to determine the appropriate disclosure process.⁹¹ This section will discuss the relevant provisions of the most frequently used institutional and ad hoc arbitral rules for international arbitrations seated in the U.S.

[1] Institutional Arbitration Rules

[a] *The International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR Rules”)*

The ICDR Rules, published by 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 ...”⁹² 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.⁹³

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.⁹⁴ 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

90. Section 7 of the FAA arguably grants the tribunal a narrower power to order disclosure than some of the leading arbitration rules. See G. Born, *International Commercial Arbitration* 1883 (Kluwer Law International 2009).

91. 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, since only the parties “contractually agreed to abide by [the discovery rules of an arbitral association], which are incorporated by reference into the contract”).

92. ICDR Rules (2009), Art. 16(1).

93. ICDR Rules (2009), 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 G. Born, *International Commercial Arbitration* 1890 (Kluwer Law International 2009); J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 275 (J. Carter & J. Fellas eds., Oxford University Press 2010).

94. ICDR Guidelines (2008), at 1. The ICDR Guidelines will be reflected in the next amendment of the ICDR Rules. *Id.*

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.⁹⁵

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.”⁹⁶

[b] *The Arbitration Rules of the London Court of Arbitration (“LCIA Rules”)*

The 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.”⁹⁷ In addition, the tribunal may order inspection of “any property, site or thing” under a party’s control and relating to the dispute.⁹⁸ These provisions leave no doubt that an arbitral tribunal constituted under the LCIA Rules has broad authority to order disclosure.⁹⁹

[c] *The Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”)*

Similarly, the 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.”¹⁰⁰ In addition, the tribunal may “establish the facts of the case by all appropriate means”¹⁰¹ and “summon any party to provide additional evidence.”¹⁰² 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.”¹⁰³

95. ICDR Guidelines (2008), 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).

96. ICDR Guidelines (2008), Art. 6(b).

97. LCIA Rules, Art. 22.1(e).

98. LCIA Rules, Art. 22.1(d).

99. See G. Born, *International Commercial Arbitration* 1888 (3d ed. Kluwer Law International 2009).

100. ICC Rules (2012), Art. 22(2).

101. ICC Rules (2012), Art. 25(1).

102. ICC Rules (2012), 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, Appendix IV, at (d); *see also* Commission on Arbitration, ICC, *Techniques for Controlling Time and Costs in Arbitration*, ¶¶ 51, 52 (recommending to limit the number and scope of document requests).

103. 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

[2] *Ad Hoc Arbitration Rules*

[a] *Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”)*

The 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 ...”¹⁰⁴

[b] *The Rules for Non-Administered Arbitration of International Disputes of the International Institute for Conflict Prevention and Resolution (“CPR Rules”)*

The CPR Rules¹⁰⁵ allow the tribunal to “conduct the arbitration¹⁰⁵ in such manner as it shall deem appropriate.”¹⁰⁶ For instance, the tribunal shall conduct a pre-hearing conference on “[p]rocedural matters (such as the timing and manner of any required discovery) ...”¹⁰⁷ 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.”¹⁰⁸

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

Arbitration, SK063 ALI-ABA 751, 758 (2004) (discussing the predecessor of Art. 25 in the 1998 ICC Rules). For discussion of Article 25’s predecessor provision in the 1998 ICC Rules, see, e.g., G. Born, *International Commercial Arbitration* 1889-90 (Kluwer Law International 2009); Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 281 (2d ed. Kluwer Law International 2005); M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 259-65 (2d ed, 2005); W. Craig et al., *International Chamber of Commerce Arbitration* ¶ 26.01, at 451 (3d ed. 2000); 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); J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 275 (J. Carter & J. Fellas eds., Oxford University Press 2010).

104. UNCITRAL Rules (2010), Art. 27(3).

105. The International Institute for Conflict Prevention and Resolution recently introduced a new set of rules for administered arbitration proceedings, effective as of Jul. 1, 2013. The relevant provisions on disclosure of evidence are nearly identical to the provisions in CPR Rules for non-administered arbitration proceedings. Compare CPR Procedures & Clauses, Administered Arbitration Rules (2013), R. 11, with CPR Rules (2007), R. 11. For more information on the new rules, see <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/785/7113-Administered-Arbitration-Rules-Effective-July-1-2013.aspx>.

106. CPR Rules (2007), R. 9(1).

107. CPR Rules (2007), R. 9(3)(a).

108. CPR Rules (2007), R. 11.

opportunity to adopt certain suggested modes of document disclosure.¹⁰⁹ Parties may adopt these modes in arbitrations under the CRP Rules or under other institutional or ad hoc arbitral rules.¹¹⁰ Further, 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.”¹¹¹ Notably, the CPR Protocol contemplates the possibility of depositions “in exigent circumstances” in international arbitration proceedings.¹¹²

[3] Specific Rules on Disclosure in Arbitration: The International Bar Association’s Rules on the Taking of Evidence in International Arbitration (“IBA Rules”)

The 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.¹¹³ 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.¹¹⁴ As a result, the IBA Rules adopt a somewhat restrictive approach to disclosure, and do not provide for depositions.¹¹⁵ The IBA Rules have become the commonly used procedural framework for disclosure in international

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

110. CPR Protocol (2008), Introduction, para. 1.

111. CPR Protocol (2008), §1(a).

112. CPR Protocol (2008), §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 telecommunication, before the tribunal. The tribunal should impose strict limits on the number and length of any depositions allowed.”).

113. IBA Rules (2010), Foreword para. 2.

114. *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.”); R. von Mehren & C. 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. d’Allaire & R. Trittman, *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, 131 (2011).

115. See IBA Rules (2010), Art. 3.

arbitration and are generally recognized as “the international standard for an effective, pragmatic, and relatively economical document production regime.”¹¹⁶ Short of adopting the IBA Rules, the parties frequently provide that the tribunal should be “guided” by them,¹¹⁷ allowing a tribunal to maintain its discretionary powers over the disclosure process, while providing a suggested framework for the disclosure process.¹¹⁸

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.¹¹⁹

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.¹²⁰ This is consistent with the expectations of most parties in international arbitration.¹²¹ The only limitations to the tribunal’s authority are the parties’ arbitration agreement as well as principles of procedural fairness and due process.¹²²

116. See N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.107 at 393 (Oxford University Press 2009).

117. See IBA Rules (2010), para. 5. Even where the arbitration agreement does not reference the IBA Rules, parties and tribunals regularly refer to them for guidance. See J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 278 (J. Carter & J. Fellas eds., Oxford University Press 2010).

118. See D. d’Allaire & R. Trittman, *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, 132 (2011).

119. See D. d’Allaire & R. Trittman, *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, 125 (2011).

120. See G. Born, *International Commercial Arbitration* 1886 (Kluwer Law International 2009); J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 278 (J. Carter & J. Fellas eds., Oxford University Press 2010); 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.”).

121. See G. Born, *International Commercial Arbitration* 1886 (Kluwer Law International 2009).

122. See G. Born, *International Commercial Arbitration* 1886 (Kluwer Law International 2009); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.01 at 363 (Oxford University Press 2009).

[C] Overview of Tribunal’s Disclosure Powers as to Parties and Nonparties to Arbitral Proceedings

[1] Disclosure Powers as to Parties to Arbitral Proceedings

[a] Document Disclosure

Documents are an integral part of the evidence submitted in any arbitration.¹²³ 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.¹²⁴ Absent such agreement by the parties, however, section 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.¹²⁵

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.”¹²⁶ As for parties to the arbitration proceedings, this grant of authority is arguably narrower than that under the leading arbitral rules discussed above.¹²⁷ However, U.S. courts have generally interpreted section 7 of the FAA broadly and beyond its strict literal meaning. Several U.S. courts have held that arbitral tribunals sitting in the U.S. have broad implied powers to order whatever scope of document disclosure they consider appropriate and beyond strictly “material” information.¹²⁸ Further, U.S. courts generally interpret section 7 to

123. For a more detailed discussion of evidence categories in international arbitration, see, e.g., N. Blackaby et al., *Redfern and Hunter on International Arbitration* §§6.96-6.100 at 386 et seq. (Oxford University Press 2009); Julian M.D. Lew et al., *Taking Evidence in International Arbitration*, in *Comparative International Commercial Arbitration* §22-38 at 564 (Kluwer Law International 2003); G. von Mehren & C. Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer’s Guide*, 20(3) J. Int’l Arb. 285, 290-92 (2003).

124. See *supra* at s. I (B).

125. See D. d’Allaire & R. Trittman, *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, 122 (2011); A. Redfern, M. Hunter, N. Blackaby & C. Partasides., *Law and Practice of International Commercial Arbitration* §6-71 at 299 (4th ed., London: Sweet & Maxwell 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.”).

126. U.S. FAA, 9 U.S.C. §7.

127. See G. Born, *International Commercial Arbitration* 1886, 1896-99 (Kluwer Law International 2009).

128. 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 v. Viscount Indus. Co.*, 1993 WL 497967, at *4 (S.D.N.Y. Dec. 1, 1993) (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

enable a tribunal to order a party to the arbitration to disclose documents in advance of any hearing.¹²⁹

Commonly, a party will produce to the tribunal the documents on which it intends to rely at an early stage in the proceedings, often with its written statements.¹³⁰ This is relatively uncontroversial.¹³¹ Conversely, requests that a party produce additional documents made 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

- “[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. Jun. 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 Circuit and others have refused to apply contract-law concepts, such as the parol 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).
129. See, e.g., *Arbitration between Brazell v. Am. Color Graphics*, No. M-82 AGS, 2000 WL 364997, at *2 (S.D.N.Y. Apr. 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 s. 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 v. Viscount Indus. Co. Ltd.*, 1993 U.S. Dist. LEXIS 16903, No. 92 Civ. 9310, 1993 WL 49767, at *1 (S.D.N.Y. Dec. 1, 1993) (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).
130. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.101 at 390-91 (Oxford University Press 2009); G. von Mehren & C. Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer’s Guide*, 20(3) J. Int’l Arb. 285, 287 (2003); J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 280 (J. Carter & J. Fellas eds., Oxford University Press 2010); D. d’Allaire & R. 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, 122 (2011) 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 Art. 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.
131. 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 admissibility. For a more detailed discussion of questions of admissibility and burden of proof in international arbitration, see, e.g., N. Blackaby et al., *Redfern and Hunter on International Arbitration* §§6.89-6.95 at 386-88 (Oxford University Press 2009); G. von Mehren & C. Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer’s Guide*, 20(3) J. Int’l Arb. 290-92 (2003); Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §§22-44 et seq. at 565 (Kluwer Law International 2003).

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.¹³² The IBA Rules adopt the latter approach.¹³³ Under the IBA Rules, document requests are generally made after the parties' initial exchange of documents.¹³⁴ 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."¹³⁵ The production of electronic documents is discussed in detail in Chapter 16 on Electronic Discovery and International Arbitration.

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.¹³⁶ Further, the requesting party must state how the requested documents are "relevant to the case" and "material to its outcome."¹³⁷ 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.¹³⁸ The other party must then either produce the documents within the time indicated by the tribunal or state its objections.¹³⁹ 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.¹⁴⁰

Requests for production are generally made in form of a "Redfern Schedule," which crystallizes the issues in dispute to facilitate the tribunal's ruling.¹⁴¹ 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 requests may help avoid the need for a case management meeting, saving costs and reducing delays.¹⁴²

132. J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 280 (J. Carter & J. Fellas eds., Oxford University Press 2010).

133. IBA Rules (2010), Art. 3(2).

134. J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 280 (J. Carter & J. Fellas eds., Oxford University Press 2010); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §§6.108 at 394 (Oxford University Press 2009).

135. IBA Rules (2010), Definitions at para. 3.

136. IBA Rules (2010), Art. 3(3)(a).

137. IBA Rules (2010), Art. 3(3)(b).

138. IBA Rules (2010), Art. 3(3)(c).

139. IBA Rules (2010), Art. 3(4), 3(5). The reasons for objecting to production are set out in Arts 3(3) and 9(2) of the IBA Rules.

140. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §§6.111-6.112 at 395 (Oxford University Press 2009); D. d'Allaire & R. Trittman, *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, 122 (2011).

141. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §§6.113-6.116 at 395-96 (Oxford University Press 2009).

142. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.116 at 396 (Oxford University Press 2009).

[b] *Witness Testimony*

Witness testimony is another key element of evidence submitted in an arbitration.¹⁴³ 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.¹⁴⁴ Similar to documentary evidence, the IBA Rules provide that each party “identify the witnesses on whose testimony it intends to rely.”¹⁴⁵ 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.¹⁴⁶ Each party and the tribunal may request the presence of party witnesses at the hearing, and ultimately the tribunal has authority to decide whether, how, where and when witnesses may be examined.¹⁴⁷ Tribunals frequently issue a procedural order on the way in which witness examination will take place.¹⁴⁸ 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).¹⁴⁹ Similarly, most institutional rules are silent on this

143. 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 Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §§22-80 et seq. at 575-578 (Kluwer Law International 2003); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §§6.152 et seq. at 406-410 (Oxford University Press 2009). A detailed discussion of expert witnesses is beyond the scope of this Chapter.

144. See Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §22-62 at 570 (Kluwer Law International 2003).

145. IBA Rules, Art. 4(1); see also LCIA Rules, Art. 20.1; ICDR Rules, Art. 20(2); CPR Rules (2007), Art. 12(1)(e).

146. See IBA Rules, Art. 4(4); LCIA Rules, 20.3; ICDR Rules, Art. 20(5); CPR Rules (2007), Commentary on Individual Rules, Art. 12; UNCITRAL Rules, Art. 27(2); see Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §22-66 at 571 (Kluwer Law International 2003); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.137 at 401-402 (Oxford University Press 2009); G. von Mehren & C. Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer's Guide*, 20(3) J. Int'l Arb. 285, 286-87 (2003). The IBA Rules set forth details as to the form and contents of a witness statement. IBA Rules, Art. 4(5).

147. See IBA Rules, Art. 8(1); LCIA Rules, Art. 20.4; see also Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §§22-66 et seq. at 571-72 (Kluwer Law International 2003); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.96 at 387-88 (Oxford University Press 2009); G. von Mehren & C. Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer's Guide*, 20(3) J. Int'l Arb. 285, 288 (2003).

148. See Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §§22-69-22-70 at 572-73 (Kluwer Law International 2003).

149. See G. Born, *International Commercial Arbitration 1900-1901* (Kluwer Law International 2009). Notably, in international arbitration, any person (including party employees, officers and directors) may testify as a witness. See Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §§22.65 at 571 (Kluwer Law International 2003); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.141 at 403-404 (Oxford University Press 2009) (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

issue.¹⁵⁰ 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.”¹⁵¹ This is uncontroversial.¹⁵²

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.¹⁵³ 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.”¹⁵⁴ Most arbitral rules and national laws, however, are silent on this issue.¹⁵⁵ 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.¹⁵⁶

courts of these countries a party can be heard—the rule merely forbids them from being categorized as witnesses.); see also IBA Rules, Art. 4(2); LCIA Rules, Art. 20.7.

150. See, G. Born, *International Commercial Arbitration* 1900 (Kluwer Law International 2009). 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, Art. 4(8).
151. U.S. FAA, 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 G. Born, *International Commercial Arbitration* 1900-01 (Kluwer Law International 2009) (analogizing a tribunal’s power to order a party to produce documents within its control).
152. 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).
153. See G. Born, *International Commercial Arbitration* 1904-1905 (Kluwer Law International 2009).
154. CPR Protocol, Art. 2(c); see also Fed. R. Civ. P. 30, 31.
155. 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.”).
156. See G. Born, *International Commercial Arbitration* 1905 (Kluwer Law International 2009).

While not infrequent in domestic arbitrations in the U.S.,¹⁵⁷ depositions generally are considered inappropriate in international arbitration proceedings.¹⁵⁸ In international arbitrations with a U.S. nexus, parties may voluntarily agree to depositions. Tribunals, however, are unlikely to order party depositions in international arbitrations, including in proceedings seated in the U.S., when one party objects to them.¹⁵⁹ Nevertheless, 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.¹⁶⁰

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.¹⁶¹ On the other hand, requests for admission consist of a written request to admit the truth of any "discoverable" issue.¹⁶² 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.¹⁶³ In most international arbitration proceedings, however, interrogatories and requests for admission are infrequently used and likely inappropriate.¹⁶⁴

-
157. 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).
158. See G. Born, *International Commercial Arbitration* 1903 (Kluwer Law International 2009); J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 285 (J. Carter & J. Fellas eds., Oxford University Press 2010); 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 s. 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. Jul. 9, 2004); *Deiulemar Compagnia di Navigazione SpA v. M/V Allegra*, 198 F.3d 473, 479-480 (4th Cir. 1999); *Gresham v. Norris*, 304 F. Supp. 2d 795, 796 (E.D. Va. 2004).
159. See G. Born, *International Commercial Arbitration* 1903 (Kluwer Law International 2009); J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 285 (J. Carter & J. Fellas eds., Oxford University Press 2010).
160. See G. Born, *International Commercial Arbitration* 1904-05 (Kluwer Law International 2009).
161. See Fed. R. Civ. P. 33, and 26(b)(2). Answers to interrogatories are generally prepared by a party's counsel in writing.
162. See Fed. R. Civ. P. 36, and 26(b)(2).
163. See G. Born, *International Commercial Arbitration* 1902 (Kluwer Law International 2009).
164. See Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int'l 59, 62 (2002) (noting that the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules")—developed as a middle ground between common law systems (which favor liberal discovery) and civil law systems (which do

Tribunals also have the power to order a party to permit site or subject matter inspections.¹⁶⁵ Such inspections are rare though, and mostly occur in construction, engineering, and mining disputes, where a tribunal may have to evaluate the state of affairs or property.¹⁶⁶

[2] *Disclosure Powers as to Nonparties to Arbitral Proceedings*

The parties' agreement to arbitrate creates rights and obligations as between the parties (*inter partes*), but does not generally bind third parties to the arbitration.¹⁶⁷ As a result, a tribunal's 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 nonparties, even if they are in possession of potentially relevant (and material) information (whether in form of documents or personal knowledge).¹⁶⁸

not)—contain any provision for interrogatories); G. Born, *International Commercial Arbitration 1902-1903* (Kluwer Law International 2009); J. Gardiner, L. Haber Kuck & J. Bédard, *Discovery*, in *International Commercial Arbitration in New York* 269, 269 n. 1, 285 (J. Carter & J. Fellas eds., Oxford University Press 2010); 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.”).

165. See, e.g., UNCITRAL Model Law, Art. 24(2); IBA Rules, 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 Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §§22.93 at 579 (Kluwer Law International 2003); G. Born, *International Commercial Arbitration 1902-03* (Kluwer Law International 2009); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.173 et seq. at 411-413 (Oxford University Press 2009).

166. See Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §§22.93 at 579 (Kluwer Law International 2003).

167. See G. Born, *International Commercial Arbitration 1891* (Kluwer Law International 2009); (“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 parties’ arbitration agreement (and any institutional rules it incorporates) extend only to the parties to that agreement”); Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §22.57 at 569 (Kluwer Law International 2003) (“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”).

168. G. Born, *International Commercial Arbitration 1891, 1901* (Kluwer Law International 2009); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.17 at 399 (Oxford University Press 2009); *AT & T Technologies, Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986) (stating that since 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).

Hence, most arbitral rules only provide for the tribunal's disclosure power over the parties.¹⁶⁹ 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.¹⁷⁰ Notably, the tribunal may not itself order disclosure from a nonparty.

By contrast, a few arbitral rules specifically allow a tribunal to order nonparty disclosure.¹⁷¹ Article 11 of the CPR Rules does not expressly limit the tribunal's disclosure power to parties to the proceedings.¹⁷² 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 nonparties to the arbitration.¹⁷³ 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 nonparty 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 nonparty disclosure order by the tribunal is ultimately left to the local courts.¹⁷⁴ U.S. courts have confirmed that section 7 of the FAA “is the only source of the authority for the validity and enforceability of the arbitrators' subpoena [over a nonparty].”¹⁷⁵

169. 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 G. Born, *International Commercial Arbitration* 1988 n. 58 (Kluwer Law International 2009).

170. IBA Rules, 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., U.S. FAA, 9 U.S.C. §7; French Code of Civil Procedure, Art. 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).

171. 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).

172. CPR Rules, Art. 11.

173. CPR Protocol, Schedule 1, Mode C.

174. See, e.g., *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008) (holding with regards 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.’”).

175. See *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004); *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);

[a] Nonparty Disclosure at a Hearing

Contrary to most national arbitration laws, which limit the tribunal's authority to parties to the arbitration proceedings, section 7 of the FAA unequivocally provides that a tribunal may order "any person," including nonparties, to attend a hearing and give evidence in the form of documents or testimony at the hearing.¹⁷⁶ The tribunal's disclosure power over nonparties at a hearing—though unusual compared to other countries—is relatively uncontroversial for tribunals sitting in the U.S.¹⁷⁷ Conversely, where a nonparty to the arbitration proceedings refuses to comply with the tribunal's order, enforcement of the order can raise complex issues.¹⁷⁸

[b] Nonparty Disclosure Before a Hearing

U.S. courts are divided as to whether an arbitral tribunal may order a nonparty to produce documents *before* a hearing under section 7 of the FAA. The Sixth and Eighth Circuits as well as several lower federal courts in these and other circuits have held that section 7 authorizes arbitral tribunals to order pre-hearing document disclosure from nonparties to the arbitration.¹⁷⁹

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* New York City Bar Association, Obtaining Evidence from Non-Parties in International Arbitration in the United States 19 et seq. (July 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf> (last visited Dec. 10, 2013).

176. U.S. FAA, 9 U.S.C. §7 (emphasis added).

177. *See* G. Born, *International Commercial Arbitration* 1892 (Kluwer Law International 2009); N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.127 at 399 (Oxford University Press 2009).

178. *See infra* at s. III.

179. *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870-871 (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 s. 7); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988) (holding that under s. 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 "documents 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. Jul. 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 Cnty, Ltd.*, 879 F. Supp. 878, 881

In *Am. Fed. of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Comm. of Detroit, Inc.)*, 164 F.3d 1004 (6th Cir. 1999), 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.”¹⁸⁰ In *Security Life Insurance Company of America v. Duncanson & Holt, Inc. (In re Security. Life of America)*, 228 F.3d 865 (8th Cir. 2000), 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.¹⁸¹ 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.¹⁸²

On the other hand, the Second, Third, and Fourth Circuits as well as some lower federal courts follow a literal reading of section 7, mandating that nonparty document disclosure coincide with the nonparty’s attendance of a hearing.¹⁸³ In *COMSAT Corp. v.*

(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).

180. *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) (analogizing a labor arbitrator’s power under s. 301 of the Labor Management Relations Act of 1947 to an arbitral tribunal’s power under the FAA, which it did not apply).
181. *In re Arbitration between Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000); *but see Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 408-410 (3d Cir. 2004) (specifically rejecting the Eighth Circuit’s “power-by-implication analysis”).
182. *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 871 (8th Cir. 2000); *see also Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1993) (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 v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 217 (2d Cir. 2008).
183. *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, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406-07 (3d Cir. 2004) (“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 v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216-17 (2d Cir. 2008) (“[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. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995); *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 s. 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,

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.”¹⁸⁴ The court appears to have interpreted the phrase “before them” in section 7 of the FAA to require a merits hearing.¹⁸⁵ 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.”¹⁸⁶ The court also noted in dicta that a party may be able to obtain pre-hearing document disclosure from a nonparty upon making a showing of special need or hardship.¹⁸⁷ 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.”¹⁸⁸

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 section 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.”¹⁸⁹ The court rejected the argument that the tribunal’s power to order pre-hearing document disclosure from nonparties was implied in section 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 nonparties for pre-hearing document discovery.¹⁹⁰ The court noted that such literal reading of section 7 “actually furthers arbitration’s goal of ‘resolving disputes in a timely and cost efficient manner.’”¹⁹¹ Requiring nonparty 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 expand if an actual appearance before an arbitrator is needed.”¹⁹² Allowing pre-hearing document disclosure from nonparties would provide “less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some

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 New York City Bar Association, *Obtaining Evidence from Non-Parties in International Arbitration in the United States* 3 (July 2010) available at <http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf> (last visited Dec. 10, 2013).

184. *COMSAT Corp. v. Nat’l Science Found.*, 190 F.3d 269, 271, 275 (4th Cir. 1999).

185. *Id.* at 275.

186. *Id.* at 276.

187. *COMSAT Corp. v. Nat’l Science Found.*, 190 F.3d 269, 271, 276 (4th Cir. 1999); see also *Deiulemar Compagnia di Navigazione SpA v. M/V Allegra*, 198 F.3d 473, 479-481 (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. Jul. 9, 2004).

188. *Id.*

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

190. *Id.* at 407-09.

191. *Id.* at 409.

192. *Id.*

of the advantages of the supposedly shorter and cheaper system of arbitration.”¹⁹³ The court specifically noted that while efficiency considerations may play a role in interpreting section 7, “efficiency is not the principal goal of the FAA.”¹⁹⁴

Similarly, in *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, the Second Circuit held that section 7 did not authorize a tribunal to order pre-hearing document disclosure from nonparties.¹⁹⁵ 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.”¹⁹⁶ The court reasoned that this authority granted to the tribunal pursuant to the arbitral rules agreed upon by the parties was “binding only on the parties.”¹⁹⁷ Where the nonparty would not voluntarily comply, the court was bound to apply section 7 of the FAA, which—in its opinion—did not allow for pre-hearing disclosure from nonparties.¹⁹⁸ To require the presence of a nonparty at the hearing “forces the party seeking the non-party discovery—and the arbitrators authorizing it—to consider whether production is truly necessary.”¹⁹⁹ Both the Second and Third Circuits have rejected the “special need” exception suggested by COMSAT,²⁰⁰ while New York state courts seem to have adopted it, thus creating a conflict between federal and state courts in New York.²⁰¹

193. *Id.*

194. *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.”))

195. *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 218 (2d Cir. 2008).

196. *Id.* at 216.

197. *Id.* at 218.

198. *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 865, 870-71 (8th Cir. 2000) (noting that s. 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. 42, 45 (M.D. Tenn. 1994) (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*. at 218.

199. *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 218 (2d Cir. 2008).

200. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004) (finding “no textual basis for allowing any ‘special need’ exception”); *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216 (2d Cir. 2008).

201. *ImClone Sys. v. Waksal*, 22 A.D.3d 387, 388 (N.Y. App. Div. 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 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

This split among circuit courts undermines uniformity in the application of the FAA.²⁰² Unless Congress clarifies the meaning of section 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 section 7 of the FAA, precluding tribunals from ordering pre-hearing document disclosure from nonparties, 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 section 7 “does not leave arbitrators powerless’ to order” nonparty document production.²⁰³ Other courts have held that section 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.²⁰⁴ Some commentators have criticized this approach.²⁰⁵ In addition, the unambiguous language of section 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

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. v. Waksal*, 22 A.D.3d 387, 388 (N.Y. App. Div. 1st Dep’t 2005) (“[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.”).

202. 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).
203. *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 218 (2d Cir. 2008) (quoting *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413 (3d Cir. 2004) (Chertoff, J., concurring)).
204. *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).
205. 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.”).

as the nonparty appears and produces the requested documents.²⁰⁶ Ultimately, the “inconvenience of making a personal appearance” may lead a nonparty to “deliver the documents and waive presence.”²⁰⁷

To ease the burden and costs of such hearings intended mainly to obtain document disclosure from nonparties, some commentators have suggested the use of telephone or video conferencing technology, allowing the hearing participants to “virtually appear” before the tribunal.²⁰⁸ Others have asked for an amendment of section 7 of the FAA to eliminate the requirement of a hearing for production of documents from nonparties.²⁰⁹

[c] Nonparty Deposition Before a Hearing

Even if a tribunal may order pre-hearing document disclosure of a nonparty under section 7 of the FAA, the same is not necessarily true for pre-hearing nonparty 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 nonparties under section 7 of the FAA.²¹⁰ As the U.S. District Court for the Southern District of New York explained:

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

-
206. See *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413 (3d Cir. 2004); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008); *Alliance Healthcare Serv., Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).
207. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008) (quoting *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413 (3d Cir. 2004)).
208. 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, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) (interpreting the phrase “before them” in s. 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).
209. See, e.g., New York City Bar Association, *Obtaining Evidence from Non-Parties in International Arbitration in the United States* 26-28 (July 2010) available at <http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf> (last visited Dec. 10, 2013).
210. 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. Jul. 17, 2003); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995); *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 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. Jul. 9, 2004); *ImClone Sys. v. Waksal*, 22 A.D.3d 387, 388 (N.Y. App. Div. 1st Dep't 2005); *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).

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.²¹¹

In addition, because depositions are not held before the tribunal, nonparties may not be protected from harassing or abusive discovery.²¹² Notably, both the Sixth and the Eighth Circuits declined to reach the issue of a tribunal's power to order nonparty depositions.²¹³

Very few courts have held that a tribunal may order pre-hearing depositions of nonparties under section 7 of the FAA,²¹⁴ and most of these cases did not concern international arbitration proceedings. In any case, as discussed above, depositions—whether of a party or nonparty—are generally considered inappropriate in international arbitration proceedings.

[D] Tribunal's Power to Draw 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.²¹⁵ The IBA Rules provide 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 an order by the tribunal to produce.²¹⁶ Tribunals have required additional showings before drawing adverse inferences, such as that the requesting party itself produced material evidence as required, that the

211. *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995); see also *In re Meridian Bulk Carriers, Ltd*, No. 03-2011, 2003 U.S. Dist. LEXIS 24203, at *4 (E.D. La. Jul. 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).

212. *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995).

213. *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).

214. See *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1243 (S.D. Fla. 1988) (holding that s. 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).

215. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.129 at 398-399 (Oxford University Press 2009); Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §22-47 at 566 (Kluwer Law International 2003); G. Born, *International Commercial Arbitration* 1919-21 (Kluwer Law Arbitration 2009).

216. IBA Rules, Art. 9.5, 9.6; see also ICDR Guidelines, §8(b); UNCITRAL Model Law, Art. 25(c).

requested inference is reasonable, supported by prima facie evidence and consistent with the evidentiary record, and that the nonproducing party was aware of the possibility of adverse inferences.²¹⁷

U.S. courts recognize a tribunal's power to draw adverse inferences.²¹⁸ It is for the tribunal to decide whether an explanation that the requested evidence does not or no longer exists is satisfactory.²¹⁹ The tribunal's adverse inferences should be based on a reasonable factual analysis and take into account the importance of the issues and the nature of materials requested and not disclosed.²²⁰ However, one commentator notes that tribunals are "often overly hesitant" to draw adverse inferences, which can lead to a denial of justice.²²¹

Alternatively, the tribunal may impose sanctions against the noncompliant 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 U.S. COURTS MAY PROVIDE TO DISCLOSURE IN INTERNATIONAL ARBITRATION PROCEEDINGS

Most disclosure in international arbitration proceedings occurs within the context of the arbitration and under the control of the tribunal.²²² Yet, at times, the tribunal and

217. G. Born, *International Commercial Arbitration* 1920 (Kluwer Law Arbitration 2009).

218. 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 v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 217 (2d Cir. 2008) (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.").

219. N. Blackaby et al., *Redfern and Hunter on International Arbitration* §6.130 at 400 (Oxford University Press 2009) (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).

220. G. Born, *International Commercial Arbitration* 1920 n. 205 (Kluwer Law Arbitration 2009) (noting that a tribunal should not exercise punishment by drawing adverse "punitive inferences").

221. G. Born, *International Commercial Arbitration* 1920 (Kluwer Law Arbitration 2009) (noting that a tribunal should not exercise punishment by drawing adverse "punitive inferences").

222. G. Born, *International Commercial Arbitration* 1922-23 (Kluwer Law Arbitration 2009).

the parties may wish to seek judicial assistance in accordance with national laws in obtaining disclosure.²²³ 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 U.S., courts may provide judicial assistance to the tribunal in enforcing a disclosure order.²²⁴ 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.²²⁵

Thus, section 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.²²⁶ These limitations are interrelated as both the service and enforcement of subpoenas by federal courts are governed by Rule 45 of the Federal Rules of Civil Procedure, which thus in turn governs the service and enforcement of a tribunal's disclosure order.²²⁷

Under Rule 45(b)(2) "a subpoena may be served at any place (A) within the district of the court by which it is issued, [or] (B) at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or

223. G. Born, *International Commercial Arbitration* 1922 (Kluwer Law Arbitration 2009).

224. Such order can take the form of an interim or partial award or a mere procedural order. See Julian M.D. Lew et al., *Comparative International Commercial Arbitration* §22-53 at 568 (Kluwer Law International 2003). While final awards are generally enforceable under the New York Convention, a tribunal's procedural order is not normally enforceable. *Id.* §22-58 at 569 (Kluwer Law International 2003); 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 (nonparty) 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 Corp. v. Nat'l Science Found.*, 190 F.3d 269, 271, 276 (4th Cir. 1999).

225. U.S. FAA, 9 U.S.C. §7.

226. U.S. FAA, 9 U.S.C. §7.

227. *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).

inspection specified in the subpoena”²²⁸ 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 not validly be served due to these geographical limitations.

In addition, section 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. Consequently, even if the third-party witness was ordered to produce documents in California (in compliance with the service requirement under Rule 45(b)(2)(B)), the federal district court in New York would lack personal jurisdiction over the third-party witness in California to enforce it. Thus, section 7 of the FAA appears to authorize the issuance of some subpoenas by a tribunal that cannot be enforced.

Several courts have recognized that section 7 of the FAA read in conjunction with Rule 45 of the Federal Rules of Procedure leave such an “enforcement gap,” but consider that it is not for the courts (but Congress) to fill it.²²⁹ Yet, to “bypass” this gap some courts have suggested holding a special “document production hearing” with the majority of the arbitrators at the nonparty’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 that would not otherwise be subject to the subpoena at the arbitral seat specified in the arbitration agreement.²³⁰ Some commentators have called for an amendment of Rule 45 of the Federal Rules of Civil Procedure

228. Fed. R. Civ. P. 45(b)(2)(A), (B). Rule 45 also provides that a subpoena must be issued “from the court for the district where the hearing or trial is to be held” or “where the production or inspection is to be made.” Fed. R. Civ. P. 45(a)(2)(A), (C).

229. See, e.g., *Alliance Healthcare Servs. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 813 (N.D. Ill. 2011) (refusing to enforce subpoena issued by tribunal seated in Chicago, Illinois for production of document and attendance at hearing in San Francisco, California); *Dynega 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 nonparties 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 s. 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. v. John Hancock Mut. Life Ins. Co.*, 33 Fed. Appx. 26, 27-28 (3d Cir. 2002) (holding that a district court in Pennsylvania cannot enforce an arbitration subpoena directed to a nonparty in Florida).

230. 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 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 nonparty 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

to close this gap.²³¹ However, relocating the hearing may be a time-consuming and costly task, and may be met with resistance from the opposing party.²³²

Other courts have held that the territorial limits of service or process and thus personal jurisdiction do not apply to the enforcement of a subpoena under the FAA.²³³

Finally, at least one court read section 7 of the FAA and Rule 45 of the Federal Rules of Civil Procedure in a way that “plugged the gap.”²³⁴ In *Amgen v. Kidney Center of Delaware County*, 879 F. Supp. 878 (N.D. Ill. 1995), 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).²³⁵ This “compromise position” was rejected by the Second Circuit and a subsequent decision of the Northern District of Illinois because section 7 of the FAA only refers to the issuance of subpoenas “in the name of arbitrators,” not counsel.²³⁶

(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.

231. See Gunjan Sharma, *Proposed Amendments to Rule 45 of the Federal Rules of Civil Procedure May Expand the Territorial Scope of Arbitral Subpoenas Under Section 7 of the Federal Arbitration Act*, 27(6) Mealey’s Int’l Arb. Rep. 24, 24 (2012); New York City Bar Association, *Obtaining Evidence from Non-parties in International Arbitration in the United States 28-30* (July 2010) (recommending to amend s. 7 of the FAA to allow for enforcement of subpoenas under Rule 45(a)(3)(B) as applied in *Amgen*) available at <http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf> (last visited Dec. 10, 2013).
232. New York City Bar Association, *Obtaining Evidence from Non-Parties in International Arbitration in the United States 30* (July 2010) available at <http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf> (last visited Dec. 10, 2013); Teresa Snider, *The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act*, 34 Tort & Ins. L.J. 101, 101 (1998).
233. *SchlumgergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647, at *2 (D. Minn. 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. (In re Sec. Life Ins. Co. of Am.)*, 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, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413 (3d Cir. 2004) (holding in *dicta* that the personal jurisdiction argument is “unconvincing”); L.M. Eddington & H.S. Suskin, *Enforcing Third-Party Discovery in Arbitration*, 37(2) Lit. News 2 (2012).
234. U.S. District Court for the Northern District of Illinois. See *Amgen, Inc. v. Kidney Ctr of Delaware Cnty*, 879 F. Supp. 878, 883 (N.D. Ill. 1995); *Alliance Healthcare Servs. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 812 (N.D. Ill. 2011).
235. *Amgen, Inc. v. Kidney Ctr of Delaware Cnty*, 879 F. Supp. 878, 882-883 (N.D. Ill. 1995).
236. *Dynega Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006); *Alliance Healthcare Servs. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 813 (N.D. Ill. 2011).

To minimize the enforcement risk of a tribunal's production order, when drafting the arbitration agreement parties should take into account the location of nonparties in possession of potentially important information when selecting the arbitral seat.²³⁷

[B] Judicial Assistance to a Party to Arbitral Proceedings 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.²³⁸ This makes section 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.²³⁹ Most courts have required a showing of "exceptional circumstances" to grant a party's request for judicial assistance with evidence taking.²⁴⁰ A party will have to show a compelling need for the evidence sought that would otherwise be unavailable and that the tribunal is not yet constituted or unable to obtain the evidence itself.²⁴¹ Other courts

237. See L.M. Eddington & H.S. Suskin, *Enforcing Third-Party Discovery in Arbitration*, 37(2) Lit. News 2 (2012); see also *Dynega Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006).

238. G. Born, *International Commercial Arbitration* 1929 (Kluwer Law Arbitration 2009).

239. See, e.g., IBA Rules, 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.").

240. 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 Deulemar 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 G. Born, *International Commercial Arbitration* 1930 (Kluwer Law Arbitration 2009); Friedland & Martinez, *Arbitral Subpoenas under U.S. Law and Practice*, 14 Am. Rev. Int'l Arb. 197, 205-06 (2003). 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 (N.Y. App. Div. 1st Dep't 1982); *Motor Vehicle Accident Indemnification Corp. v. McCabe*, 19 A.D.2d 349, 352 (N.Y. App. Div. 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, 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).

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); *Vespe Contracting Co. v. Anvan Corp.*, 399 F. Supp. 516, 522 (E.D. Pa. 1975) (retaining jurisdiction and permitting pretrial discovery to

have been less demanding, but emphasized that court-ordered disclosure should not delay the arbitration proceedings.²⁴² A significant number of federal and state courts have refused requests for court-ordered disclosure at the request of a party.²⁴³

IV CONCLUSION

International arbitration in the U.S. under section 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 nonparties to the arbitration. Even within the U.S., 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 U.S., the parties should carefully consider the likely locations of prospective witnesses or documents.

continue until parties have chosen arbitrator or arbitral panel); *see also* G. Born, *International Commercial Arbitration* 1930-31 (Kluwer Law Arbitration 2009) (noting that these decisions are "best understood as forms of court-ordered provisional measures in aid of arbitration").

242. *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* G. Born, *International Commercial Arbitration 1930-1932* (Kluwer Law Arbitration 2009) (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).
243. *See, e.g., Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (noting that s. 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]").