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Document Discovery in International Arbitration—Getting the Documents You Need

*Nathan D. O'Malley** and *Shawn C. Conway***

I. INTRODUCTION

For many American lawyers it is hard to imagine filing a lawsuit only to be told later that there will be no pre-trial discovery. Nevertheless, such is often the case in international arbitration, particularly outside of the United States. It can therefore come as a rude surprise to many practitioners of domestic litigation to find that their expectations for document discovery may not be realized.

For most of Europe, which draws its legal heritage from the civil law tradition, discovery as Americans understand it is considered intrusive, unnecessary, and unfair. In international arbitration, which borrows aspects of its procedure from both the civil and common law traditions, discovery is not allowed on a level comparable to what is standard within the American legal practice, if allowed at all.¹ To a very limited degree, international arbitral tribunals may order document production, but depositions, even of party witnesses, are almost never allowed.²

Litigation without discovery may be a world in which most American lawyers would prefer not to live. Yet, the reality of the global economy is that cross border business will continue to increase in the future. International arbitration, because of its speed, neutrality, and confidentiality, is the preferred method of dispute resolution for international commercial disputes, and thus it too will grow.³ Therefore, the likelihood of being confronted with international arbitration for even those lawyers who have domestic commercial practices is growing.

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1. There are various reasons for this. One commentator suggests that discovery procedures and the attendant disputes are contrary to one of the core advantages of arbitration, namely the speed at which the process is to take place. Further noted is the tribunal's lack of coercive power to investigate and force compliance with discovery orders, which can also be an impediment to discovery in many jurisdictions. MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION LAW AND PRACTICE* 675 (2d ed. 2001).

2. The authors will explore discovery requests within the arbitration procedure itself in section III.

3. This growth is demonstrated by the steady rise in cases coming before International Chamber of Commerce ("ICC") arbitral tribunals, just in the past three years alone. See ICC Statistics for 2000-02, available at http://www.iccwbo.org/court/english/right_topics/stat_2002.asp.

II. THE PROBLEM

Certainly anyone who enters an international arbitration with large claims but insufficient documentation to support them is not in an enviable position.⁴ Nevertheless, there are various ways in which a party may go about getting the documentary evidence that is needed. These methods can be distinguished between those that are available within the arbitration process, which is to say pursued with the consent and involvement of the arbitral tribunal, and those that require a party to go outside the confines of the arbitration to the courts. This article will review the various methods for compelling document disclosure in connection with international arbitration. Other methods of discovery (e.g. interrogatories, depositions, etc.) will only be discussed as they relate to document discovery.

III. WITHIN THE ARBITRATION PROCESS

Arbitral tribunals are allotted a wide berth when making procedural rulings.⁵ In the absence of a direct reference to a procedural law in the arbitration clause or other specific agreements between the parties, tribunals are free to choose which principles or rules they will apply. The only constraints that are generally laid upon tribunals are the rules of the arbitration as dictated by the administering institution, or the mandatory law of the seat of arbitration.

A. Arbitration Rules

When it comes to the issue of document discovery, the rules of the prominent arbitration institutions and the United Nations Commission on International Trade Law rules for ad hoc arbitrations give little guidance.⁶ Under such rules, parties may be obligated to provide documents upon which they rely, and arbitrators are given the right to ask for a party to provide additional evidence. Tribunals such as those of the International Chamber of Commerce (“ICC”), are also given the power to request parties to provide additional evidence.⁷ Therefore,

4. This is especially true for arbitrators from a civil law tradition (such as continental Europe) who place much more reliance on contemporary documents than witness statements made in arbitral proceedings.

5. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 301 (3d ed. 2000). “The arbitral tribunal’s discretion to make procedural rulings is wide, and even more so where no national procedural law principles are referred to.” *Id.*

6. The ICC Rules referee to the ability of the tribunal to study all documents that the parties have relied upon in making their submissions, thus implying the right of the tribunal to have a party produce all documents which a party may cite, or rely on. International Chamber of Commerce, Rules of Arbitration, art. 20(2) [hereinafter ICC Rules], available at <http://www.iccwbo.org/court/english/rules/rules.asp>. See London Court of International Arbitration, LCIA Rules, art. 15(6), available at <http://www.lcia-arbitration.com/arb/uk.htm> (similarly providing that statements shall be accompanied by all essential documents relied upon, as well as relevant samples and exhibits).

7. ICC Rules, *supra* note 6, art. 20(5).

a tribunal may require a party to produce documents in addition to those on which they have already chosen to rely. Nevertheless, this does not give guidance as to whether a party can compel document production from his adversary, or what standard of review is applied to such a request.

The mandatory law of a jurisdiction is likewise typically of little help on this question. Most prominent seats of arbitration do not have mandatory law with regard to the issue of discovery, and thus do little to answer the question.⁸

Absent any reference to procedural law in the contract clause governing the arbitration, the arbitrators are thus left with discretion on this point. Many would argue that an arbitral tribunal's concern for ensuring a basic measure of equity requires it to take into account the expectations of the parties. A party from a civil law jurisdiction typically has little or virtually no experience with (much less expectation of) discovery. On the opposite end of the spectrum most American parties usually assume discovery to be entirely appropriate.⁹ Thus, on this critical point, a tribunal may be forced to seek a compromise.

B. IBA Rules of Evidence

What has been hailed by some commentators as the middle ground was developed in 1999 by the International Bar Association ("IBA") in the form of the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules of Evidence"). These rules are designed to be applied within the setting of international arbitration (either by agreement of the parties or on the initiative of the arbitrators). Regarding document discovery, the IBA Rules of Evidence allow parties to request certain documents from opposing parties during the arbitration.¹⁰ However, compared to Rule 26(b) of the U.S. Federal Rules of Civil Procedure,¹¹ Article 3(3) of the IBA Rules of Evidence requires a party's document requests to be more limited in scope. Requests for a category of documents must be narrowly defined, their relevancy explained, and

8. As an example, the Swiss Private International Law Act does not provide any provisions for the taking of evidence. Robert Briner, *Switzerland*, in *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* VOL. III 22 (Apr. 2003). Some authors suggest that United States case law imposes an affirmative duty on arbitrators to insure the exchange of all relevant documents between the parties. Nevertheless, this appears mainly with regard to maritime arbitration and even there, a failure to require discovery does not provide grounds for setting aside an award. See Bruce A. McAllister & Amy Bloom, *Evidence in Arbitration*, 34 J. MAR. L. & COM. 35, 38 (2003).

9. Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, 18 *ARB. INT'L* 59, 60 (2002). "Americans tend to expect that liberal discovery will be available after the case is commenced, and may find themselves at loggerheads with a civil law opponent whose idea of liberal discovery would be to allow one party to obtain from the other a signed copy of a document of which the requesting party has only an unsigned copy." *Id.*

10. Int'l Bar Assoc. Rules of Evidence, art 3(2), available at <http://www.ibanet.org> [hereinafter *Rules of Evidence*].

11. Under the U.S. Federal Rules of Civil Procedure, document requests are valid so long as such requests are, "reasonably calculated to lead to discovery of admissible evidence." FED. R. CIV. P. 26 (6).

justification given for why it is presumed the opposing party would possess such documents.¹² Furthermore, requests for document discovery must be submitted to the tribunal, not the opposing party.

Document requests under these rules should be narrowly tailored to specific issues. It is clear that the intention behind the rules is to allow a party who is fairly certain that there are vital and specific documents in his adversary's possession to request them. The IBA Rules of Evidence are thus not an effective tool for parties hoping to find substantiation for a potential legal theory. The IBA Working Party took specific note of this in their commentary, "Expansive American or English style discovery is generally inappropriate in international arbitration."¹³

An illustrative example of how rules such as those developed by the IBA are implemented is the procedural decision in an International Center for Settlement of Investment Dispute ("ICSID") arbitration entitled *ADF Group Inc. v. United States of America*. In this case, the arbitral tribunal analyzed a request for documents using a formula similar to that found in the IBA Rules of Evidence.¹⁴ The investor party, ADF Group, requested several categories of documents¹⁵ which the tribunal reviewed using a standard predicated on the "necessity" of these documents to the arbitration proceeding.¹⁶ In applying this standard, the panel stated that the first aspect of the analysis "relates to a substantive inquiry into whether the documents requested are relevant to, and in that sense necessary for, the purposes of the proceedings where the documents are to be used."¹⁷ The tribunal rejected requests for which the investor failed to provide a specific explanation of how the documents would prove a factual point, as well as those requests in which documents were insufficiently identified (e.g. failing to name the dates for which the documents were sought, the exact government department from which they would come or the category or type of document sought). Furthermore, the tribunal also evaluated the requests on procedural grounds to determine whether the documents were sufficiently in the public domain and thus available to the requesting party through its own efforts.¹⁸

12. See *Rules of Evidence*, *supra* note 10, art. 3(3)(a)-(c).

13. IBA Working Party, *Commentary on IBA Rules of Evidence*, International Bar Association, at 5 (1999).

14. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1.

15. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Procedural Order No. 3, Concerning the Production of Documents.

16. ICSID Arbitration (Additional Facility) Rules, art. 41(2).

17. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Procedural Order No. 3, Concerning the Production of Documents.

18. "Where, however, the documents requested are in the public domain and equally and effectively available to both parties, we believe that there would be no necessity for requiring the other party physically to produce and deliver the documents to the former for inspection and copying." See *id.* ¶ 4.

This example demonstrates how narrowly document production requests can be construed by arbitral tribunals in international arbitration. Simply categorizing broad requests for records as they relate to specific issues within the case will often be regarded as overly broad by a tribunal. Requests for document production in international arbitration under rules such as the IBA Rules of Evidence must ideally have sufficient detail to show that the document exists and that it will prove a salient point.

Under the IBA Rules of Evidence, parties opposing requests for documents are given an opportunity to file their objections with the tribunal prior to issuance of any order for production.¹⁹ Specific objections to document production are listed in Article 9.2 of the Rules. For instance, insufficient relevance or materiality to the outcome of the case, professional privilege, and unreasonable burden to produce are recognized grounds for rejecting a request.²⁰

The IBA Rules of Evidence are not commonly referred to in contract arbitration clauses, but may nonetheless be proposed (by the parties or tribunal) during the organizational phase of the arbitration. In a broad sense these rules provide parties with a credible reference point for arguing that some discovery of documents should be allowed within the arbitration process. Of course it is better to have incorporated them in the arbitration clause to begin with, but if they are not included, the IBA Rules of Evidence's growing popularity and general acceptance within the world of international arbitration can be grounds to argue for their inclusion. It is not uncommon for tribunals to take the IBA Rules of Evidence *a la carte*, using them as a guide for determining requests for documents, but not adhering to them strictly.

IV. GETTING DOCUMENTS FROM THIRD PARTIES WITHIN THE ARBITRATION PROCESS.

In international arbitration the general rule with respect to third parties is that arbitral tribunals have no power over them.²¹ There are in some jurisdictions laws which will allow an arbitral tribunal to utilize the local courts to assist it vis-a-vis third parties.

A. *U.S. Federal Arbitration Act*

In the United States, the Federal Arbitration Act ("FAA") gives arbitral tribunals the right to summon third parties to appear and produce documents and

19. *Rules of Evidence*, *supra* note 10, art. 3(5).

20. *Id.* art. 9(2); *Commentary on IBA Rules of Evidence*, *supra* note 13, at 6.

21. See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 333 (2d. ed. 1991) (noting that a tribunal's power is derived from the parties contractual agreement to arbitration, although parties cannot grant authority over third parties).

other records which are deemed material to the tribunal at a hearing.²² This right is enforceable by the tribunal upon application to the United States District Court in the district in which the tribunal is seated.

It is possible that the FAA may allow a party the opportunity to seek potentially wide-ranging (U.S.-style) discovery from a third party. Nevertheless, it is subject to two restrictions. First, it only applies to those arbitrations in which the tribunal is seated within the jurisdiction of a U.S. court. Therefore, it would not apply to an arbitration taking place outside the borders of the United States. It also does not authorize a court to act on a letter rogatory from an arbitration panel sitting, for instance, in The Hague, The Netherlands. The second major restriction is that the only competent party that is able to make such an application for judicial assistance is the arbitration tribunal itself. Thus the tribunal will decide the extent of such a request, not a party.²³

Until recently, most courts consistently upheld the right of arbitration panels under the FAA to subpoena documents from third parties and require them to make documents available prior to a hearing for inspection by a party to the arbitration.²⁴ Recent decisions have qualified this position to some extent, however, quashing or modifying arbitrators' subpoenas that were deemed to put too great a burden upon the third party.²⁵

A recent case, *Comsat Corporation v. National Science Foundation*, decided by the Fourth U.S. Circuit Court of Appeals, is an example of such a restriction on a tribunal's authority to order pre-hearing discovery of documents under the FAA.²⁶ That case held that document discovery prior to the witness hearing is not implied within the FAA's grant of authority to the arbitration tribunal to issue subpoenas *ducus tecum*. Other circuits have taken the opposite approach. Most notably, the Eighth U.S. Circuit Court of Appeals ruled in a similar case that, "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant

22. Federal Arbitration Act, 9 U.S.C. § 7 (1947, as amended in 1951).

23. CAL. CIV. PROC. CODE §§ 1297.11-17.

24. *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *In re Arbitration Between Douglas Brazell v. Am. Color Graphics Inc.*, 2000 WL 364997 (S.D.N.Y. 2000). *Contra Comsat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999).

25. A district court in the Southern District of New York quashed a subpoena issued by an arbitral tribunal that summoned a third party to a pre-hearing deposition. The court found that pre-hearing depositions could place too great a burden on the non-party, and thus amended the subpoena to only require the third party to appear at the hearing for questioning. Of note, however, is that this court clearly indicated that the request for documents from a third party would not be considered to be burdensome. *In re Integrity Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995).

26. Citing the lack of explicit language authorizing, "pre-hearing" discovery within the FAA, the court stated, "Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery." *Contra Comsat Corp.*, *supra* note 24, at 275.

documents for review by a party prior to the hearing.”²⁷ Thus, the extent of a tribunal’s power to subpoena under the FAA is in flux at present.

If a subpoena requiring the pre-hearing production of documents may be disregarded by a third party, it is in the interest of the party who desires the documents to ensure that, once the documents are finally produced at the hearing, they be entered into evidence and usable in a later submission to the tribunal.

B. Uniform Arbitration Act

A similar law exists in U.S. states that have passed some form of the Uniform Arbitration Act (“UAA”), including California. This law empowers a California State Superior Court to issue a subpoena or otherwise “assist” an arbitral tribunal in the taking of evidence, in accordance with California’s rules on the taking of evidence.²⁸ The UAA is slightly different from the FAA in that the tribunal itself does not issue a subpoena and a party (with the tribunal’s approval) may make the application to the court.

C. U.K. Arbitration Act

In the United Kingdom, there is a legal avenue to document production available under the Arbitration Act of 1996, whereby a party, on its own, may issue a subpoena to a third party to produce documents relevant to the arbitration.²⁹ This subpoena may only be issued with the permission of the tribunal, but a party may pursue it in the courts on its own accord once that permission is granted.³⁰

A recent decision rendered in late November 2003 by the High Court of Justice, Commercial Court, *BNP Paribas & Ors v. Deloitte & Touche LLP*, has shown that the range of discovery that can be obtained under this article is rather narrow.³¹ The court ruled on an application under Article 43 of the Act which permits parties to use “the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.” The decision addressed the specificity required by the phrase “produce

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

28. CAL. CIV. PROC. CODE § 1297.271. “The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the superior court assistance in taking evidence and the court may execute the request within its competence and according to its rules on taking evidence. In addition, a subpoena may issue as provided in Section 1282.6, in which case the witness compensation provisions of Section 1283.2 shall apply.” *Id.*

29. Arbitration Act, UK ST 1996 c. 23 pt. I § 43(1).

30. *Id.*

31. *BNP Paribas & Ors v. Deloitte & Touche LLP*, 2003 EWHC 2874 (COMM) (Q.B. 28 November 2003), available at <http://www.courtservice.gov.uk/judgmentfiles/j2114/bnp-paribas.htm> [hereinafter BNP].

documents” in the Act.³² The subpoena in question identified a wide category of document discovery, requesting the third party to turn over, “notes, memoranda and/or other documents” relating to one of the central issues at bar.³³

The court found that such a document request was not appropriate under Article 43.³⁴ The court’s analysis distinguished between requesting documents for a general review by a party as to their relevance, which was not allowed under the Act, and requesting specific documents for the purpose of introducing them into the record as evidence of a relevant fact.³⁵ This distinction could be recast as simply the difference between requests based on a suspicion as to the existence and relevance of the requested documents, and those made with the knowledge that the documents sought exist and will constitute proof of a factual contention. Thus, the English courts have interpreted the scope of Article 43 as the latter, limiting significantly the reach of the 1996 Act in respect to potential document discovery.³⁶

D. Swiss Federal Arbitration Law / Hague Evidence Convention

Similarly, under the Swiss Private International Law Act of 1987, a tribunal seated in Switzerland may approach a competent national court to assist it in compelling a witness to give testimony.³⁷ The Swiss Act makes no reference to the production of documents, but it can be given extraterritorial effect if used in combination with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which also allows a party to request documents from a witness.³⁸ Under this treaty a Swiss court, pursuant to a request from a tribunal, could issue a Letter of Request requiring, for example, an American court to subpoena for questioning a witness found within its jurisdiction.³⁹ This witness could also be ordered to produce certain documents within his possession as Article 10 of the Convention allows an executing court, in this case an American one, to use the same rules that would be applied within its own internal proceedings.⁴⁰ The explanatory notes to the convention make specific reference to the power of a court to, “require him [the witness] to produce certain documents”

32. Arbitration Act, *supra* note 29, at 5.

33. *Id.* ¶ 6. *See* BNP, *supra* note 31.

34. “In summary, therefore, this is an application for the production of classes of documents as opposed to an application for the production in evidence of specific identified documents. Accordingly this is not an application which falls within section 43 because it was too widely framed.” *Id.* ¶ 14. *See* BNP, *supra* note 31.

35. *Id.* ¶ 6. *See* BNP, *supra* note 31.

36. What is also important to note is how this decision tends toward the attitude taken within the IBA Rules and in international arbitration in general regarding document requests.

37. Swiss Private International Law Act (1987), art. 184(2), 27 I.L.M. 37(1988).

38. The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, available at <http://www.hcch.net> (last visited January 20, 2004).

39. *See id.* art. 1.

40. *See id.* art 10.

if it is within the normal court procedure for that state.⁴¹ Thus, since a deposition witness may be required to produce certain documents in the United States, a court executing a Letter of Request may require the person to be questioned to also produce documentation in his possession. The Hague Convention may of course be used by any court sitting in a state that is a treaty signatory.

V. GOING OUTSIDE THE ARBITRATION

The avenues available for obtaining discovery within the arbitration process do provide some relief to parties needing documents crucial to their case. Nevertheless, such routes may not be sufficient for that party who needs the wider range of document production usually available under United States rules of discovery. To obtain such wide-ranging discovery within the context of international arbitration, it may be necessary to apply directly, without the involvement of the arbitration tribunal, to a U.S. court for assistance.

A. 28 U.S.C. Section 1782

Previously, a Federal statute offered one of the most unique and direct methods for a party in a foreign arbitration to seek discovery help from U.S. courts. Until the 1990s, U.S. law⁴² was interpreted to allow Federal district courts to order discovery in favor of a party involved in arbitration.⁴³ For example, in a 1994 decision, *In Re Application of Technostroyexport*, the U.S. federal court of the Southern District of New York held that the phrase “foreign tribunal” encompassed international arbitration tribunals. Thus, section 1782 could be used in assistance of international arbitration.⁴⁴

Section 1782 itself would warrant detailed discussion if it had not been for two recent decisions by the Second and Fifth Circuits ruling that the term “tribunal” does not include international commercial arbitration tribunals. The *NBC v. Bear Sterns* decision issued by the Second Circuit determined that the phrase “foreign or international tribunal,” based on the legislative history of section 1782, did not include private arbitration tribunals, and in this particular

41. Philip W. Amram, *Explanatory Report on the 1970 Hague Evidence Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, available at <http://www.hcch.net>.

42. See 28 U.S.C. § 1782 (labeled “Assistance to foreign and international tribunals and to litigants before such tribunals”).

43. See, e.g., *Application of Malev Hungarian Airlines*, 964 F.2d 97, 101 (2d Cir. 1992), *cert. den'd.*, 113 S. Ct. 179 (1992).

44. *In re Application of Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994). The court, however, decided that the request should be denied, because the request to the district court had not been accompanied by a ruling from the arbitral tribunal authorizing the party to approach the district court and seek the discovery order. This requirement, however, does not appear within the language of 1782, as the section also allows “interested parties” to approach the courts in order to obtain discovery. *But see Eco Swiss v. Timex Corporation*, 944 F. Supp. 134 (D. Conn. 1996) (requiring no such procedure).

case, an International Chamber of Commerce arbitral tribunal.⁴⁵ The court gave this interpretation despite the fact that the reporter to the Advisory Committee of the U.S. Commission on International Judicial Assistance in 1963, which drafted and submitted section 1782, has stated in more than one article that the word tribunal clearly encompasses private arbitral tribunals.⁴⁶ Nevertheless, this decision and the Fifth Circuit decision following it, has closed the door in at least certain regions of the United States on section 1782's availability to international commercial arbitration.

B. U.S. Uniform Laws

This does not mean, however, that such assistance is not available from U.S. state courts. There are a few state laws that may grant essentially the same possibilities to parties to international arbitrations as section 1782. Two uniform acts that have been enacted by some states bearing directly on this issue are the Uniform Interstate and International Procedure Act ("UPA") and the Uniform Foreign Deposition Act ("UFDA").

One of the few states which enacted the UPA is Pennsylvania, which did so under the caption, "assistance to tribunals and litigants outside this Commonwealth with respect to depositions." The relevant portion states as follows:

(a) General rule—A court of this Commonwealth may order a person who is domiciled or is found within this Commonwealth to give his testimony or statement or to produce documents or other things for use in a matter pending in a tribunal outside this Commonwealth. The order may be made upon the application of any interested person or in response to a Letter Rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this Commonwealth, for taking the testimony or statement of producing the documents or other things.⁴⁷

Pennsylvania has some of the few reported precedents that apply the Act in support of international arbitration. The first case is *Quijada v. Unifruiti*.⁴⁸ In that case, a Pennsylvania court of common pleas was asked to grant the application of a Chilean farmer for a subpoena seeking discovery against an American company. The arbitration proceedings took place in Chile. In deciding the case, the court observed that "Chilean arbitrators are expected to 'judge' (or

45. *NBC v. Bear Stearns & Co. Inc.*, 165 F.3d 184, 188-97 (2d Cir. 1999).

46. Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT'L ARB. 153, 155 (1997).

47. 42 PA. CONS. STAT. ANN. § 5326 (Purdon 1976).

48. *Quijada v. Unifruiti of Am. Inc.*, 12 Pa D. & C.4th 225 (1991).

adjudicate) disputes” in the same manner as a Chilean court.⁴⁹ Further, relying on the official comment to the UPA, the court took note that the word “tribunal” encompasses any “body performing a judicial function.”⁵⁰ Thus, in the court’s assessment, the Chilean arbitrator was the functional equivalent of a “foreign tribunal.”⁵¹ Accordingly, the application for the discovery order was approved.

The *Quijada* decision was followed in 2003 by another Pennsylvania trial court in a similar application. The 2003 decision granted a Dutch company’s application to obtain documents from a third party for use in an ICC arbitration in Geneva. This decision ordering the production of the requested documents is unpublished.

Although the *Quijada* decision was at the trial court level, it is the only reported case which discusses the interaction between the UPA and arbitration. Thus, the only known case law indicates that the UPA does apply to arbitration proceedings in general and international arbitration in particular. Therefore, for international arbitration outside of the United States, should a third party or the opposing party itself (as was the case in *Unifruiti*) be located within a jurisdiction that has enacted the UPA, that party could potentially use full American style discovery within the international commercial arbitration proceedings regardless of where the hearings are held. The tribunal need not be involved in the application process.

Another alternative avenue to discovery is the UFDA. Again, like the UPA, this is uniform law that has not enjoyed widespread adoption by state lawmakers. Nevertheless, it is found in a number of states, including New York, where it has been enacted as follows:

Action pending in another jurisdiction. When under any mandate, writ or commission issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement, it is required to take the testimony of a witness in the state, he may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state. The supreme court or a county court shall make any appropriate order in aid of taking such a deposition.⁵²

In New York, this statute has been successfully used by a party to arbitration to secure a trial court order for discovery.⁵³ The Appellate Division upheld the lower court’s order, and stated that a court does not abuse its discretion in

49. *Id.* at 228, n. 7.

50. *Id.*

51. *Id.* at 228.

52. N.Y. CIVIL PRACTICE LAW § 3102(e) (McKinney 1962); CAL. CODE CIV. PROC. § 2029.

53. *See, e.g.,* Hendler & Murray P.C. v. Lambert, 127 A.D.2d 820 (1987); Brian M. Cogan & David A. Sifre, *United States Federal Courts: No Longer Available to Compel Discovery in Connection with Non-United States Arbitrations*, 10 AM. REV. INT’L ARB. 19 (1999).

ordering discovery to aid an arbitration where the moving party demonstrates that the documents are required “to present a proper case to the arbitrator.”⁵⁴ Therefore, at least in New York, the door is open to arbitration parties wanting to use the Uniform Foreign Deposition Act in seeking discovery.

C. Federal Rules of Civil Procedure, Rule 27

Another possibility for obtaining discovery from a federal court in the United States has come about as a result of the creative application of another area of the Federal Rules of Civil Procedure, Rule 27, “Depositions Before Action or Pending Appeal.” This Rule provides for discovery in anticipation of any action being filed which is “cognizable in any court of the United States.”⁵⁵ This procedure is most commonly invoked by parties who are seeking to conduct depositions in anticipation of a federal court case. Indeed the statute only refers to obtaining testimony (not documents). Nevertheless, it has also been used by a chartering company who was initiating a maritime arbitration in London to obtain an order to retrieve documents and other evidence from a ship that was about to depart.⁵⁶ The Appellate Court affirmed the lower court’s granting of the subpoena *ducus tecum*.

In its analysis the Fourth U.S. Circuit Court of Appeals allowed the use of Rule 27 only where the applicant party demonstrated a “special need,” which is to say that the evidence sought is not available by other means.⁵⁷ The court also found that Rule 27 was applicable in this circumstance as it could be used in anticipation of a federal court proceeding authorized by Title 9, that is, a proceeding for the enforcement of an arbitration or other action related to arbitration.⁵⁸ Thus, it would appear that a Rule 27 application need not be filed before an arbitration request, but merely prior to any federal court proceeding related to the arbitration.

The application of this precedent is very narrow given the requirement to demonstrate a “special need.” Moreover, whether this case will be followed outside the Fourth Circuit is uncertain. Nevertheless, there is no reason why a party to an arbitration that is not maritime-related could not use it to discover documents if it met the “special need” standard. A party to an international arbitration may very well meet this standard if it shows that another party in

54. *Hendler & Murray P.C. v. Lambert*, 127 A.D.2d at 942.

55. *See also*, Fed. R. Civ. P. 26(6) (entitled “General Provisions Regarding Discovery; Duty of Disclosure”). The Netherlands offers a similar procedure to hear witnesses under oath in anticipation of legal proceedings. DUTCH CODE CIV. PROC., art. 186 *et seq.* This procedure is available even when the parties have agreed to submit all disputes to arbitration (DUTCH ARBITRATION ACT, art. 1022(3)), at least until the arbitration tribunal is composed (DUTCH ARBITRATION ACT, art. 1039). It has been used in connection with proceedings to be commenced abroad. However, it does not encompass the production of documents.

56. *Deiulemar Compagnia di Navigazione S.p.A. M/V v. Allegra*, 198 F.3d 473 (9th Cir. 1999).

57. *Id.* at 480-81.

58. *Id.* at 481-83.

possession of evidence is trying to move such evidence to a location where it could not be obtained by subpoena of an arbitrator under the FAA.

VI. CONCLUSION

One of the most common practical problems that parties (and their lawyers) confront in international arbitration is obtaining the documentary evidence necessary to establish their case. International arbitration rules are usually silent on, or leave to the tribunal's discretion, the extent a party may be compelled to disclose documents involuntarily. The IBA Rules of Evidence are a welcome tool to fill this vacuum, provided the parties agree to them or the tribunal adopts them. Outside of the arbitration process, however, there are a number of obscure procedures available in different jurisdictions in Europe and the United States that afford avenues for obtaining document discovery both from an opposing party and third parties. The case law applying these procedures in connection with international arbitration is rather limited, but continues to grow. Where crucial evidence is otherwise unavailable through arbitral rules, this case law can either make or break one's case.

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