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# Discovery

## Comparison Of Third-Party Discovery In Domestic And International Arbitration

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# Commentary

## Comparison Of Third-Party Discovery In Domestic And International Arbitration

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To establish claims and defenses in arbitral proceedings, parties may need or want to rely on documents or information in the possession of third-parties.

In domestic arbitrations in the United States, the Federal Arbitration Act ("FAA") has long empowered arbitral tribunals to "summon in writing any person to attend . . . as a witness and . . . bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."<sup>1</sup> Federal district courts enforce such subpoenas and may impose sanctions upon a recalcitrant third-party. Federal courts' interpretation of this power and its scope has profoundly affected the evidentiary powers of arbitral tribunals.

In contrast to the scheme that applies in U.S. domestic arbitrations, arbitral tribunals in other countries depend on applicable local rules to obtain evidence from third parties. But, as in the United States, the same tensions exist between a third-party's lack of consent to arbitration, judicial enforcement of

third-party discovery, and the practical and logistical realities of enforcing a subpoena when the tribunal's seat is far from the desired evidence. As discussed below, third-party discovery rules vary greatly across jurisdictions, and the governing law on this issue can be outcome determinative.

### I. Overview of the Right to Third-Party Discovery in U.S. Domestic Arbitration

#### A. Unifying Discovery in U.S. and International Arbitration

Although the mechanism to compel third-party discovery set forth in the FAA is well-established in domestic arbitration in the United States, it is less settled when a party to an international arbitration seeks to compel discovery from a third-party located in the United States. In 2022, the Supreme Court resolved a circuit split regarding whether international arbitral tribunals fall within the purview of "foreign or international tribunal[s]" under the federal statute upon which parties to international arbitrations previously relied to compel third-party evidence located in the United States, 28 U.S.C. § 1782(a).<sup>2</sup> In *ZF Automotive US, Inc. v. Luxshare, Ltd.*, the Supreme Court ruled that Section 1782(a) does not apply to non-governmental entities, such as arbitral tribunals, thereby preventing U.S. federal courts from providing evidentiary assistance to parties to international commercial arbitrations.<sup>3</sup>

Following that decision, the Ninth Circuit sought to fill the gap in proceedings falling under the Conven-

tion on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). In *Jones Day v. Orrick, Herrington & Sutcliffe, LLP*, one of the parties sought evidence from a California-based third-party in aid of an international arbitration seated in Washington, D.C. and governed by the FAA.<sup>4</sup> The Ninth Circuit enforced the arbitral summons on the ground that federal courts’ powers to assist domestic arbitral proceedings under the FAA also applies to international proceedings falling under the New York Convention.<sup>5</sup> Specifically, the court found that Section 203, which defines federal jurisdiction over arbitration under the New York Convention, incorporated Section 7 of the FAA.<sup>6</sup> Under the Ninth Circuit’s reading, third-party discovery in international arbitration governed by the New York Convention (whether based in the United States or not) follows the same rules that apply to domestic arbitrations set forth in Section 7.<sup>7</sup>

### B. Documents v. Testimony

Section 7 of the FAA mentions both the personal attendance of a witness to offer testimony, and the production of material evidence.<sup>8</sup> An arbitral tribunal may require a third-party to “bring with him or them” any such evidence.<sup>9</sup> But while compelling a witness to appear in person at an arbitration hearing is a well-recognized power, it is less settled whether an arbitral tribunal may compel a non-party to produce documents without a hearing.

U.S. Courts of Appeals have interpreted Section 7 in a variety of ways:

- The majority of Circuits have held that documents may only be subpoenaed in connection with a hearing, “in the physical presence of the arbitrator,” and require the witness to “hand over the documents at that time.”<sup>10</sup> But the arbitral tribunal can hold a distinct evidentiary hearing for this purpose, prior to any discussion of the merits.<sup>11</sup>
- The Fourth Circuit qualified this rule in *COMSAT Corp. v. National Life Science Foundation*, adding that “a showing of special need or hardship” may, “under unusual circumstances,” justify pre-arbitration discovery that would otherwise be impermissible under Section 7.<sup>12</sup>

- In *In re Security Life Insurance Co. of America*, the Eighth Circuit held that arbitral tribunals have an implicit power to “order the production of relevant documents for review by a party prior to the hearing.”<sup>13</sup> Lower courts in the Seventh Circuit have adopted the Eighth Circuit’s position.<sup>14</sup> A lower court in the Eighth Circuit further expanded the scope of an arbitrator’s authority, finding that arbitrators can compel a third-party to provide documents at a pre-hearing deposition organized by the tribunal.<sup>15</sup>
- The Sixth Circuit has declined to take a stance.<sup>16</sup>

### C. Geographic Reach of the Tribunal’s Subpoena Power

There is relative consensus as to the territorial limitations of a subpoena issued by an arbitral tribunal in the United States.<sup>17</sup> Although a subpoena may be served “at any place within the United States,”<sup>18</sup> a motion to compel must be filed “in the district in which the arbitrators are sitting.”<sup>19</sup>

Courts have, however, adopted different interpretations of where the arbitrators are “sitting,” which can change the scope of a tribunal’s subpoena powers. Most courts consider arbitrators to be sitting at the “seat” or the “place” of the arbitration, which is typically where the final arbitration hearing will take place.<sup>20</sup> Some have adopted a more expansive approach. For example, in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, the Third Circuit found that, if a witness is validly subpoenaed, a party may obtain discovery of documents physically located beyond the territorial limit.<sup>21</sup>

Taking a more flexible approach, in *Seaton Ins. Co. v. Cavell USA*, the U.S. District Court for the District of Connecticut held that nothing “prevents the parties to an arbitration agreement 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.”<sup>22</sup> The Sixth Circuit<sup>23</sup> and the Second Circuit<sup>24</sup> have likewise adopted this approach. As

mentioned above, the Ninth Circuit has determined that the district court located where venue lies under Section 1391 (typically, where the court has personal jurisdiction over a defendant), is a proper enforcement court under Sections 203 and 204 of the FAA.<sup>25</sup>

Notably, virtual proceedings typically cannot be used to expand the scope of an arbitral tribunal's subpoena powers. In *Broumand v. Joseph*, the Southern District of New York emphasized that "the site of the arbitration does not change simply because certain participants remotely access the proceedings from elsewhere."<sup>26</sup> Consistently, the Eleventh Circuit concluded that Section 7 requires "summoned non-parties to appear in the physical presence of the arbitrator as opposed to a video conference or teleconference."<sup>27</sup>

## II. Enforcement Mechanisms in International Arbitration

In the **United Kingdom**, there are two provisions of the Arbitration Act of 1996 (the "Act") that empower courts to compel third-party discovery: Section 43 (testimony and document production) and Section 44(2)(a) ("the taking of the evidence of witnesses").

- Section 43 of the Act applies when (1) the witnesses are located in the UK, (2) the arbitration hearing at which they must appear is being held in the U.K. (although the arbitration may be seated elsewhere), (3) the parties agree or tribunal authorizes the application,<sup>28</sup> and (4) the documents sought are specific and identifiable.<sup>29</sup>
- Section 44 of the Act provides courts the same power to compel witness evidence and to order evidence preservation in arbitration that they would have in litigation. These powers extend to witnesses located outside of the U.K. and arbitrations seated outside of the U.K., although U.K. courts may decline to compel such evidence if the courts where the arbitration is being held can do so. Unless there is an urgent need to preserve evidence, the moving party must obtain agreement of the parties or the tribunal's permission before seeking enforcement from a court.<sup>30</sup>

Applying Section 44(2)(a), a 2020 Court of Appeal (England and Wales) decision held that a third-party

witness, located in the U.K., could be compelled to testify in support of foreign arbitral proceedings.<sup>31</sup> In that case, the proceedings were held in New York and a key witness resided in England and was unwilling to travel to the U.S. The Court concluded that the witness could be deposed in the U.K. and the recording could be submitted to the arbitral tribunal for consideration. While the Court of Appeal did not take a position about third-party document productions, the High Court has previously held that courts cannot compel such productions under the Act.<sup>32</sup>

Under **Hong Kong** law, when arbitration proceedings are seated in Hong Kong, courts may "order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence."<sup>33</sup> Under this provision of the Hong Kong Arbitration Ordinance, which is based on Article 27 of the UNCITRAL Model Law, the arbitrator must grant a party leave to apply to the court prior to taking any action.<sup>34</sup> After receiving such leave, the moving party may seek an *ex parte* order compelling the production of non-party evidence from the Court of First Instance.<sup>35</sup> In contrast, parties to arbitrations seated outside of Hong Kong can only request an order requiring a party to preserve relevant and material evidence.<sup>36</sup>

The International Arbitration Act of **Singapore** grants the General Division of High Court broad power to order non-party witness testimony or document productions in aid of domestic or international arbitration at any party's request,<sup>37</sup> subject to trial evidentiary rules.<sup>38</sup> The High Court may not, however, grant interim measures for document discovery or interrogatories.<sup>39</sup>

In **Canada**, the Court of Appeal of Alberta also held that arbitral tribunals can apply (or grant leave for a party to apply) for an order compelling third-party discovery, to the extent permitted by court rules, in accordance with Article 27 of the UNCITRAL Model Law.<sup>40</sup> However, just as with domestic arbitrations, the tribunal itself cannot issue that order. Instead, the tribunal or a party must file an application for a competent court to issue the order.<sup>41</sup>

In **France**, the Civil Procedure Code provides for specific French state court judges to act in support of the arbitration, referred to as the *Juge d'appui*, or

“support judge.”<sup>42</sup> Unless otherwise stipulated to by the parties, the *juge d'appui* is the President of the Paris Tribunal Judiciaire.<sup>43</sup> With the arbitral tribunal's permission, the *juge d'appui* assists the parties in obtaining documents or evidence from third parties. Parties may seek leave from arbitral tribunals to apply to the *juge d'appui*, who sits in the French domestic courts, to compel evidentiary disclosures from third parties.<sup>44</sup> But while a court may issue a subpoena for documents held by third parties, third parties may not be compelled to testify in person before a tribunal.<sup>45</sup>

In practice, the feasibility of pursuing the above discovery options may be questionable: applying to a court can take time and may not be possible before important milestones in the arbitration (such as the merits hearing) occur. Nevertheless, it is useful to keep these options in mind, particularly when critical evidence is held by third parties.

## Conclusion

Arbitration's dependence on domestic legislation for mechanisms to obtain third-party discovery creates substantive and procedural challenges. The extent to which judicial assistance is needed to obtain discovery reflects legislative and policy support for arbitration, as well as each country's legal traditions. While arbitral proceedings can offer flexible, party-centered dispute resolution, the ability to obtain evidence from third parties varies greatly across jurisdictions and can be limited in some jurisdictions. A potential additional limit is whether parties have sufficient time and resources to seek third-party discovery. Parties should consider the potential future need for and ability to obtain third-party discovery when entering into arbitration agreements, selecting a forum for arbitration, and deciding whether and when to commence arbitration.

## Endnotes

1. 9 U.S.C. § 7.
2. *ZF Automotive U.S., Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022) (analyzing 28 U.S.C. § 1782(a)).
3. *Id.* at 633.
4. *Jones Day v. Orrick, Herrington & Sutcliffe, LLP*, 42 F.4th 1131 (9th Cir. 2022).
5. *Id.* at 1139. Interestingly, the Ninth Circuit also determined that it had authority to rule on this issue even though the arbitration was seated in Washington, D.C. because the summons was issued in a place where venue was available under 28 U.S.C. § 1391, and there was no dispute that the Northern District of California was a proper venue under § 1391, given that is Orrick's principal place of business.
6. *Id.* at 1136.
7. *Id.* at 1139 (“Recognizing and enforcing arbitration agreements includes facilitating the arbitration process and providing arbitrators—in both domestic and international arbitrations—with access to the ancillary actions and proceedings necessary to arrive at an arbitration award. This includes arbitral subpoenas and their enforcement.”).
8. 9 U.S.C. § 7.
9. *Id.*
10. *E.g., Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004); *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008) (“Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness.”); *see also CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 708 (9th Cir. 2017) (“[S]ection 7 of the FAA does not grant arbitrators the power to order third parties to produce documents prior to an arbitration hearing.”); *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159 (11th Cir. 2019) (“The FAA confers the power to compel a non-party to attend an arbitration hearing and bring documents, but is silent regarding the power to compel documents from non-parties without summoning the non-party to testify.”).
11. *Stolt-Nielsen SA v. Celanese AG* 430 F.3d 567, 577 (2d Cir. 2005).
12. 190 F.3d 269, 275–6 (4th Cir. 1999) (citing *Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980)).
13. 228 F.3d 865, 870–71 (8th Cir. 2000).

14. *See Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878, 880 (N.D. Ill. 1995) (citing *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994)) (“[I]mplicit is the power to compel testimony and documents for purpose of a hearing is the lesser power to compel such testimony and documents for purposes prior to hearing.”).
15. *Int'l Seaway Trading Co. v. Target Co.*, No. 0:20-mc-00086-NEB-KMM, 2021 U.S. Dist. LEXIS 31755, 2021 WL 672990 at \*4 (D. Minn. Feb. 22, 2021) (*appeal dismissed, Int'l Seaway Trading Co. v. Target Co.*, No. 21-2036, 2021 U.S. App. LEXIS 34777, 2021 WL 5365242 (8th Cir. June 30, 2021)).
16. *Symetra Life Ins. Co. v. Admin. Systems Research Co.*, *Int'l*, No. 21-2742, 2022 U.S. App. LEXIS 30996, 2022 WL 16730542 at \*5 (6th Cir. Nov. 7, 2022) (“We . . . decline to address whether pre-hearing discovery is otherwise permitted under [Section 7].”).
17. *See Legions Co. v. John Hancock Mut. Life Ins. Co.*, 33 F. App'x 26, 28 (2002); *see also Managed Care Advisory Grp., LLC*, 939 F.3d at 1157 (noting that Section 7 references Rule 45 of the Federal Rules of Civil Procedure).
18. Fed. R. Civ. P. 45(b)(2); *see also Managed Care Advisory Grp., LLC*, 939 F.3d at 1157.
19. *Managed Care Advisory Grp., LLC*, 939 F.3d at 1158.
20. *See Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 95 (refusing to compel a third-party to produce documents within 100 miles of its domicile, as the underlying arbitration was taking place in New York); *Ping-Kuo Lin v. Horan Cap. Mgmt., LLC*, No. 14 Civ. 5202(LLS), 2014 U.S. Dist. LEXIS 114631, 2014 WL 3974585, at \*2 (S.D.N.Y. Aug. 13, 2014) (refusing to compel a corporation with offices in Maryland and Florida to testify at a New York arbitration); *Rembrandt Vision Techs., L.P. v. Bausch & Lomb, Inc.*, No. 1:11-CV-2829-JEC, 2011 U.S. Dist. LEXIS 172498, 2011 WL 13319343, at \*4 (N.D. Ga. Oct. 7, 2011), *report and recommendation adopted* by U.S. Dist. LEXIS 172472, 2011 WL 13319422 (N.D. Ga. Oct. 28, 2011) (refusing to compel a third-party to testify before arbitrators sitting in the third-party's offices, as the arbitrators were sitting in New York).
21. *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 412 (3d Cir. 2004) (“Nothing in this language suggests that a witness who is subpoenaed to testify may not also be directed to bring documents that are not located within the territorial limits set out in Rule 45(b)(2).”).
22. No. 3:07-cv-356, 2007 U.S. Dist. LEXIS 104589, 2007 WL 9657277 at \*2 (D. Conn. Mar. 21, 2007).
23. *Symetra Life Ins.*, 2022 U.S. App. LEXIS 30996, 2022 WL 16730542 at \*4.
24. *Wash. Nat'l Co. v. OBEX Grp. LLC*, 958 F.3d 126, 140 (2d Cir. 2020) (“Whether the arbitrators were sitting in the Eastern District of Pennsylvania at another time or in connection with a separate summons is not relevant to our inquiry.”).
25. *Jones Day*, 42 F.4th at 1140-41.
26. 522 F. Supp. 3d 8, 23 (S.D.N.Y. 2021).
27. *Managed Care Advisory Grp., LLC*, 939 F.3d at 1161.
28. *See Arbitration Act 1996* § 3 (providing that the court may refuse to exercise its powers in aid of a foreign tribunal “if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland . . . makes it inappropriate to do so.”); *see also SQB v. QYP*, [2023] EWHC 2145 (Comm) at [26]–[27].
29. Arbitration Act of 1996 § 43(3).
30. Arbitration Act 1996 § 44(4) (“If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.”); *see also VTB Commodities Trading DAC v. JSC Antipinsky Refinery*, [2020] EWHC 72 (Comm) at [39] (holding that once

the urgency ceases, the notice and agreement requirements become applicable).

31. *A and B v. C, D, and E* [2020] EWCA Civ 409 at [35] (“[S]ection 44(2)(a) does give the court power to make an order for the taking of evidence by way of deposition from a non-party witness in aid of a foreign arbitration.”).

32. *Assimina Mar. Ltd. v. Pakistan Shipping Co.*, [2004] EWHC 3005 (Comm) at [12] (“These five types of order[s] do not include an order for disclosure by a non-party of documents relevant to an issue in the arbitration.”); *see also DTEK Trading SA v. Morozov*, [2017] EWHC 94 (Comm), distinguished by *A and B v. C, D, and E* [2020] EWCA Civ 409 at [53] and [57].

33. Hong Kong Arbitration Ordinance, No. 609 (2011) § 55(2).

34. *Vibroflotation AG v. Express Builders Co. Ltd.* [1994] 3 H.K.C 263, 267 (H.C.).

35. *Cf. Pat Bobby Ying Ho v. Hong Kong Solicitors Indem. Fund Ltd.*, [2004] 40 H.C.C.T. 5 (C.F.I.).

36. *See* Hong Kong Arbitration Ordinance, No. 609 (2011) § 45(2) (incorporating Article 17(2) of the UNCITRAL Model Law) and § 5(2) (excluding the application of § 55 for foreign arbitrations). ■

37. International Arbitration Act 1994 § 13 (Sing.).

38. International Arbitration Act 1994 § 13(4) (Sing.) (“A person must not be compelled . . . to produce any document which the person could not be compelled to produce on the trial of an action.”).

39. International Arbitration Act § 12(A)(2) (Sing.).

40. *Jardine Lloyd Thompson Canada Inc. v. SJO Catlin* (2006) ABCA 18 at [44] (Can. Al. C.A.).

41. *Cf. Link 427 Gen. P'ship v. His Majesty The King* [2023] ONSC 2433 at [7] (Can.) (denying an “application to enforce an interim procedural arbitral decision” directed against a non-party.).

42. Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1505 (Fr.).

43. C.P.C. art. 1505.

44. C.P.C. art. 1469.

45. Jean-Yves Garaud & Elisabeth Jung, *L'obtention ex parte d'un document en matière d'arbitrage [The Ex Parte Obtention of Documents in Arbitration]*, 1 REVUE DE L'ARBITRAGE [ARB. REV.] 15, 37 (2020). ■

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