

**NON-PARTY DOCUMENTS:
TECHNIQUES TO GET THEM IF YOU NEED THEM
MINSK, 22 SEPTEMBER 2017**

GARRIGUES

Joe Tirado

Partner, Co-Head of International Arbitration and ADR

Email: joe.tirado@garrigues.com

Tel.: +44 7557 868 952

ÍNDICE

1

Introduction

2

Can a party obtain the documents on its own?

3

National legal instruments

4

International legal instruments

5

Practice tips/Closing remarks

Introduction

GARRIGUES

introduction

- Document discovery between the parties is common place in international arbitration:
 - Virtually all national arbitration statutes recognize the parties' autonomy to reach an agreement on most aspects of disclosure
 - Arbitral tribunals generally enjoy wide powers to order the production of documents between the parties
- Yet, disclosure against third parties is a very different animal than disclosure between the parties because of the principle of privity of contract (and, in turn, of arbitration agreements)
- As such, as regards disclosure against third parties, we must note the following:
 - i. Third parties vis-à-vis an arbitration agreement are not bound by it
 - ii. Generally, arbitral tribunals lack enforcement powers of their own, and much less do they hold compulsion powers over third parties to the arbitration
 - iii. As a result, arbitral tribunals will (normally) lack power to compel the production of documents from third parties
- This means that disclosure against third parties in international arbitration can only be compelled if:
 - (a) a binding legal instrument allows for such possibility; and
 - (b) the judicial assistance of national courts where the documents can be found is forthcoming.

Can a party obtain the documents on its own?

Can a party obtain the documents on its own?

- **Does it make sense to request the documents directly to whoever keeps them?**
 - Would it be costly for the keeper of the documents to produce them?
 - Would it be in their interest or against their interest to produce the documents?
 - Is there a chance that the documents might 'vanish' after requesting them?
- **Obtaining the documents via corporate ties:**
 - Is the opposing party a publicly traded company with disclosure obligations?
 - Are you a shareholder of the opposing party? Would your right to access books and records give you access to the documents?
- **If the documents are with a public organism:**
 - Is there a transparency law facilitating access to the documents?
 - If there is an ongoing administrative proceeding against the opposing party? Could you become a party to the proceedings to gain access to the documents? Would showing a genuine interest in the proceedings suffice to obtain the documents?
- **If the documents lie with an investigative body as part of a criminal investigation**

NATIONAL LEGAL INSTRUMENTS

NATIONAL LEGAL INSTRUMENTS

- A significant number of national arbitration laws around the world empower national courts to provide assistance to arbitral tribunals in disclosure from third parties.
- Since discovery is part of the DNA of common law civil procedure, common law jurisdictions will tend to be more sympathetic to requests for judicial assistance than civil law jurisdictions, where there is no pre-trial discovery
- On the matter of disclosure as against third parties, national arbitration laws can normally be distinguished by three distinctive features:
 - **Who**: who may seek judicial assistance to order a third party to produce documents?
 - **Where**: is the power of the national courts to order third parties to produce documents?
 - **When**: are national courts allowed to assist in disclosure prior to arbitration?

NATIONAL LEGAL INSTRUMENTS

A. 2006 UNCITRAL Model Law

– Art. 27 provides:

“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”

- Who: the arbitral tribunal or a party *with the approval of the arbitral tribunal*
- Where: national courts may only grant assistance in arbitrations seating in their country pursuant to Article 1(2) of the Model Law
- When: Model Law jurisdictions are split on this issue (divergent interpretations of “assistance in taking evidence”)

NATIONAL LEGAL INSTRUMENTS

B. 1996 English Arbitration Act

- Section 43(1) provides:

“A party to arbitral proceedings may 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.”

- **Who**: as per Section 43(1) and (2), “a party” may request judicial assistance but this “may only be done with the permission of the tribunal or the agreement of the other parties”
- **Where**: Section 1(3)(a) of the Arbitration Act provides *discretionary powers* to English courts to provide assistance in aid of foreign arbitrations
- **When**: English courts have refused to provide judicial assistance prior to commencement of arbitral proceedings

NATIONAL LEGAL INSTRUMENTS

C. 1925 U.S. Federal Arbitration Act (FAA) and 28 U.S. Code § 1782

- FAA § 7 provides:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case...

- **Who**: the requesting party will submit a subpoena to the arbitration panel for approval and signature, which will then be served as a judicial subpoena
- **Where**: U.S. Courts have provided assistance in aid of foreign arbitrations under both FAA § 7 (although only “in exceptional circumstances”) and § 1782
- **When**: there is a circuit split as to whether FAA 7 provides for prehearing non-party discovery

INTERNATIONAL LEGAL INSTRUMENTS

International legal instruments

- Currently, there are no international instruments by virtue of which document production orders against third parties to the arbitration may be enforced.
 - **1958 New York Convention**
 - Not applicable: document production *orders* lack the finality required for an arbitral award to be considered as such
 - **1970 Hague Evidence Convention**
 - Only “judicial authorities” may resort to the Hague Evidence Convention
 - Cannot be used “to obtain evidence which is not intended for use in judicial proceedings”
 - **(EC) No 1206/2001 of 28 May 2001 on cooperation between courts of Member States**
 - Only “courts *of a Member State*” can resort to it

PRACTICE TIPS/CLOSING REMARKS

PRACTICE TIPS/CLOSING REMARKS

- i. Evaluate the need to obtain third-party documents as early as possible
- ii. The hunt for non-party documents should always start by assessing whether you can get the documents by your own means
- iii. Make the arbitrator(s) aware of the need for third-party discovery at the initial scheduling conference and include it into the corresponding procedural order
- iv. Do whatever you reasonably can to compel voluntary production
- v. Bear in mind that national courts must be empowered by a national statute to compel the production of documents from a non-party to the arbitration.
- vi. “Who”, “where” ,“when” are the key features that will determine the scope of judicial assistance

GARRIGUES

www.garrigues.com