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"Obtendo Documentos em Arbitragem: Qual é a sua Estratégia:"

("Obtaining Documents in an Arbitration: What's Your Strategy?")

Por

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Introduction

Attorneys representing parties in a proceeding whether before a national court or in arbitration usually must be concerned about documents.[1] Discovery in arbitrations is usually limited to requests for and the production of documents.[2] For a variety of reasons, a party may want certain documents to be part of the arbitration, or a party may want to keep certain documents out of the case. The extent to which parties want the ability to obtain documents must be balanced with their other concerns, such as speed, efficiency or confidentiality of arbitration. Indeed parties may have agreed to arbitration in the expectation that discovery would be limited.[3]

Either in a judicial proceeding or in an arbitration the parties may not be equal or have parity with respect to documents. One side, for example, may be in a strong strategic position because it has possession, or at least knows the identity and location, of documents that may be critical to the outcome of the case. If "all of the essential documents are in the hands of one party or a non-litigant third party," the use of discovery procedures may be the only way that a party will have a chance of prevailing.[4]

Discovery in United States Courts Compared to Arbitration

In general, in contrast to arbitration practice, in judicial proceedings in the United States both federal and state courts have broad rules of discovery.[5] Documents and other evidence may be obtained in a process known as pre-trial discovery. Under the rules of court a party may be requested to produce certain documents for the inspection and copying of the opposing party.[6] In federal courts, for example, under the Federal Rules of Civil Procedure "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including … documents." Moreover,

"[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[7] Non-parties may be commanded to appear and produce documents.[8] The courts are authorized to impose sanctions for a party's or a non-party's failure to cooperate or to comply with court orders regarding discovery.[9] The Federal Rules of Civil Procedure, of course, are not applicable to arbitrations in the United States, unless the parties were to otherwise agree.[10]

Generally it is said that "'discovery' is available in most international arbitrations, either pursuant to voluntary agreement, by order of the tribunal, or by order of a national court,"[11] but "disclosure in international arbitration is significantly more limited" than in litigation in the United States.[12] Nevertheless, the parties' agreement, the arbitral rules applicable to the arbitration, the arbitrator's background and exercise of discretion, and the law at the location of the arbitration,[13] and possibly other factors, will determine whether documents that a party wants produced, or does not want produced, are in fact produced during an arbitration.

The Parties' Agreement

First, as they say, timing is everything. Unless the parties to a contract with an arbitration clause, or in a separate agreement for arbitration, have considered at a very early stage and addressed the issue of documents in their contract, the parties may be less able to predict how extensive or minimal the production of documents by each side will be in the course of the arbitration. Moreover, after commencement of the arbitration it may be more difficult to reach agreement on the production of documents by each party. Thus, depending on the circumstances, the time to consider the issue and importance of documents may be when the parties are negotiating their agreement, which we assume

contains an arbitration clause. At least under United States law, "the parties are free to agree on the appropriate scope and manner of discovery" in their agreement.[14]

One option for the parties is to include a stipulation in their contract that is an explicit, substantive contractual right to specific documents or categories of documents.[15] In other words, include in the contract a contractual right to documents and the duty to provide them in the event of arbitration. It may be prudent also to define in the contract what is meant by the term "documents." The contract could even include as well a broad contractual right to all documents in any way related to or connected with the contract or matters in dispute. Obviously, the drafting of such contractual rights is important as the language ultimately may have to be interpreted by an arbitral tribunal or, as discussed later, by a national court.

Texts on arbitration also emphasize the possibility of having provisions in the parties' agreement regarding documents.

> Of course, *the parties may agree either in the agreement to arbitrate,* in the Terms of Reference, or elsewhere, to produce documents for examination and copying the other party…. Thus, *when one of the parties fails to respect its agreement, the arbitrators' authority to make an order for production is considerably reinforced by such a stipulation.*[16]

If a stipulation on production of documents appears in the contract, then the arbitrators merely would be requiring parties to do as they agreed in their contract.

Besides having in the contract a substantive right to documents, some procedural rights should be included so that there is a clear method to enforce the right to documents. For example, the agreement could provide that either a party or the arbitral tribunal shall be authorized as may be needed to request national courts to compel compliance with the parties' contractual obligation (and any order of the arbitral tribunal)

to produce documents or other evidence.[17] A contractual stipulation that "commits both parties to supply relevant documents and witnesses in the arbitral proceedings … is particularly helpful in the international context, where foreign notions of discovery may differ…."[18]

Contractual obligations to produce documents may encourage cooperation by eliminating uncertainty over whether or to what extent the parties have such a duty and whether there are methods to compel compliance. Without substantive and procedural rights in the contract, a party could find itself at a strategic disadvantage and have to go forward without having documents it believes are needed to prevail on one or more claims or defenses.

The Rules Applicable to the Arbitration

Because there are various institutional and other rules that may be designated by the parties to govern the arbitration, no attempt will be made here to compare the rules, which, of course, should be reviewed before being designated for the arbitration. Nevertheless, arbitral rules may or may not mention the matter of discovery or documents.[19] One text discussing ICC arbitration notes that the authority of arbitrators to order production of documents that are in the hands of a party or under its control is "*implicit* … under Article 20(1) of the ICC Rules to establish the facts 'by all appropriate means.'"[20] The treatise states that Article 20(5) (which provides that "[a]t any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence") "also responds to the increasing number of demands for discovery by ICC arbitration users…."[21] Even so these provisions in the rules do "not mean that a party has a *right* to document discovery or other discovery measures."[22] "The arbitral

tribunal has discretion whether to require discovery and to what degree,"[23] but when arbitrators issue orders for the production of documents, the orders "are generally rather limited in scope…."[24]

Discovery Orders by the Arbitral Tribunal

Even if arbitrators have the power to order substantial discovery they may be reluctant to do so.[25] In any case arbitrators lack "direct authority to sanction disobedience" with respect to their discovery orders and "in general … will not order discovery nor seek court assistance to sanction non-compliance."[26] Again, the parties may address this issue in their contract so that there is a method to enforce compliance. Indeed, a stipulation in the contract may assist parties in obtaining an order from an arbitral tribunal an order, and assist thereafter possibly in obtaining an order from a national court, for production of documents or other evidence.

> There may nevertheless be circumstances in which it is appropriate to make a *contractual stipulation* to the effect that either party shall at the request of the other make available documents or witnesses relevant to the major aspects of the contractual relationship issues. Faced with such contractual language, refusal to comply would not only be defiance of the arbitrator's general authority, but breach of a specific contractual undertaking.[27]

IBA Rules of Evidence

The parties also may stipulate in their contract that in addition to the rules that apply to the arbitration the International Bar Association's *Rules on the Taking of Evidence in International Commercial Arbitration* ("IBA Rules of Evidence") shall apply to the arbitration.[28]

Article 3 of the IBA Rules specifically addresses the procedures relating to requests for documents in the arbitration. The Rules' "provisions for the request of

document production is much more limited than would be found in judicial proceedings in common law jurisdictions."[29] Nevertheless, as the preamble to the IBA Rules of Evidence states, the rules "are designed to supplement the legal provisions and the institutional or *ad hoc* rules according to which the Parties are conducting their arbitration."[30] One text on arbitration states that "[w]ell-informed drafters may consider reference to [the IBA Rules of Evidence] in arbitration clauses … with the aim of achieving a higher degree of predictability."[31] Moreover, it may be prudent to incorporate the IBA Rules of Evidence by reference in the parties' contract rather than assume that all parties would agree later that the Rules are to be applied. However, prior to incorporating the IBA Rules of Evidence, it would be prudent also to review the other provisions in the Rules to assure that they are acceptable. [32]

Even if the contract has a stipulation for the production of documents or if the contract incorporates the IBA Rules of Evidence, a party still may encounter problems in obtaining documents.[33] "Parties should be aware of the practical limitations on the arbitrator's power to order the production of documents or other evidence…."[34] Furthermore, "in respect to the parties, the arbitrator has no real power of enforcement and thus the arbitrator's order may be disobeyed, or at least only half-heartedly obeyed, without fear of sanction. The power of the arbitrator to 'draw adverse inferences' from non-production has substantial limitations."[35]

Interim Measures to Preserve Documents or Other Evidence Prior to the Formation of the Arbitral Tribunal

In some cases, parties may be concerned about the potential loss or destruction of evidence before an arbitral tribunal is constituted. However, the arbitral rules, or supplemental rules thereto, may provide for conservatory and interim measures pending

organization of the panel or the transmittal of the file to the arbitrators.[36] If not provided for in the applicable arbitral rules,[37] the contract could provide that the parties may apply to a national court for interim or conservatory measures for the preservation of evidence prior to or pending an arbitration. Thus, a party who is particularly concerned about the loss or destruction of evidence may want to verify that the rules that are applicable to the arbitration provide a mechanism for preserving evidence before the arbitration panel is in a position to act, or include a stipulation in the contract that authorizes the parties to resort to a national court for an order preserving evidence.

Judicial Assistance at the Venue of the Arbitration

As said earlier, the parties' contract could stipulate that the arbitral tribunal or a party may apply to a national court to enforce the arbitrators' order for the production of evidence. It may be impossible to predict where the court or courts would be located from which either an arbitral tribunal or the parties would have to seek assistance to compel the production of documents. A stipulation in the parties' contract that the courts may be used for this purpose may assist in overcoming any reluctance of a national court to become involved, assuming the law at the venue of the arbitration permits courts to enforce an arbitral panel's order for production of documents.

As for the arbitrator's power to subpoena documents, "[t]he power of subpoena can only derive from national law."[38] Where arbitrators may be reluctant to go beyond their own institutional rules and powers, there "exists the possibility … for a party to bring ancillary proceedings in support of arbitration before a court to obtain discovery from a party, or for a party or the tribunal itself to seek judicial assistance to obtain evidence from a third party."[39]

Arbitrators, nevertheless, may issue an order that is the equivalent of a subpoena. "Where the arbitral tribunal itself has issued a subpoena or made an order to produce evidence for the arbitration hearing, a court may be called upon to ensure compliance, pursuant to specific state or federal legislative provisions."[40]

> [U]nder some national laws, it is possible for either the parties to an arbitration, or the arbitral tribunal, to seek judicial assistance in obtaining coercive discovery…. [T]he United States is particularly liberal in permitting judicial assistance to discovery requests by arbitrators…. [S]uch court-ordered discovery can … depending upon national law, be obtained from either other parties or (less frequently) non-party witnesses.[41]

Selection of the appropriate place for the arbitration is subject to a number of considerations; however, the venue of the arbitration may have a very important impact on a party's ability to obtain documents or other evidence.[42] Thus, "it is desirable to select a forum whose courts, while not interfering in arbitral proceedings, will nonetheless assist the proceedings if necessary. Examples of desirable judicial assistance can include enforcing discovery orders made by the tribunal…."[43]

Judicial Assistance in the United States

As for having the assistance of a court in the United States, under the Federal Arbitration Act ("FAA"),[44] as well as the laws of individual states,[45] "arbitrators have the power to issue subpoenas and order production of documents."[46] Although arbitrators may be unable to impose sanctions for non-compliance with their order, a United States court may impose sanctions for a party's failure to comply with the court's order enforcing the arbitrator's subpoena.[47]

Section 7 of the FAA provides in part that "[t]he 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."[48] Section 7 goes on to state how the "summons shall issue" and that it "shall be served in the same manner as subpoenas…." The law is clear, moreover, about what happens when a person fails to comply with the summons or subpoena.

> [I]f 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.[49]

There are cases in which arbitrators have invoked § 7 of the FAA. In an early case on the subject, *Complaint of Koala Shipping & Trading Inc*.,[50] the arbitration panel had suggested that the party seeking a discovery order and a *subpoena duces tecum* that the party should present the application first to the federal court. However, the federal district court stated that § 7 "authorizes arbitrators to subpoena individuals and documents" and that "[i]n the future, the panel should exercise its power."[51] The court proceeded to review the application without sending it back to the panel and ordered the party that had opposed the subpoena to produce its president and its managing agent for depositions "and to bring with them" certain records and documents identified by the court.[52] In an even earlier case, a federal district court ordered compliance by a party with "a *subpoena duces tecum* issued by the arbitrators directing [the respondent in the arbitration] to produce certain records showing profits earned by [the party] from [the party's] alleged wrongful use of the ship during the period when it was under charter to plaintiff."[53]

When summoning documents from a *non-party* for the arbitration it appears that the arbitrator must summon both the documents and the custodian of the documents to testify. Section 7 has been interpreted to mean that the arbitrators must call the non-party to appear "in the physical presence of the arbitrator and to hand over the documents at that time."[54] Thus, if the arbitral panel wants non-parties to produce documents, then the panel has to subpoena the non-parties to appear before the panel and order them to "bring the documents with them."[55]

As for requiring *non-parties* to appear and produce documents in a manner similar to a pre-hearing deposition, apparently this approach is not permitted by § 7 of the FAA. As a federal district court stated in *Odfjell ASA v. Celanese AG*,[56] under § 7 the arbitrators have "the power to summon a non-party to appear 'before them … as a witness' and the power to require certain document production in connection thereto." But the court ruled that § 7 did not give the arbitrators the power to compel a *pre-hearing* deposition or a *pre-hearing* document production from a non-party. The court stated that in an arbitration it was "particularly inappropriate to subject parties who never agreed to participate in the arbitration in any way to the notorious burdens of pre-hearing discovery."[57] However, there are cases where the courts compelled a pre-hearing document production from non-parties.[58]

Another alternative to enforce orders of arbitrators to produce documents is the Uniform Arbitration Act ("UAA") that has been enacted by about 35 states with another 14 states adopting substantially similar legislation. Section 7 of the 1955 UAA provides that arbitrators could issue subpoenas for the attendance of witnesses and production of documents and other evidence. Either a party or the arbitrators could apply to the

appropriate court for enforcement of the subpoena. Section 7 has been expanded and now appears as § 17 in the 2000 UAA under which arbitrators have extensive discretion.[59] Under § 17(a) either a party or the arbitrators may apply to the appropriate court for enforcement of the arbitrators' summons or subpoena for a person or entity to produce documents.

In sum, in the United States, there are legal means to assist arbitrators and parties in obtaining documents and other evidence relevant to the arbitration.

Conclusion

As said, if a party has concerns about being at a strategic disadvantage by not being able to obtain documents that may be needed for an arbitration, the time to consider a document strategy begins with the parties' contract with the arbitration clause. Contractual obligations for production, the choice of the arbitral rules, the incorporation of the IBA Rules of Evidence, and the careful selection of the venue for the arbitration where national courts are authorized to render assistance are important considerations. A document strategy may enable a party to obtain needed documents and thereby gain parity with the opposing party, at least with respect to the matter of documents.

Endnotes

[1] Gary Born, *International Commercial Arbitration: Commentary and Materials*, 2nd edition (2001), hereinafter referred to as "Born, *International Commercial Arbitration - Commentary*," p. 469.

[2] Gary Born, *International Commercial Arbitration in the United States* (1994), hereinafter referred to as "Born, *International Commercial Arbitration*," p. 82.

[3] Jack J. Coe, *International Commercial Arbitration: American Principles and Practice in a Global Context* (1997), p. 834, hereinafter referred to as "Coe." *See also*, W. Laurence Craig, William W. Park, and Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edition, § 8.09, p. 118, hereinafter referred to as "Craig, Park and Paulsson."

[4] Coe, *supra* note 3, p. 21.

[5] *Id.*

[6] Fed. R. Civ. Proc., Rule 34.

[7] Fed. R. Civ. Proc., Rule 26(b)(1).

[8] Fed. R. Civ. Proc., Rule 45.

[9] Fed. R. Civ. Proc., Rule 37.

[10] Born, *International Commercial Arbitration - Commentary*, *supra* note 1, pp. 492, 496.

[11] Born, *International Commercial Arbitration*, *supra* note 2, p. 82.

[12] Born, *International Commercial Arbitration - Commentary*, *supra* note 1, p. 485, n. 3(b).

[13] *Id*., p. 469.

[14] Born, *International Commercial Arbitration*, *supra* note 2, p. 82.

[15] *See discussion with examples in* Born, *International Commercial Arbitration - Commentary*, p. 475, n. 11; *see also, id.*, p. 493, n. 6(b).

[16] Craig, Park and Paulsson, *supra* note 3, p. 451 (emphasis supplied).

[17] The parties also may wish to authorize the arbitral tribunal to award a party its costs in connection with obtaining documents that an opposing party in the arbitration should have produced.

[18] Born, *International Commercial Arbitration*, *supra* note 2, p. 82, n. 197.

[19] Born, *International Commercial Arbitration - Commentary*, *supra* note 1, p. 470.

[20] Craig, Park and Paulsson, *supra* note 3, p. 449 (emphasis supplied).

[21] *Id.,* § 26.01, p. 450.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Born, *International Commercial Arbitration - Commentary*, *supra* note 1, p. 477; Born, *International Commercial Arbitration*, *supra* note 2, p. 83.

[26] Born, *International Commercial Arbitration*, *supra* note 2, p. 84. *See also*, Craig, Park and Paulsson, *supra* note 3, § 26.01, p. 450.

[27] Craig, Park and Paulsson, *supra* note 3, § 8.09, p. 118 (emphasis supplied).

[28] *See* Born, *International Commercial Arbitration - Commentary*, p. 484-85, n. 1; Born, *International Commercial Arbitration*, *supra* note 2, p. 83.

[29] Craig, Park and Paulsson, *supra* note 3, § 26.01, p. 453.

[30] IBA Rules of Evidence, Preamble, ¶ 1.

[31] Craig, Park and Paulsson, *supra* note 3, § 8.09, p. 118.

[32] The IBA Rules of Evidence have provisions on witnesses (Article 4), party-appointed experts (Article 5), tribunal-appointed experts (Article 6), on site inspection (Article 7), and the evidentiary hearing (Article 8).

[33] Craig, Park and Paulsson, *supra* note 3, § 26.01, p. 456. In discussing ICC arbitrations, the authors note that the power of the arbitrators is limited in regard to their ability to compel third parties to produce documents in the arbitration, because "[i]n the first place, the ICC Rules do not provide any authority for an arbitrator to make any order of production involving a third party. Any such request would necessarily be based on statutory provision of national law and for enforcement require the intervention of a State court, and even there recourse may be limited." *Id.*

[34] Craig, Park and Paulsson, *supra* note 3, § 26.01, p. 456.

[35] *Id.*

[36] *See, e.g.*, *International Chamber of Commerce Rules for a Pre-arbitral Referee Procedure*. Pursuant to Article 1.1 the Referee "has the power to make certain orders prior to the arbitral tribunal or national court competent to deal with the case … being seized of it." The Referee has the power "[t]o order any measures necessary to preserve or establish evidence." *See, id.*, Article 2.1(d).

[37] *See, e.g.*, *International Chamber of Commerce Rules of Arbitration*, Article 23(2).

[38] Craig, Park and Paulsson, *supra* note 3, § 25.01, p. 435; Born, *International Commercial Arbitration*, *supra* note 2, p. 82.

[39] Craig, Park and Paulsson, *supra* note 3, § 27.05, pp. 486-487.

[40] Craig, Park and Paulsson, *supra* note 3, § 27.05, p. 488; *see also*, M. Domke, *Commercial Arbitration* (1994).

[41] Born, *International Commercial Arbitration*, *supra* note 2, p. 84; *see also, id*., pp. 826-33.

[42] Born, *International Commercial Arbitration - Commentary*, *supra* note 1, pp. 412, 486, n. 3(e).

[43] Born, *International Commercial Arbitration*, *supra* note 2, p. 73.

[44] Federal Arbitration Act, 9 U.S.C. § 1, *et seq*.

[45] Born, *International Commercial Arbitration - Commentary, supra* note 1, p. 494, n. 10.

[46] Craig, Park and Paulsson, *supra* note 3, § 26.01, p. 452; *see* Born, *International Commercial Arbitration - Commentary, supra* note 1, p. 494, n. 10.

[47] Some of the text writers cited herein also mention another provision of federal law, 28 U.S.C. § 1782(a) (providing, *inter alia*, that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation….") *See* Born, *International Commercial Arbitration - Commentary, supra* note 1, p. 496. Although there are some cases allowing the use of § 1782(a) to obtain documents and other evidence in support of arbitrations, it appears that the courts generally disfavor the use of § 1782(a) in private arbitration. *See NBC v. Bear Stearns & Co*., 165 F.3d 184 (2nd Cir. 1999); *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999); *Application of Medway Power, Ltd*., 985 F. Supp. 402 (S.D.N.Y. 1997). However, in one case where the court would have allowed the use of § 1782(a), the application for discovery was denied because the applicant did not first obtain a ruling from the arbitrators in accordance with the applicable foreign law. *Application of Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994).

[48] 9 U.S.C. § 7 (emphasis supplied); *see* Born, *International Commercial Arbitration - Commentary, supra* note 1, p. 494, n. 11.

[49] 9 U.S.C. § 7.

[50] 587 F. Supp. 140 (S.D.N.Y. 1984).

[51] *Koala*, 587 F. Supp. at 142-43.

[52] *Id.* at 143-44.

[53] *Commercial Metals Company v. International Union Marine Corporation*, 318 F. Supp. 1334 (S.D.N.Y. 1970).

[54] *Hay Group, Inc. v. E.B.S Acquisition Corp*., 360 F.3d 404 (3rd Cir. 2004).

[55] *Hay Group, Inc.*, 360 F.3d at 411.

[56] 328 F. Supp.2d 505, 507 (S.D.N.Y. 2004).

[57] 328 F. Supp.2d at 507. There are cases where the courts compelled pre-hearing document production from non-parties. *See Security Life Insurance Company*, 228 F. 3d 865, 870-71 (8th Cir. 2000) ("[I]mplicit in an arbitration panel's power to subpoena relevant documents for production" is the power to order production "prior to the hearing."); *Meadows Indem. Co., Ltd. v. Nutmeg Ins. Co*., 157 F.R.D. 42, 44-45 (M.D. Tenn. 1994).

[58] *See Security Life Insurance Company*, 228 F. 3d 865 (8th Cir. 2000) and *Meadows Indem. Co., Ltd. v. Nutmeg Ins. Co*., 157 F.R.D. 42, 44-45 (M.D. Tenn. 1994).

[59] *See* UAA, § 17, Comment, pp. 38-39.