# Kluwer Arbitration Blog

## Non-Party Discovery in International Arbitration

Paul Friedland (White & Case LLP) · Wednesday, March 11th, 2009 · White & Case

The Federal Arbitration Act ("FAA") applies to interstate and international arbitrations in the United States, and it defines the limits of an arbitrator's power to order non-party discovery. See 9 U.S.C. §§ 2 (directing U.S. courts to enforce arbitration agreements in "any maritime transaction or a contract evidencing a transaction involving commerce") & 7 (related to ordering witnesses to appear before the tribunal).

Unfortunately, U.S. law is muddled, and the courts are divided, on the extent of permissible non-party discovery under the FAA. The recent decision by the Court of Appeals for the Second Circuit in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London* helps to clarify the issue of non-party discovery as it relates to arbitrations seated in New York. Nonetheless, several questions remain.

In *Life Receivables Trust*, 549 F.3d 210 (2d Cir. Nov. 25, 2008), the Second Circuit, which includes New York, considered whether federal law empowers an arbitrator to order a non-party to an arbitration to produce documents before an arbitral hearing. The FAA provides that arbitrators "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." 9 U.S.C. § 7 (emphasis added). The Court read this provision literally and concluded that an arbitrator may not order a non-party to produce documents prior to an arbitral hearing. *See Life Receivables Trust*, 549 F.3d at 216 ("There may be valid reasons to empower arbitrators to subpoena documents from third-parties, but we must interpret a statute as it is, not as it might be . . . ."). Consistent with the plain language of the FAA, the Court stated that an arbitrator is empowered to order a non-party to appear only at a preliminary hearing or a merits hearing to testify and to present evidence. *Id*. at 218. In many cases, rather than undertake the burden of appearing at a hearing, a non-party will choose to produce the documents to the parties in advance.

The *Life Receivables Trust* decision places the Second Circuit in the literalist camp on the issue of non-party discovery under the FAA. The Third Circuit agrees that non-party pre-hearing discovery is prohibited. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). The Fourth Circuit, by contrast, has concluded that such discovery is available, although only in the case of a special need or hardship. *See COMSAT Corp. v. Nat. Science Found.*, 190 F.3d 269 (4th Cir. 1999). The Eighth Circuit has taken the anti-literalist view, finding that such discovery is permissible regardless of any special need. *See In re Sec. Life Ins. Co.*, 228 F.3d 865 (8th Cir. 2000). Therefore, in interstate and international arbitrations situated in the United States, the

location of the arbitration may determine the availability of non-party discovery.

The complexity of U.S. law on the subject does not end with the division among the federal circuits. While the FAA governs interstate and international arbitrations in the United States, it also directs courts to respect party agreement, and parties can (though they seldom do) agree that state arbitration laws will govern their arbitration. Unlike the FAA, some state arbitration laws provide for broad discovery over non-parties. *See*, *e.g.*, Florida Stat. § 684.15 ("The arbitral tribunal may issue subpoenas or other demands for the attendance of witnesses or for the production of books, records, documents, and other evidence, may administer oaths, may order depositions to be taken or other discovery obtained, without regard to the place where the witness or other evidence is located, and may appoint one or more experts to report to it."). Therefore, the applicable arbitration law can affect the scope of discovery over non-parties. Moreover, the applicable arbitration law may have significant impact with regard to jurisdiction over non-party witnesses, some of whom may be located outside of the state of the seat of arbitration.

In sum, while *Life Receivables Trust* helps to clarify certain aspects of the law as to non-party discovery in international arbitration in New York, there remain several issues to consider when drafting arbitration clauses, and there remains significant room for dispute to the extent that a party or non-party to an arbitration opposes discovery.

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