

# Getting the Documents: Cross-Border Evidence from Third Parties in Commercial Litigation and Arbitration

ESSEX COURT CHAMBERS  
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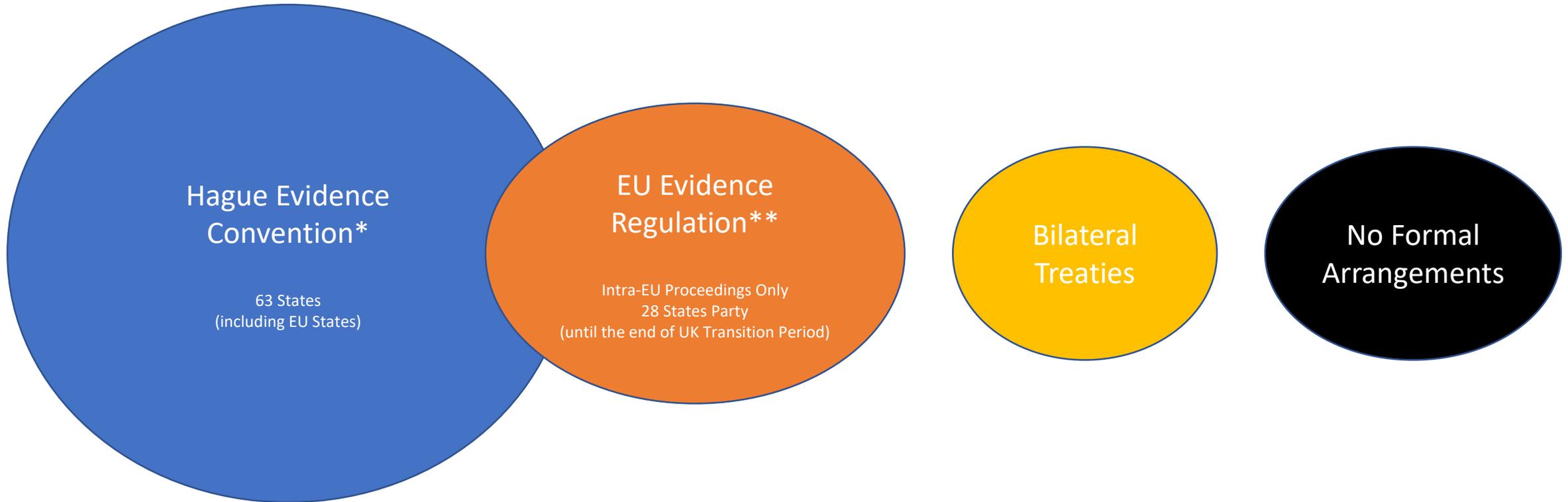
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# Focus of the Seminar

- Obtaining documentary evidence, not oral evidence, but similar (although slightly less stringent) considerations apply
- Obtaining evidence from third parties / non parties to the dispute
- The third parties are at arm's length (so e.g. not subject to disclosure orders in support of freezing injunctions or otherwise involved in proceedings)
- The third parties are in a different jurisdiction to the jurisdiction dealing with the substantive proceedings (so e.g. not susceptible to non party disclosure under **CPR r31.17**)
- Need to distinguish between:
  - Inwards / Inbound Applications (*foreign proceedings, evidence in England & Wales*)
  - Outwards / Outbound Applications (*English proceedings, evidence in foreign jurisdiction*)
- Inwards Applications are most relevant, but again similar principles apply to Outwards Applications. Outwards Applications may not be necessary if the foreign jurisdiction allows free standing proceedings for obtaining evidence, e.g. **US Code s1782**.
- The terminology (often unfamiliar) includes: Letters of Request and Letters Rogatory

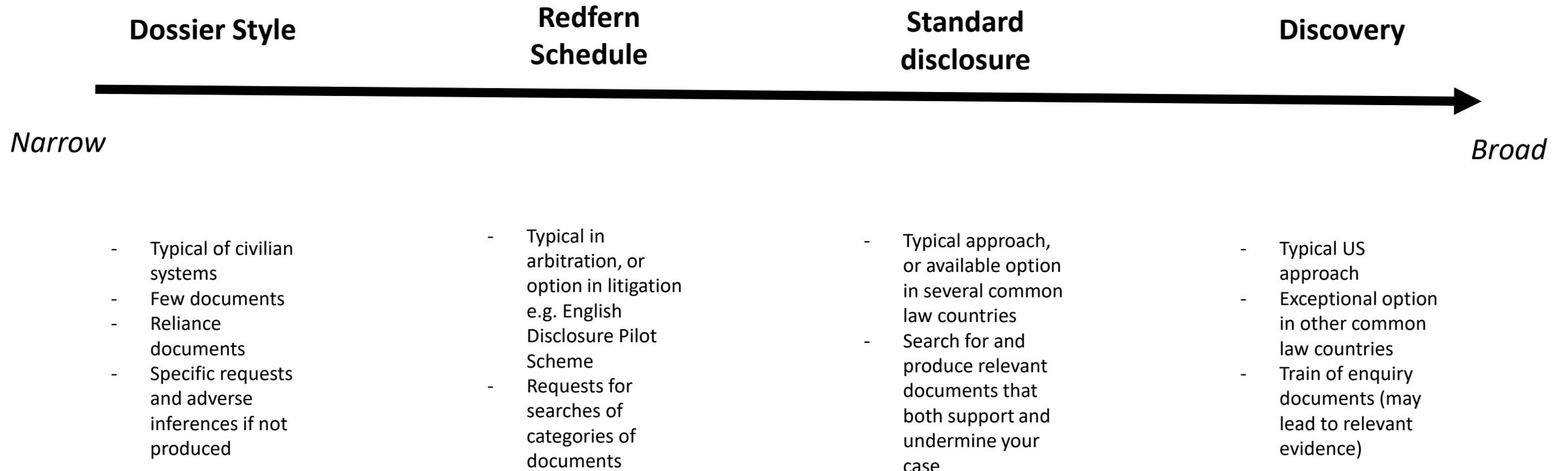
# Litigation: which Regime?



\*Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

\*\*Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

# General Approaches to Document Production



# From the International to the Domestic

## Article 23 of the Hague Evidence Convention

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

## UK RESERVATION

3. In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

# From the International to the Domestic (II)

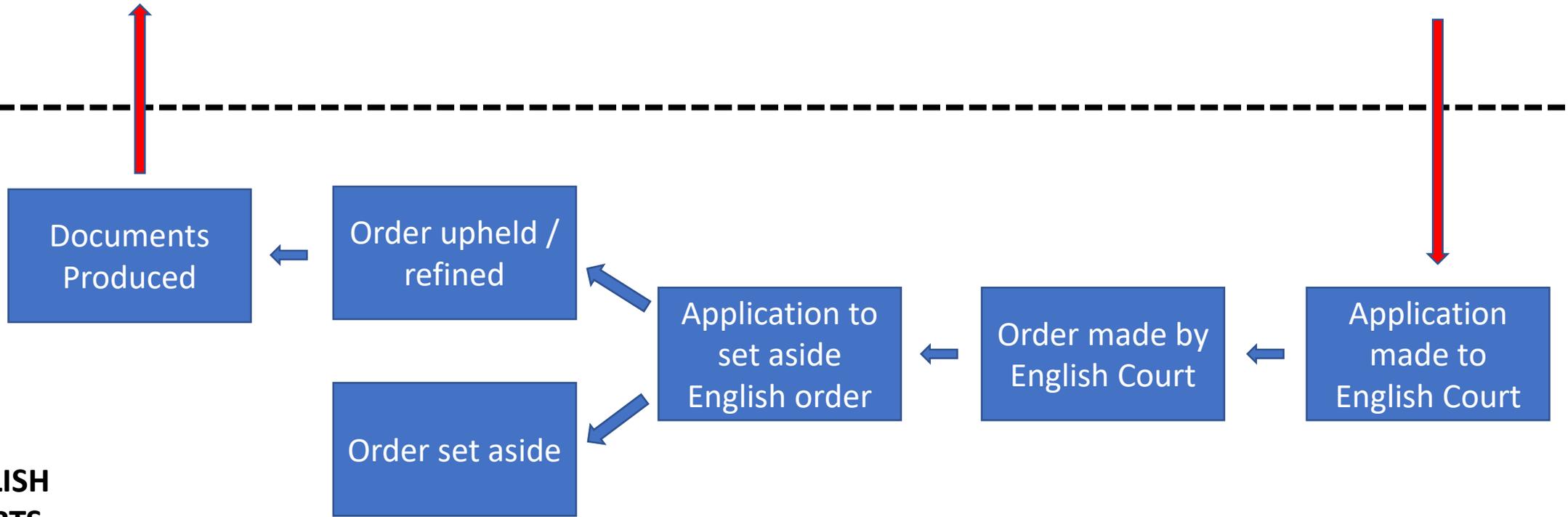
- The UK Reservation is reflected in the wording of the **Evidence (Proceedings in Other Jurisdictions) Act 1975 s2** governing inwards requests:
  - (3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.
  - (4) An order under this section shall not require a person—
    - (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
    - (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.
- Section 2(4) has been judicially glossed as a strict requirement for “*individual documents, separately described*”: **RTZ Corporation v Westinghouse Electric Corporation** [1978] AC 547 per Lord Diplock
- A “*compendious*” description may be possible, but remains subject to existence and possession requirements: **Re Asbestos Insurance Cases** [1985] 1 WLR 331 per Lord Fraser
  - (giving as a permissible example monthly bank statements for a particular year in relation to a specific account at a particular bank if the evidence showed regular monthly statements had been sent and were likely in the party’s possession)



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# Arbitration: what's the difference?

## **THE SCENARIO: a foreign seated Tribunal, evidence in England in the possession of a non-party to the arbitration agreement**

- Section 43 of the Arbitration Act 1996 (Securing the attendance of witnesses)
  - (1) 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.*
  - (2) This may only be done with the permission of the tribunal or the agreement of the other parties.*
  - (3) The court procedures may only be used if—*
    - (a) the witness is in the United Kingdom, and*
    - (b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.*
  - (4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.*
- Section 44 of the Arbitration Act 1996 (Court powers exercisable in support of arbitral proceedings) provides:
  - (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*
  - (2) Those matters are—*
    - (a) the taking of the evidence of witnesses*
- An application can be made to the Court if the parties consent or if the Tribunal gives permission: section 44(4).

# Arbitration: what's the difference (II)

- The Letter of Request mechanism operates on a State to State level via their Courts, so a private arbitration tribunal cannot issue one: ***Commerce and Industry Insurance Co of Canada v Lloyd's Underwriters*** [2002] 1 Lloyd's Rep 219 at 223.
- The recent decision of the Court of Appeal in ***A and B v C, D and E*** [2020] EWCA Civ 409 has clarified that section 44(2)(a) of the Arbitration Act 1996 also applies to non parties (a point upon which there was previously some controversy) and can be used in support of foreign seated arbitral proceedings to obtain oral evidence by deposition.
- It unlikely that this decision can be used to extend to the disclosure of documents. In terms of the language used, the first instance decision of Colman J in ***Assimina Maritime Ltd v Pakistan Shipping Corporation (The Tasman Spirit)*** [2005] 1 Lloyd's Rep 525 is also to the effect that section 44 does not allow access to the third party disclosure regime in CPR r31.17 in aid of an arbitration.
- Section 43 does allow for a party to obtain specific documents from a non-party, due to the historic development of the *subpoena duces tecum* (a witness summons to provide documents). But:
  - the decision of the Court of Appeal in ***Tajik Aluminium Plant v Hydro Aluminium AS*** [2006] 1 WLR 767 rejects the argument that section 43 could be interpreted as equivalent to or allowing access to the third party disclosure regime.
  - Section 43(3)(b) appears to impose a 'venue' requirement, although this might be approached somewhat liberally (and a supervisory Court at the seat might be invited to issue a Letter of Request on behalf of the Tribunal as an alternative – although this is untested)

# Summary

- Remember that for Court proceedings, this area of law likely involves the application of a blend of:
  - (a) the rules of a foreign jurisdiction;
  - (b) an international convention; and
  - (c) the English jurisdiction
- Take specialist advice early – ideally at the stage when the need for English evidence is identified in the foreign proceedings or arbitration, so that input can be given into the way the Letter of Request or section 43 application is drafted
- Letters of Request in the form “*All documents relating to ...*” (particularly common from the US) are likely to be rejected outright and there is very limited scope for saving them at the English end
- The same will likely be true in arbitration, and indeed there are additional hurdles to overcome to access even the narrow jurisdiction that exists relating to specific documents



Legal 500 UK Bar

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(2018, 2019 and 2020):

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***“Not afraid to express an opinion (which is always considered) and to think strategically. He also works well as part of a team. One to watch.”***

***“A promising and rising barrister whose grasp of the law is impressive.”***

With a case mix that is split fairly evenly between commercial litigation and international arbitration, many of Richard’s matters have a cross-border element, often including choice of law and jurisdictional issues. In terms of substantive law, recent cases have involved: a wide range of contractual issues; financial transactions and instruments; joint venture/shareholder disputes; economic torts; and fraud. Some have also included treaty interpretation and questions of public international law.

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