Challenges in the Taking of Evidence in Arbitrations Seated in Mainland China

Milo Molfa*, Adam Grant*, Paul Kleist* & Amy Wen Wei*

Arbitration is often hampered by obstacles to the taking of evidence, either because one party fails to produce relevant documents when requested or the documents are held by a third party outside the tribunal's powers. Parties engaged in arbitration seated in Mainland China are constrained by the Chinese state court's limited powers to assist in evidence taking. This article considers the wider scope of options for the taking of evidence in arbitrations seated in Mainland China. The first port of call may be to seek an order from the arbitral tribunal to impose sanctions within the arbitration, such as adverse inferences or adverse cost orders. If the arbitral tribunal cannot compel the recalcitrant party or a third party to produce documents or other evidence, the party may seek assistance from the court at the arbitral seat or a foreign court connected to the arbitration. This article compares the options for state court assistance in evidence taking available in the state courts of Mainland China, England and Wales, Hong Kong, and the United States. Practitioners should be aware that the powers of state courts to assist in evidence taking in international arbitration varies widely between these jurisdictions, from allowing only orders for preservation of key evidence in Mainland China to wide-ranging discovery from third parties by way of Section 1782 applications in the United States.

1 INTRODUCTION

The outcome in any arbitration will depend primarily on a party's ability to establish its case on the facts. There is consensus among leading international arbitration practitioners that 'the eventual outcomes in the majority of international arbitrations (perhaps 60–70%) usually turn on the facts rather than on the application of the relevant principles of law.'[1] Facts are proven by evidence, which may come in the form of witness testimony, documents, or tangible objects. A case will therefore often turn on whether a party can proffer sufficient material evidence, whether it is in the possession or control of the parties to the arbitration or that of third parties.

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* Milo Molfa is an international arbitration counsel, and Adam Grant and Paul Kleist are associates, in the London office of Cleary Gottlieb Steen & Hamilton LLP. Amy Wen Wey is a former associate in the Paris office of Cleary Gottlieb Steen & Hamilton LLP. The views expressed in this article are the authors' own. They do not represent the views of Cleary Gottlieb Steen & Hamilton LLP or any of its members or clients. Emails: mmolfa@cgsh.com, adgrant@cgsh.com and pkleist@cgsh.com.

[1] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* 375 (6th ed., OUP 2015).

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Obtaining evidence in any arbitration can prove to be a challenge because an arbitral tribunal lacks the coercive power of a state court to compel attendance of witnesses or production of documents. In the normal course, the rules governing the taking of evidence in an arbitration will set forth a procedure by which the tribunal can order each party to produce documents to the other. However, the powers of an arbitral tribunal to make evidentiary orders are limited by several factors.

First, if a party fails to comply with an evidentiary order, the arbitral tribunal lacks the power to impose sanctions for contempt against that party in the same way that a state court can. When dealing with a party that fails to produce evidence, the arbitral tribunal will be limited to sanctions such as adverse inferences and adverse cost orders.

Second, arbitral tribunals are not able to order the production of documents in the possession of third parties; in the absence of an arbitration agreement binding such parties, arbitral tribunals generally lack the jurisdiction to do so.[2] Similarly, arbitral tribunals cannot compel the attendance of witnesses at the hearing. An arbitral tribunal will generally expect each party to the arbitration to proffer its own witnesses of fact in order to prove its case.

Third, an arbitral tribunal is generally only capable of acting on an *inter partes* basis after it has been constituted. However, there may be circumstances where the parties cannot wait for the constitution of the tribunal to seek relief in evidentiary matters and/or relief is required on an *ex parte* basis (e.g. for the preservation of documentary evidence).[3]

If a party is unable to obtain relevant evidence according to the procedures of the arbitration, it may seek the support of the arbitral tribunal to compel, albeit indirectly, i.e., through adverse inferences or adverse cost orders, the recalcitrant party to produce evidence. If that fails, or the evidence is held by a third party over whom the tribunal lacks jurisdiction, the party seeking evidence may be able to apply for a state court to compel the other party or a third party to produce relevant evidence. Where the arbitration is seated in Mainland China and relevant evidence can be obtained there, the first port of call might be the Chinese courts. However, Chinese state court assistance in Mainland China-seated arbitrations is only available in limited circumstances.

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[2] The *ratione personae* scope of arbitration agreements is sometimes 'extended' to non-signatories under group of companies, apparent agency, veil-piercing, *alter ego* and/or estoppel theories, and a party seeking evidence in the possession of a non-signatory could consider joining the non-signatory to the arbitration for strategic purposes based upon one or more of the foregoing theories. The so-called 'extension' doctrine and its strategic application, however, are outside the scope of this article.

[3] Some arbitration rules allow for interim relief on an *ex parte* basis in exceptional circumstances, including the DIS Arbitration Rules and the Swiss Rules of International Arbitration. *See* DIS Arbitration Rules, Art. 25.2; Swiss Rules of International Arbitration, Art. 26.3.

Where the parties to the arbitration have a presence outside Mainland China, or third parties outside Mainland China possess relevant evidence, jurisdictions such as England and Wales, Hong Kong, and the United States may provide more robust legislative support in connection with the taking of evidence, including by empowering the local courts to order the production of key evidence for use in Mainland China-seated arbitration. Parties and counsel in arbitration proceedings seated in Mainland China should therefore be aware that they may resort to the assistance of a foreign court for the taking of evidence.

This article will discuss the following: (1) adverse inferences and cost orders; (2) Chinese state court assistance in taking evidence; and (3) foreign state court assistance in taking evidence available to Mainland China-seated arbitrations, with a focus on England and Wales, Hong Kong, and the United States.

2 ADVERSE INFERENCES AND COST ORDERS

In international arbitration, a party may find itself litigating against an opponent who is 'tempted to refuse to comply with a document production order if it considers the requested documents to be damaging for its case,' given that the arbitral tribunal has no power to force production or charge the recalcitrant party with contempt.[4] In these circumstances, the requesting party can ask that the arbitral tribunal draw an *adverse inference* from its opponent's non-compliance.

An adverse inference is '[a] detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control.'[5] Properly drawn, an adverse inference serves as a substitute for missing evidence, or 'gap filler.'[6]

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[4] Simon Greenberg & Felix Lautenschlager, *Adverse Inferences in International Arbitral Practice*, 22(2) ICC ICA Bull. 44 (2011). *See* Sam Luttrell, *Ten Things to Consider When Seeking Adverse Inferences in International Arbitration*, in *40 Under 40: International Arbitration* 293 (Carlos González-Bueno ed., Dykinson S.L. 2018) (observing that the IBA Guidelines on Party Representation require a party representative to inform his or her client of the necessity of producing any document the party has been ordered to produce). In some cases, an arbitral tribunal may charge the non-producing party with *astreinte*, a financial penalty for non-compliance, although this is likely to be the exception, particularly in Mainland China-seated arbitrations. *See* Andrea Carlevaris, *The Enforcement of Interim Measures Ordered by International Arbitrators: Different Legislative Approaches and Recent Developments in the Amendment of the UNCITRAL Model Law*, in *Interim Measures in International Commercial Arbitration* 15–16 (Association for International Arbitration ed., Maklu 2007) (recognizing that several national legal systems expressly permit arbitrators to issue *astreinte* penalties, but characterizing their use by arbitrators as 'highly doubtful' nevertheless).

[5] Timothy G. Nelson et al., *Evidentiary Inferences: Do Choice of Law and Seat Make a Difference?*, in *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* 153 (Neil Kaplan & Michael Moser eds, Kluwer 2018) (quoting Bryan A. Garner, *Black's Law Dictionary* 897 (10th ed., Reuters 2014)).

[6] Greenberg & Lautenschlager, *supra* n. 4, at 46; *see also* Luttrell, *supra* n. 4, at 286–87 ('[T]he proper form of the [adverse inference] request is that, in the absence of the requested evidence, the tribunal should assume that the unproven fact is true. Thus, the requesting party asks the tribunal to draw an inference *in substitution for evidence* that it would otherwise lack.') (original emphasis).

It takes the place of missing evidence, and speaks for it; it does not (at least directly) shift the burden of proof or impact the weight accorded to other evidence in the case.[7]

When used by an arbitral tribunal to fill evidentiary gaps, adverse inferences are properly regarded as 'an ordinary part of the fact-finding process' or 'a rule of evidence which, if the elements are made out, creates an indirect piece of evidence that needs to be weighed together with all the rest of the evidence.'[8] Insofar as adverse inferences penalize a party for failing to comply with an arbitral tribunal's evidentiary order – by prompting the tribunal to find a fact against them – adverse inferences also help to 'enforc[e] procedural discipline.'[9] Thus, adverse inferences 'work both as a rule of evidence *and* as a penalty or sanction against a party that has failed to comply with the tribunal's orders.'[10]

An arbitral tribunal's power to draw adverse inferences is well established as a matter of international arbitration practice.[11] This power may derive from the *lex arbitri*,[12] but primarily 'originate[s] from the arbitrators' *freedom of judgment* or *discretionary power* to appraise the probative value of documents and evidence,' a principle reflected in most arbitration rules.[13]

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7 An arbitral tribunal may conclude that a party did not meet its burden because it did not produce sufficient evidence, and/or that a party's failure to produce important documents suggests that other evidence it may have produced is less credible. According to Greenberg and Lautenschlager, the former scenario is better described as a conclusion based on an 'absence of evidence,' while the latter scenario is an 'improper' adverse inference, insofar as 'the inference only influences the weight attached to *existing* evidence,' and does not substitute for missing evidence. Greenberg & Lautenschlager, *supra* n. 4, at 45–46.

8 Nelson, *supra* n. 5, at 154.

9 Luttrell, *supra* n. 4, at 285 (quoting Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* 193 (Informa 2012)).

10 *Ibid.* (emphasis added).

11 Greenberg & Lautenschlager, *supra* n. 4, at 44, 56; *see also* Blackaby, *supra* n. 1, at 310 ('In the event that the requested party does not produce the ordered documents, the tribunal … may … draw adverse inferences from such failure[.]').

12 *See* Nelson, *supra* n. 5, at 161. For example, s. 53.4 of the Hong Kong Arbitration Ordinance provides that if a party fails to comply with a peremptory order, the arbitral tribunal may 'draw any adverse inferences that the circumstances may justify from the non-compliance.' The Chinese arbitration law, on the other hand, does not expressly permit a Mainland China-seated arbitral tribunal to draw adverse inferences, although the People's Supreme Court has recognized the concept in domestic litigation since 2001. *See* Some Provisions from the Supreme People's Court on Evidence in Civil Procedures [revised in 2001], Art. 75.

13 Guilherme Rizzo Amaral, *Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart*, 35(1) J. Int'l Arb. 8 (2018) (original emphasis); *see also* Gary Born, *International Commercial Arbitration* 1918 (2d ed., Kluwer 2014). For example, both the UNCITRAL Arbitration Rules and the HKIAC Administered Arbitration Rules provide that the arbitral tribunal 'shall determine the admissibility, relevance, materiality and weight of the evidence' offered. UNCITRAL Arbitration Rules, Art. 27.4; HKIAC Administered Arbitration Rules, Art. 22.2. The CIETAC Arbitration Rules also acknowledge this principle, albeit less explicitly. *See* CIETAC Arbitration Rules, Art. 35.1 (2015) (providing that the arbitral tribunal 'shall examine the case in any way it deems appropriate'); *ibid.*, Art. 43.1 (authorizing the arbitral tribunal to 'undertake investigation and collect evidence as it considers necessary').

The International Bar Association (IBA) Rules on the Taking of Evidence ('IBA Rules') provide an additional source of authority for an arbitral tribunal's power to draw adverse inferences.[14] According to the IBA Rules:

> [i]f a party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.[15]

The China International and Economic and Trade Association (CIETAC) Guidelines on Evidence ('CIETAC Guidelines'), particularly influential in Mainland China-seated arbitrations, provide similarly that:

> [w]here a party refuses, without justifiable reasons, to produce the document(s) pursuant to a request to produce granted or directly ordered by the tribunal, the tribunal may draw adverse inferences.[16]

In practice, it is not enough for a party seeking adverse inferences to claim that its opponent should have produced certain relevant documents or other evidence but failed to do so. As illustrated by the IBA Rules and CIETAC Guidelines – both of which suggest certain threshold requirements, including that the non-producing party cannot provide a 'satisfactory explanation' or 'justifiable reasons'[17] for its failure to produce – arbitral tribunals typically consider multiple factors before acceding to a party's request to draw adverse inferences.

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[14] The IBA Rules are said to reflect best practices in the taking of evidence in international arbitration, although they are not binding in a given case unless the parties have agreed or the tribunal has determined to apply them. IBA Rules, Art. 1.1.

[15] *Ibid.*, Art. 9.5. The IBA Rules include an analogous provision for 'any other relevant evidence, including testimony.' *Ibid.*, Art. 9.6. However, based on Greenberg and Lautenschlager's analysis of more than two-dozen International Chamber of Commerce-administered arbitration awards in which the arbitral tribunal was asked to draw adverse inferences, it would appear that arbitral tribunals rarely if ever draw adverse inferences from a party's failure to present a witness alone. *See* Greenberg & Lautenschlager, *supra* n. 4, at 50 (noting that none of nine tribunals asked to draw an adverse inference 'because the opposing side either did not call a critical fact witness or did not present a witness for cross-examination' elected to do so 'based exclusively on the absence of [the] witness,' although the tribunals 'generally acknowledged that the absence of a witness could be a ground for drawing adverse inferences,' and in two instances drew an adverse inference on the basis of the absence of a witness coupled with the refusal to produce certain documents).

[16] CIETAC Guidelines, Art. 23 (2015). According to one study, 'CIETAC arbitrators regularly draw adverse inferences when parties hide damaging evidence, despite being asked by the tribunal to produce it for inspection.' Bryant Yuan Fu Yang & Diane Chen Dai, *Tipping the Scale to Bring a Balanced Approach: Evidence Disclosure in Chinese International Arbitration*, 17(1) Pac. Rim L. & Pol'y J. 54 (2008). Likewise, pursuant to Art. 10 of the Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules'), 'If a party does not comply with the arbitral tribunal's order(s) or instruction(s), without justifiable grounds, the arbitral tribunal may draw, where it considers appropriate, an adverse inference with regard to such party's respective case or issue.'

[17] The Prague Rules speak of 'justifiable grounds.' *See ibid.*

The most frequently cited 'test' for adverse inferences includes five conditions:

1. The party seeking the adverse inference must produce discoverable evidence in its own possession corroborating the inference sought, or otherwise adequately explain the non-production of such evidence.
2. The requested evidence must be available to the inference opponent.
3. The inference sought must be reasonable, consistent with the facts on the record, and logically related to the likely nature of the evidence withheld.
4. The party seeking the adverse inference must produce reasonably complete, consistent, and detailed prima facie evidence of the claim or defense in support of which the adverse inference is sought.
5. The inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the inference sought.[18]

'[T]here is currently a reasonable consensus' that these conditions 'must be satisfied in order for adverse inferences to be drawn.'[19] To ensure that these conditions are satisfied – or at least increase the likelihood of a favourable ruling – a party seeking adverse inferences should identify, to the extent possible, the material sought, and request on the record that its opponent produce it.[20] A party seeking an adverse inference should also produce evidence in its possession that would tend to suggest that its opponent has possession of or access to the requested material, as well as evidence supporting its own case and the inference sought, such that 'the assumption is consistent with what the body of evidence tends to suggest the missing document or witness would say.'[21] Finally, the party seeking an adverse inference 'must make clear what inference it wishes to be drawn,' and should carefully frame its request to ensure that the conclusion it is asking the tribunal to draw is consistent with the body of evidence and logically and reasonably related to the evidence withheld.[22]

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18 *See* Jeremy K. Sharpe, *Drawing Adverse Inferences from Non-Production of Evidence*, 22(4) Arb. Int'l 554–70 (2006).

19 Luttrell, *supra* n. 4, at 282.

20 *See ibid.*, at 288 ('This may seem like an obvious point but, in the author's experience, it is not unusual to *see* adverse inferences requested in circumstances where the inference proponent has not earlier sought the evidence in question. Most arbitrators will refuse to draw an adverse inference in these circumstances, fundamentally because to do so would be unfair to the inference opponent.').

21 *Ibid.*, at 287. According to Greenberg and Lautenschlager, arbitral tribunals are typically 'reluctant' to rely on adverse inferences. Greenberg & Lautenschlager, *supra* n. 4, at 44. This is at least in part because adverse inferences implicate due process concerns: a party against whom an adverse inference is drawn may argue that facts were improperly found against it or that it was denied the opportunity to present its case. A party seeking adverse inferences can attempt to insulate an arbitral tribunal from due process challenges by establishing a clear record of requesting specific evidence or categories of evidence, demonstrating to the extent possible that this information is in its opponent's possession, and rebutting any claims by its opponent that the production of that evidence is unjustified.

22 Greenberg & Lautenschlager, *supra* n. 4, at 53.

A further sanction at the disposal of an arbitral tribunal when faced with a party that deliberately fails to produce documents when required is the imposition of adverse cost orders. Failure to produce documents can be considered among other undesirable tactics employed by parties, together with failure to comply with deadlines, late delivery of materials, failure to appear at hearings and revisiting matters already decided by the tribunal.[23] Adverse cost orders are most effectively used as a threat and deterrent rather than to penalize the party who fails to comply after the event. For this reason, arbitral tribunals are empowered by some institutional rules and guidelines to impose adverse cost orders for the failure to cooperate or act in good faith, including with respect to document production.[24]

Adverse inferences and adverse cost orders, and the threat thereof, may convince parties to produce requested evidence, or else provide some measure of relief if they do not. But neither mechanism applies to third parties, in the possession of whom relevant evidence may reside. To obtain evidence from third parties, which an arbitral tribunal is powerless to demand, a party may need to seek state court assistance.

3 CHINESE STATE COURT ASSISTANCE

In recent years, China has continued to develop legislation and case law which has helped promote arbitration as an effective mechanism for resolving disputes, especially those involving foreign investors.[25] A key milestone in the development of arbitration in China was the 1994 Arbitration Law of the People's Republic of China ('Chinese Arbitration Law'). While primarily based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ('Model Law'), the Chinese Arbitration Law deviates from it in certain key respects, including those relating to state court assistance in the taking of evidence.

Specifically, Article 27 of the Model Law provides that an arbitral tribunal or a party to arbitral proceedings that has permission from the tribunal may seek state court assistance in evidentiary matters.[26] In contrast, the Chinese Arbitration Law does not contain a provision equivalent to Article 27 of the Model Law for

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[23] *See* Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* 1224 (Kluwer 2012).

[24] *See* e.g. LCIA Arbitration Rules, Art. 28.4; IBA Rules, Art. 9.7; IBA Guidelines on Party Representation, Art. 26; Prague Rules, Art. 11.

[25] *See* e.g. CIETAC, 2017 Annual Report of International Commercial Arbitration in China, Preface; CIETAC, 2016 Annual Report of International Commercial Arbitration in China, Preface, Ch. 1.

[26] Art. 27 of the Model Law provides as follows: '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.' Arbitration statutes around the World contemplate similar provisions. *See* e.g. Hong Kong Arbitration Ordinance, s. 55; 1996 English Arbitration Act, s. 43; Swiss Private International Law Act, Ch. 12, Arts 183–84 (1987); Swedish Arbitration Act, s. 26 (1999); Federal Arbitration Act, 9 U.S Code. para. 7.

Mainland China-seated arbitrations.[27] There are no mechanisms available under the Chinese Arbitration Law by which parties engaged in arbitrations seated in Mainland China can seek assistance from the local courts to compel the production of documents or the appearance of witnesses in the arbitration.

The only relevant exception concerns an application for the preservation of evidence, which can be filed with the Chinese courts by the *institution* administering the arbitration proceedings, rather than the arbitral *tribunal*. Thus, pursuant to Article 46 of the Chinese Arbitration Law:

> Under circumstances where the evidence may be destroyed or lost or difficult to obtain at a later time, a party may apply for preservation of the evidence. If a party applies for preservation of the evidence, the arbitration commission shall submit his application to the basic people's court in the place where the evidence is located.[28]

Article 46 of the Chinese Arbitration Law specifies that such an application can be filed via the 'arbitration commission', which will in turn submit this request to the competent Chinese court. This 'arbitration commission' must be a Chinese arbitral institution properly registered with the Mainland Chinese authority.[29] Only parties engaged in an arbitration administered by a Chinese arbitral institution may therefore make use of Article 46.

Article 46 of the Chinese Arbitration Law is also generally understood not to apply to third parties or evidence in the possession of third parties.[30] The applicant must be able to identify the evidence with detailed description of its nature, content, location, and significance to the dispute and establish that the evidence 'may be destroyed or lost or difficult to obtain at a later time,' which is in practice a very high evidential threshold.[31]

China is currently moving from strength to strength as an arbitration-friendly forum for both domestic and international disputes.[32] Given China's trend of increasingly arbitration-friendly legislation and jurisprudence, there may be a move in the future for China to bring its provisions on state court

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27 *See* e.g. Cui Qifan, *On Courts' Assistance in Taking Evidence in International Commercial Arbitration*, 1 Int'l Comp. L. Rev. (2013).

28 Chinese Arbitration Law, Art. 46. Under Art. 68 of the Chinese Arbitration Law, if the arbitration is 'foreign-related', i.e. one of the parties is foreign or resident abroad or the subject matter of the arbitration is based abroad, the arbitration commission should apply to the intermediate people's court.

29 Chinese Arbitration Law, Art. 10.

30 Cui Qifan, *Adverse Inference in International Commercial Arbitration Proceedings*, 2 Beijing Arb. 59 (2011); Yang & Dai, *supra* n. 16, at 56.

31 Qifan, *supra* n. 27.

32 Reportedly, all Chinese arbitration institutions have administered in 2017 over 300,000 new arbitration proceedings. *See* Lu Song, *National Report for China (2018)*, in *ICCA Int'l Handbook on Com. Arb.*, vol. 98 (Jan Paulsson & Lise Bosman eds, Kluwer 1984 Mar. 2018).

assistance in evidentiary matters in line with the Model Law, thereby allowing more robust support in evidence-taking for both domestic and foreign arbitrations.[33]

4 FOREIGN STATE COURT ASSISTANCE IN RESPECT OF ARBITRATION PROCEEDINGS SEATED IN MAINLAND CHINA

Where evidence is available in offshore jurisdictions, parties engaged in Mainland China-seated arbitrations may be able to avail themselves of more liberal rules in respect of state court assistance in those jurisdictions. In certain cases, a party may have a choice of forum, for example, where a company has a global presence or a witness is resident in multiple jurisdictions.

State court assistance in the taking of evidence in international arbitration has traditionally fallen within the purview of the law of the arbitral seat. Indeed, Article 27 of the Model Law only allows a state court to take evidence in support of an arbitration seated in the same state.[34] However, it is often the reality that evidence cannot be found at the seat of the arbitration, not least because one of the primary factors for consideration when selecting an arbitral seat is that the seat represents a 'neutral' location where neither party to the arbitration has a presence. It is with this reality in mind that various jurisdictions have taken the position that their state courts may provide assistance in the taking of evidence in respect of foreign arbitration proceedings.

4.1 England and Wales

The English court's powers in support of arbitration proceedings are set forth in Sections 43 and 44 of the 1996 English Arbitration Act:

- Section 43 ('Securing the attendance of witnesses') empowers the English court to assist an arbitral tribunal by: (1) securing the attendance of a reluctant witness before an arbitral tribunal; and (2) ordering the witness to produce documents.
- Section 44 ('Court powers exercisable in support of arbitral proceedings') may be used: (1) to secure witness evidence in the form of a deposition taken before a court-appointed officer; and (2) where the witness is outside the United Kingdom, to request the assistance of the foreign jurisdiction's courts in taking the witness' evidence.

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[33] Commentators regularly call for Chinese legislation and jurisprudence to be brought in line with other jurisdictions, including by the adoption of the Model Law. *See* e.g. João Ribeiro & Stephanie Teh, *The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law*, 34(3) J. Int'l Arb. 459–88 (2017).

[34] *See* Art. 1.2 of the Model Law which provides that 'the provisions of this Law … apply only if the place of arbitration is in the territory of this State'.

Pursuant to Section 2(3) of the English Arbitration Act, these provisions apply even where the arbitration is not seated in England or no seat has been determined, although the court has discretion to refuse to exercise any such power where the fact that the arbitration is seated elsewhere makes it 'inappropriate to do so.'[35] There is relatively little case law in England explaining how the court should exercise its discretion under Section 2(3) of the English Arbitration Act, although one example of where it would be inappropriate would be where the party is seeking an order for something that is unavailable in the English system, e.g., a US-style discovery deposition.[36] However, it remains the case that parties to arbitration proceedings seated in Mainland China may be able to seek the assistance of the English court to obtain evidence that is located in England where it is appropriate to do so.

4.1[a] *Section 43*

There are three separate requirements for a Section 43 application to secure the attendance of a witness or production of documents by that witness: (1) that the applicant obtains the written consent of the other party or the permission of the arbitral tribunal; (2) that the witness who is to give oral testimony or produce documents is in England and is therefore subject to the jurisdiction of the English court; and (3) that the arbitration 'proceedings are being conducted' in England.

While the first two requirements are self-explanatory, the third requirement does not refer to the arbitral seat but means only that the arbitral tribunal must hold a hearing in England (which could be solely for the purpose of hearing the testimony of the compelled witness) without prejudice to the arbitral seat selected by the parties.[37]

A witness summons to produce documents must relate to specific, identifiable documents which are required to be adduced in evidence in the arbitration. Under Section 43, the English court does not have discretion (as it does in litigation, for example) to order a witness to carry out a reasonable search for documents. The English court will generally use the test for evidence sought by letters of request in litigation, where requests for documents from witnesses should refer to 'individual documents separately described.'[38] The powers of document production are

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35 *Rio Tinto v. Westinghouse*, [1978] AC 547, 635.

36 *See* n. 38, *infra*.

37 The seat or place of arbitration is the legal jurisdiction where the arbitration is based and where the state courts have supervisory jurisdiction over the arbitration. All major institutional rules make it clear that the seat of arbitration is not tethered to the place where arbitration hearings are conducted. *See* ICC Rules, Art. 18(2); LCIA Rules, Art. 16.3; HKIAC Rules, Art. 14.2.

38 *See Commerce Insurance Co. v. Lloyd's Underwriters*, [2002] 1 WLR 1323, 1330C, where the court refused to grant a s. 44 application for the examination of witnesses in support of arbitration proceedings seated in New York, principally because the assistance of the English court was being sought in respect of evidence that would not be available in England.

therefore much less broad than the powers of third-party disclosure available in English litigation or the powers available under Section 1782 in the United States.

Failure to comply with the specificity requirement is often in practice a primary reason the English court will reject an application for an order for a witness to produce documents. An English High Court Master (the judicial officer who usually rules on this form of application) may reject a draft order for production of documents from a witness which only specifies 'any document relating to' a widely defined issue.[39] Even if the Master grants the order, the witness may subsequently successfully apply to set aside or vary the order on the same basis.

In circumstances where the party seeking disclosure either lacks the information to specify individual documents or wishes to cast a wider net, the applicant for an order for production of documents from a witness should be as specific as possible, identifying documents if their exact description is known. If the documents themselves cannot be specifically identified, the description of them or the category in which they fall (including, for example, their author, content, date of creation) must be as compendious as possible.[40]

4.1[b] *Section 44*

Section 44 of the English Arbitration Act empowers a party to arbitration proceedings to apply to the English court to: (1) obtain evidence from a witness who is unable or unwilling to attend the arbitral hearing by way of a deposition or 'examination'; and (2) obtain oral or documentary evidence from a witness from outside the jurisdiction by asking the English court to issue a letter of request to the foreign court of the jurisdiction in which the witness is to be found (e.g. pursuant to the Hague Evidence Convention).

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[39] *See Assimina Maritime Ltd. v. Pakistan National Shipping Corp.*, [2004] EWHC 3005 (Comm), para. 14, showing the type of amendment to a draft order for production of documents that may need to be made in practice ('[The documents] cannot simply be defined by reference to their relevance to particular issues, as would be the case with an order for ordinary disclosure. For that reason, in the present case the documents to be inspected and copied must be confined to those sent by Wallingford to the KPT or documents which were created as part of the process of preparing such documents.').

[40] *See Tajik Aluminium Plant v. Hydro Aluminium*, [2005] EWCA Civ 1218 ('[W]ithout describing them individually, it may be possible to identify the documents to be produced with sufficient certainty to leave no real doubt in the mind of the person to whom the summons is addressed about what he is required to do … Whether [this test] has been met is likely to depend, at least in part, on the particular circumstances of the case. It is unlikely to be met if the documents are described simply by reference to a particular transaction or event which is itself described in broad terms, although in cases where the transaction is self-contained and sufficiently well-defined that might be satisfactory. In general, I think that doubts about the adequacy of the description should be resolved in favour of the witness.' In *Assimina Maritime Ltd. v. Pakistan National Shipping Corp.*, [2004] EWHC 3005 (Comm), the Court of Appeal held that for the purposes of s. 43 'it is insufficiently specific to order a witness to produce a broad class of documents, but sufficient to order production of a defined group of documents individually identifiable by reference to a compendious description.'

The English courts have recently held that orders under Section 44 cannot be made against a person who is not a signatory to the arbitration agreement or a party to the arbitral proceedings.[41] The use of Section 44 may therefore be restricted to seeking or preserving evidence from parties to foreign arbitration proceedings who refuse to comply with a tribunal's production order or will not proffer a key witness of fact.

A party may also apply to the court under Section 44 for a 'search order' (also known as an 'Anton Piller' order), requiring a party to permit identified persons to enter premises and search for and seize evidence.[42] This highly intrusive order is only available where (1) there is an 'extremely strong prima facie case'; (2) the respondent's actions have resulted in very serious potential or actual damage to the claimant's interests; and (3) there is clear evidence that the respondent possesses 'incriminating documents or things' and there is a 'real possibility' that the respondent may destroy or dispose of them before an application can be made on notice.[43]

Meanwhile, if a relevant document which must be preserved is in the hands of a third party in a different jurisdiction, the English court can issue a letter of request to that jurisdiction to preserve that document.

Certain further key features of Section 44 are as follows:

- Where the Section 44 application is non-urgent, the applicant must have either the permission of the arbitral tribunal to apply, or the agreement of the parties in writing (as is the case for applications under Section 43).
- Where the Section 44 application is urgent, for example, to preserve evidence by way of a search order, the applicant does not require the tribunal's permission or the agreement of the other party.
- Unlike Section 43, Section 44 does not require that the arbitration proceedings in support of which the Section 44 application is made are being or will be 'conducted' in England.
- The English court's power to make orders in support of foreign-seated arbitrations is a 'long arm' jurisdiction and therefore the applicant must

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41 *See DTEK Trading S.A. v. Morozov*, [2017] EWHC 94 (Comm) includes a detailed review by the judge of the case law in respect of s. 44, finding that 'it is clear that Section 44 is designed primarily to cover applications between the parties to an arbitration agreement. Applications against a third party would be the exception, not the rule.' In *Morozov*, the judge distinguished *Assimina Maritime Ltd. v. Pakistan National Shipping Corp. & anor.*, [2004] EWHC 3005 (Comm), where an order for preservation of evidence was made in respect of a non-party, on the basis that it was an *ex parte* decision and the order was parcelled with witness summons under s. 43. As of writing, there has yet to be Court of Appeal scrutiny of these decisions. *See also Cruz City 1 Mauritius Holdings v. Unitech Ltd.*, [2014] EWHC 3704 (Comm); Steven Gee, *Commercial Injunctions* (6th ed., Sweet & Maxwell 2016), para. 6-037.

42 *See ibid.*, at para. 6-035.

43 *See Anton Piller K.G. v. Manufacturing Limited Processes Ltd.*, [1976] Ch. 55.

justify the application being made to an English court rather than the court at the seat of arbitration.[44]

- The court may order an 'examination' of the witness before a court-appointed officer (usually a practicing barrister), which arbitral tribunals do not normally have the power to do.
- Pursuant to Section 44(4) of the English Arbitration Act and Rule 62.6(3) of the Civil Procedure Rules (CPR), an application must be made on notice to the other parties to the arbitration, who should be named as defendant. However, if the case is one of urgency, the application can be made *ex parte*.[45]
- Pursuant to CPR Part 34, the procedure by which the High Court in London secures the attendance of witnesses before it for the purposes of Section 44 is known as a 'witness summons.' Failure to comply with the witness summons is a contempt of court, punishable by a fine or imprisonment.
- Unlike Section 43, Section 44 is a non-mandatory provision of the English Arbitration Act. The parties may therefore agree to exclude its application.

Section 44 therefore provides an additional tool to a party seeking to obtain or preserve evidence in the face of a lack of cooperation from its opponent.

4.2 Hong Kong

The Hong Kong Arbitration Ordinance 2011 provides that the Hong Kong state court can assist in evidence taking for international arbitration seated in foreign jurisdictions such as Mainland China in certain circumstances:

- Section 45(2) of the Hong Kong Arbitration Ordinance provides for the Hong Kong court to grant interim measures in relation to arbitral proceedings which have been or are to be commenced in or outside Hong Kong.[46] One of the interim measures that the Hong Kong court may grant under this provision (usually on an *ex parte* basis) is a search order to

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[44] In *Econet*, [2006] EWHC 1568 (Comm), para. 19, the court noted that the first question to be asked should be 'why are you asking for an order from this court?' J. Morison agreed that '[t]he natural court for the granting of the interim injunctive relief must be the court of the country of the seat of arbitration, especially where the curial law of the arbitration is that of the same country'.

[45] In *Cetelem S.A. v. Roust Holdings Ltd.*, the Court of Appeal concluded that the power under s. 44(3) to make an urgent interim order is available where (1) the case is one of urgency, and (2) the order sought is necessary for the preservation of evidence or assets. *Cetelem S.A. v. Roust Holdings Ltd.*, [2005] EWCA Civ 618, paras 45–47.

[46] The Hong Kong court also has inherent jurisdiction to grant interim measures of protection in aid of foreign arbitral proceedings. *See The Lady Muriel*, [1995] 2 HKC 320.

permit identified persons to search for and seize evidence. Under Hong Kong case law, a search order of this kind will be available in the same exceptional circumstances as it is in England and Wales, as discussed above.[47] The form of Hong Kong search order is set out in an appendix to Practice Direction 11.2.

- Section 60 provides that the court can make an order: (1) directing the inspection, photographing, preservation, custody, detention, or sale of any relevant property by the arbitral tribunal, a party to the arbitral proceedings, or an expert; or (2) directing samples be taken from, observations made of, or experiments conducted on any relevant property. Section 60 orders are available in relation to foreign-seated arbitrations. Property is 'relevant' if it is the subject of the arbitral proceedings or a question relating to the property has arisen in the arbitral proceedings.

In the cases of both Section 45(2) and Section 60, the court may decline to make an order if the measure sought is currently the subject of arbitral proceedings and the court considers that the issue is more appropriate for the matter to be dealt with by the arbitral tribunal. The Hong Kong courts have generally proved reluctant to exercise their jurisdiction to make an order where an arbitral tribunal has the same powers, therefore parties should apply in the first instance to the arbitral tribunal unless the order sought must be granted on a without notice basis.[48]

In respect of Hong Kong-seated arbitrations only,[49] Section 55 of the Hong Kong Arbitration Ordinance incorporates Article 27 of the Model Law[50] allowing the Hong Kong court to order a person to attend proceedings before an arbitral tribunal. Any party applying to the Hong Kong court for assistance in taking evidence under Section 55 should be in a position to show the court the express written approval of the arbitrator to do so.[51]

The Hong Kong courts will treat precedents from other common law jurisdictions such as England and Wales and the United States as persuasive when interpreting arbitration law provisions.[52] Indeed, the Hong Kong Arbitration Ordinance was originally modelled on an earlier incarnation of the English Arbitration Act. As a result, Section 60 of the Hong Kong Arbitration Ordinance provides for many of the same powers as Section 44 of the English Arbitration Act 1996 in respect of

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47 *See Ng Chun Fai Stephen v. Tamco Electrical & Electronics (Hong Kong) Ltd.*, [1993] 1 HKC 160; *Anton Piller K.G. v. Manufacturing Limited Processes Ltd.*, [1976] Ch. 55.

48 *Leviathan Shipping Co. Ltd. v. Sky Sailing Overseas Co. Ltd.*, [1998] 4 HKC 347.

49 *See* Hong Kong Arbitration Ordinance 2011, s. 5(2), which does not include s. 55 among those parts of the Ordinance that apply if the place of arbitration is outside Hong Kong.

50 *See supra* n. 26.

51 Hong Kong Arbitration Ordinance, s. 55(4); *Vibroflotation A.G. v. Express Builders Co. Ltd.*, [1994] 3 HKC 263.

52 *See* Hong Kong Basic Law, Art. 84.

preservation of evidence and the relevant English case law will therefore be instructive.[53] Following the recent jurisprudence in the English courts, for example, a Section 60 order may not be available in respect of non-parties to the arbitration.[54]

4.3 United States

Enacted by Congress to 'facilitate the conduct of litigation in foreign tribunals [and] improve international cooperation in litigation,'[55] 28 U.S.C. § 1782 ('Section 1782') makes a wide range of US discovery tools available to litigants in foreign proceedings, arguably including foreign arbitration proceedings, provided certain conditions are satisfied. These tools, accessible by application only, include the production of hard-copy and electronically stored documents and other information, as well as oral and written examinations of individuals and corporate representatives, called depositions.[56]

Section 1782 provides, in relevant part, that a US 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.'[57] US courts have interpreted this text as giving rise to three threshold requirements: (1) the person from whom (or the corporation from which) discovery is sought must reside or be found or otherwise have a substantial presence in the judicial district in which the Section 1782 application is made; (2) the discovery sought must be for use in a 'foreign tribunal,' as that term is used in the statute; and (3) the application must be made by the 'foreign tribunal,' or by a person or entity with a reasonable interest in obtaining relief in the foreign proceedings.[58] If these three requirements are met, the court is *permitted* but not required to grant discovery under Section 1782.

To guide judicial decision-making in this regard, the US Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*—the leading authority on Section 1782 – articulated four discretionary factors 'that bear consideration in ruling a [Section] 1782 request.'[59] These factors, which often prove dispositive in practice,

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53 Both the Hong Kong Arbitration Ordinance 2011 and the English Arbitration Act 1996 provide for inspection, photographing, preservation, custody, detention, or sale of relevant property.

54 *See DTEK Trading S.A. v. Morozov*, [2017] EWHC 94 (Comm); *Cruz City 1 Mauritius Holdings v. Unitech Ltd.*, [2014] EWHC 3704 (Comm).

55 *In re Bayer A.G.*, 146 F.3d 188, 191 (3d Cir. 1998).

56 *See* Fed. R. Civ. P. at 30–31, 34.

57 28 U.S.C., s. 1782(a).

58 *See* e.g. *In re Accent Delight Int'l Ltd.*, 869 F.3d 121, 128 (2d Cir. 2017); *In re Dubey*, 949 F. Supp. 2d 990, 991–92 (C.D. Cal. 2013). Some courts have adopted a fourth statutory requirement: the evidence sought must not be subject to any legally applicable privilege that would preclude its production. *See In re Schlich*, 893 F.3d 40, 46 & n.6 (1st Cir. 2018).

59 542 U.S. 241, 264 (2004).

are: (1) whether the person or entity from whom discovery is sought is a participant in the foreign proceeding, in which case Section 1782 discovery may be deemed unnecessary; (2) the receptivity of the foreign tribunal to US judicial assistance; (3) whether the application is an improper attempt to circumvent foreign proof-gathering restrictions; and (4) whether the discovery requests are unduly intrusive or burdensome.[60]

Procedurally, a party seeking Section 1782 discovery will typically submit an application to the appropriate district court[61] on an *ex parte* basis, meaning that the discovery target is not immediately notified. In connection with its application, the applicant will include a memorandum of law explaining why the application satisfies the three threshold requirements and why the four discretionary factors weigh in favour of granting the application. The application may also include a declaration by the applicant's attorney including any supporting evidentiary materials, as well as subpoenas describing the documentary or testimonial evidence sought, as well as a proposed order for the court to endorse, giving the applicant permission to serve the subpoenas on the discovery target.

The court may grant or deny the application. The court may also determine that it cannot decide the application on an *ex parte* basis and direct the applicant to serve notice of the application on the discovery target, who may seek to oppose the application.

If the court grants the application, then the applicant must serve the subpoenas on the target, subject to any modifications the court may have ordered (for example, to narrow the scope of the requests or clarify the documents being sought). If the discovery target has not yet had the opportunity to object – because the court granted the application *ex parte* – it may do so once served, and may argue that the subpoenas are overly broad or unduly burdensome, or that the court erred in granting the Section 1782 application. The court's decision to grant or deny the Section 1782 application (or to overrule the discovery target's objection to the application) is immediately appealable to the Court of Appeals for the federal judicial district in which the court is located.[62] As a practical matter, the decision of the Court of Appeals regarding the application is likely final, as the Supreme Court hears only a small fraction of the petitions that it receives.

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60 *See ibid.*, at 264–65.

61 A district court is the trial-level court within the US federal court system. There are ninety-four judicial districts in total, including at least one per state.

62 Appeals from a district court are heard by the appropriate Court of Appeals, of which there are thirteen; all but one of the thirteen are arranged geographically, by 'circuit.' By way of example, Manhattan and other parts of New York City and the surrounding communities make up the Southern District of New York. Appeals from the District Court for the Southern District of New York are heard by the Court of Appeals for the Second Circuit, which covers the federal judicial districts in New York, Connecticut, and Vermont.

Section 1782 is an increasingly popular discovery tool, and there is a voluminous and ever-expanding body of case law governing its application. A party considering whether to seek Section 1782 discovery for use in international arbitration proceedings should be aware of several key considerations, including the following.

(1) Section 1782 discovery may not be available in private commercial arbitrations, depending on the judicial district and circuit in which the application is made.

The second statutory requirement for Section 1782 discovery is that the discovery sought must be for use in a 'foreign tribunal.' The US Supreme Court in *Intel* suggested that, by this term, Congress meant to include not only judicial proceedings in conventional courts, but also 'administrative and quasi-judicial proceedings abroad.'[63] The Court also suggested that the term 'tribunal' includes 'arbitral tribunals,' favourably quoting scholarship to that effect.[64]

US courts are nevertheless 'split as to whether a purely private arbitration would fall within the scope of the statute.'[65] Prior to *Intel*, which was decided in 2004, the Court of Appeals for the Second Circuit (which covers the federal judicial districts in New York, Connecticut, and Vermont) held that Section 1782 does *not* apply to private commercial arbitrations, citing the statute's legislative history – which, in the Second Circuit's view, reflects an intent to provide US judicial assistance to 'governmental entities,' only – as well as concerns that '[o]pening the door to the type of discovery' permitted by Section 1782 in private commercial arbitrations would undermine their 'efficiency and cost-effectiveness.'[66] The Court of Appeals for the Fifth Circuit (which covers the federal judicial districts in Louisiana, Mississippi, and Texas), the only other Court of Appeals to directly address the issue pre-*Intel*, held similarly.[67]

Although the Second Circuit 'has not weighed in on the issue in light of *Intel*,'[68] the Fifth Circuit has since affirmed its earlier view that Section 1782 does not extend to private commercial arbitrations.[69] Many courts agree.[70]

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63 524 US at 259 (citations omitted).

64 *Ibid.* (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026–27 & nn. 71, 73 (1965)).

65 *In re Kleimar N.V.*, No. 17-CV-01287, 2017 WL 3386115, at *5 (N.D. Ill. 7 Aug. 2017).

66 *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 192–92 (2d Cir. 1999).

67 *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

68 *In re Ex Parte Application of Kleimar N. V.*, No. 16-mc-355, 220 F. Supp. 3d 517, 521–22 (S.D.N.Y. 2016).

69 *See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 33–34 (5th Cir. 2009) (reasoning that in *Intel*, 'the question of whether a private international arbitration tribunal also qualifies as a "tribunal" under [Section] 1782 was not before the [Supreme] Court').

70 *See* e.g. *In re Application of the Gov't of the Lao People's Democratic Republic*, No. 1:15-MC-00018, 2016 WL 1389764, at *4–6 (D. N. Mar. I. 7 Apr. 2016); *In re Application of Grupo Unidos Por El Canal S.A.*, No. 14-mc-80277, 2015 WL 1815251, at *8 (N.D. Cal. 21 Apr. 2015); *In re Application of Operadora*

Other courts have inferred from *Intel* that Section 1782 discovery *does* extend to private commercial arbitrations.[71] In an opinion that was later superseded, the Court of Appeals for the Eleventh Circuit (which covers the federal judicial districts in Alabama, Florida, and Georgia) explained why, noting that the Supreme Court had 'quoted with approval' a 'broad definition of "tribunal" set forth by a leading scholar on international procedure,' and observing that like the entity found by the Supreme Court to be a 'foreign tribunal' in *Intel* – the Directorate-General for Competition of the European Commission – private commercial arbitral tribunals 'act as a first-instance adjudicative decisionmaker,' 'permit the gathering and submission of evidence,' 'determine liability and impose penalties,' and render decisions subject to (some level of) judicial review.[72]

With the exception of the Fifth Circuit, no Court of Appeals has definitively decided, post-*Intel*, whether Section 1782 extends to private commercial arbitrations. Unless and until a consensus emerges among the Courts of Appeals that it does, or the Supreme Court provides an answer, applicants seeking discovery must carefully consider the case law of the federal judicial district and circuit where the application will be made to ensure that the 'foreign tribunal' requirement does not pose a serious obstacle – and for the time being, should avoid applying for Section 1782 discovery within the Fifth Circuit, if possible.[73]

(2) Section 1782 discovery is available from non-parties to the foreign proceeding, but may be more difficult to obtain from parties.

As noted above, among the discretionary factors courts consider is whether the person or entity from whom Section 1782 discovery is sought is a participant in the foreign proceeding. '[W]hen the person from whom discovery is sought is a participant in the foreign proceeding,' the Supreme Court observed in *Intel*, 'the need for [Section] 1782(a) aid is generally not as apparent as it is when the evidence

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DB Mexico, S.A., No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *9, *12 (M.D. Fla. 4 Aug. 2009); *In re Arbitration in London, England*, 626 F. Supp. 2d 882, 885–86 (N.D. Ill. 2009).

71 *See* e.g. *In re Application of Pola Maritime, Ltd.*, No. 416–333, 2017 WL 3714032, at *2 (S.D. Ga. 29 Aug. 2017); *In re Owl Shipping, LLC*, No. 14–5655, 2014 WL, at *2 (D.N.J. 7 Oct. 2014); *Ex rel Application of Winning (HK) Shipping Co. Ltd.*, No. 09–22659-MC, 2010 WL 1796579, at *8–10 (S.D. Fla. 30 Apr. 2010); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 238 (D. Mass. 2008).

72 *In re Cosorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987, 994–97 (11th Cir. 2012), *superseded by* 747 F.3d 1262 (11th Cir. 2014).

73 While US courts disagree whether s. 1782 applies to private commercial arbitrations, there is an emerging consensus that arbitrations arising from international treaties, including bilateral investment treaties, fall within its scope. *See* e.g. *In re Mesa Power Grp., LLC*, No. 2:11-mc-280-ES, 2012 WL 6060941, at *5, *7 (D.N.J. 20 Nov. 2012); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010); *Chevron Corp. v. Sheffitz*, 754 F. Supp. 2d 254, 260 (D. Mass. 2010). According to one court that so held, this is because such arbitrations 'are conducted within a framework defined by two nations,' and thus more closely resemble the 'governmental' proceedings the Second Circuit once concluded s. 1782 is meant to cover. *In re Oxus Gold PLC*, No. 06-82-GEB, 2007 WL 1037387, at *5 (D.N.J. 2 Apr. 2007) (citing *National Broadcasting*, 165 F.3d at 190).

is sought from a nonparticipant.'[74] This is because '[a] foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence.'[75] Conversely, 'nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach,' and hence 'their evidence … may not be obtainable absent [Section] 1782(a) aid.'[76]

Citing this maxim, US courts routinely grant Section 1782 applications seeking discovery from non-parties to the foreign proceeding,[77] and frequently deny discovery from parties.[78]

'[P]articipation in the foreign proceeding does not automatically foreclose [Section] 1782 aid,' however.[79] Recognizing that a foreign tribunal's jurisdiction over the parties does not guarantee access to evidence, US courts have permitted Section 1782 discovery from parties where the local laws do not provide for expansive, US-style discovery,[80] or the foreign tribunal ordered a party to produce evidence but the party failed to comply.[81]

To be sure, Section 1782 does not 'force litigants to seek information through the foreign or international tribunal before requesting discovery from the district court.'[82] However, to the extent an applicant seeks Section 1782 discovery from another party, the above-cited case law suggests that it would be helpful to demonstrate why the foreign tribunal – despite having jurisdiction over the

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74 524 US at 264.

75 *Ibid*.

76 *Ibid*.

77 *See* e.g. *In re Application of Pola Maritime, Ltd*., 2017 WL 3714032, at *3; *In re Application of Republic of Ecuador*, 153 F. Supp. 3d 484, 488 (D. Mass. 2015); *Ex rel Application of Winning (HK) Shipping Co. Ltd*., 2010 WL 1796579, at *10; *see also In re Chevron Corp*., 633 F.3d 153, 162 (3d Cir. 2011) (concluding that because certain documents in the possession of non-parties to a BIT arbitration would not be obtainable for use in the BIT arbitration absent s. 1782 aid, the district court did not err in finding that this discretionary factor weighed in favour of granting the application).

78 *See* e.g. *In re Judicial Assistance Pursuant to 28 U.S.C. § 1782 by Macquarie Bank Ltd*., No. 2:14-cv-00797-GMN-NJK, 2015 WL 3439103, at *6–7 (D. Nev. 28 May 2015); *In re Application of OOO Promnefstroy*, No. 19–99(RJS), 2009 WL 3335608, at *6 (S.D.N.Y. 15 Oct. 2009); *In re Microsoft Corp*., 428 F. Supp. 2d 188, 193–94 (S.D.N.Y. 2006). Insofar as s. 1782 more readily permits access to discovery from non-parties than parties, it differs significantly from ss. 43 and 44 of the English Arbitration Act, which apply primarily to parties.

79 *In re Application of Gorsoan Ltd*., 652 F. App'x 7, 9 (2d Cir. 2016).

80 *In re Application of Auto-Guadeloupe Investissement S.A*., No. 12-MC-221 (RPP), 2012 WL 4841945, at *5–6 (S.D.N.Y. 10 Oct. 2012); *In re Application of Servicio Pan Americano de Proteccion, C.A*., 354 F. Supp. 2d 269, 274 (S.D.N.Y. 2004).

81 *In re Application of Gorsoan Ltd*., 652 F. App'x at 9; *see also In re Emergency Ex Parte Application of Godfrey*, No. 17–21631-CV, 2018 WL 1863749, at *8–9 (S.D. Fla. 22 Feb. 2018) (granting s. 1782 application for discovery from a party because the foreign tribunal, the English Commercial Court, was expected to order the party to produce documents, he had sought to avoid participating in the English proceeding by evading process servers, and the US court was not 'confiden[t]' that he would comply with the English order).

82 *Euromepa S.A. v. R. Esmerian, Inc*., 51 F.3d 1095, 1098 (2d Cir. 1995) (internal quotation marks and citation omitted); *accord In re O'Keeffe*, 646 F. App'x 263, 268 (3d Cir. 2016).

parties – cannot obtain the evidence itself. [83] In the arbitration context, this may entail explaining to the US court that although tribunals can and often do order the production of evidence, a party's ability to enforce an arbitral tribunal's production order is limited, particularly in Mainland China-seated arbitrations, given that there is limited (if any) recourse under the Chinese Arbitration Law to obtain the production (as opposed to the preservation) of evidence via the Chinese courts. [84]

(3) A Section 1782 applicant may be able to obtain evidence located outside the United States, so long as it is in the possession, custody, or control of the US discovery target.

Section 1782 provides that discovery is to be produced thereunder 'in accordance with the Federal Rules of Civil Procedure.'[85] '[D]iscovery pursuant to the Federal Rules of Civil Procedure is broad and covers materials located outside of the United States,' so long as those materials are within the 'possession, custody, or control' of the subpoenaed party.[86]

For this reason, and because the plain language of Section 1782 imposes no geographical limit on the production of documents, several US courts have held that the statute can reach documents located abroad, provided the discovery target resides or is found in the United States and maintains possession, custody, or control over the evidence sought.[87] Citing the statute's legislative history and a concern that use of Section 1782 for evidence located outside the United States could turn American courts into clearing houses for information requests from around the world, other courts disagree, and have held that a Section 1782

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[83] One district court denied an applicant's s. 1782 application for discovery from a party in part because the applicant failed to support 'with concrete evidence' its stated concern that the other party 'may not comply with its discovery obligations in [the foreign] proceedings.' *In re Judicial Assistance Pursuant to 28 U.S.C. § 1782 by Macquarie Bank Ltd.*, 2015 WL 3439103, at *7. An applicant could seemingly avoid this problem by obtaining a production order from the arbitral tribunal in the first instance, and delaying its s. 1782 application until after its opponent has failed to comply – and highlighting both this failure and the arbitral tribunal's limited enforcement powers in its application.

[84] For the avoidance of doubt, there is no requirement under s. 1782 that the discovery sought in the United States be discoverable in the foreign proceeding. *See Intel*, 542 US at 247. That is, the scope of discovery under s. 1782 is set by US law, not by the *lex arbitri* or other rules governing the arbitration proceedings. However, if an applicant seeks to obtain evidence the production of which is flatly barred by the *lex arbitri* or applicable substantive law, or which the arbitral tribunal has ordered need not or should not be produced, a US court may conclude, in its discretion, that s. 1782 discovery is inappropriate. *See ibid.*, at 265 (suggesting that s. 1782 applicants should not 'attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country').

[85] 28 U.S.C., s. 1782(a).

[86] *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1200 (11th Cir. 2016); Fed. R. Civ. P. 45(a)(1)(A)(iii).

[87] *See* e.g. *Sergeeva*, 834 F.3d at 1194–95; *In re Application of Accent Delight Int'l Ltd.*, Nos. 16-MC-125 (JMF), 18-MC-50(JMF), 2018 WL 2849724, at *3–4 (S.D.N.Y. 11 June 2018); *In re Application of HydroDive Nigeria, Ltd.*, No. 13-MC-0477, 2013 WL 12155021, at *1–2 (S.D. Tex. 29 May 2013); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007); *In re Application of Gemeinschaftspraxis Dr Med. Schottdorf*, No. 19–88 BSJ, 2006 WL 3844464, at *4–5 (S.D.N.Y. 29 Dec. 2006).

respondent cannot be compelled to produce documents located abroad,[88] or at the very least that the location of documents abroad weighs against granting a Section 1782 application.[89]

As with the applicability of Section 1782 to private commercial arbitrations, US courts are split as to whether the statute permits an applicant to obtain evidence located outside the United States: the Court of Appeals for the Eleventh Circuit, along with several district courts, has held that it can, while several other district courts have held that it cannot (and the Second Circuit once suggested as much).[90] Unless and until there is greater clarity among the courts on this issue, applicants seeking discovery must (again) carefully consider the case law in the federal judicial district and circuit where the application will be made, and tailor their requests accordingly.[91]

5 CONCLUSION

Parties faced with opponents in arbitration who fail to produce evidence may first consider adverse inferences and adverse cost orders as appropriate measures to compel them to provide evidence. If this fails, or the evidence is held by non-parties to the arbitration, counsel should consider enlisting the support of the court

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88 *See* e.g. *In re Kreke Immobilien KG*, No. 13-MC-110 (NRB), 2013 WL 5966916, at *4 (S.D.N.Y. 8 Nov. 2013); *In re Godfrey*, 526 F. Supp. 2d 417, 423–24 (S.D.N.Y. 2007); *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 384 F. Supp. 2d 45, 52–53 (D.D.C. 2005).

89 *See In re Veiga*, 746 F. Supp. 2d 8, 25 (D.D.C. 2010) (stating 'there is no doubt that courts may exercise their discretion to decline to order the production of documents abroad,' and citing cases).

90 In a 1997 case, the Second Circuit stated in dicta that 'despite [Section 1782's] unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States.' *In re Application of Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997). Citing this statement, several courts within the Second Circuit have held that s. 1782 does not reach evidence located abroad. Several courts within the Second Circuit have also reached the opposite conclusion, however, demonstrating the depth of this issue's divide. *See In re Godfrey*, 526 F. Supp. 2d at 423 (acknowledging disagreement with a fellow S.D.N.Y. judge on the extraterritorial reach of s. 1782).

91 A s. 1782 applicant seeking information maintained abroad by a US target may consider applying for discovery in a judicial district in which the courts have taken a more expansive view of the geographic scope of s. 1782. The applicant must carefully consider a number of factors before taking such a decision, however, including whether courts in the relevant judicial district permit s. 1782 discovery in aid of private commercial arbitrations, as discussed above, and also whether the discovery target has sufficient minimum contacts with the judicial district such that it can be said to 'reside' or be 'found' there, as required by the statute. The case law in this respect, too, is less than clear: some courts have recently suggested that the 'reside' or be 'found' requirement is coextensive with personal jurisdiction and/or the maintenance of systematic and continuous contacts in the judicial district, while others apply a less onerous standard. Compare *In re Application of Del Valle Ruiz*, 342 F. Supp. 3d 448, 453–57 (S.D.N.Y. 2018) (denying the application at issue because although the target maintained offices and conducted banking activities in the judicial district, its headquarters and principal place of business were elsewhere) with *Ayyash v. Crowe Horwath LLP*, No. 17-mc-482 (AJN), 2018 WL 1871087, at *2 (S.D.N.Y. 17 Apr. 2018) (holding that the discovery targets were 'found' in the judicial district on the basis of their in-district offices).

at the arbitral seat or a foreign court to compel production of evidence or attendance of witnesses.

In Mainland China, the options for state court assistance in taking evidence are restricted to the preservation of evidence. Given China's ongoing development as an arbitration-friendly jurisdiction, the options for evidence-taking may increase in the future. In any event, parties engaged in arbitrations seated in Mainland China are not prevented from seeking state court assistance in other jurisdictions where the dispute has an international aspect and where evidence is located outside of Mainland China. Although state courts are generally reluctant to interfere with arbitrations and there are various obstacles to obtaining state court assistance, where there are compelling reasons for foreign state courts to act, they will do so. Practitioners should therefore carefully consider the evidence-taking tools available in foreign jurisdictions at the earliest opportunity.