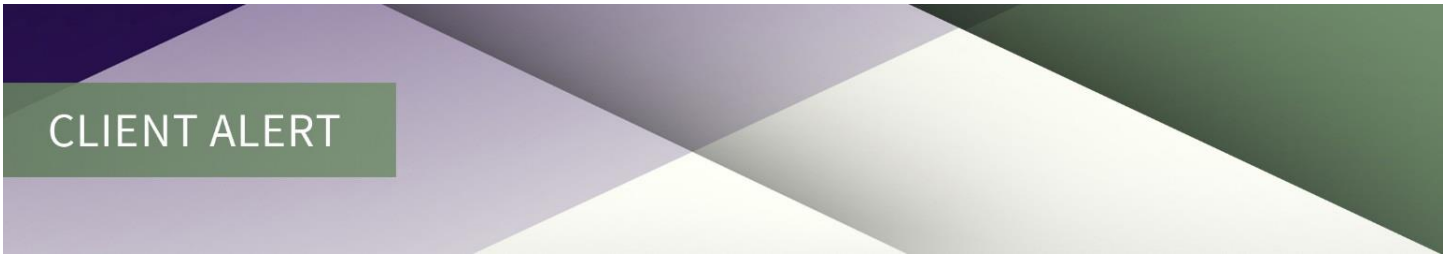

Obtaining Evidence from Non-Parties in International Arbitration: A Comparative Analysis

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Introduction

In international arbitration, evidence held by a non-party can be crucial to the outcome of the proceedings. However, because an arbitral tribunal, unlike national courts, generally derives its jurisdiction from the consent of the parties, it typically has no jurisdiction to compel non-parties to the arbitration agreement to produce documents.

The circumstances in which a non-party can be compelled to provide documents, witness testimony or other evidence in an arbitration have been the subject of significant recent judicial attention. Internationally, different jurisdictions take differing approaches to this issue. This client alert surveys the relevant rules in some of the key international arbitration jurisdictions: England and Wales, Germany, Hong Kong, Singapore and the United States. We conclude with some practical takeaways and advice.

England and Wales

The English courts may assist parties to arbitrations with obtaining witness evidence in two principal ways. Under section 43 of the Arbitration Act 1996 (**1996 Act**), the court has the power to "secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence". In addition, under section 44(2)(a), the court may order "the taking of the evidence of witnesses". While both sections may assist parties to an arbitration in securing witness evidence, they differ significantly in their requirements, scope and practical application.

Section 43: Securing the attendance of witnesses

Where a non-party refuses to provide witness evidence, under section 43 the courts may step in and compel the attendance of a witness at an arbitral hearing, whether to give oral evidence or to produce specific documents. In the right circumstances, section 43 can therefore be a powerful and practical device to secure witness evidence from non-parties in aid of arbitration proceedings. However, the exercise of the court's power under this provision is both limited in scope and subject to conditions.

First, the court may only summon witnesses who are in the United Kingdom, and it may only order them to attend an arbitral hearing held in England, Wales or Northern Ireland. Although the section refers to the location where "the arbitral proceedings are being conducted", this is a reference to the venue of the hearing rather than the seat of the arbitration. In principle, the powers conferred by section 43 may therefore also be exercised where the arbitral seat is in another country or no seat has been designated, provided that a hearing takes place within the jurisdiction.[1]

Second, an application under section 43 requires either the tribunal's permission or the agreement of the parties. [2] The court will only intervene if the tribunal is unable to act, for example because it does not have jurisdiction over non-parties. Accordingly, section 43 cannot be used to obtain evidence from another party to the arbitration.[3]

Lastly, courts have imposed limitations on the scope and nature of requests that will be granted. A request will only be granted if it is made in respect of specific, individually identifiable documents; an application for widely defined categories of documents is therefore unlikely to be successful.[4] Moreover, the courts will generally need to be satisfied that the documents sought are relevant and material.[5] In addition, pursuant to section 43(4), a witness summons cannot be made in respect of privileged material.

If the above requirements are met, the court will issue a witness summons in the same form, and with the same legal effect, as a witness summons in English litigation. In most cases, the court will proceed to serve the summons on the

1 Section 2(3) of the 1996 Act expressly provides that the "powers conferred by [section 43] apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined". In those circumstances, however, the Court may refuse to exercise its powers on the basis that it would be "inappropriate to do so".

2 Section 43(2) of the 1996 Act. In each case, the applicant must provide written evidence that the relevant condition has been satisfied: Civil Procedure Rules, Practice Direction 62.7(3).

3 *South Tyneside Borough Council v Wickes Building Supplies Ltd* [2004] EWHC 2428 (Comm), at para. 23: "[B]y its nature, a witness summons seeks to compel production from a non-party to the proceedings in question" (per Gross J).

4 *See, e.g., South Tyneside Borough Council v Wickes Building Supplies Ltd* [2004] EWHC 2428 (Comm), at para. 23: "The object of a witness summons is to obtain production at trial of specified documents; accordingly, the witness summons must specifically identify the documents sought, it must not be used as an instrument to obtain disclosure and it must not be of a fishing or speculative nature." (per Gross J).

5 *Id*.

relevant witness, and an application may be made to set aside or vary the witness summons.[6] Should the witness fail to attend the arbitral hearing without a reasonable excuse, his or her absence may be punishable as a contempt of court.[7]

Section 44: court powers exercisable in support of arbitral proceedings

Section 44 provides an alternative route to securing witness evidence in the context of arbitral proceedings. Section 44 provides that, in respect of certain matters, the court has the same power to make orders in aid of arbitration as it does in respect of English litigation proceedings. Those matters include, *inter alia*, the taking of the evidence of witnesses and the preservation of evidence.[8]

Crucially, the court's powers under section 44 are not subject to the same territorial restrictions as the equivalent powers under section 43. A witness summons may thus be issued even in respect of witnesses outside the United Kingdom, which significantly broadens the scope for compelling witness evidence. As in the case of section 43, the court's powers under section 44 also apply in the context of arbitrations with a foreign seat.[9] Nevertheless, the court may consider it inappropriate to exercise its discretion if the courts of the seat could provide similar relief.[10]

While section 43 is clearly aimed at witnesses who are not a party to the arbitration, there has been considerable debate, and conflicting authority, on whether section 44 applies to third parties. The Court of Appeal's most recent decision in *A and B v C, D and E* concluded that "section 44(2)(a) does give the court power to make an order for the taking of evidence by way of deposition from a non-party witness in aid of a foreign arbitration".[11] However, the court expressly limited its decision to the first power listed in section 44, "whatever the position is as regards Orders against non-parties under the other heads of subsection 44(2)".[12]

The exercise of the court's powers under section 44 is also subject to different procedural requirements. First, unlike section 43, which is a mandatory provision, the parties' right to apply for an order under section 44 can be excluded by agreement. In addition, the scope and operation of section 44 differ depending on whether the application is urgent or non-urgent. In the latter case, the court will only exercise its powers if the parties agree or if the tribunal has given its

6 Civil Procedure Rules, r.34.6(1) and r.34.3(4).

7 Civil Procedure Rules, Part 81.

8 Section 44(2)(a) and (b) of the 1996 Act.

9 Section 2(3) of the 1996 Act.

10 *See, e.g., U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2013] EWHC 260, at para. 63: "[A] party may exceptionally be entitled to seek interim relief in some court other than that of the seat, if for practical reasons the application can only sensibly be made there …" (per Blair J).

11 *A and B v C, D and E* [2020] EWCA Civ 409, at para. 35. This decision is contrary to two earlier High Court decisions: *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm); and *DTEK Trading S.A. v Morozov & Anor* [2017] EWHC 94 (Comm).

12 *A and B v C, D and E* [2020] EWCA Civ 409, at para. 49.

permission.[13] In cases of urgency, by contrast, the applicant is not required to provide evidence of the parties' agreement or the tribunal's permission, but the court may only make such orders as are "necessary for the purpose of preserving evidence or assets".[14]

The decision whether to apply for court assistance under section 43 or section 44 should thus be informed by the specific circumstances of the case, taking into account the location of potential witnesses, the urgency of the application and the nature of the relief sought.

Germany

In Germany, similar to the situation in England and Wales, in some circumstances, the courts have the power to require the production of evidence in support of arbitral proceedings.

Applications for assistance are regulated by § 1050 of the Code of Civil Procedure ("*Zivilprozessordnung*", **ZPO**), which reads as follows:

"*The arbitral tribunal or, with the approval of the arbitral tribunal, a party may request that a court provide assistance in taking evidence or by performing any other judicial acts for which the arbitral tribunal is not authorised. Unless it regards the request to be inadmissible, the court deals with such request in accordance with its procedural rules for the taking of evidence or any other judicial acts. The arbitrators are entitled to participate in the court hearing at which evidence is taken and to ask questions*."

§ 1050 ZPO is based on Art. 27 of the UNCITRAL Model Law. The section applies to both domestic German and foreign arbitral proceedings as well as to arbitrations where the seat of the arbitration is yet undetermined.

§ 1050 ZPO allows the court to render assistance in the taking of evidence in various ways. Most importantly, the court has authority to summon and question witnesses and expert witnesses if they refuse to testify before the arbitral tribunal voluntarily. Parties and arbitrators alike should be aware that the court will likely take a leading role in the questioning of witnesses. Where the measure consists of the taking of evidence, according to § 1050 ZPO, the arbitrators are allowed to take part in the taking of evidence and ask questions. Requests by the parties to participate in the evidentiary proceedings are usually granted. German courts do not usually allow extensive questioning of witnesses by the parties and will be wary of cross-examination style questioning, which is being viewed as contrary to German public policy. It is advisable to discuss and agree on formalities and proceedings, *e.g.* a verbatim record, or a list of specific questions to be asked, with the court prior to the evidentiary proceedings, especially if the parties or the arbitral tribunal desire specific formalities that

[13] Section 44(4) of the 1996 Act.

[14] Section 44(3) of the 1996 Act.

are not standard in German civil procedure. The evidentiary proceedings are not open to the public. In contrast to an arbitral tribunal, the court also has the power to use coercive measures to compel the respective witness to appear.

Significantly, the court may assist in obtaining documents or objects from non-parties, and can order non-parties to tolerate certain measures required for the taking of evidence, *e.g.*, an expert entering a non-party's property in preparation of an expert report for use in the arbitration.[15] Furthermore, the court may assist by seeking access to public records from German or foreign authorities.[16]

The court will assist upon a written application by the arbitral tribunal, or on an application by a party with the approval of the tribunal. The application pursuant to § 1050 ZPO must be filed with the competent court. This is, according to § 1062(4) ZPO, the local court ("*Amtsgericht*") in the district in which the judicial act is to be performed, *i.e.* in case of witness evidence, the court at the witness's domicile.

If only one party applies for judicial assistance, the arbitral tribunal has the power to block the application by withholding its consent. The legislative reasoning behind this approach is that the tribunal should be able to prevent applications to courts filed for the sole purpose of delaying the arbitration. Accordingly, the tribunal may refuse an application if it deems the evidence sought irrelevant for deciding the case.[17] If all the parties agree that judicial assistance from a court is necessary, the arbitral tribunal will usually be bound by the decision of the parties, thus giving effect to the principle of party autonomy.[18]

If evidence needs to be taken outside of Germany, the arbitral tribunal and the parties have two options: they can either look to the courts in the foreign jurisdiction for assistance, or they can file a request with the German court, which will then submit an official request for judicial assistance under the respective means in force between Germany and the foreign country from which judicial assistance is sought, *e.g.*, the Hague Evidence Convention or a bilateral treaty. After the U.S. Supreme Court's recent ruling in *ZF Automotive* essentially prohibiting the use of 28 USC Section 1782(a) for arbitral proceedings (see the discussion in the section on the United States below), German parties can still rely on a request for judicial assistance by a German court under § 1050 ZPO when seeking to obtain evidence in the United States.

As a general rule, an arbitral tribunal or the parties to an arbitration may only request judicial assistance under § 1050 ZPO if the tribunal does not have the power to carry out the relevant act itself. It is unclear whether a court is required to provide assistance pursuant to § 1050 ZPO where the arbitral tribunal would be able to carry out the respective measure by itself but where doing so would require disproportionate efforts of the tribunal.

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15 *Münch*, in: MüKo ZPO, 6th ed. 2022, § 1050, para. 6.

16 *Wilske/Markert*, in: BeckOK ZPO, 44th ed., March 1, 2022, § 1050, para. 4.

17 Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274, p. 51.

18 *Wilske/Markert*, in: BeckOK ZPO, 44th ed., March 1, 2022, § 1050, para. 7.

Once an application is filed, the court only has very limited scope for review. In particular, the court will not consider whether the requested act of assistance is relevant and material to the outcome of the arbitration because this determination lies within the competence of the arbitral tribunal. Nor will it consider whether the arbitration or submission agreement on which the arbitration is based is valid, although some commentators have suggested that the court should deny the request if the arbitration agreement is clearly invalid.[19] In general, the court will only consider: *First*, whether it has jurisdiction; *second*, whether the arbitral tribunal approved the application of a party; *third*, whether the arbitral tribunal can carry out the requested act by itself; and *fourth*, whether the requested act is permitted under German civil procedural law.[20] German courts will usually deny any request to obtain documentary evidence that is similar to a request for "discovery of documents" as it is practiced under U.S. law. Such discovery of documents is considered incompatible with German civil procedure.[21]

All in all, § 1050 ZPO provides arbitral tribunals and parties to an arbitration with an easily accessible means to obtain evidence from non-parties by way of judicial assistance. However, parties and arbitral tribunals should be aware of the distinctive features of German civil procedure, such as the rejection of requests for extensive discovery of documents or cross-examination. It is advisable in all cases to communicate with the respective German court beforehand about the objective and the practicalities of the requested measure of judicial assistance.

Hong Kong

Hong Kong law provides for powers to compel non-parties to produce or give evidence in respect of arbitrations seated in Hong Kong, and also empowers courts, in some circumstances, to make orders against third parties in arbitrations seated outside Hong Kong.

The Hong Kong Arbitration Ordinance (Cap 609) (**AO**) is based on the UNCITRAL Model Law. Article 27 of the UNCITRAL Model Law on "court assistance in taking evidence" has been incorporated into Section 55 of the AO with supplementations. In addition to the language under Article 27, Section 55 of the AO also specifies that the "*court may order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence*."[22] However, Section 55 of the AO explicitly does not apply to arbitrations seated outside of Hong Kong. [23] As a

[19] *Voit*, in: Musielak/Voit, ZPO, 19th ed. 2022, § 1050, para. 5.

[20] *Wilske/Markert*, in: BeckOK ZPO, 44th ed., March 1, 2022, § 1050, para. 9; see also *Münch*, in: MüKo ZPO, 6th ed. 2022, § 1050, paras. 26 et seq.

[21] *Wilske/Markert*, in: BeckOK ZPO, 44th ed., March 1, 2022, § 1050, para. 9; *Münch*, in: MüKo ZPO, 6th ed. 2022, § 1050, para. 27.

[22] Hong Kong Arbitration Ordinance (Cap. 609), s. 55(2).

[23] Hong Kong Arbitration Ordinance (Cap. 609), s. 5(2) ("*If the place of arbitration is outside Hong Kong, only this Part, sections 20 and 21, Part 3A, sections 45, 60 and 61, Part 10 and sections 103A, 103B, 103C, 103D, 103G and 103H apply to the arbitration*.").

result, parties cannot apply to the Hong Kong Court of First Instance for assistance in obtaining evidence for foreign arbitrations under Section 55 of the AO.

Two sections under the AO provide for the Hong Kong courts' power to assist in evidential matters in arbitrations seated outside of Hong Kong.[24]

First, Section 45(2) of the AO provides that "*[o]n the application of any party, the court may, in relation to any arbitral proceedings which have been or are to be commenced* ***in or outside Hong Kong, grant an interim measure****.*" The "*interim measure*" as referred to in Section 45(2) "*means an interim measure referred to in article 17(2) of the UNCITRAL Model Law, given effect to by section 35(1), as if – (a) a reference to the arbitral tribunal in that article were the court; and (b) a reference to arbitral proceedings in that article were court proceedings*."[25] Article 17(2) of the UNCITRAL Model Law empowers an arbitral tribunal, *inter alia*, to make "*an award … by which, … the arbitral tribunal orders a party to: … (d)* ***Preserve evidence that may be relevant and material to the resolution of the dispute***."[26]

Section 45(2) of the OA thus gives the Hong Kong court the power to grant an interim measure to order a party to preserve evidence relevant and material to the resolution of the dispute in aid of an arbitration seated outside of Hong Kong. However, it is unclear whether a Hong Kong court can make an order that is more extensive than mere preservation of evidence, such as an *Anton Piller* order[27] (*i.e.* an injunction to allow a party to attend another party's premises in order to inspect or take copies of documents) in aid of arbitrations seated outside of Hong Kong under Section 45(2).

The preferable view is that the reference to "*interim measures*" in Section 45(2) should be read broadly so as to encompass any measures which achieve the *objectives* of the specific measures listed. In that sense, for example, an *Anton Piller* order might be considered an order to "*[p]reserve evidence that may be relevant and material to the resolution of the dispute*." This reading is also consistent with the Hong Kong court's attitude to supporting arbitration, regardless of where it is seated.

Second, Section 60(1) of the AO provides that, on the application of any party to arbitral proceedings (whether seated in Hong Kong or elsewhere), the Hong Kong court may make an order "*(a) directing the inspection, photographing, preservation, custody, detention or sale of any relevant property by the arbitral tribunal, a party to the arbitral proceedings*

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[24] The Hong Kong Court also retains inherent jurisdiction to grant interim measures of protection in aid of arbitrations seated outside of Hong Kong. *See The Lady Muriel* [1995] 2 HKC 320.

[25] Hong Kong Arbitration Ordinance (Cap. 609), s. 45(9).

[26] UNCITRAL Model Law, Article 17(2) (emphasis added).

[27] *Anton Piller K.G. v. Manufacturing Limited Processes Lt.* [1976] Ch. 55; *Ng Chun Fai Stephen v. Tamco Electrical & Electronics (Hong Kong) Ltd*. [1993] 1 HKC 160. *See also* Practice Direction 11.2 on the form of an *Anton Piller* order.

or an expert; or (b) directing samples to be taken from, observations to be made of, or experiments to be conducted on any relevant property."

A party seeking to invoke the Hong Kong court's power to assist in evidential matters in aid of an arbitration seated outside of Hong Kong, under either Section 45(2) or Section 60(1), is also well advised to first apply to the tribunal for assistance.[28]

Singapore

The laws of Singapore also provide for powers to take evidence from non-parties, in both domestic and foreign arbitrations. The Singapore International Arbitration Act 1994 (**IAA**) is based on the UNCITRAL Model Law, with certain modifications. Section 12A(2) of the IAA, which is applicable "*irrespective of whether the place of arbitration is in the territory of Singapore*",[29] provides that the General Division of the High Court has the same powers to grant interim measures as those available to an arbitral tribunal under the IAA, except to order "*security for costs*" and "*discovery of documents and interrogatories*". [30] Therefore, under Section 12A, the General Division of High Court cannot order interim measures for discovery of documents or interrogatories.

However, the Singapore court retains the power to order interim measures for:

"*(c) giving of evidence by affidavit;*

(d) the preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute;

(e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject matter of the dispute;

(f) the preservation and interim custody of any evidence for the purposes of the proceedings …"[31]

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[28] *The Lady Muriel* [1995] 2 HKC 320, at [13] ("*[W]here a party to an international commercial arbitration, the seat of which is in a place other than Hong Kong, seeks 'an interim measure of protection' from the court of Hong Kong without having first obtained the approval of the arbitrators to his application, the Hong Kong court should refuse the application unless satisfied that the justice of the case necessitates the grant of the relief in order to prevent what may be serious and irreparable damage to the position of the applicant in the arbitration. If, as I think is here the case, the applicant is unable to discharge this (admittedly, very heavy) burden, the Hong Kong court should refuse him relief.*").

[29] International Arbitration Act 1994, s. 12A(1)(b).

[30] International Arbitration Act 1994, s. 12A(2) (that "*the General Division of the High Court has the same power of making an order in respect of any of the matters set out in section 12(1)(c) to (j) as it has for the purpose of and in relation to an action or a matter in the court*."). International Arbitration Act 1994, s. 12(1)(a) and (b) provide for an arbitral tribunal's power to order interim relief on "*security for costs*" and "*discovery of documents and interrogatories*" respectively.

[31] International Arbitration Act 1994, s. 12(1)(c) to (f). Sections 12(1)(g) to (j) are irrelevant to discovery or disclosure of documents or evidence.

In addition, Section 13 of the IAA provides that "*[a]ny party to an arbitration agreement may take out a subpoena to testify or a subpoena to produce documents*". Where a person subject to such a subpoena is not located in Singapore, it will be necessary to rely upon the power of the General Division of the High Court under the Rules of Court to obtain evidence by deposition in foreign jurisdictions. Therefore, while the General Division of the High Court cannot order interim measures for discovery or interrogatories, it may subpoena any person to testify or to produce documents in aid of a foreign-seated arbitration.

United States

As noted in our recent client alert, the U.S. position has now been clarified following the Supreme Court's decision in *ZF Automotive US, Inc. v. Luxshare Ltd* and *AlixPartners, LLP v. The Fund for Protection of Investor Rights in Foreign States*, in which Willkie Farr & Gallagher LLP successfully represented AlixPartners. In a decision handed down on 13 June 2022, Justice Amy Coney Barrett gave judgment for a unanimous bench. The federal provision at issue, and on which parties to foreign arbitrations have often relied previously, was 28 U.S.C. § 1782(a).[32] That provision reads as follows:

"*The 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*."

The key question was whether the arbitral panels in the two consolidated cases were "foreign or international tribunal[s]" and thus whether the parties to the cases were entitled to apply to a district court for discovery under Section 1782. In *ZF Automotive*, the panel was formed pursuant to the Arbitration Rules of the German Institution of Arbitration (**DIS**) and was adjudicating a commercial dispute between two private entities, one American and one incorporated in Hong Kong. In *AlixPartners*, the deliberating body was a panel of three private arbitrators formed pursuant to the bilateral investment treaty in force between Russia and Lithuania. One arbitrator each was selected by the claimant, a Russian national, and the respondent, Lithuania, sued as sovereign. The two arbitrators then selected the third. In short, a Russian investor had taken advantage of an ISDS provision in that treaty to initiate an ad hoc investment arbitration under the UNCITRAL Rules against Lithuania.

The Supreme Court found that Section 1782 requires a "foreign or international tribunal" to be *governmental or intergovernmental*: a "foreign tribunal" exercises governmental authority conferred by a single nation and an "international tribunal" exercises governmental authority conferred by multiple nations. Private adjudicatory bodies do not fall within Section 1782, including commercial arbitrators and ad hoc investment arbitration panels. The court then went on to find

[32] The Second, Fifth and Seventh Circuits had previously held that Section 1782 did not extend to private commercial arbitrations, whereas the Fourth and Sixth Circuits found that it did.

that neither arbitral panel comprised a foreign or international tribunal as those terms are used in Section 1782. A summary of the court's primary reasoning follows:

First, while the court acknowledged that the word "tribunal" can be broadly used to refer to any adjudicatory body, it said this broad usage was unlikely given the adjectives "foreign" and "international" before "tribunal" in Section 1782.

Second, the court held that the focus on governmental and intergovernmental tribunals in Section 1782 is confirmed by the statute's history. For more than a century, Section 1782 and its antecedents limited assistance to foreign "courts". In 1958, Congress charged the Commission on International Rules of Judicial Procedure with improving the process of judicial assistance, specifying that "the rendering of assistance to foreign courts and quasi-judicial agencies" should be improved. Congress then adopted the Commission's proposed legislation. Furthermore, given that the animating purpose of Section 1782 is comity, the court found it difficult to see how enlisting federal courts to help private bodies would serve that end.

Third, in a comparative analysis, the court concluded that extending Section 1782 to private bodies would be in significant tension with the Federal Arbitration Act (**FAA**), which governs domestic arbitrations in the United States. That is because Section 1782 permits much broader discovery than the FAA, including the ability to obtain discovery before arbitration proceedings have been commenced. The court held that there would be no rationale for such a discrepancy between private domestic and foreign arbitrations.

Having reached its conclusion as to the correct interpretation of Section 1782, the court then turned to analyse the nature of the arbitral panels in the two cases before it, and whether either or both constituted a "foreign or international tribunal". The panel in *ZF Automotive* was straightforward. DIS panels are formed by the parties. No government is involved in creating a DIS panel or prescribing its procedures. The panel in question was therefore not a foreign or international tribunal.

The ad hoc investment panel in *AlixPartners* presented an additional question: a sovereign State was on one side of the dispute, and the option to arbitrate was contained within an international treaty rather than a private contract. However, the court found that the ad hoc panel still derived its authority in much the same way as the DIS panel. Russia and Lithuania each agreed in the treaty to submit to ad hoc arbitration if an investor chose it, and accordingly the ad hoc panel's authority exists because Lithuania and the Russian investor consented to the arbitration – not because Russia and Lithuania cloaked the panel with governmental authority.

The court's judgment accordingly provides a definitive answer to whether parties to international commercial arbitrations or ad hoc investment arbitral proceedings can seek discovery from U.S. federal courts: they may not.

There remains a question as to whether investment panels formed under the auspices of the International Centre for Settlement of Investment Disputes (**ICSID**) might comprise a "foreign or international" tribunal. ICSID panels could be

arguably said to be imbued with governmental authority given that the ICSID Convention affords member states some degree of control and influence over administrative matters, including the ability to nominate persons to serve on panels as potential conciliators and arbitrators.

In any event, it is clear that *ZF Automotive* forecloses an avenue that had previously been very popular for parties to foreign-seated arbitrations seeking discovery from non-parties subject to U.S. jurisdiction. Arbitration users may now have to focus on other discovery tools, including Section 7 of the FAA and state-law provisions such as Section 3102 of the New York Civil Practice Law and Rules.

Practical Takeaways and Advice

The circumstances in which disclosure can be sought from non-parties continue to generate considerable attention. The following practical takeaways can be derived from the analysis above.

First, there are routes available for parties to seek disclosure from non-parties to an arbitration through national courts but these routes are subject to specific requirements. For example, some national courts might be reluctant to make disclosure orders if an application could instead be made to a court of the jurisdiction in which the relevant non-party resides. Nevertheless, in some circumstances, national courts may require non-parties to produce documents or provide witness testimony. The possibility of applying to a national court for an order that a non-party produce evidence can, in the right circumstances, be a powerful additional tool on top of the tribunal's powers to order parties to the arbitration to produce evidence.

Second, the scope and nature of, and requirements for, seeking disclosure from national courts vary considerably from jurisdiction to jurisdiction. Moreover, there have been recent evolutions in the case law restricting the circumstances in which a non-party may be ordered to produce evidence, most notably in the United States in the *ZF Automotive* and *AlixPartners* cases. It would, therefore, be advisable for a party seeking documents from a non-party to consider multiple jurisdictions and think laterally, including about which parties may have custody or control over relevant evidence. In turn, a non-party seeking to resist an order for the production of documents has considerable scope to use recent case law developments (such as the *ZF Automotive* and *AlixPartners* cases in the United States) to its advantage.

Third, parties should give strategic consideration to the evidence they may require in an ultimate arbitration at the stage of drafting the agreement to arbitrate. Some provisions (such as Section 44 of the English Arbitration Act) are non-mandatory and can be opted out of by agreement. Moreover, if a party wishes to have a right to obtain certain types of evidence or information, it can include contractual provisions requiring that its counter-party provides or procures the provision of the relevant documents and information. Including these kinds of contractual obligations at the outset can save time and expense that might otherwise be spent on subsequent applications to courts for the production of evidence.

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