SHALL NATIONAL COURTS ASSIST ARBITRAL TRIBUNALS IN GATHERING EVIDENCE?

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I. INTRODUCTION

There is a great diversity of interferences between national courts and arbitral tribunals, at all stages of arbitration proceedings.

At the outset, the question of the validity and enforcement of arbitration agreements, while governed by the commonly applied principles of the autonomy of the arbitration clause and *competence-competence*, is in reality approached very differently by national jurisdictions. Similarly, while the New York Convention is meant to provide uniformity in the processes for recognition and enforcement of arbitral awards, the development of international arbitration all around the globe has led to distinct approaches and interpretations of the convention by domestic courts when the enforcement of an award is at stake. Between these two ends of the spectrum, national courts also play an active role in the conduct of arbitration proceedings.

In theory, the conduct of the proceedings is the procedural moment where arbitral tribunals, once constituted, have full powers to manage all procedural aspects of the arbitration, as opposed to the pre-arbitration or post-award phases described just above. Logically, the assistance and intervention of the judicial courts should be limited. In reality, national courts continue to interact, directly or indirectly, with arbitration tribunals during that phase, on many issues such as, inter alia, the appointment or removal of arbitrators, the management of multi-party proceedings and the taking of evidence. Surprisingly enough, during that same moment, arbitration practitioners themselves, despite their posture as fierce defendants of the autonomy and independence of international arbitration, tend to increasingly encourage the intervention of and resort to local courts when the arbitration proceedings face a difficulty.

Despite this growing practice and multiplications of interactions between domestic courts and arbitration players, the subject of evidence taking has been and still is, in my view, insufficiently explored in legal writings and by practitioners in their dispute resolution strategies. This is the case despite the fact that it is however widely admitted that the success of a case in an arbitration vastly
depends on the evidence that one party has been able to gather to support its claims¹.

Based on the role arbitral tribunals have in the taking of evidence during the proceedings, this paper aims at understanding whether the interference with, or the assistance of, domestic courts in this process is consistent with the parties’ intent to arbitrate and necessary to supplement the limits of the arbitral process (II). In a second stage, this presentation will analyze how different jurisdictions have approached this topic and what criteria and conditions have been applied by national legislations to lend their national tools and judicial systems to gather evidence for the benefit of private arbitral tribunals f(III).

II. THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION: SOURCES, CURRENT PRACTICE AND SHORTCOMINGS

1. Sources of arbitrators’ powers on the taking of evidence and current arbitration practice on evidence taking

In the context of an international arbitration, it is commonly agreed that the arbitral tribunal - once appointed - is in charge of deciding the issue of evidence. What are the sources of this procedural this power?

a. The arbitration agreement as the source of arbitrators’ powers in evidence taking

As arbitration is rooted in the parties’ mutual agreement, the principles governing evidence taking would normally governed by the arbitration agreement².

In theory, the parties could therefore include detailed provisions on the availability, scope and timing of disclosure in their arbitration agreement³. In practice though, such detailed provisions are rarely drafted, for several sound practical reasons, ranging from the difficulty to predict the amount of disclosure that would be appropriate for a dispute that is undefined at the time of the

¹ The increasing number of debates on whether the law chosen by the parties and applicable on the merits is truly imperative and shall govern the parties’ agreement when conflicted with what the contract states – which also embodies the parties’ agreement - reflect in some ways the overwhelming weight given to the facts, the parties’ intent and contemporaneous evidence by arbitral tribunals, as opposed to applying legal theories. Hence, the recognized necessity for the parties to have solid factual records and, accordingly, a facilitated access to collecting evidence of these facts.


negotiations of the clause, to the scarce attention which is often given to the
details of the dispute resolution mechanisms when finalizing a contract.

b. National laws and the UNCITRAL model law on evidence taking

Absent sufficient, if any, guidance in the arbitration agreement, the rules
governing the taking of evidence in international arbitration would normally be
the ones applicable to these proceedings at the seat of the arbitration.

For example, the United-States (“US”) Federal Arbitration Act (“the FAA”) provides, for arbitration proceedings seated in the USA, that “the arbitrators [...] may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case”4. Therefore, under US law on international arbitration, the tribunal is granted broad powers for evidence taking, though without much details when one compares this article to the extensive provisions applicable when dealing with discovery (see, in comparison, Title V – Disclosure and Discovery of the Federal Rules of Civil Procedure (covering Rules 26 to 37) which provides for a large scope and extensive guidelines regarding the taking of evidence in civil litigation).

Similarly, French law only briefly deals with this question and provides that “if a party is in possession of an item of evidence, the arbitral tribunal may enjoin that party to produce it, determine the manner in which it is to be produced and, if necessary, attach penalties to such injunction”.5

Also in line with the previous, the English Arbitration Act, 1996 provides for a Section 34(1) according to which: “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter” and for a Section 34(2)(d) that clearly states that the tribunal shall decide: “whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage”.

The Belgian Law provides for a similar view by holding that: “If a party holds a piece of evidence, the arbitral tribunal may enjoin it to disclose the evidence according to such terms as the arbitral tribunal shall decide and, if necessary, on pain of a penalty payment”\textsuperscript{6}.

The UNCITRAL Model Law, on its end, first emphasizes the parties’ autonomy under Article 19(1), which provides that “subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceeding”. The following Article 19(2) further provides that, in the absence of any guidance from the parties “the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence”. It is then completed by Article 27\textsuperscript{7}, which specifies that the assistance of national courts might be sought in the collection of evidence.

Hence, when examining these laws, one can agree with Gary Born that “[m]ost national arbitration statutes contain only limited provisions dealing with the disclosure authority of international arbitral tribunals. Nonetheless, virtually all jurisdictions recognize the parties’ autonomy to agree upon the existence, scope and timing of disclosure within the arbitration, although usually as an aspect of the parties’ more general procedural autonomy”\textsuperscript{8}.

c. Institutional rules on evidence taking

Beyond national laws, the question of the arbitral tribunals’ authority to collect evidence appears in the arbitration institutions’ rules that have been elected by the parties and, as such, are mandatory.

For instance, the International Chamber of Commerce (“ICC”) Rules provide that “the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any


\textsuperscript{7} UNCITRAL, Model Law on International Commercial Arbitration, Article 27, available at http://www.uncitral.org/uncitrar/en/uncitral_texts/arbitration/1985Model_arbitration.html (last accessed June 17, 2016): “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 (...)”.

\textsuperscript{8} G.BORN, International Commercial Arbitration, page 2324.
agreements of the parties”. Similarly, the London Court of International Arbitration (“LCIA”) provides that an arbitral tribunal is empowered to “conduct such inquiries as may appear to the Arbitral Tribunal to be necessary, or expedient [...] and to order any party to make any property, site or thing under its control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, any other party, its expert or any expert to the Arbitral Tribunal”.

Under the Hong Kong International Arbitration Centre (“HKIAC”) Rules, Article 22(3) provides that: “At any time during the arbitration the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to the outcome”.

The Singapore International Arbitration Centre (“SIAC”) Rules, Article 24(g) provides that the tribunal shall have the power to: “order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome”.

Moreover, both Rule R-22(b) of the American Arbitration Association (the “AAA”) Commercial Rules and Article 20 of the ICDR Rules expressly refer to the arbitrators’ power regarding the taking of evidence.

Finally, Article 26(3) of the Stockholm Chamber of Commerce (the “SCC”) arbitration Rules provides that: “At the request of a party, the Arbitral Tribunal
may order a party to produce any documents or other evidence which may be relevant to the outcome of the case”.

Hence, just as national laws, institutional rules have taken a liberal and concise approach to the arbitrators’ powers to rule on evidence gathering.

There is accordingly a general consensus, stemming from the parties’ autonomy principle and reflected in national laws and institution rules, that arbitral tribunals are the entities in charge, within the conduct of the proceedings, to gather evidence for use in the arbitration. The next question is now how, in practice, arbitrators do carry out this task and in accordance with which standards. This is obviously not a mundane question, when one is aware of the fundamental cultural differences in the approach to evidence between civil law jurisdictions and common law systems.

d. The International Bar Association Rules on the Taking of Evidence in International Arbitration: non-mandatory but widely used standards

As set forth above, while local laws and institutional rules have recognized the powers of arbitrators to govern the evidence taking process, they provide limited guidance, if any, on how to proceed and which principles shall be applied to effectively tackle the issue of evidence production. This is certainly a positive tribute to the parties’ autonomy in the shaping up of their procedures but it leaves wide room for creativity or alternatively for disorder in the conduct of the proceedings.

For over thirty years, arbitration practitioners have thus worked on defining one common platform relating to evidence collection, which would be at the cross-road of the arbitration practitioners’ various legal cultures. This instrument, which was meant to define guidelines for international panels on disclosure of evidence in international arbitration, has been edited by the International Bar Association and is referred to as the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”). Conceived for the first time in 1983 as “the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration”, its most recent version was revised and adopted by the IBA Council on 29 May 2010. It was conceived as a “balanced
compromise between the broader view generally taken in common law countries and the more narrow view generally held in civil law countries”\textsuperscript{12}, an objective which has undoubtedly been achieved if one considers its current success and status as a major reference in international arbitration.

However, it is noticeable that the preamble of the commentary of the IBA Rules states that such rules are merely supplemental and that they should only fill in gaps intentionally left in the national procedural framework rules with respect to the taking of evidence\textsuperscript{13}.

The conclusion of this description of the applicable laws, rules and norms defining the powers of the arbitrators on the taking of evidence in international arbitration is that there is, in this field, very limited mandatory guidelines that the arbitrators have to adopt and implement. Their freedom is accordingly significant, but, correlatively, their ability and powers to ensure that evidence is preserved at all stages of the procedure and to ensure that every significant piece of evidence will make its way before their eyes is somehow limited when compared to the availability of \textit{ex parte} proceedings before judicial courts and their coercive powers.

2. The shortcomings of the powers entrusted arbitral tribunals on the taking of evidence

There are significant benefits in resorting to arbitration when looking at the specific issue of evidence, the first of which being the freedom that national laws, institutional rules and even the IBA Rules apparently confers upon arbitrators in this process.

A second benefit is that the local courts rarely get involved in decisions made by arbitral tribunals regarding disclosure requests and overall their approach to evidence taking, which belong to the procedural monopoly of arbitral tribunals in the conduct of the proceedings. National courts in an international commercial arbitration context regularly confirm this view, such as when the Paris Court of appeals stated that “the decision of the arbitral tribunal to order discovery is


within its procedural discretion”\textsuperscript{14}. A similar view was adopted in ICSID annulment proceedings where the annulment panel held that “the extent to which the tribunal does call upon one party to produce documents at the request of another party will always be a matter for the tribunal to determine in its discretion”\textsuperscript{15}. Finally, another key element in favor of resorting to international arbitration from an evidence viewpoint is that arbitral tribunals are not bound by the procedures on evidence applied by local courts. Indeed, as described above, the national arbitration laws of the seat of the arbitration tend to uphold the principle of procedural autonomy\textsuperscript{16}, thereby allowing the arbitral tribunals and the parties to escape the evidence rules applicable within the local courts systems of the seat, which, depending on the legal cultures involved, may be perceived as excessively invasive or dramatically insufficient.

However, these positive elements are counter-balanced by obvious shortcomings, described hereinafter, which justify, in my view, that arbitration practitioners resort to domestic courts prior to or during the conduct of the proceedings to solve certain issues relating to evidence taking.

The first flaw in the arbitration system when it comes to the taking of evidence is that arbitral tribunals do not have any access to third parties. The well-known rationale behind this rule is that arbitration is rooted in “consent”.\textsuperscript{17} Therefore, an arbitral tribunal will normally lack jurisdiction to order production of documents over third parties and accordingly might have to seek assistance from local courts to obtain documents from a third party.

A second issue is the effectiveness of the arbitral tribunal’s powers in obtaining documents or the testimony of witnesses, when a party refuses to comply with an order from a tribunal to produce documents or to ensure the attendance of a particular witness at the hearing. The usual remedy is the so-called “adverse
inference”, as per the IBA Rules, which provide that a tribunal may infer that a document or other relevant evidence “would be adverse to the interests” of a party, where the party “without satisfactory explanation” failed to produce it following a request for production to which it did not object, or an order by the tribunal to produce\textsuperscript{18}. However, all practitioners agree that the degree of uncertainty in which the lack of production leaves the tribunal is high, and accordingly, that the “adverse inference” is highly unsatisfactory. National laws may provide more sophisticated solutions, and sometimes allow specific measures that can be carried out by the parties or the tribunal itself to deter a party from resisting the disclosure order, such as a penalty\textsuperscript{19}. Nonetheless, commentators have noted that these penalties are often ineffective, since the tribunal has no power to enforce the penalty itself but in an award, ie at a late stage in the proceedings\textsuperscript{20}. Moreover, these legislations are rather exceptional and the general picture is that, as underscored by Gary Born, nothing “in the UNCITRAL Model Law, the US FAA, the Swiss Law on Private International Law or other leading arbitration statutes empowers arbitral tribunals to impose fines or other penalties on either parties or nonparties to an international arbitration”\textsuperscript{21}.

These two limits have been recognized and, to a certain extent, dealt with by several local laws. This is notably admitted in the UNCITRAL Model Law, whose Article 27 allows arbitrators to seek judicial assistance in the taking of evidence\textsuperscript{22}. Similarly, the 1996 English Arbitration Act provides that: “A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material

\textsuperscript{18} International Bar Association Rules (“IBA Rules”), Articles 9(5) and 9(6), (2010), available at \url{http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx}, (last accessed June 17, 2016).

\textsuperscript{19} See French CPC, Article 1467 (3). See also Belgium Judicial Code, Article 1007(4), available at \url{http://www.cepani.be/en/arbitration/belgian-judicial-code-provisions} (last accessed June 17, 2016), which provides that “if a party holds a piece of evidence, the arbitral tribunal may enjoin it to disclose the evidence according to such terms as the arbitral tribunal shall decide and, if necessary, on pain of a penalty payment”.

\textsuperscript{20} Christophe SERAGLINI and Jérôme ORTSCHEIDT, Droit de l’arbitrage interne et international Montchrestien, 1st edn. (LGDJ 2013), page 770.


\textsuperscript{22} UNCITRAL, Model Law On International Commercial Arbitration, Article 27 available at \url{http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html} (last accessed June 17, 2016), states that: “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”.

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There is therefore a clear “renvoi” to local courts and local legislations to determine whether to order third parties or recalcitrant parties to disclose evidence. Other national laws contain identical provisions: for instance, Article 184 of the Swiss Law on Private International Law provides that arbitral tribunals seated in Switzerland may seek the assistance of Swiss courts in taking evidence: “Where the assistance of state authorities is needed for taking evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court at the seat of the arbitral tribunal; such court shall apply its own law”. Under French Law, the domestic courts’ assistance is defined in Article 1449 of the French Code of Civil Procedure (“CPC”), which makes a straight reference to Article 145 of the same CPC. The latter provides that: “If there is a legitimate reason to preserve or to establish before any trial, the evidence of the facts on which the resolution of a dispute might depend, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of an ex parte application or by way of a summary procedure”. Hence, the recourse to domestic courts in France is widely conceived when it is prior the appointment of the arbitral tribunal, but, once the arbitral tribunal is formed, the latter only shall decide the issues on evidence and a party will not be able to go before the court to obtain such evidence.

A third and significant limit to the effectiveness of arbitral tribunals’ powers in the context of evidence gathering is the risk of destruction of evidence prior to the formation of the tribunal and/or the absence of any surprise effect in the process of evidence taking. Indeed, one major drawback that comes with the fact that the

24 French CPC, Article 1449 states that : "The existence of an arbitration clause does not prevent, until the arbitral tribunal is constituted, a party from seizing a domestic courts in order to obtain an investigative measure or interim or preventive measure. With reservations regarding preventive measures and attachments orders, this request is submitted before the president of the first instance court or of the commercial court, who will decide on the interim measures in accordance with Article 145 and, in case of emergency, on interim or preventive measures requested by the parties to the arbitral agreement.
25 French CPC, Article 1467 states that: "The arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matters, unless the parties authorise it to delegate such tasks to one of its members. The arbitral tribunal may call upon any person to provide testimony. Witnesses shall not be sworn in. If a party is in possession of an item of evidence, the arbitral tribunal may enjoin that party to produce it, determine the manner in which it is to be produced and, if necessary, attach penalties to such injunction".
process for disclosure is transparent and adversarial in arbitration\textsuperscript{26} is that a party may make unfavorable documents go away when receiving the request for production or even at an earlier stage, when receiving the request for arbitration. While such behavior is obviously highly unethical, the absence of constituted tribunal at the outset of the proceedings and the lack of \textit{ex parte} proceedings renders such a hypothesis credible.

These identified weaknesses have led the parties and their counsel to wonder whether seeking assistance from domestic courts could not actually efficiently solve certain situations and practically allow the arbitration process to run smoothly, all relevant evidence having been preserved and/or gathered. As a matter of principle though, one may wonder whether this recourse to domestic courts is not inconsistent with the parties’ intent to arbitrate, and to which extent it does not constitute an illegitimate attempt to circumvent their common choice for out-of-courts proceedings.

3. \textbf{Is resorting to the assistance of domestic courts for the taking of evidence for use in arbitration compliant with the intent of the parties to arbitrate?}

a. \textbf{Is resorting to domestic courts to gather evidence for use in arbitration at odds with the parties’ intent to go to arbitration?}

The arbitration system as described under Section 1 of this paper provides for adequate mechanisms in the context of evidence collection. However, given the absence of an arbitral tribunal at the outset of the proceedings and its lack of power to prevent evidence destruction or to coercively enforce measures such as penalties\textsuperscript{27}, the effectiveness of a tribunal’s decisions in this field is entirely dependent on the parties’ good faith in complying with the panel’s orders.

Therefore, in cases where there is a serious risk that a party does not abide by the rules or fails to comply with its own undertakings arising out of their agreement to arbitrate, the local court might be called upon to act and intervene in support

\textsuperscript{26} See, IBA Rules, Article 3 and Section 1.d of this paper.

\textsuperscript{27} C. SERAGLINI and J. ORTSCHEIDT, \textit{Droit de l’arbitrage interne et international} Montchrestien, page 322. According to the authors, the arbitral tribunal lacks the power of \textit{imperium merum.} meaning that it cannot compel one party to produce evidence.
of the arbitration, if and when the applicable national procedural arbitration law provides for it\textsuperscript{28}.

One may question whether such intervention of national courts is appropriate in the context of arbitration and does not constitute an undue interference with the arbitration process. It could also be perceived as one party trying to impose, by resorting to local courts, their legal culture as a matter of evidence, as opposed to adopting the balanced approach that international arbitration advocates in terms of evidence. Finally, it could be interpreted as circumventing the arbitral tribunal’s exclusive control over procedural aspects of the conduct of the case.

Overall though, in my view, there are more positive aspects to this judicial-arbitral cooperation than real difficulties or breaches of the agreement to arbitrate.

Firstly, the intrusive aspects of the domestic courts’ intervention over the acts of the tribunal relating to evidence taking are limited. As already examined above, in the context of international arbitration, the tribunal’s power to order disclosure of document is subject to minimal review only from the local courts, which generally have shown great deference to arbitrators’ decisions on disclosure\textsuperscript{29}. In a nutshell, even if the local judge regains a role in the arbitration process when called to enforce a tribunal’s order, its jurisdiction will essentially consist in enforcing the tribunal’s order, not reviewing it\textsuperscript{30}.

Second, another way to look positively at the intervention of the local judge in the arbitration process in the context of evidence taking is that it could only contribute to a better information of the tribunal and shall allow the panel to render a more accurate and fact-grounded decision, thereby contributing to the quality of the arbitral system. Domestic courts come in only to support the arbitral tribunal in carrying out its task, nothing else; this is particularly necessary when the arbitral tribunal has limited powers, such as with regard to third parties, and definitely not subject to serious criticisms.

In that respect, one author goes as far as asserting that the justification of the national courts’ intervention is actually rooted in the parties’ agreement to

\begin{footnotesize}
\textsuperscript{28} G. BORN, \textit{International Commercial Arbitration}, page 2395.
\textsuperscript{29} Paris Court of Appeal, 22 January 2004, \textit{Nafimco V. Société Foster Wheeler Trading Co.}
\textsuperscript{30} C. SERAGLINI and J. ORTSCHEIDT, \textit{Droit de l’arbitrage interne et international}, page 621 and 622.
\end{footnotesize}
arbitrate\textsuperscript{31}. The reasoning is as follows: when one of the parties refuses to comply with an order of the arbitral tribunal to produce evidence, said party breaches the undertaking it made when it entered into the arbitration agreement; it thus immediately gives the right to the arbitral tribunal to sanction such breach by seeking assistance from the domestic courts if available.

b. Is resorting to national courts at odds with the philosophy of the taking of evidence in international arbitration?

The IBA Rules have been praised for their balanced approach to evidence collection. It is accordingly legitimate to question whether resorting to domestic courts to assist tribunals with the collection of evidence is not inconsistent with the apparent desire of arbitration practitioners and users to deal with the evidence issues outside of the courts systems.

Arbitration users have themselves formulated different answers to this question.

In the IBA Rules, the question of domestic court’s assistance in the context of evidence, which is in possession of a third party, is directly treated. According to Article 3(9), a party that seeks disclosure from third parties may request the tribunal to exercise whatever power it may have under applicable national law. The party may also obtain leave from the tribunal to resort itself to any mechanism it has under national law to obtain judicial assistance in the collection of evidence from third parties\textsuperscript{32}. The IBA Rules though are silent on the potential assistance of local courts for forcing the production of evidence in the possession of the parties themselves, for which it already provides the “adverse inference” remedy.

The possibility to go before national court systems is also reflected, with an unlimited scope as to the persons from which evidence might be requested, in the UNICTRAL Model Law, which provides under Article 27: “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”.

Numerous national legislations, some of which are cited supra, also provide for

\textsuperscript{31} C. SERAGLINI and J. ORTSCHIEDT, Droit de l’arbitrage interne et international, page 734 and 735.

\textsuperscript{32} IBA Rules, Article 3(9).
such assistance: it is alternatively solely provided for evidence in the possession of third parties only, in line with the IBA Rules philosophy, or without regard to the status of the persons from which it is collected.

Under other legal systems, it is possible to seek court assistance to obtain evidence, irrespectively whether it comes from third parties or a party to the arbitration. For instance, under Swedish Law, Article 26 of the Swedish Arbitration Act states that: “Where a party wishes a witness or an expert to testify under oath, or a party to be examined under truth affirmation, that party may, after obtaining the consent of the arbitrators, submit an application to such effect to the District Court. The aforementioned shall apply where a party wishes that a party or other person be ordered to produce as evidence a document or an object. If the arbitrators consider that the measure is justified having regard to the evidence in the case, they shall approve the request” (emphasis added). Similarly, Section 43(1) of the 1996 English Arbitration Act makes no distinction as to whether the court proceedings can be pursued to gather evidence against third parties and parties to the arbitration proceedings33. Under French law, it has been widely admitted that Article 145 of the CPC could be used to obtain evidence from a person that is not contemplated to be a party in the future proceeding34, though exclusively prior to the commencement of the arbitration, as further detailed below.

In contrast, US domestic courts have refused to allow pre-hearing disclosures against third parties on the ground that Section 7 of the FAA does not permit an arbitral tribunal to obtain judicial assistance in conducting pre-hearing discovery from third parties35.

There are accordingly no apparent incompatibilities between the recourse to domestic courts and the conduct of the proceedings by the arbitrators, including in legal instruments drafted by arbitration users, such as the IBA Rules or the

33 English Arbitration Act, Section 43(1), (1996) reads as follows: “A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence”.
34 Cour de Cassation, 2ème chambre civile, February 27, 2014, No. 13-10.013.
35 United States Court of Appeals for the 2nd circuit, November 25, 2008, Life Receivables Trust V. Syndicate 102, 549F.3d 2010, holding that Section 7 does not permit an arbitral tribunal to obtain judicial assistance in conducting pre-hearing « discovery » from third parties.
UNCITRAL Rules. This is all the more true since, as detailed below in section 3, many national legislations balance the intervention of their domestic courts by placing the arbitral panel at the center of this process, either as the requesting party or whose authorization is necessary to present a request before their domestic courts.

Having said that, the quasi-systematic drawback of evidence taking mechanisms before domestic courts is that it gives rise to additional, costly procedures, which were certainly unintended by the parties when they chose arbitration, and have direct consequences on the conduct of the main arbitration proceedings. Indeed, seeking the disclosure of evidence through national courts necessarily entails the additional costs related to these additional proceedings, adds additional complexity in the management of the case and almost always delays in the calendar of the main arbitral proceedings. For instance, in my experience, in an international commercial arbitration, the debate over the production of a piece of evidence was brought by a party before the local courts, in order to enforce an order to produce one piece of evidence issued by the Arbitral Tribunal, that was resisted by the other party. While the local court of first instance ordered the production of the concerned document, this decision was reversed by the court of appeals, a decision that was brought to the Supreme Court. In the meantime, the arbitration proceedings had to be bifurcated to avoid to be entirely halted while the question of the production of the document was being solved, which created a significant delay in the conduct of these proceedings. Would have the “adverse inference” been sufficient? This was obviously not the opinion of the party that pursued the domestic procedure. Should have the tribunal prevented such recourse, and would it empowered to do so if it judges that such domestic court proceedings are unnecessary?

Indeed, one could legitimately question whether resorting to local courts for evidence is not an option which might be elected for disloyal reasons, sometimes without regard to the evidence that is actually sought to be collected. In other words, a party could be attempting to circumvent the arbitration agreement at stake and the conduct of the proceedings entrusted to the arbitral tribunal by
returning or putting in motion domestic courts and attracting its opponents to such forum.

From that point of view, it appears necessary to set boundaries in order to prevent bad faith tactics and make sure that a move to local courts is made for legitimate reasons and solely to supplement the limits of the powers of the arbitral tribunal in that field.

There is not one single way to achieve that objective. The approach heavily depends on the legitimacy of the request for documents that is put before domestic courts, and overall the procedural attitude of the concerned party. Domestic courts and local laws have taken into consideration this element very seriously. For instance, a French court would only assist a party under Article 145 of the CPC if it is shown that there is a legitimate motive, and only before the tribunal is formed. Pursuing the same logics, a US Court will agree to act under Article 1782 USC (assuming that US Court agrees that an arbitral tribunal is an international tribunal per the statute) only if it is convinced that the concerned tribunal does not have the power to obtain these documents and will accept them in its ongoing proceedings. These criteria were set out in an important decision issued by the Supreme Court36 and lower courts have been receptive to these since then37. Some courts have even assumed that the judicial assistance would be well received by the foreign tribunal, absent evidence establishing the contrary38.

In addition, to avoid these tactics and to ensure that the multiculturalism and balanced approach of international arbitration is complied with, as per their

36 United States Supreme Court, June 21, 2004, Intel Corporation V. Advanced Micro Devices, 542 U.S. 241, (Supreme Court of the United States, page 20-21 holding that a district court may consider among others (1) whether the evidence sought is within the tribunal’s jurisdictional reach and thus accessible without resorting to Article 1782 USC. And (2) whether the foreign court would be receptive to the assistance of the foreign US court.

37 United States District Court, September 1, 2004, In Re Application of Procter & Gamble Co., 334 F.Supp. 2d 1112 referring to the Intel criteria and stating that the court shall consider "whether the person from whom discovery is sought is a participant in the foreign litigation (...) the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance".

38 United States Court of Appeals for the 8th circuit, May 1, 2012, Government of Ghana V. ProEnergy Servs, LLC, 2011, WL 2652755 recalling the first criterion and stating that absent reliable evidence that the tribunal would reject evidence sought, the court assumes that the arbitral tribunal would be receptive to judicial assistance.
agreement to arbitrate, the arbitral tribunal and/or parties have different options, at different stages of the proceedings:

− When drafting the arbitration clause, the parties could precisely define the conditions for resorting to evidence taking before domestic courts, or go as far as precluding them entirely;

− When drafting the terms of reference or discussing the scope and extent of the taking evidence in a specific proceedings, the arbitral tribunal may suggest and obtain the parties' agreement, taking into consideration the law of the seat, that any request to a domestic court shall be made by the tribunal itself or shall get the approval of the tribunal;

− When adopting the arbitration rules that will govern their proceedings, the parties may elect rules that prevent parties from resorting to local courts to collect evidence. One notable case is the LCIA rules, for documentary evidence, Article 22(2), which states: “By agreeing to arbitration under these rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any order available from the Arbitral Tribunal under Article 22.1, except with the agreement in writing of all parties”39. Article 22(1) (V) provides that the arbitral tribunal will have jurisdiction to “order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant”. Article 26 of the ICSID Convention has a similar content, thereby precluding the parties from going to domestic courts of evidence (see ICSID Vol 2, No. 2, “ICSID”).40

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39 LCIA rules, Article 22(2).
40 However, the parties may expressly agree that resorting to local courts is allowed. Under the International Center for Settlement of Investment Disputes (“ICSID”) Arbitration Rules, Article 39(6), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm, (last accessed June 17, 2016) which provides that: “Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.” The model for an ICSID arbitration agreement actually specifically refer to that exception, in its Article 14, which provides: “Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding, or during the proceeding, for the preservation of its rights and interests”. 

During the proceedings, the parties may request that the arbitral tribunal address in its final award all the costs incurred for the taking of evidence, including costs incurred before domestic courts. The objective is to provide a sanction, in terms of cost shifting, for unduly burdensome and costly recourse before local courts; this provision should ideally be incorporated in the arbitration agreement; indeed, the likelihood of success of such request, if made during the proceeding as opposed to in the arbitration agreement, is, in my opinion, moderate: numerous arbitral tribunals will consider that costs borne out of their forum are already being dealt with by the local rules and shall not enter the sphere of the arbitration.

In conclusion, I am of the view that resorting to domestic courts for the taking of evidence, over the powers of the arbitral tribunals or to supplement them, has no solid reason to be prevented or entirely avoided. As much as arbitration needs the assistance of domestic courts to enforce arbitration agreements and arbitration awards, the limits of the arbitral tribunals’ powers on issues of evidence that I have developed above require the assistance of domestic courts, when necessary and helpful to the process.

This view is reflected by many national legislations, which have allowed and determined the perimeter of the intervention of their own judicial system in aid of international arbitration on evidence questions. They will be studied and described in this section III.

III. A BRIEF SURVEY OF NATIONAL LAWS AND CURRENT PRACTICES FOR THE TAKING OF EVIDENCE IN AID OF INTERNATIONAL ARBITRATION

Numerous domestic legislations provide that their domestic courts may assist arbitral tribunals in their fact-finding process.

Yet, the extent and the way in which a tribunal or the parties may resort to local courts greatly varies according from one State’s practice to another. Their differences and their implications in terms of conduct of proceedings are detailed below. Needless to say, knowing and mastering these differences could greatly
assist the parties in their search for evidence and in their strategic approach to a dispute, from a transnational perspective.

National laws have also defined several criteria to extend their assistance – or not – to arbitral tribunals, namely:

- the involvement of the arbitral tribunal into the court’s proceedings;
- the localization of the seat of the arbitration versus the localization of the courts required to assist in the evidence taking;
- the scope of the evidence which is requested.

1. **Which degree of involvement of arbitral tribunals in the evidence taking process before domestic courts?**

In some jurisdictions, the arbitral tribunal is directly entitled to request that the local court intervene to collect evidence. The parties to the arbitration may also be granted a direct access to the domestic courts, but only with the approval of the arbitral tribunal. In both cases, this approach leaves and comforts the place of the arbitral tribunals at the center of the evidence taking efforts.

The UNCITRAL Model Law has set forth this philosophy in its Article 27. The tribunal retains control over the disclosure process and whether or not to seek assistance from a local court. Following the same logics, if a party wishes to obtain disclosure of a document by a local court, it must first and foremost seek the tribunal’s permission.

The 1996 English Arbitration Act has followed a similar approach under its Section 44.4 and 44.5, in which, just like in the Model Law, the tribunal must approve the action envisaged by a party (unless the emergency justifies an order to preserve evidence without consultation of the arbitral tribunal). Numerous other current national laws in well-known and sought-for arbitration seats have replicated this view. To cite only a few, this is the case for Swiss Law on Private International Law (the “PIL”), Swedish law, Belgian law and Dutch law.

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41 See. UNCITRAL, Model Law on International Commercial Arbitration, Article 27.
42 Federal Act on Private International Law (1987 as amended July 1: 2014), Article 184 paragraph 2, available at [https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws](https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws) (last accessed June 17, 2016) holds that “Where the assistance of state authorities is needed for taking evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court at the seat of the arbitral tribunal; such court shall apply its own law.”
The objective is clear: the arbitral tribunal shall retain control over the arbitral proceedings\textsuperscript{46}, including all phases relating to evidence. Therefore parties shall be prevented from taking steps without at least his participation or the approval of the arbitral tribunal. As discussed above, this view is also compliant with the IBA Rules\textsuperscript{47}.

In reality, having the arbitral tribunal directly initiating proceedings before a local court to collect evidence and/or to force a witness to appear, is extremely rare\textsuperscript{48}. They might authorize, or sometimes even encourage the parties to do so, but the cases where an arbitral tribunal appears as the requesting party before the domestic court are exceptional. The reasons for the observed reluctance of arbitral tribunals range from the risk of appearing as partial, if the evidence to be collected goes clearly against the case of one party, the difficulty in changing roles, from an adjudicating body to a simple party to a domestic procedure, the lack of corporate personality of an arbitral tribunal, certainly also the fear of their personal liability and the unsolved question of who is going to bear the costs of such procedure, etc. The vast majority of cases are therefore at the initiative of the parties, further to being authorized by arbitral tribunals.

In contrast, certain countries have adopted a more liberal approach by allowing parties to act entirely independently in gathering evidence and obtaining the court’s assistance in doing so.

\begin{itemize}
\item \textsuperscript{43} Swedish Arbitration Act (1999), Section 26, available at http://swedisharbitration.se/wp-content/uploads/2011/09/The-Swedish-Arbitration-Act.pdf (last accessed June 17, 2016) provides that “Where a party wishes a witness or an expert to testify under oath, or a party to be examined under truth affirmation, the party may, after obtaining the consent of the arbitrators, submit an application to such effect to the District Court. The aforementioned shall apply where a party wishes that a party or other person be ordered to produce as evidence a document or an object. If the arbitrators consider that the measure is justified having regard to the evidence in the case, they shall approve the request”.
\item \textsuperscript{44} Belgian Judicial Code, Article 1708 (as in force as September 1, 2013), provides that “With the approval of the arbitral tribunal, a party may apply to the President of the Court of First Instance ruling as in summary proceedings to order all necessary measures for the taking of evidence (…)”.\textsuperscript{8}
\item \textsuperscript{45} Netherlands Code of Civil Procedure, Article 1041(2), available at http://www.dutchcivillaw.com/civilprocedureleg.htm (last accessed June 17, 2016) “If a witness does not appear voluntarily or, having appeared, refuses to give evidence, the arbitral tribunal may allow a party who so requests, within a period of time determined by the arbitral tribunal, to petition the Provisional Relief Judge of the District Court to appoint a Judge-Commissary before whom the examination of the witness shall take place (…)”.
\item \textsuperscript{46} C. SERAGLINI and J. ORTSCHEIDT, Droit de l’arbitrage interne et international, page 717 stating that the arbitrators have the duty to conduct the arbitration proceedings.
\item \textsuperscript{47} Article 3(9) of the IBA Rules, 2010.
\item \textsuperscript{48} Christoph MULLER, International Arbitration, Swiss case law in international arbitration, 2\textsuperscript{nd} edition, (Schulthess 2010), Page 183.
\end{itemize}
The United States illustrates this view, under two different statutes. First, the US FAA provides for assistance of domestic courts directly to the parties, at their request, when the seat of the arbitration is in the US\textsuperscript{49}, without seeking any intervention or even requesting that the arbitral tribunal be informed. One shall note however that there is a split among US district courts on the conditions under which courts should assist private parties, as some courts have limited the possibility for a private party to obtain judicial assistance for only under exceptional circumstances. For instance, in \textit{Vespe Contracting Co. V. Anvan Corporation}\textsuperscript{50}, the district court for the Eastern District of Pennsylvania granted the request in the “peculiar circumstances” that the tribunal was not constituted and the evidence was “disappearing” because of the continuing work on the construction project. Other courts have simply refused requests filed directly by parties – as opposed to requests filed by tribunals - for court-ordered discovery in aid of arbitration\textsuperscript{51}.

In addition to this, Section 28 U.S.C. §1782 of the US Code (“Section 1782”) grants U.S. courts an even wider power to order discovery for use in the context of a foreign proceeding or before a so-called “international tribunal”, to any interested party. Specifically, this section states that “\textit{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 (...) The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court}”. The application of Section 1782 to collect evidence for use before an arbitral tribunal, whether such arbitral tribunal qualifies as an

\textsuperscript{49} G.BORN, \textit{International Commercial Arbitration}, page 2404 et seq.

\textsuperscript{50} United States District Court for the eastern district of Pennsylvania, July 24, 1975 \textit{Vespe Contracting Co. V. Anvan Corporation}, 399 F. Supp. 516. More recently, a decision by the United States District Court for the eastern district of New York, February 6, 2004, \textit{In Re Compania Chilena de Navegacion Interoceania S.A}, 2004 AMC 443. held that extraordinary circumstances justified a court order preserving evidence.

\textsuperscript{51} For example, in a decision by the United States Court of Appeals for the 4th circuit, February 7, 1980, \textit{Burton V. Re Bush}, 614 F. 2d 389, the court held that: "[w]hile an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege". 1980. Similarly, in a decision by the United States Court of Appeals for the 2nd circuit, January 26, 1999, \textit{NBC V. Bear Steams & Co. 165 F.3d 184}, the Court noted that: \textit{First, § 7 explicitly confers authority only upon arbitrators; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents or witnesses}. 
“international tribunal” and the criteria for resorting to this Section 1782 have been heavily discussed in the past few years and let a split between Circuits\textsuperscript{52}. However, it is interesting to highlight that it entitles any “interested party” to initiate such an action to gather evidence located in the US for use in foreign proceedings. It thus includes the tribunal, the parties but it could also allow sister companies, shareholders, and go as far as to complete third parties to initiate these proceedings, using the sole criteria that the outcome shall present an interest to them. In short, US courts are amenable to assist such “international tribunals” in the context of proceedings that might not have any other relationship with the US than the location of the evidence. In other words, the classic criteria relating to the necessity to be a party to the arbitration proceedings, the required authorization of the concerned tribunal or the location of the seat of the arbitration have been discarded by Section 1782.

Another illustration of domestic laws generously providing their assistance to parties is found under French law, where the above mentioned Article 145 of the French CPC states that “If there is a legitimate reason to preserve or to establish before any trial, the evidence of the facts on which the resolution of a dispute might depend, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of an ex parte application or by way of a summary procedure”. Hence, the conditions set forth in that article are that (i) no proceedings have started yet\textsuperscript{53} (ii) there is a legitimate reason to preserve or establish evidence and (iii) the outcome of a future case is contingent on the collection of these evidence. Here again, the localization of the potential main proceedings, for which the evidence is sought, the nature of these proceedings (civil, criminal, arbitral...), the seat, the nationality of the parties are irrelevant factors. Only the localization of the documents matters. The philosophy underlying the use of Article 145 of the French CPC is however different from the one underlying Article 7 of the FAA or Section 1782: here, this tool is only

\textsuperscript{52} Whether the arbitral tribunal is in an international tribunal within the meaning of Section 1782 has led to a circuit split in the US. For a detailed analysis on this question see. Carine DUPEYRON and Marie VALENTINI “Legal instruments used in the search for evidence in support of arbitration: comparative study of Article 145 of the French Code of Civil Procedure and Section 28 U.S.C. § 1782 in the United-States” 6 Intl’ Business Law Journal (2013), page 533 et seq. See also hereunder, Section 2.b.

\textsuperscript{53} In this context, the word « trial » includes within its meaning arbitration, as consistently admitted by French case law (see. Cour de Cassation, 1\textsuperscript{ère} chambre civile, 25\textsuperscript{ème} April 2006, No. 05-13.749).
available to a party to a potential arbitration before the constitution of the tribunal. The intent of the French legislator in authorizing that parties initiate proceedings under this section was accordingly to fill a gap at the outset of the arbitration proceedings, when the tribunal is not formed, and to avoid leaving a party “empty handed” by creating the opportunity to resort to local courts in order to obtain evidence that might disappear or not be available later on in the proceedings. At a later stage, the primacy is handed over to the arbitral tribunal, which is vested with the greatest powers to decide issues regarding evidence, as soon as it is constituted, i.e. as soon as the last arbitrator has accepted its mandate (Articles 1449 and 1468 of the French CPC).

This provision, in a country that is particularly reluctant to and criticizes anything close to a systematic discovery or disclosure of documents is sufficiently extraordinary in its own legal culture to be underscored and worth knowing.

To supplement this open access to the domestic courts at the very outset of arbitral proceedings, French law also acknowledges that, with respect to documents detained by third parties, the powers of the arbitrators is limited and accordingly states that a party may seek the assistance of French courts, if the arbitral tribunal approves it (Article 1469 of the French CPC). We are accordingly here back to a more classic approach, which again and logically places the arbitral tribunal at the center of the discussion over evidence.

2. The requirement concerning the seat of the arbitration proceedings

Another distinctive feature is the extent to which the domestic courts will assist arbitral tribunals based on whether the arbitration proceedings are seated within their jurisdiction. In some jurisdictions, the local courts will only support the taking of evidence if the arbitral tribunal is seated within their jurisdiction, other provide for assistance in the taking of evidence irrespective of the seat of the arbitral tribunal. In such case, when a court decides to assist an arbitral tribunal that is not seated within its jurisdiction, it obviously upholds the idea (tendency?) that the arbitral system is independent from any national forum and from its seat.
a. Domestic courts’ assistance limited to arbitration proceedings seated in their jurisdictions

The UNCITRAL Model Law adopts the more restrictive approach: Article 27 is only available for locally-seated arbitral tribunals. Article 1(2) of the Model Law provides for the following limitation: “the provisions of this Law (...) apply only if the place of arbitration is in the territory of this State”. Similarly, the PIL Swiss Law provides for the same limitation under Article 184. Same reasoning in the United-Kingdom, where the 1996 English Arbitration Act also requires that: “The court procedures may only be used if (...) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland”54. Yet, pursuant to Section 2(3) of the 1996 English Arbitration Act, in the context of evidence taking, there remains a possibility, since the domestic courts may exercise discretion in deciding whether they should provide assistance to arbitration seated outside their jurisdiction55.

While it makes sense that the national legislator determines that its judicial system is not meant to assist international arbitration “globally”, certainly for budget and time constraints for instance, this is relatively at odds with the notion that international arbitration has no link with one nation or another, in others words, that international arbitration is an autonomous legal system.56. This is also narrowing dramatically the real assistance that local courts may provide, since it presupposes that the evidence should be located at the seat of the arbitration for the local court to exercise coercive powers over the party. Since the seat of the arbitration is often elected by the parties in a neutral country, ie a country with limited links with the merits of the dispute and/or the parties’ place of incorporation, the probability that the local courts will effectively act is significantly reduced when this criteria is provided for.

54 English Arbitration Act, Section 43(3)(b), (1996).
55 English Arbitration Act, Section 2(3), (1996) reads : « the powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined (...) section 43 (securing the attendance of witnesses) (...) but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so » (emphasis added).
56 C. SERAGLINI and J. ORTSCHEIDT, Droit de l’arbitrage interne et international,, page 473 et seq. on the question of the autonomy of international arbitration from any forum.
In my opinion, a court of law should assist an international tribunal, irrespective of where its seat is located so as to participate in a sound management of the arbitral process. As the evidence may be located anywhere, the arbitral tribunal shall have access to the local courts where the evidence is located without facing the reluctance of the court because the seat of arbitration is not located within its jurisdiction.

b. Domestic courts’ assistance for foreign seated arbitral proceedings

Receptive to these arguments, some jurisdictions have expressly provided the possibility of assisting arbitral tribunals irrespective of their location that is to say, granting assistance to all arbitral tribunals including those seated within a different jurisdiction and in need of evidence located within their own jurisdiction.

For instance, as discussed above, US law specifically provides for such assistance in Section 1782, which permits a district court in the US to order a person who resides or “is found” in the district to give testimony or produce documents for use in a foreign or international tribunal upon the application of an interested person. If such request is admitted (assuming the debate over the definition of “international tribunal” has been decided in favor of arbitration), it allows the tribunal or a party to request evidence from the court for production in the arbitration proceedings. This solution is welcomed: material evidence might be located in the United-States without the arbitral tribunal being seated there and the parties would then be entitled to collect this evidence and produce it before the arbitral tribunal with the assistance of the US state court.

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57 Gary BORN, International Commercial Arbitration, page 2396 where the author considers that this territorial limitation unduly restricts judicial support for the international arbitral process.

58 C.DUPEYRON and Marie VALENTINI "Legal instruments used in the search for evidence in support of arbitration: comparative study of Article 145 of the French Code of Civil Procedure and Section 28 U.S.C. § 1782 in the United-States", page 5 et seq. In 2004, the Intel decision the Supreme Court adopted an extensive view of the applicability of Section 1782 regarding what constituted an international or foreign tribunal leaving one to infer that this tool was available in the context of international arbitration. However, lower courts have split on this issue some court refusing to consider that a private arbitral tribunal would fit within the meaning of Section 1782 (United States Court of Appeals for the 2nd circuit, January 26, 1999, NBC V. Bear Steams & Co. 165 F.3d 184or United States District Court for the district of Kansas, March 25, 2011, In re Application by Rhodianyl SAS 2011 US Dist. LEXIS 72910,) while other adopted a much more liberal view (United States District Court for the Northern district of California, March 9, 2012, In re Application of the Republic of Ecuador 2011, 280 F.R.D. 506, WL 4434816).
Similarly, French law permits a party to obtain evidence through the process of Article 145 of the CPC, irrespective of the fact that the parties will engage in an arbitration that is not seated in France.

In both examples, the key element taken into consideration by the local courts is whether they have jurisdiction over the evidence itself, i.e., whether documents or persons are located/residing within their jurisdictions.

In conclusion, it is interesting to ask whether the assistance available before domestic courts to an international tribunal, which is contingent or not on the localization of the seat of the arbitration proceeding, reflects the degree of deference that such particular legislations place in the concept of seat of the arbitration and, perhaps overall its vision of arbitration as an autonomous system, or is not.

3. The scope of the evidence collection that could be ordered

In the context of assistance by the courts, the scope of the evidence that could be required to be disclosed, along with the question of whether or not evidence can be taken from third parties, is also subject to national arbitration laws.

Regarding the scope of disclosure, the UNCITRAL Model Law provides that judicial assistance will be made available to the arbitral tribunal. A question that arose in that context is whether such assistance in the taking of evidence would extend to broad discovery, as widely used in common law jurisdictions, or to more limited document production, in line with the IBA Rules philosophy. This question is key, as it narrowly relates to the balance that has been reached, in our view, after years of discussion, by arbitration practitioners coming from extremely different legal cultures.

Some jurisdictions have been reluctant to order wide disclosure of documents in aid of arbitration. For example, in *BNP Paribas V. Deloitte*, the English High Court concluded that, as it was presented with an application for the production in evidence of classes of documents rather than specific identified documents, it would not fall within Section 43 of the 1996 English Arbitration Act.

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60 *Commercial Court, November 28, 2003, BNP Paribas V. Deloitte & Touche LLP [2003] All ER (D) 431 (Nov).*
Unsurprisingly, under French law, the scope of the pre-trial disclosure of Article 145 of the French CPC will be naturally limited, in compliance with the traditional view in civil law jurisdictions that fishing expeditions shall be avoided and document requests narrowly crafted. Indeed Article 147 of the French CPC provides that: “the judge must limit the choice of the order as to what is sufficient for the resolution of the dispute by endeavouring to select the simplest and least onerous ones” (emphasis added), thus preventing any fishing expedition prior the arbitral proceedings.

In contrast, other jurisdictions have allowed wide pre-trial disclosures on the ground that if the Model Law intended to limit the assistance of the courts to the hearing it would have stated so. In the US, opinions have been divergent regarding the scope of judicial assistance available under Section 7 of the FAA and whether pre-arbitration discovery was available. With regard to Section 1782, US courts have naturally limited the scope of their assistance and have avoided launching full discovery procedures.

Lastly, in the context of whether the court will assist with the taking of evidence against a third party, this will as always depend on the country concerned. The wording of the UNCITRAL Model Law does not provide for a direct answer: “the court may execute the request within its competence and according to its rules on taking evidence” (emphasis added), thus, living it up to local laws to determine

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61 Alberta Court of Appeal, January 18, 2006, Jardine V. SJIO Catlin [2006] A.J. No. 32.: “The Model Law is part of the law of Alberta. It must be interpreted in accordance with the ordinary meaning to be given to the terms in their context and in light of its objects and purposes. Article 27 speaks of “assistance in taking evidence”. In my view, it is a gloss to add, by implication or otherwise, the words “at the hearing”. Those words are not there”.

62 Some courts have held that the arbitral tribunal had authority to determine the scope of discovery and allowed for discovery prior to the hearing (United States District Court for the northern district of Georgia, May 23,2006, Festus & Helen Stacy Found. Inc. V. Merrill Lynch, 432 F.Supp. 2d 1375) while other courts held that pretrial discovery is not available under our present statutes for arbitration (United States District Court for the southern district of New York, August 5, 2004, Odjfell ASA V. Celanese AG., 328 F. Supp. 2d 505).

63 Whether the conditions for granting a production of documents measure under USC § 1782 seem comparable to those provided by Section 26 (b) of the Federal Rules of Procedure, because both require that the requested measure be intended to gather evidence that could be useful (“for use in”) in a dispute initiated in another proceeding, the scope of these two sections is not identical. Indeed, a U.S. Court has expressly excluded the broad definition given by Section 26 (b) (1) Federal Rules of Civil Procedure from the definition of “utility” of the evidence required under Section 1782. This section allows the production of any evidence that could lead to a new discovery of evidence that would, itself, be admissible. The Court states that “ To be perfectly clear, the Court specifically excludes from the standard the sentence in Rule 26(b)(1) that reads: ‘Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence ». See. United States District Court for the northern district of Illinois, December 6, 2006, In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil, 466 F. Supp.2d 1020.
this issue. Under French law, it is possible to resort to Article 145 of the French CPC to obtain evidence against a third party\textsuperscript{64}. As developed above, it is also feasible under Section 1782. Similarly, Section 43 of the 1996 English Arbitration Act will allow a party to request the court to compel the production of documents from a third party\textsuperscript{65}. In line with the previous, Article 184 of the Swiss PIL provides that local courts will also be able to assist the tribunal with the taking of evidence against third parties\textsuperscript{66}.

IV. CONCLUSION

International arbitration strategies are conceived on a global scale, with a constant interaction between arbitral tribunals and domestic courts. The taking of evidence is not an exception to the existence of this close, although almost systematically indirect, relationship between arbitrators and judges.

In that regard, the question of whether there should be a primacy or a priority in this relationship between the national courts of the seat of the arbitration in the evidence collection process touches upon the prominence of the seat of the arbitration itself. My view is that there is no serious legal rationale for limiting recourse to the domestic courts of the place of arbitration only; in addition, practically, it rarely make sense. In other words, inasmuch as national courts have preserved their rights to enforce an award or refuse enforcement, notwithstanding the fact that it might or might not have been rendered on their soils, domestic courts should lend a hand to international arbitration proceedings on matters involving evidence located in their jurisdictions. This assistance though has to take into consideration the balanced approach desired by arbitration practitioners on evidence collection. The second aspect of that conclusion is the necessity to maintain the arbitral tribunal at the center of all questions and all domestic proceedings relating to evidence, at least when the arbitral tribunal is in

\textsuperscript{64} Cour de Cassation, 2\textsuperscript{ème} chambre civile, 27 février 2014, No. 13-10.013.

\textsuperscript{65} Peter GOODWIN, Dominic ROUGHTON and David GILMORE, "Compelling third party witnesses based in England to assist foreign arbitration", Lexology.com, (May 2008), http://www.lexology.com/library/detail.aspx?g=cfe0a8e7-0e71-47bd-bb6a-a4f6d90b8be3 (last accessed 17 June 2016) Also, in the context of \textit{BNP Paribas V. Deloitte}, the arbitration was between BNP and Avis and BNP requested production from a third party.

\textsuperscript{66} Loukas A. MISTELIS, Georg VON SEGESSER and Anya GEORGE, \textit{Concise International Arbitration, Swiss Private International Law Act (Chapter 12), Article 184 [Procedure: taking of evidence]}, 2\textsuperscript{nd} edn. (Kluwer Arbitration 2015), page 1217-1220 stating that "the form of judicial assistance and its requirements are subject to the Federal Civil Code of Procedure".
place. A domestic court should accept that a party, who originally had elected for out-of-court proceedings, submits issues of evidence only if the arbitral tribunal has agreed to authorize such action, and potentially has defined its scope. The aims of this restriction are to preserve the intent of the parties to arbitrate, to ensure that delaying or derailing tactics are not used, to avoid undue interference and inconsistencies, and to ascertain the efficiency of the main arbitration proceedings.