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Master's Thesis

Court Assistance in the Taking of Evidence in International Arbitration

Teismo pagalba renkant įrodymus tarptautiniame arbitraže

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ABSTRACT AND KEY WORDS

As the role of international arbitration continues to expand over time, an increasing number of complexities and issues arise that require clarification. The power of international arbitration is primarily derived from the agreements between the parties involved, which limits arbitration's authority to compel third parties to provide evidence. Consequently, the arbitration frequently seeks assistance from state courts. Nevertheless, obtaining evidence across international borders presents its own set of challenges. This thesis aims to thoroughly explore the process of evidence collection through state courts in the context of international arbitration.

Keywords: international arbitration, court, assistance, taking of evidence, parties, tribunal, model law

Su laiku tarptautinio arbitražo svarba vis labiau auga, kartu atsiranda daugiau sudėtingų klausimų, kuriuos reikia išspręsti. Tarptautinio arbitražo įgaliojimai visų pirma kyla iš dalyvaujančių šalių susitarimų, kurie riboja trečiųjų šalių galimybę teikti įrodymus. Todėl arbitražas dažnai kreipiasi pagalbos į valstybės teismus. Nepaisant to, įrodymų gavimas tarptautiniu mastu kelia savų iššūkių. Šiame baigiamajame darbe siekiama išsamiai išnagrinėti įrodymų rinkimo per valstybės teismus procesą tarptautinio arbitražo kontekste.

Raktiniai žodžiai: tarptautinis arbitražas, teismas, pagalba, įrodymų rinkimas, šalys, tribunolas, pavyzdinė įstatyme

TABLE OF CONTENTS

Introduction

Arbitration is appealing in the contemporary world as it offers several advantages over traditional court proceedings, such as speed, flexibility, and often cost efficiency. With evolving business dynamics, arbitration plays an increasingly critical role, especially in international contexts. Moreover, businesses often favor arbitration because it allows them to select the place of arbitration, arbitrators, and the governing rules in the event of a dispute. International arbitration is often preferred to avoid relying solely on the judicial system of a single state and it is commonly chosen for businesses. Even though it is faster than court litigation, arbitration still requires time for case analysis, evidence gathering and witness examination. As a legal tribunal, the arbitration decision shall be based on the evidence presented, making the evidence stage crucial. Moreover, thorough examination of all evidence presented is an essential component of the fairness of the proceedings. Oral pleadings also play a significant role as they clarify case facts, allowing parties to strengthen their arguments and defend their positions effectively. However, an arbitrator's power is based on the parties' agreement and is thus limited to the parties involved in the arbitration. The latter means that arbitrators cannot force third parties to provide evidence or testimony in the arbitration proceedings. Consequently, court assistance in securing and gathering evidence is vital for efficient arbitration. Since arbitrators lack governmental power, obtaining evidence can be challenging, potentially delaying the arbitration, or making the process futile. Thus, legal frameworks that ensure court support in evidence gathering are essential for effective arbitration resolution.

The significance and relevance of the present paper arises from the increasing importance of international arbitration and the utmost need for judicial assistance in this process. Given the diverse ways in which different countries approach judicial assistance, the area of law is sometimes contradictory and ambiguous, hence, the need for clarifications arises. A key aspect to explore is identifying who is entitled to seek court assistance in arbitration cases. At the same time the processes with respect to arbitration occurring in one country while the evidence is located in another needs clarifications. In particular, the question arises of whether the request should be made to the court in the country of the arbitration or where the evidence is located. Furthermore, it's important to determine the appropriate timing for such requests, whether during arbitration process or beforehand, to protect the evidence from external influence. This paper examines the questions above analyzing relevant legislation, scholarly opinions, and court decisions, primarily focusing on the UNCITRAL Model Law. It explores how jurisdictions influenced by or adhering to the Model Law approach court assistance in evidence gathering and includes an analysis of

court decisions from various jurisdictions for comprehensive insights. Additionally, the paper evaluates these questions integrating the approaches of countries that are not influenced by the Model Law, highlighting jurisdictional differences concerning the issue. Finally, the paper tries to address gaps in the Model Law and various jurisdictions, highlighting areas that require more comprehensive clarification and analysis. The paper primarily concentrates on examining judicial decisions from various countries, exploring their position on providing court assistance for evidence collection in international arbitration. Its originality lies in identifying and comparing the different approaches reflected in these judicial decisions. It explores the reasoning provided by courts that either support or limit their legal frameworks to assist the requests from foreign arbitration to obtain evidence within their jurisdiction. This analysis offers insights into the detailed legal perspectives and practices regarding the role of courts in supporting international arbitration processes.

1. LEGAL BASIS FOR COURT ASSISTANCE IN DIFFERENT JURISDICTIONS

In international arbitration, the process is guided by the need for efficiency and equal treatment for all parties involved. This framework permits engaged parties in the arbitration process to introduce any evidence they deem necessary to substantiate their claims. The responsibility, however, lies with the arbitration tribunal to distinguish and evaluate the presented evidence. This arrangement ensures that although parties have the freedom to present any evidence, the ultimate judgment on its significance and impact on the case is still decided by the tribunal. In international arbitration proceedings, evidence plays a key role in helping the tribunal resolve disputed factual circumstances, like its function in domestic court cases. These tribunals follow certain procedural rules for submitting and assessing evidence, but these rules basically are more flexible compared to those in domestic legal systems (Pietrowski, 2006, p.373).

Evidence plays an important role in resolving disputes, as even a single piece of documentation can significantly change the result. Recognizing this, arbitration laws in many jurisdictions empower courts to help arbitrations or parties in acquiring evidence. This evidence supports facts in the case that are essential for proving claims. Without such evidence, it becomes highly challenging, or sometimes even impossible for a party to substantiate the truth of the facts they are stating.

In international arbitration, common rules and principles apply to get the evidence, no matter who the parties are (states or private entities) or under what legal system the arbitration operates (whether it's international or domestic law). These rules are generally not strict about the form and acceptance of evidence. The process includes both written submissions and oral arguments. The tribunal controls the timeline and procedural rules. Each party is responsible for providing evidence to support their own arguments. The tribunal might also request additional evidence as needed. Document-based evidence is often prioritized, and most documents presented by the parties are usually accepted. Testimonial evidence, such as statements or oral testimony, is also commonly accepted, witnesses are questioned by attorneys and by the tribunal. Experts on specific topics can be called upon by either the tribunal or the parties, but the tribunal isn’t obligated to follow the expert's opinion (Pietrowski, 2006, p.373).

In certain cases, arbitration may require assistance from a court to acquire evidence. Given that arbitration is a private process agreed upon by the parties, the main international

arbitration regulations typically do not include provisions for obtaining evidence from external parties. However, with the increasing use of arbitration, the consensus is growing on the importance of accessing vital evidence from such third parties (Sami ud-Din, 2013, p. 24-25).

1.1 Procedures and requirements for seeking court assistance according to UNCITRAL Model Law

The UNCITRAL Model Law (UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006) is essential for international arbitration because it offers a universally recognized and flexible legal framework that ensures consistency, the ability to enforce decisions globally, and fairness in settling international business disputes. These principles have greatly progressed the popularity and effectiveness of international arbitration as the preferred rules to address cross-border commercial conflicts.

The present chapter will explain the framework rule for taking evidence in arbitration defined by UNCITRAL model law and how it intersects with the legislation of different countries. The purpose of chapter is to define the general rule and to show how this rule has been reflected in the legislation of different countries.

According to Article 27 of UNCITRAL Model law, -

„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."(UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006)

The rule allows the arbitral tribunal or a party, with the approval of the arbitral tribunal, to ask for assistance from a competent court of the State for evidence taking. The court in turn will then discuss this request and process it according to its competence and the established rules.

It is important to note that the UNCITRAL Model Law applies only if the place of arbitration is in the same territory as the court. Which means that the rule established by Article 27 does not apply to arbitration taking place in another country, or in another territory. This restriction is based on Article 1(2) of UNCITRAL Model Law, which limits the scope of the Model Law to arbitrations held within one jurisdiction. The limitation

based on territory is considered problematic, since it unreasonably restricts the support that courts can provide to the international arbitration process (Born, 2021, p. 2572).

The next important criterion defined by Article 27 of UNCITRAL Model law is that the request to the court for assistance in obtaining evidence is applied by the arbitration itself or by the party after obtaining the approval from the arbitration. Which means that if a party does this independently from arbitration, it will be considered a violation of the conditions set forth in Article 27. More specifically, if a party tries to seek this judicial assistance without the tribunal's approval, it could be seen as misusing the court's power (Banketas et al., 2020, p. 722).

A good example of what can be considered an abuse of judicial power is given in Indian Delhi case SH Satinder Narayan Singh v. Indian Labour Cooperative Society Ltd and Others(SH Satinder Narayan Singh v. Indian Labour Cooperative Society Ltd and Others, High Court of Delhi, 2007). In this case, the claimant had initially requested to summon two witnesses, but one of them had already been rejected by the arbitrator due to a lack of merit in the application. Subsequently, the party filed a similar request to summon the same witness. The application was dismissed because of the fact that the party had not obtained approval from the arbitral tribunal before seeking court assistance in gathering evidence (Banketas et al., 2020, p. 722).

An important issue that this case focuses on is the question of whether the courts should closely scrutinize the arbitral tribunal's authority to approve such requests. It is also worth considering that the evidence is of great importance for the dispute resolution. However, it's crucial to note that while Article 27 prohibits parties from directly seeking evidential assistance from the courts without involving the arbitral tribunal, parties still have the option to apply to set aside an arbitral award within three months under Article 34 if there is procedural unfairness or other reasonable grounds for objection from arbitration (Banketas et al., 2020 p. 722).

In another case in Singapore ALC v. ALF (ALC v ALF, Singapore High Court, 2010) the party applied to the Singapore High court to summon the witness. However, in this case, the party initially applied to arbitration, and it was refused. The Singapore High Court pointed out that the arbitrator is authorized to decide on the importance and relevance of such requests and it did not interfere with the authority of the arbitrator simply because it would make a different decision. The Court decided to refuse the request, to avoid

interfering within the authority of the arbitrator. The court considered the said action of the party to qualify as an abuse of legal process(Banketas et al., 2020 p. 723).

The court determined that the defendant's request attempted to circumvent the arbitrator's authority over the arbitration process. In Singapore, the courts adhere to a policy of minimal involvement in arbitration cases. This approach applies not only to the main dispute between the parties but also to their procedural choices, both before and during the arbitration hearings. Therefore, those involved in an arbitration should not turn to the court for assistance without first using all the procedural options indicated in their arbitration agreement (Rajah & Tann LLP, Dispute resolution, 2011).

In Vibroflotation v. Express Builders, Supreme court of Hong Kong determined that sometimes the tribunal's approval might be implied based on the context of the case. The Plaintiff in this case was a sub-sub-contractor working on a part of the airport's construction. They had started a lawsuit in the High Court against a defendant sub-contractor. In May 1993, the Plaintiff had managed to get a *subpoena duces tecum* issued. This subpoena was directed at Mr. Hans Boender, which was the main contractor on the project. The subpoena asked for documents related to certain machines (vibroflots) used in the construction. After the subpoena was issued, the Plaintiff got to see some, but not all, of the requested documents at HAM's offices. Plaintiff asked for a subpoena; however, this request should have been approved by the arbitrator before it was considered valid. Party argued that the arbitrator hadn't given her permission for this request. The judge then looked at a letter from Miss Cheng, the arbitrator. In her letter, after listening to both sides in the dispute, she mentioned that the documents in question seemed important for one of the main issues in the arbitration. Therefore, she set a date for these documents to be produced as per any orders made by the Court. She chose this date based on when she and others were available. The court concluded that Miss Cheng’s actions, particularly setting a hearing date to receive the documents, implicitly meant she approved the subpoena request. The court couldn’t see why the arbitrator would set a hearing if she didn’t approve of the subpoena. Therefore, the court was convinced that the request for the subpoena was correctly made according to Article 27 and had the arbitrator’s approval (Vibroflotation v. Express Builders, Supreme Court of Hong Kong, 1994).

Nonetheless, the court recommended that parties should ideally obtain explicit written approval from the arbitrator. This makes it easier to demonstrate to the court that they have met the requirements set by article 27 when seeking assistance (United Nations,

UNCITRAL 2012 Digest Digest of Case Law on the Model Law on International Commercial Arbitration, p. 119).

Additional argument for seeking approval relates to the court's function in these requests. In particular, when the court considers a party's request for assistance in obtaining evidence, it does not examine the issue of whether the said evidence is relevant to the case or not. Because with this request, either the arbitrator himself applies to the court or the party with the prior permission of the arbitrator. Therefore, it is no longer a court's discretion to consider the relevance of evidence. The court's function is simply to use its power to enforce something that the arbitration tribunal itself might not be able to do. Court in Canada (Jardine Lloyd Thompson Canada Inc. v. SJO Catlin Jardine Lloyd Thompson Canada Inc., Alberta Court of Appeal, 2006) interpreted article 27 as a means to aid the arbitration tribunal in uncovering the truth. This court stated that courts could support arbitration tribunals in gathering evidence from external parties, especially during the pre-trial phase, where detailed information is collected. The court also noted that restricting the extent of this discovery in arbitration isn't justifiable merely because the arbitration process differs from the conventional court system. Essentially, courts can support arbitration in evidence collection without restrictions occurred by the differences between arbitration and standard judicial processes (United Nations, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 120).

After obtaining approval from arbitration, the next step is to go to court for assistance. The court will review the party's request according to its competence and the laws of the relevant jurisdiction and the practices of the court. However, it should be noted that the court has no obligation to fulfill the party's request, since it is independent and free in its decisions. Generally, when deciding on evidentiary orders, the court should consider factors like supporting the arbitration process and preserving party autonomy to ensure procedural fairness (Banketas et al., 2020, p.724).

Two additional factors such as specificity and timeline are also of great importance when the party submits its request for court assistance. Specificity means that the party must clarify in its request as much as possible, which evidence needs to be obtained and the request should not be broad. As for the timeline, it's important for a party to submit their request for evidence collection early. If the request comes after the arbitration tribunal has already resolved a related issue, it could be considered too late. Timely requests are essential before the tribunal reaches a decision on the matter. (Born, 2021, p. 2572)

For instance, in a particular case in Canada, Delphi Petroleum Inc. v. Derin Shipping and Training Ltd, the plaintiff, dissatisfied with the demurrage charges decided by an arbitration tribunal, requested an interim order for a witness's evidence. The court, however, ruled this request as untimely since the demurrage costs had already been fixed by the tribunal. Additionally, the court assessed that the evidence the plaintiff sought from the witness did not have a clear connection to the other issues they presented in their application. Consequently, the court dismissed the plaintiff's request on the grounds that the evidence requested for did not significantly relate to the main aspects of the case and the main purpose of the request was to delay the proceedings(Delphi Petroleum Inc. v. Derin Shipping and Training Ltd, Federal Court of Canada, 1993).

When considering Article 27, its prerequisites and purpose, it is also necessary to focus on requesting evidence at proper phase of proceedings.

As Gary B. Born explains, Article 27 of the Model Law primarily serves to allow arbitral tribunals to seek court support for enforcing orders related to evidence disclosure. Its intent is not to interfere with tribunals by requesting or obtaining evidence. It is widely accepted that the Model Law grants arbitrators the power to request, and courts the duty to provide, legal assistance throughout the arbitration process, including during the pre-hearing phase for evidence disclosure. Article 27 assists arbitration tribunal in getting information they need from courts, and this assistance can happen at various stages, including before an official hearing. The focus is on cooperation between courts and tribunals rather than restricting the ability to gather evidence (Born, 2014, p. 2398).

Court decision in Canada (Jardine Lloyd Thompson Canada Inc. v. SJO Catlin Jardine Lloyd Thompson Canada Inc., Alberta Court of Appeal, 2006) supports the idea that Article 27 allows tribunals to get assistance for gathering information before a trial. This decision highlights that courts should assist without challenging the tribunal's judgment on the required evidence. Hence the case showed that the court believes that Article 27 is there to help tribunals find the truth, irrespective of whether this occurs before or during the trial. The general approach of the courts of different countries is that they will make special exceptions or treat evidence from before and during a trial the same way. Therefore, whether a court accepts or denies these requests can depend more on the specific details of the case rather than on the phase of the case (Jardine Lloyd Thompson Canada Inc. v. SJO Catlin Jardine Lloyd Thompson Canada Inc., Alberta Court of Appeal, 2006).

In one case in England (BNP Paribas and others v. Deloitte and Touche LLP, commercial court of England, 2003), which does not fully adhere to the Model Law, there was a debate over the interpretation of legal provisions related to arbitration. A party involved in the case argued that, based on article 27 of the Model Law, English laws should permit court involvement in pre-trial discovery or disclosure. The court, however, disagreed with this interpretation. It clarified that article 27 specifically relates to the actual gathering of evidence during an arbitration process, not to the pre-trial phase where information is being collected. The court pointed out that the Model Law, which serves as a guide for arbitration procedures, does not indicate that courts should be involved in the pre-trial disclosure process. Therefore, the court concluded that the assistance indicated in article 27 does not extend to helping with gathering evidence before the arbitration proceedings commence (United Nations, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 120).

However, in a Canadian court case (Jardine Lloyd Thompson Canada Inc. v. SJO Catlin Jardine Lloyd Thompson Canada Inc., Alberta Court of Appeal, 2006), the judges disagreed with English court decision, interpreting article 27 as including judicial assistance in the pre-trial discovery or disclosure phase. The Canadian court highlighted that article 27 simply mentions assisting in taking evidence, and it would be incorrect to assume or add that this only applies to evidence taken at the hearing. They argued that if the drafters of Article 27 had intended to restrict its application only to evidence collected during hearings, they would have explicitly stated so. Similarly, in a 1994 Hong Kong case (Vibroflotation v. Express Builders, Supreme court of Hong Kong, 1994), the court faced a request for assistance under article 27 for obtaining documents from a non-party as part of discovery in arbitration. The court eventually dismissed the request, but not on the grounds that article 27 was inapplicable to pre-trial discovery. The dismissal was based on local civil procedure rules not permitting discovery from non-parties, suggesting that under different rules, the Hong Kong court might have considered article 27 relevant to pre-trial discovery or disclosure (United Nations, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 120).

Court decision in Canada on the case Jardine Lloyd Thompson Canada Inc. v SJO Catlin is also important because it describes the restrictions faced by arbitrators in arbitration cases and how courts can assist them in gathering evidence. The court indicated that it doesn't have to help arbitration just because it was requested, moreover, the court checks the reasons for the request and decides if it's fair and necessary for the case (Jardine Lloyd

Thompson Canada Inc. v. SJO Catlin Jardine Lloyd Thompson Canada Inc., Alberta Court of Appeal, 2006).

Arbitrators base their authority on the contractual agreement between the disputing parties. This confines their power to issue orders only to those involved in the arbitration. Moreover, their orders don't automatically enforce themselves, they rely on the parties' willingness to comply. The ability of arbitrators to gather facts for a case is restricted in two significant ways, they lack the power to compel individuals not involved in the arbitration to provide evidence, they cannot force the disputing parties to adhere to orders regarding evidence submission. Given these restrictions, there's a provision in many countries' contemporary international commercial arbitration laws that allows courts to step in and assist with evidence-related matters. This assistance can be requested by the arbitrators themselves or by a party in the arbitration, provided the arbitrators approve. This legal provision ensures that arbitrators can access vital evidence, aiding them in concluding a fair decision (United Nations, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p.118).

The court may sometimes deny the party's request for help with gathering evidence in arbitration cases to prevent delays in the process and to avoid abuses. The same happened in Delphi case, where court considered that party's request was intended only to delay paying demurrage costs (Delphi Petroleum Inc. v. Derin Shipping and Training Ltd, Federal Court of Canada, 1993). But, if an arbitral tribunal considers that the evidence is really necessary for dispute resolution, the court usually assists without much scrutiny. On the other hand, courts have the freedom to decide whether to grant assistance with taking of evidence and they just check how specific, relevant and the timely request is. The main idea of court assistance is that to help arbitration process to conduct smoothly and the gathering of evidence in arbitration should not be limited just because it's not the same as in regular court (Banketas et al., 2020, p. 726-727).

Article 27 does not empower local courts to aid in evidence gathering if the place of arbitration is in an unspecified location or outside the country. This is because article 27 is not included in Article 1(2) of Model Law, which lists the specific provisions for these cases. The explanation behind this is to strike a balance between those who support the involvement of courts in evidence collection and those who are against any such involvement. The intent behind the formulation of article 27 wasn't to involve courts of one country in arbitrations occurring in another country, but rather to facilitate cooperation between courts and arbitrations within the same national jurisdiction. The latter was

affirmed by Canadian courts (Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. and STET International, Ontario Superior Court of Justice,1999) where the court interpreted Article 27 as allowing them to assist only with arbitrations taking place within Canada, not in other countries. Similarly, Article 27 does not permit arbitration tribunals in different countries to seek help from Canadian courts. Assisting international arbitration is a matter left to the individual laws of each country. In Canada this interpretation was highlighted in another case, where a court declined to fulfill a request from an international arbitration tribunal (B.F. Jones Logistics Inc. v. Rolko, Ontario Superior Court of Justice, 2004). Such instances underline the principle that Article 27 is intended for support within the confines of a country's legal system, rather than for international arbitration aid. Thus, Article 27 is focused on facilitating judicial support locally, limited strictly to the legal boundaries of the country, without involving cross-border judicial cooperation in arbitration matters (United Nations, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 119).

However, over time, Canadian courts adopted different and more positive approach towards requests made by foreign arbitral tribunal. Supreme court of Canada indicated in Zingre v. The Queen et al. case that when a court is asked to enforce a request (letter of request) from a foreign tribunal, it may do so on the desire to help foreign legal system, however, the proper attention must be paid to the principle of Canada's sovereignty while fulfilling to help foreign legal systems (Zingre v. The Queen et al., Supreme Court, 1981). Furthermore, Ontario court decided that it's not necessary for there to be reciprocity (a mutual exchange of assistance) for a Canadian court to help enforce these letters of request. This means Canadian courts can assist foreign tribunals even if there isn’t a guarantee of similar help in return (Republic of France v. De Havilland Aircraft of Canada Ltd. and Byron-Exarcos, Ontario Court of Appeal, 1991). Ultimately, Canadian courts have the capacity to support foreign arbitration tribunals by applying their domestic laws, despite Article 27 not explicitly stating that such assistance is permissible when the arbitration occurs outside of Canada (United Nations, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 119).

Since different examples from various jurisdictions were stated above, it is worth to mention that India, Canada, and Singapore are based or influenced by the UNCITRAL Model Law. Meaning that their legislation on arbitration follows UNCITRAL Model Law.

Overall, as evidenced above, the UNCITRAL Model Law's capacity to address evidence gathering beyond national jurisdictions is limited. Although some jurisdictions voluntarily extend aid to international arbitration, no concrete rule governing this can be deduced directly from the Model Law itself. However, certain standards applicable to these requests can be identified: firstly, the necessity of arbitrator approval as a precondition for seeking court assistance; secondly, the requirement for the request to be precisely formulated; and thirdly, the irrelevance of the proceedings' phase, provided the request is made before the case's conclusion.

1.2 English Arbitration Act

English arbitration act (English Arbitration Act 1996) basically repeats the condition of the UNCITRAL Model Law that a party can apply to the court for assistance only if the tribunal agrees to do so. As regards to summon a witness or requesting a document from third party it can be done only if two conditions are met: First, the witness party wants to bring in must be in the United Kingdom. Second, the arbitration case itself is being conducted in either England and Wales or Northern Ireland.

Section 43 of English arbitration act states 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 evidence. (2)This may only be done with the permission of the tribunal or the agreement of the other parties. (3)The court procedures may only be used if— (a)the witness is in the United Kingdom, and (b)the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland."(English Arbitration Act 1996)

If the place of arbitration is in England and Wales or Northern Ireland, party can request English courts' assistance in getting a witness to give evidence or to share documents. But they need to either have permission from the tribunal or it must be included in the agreement with the other party. However, the rules on privacy(privilege) apply to some of the information kept. Another important issue is that English courts generally resist compelling extensive and detailed information disclosure (broad disclosure) solely for aiding in arbitration cases. They see their role as facilitating the acquisition of evidence, rather than procuring exhaustive detailed information from the other party. Also, English courts generally, will not assist party to get the evidence before the arbitration case starts. The

party can only apply to receive court assistance once the arbitration is underway (Born, 2021, p. 2573).

One important case where the English courts elaborated on the requirement of evidence from a third party is Sunderland Steamship and I Association v Gatoil International Inc. The case concerned an arbitration over a cargo damage between a ship owner and the company that rented the ship (charterers)(Sunderland Steamship and I Association v Gatoil International Inc, Queen's Bench Division, 1987).

The charterers wished to obtain numerous documents from the ship owner's insurance and to this end resorted to the legal order "*subpoena duces tecum*"(Sunderland Steamship and I Association v Gatoil International Inc, Queen's Bench Division, 1987). However, the judge dismissed the subpoena, explaining that in legal proceedings, a party cannot compel a third party to produce a large number of documents unless the circumstances are exceptional.The charterers could use a subpoena under a specific law, however additional special rules would also apply. In particular, the documents requested had to be relevant and likely to be allowed in a court. In case subpoena is contested, the requesting party must demonstrate the necessity of these documents for a fair resolution of the case. Moreover, if the court has already refused to get these documents directly from the third party in the case, that's a strong reason to deny the subpoena. Additional requirements related to the clarity with respect to the requested documents. Thus the vague request will likely be denied. The judge also pointed out that these rules apply to both court proceeding cases and arbitration. Since arbitration aims to be fast, cost-effective, and final, the court will be extra careful to ensure that any subpoena issued in the context of arbitration is justified and does not aim to gather excessive information without a clearly defined necessity (Born, 2021, p. 2573).

Moreover, there are two notable cases that illustrate the criteria used by English courts in determining the permissibility of subpoenas within arbitration proceedings. These decisions highlight the necessity and relevance of the information requested to the matter at hand.

In the case Wakefield v. Outhwaite (Wakefield v. Outhwaite, Queen's Bench Division, 1990), the claimant was a famous insurance company located in London, and the defendant was a reinsurer, a company that provides insurance coverage to other insurance companies. The defendant asked that the claimant's broker produce a particular note and all related files for the arbitration and remain present throughout the hearing. The broker agreed to provide

the note but was unwilling to submit all the files or attend the entire hearing. The court agreed with the broker, determining that the subpoena was overly broad and exceeded its fundamental intent. The court believed it shouldn't be used just to explore lots of documents to question a witness (Wakefield v. Outhwaite, Queen's Bench Division, 1990).

In the case London and Leeds Estates Ltd. v. Paribas Ltd (London and Leeds Estates Ltd. v. Paribas Ltd, English court, 1995) in arbitration, one party wanted to get two reports previously prepared by an expert witness for different cases. They wanted these reports to challenge the expert's opinion. The court agreed to request the first report because, as it had already been referenced in the arbitration and was relevant to the expert's perspective on the West London property market, it was thus important to the case. However, the court rejected the request for the second report as it wasn't previously mentioned and did not relate to the same market, therefore rejecting the subpoena (London and Leeds Estates Ltd. v. Paribas Ltd, English court, 1995).

It is also worth noting that under the English law, an international arbitration tribunal can request assistance from an English court in gathering evidence. The Arbitration Act 1996, which governs arbitration proceedings in England and Wales, allows for such assistance. Section 44 of the Act lets courts issue orders concerning evidence in the same way they would in regular legal cases. The latter means that if a tribunal finds it necessary to gather evidence that it cannot obtain on its own, it can seek the help of English courts. However, this is usually subject to the agreement of the parties involved in the arbitration or under certain conditions set by the Act (Born, 2021, p. 2573).

It is noteworthy to underline the fact that while assistance to international arbitration under this clause is applicable if the seat of arbitration is in England or Wales, in which case the arbitrator has the right to apply to the English courts for assistance. The scope of assistance changes when the arbitration is seated outside these jurisdictions. The Arbitration Act 1996 primarily applies to arbitrations with their seat in England and Wales. However, Section 44 of the Act is an exception clause, which allows courts to help in gathering evidence even when the arbitration is seated outside England and Wales. The extent to which an English court will assist in these cases can depend on several factors, including the nature of the assistance requested and the connection of the case or the evidence to England or Wales. However even then, English courts might be cautious carefully considering international regulations and assessing their jurisdictional authority to offer such help (Born, 2021, p. 2573).

An interesting and important fact is that England is not included in the list of jurisdictions whose legislation is influenced by or based on UNCITRAL Model Law. Except Bermuda, British Virgin Island and Scotland.

1.3 US Arbitration Legislation

The U.S. has substantially different approach to court involvement in evidence collection for arbitration compared to the UNCITRAL Model Law and the practices of many other countries. There are two main U.S. laws that discuss this issue, firstly Section 7 of the Federal Arbitration Act (FAA) (The United States Federal Arbitration Act, 2022) which has been used to allow courts to assist in evidence acquisition in arbitration cases when requested by one of the parties. The latter practice is substantially different compared to other jurisdictions where such requests usually come from the arbitrators themselves. Secondly, U.S.C. Article 1782(The United States Code, 2022) allows courts to assist in gathering evidence for international arbitration cases, even if the place of arbitration is not in the U.S. Hence in the U.S., both laws can be used to get courts assistance in collecting evidence for arbitration cases, and this includes cases that are taking place in other countries, not just in the U.S. (Born, 2021, p. 2575).

The United States Federal Arbitration Act (FAA) has specific sections that give tribunal certain powers to obtain evidence for arbitration cases. Section 7 of the FAA empowers arbitrators to issue subpoenas compelling witnesses to testify or produce essential documents, same as the authority held by courts. This means they can make sure witnesses will appear and bring any relevant books, records, or papers that are important for the case. The witnesses are also entitled to compensation, the same as they would in a court. Moreover, Section 7 maintains that arbitrators can administer oaths to witnesses and employ the same procedures as district courts in civil trials to secure evidence. It's important to mention that while the FAA lets arbitrators have these powers, they may be subject to other rules derived from specific arbitration agreement concluded between the parties or the rules of the organization that's overseeing the arbitration. Therefore, when it comes to receiving evidence in arbitration cases in the U.S., both the FAA and any other rules that might apply must be considered (Born, 2021, p. 2575).

Furthermore, Section 7 of FAA also regulated failure to comply with an arbitrator's subpoena to appear or produce requested items. In such cases, the court can either force them to comply with the arbitrator's request or punish them for not doing so, just like it would in a court case. The key aspect of Section 7 is its facilitation of evidence acquisition

not only from the disputing parties but also from third parties, or "non-parties," to the arbitration. The law's wording covers "any person or persons," meaning anyone from whom the arbitrators seek testimony or documents. U.S. lower courts have often referred this law to order people who are non-parties of the arbitration to give evidence or other information upon the request of arbitrators or the involved parties (Born, 2021, p. 2575).

As Gary B Born indicates in his book International Commercial Arbitration, U.S. courts vary in how they use Section 7 of the FAA for pre-hearing discovery in arbitration, with some allowing it, some not, and others setting specific conditions. The debate focuses on how to interpret Section 7 and the extent of an arbitrator's powers in gathering evidence before the actual arbitration hearing. U.S. courts frequently disagree on how to apply Section 7 for pre-hearing discovery. Some courts have allowed arbitrators to request extensive documentation prior to hearings, including from people not directly involved in the arbitration (third parties). The reasoning is that if arbitrators can request that the documents be brought to the hearing, they should also be able to review those documents beforehand. Thus, many courts don't question the arbitrator's decisions on relevance or extent of the information to be shared. However, other courts claim that Section 7 doesn't let arbitrators get help from courts for pre-hearing discovery from third parties. Some Courts contended that the section does not provide the arbitrators with the means to seek court assistance for gathering evidence before the hearing, interpreting the law as applicable only to the actual hearing. Some courts are in the middle, they think arbitrators can get court help for pre-hearing discovery but want to make sure the information requested is necessary and important. Thus, there's no one and consistent interpretation of Section 7. Some arguments are raised to allow pre-hearing discovery, as the law doesn't specifically limit this to the hearing. Also, the law was written broadly enough to include different types of evidence gathering. Allowing pre-hearing discovery is argued to be helpful in the arbitration process, as it lets arbitrators gather and understand evidence better prior to the hearing. Arbitrators usually have a lot of freedom in deciding how to handle evidence. Thus, it's argued that there shouldn't be unnecessary limits on their power to establish facts, including getting documents before the hearing (Born, 2021, p. 2575).

The above arguments are illustrated in the Comsat case (Comsat Corporation v. National Science Foundation, United States Court of Appeals, 1999) where the court clarified that under the FAA, arbitrators can't generally order non-parties to provide evidence before the actual arbitration hearing, except in rare, special situations. (Comsat Corporation v. National Science Foundation, United States Court of Appeals, 1999).

The case concerned an arbitration between Comsat and American Universities, Incorporated (AUI). The dispute concerned the extra costs in a construction project. Comsat requested and received various documents from the National Science Foundation (a U.S. federal agency) through a Freedom of Information Act. Comsat then asked the arbitration tribunal to compel the Foundation to provide all documents related to the project. The tribunal issued a subpoena for these documents. The court said that the Federal Arbitration Act (FAA) doesn't give arbitrators the power to force non-parties (like the Foundation) to come to pre-trial testimonies or provide documents before the actual arbitration hearing. The FAA only allows arbitrators to compel non-parties to come to the arbitration hearing itself. The idea is that when parties choose arbitration over formal court litigation, they give up some of the usual legal procedures for a quicker, more cost-effective solution. Hence, they can't expect to get extensive discovery from each other or third parties. The court recognized that in complex cases, it might be necessary to have some pre-arbitration discovery to understand the evidence before the hearing. But this would only be allowed in special cases where a party can show a real need for it and the information can't be obtained by other means. In this case, Comsat could not prove they needed pre-arbitration discovery. They had already obtained numerous documents through the Freedom of Information Act, and they failed to establish that the information sought from the Foundation's employees was unavailable through American Universities, Incorporated (Comsat Corporation v. National Science Foundation, United States Court of Appeals, 1999).

In another case the MV ''Allegra'' case (Deiulemar Compagnia Di Navigazione v. M/V Allegra, United States District Court of Maryland, 1999) the court also emphasized that party cannot receive evidence from third parties unless there is an important and specific need for the request. The courts are generally careful to ensure that the rule is not misused, and they expect that the requesting party will try to get evidence through the arbitration process first. The mentioned case concerned a dispute between a shipowner and a charterer over the condition of a ship. When the charterer's expert was not allowed to inspect the ship, the charterer requested the court's assistance in preserving the evidence (like the ship's condition) under a special rule (Rule 27 of the Federal Rules of Civil Procedure). The court agreed because the ship was about to leave U.S. waters, so the evidence would be lost otherwise. In this case the party showed a ''special need'' since the evidence was about to disappear or change, and it was necessary for the arbitration. According to the judgement, receiving evidence from third parties before an arbitration hearing is generally only allowed in very special situations. The Federal Rules of Civil Procedure can't be used to get around

this limitation, except in these special situations. If there's a ''special need,'' and it's covered by the Federal Rules, then receiving the evidence is allowed. Moreover, while the court doesn't specifically address the extent of evidence production during the actual arbitration hearings, it still suggests it might be limited. The court also implies that an arbitral tribunal outside the U.S. could potentially request discovery within the U.S. (Deiulemar Compagnia Di Navigazione v. M/V Allegra, United States District Court of Maryland, 1999).

In the cases above, an,, extraordinary circumstances'' was required to exist for the court to require evidence from a third party. The mentioned ,, extraordinary circumstances'' implies that the party tried all other means and could not independently obtain the said evidence. This kind of court order is usually given before the arbitration tribunal is set up and is seen as a temporary measure to help the arbitration. However, many U.S. courts have rejected these type of requests, especially if they don't meet the ,,extraordinary circumstances'' criteria. The rationale behind is that letting parties go to court for evidence in these situations goes against the idea of arbitration (Webster, 2001, p. 31-32).

While the FAA has been updated to make it easier to call witnesses from anywhere in the U.S., there are still rules about how far a witness can be asked to travel. Arbitrators have the option to move the location of a hearing to make it easier for witnesses to attend. Originally, under the FAA and the Federal Rules of Civil Procedure, a subpoena to ask a witness to come to court could only be served within the area of the U.S. court that issued it. The latter meant that witnesses outside the court's area in the U.S. couldn't be legally required to come to a hearing. However, an updated rules now allow subpoenas to be served all across the U.S., not just within a specific area. Despite the change, there remain stipulations regarding the permissible distance a witness may be required to travel to provide evidence. Generally, a witness can only be required to travel a certain distance to give evidence. However, the arbitration doesn't have to be fixed in one location. Thus, if a witness cannot travel far, the arbitrators or one of them can move the hearing to a place within the witness's travel limits. This flexibility helps ensure that important evidence can be heard, no matter where the arbitration is officially taking place (Born, 2021, p. 2583-2584).

As for the assistance of U.S. courts in international arbitration, the approach of the courts in this direction is determined by the U.S. law, 28 U.S.C. 1782, which allows courts to compel individuals within the U.S. to produce evidence, such as documents or testimonies, for use in foreign legal proceedings. The request for this kind of legal help can come from

the foreign tribunal involved in the case or from any person significantly interested in the proceedings (Born, 2021, p. 2585).

According to 1782 of US Code, if there's a legal case or criminal investigation in a foreign country or international tribunal, a U.S. district court can order anyone who lives or is located in that district to be a witness or provide documents or other items needed for the case (The United States Code, 2022).

This order can be based on a formal request from the foreign tribunal or party. The court can appoint a person to collect the testimony or other items. The appointed person has the authority to swear in the witness and record their testimony. The court can also set rules on how this process should take place, which could also follow the practices of the foreign country or tribunal. However, if the court doesn't specify otherwise, the process follows rules of U.S. civil procedure. Nonetheless, the law does not override legal privileges; individuals cannot be compelled to testify or submit materials in violation of privileges, such as attorney-client confidentiality. Additionally, the law doesn't stop someone in the U.S. from voluntarily giving testimony, statements, or items for a case in a foreign tribunal. They can do this in any way and with anyone they choose (The United States Code, 2022).

The important fact is that section 1782 was initially intended mainly for use in foreign judicial proceedings. However, the Supreme Court of the United States broadened its application in 2004 with the Intel Corp. v. Advanced Micro Devices, Inc. (Intel Corp. v. Advances Micro Devices Inc., U.S. Supreme Court, 2004) decision, interpreting the term "tribunal" broadly that include international arbitrations (Born, 2021, p. 2585).

The abovementioned case was one of the most important decisions with respect to court assistance in evidence gathering for international arbitration, as the U.S. Supreme Court decided to expand the interpretation of a legal rule, 28 U.S.C. section 1782. The case concerned a dispute over unfair business practices allegedly committed by Intel against Advanced Micro Devices (AMD). The plaintiff (AMD) took its complaint to a European Commission. AMD wanted to obtain documents from Intel in the U.S. to support its case in Europe. The primary question concerned whether the European Commission could be considered as a "tribunal" under U.S. law, which would allow AMD to use U.S. courts to get the Intel documents. The Supreme Court affirmed the claim, thereby equating the European Commission's investigation to a judicial proceeding to the extent that U.S. courts could participate in evidence collection. This decision by the Supreme Court broadened the use of Section 1782. It allowed not just formal court cases but also other legal proceedings

outside the U.S. (like the European Commission's investigation) to receive assistance from U.S. courts in gathering evidence. The ruling made it easier for people involved in international legal matters, including arbitrations, to seek evidence through U.S. courts, even if their case was being heard in another country (Intel Corp. v. Advances Micro Devices Inc., U.S. Supreme Court, 2004).

Section 1782 has gained significant attention following two recent U.S. Supreme Court decisions issued in 2022. These decisions clarified that Section 1782 does not extend to international arbitration, specifying that "foreign or international tribunals" do not include commercial arbitration. This interpretation is a notable shift from previous understandings, like the one in the Intel case.

Both cases involved arbitration proceedings outside the U.S., where the involved parties sought to collect evidence within the United States. In the first case, the dispute was between Luxshare, a Hong Kong-based company, and a Michigan-based company ZF Automotive (ZF Automotive US, INC. v. Luxshare, Ltd, Supreme Court of United States, 2022). Luxshare accused the Michigan company of fraud. Their agreement stipulated that any disputes would be resolved through German arbitration. Therefore, Luxshare requested assistance from a U.S. federal court to gather the information from the Michigan based company. In the second case, the parties were a Russian corporation and a Lithuanian bank (AB bankas SNORAS (Snoras) v. Russian Fund, Supreme Court of United States, 2022). The Russian corporation-initiated arbitration against the Lithuanian bank based on an international treaty between Lithuania and Russia. Seeking information from an American firm, the Russian corporation approached the U.S. court for assistance (AB bankas SNORAS (Snoras) v. Russian Fund, Supreme Court of United States, 2022).

In both cases, the U.S. Supreme Court determined that the arbitration didn't meet the criteria of "foreign, or international tribunals" as defined by section 1782. The Court highlighted that arbitrations were privately established through agreements, not by government or international organizations with official power. As a result, section 1782 wasn't applicable, and thus U.S. courts couldn't be used to collect evidence for these private legal disputes. The reasoning behind the Court's ruling was that section1782 is intended to provide assistance exclusively to official government or international entities, which was the historical intent and purpose of the provision (Luder, Christe, 2022, p. 779-786).

The Court in both cases claimed that "foreign tribunal" likely means a legal body that has governmental authority from a foreign nation, not just any tribunal located in a foreign

country. As for the "international tribunal," it claimed to mean a tribunal created or recognized by two or more nations, not just a tribunal with members from different countries. The Court found that the history of Section 1782 and the intentions of Congress suggested it was meant to help governmental and intergovernmental bodies, not private ones. They also noted that the Federal Arbitration Act, which governs domestic (U.S.) arbitrations, limits discovery and does not allow for pre-arbitration discovery, unlike Section 1782. The Supreme Court concluded that for a tribunal to be considered under Section 1782, it must be either a governmental body from a single country or an intergovernmental body from two or more countries. Thus, private arbitrations were excluded from the protection. In this context, the dispute involving ZF Automotive and Luxshare, where they found that the arbitration was entirely private and had no government involvement, was consequently failed to qualify. Even though the case involving a dispute under a Lithuanian-Russian investment treaty, was more complex, as it involved a treaty and a sovereign state, the Court decided that the *ad hoc arbitration* did not operate with governmental authority, thus it also failed to qualify. In the final decision because neither arbitration was considered a "foreign or international tribunal" under Section 1782, the Supreme Court reversed the decisions of the lower courts that had allowed the use of Section 1782 for discovery in these cases (Luder, Christe, 2022, p. 779-786).

According to the above-mentioned court decisions it is clear that section 1782 cannot be used for private international arbitrations under any arbitration rules. Moreover, the court indicated that there's no universal rule to determine when an arbitration qualifies as a "foreign or international tribunal." The Court's primary consideration is whether the arbitration in question is supported with governmental authority by the countries involved. This refers to arbitrations officially empowered by a government to resolve disputes, as opposed to arbitrations deriving their authority solely from the mutual agreement of the disputing parties. A good example of what can be considered as an arbitration which has the authority derived from the government of a country can be bilateral investment treaty between Switzerland and Georgia on the Promotion and Reciprocal Protection of Investments from 2014. Which stipulates the possibility for the parties once they have a dispute to apply to the International Centre for Settlement of Investment Disputes (ICSID) and an ad hoc-arbitral tribunal which shall be established under the arbitration rules of the United Nations Commission on International Trade (UNCITRAL). In this case, there are strong indications of governmental authority for ICSID. This includes the way the ICSID is funded and organized, and its close ties with governments. Therefore, it's possible that

ICSID arbitrations might qualify for section 1782 discovery. On the other hand, for ad hoc arbitrations under UNCITRAL rules, it's less likely they would be considered as exercising governmental authority, following the Supreme Court's decision. This means section 1782 discovery wouldn't typically apply to these arbitrations. However, each case needs to be looked at individually. The Supreme Court's decision also leaves open questions about how to handle requests for section 1782 discovery when parties haven't yet chosen their dispute resolution method, or when the arbitration clause doesn't exclude the jurisdiction of state courts. In these cases, it seems a party would need to select a dispute resolution method first, to help U.S. courts determine if section 1782 discovery applies (Luder, Christe, 2022, p. 779-786).

The use of Section 1782 in international arbitration is still developing. A significant turning point was a Supreme Court decision (in the Intel case) that allowed Section 1782 to be used to support arbitration, which was a significant change from previous rulings. This development is significant as it offers broader opportunities to gather evidence from the U.S., beyond the typical constraints of international arbitration as outlined under the Model Law or other guidelines like the IBA Rules on Taking Evidence (Bantekas et al., 2020, p. 730-731).

It is also important to note here that in USA only several states, such as California, Connecticut, Florida, Georgia Illinois, Louisiana, Oregon and Texas jurisdictions are influenced by UNCITRAL Model Law. For example, a New York court acknowledged that arbitrations based in London could request evidence under U.S. law. As courts increasingly accommodate arbitrations conducted in foreign countries, statutes such as Section 1782 become even more crucial in international arbitration. This includes enforcing interim measures (temporary court orders) for preserving evidence (Bantekas et al., 2020, p. 730-731).

In summary, in the United States, the process for collecting evidence in arbitration cases is governed by the Federal Arbitration Act (FAA) and U.S.C. Article 1782, which differs from the UNCITRAL Model Law and the approaches of many other countries. Under the FAA, arbitrators have the authority to issue subpoenas for witnesses and documents and U.S. courts having the power to enforce these, including for individuals who are not directly involved in the arbitration. However, there is a diversity of opinion among U.S. courts regarding the allowance of pre-trial discovery from third parties. Section 1782 broadens the scope for U.S. courts to facilitate evidence gathering in international arbitrations, irrespective of the arbitration's location. While this provision allows for more extensive

evidence collection, U.S. courts typically prefer requests for discovery that are supported by the arbitration tribunal and assess each request's necessity and suitability carefully. However, it is also important to be noted that recent U.S. Supreme court decisions have cast serious doubt on the applicability of Section 1782 in cases involving international arbitration.

1.4 French Code of Civil Procedure

Article 1469 of the French Code of Civil Procedure deals with the court's role in gathering evidence for arbitration cases. If a party in an arbitration case needs to use an official or private document that they were not a party to, or a document held by someone else, they must first seek approval from the arbitral tribunal to engage this third party. With the tribunal's approval, they can then summon the third party before the president of the judicial court to request the document. The legal action takes place at a location specified by certain legal articles and follows an expedited legal process. If the president of the court finds the request valid, they can order the third party to provide the document, in its original form, a copy, or an extract, under specific conditions and possibly with a penalty for non-compliance. The court decision is not immediately enforceable and can be appealed within fifteen days of being notified (French Code of Civil Procedure, 2011).

According to Thomas H. Webster in French commercial legal cases, it's rare to use oral testimony, and third-party testimony is quite unusual. Also, unlike many other legal systems, there's no 'discovery' phase in French law. Courts can, however, order parties to produce specific documents, though this doesn't typically apply to non-parties. When dealing with evidence held by non-involved parties, the usual approach in France is for one of the parties to request a court-appointed expert to examine all the evidence, including that held by these third parties. This is especially common in arbitration cases like construction disputes. In situations where a party needs a specific document from a third party, such as a company's shareholder register, they may ask the court to inspect the document. A significant concern in these processes is that they are often initiated by one party before the arbitration tribunal is set up, which might give them an unfair advantage. This leads to objections from the other party and challenges for arbitrators. Arbitration rules typically allow the tribunal to appoint an expert. If the issue involves inspecting a site or documents controlled by a third party, the most effective action might be for the tribunal to appoint an expert for this purpose. If the third-party refuses access, the tribunal or parties can ask to

French courts for enforcement. Such enforcement is likely possible given the general acceptance of experts in French legal proceedings (Webster, 2001, p. 158-159).

Under French law, an international arbitration tribunal may request assistance from a French court in gathering evidence, even when the seat of arbitration is not in France. French legal rules are quite open to supporting international arbitration, no matter where it's officially based. They focus more on the international aspect and the need for a fair and effective arbitration process, including helping with evidence collection. The actual help a French court will give depends on each specific situation and the rules of the arbitration (Raess, 2020, p.27).

1.5 Swiss Law on Private International Law

In the Swiss Law on Private International Law, Article 184 deals with evidence gathering in arbitration cases. It states that the arbitration tribunal itself should handle the collection of evidence. However, if they need assistance from state judicial authorities during this process, either the tribunal or one of the parties (with the tribunal's approval) can ask for assistance from the local court where the place of arbitration is (Federal Act on Private International Law (PILA), 1987).

Under the Swiss law, when an international arbitration is based outside of Switzerland, the chances of a Swiss court helping with evidence collection are quite limited. Swiss law mainly supports arbitration cases that have their legal base, or "seat," in Switzerland. Although Swiss courts are generally supportive of arbitration, their ability to assist in cases seated in other countries is more restricted. This limitation is due to legal jurisdiction issues and the need to respect international legal boundaries (Raess, 2020, p.32).

It is important to mention that Swiss Private International Law Article 184(2) entitles the arbitration tribunal to ask court assistance for evidence gathering without the party's prior consent. In Switzerland, an arbitration tribunal has the flexibility to evaluate evidence on its own terms and can decide not to accept more evidence if it believes it already has already collected enough. Therefore, if the tribunal handles the case carefully and ensures fair treatment for all parties, it is allowed to request help from courts for gathering evidence, even if the parties involved in the arbitration disagree with this. On the other hand, if a party decides to seek court assistance without tribunals' prior permission the tribunal might not use this evidence, having not agreed to the process. However, in this case the party has the

right to challenge arbitral award if it ignores key evidence, potentially infringing on the right of parties to have their case heard (Raess, 2020, p.32).

However, the Swiss Federal Tribunal has clarified that challenges are only valid in cases of major injustice, not simply because evidence was assessed incorrectly. Therefore, it's generally expected that state courts will not provide help in gathering evidence unless the arbitration tribunal agrees to it. This approach helps keep the process efficient and acknowledges that the tribunal might not use the evidence if it didn't approve its collection in the first place (Raess, 2020, p.32).

1.6 Law of Georgia on Arbitration

Law of Georgia on Arbitration also regulates court assistance in the taking of evidence in arbitration, according to the Article 35(3):

,,At any stage of the arbitration proceeding, the arbitral tribunal or a party, with the consent of the arbitral tribunal, may request from a court assistance in taking evidence. This evidence shall be presented to the party (parties) or arbitral tribunal at any stage of arbitration proceedings. The arbitral tribunal is authorized to ask the court to ensure attendance of witness. The rights and duties of the witnesses summoned by the court shall be determined in accordance with the Civil Procedure Code of Georgia."(Law of Georgia on Arbitration, 2009).

To ensure a fair and informed decision in arbitration, it's essential for the arbitrator to access all crucial evidence related to the case. Many countries' legal frameworks, including the Georgian Law on Arbitration, acknowledge the need for court assistance in gathering evidence for arbitration proceedings. However, before a court offers its assistance to the arbitral tribunal in this regard, it must first evaluate its own jurisdictional authority to consider such requests. This evaluation involves determining if the court has the discretion to review the application for assistance and, if so, whether the necessary conditions for granting such assistance are met. In reviewing an application for court assistance in evidence collection, the court should consider several key factors such as: the identity of the applicant, the location of the arbitration proceedings, prior tribunal consent, timing of the request, legal admissibility. These considerations are crucial in ensuring that the court's involvement in the arbitration process is appropriate, lawful, and conducive to the fair resolution of the dispute(Kekenadze, Tkemaladze, 2017, p.121).

Under Georgian arbitration law, both the arbitral tribunal and the parties, with the tribunal's approval, are authorized to seek court assistance for evidence collection. The Law on Arbitration in Georgia does not stipulate a particular format for the tribunal's consent when submitting a request to the court. This flexibility comes from the approach in the Model Law, where neither its legislative history nor the accompanying commentaries specify a requirement for the arbitration consent to be in written form. As a result, the expression of consent for arbitration can take various formats, as long as it is clear and its content can be precisely identified. This flexibility is essential to ensure that the court can confidently verify that the arbitrator's approval has been obtained. To be recognized and acted accordingly, this consent must be supported by evidence that clearly demonstrates three key elements: the arbitrator's consent to seek court assistance, the identification of the parties engaged in the arbitration, and the grounds upon which the consent was granted. The manner of granting consent can be explicit, such as a written letter explicitly consenting to the provision of specific evidence, or it can be implicit, concluded from the circumstances or conduct of the parties involved (Kekenadze, Tkemaladze, 2017, p.122).

Discussing indirect consent, a good example is a case from Hong Kong (Vibroflotation v. Express Builders, Supreme court of Hong Kong, 1994), where explicit consent from the tribunal for court assistance in evidence collection was not provided. Nevertheless, correspondence from the arbitrator highlighted the necessity of certain evidence for the case and specified deadlines for its submission by the parties. In interpreting Article 27 of the Model Law, which covers both Hong Kong's and Georgia's arbitration laws, the court concluded that the arbitrator's letters constituted direct approval for seeking court assistance in gathering evidence. The court observed that while the arbitrator's direct consent was not explicitly stated, it was concluded from the content and context of her communications. Notably, the arbitrator's action of setting a timeline for evidence presentation and its subsequent hearing was interpreted as an implicit sanction for the parties to approach the court. This interpretation comes from the understanding that court intervention was necessary to secure the specified evidence, a fact the arbitrator was evidently aware of. This scenario illustrates how arbitrator consent can be perceived not only through direct statements but also from implied indications from their actions and written communications (Kekenadze, Tkemaladze, 2017, p.122-123).

Article 35 of the Georgian Arbitration Law is focused on arbitration cases when the place of arbitration is in Georgia, specifically referring to the cases when the place of arbitration is in the country. The approach to court assistance in obtaining evidence when the place of

arbitration is abroad varies internationally. Some countries' laws, like the German Code of Civil Procedure, explicitly state that their provisions for court assistance in evidence gathering are applicable to both arbitrations occurring within their own territory and those when the place of arbitration is abroad. On the other hand, the Model Law and the Georgian Law on Arbitration have a more limited scope. They stipulate that Article 27 of the Model Law is applicable only in cases where the place of arbitration is within the same country as the court from which assistance is sought. In the context of Georgia, the laws are designed to primarily address cases where the arbitration takes place within its borders. The Georgian legal framework is clear in its stipulations, unless explicitly stated, the law's provisions, such as those in Article 35 of Georgian Law on arbitration, do not extend to arbitrations conducted in other countries. As there is no direct statement extending its reach to international arbitrations (Kekenadze, Tkemaladze, 2017, p.122-123).

The Law on Arbitration of Georgia allows for the submission of requests for court assistance in evidence gathering at any stage of the arbitration process, whether during pre-trial preparations or during the arbitration proceedings themselves. This aligns with Article 27 of the Model Law, which states that the timing of such requests should not be limited solely to the phase of oral hearings or during pre-hearing.

A significant aspect of Article 35 of the Georgian Law on Arbitration concerns the nature of judicial assistance – whether it is obligatory or at the court's discretion. According to Georgian legislation, the court is mandated to provide support to either the party or the arbitrator in gathering evidence, except when such a request conflicts with the country's procedural laws. The court is expected to avoid going into detail into the substantive aspects of the case. Specifically, it is not within the court's obligation to evaluate the relevance or appropriateness of the evidence in relation to the dispute. This task is presumed to have already been undertaken and resolved by the arbitration tribunal. Therefore, the court's involvement is restricted to offering procedural or technical assistance, simplifying the enforcement of evidence production when the arbitrator does not have the authority to do so. This approach ensures that the court helps the arbitration process without overstepping the substantive judgment (Kekenadze, Tkemaladze, 2017, p.125).

Under the Georgian Law on Arbitration, arbitral tribunals lack the authority to oblige third parties to attend hearings. Typically, when a party in arbitration depends on a witness's testimony, it is their responsibility to ensure the witness's presence. However, if the witness does not want to cooperate and the party cannot secure their testimony, the tribunal may seek the court's help. Article 35 of the Georgian Law does not explicitly mention court

assistance for witness attendance. However, the law's definition of assistance in obtaining evidence includes the collection of witness testimonies, thus extending the applicability of Article 35 to such cases. The main distinction here is that while the arbitrator or a party (with the arbitrator's consent) can request evidence provision, only the arbitrator is permitted to ask for a witness's attendance. When a court reviews a request to ensure a witness's attendance, it examines the same factors and follows the same standards as it would for any assistance in evidence gathering. The Georgian Law on Arbitration does not specify where the witness should appear, indicating that the court's role is to ensure the witness's presence at the arbitration, rather than at a court hearing. To guarantee the witness's attendance at the arbitration, the court follows procedures indicated in the Georgian Civil Procedure Code regarding the summoning and potential consequences of a witness's non-appearance. A summoned witness is legally bound to appear and provide truthful testimony. Should they fail to appear without a valid reason, they may get a fine, and the court can enforce their appearance. Additionally, there are criminal liabilities for a witness who refuses to testify or intentionally gives false testimony. This framework ensures that witnesses are effectively integrated into the arbitration process, respecting the legal consequences of both the arbitration and civil procedure (Kekenadze, Tkemaladze, 2017, p.130).

2. GATHERING EVIDENCE UNDER VARIOUS ARBITRATION RULES AND GUIDELINES

The IBA Rules on taking of evidence in International Arbitration are crucial guidelines that work together with other arbitration rules. They aim to offer clear, fair, and uniform standards for collecting evidence, helping parties avoid confusion and ensuring fair arbitration processes.

Article 3(9) of the IBA rules on the taking of evidence in international arbitration explains how a party in an arbitration can request documents from a non-party. Under this rule if a party needs documents they can't get on their own, they can ask the arbitration tribunal to assist in accessing these documents. The request must be made in writing, given to the tribunal and the other parties, and should contain specific details as indicated in Article 3.3 of the IBA Rules. The tribunal will decide on the request and may take steps itself, allow the requesting party to do so, or order another party involved in the arbitration to take action. The tribunal will do this if it thinks the documents are relevant and important to the case, if the request meets the necessary criteria, and if there are no valid objections according to other articles in the rules (IBA rules on taking of evidence in international arbitration, 2020). While the tribunal has broad authority to gather evidence, parties involved in the arbitration still remain their right to challenge the tribunal's requests for documents, similarly to how they would respond to similar requests from other parties involved in the arbitration. Article 3.10 of IBA rules discussed situations where a party not directly involved in the request may have concerns, such as claims of privilege or confidentiality, regarding the documents (Commentary on 2020 IBA Rules on the Taking of Evidence in International Arbitration, 2021 p.12-13).

The London Court of International Arbitration (LCIA) Rules (London Court of International Arbitration (LCIA) Rules, 2020). primarily concentrate on providing the procedures and protocols that govern arbitration proceedings among the parties who have agreed to arbitration under these rules. This includes guidelines for selecting arbitrators, managing the arbitration process, and how parties should submit and present evidence. However, the LCIA Rules don't specifically address the role of court assistance in gathering evidence for international arbitration. Their focus is more on the arbitration process itself, rather than on external support such as that provided by courts (London Court of International Arbitration (LCIA) Rules, 2020).

Article 22.1(v) of the LCIA Rules empowers the Arbitral Tribunal to request any party in the arbitration to produce documents or copies of documents they possess or control over, to both the tribunal and the other parties involved. This authority can be exercised either at the request of a party participating in the arbitration or by the tribunal's own decision. Additionally, the tribunal has the discretion to determine the relevance of the documents to the case and can set specific terms regarding the order, but it does not say anything about court involvement in the case for taking of evidence. Moreover, the rules do not specify what can be done in case the evidence is with the person who is not the party of the arbitration proceedings. However, this kind of evidence can be very crucial for dispute resolution though (London Court of International Arbitration (LCIA) Rules, 2020).

Article 25(4) of ICC rules (International Chamber of Commerce (ICC) arbitration rules, 2021) empowers the tribunal to request evidence from any party participating in the arbitration process, but it does not say anything about obtaining the evidence from the third parties. Also, it does not regulate the possibility for court assistance in taking of evidence in international arbitration. The article is very broad and does not clarify many important aspects of gathering evidence in arbitration (International Chamber of Commerce (ICC) arbitration rules, 2021).

According to Article 22(5) of ICDR (International Center for Dispute resolution (ICDR) rules on arbitration, 2021) if the parties do not agree on a different rule, arbitration can ask them to submit evidence which is necessary and relevant for the proceedings. Moreover, Article 24(4) of ICDR rules says that if one party in a dispute thinks there are important documents that the other party has, and they can't get these documents by themselves, they can ask the tribunal for help. The tribunal can then order the party who has the documents to give them to the party asking for them. But this will only happen if the tribunal believes these documents really exist and that they are important for deciding the case. The requesting party is obligated to precisely identify the documents they need, as opposed to making a general request for all documents. They also need to explain why each document or type of document they're asking for is important and how it could affect the outcome of the case. However, the Article does not explicitly address the acquisition of evidence from individuals who are not parties to the arbitration (International Center for Dispute resolution (ICDR) rules on arbitration, 2021).

Article 4 of the Prague rules regulates issues related to evidence and it stated that - parties are expected to submit documents that support their case early in the proceedings to ensure efficiency. If a party believes it needs specific documents from the other party, it should

indicate this during the initial case and explain why these documents are necessary. If the tribunal agrees that these documents are needed, it will set up a specific procedure for obtaining them and schedule it accordingly (Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), 2018).

While the aforementioned arbitration rules are widely recognized and frequently included in arbitration agreements, they do not address court assistance in taking of evidence, either explicitly or implicitly. Their primary focus is arbitration and its interaction with the involved parties. Additionally, it's crucial to acknowledge that these rules do not interfere with the parties' right to seek judicial assistance in gathering evidence from the state court. However, firstly, this implies that the tribunal will not participate and won't help parties in seeking assistance from a state court. Secondly, it might allow parties to approach the court without the tribunal's consent. However, this aspect is somewhat unclear, as it's likely challenging for a party to seek court assistance without the tribunal's involvement. Courts may approach such requests with skepticism, evaluating whether the evidence is essential for the proceedings and ensuring the request isn't an attempt to unnecessarily delay the process.

3. COURT ASSISTANCE IN THE TAKING OF EVIDENCE UNDER THE HAGUE CONVENTION

The Hague Convention on taking of evidence (The Hague Convention on the taking of evidence abroad in civil or commercial matters, 1970) provides guidelines for parties in legal cases who need to gather evidence from abroad. Established in 1968, the Hague Convention aimed to develop a set of standards that are applicable in both civil and common law jurisdictions. It indicates two key mechanisms, letters of request, where a court from one member state requests assistance in gathering evidence from another court, and the involvement of diplomatic officers. The Convention deals with the aspects of gathering information before a trial, letting countries choose whether to carry out these requests or not. Public authorities are playing the key role in managing these requests (Official commentary on the Hague Convention on the taking of evidence abroad in civil or commercial matters, 1970).

However, there's a question about whether this Convention applies to international arbitration, that occurs outside the regular court system. The Convention primarily discusses gathering evidence for use in standard court cases and not arbitration. It's not clear whether an arbitration tribunal qualifies as a "judicial authority" under the convention's terms, leading to ambiguity about whether such tribunals can directly use this method for international evidence collection. A different but not well-established approach could be for an arbitration tribunal to request a domestic court to issue the letter of request on its behalf. But there's not much legal history supporting this approach. Traditionally, "letters of request " have been used by courts to request evidence collection assistance from foreign courts and in order to use this evidence in court proceedings. It's uncommon but there's a theoretical possibility that an arbitration tribunal might be able to ask a local court to send a letter of request to a court in a different country. While there are few examples of this occurring, it still can be considered as an option (Born, 2021, p. 2600).

The provision for a party to acquire evidence from abroad with the assistance of their own country's court's ''letter of request'' is indicated in the second section of Article 44 of the English Arbitration Act, in relation to the Hague Convention. However, English court highlighted that this provision cannot be applied to individuals who are signatories to the arbitration agreement or participants in the arbitration process. Consequently, this regulation is relevant for parties engaged in the arbitration who are not fulfilling the requests of the arbitration (Milo et al., 2019, p. 325).

The debate over whether arbitration qualifies as a ‘’judicial proceeding’’ has varied interpretations, especially when a convention specifies its applicability to judicial proceedings only. Arbitration is different from a judicial process as it operates independently of formal judicial authorities, however it may occasionally receive court support in certain aspects. But it can be considered that arbitration is similar to a judicial process because its outcomes are legally binding and enforceable, like court decisions. Moreover, arbitration is conducted by neutral arbitrators whose authority comes from not just from the agreement between the disputing parties, but also from the legal recognition of such agreements by the state. The question of whether arbitration should be considered a legal process for the purposes of the Hague Convention remains unresolved and subject to different opinions of scholars. For instance, Gary B Born considers arbitration as a judicial process within the context of the Hague Convention, particularly for gathering evidence (Born, 2021, p. 2600).

As scholars D.N Luder and L. Christe indicate, in Switzerland for arbitrations, there's a possibility under the new section of PILA, to get assistance from U.S. courts to collect evidence, but it's not straightforward and requires several steps. This includes getting permission from the arbitration tribunal and then going through Swiss and possibly foreign courts. This could happen using the Hague Evidence Convention. But there's some uncertainty about how effective this will be, especially if the evidence is held by someone who doesn't want to cooperate. Also, this process can be long and complicated, involving multiple steps through different courts, which might discourage parties from seeking this kind of assistance (Luder, Christe, 2022, P. 789-795).

Overall, this matter is still unclear, as there has been no direct guidance from the European Court on this issue. This ongoing ambiguity underscores the complexity and evolving nature of the legal understanding of arbitration within international frameworks.

Conclusions

1. The extensive research across various legal systems reveals a consensus on the critical role courts play in assisting arbitration proceedings, especially in evidence collection. This necessity arises because arbitration obtains its authority from party agreements, lacks the power to compel non-participating third parties to provide testimony or evidence.
2. The prerequisite for court assistance in arbitration, such as prior consent from the arbitration tribunal, is grounded with the tribunal's deep understanding of ongoing arbitration case specifics. Courts, without going deeply into the merits of the case, rely on the arbitration's assessment of evidence necessity, thus giving more credibility to applications pre-approved by the tribunal. This practice also reduces potential attempts by parties to delay arbitration through unnecessary court interventions. For instance, jurisdictions like Singapore explicitly avoid intruding from the court as much as possible, delegating to arbitration the decisions on evidence admissibility.
3. Notably, courts in England and the USA exercise caution when parties request extensive document disclosure, very carefully reviewing requests to protect third-party informational privacy, which is deemed crucial. It would be beneficial for other countries as well to adopt a more thorough approach in scrutinizing requests for information gathering in arbitration proceedings. Given the sensitive nature of the information often involved, both arbitration tribunals and courts should exercise increased caution. Implementing explicit legislative limitations regarding the handling and disclosure of sensitive information could significantly enhance the integrity and effectiveness of these processes.
4. The interpretation of ‘’tribunal’’ to include international arbitration, as illustrated by the Intel case in the USA, highlighted a vital moment, influencing international legal discussions. However, recent conflicting American decisions have introduced ambiguity, highlighting a need for consistency in this interpretation. The significance of the Intel case extends far beyond its immediate context since it is an important example for other countries. Its implications have encouraged various jurisdictions to consider amending their legislation or adopting new judicial interpretations that harmonize with its principles. This case has played a crucial role in promoting a more supportive legal environment for international arbitrations, demonstrating the potential benefits of harmonizing legal approaches to help the effectiveness of international dispute resolution.

5. The Hague Convention's potential in assisting evidence gathering for arbitrations across signatory countries remains to be insufficiently explored, especially with the ongoing debate on whether arbitration qualifies as a ‘'judicial process.'’ Scholarly opinion favors this decision to support international arbitration assistance, though, official recognition is still not obtained. The consideration that countries influenced by the UNCITRAL Model Law, which currently does not allow international arbitrations to seek court assistance for evidence gathering, considers the Hague Convention as a critical alternative. Therefore, it becomes necessary to revise or adapt the Hague Convention to ensure its applicability to international arbitrations. Such an amendment would be a significant development in assisting cross-border legal cooperation and support for international arbitration processes.
6. A significant limitation of the Model Law is its focus on assistance from the same country where the place of arbitration is, limiting opportunities for international cross-border arbitration. This gap is particularly problematic for jurisdictions adhering to or influenced by the UNCITRAL Model Law, where accessing third-party evidence becomes challenging. Future amendments to the Model Law could benefit from explicit provisions on compliance with evidence-gathering orders, including specifics like witness travel arrangements and potential relocation of arbitration proceedings for this reason, like it is regulated in USA. Additionally, clarifying whether these provisions apply pre-hearing or during arbitration would greatly increase the law's efficiency and applicability. The application of these legal principles to both the pre-hearing phase and the initial stage of arbitration is widely acknowledged by scholars. However, there is a lack of explicit clarity in this area. It is essential to provide specific definitions and guidelines in the legislation to eliminate any ambiguity and ensure a clear understanding of these processes at every stage.

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SUMMARY

Court assistance in the taking of evidence in International Arbitration

Tamari Asatiani

The thesis presents a detailed analysis of various sources relevant to court assistance in the gathering of evidence in international arbitration. It primarily focuses on the UNCITRAL Model Law, a key framework in international arbitration. Notably, numerous countries are signatories to the Model Law, and their legislation is consequently influenced by its rules.

However, due to the imperfect formulation of different country rules and their limitations it is hard to get one clear answer whether courts are obliged to aid in evidence collection for international arbitration. The comparative analysis of different countries' rules is crucial for understanding diverse legal perspectives. The study observes that while some countries adopt a more liberal approach, aligning with arbitration expectations and aiding them in evidence collection, others strictly adhere to the stipulations of the Model Law, which limits this possibility. The thesis also examines the stance of countries not influenced by the Model Law.

A significant part of the research highlights the lapses that limit international arbitration from seeking assistance in countries where the evidence is located. This is a core challenge in international arbitration, especially when the arbitration is conducted in one country, but the evidence or witnesses are in another.

Through a thorough examination of scholarly works, official commentaries, and court decisions across different countries, the thesis provides a comparative perspective on potential resolutions and necessary improvements. The complexity of court assistance in international arbitration is visible, especially given the lack of concrete official guidance from state officials. This ambiguity highlights the need for clearer explanations and amendments to enable courts to fully support international arbitrations.