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TIPPING THE SCALE TO BRING A BALANCED APPROACH: EVIDENCE DISCLOSURE IN CHINESE INTERNATIONAL ARBITRATION

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Abstract: Due to the ever-increasing trade between China and the rest of the world, commercial disputes have risen dramatically. Many foreign companies choose to resolve these disputes through arbitration to circumvent the Chinese courts and to retain more autonomy and control. Arbitration itself can also be a problem because rules and laws differ, depending on the jurisdiction and the institution involved. Under China's civil law tradition, arbitrators are restricted in their ability to force parties to disclose evidence that may be detrimental to their case. Additionally, arbitrators have no authority to obtain evidence from uncooperative third parties. This Article seeks to provide some guidance for parties engaged in arbitration proceedings in China.

I. INTRODUCTION

In 2005, China became the world's fourth largest economy.[1] On average, China's economy has grown by 9.4% annually for the past twenty-seven years,[2] and it is expected to continue to grow by 7.5% until 2010.[3] China's incredible transition to a market economy has lifted 250 million

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[1] Keith Bradsher, *China Reports Another Year of Strong (or Even Better) Growth*, N.Y. TIMES, Jan. 25, 2006. In 2005, China had an economic output of USD 2.26 trillion. Only the United States, Japan and Germany have larger economies. *Id.*

[2] Embassy of the People's Republic of China in the United States of America, *China's GDP grows 9.5% in first half* (July 20, 2005), http://www.china-embassy.org/eng/gyzg/t204319.htm (last visited Dec. 12, 2006) (quoting Zheng Jingping from the National Bureau of Statistics).

[3] *China's GDP growth to average 7.5% in 2006-2010*, REUTERS, Mar. 20, 2006.

people out of poverty,[4] and much of this progress is the result of the Chinese government's decision to open its market and resources to the outside world. However, as trade, investment, and general business interactions continue to increase, so do international and domestic commercial conflicts.

To resolve these conflicts, many companies, both domestic and foreign, opt to use alternative dispute resolution ("ADR") rather than turn to the Chinese courts. ADR is the preferred method of resolving disputes because it is consistent with Chinese cultural and historical practice.[5] Traditionally, the Chinese have relied on an informal legal system composed of dispute resolution devices, using village elders and guild procedures,[6] rather than the country's formal legal system.[7] This approach reflects Confucian ideals of social harmony and reconciliation, providing parties with a "face-saving" device and an opportunity to save business relationships.[8] Many foreign investors and international companies prefer ADR because it gives them more control and autonomy[9] than they would have in Chinese courts. ADR provides them with an alternative to China's legal system, which they perceive as biased against foreigners, opaque in nature, and lacking political independence.[10] In addition to this perception of unfairness, other factors impede foreign parties from seeking remedial action, including the use of Mandarin during all court proceedings, the need for Chinese counsel, and foreigners' unfamiliarity with China's domestic laws. Foreign investors believe arbitration is less biased and more equitable because it allows them to be a part of the appointment process for selecting an arbitrator, and because it provides other contractual rights such as the

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[4] Callum MacLeod, *Report Illustrates Huge Gap Between China's Rich, Poor*, USA TODAY, Dec. 16, 2005. It is important to note that there are still millions in China who are extremely poor and growth in wealth has been imbalanced.

[5] *See* Henry J. Graham, *Foreign Investment Laws of China and the United States: A Comparative Study*, 5 J. TRANSNAT'L L. & POL'Y 253, 254-55 (1996).

[6] William C. Jones, *Trying to Understand the Current Chinese Legal System*, *in* UNDERSTANDING CHINA'S LEGAL SYSTEM 7, 18 (C. Stephen Hsu ed., 2003).

[7] *Id.* at 16-17. *See also* THE GREAT QING CODE 9-11 (William C. Jones trans., Claredon Press 1994). The center of the formal system was The Code (dynastic code), which was a directive to the district magistrate to tell him when to punish and precisely what punishment to inflict in any circumstances that were perceived to be legally significant. There were no parties or lawyers; the magistrate acted with immediate and total control. The proceedings tended to be harsh on all participants. Everyone, including witnesses, was imprisoned and punishment was handed-out without compassion.

[8] Graham, *supra* note 5.

[9] George O. White III, *Navigating the Cultural Malaise: Foreign Direct Investment Dispute Resolution in the People's Republic of China*, 5 TRANSACTIONS: TENN. J. BUS. L. 55, 68 (2003).

[10] *Id.* at 71. *See also* Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L. L. 329, 333 (1997). *But see* Teema Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002) (discussing, at length, how perceptions of the Chinese legal system are often based on stereotypes, Western biases, and ignorance).

ability to designate English as the official language for the proceedings.[11] All of these factors make ADR a more convenient and attractive method of dispute resolution for foreign investors.[12]

Although negotiation and mediation are preferred in China,[13] arbitration is used when these forms of dispute resolution fail.[14] Today, arbitration is the standard method of dispute resolution in China, as well as the primary method of resolving international commercial disputes.[15] There are over 180 domestic arbitration commissions in mainland China.[16] In the last decade, the China International Economic and Trade Arbitration Commission ("CIETAC"), China's foremost international arbitration institution, has handled more cases than any other international arbitration center.[17]

While there are tremendous advantages to international arbitration,[18] arbitration itself can present problems. Arbitral procedural and substantive rules vary, depending on the country and the institution engaged in the dispute. There is a global movement towards harmonizing arbitration law, but differences still exist.[19] For example, evidence disclosure law differs markedly depending on whether the place of arbitration, *lex loci arbitri*,[20] lies in a common law or civil law jurisdiction.[21] The term "evidence disclosure" is used here rather than "discovery," because procedural rules

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[11] White, *supra* note 9, at 68.

[12] *Id.* at 71.

[13] From 1980 to 2000, there were approximately 130 million civilian cases mediated in China, five times the number of cases handled by the Chinese courts. Kevin C. Clark, *The Philosophical Underpinnings and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?*, 2 PEPP. DISP. RESOL. L.J. 117, 127 (2002).

[14] White, *supra* note 9, at 67.

[15] *Id.*

[16] Eu Jin Chua, *Symposium: Legal Implications of a Rising China: The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 142 (2006).

[17] Tang Houzhi, *The Arbitration Road–in Commemoration of the 50th Anniversary of the Founding of CCPIT*, *in* 50TH ANNIVERSARY OF THE FOUNDING OF THE CHINESE COUNCIL FOR THE PROMOTION OF INTERNATIONAL TRADE (2002).

[18] Alan Redfern & Martin Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 22-23 (4th ed. 2004).

[19] Gabrielle Kaufmann-Kohler, *Symposium: International Commercial Arbitration: Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1321 (2003) ("Arbitration laws are increasingly harmonized. As a result, they tend to become interchangeable. Admittedly, most of them have not yet reached this stage, but the overall trend is undisputable.").

[20] *See* Christopher S. Gibson, *Report: Awards and Other Decisions: Articles 59 to 66*, 9 AM. REV. INT'L ARB. 181, 185 (1998).

[21] Although most states accommodate parties' autonomy, the state may wish to preserve the "integrity of its legal order or protect the rights of non-parties." For this reason, "the *lex arbitri* governs all phases of arbitration . . . [P]ublic policy consideration impose mandatory requirements upon the arbitral tribunal and define the available judicial remedies for assisting or controlling the arbitral process." Saul Perloff, *The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration*, 13 U. PA. J. INT'L. BUS. L. 323, 329-30 (1992).

and practices related to evidence disclosure vary to a significant extent in international arbitration.[22]

International arbitration must balance the concepts of fairness and efficiency.[23] Arbitration is designed to provide a quick, efficient process of resolving disputes, and to serve as an alternative to drawn-out and costly litigation.[24] Because of arbitration's concise nature, unconstrained evidence disclosure powers cannot be granted to arbitrators.[25] Without adequate mechanisms for compelling disclosure, however, arbitrators may not gather all the relevant information needed to render a fair decision.[26] This fear is especially well-founded when disputes involve parties with unequal powers and resources.

This Article examines whether Chinese international arbitration achieves this balance and concludes that it does not in its current form. Additional steps must be taken to provide Chinese arbitrators with the discretion and authority needed to compel evidence disclosure and to ensure substantial justice in the arbitration process. This Article also provides guidance for foreign investors and companies that seek to compel disclosure from an uncooperative opposing party or nonparty.

This Article compares three aspects of evidence disclosure practice: party disclosure, nonparty disclosure, and pre-hearing disclosure of evidence.[27] As a civil law jurisdiction, China's legal system stands in contrast to the United States and other common law jurisdictions in regard to its evidentiary disclosure law. Whereas in most common law jurisdictions these mechanisms are viable and liberally granted, it is difficult to compel evidence disclosure in Chinese arbitration. In some situations, it is not even possible.

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[22] Redfern & Hunter, *supra* note 18, at 299 ("Indeed, it is better to avoid the use of the term 'discover' because it is an ambiguous term. To a civil lawyer, it means nothing; to a U.S. lawyer it encompasses production of documents and depositions of potential witness and experts as well as inspection of the subject-matter of the dispute; to an English lawyer it refers only to the production of documents.").

[23] Eric A. Schwartz, *Reconciling Speed with Justice in International Arbitration*, *in* IMPROVING INTERNATIONAL ARBITRATION: THE NEED FOR SPEED AND TRUST 44, 44 (Benjamin G. Davis ed., 1998).

[24] *See* John C. Koski, *From Hide-And-Seek to Show-And-Tell: Evidentiary Disclosure Rules*, 17 AM. J. TRIAL ADVOC. 497, 497 (1993) (stating that discovery increases the duration and cost of litigation).

[25] Redfern & Hunter, *supra* note 18, at 300 ("Wholesale disclosure of documents is an expensive and time-consuming process for all concerned and rarely reveals the 'smoking gun' that is being sought.").

[26] *See* Gabriel Herrmann, Note, *Discovering Policy Under The Federal Arbitration Act*, 88 CORNELL L. REV. 779, 802-03 (2003).

[27] This Article limits itself to these three areas for organizational and clarity purposes. There is an array of topics that could be discussed on the issue of evidence disclosure in international arbitration, such as on-site evidence collection or expert testimony. However, this Article was written as an in-depth analysis of a few issues, rather than a broad scan of the topic.

Part I describes CIETAC, its institutional rules, and the Chinese Arbitration Law to provide background to international arbitration in China. Part II compares CIETAC arbitrators' lack of authority to compel disclosure from parties with the authority of other international arbitration institutions, and suggests potential avenues for recourse. Part III highlights the lack of power arbitrators have over nonparties in China, while simultaneously showing that CIETAC can exert some influence over nonparties to encourage disclosure. Part IV explores pre-hearing evidence disclosure proceedings. Part V concludes by providing several steps that parties can take to achieve their preferred levels of evidentiary disclosure during their arbitrations in China.

II. BACKGROUND: CIETAC AND THE CHINESE ARBITRATION LAW

International arbitration is a "hybrid" of private and public law[28] because "[i]t begins as a private agreement between the parties . . . [y]et it ends with an award that has binding legal force."[29] Any arbitration thus has two distinct legal orders or systems. One is imposed by the contract between the parties, and the other is set by an external order.[30] Because arbitration is governed both by a private agreement between the parties and national law, it is crucial to look at two sets of authority when examining issues in international arbitration: institutional rules and national laws pertaining to arbitration. Institutional rules are more important in China than in other jurisdictions because China permits only institutional arbitration; ad hoc arbitration does not exist.[31] In addition, the process of evidence collection is usually administered according to the rules of the governing institute, which is designated by the parties through their contractual agreement to arbitrate.[32]

International arbitration in China cannot be discussed without some background information on CIETAC. In 1956, CIETAC was created "to

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[28] Redfern & Hunter, *supra* note 18, at 11.

[29] *Id.*

[30] Perloff, *supra* note 21, at 327.

[31] Eu Jin Chua, *supra* note 16, at 141. Chinese law does not make any reference to ad hoc arbitration. However, under Chinese law, if an arbitration agreement does not specify an arbitration commission, it is void. International arbitration can be both ad hoc and institutional. In an ad hoc arbitration, the arbitrator or tribunal selected by the parties is responsible for all administrative matters associated with the arbitration process, such as setting the procedural rules, collecting the fees, and arranging the hearing. In institutional arbitration, an entity provides these services. Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 DAYTON L. REV. 421, 435 (2006).

[32] W. Scott Simpson & Omer Kesikli, *The Contours of Arbitration Discovery***,** 67 ALA. LAW. 280, 283 (2006).

resolve foreign trade disputes relating to 'contracts, agreements, and/or other documents between disputing parties.'"[33] In fact, CIETAC was the only organization authorized to resolve commercial disputes between Chinese and foreign parties prior to 1996.[34] Because other domestic arbitration commissions have been established to hear domestic disputes,[35] and many other local institutions are gaining recognition as suitable places to adjudicate international commercial disputes, CIETAC is no longer the only forum for resolution through arbitration.[36] Nonetheless, CIETAC remains the main Chinese international arbitration commission.[37] CIETAC's headquarters are in Beijing, and its sub-commissions are in Shanghai and Shenzhen, along with nineteen other liaison offices around the nation.[38] In 2005, it took 979 cases, of which it settled 958,[39] earning CIETAC the distinction of having the highest caseload of any arbitration institution in the world.[40]

Although CIETAC has gained an international reputation for fairness and impartiality,[41] and its awards have been enforced in over 140 countries and regions,[42] it is also criticized for its lack of transparency, perceived bias against foreign parties, and overly expensive and time-consuming process.[43] In response to these criticisms, CIETAC amended its arbitration rules in 2005, addressing such pertinent issues as the arbitrator selection process and the efficiency of the tribunal.[44]

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[33] Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 540 (1995).

[34] Eu Jin Chua, *supra* note 16, at 142. *See also* White, *supra* note 9, at 68.

[35] Eu Jin Chua, *supra* note 16, at 142.

[36] *Id.* at 142-43.

[37] *Id.* at 143.

[38] China International Economic and Trade Arbitration Commission, http://www.cietac.org.cn/english/introduction/intro_1.htm (last visited Dec. 14, 2006).

[39] CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, 50TH ANNIVERSARY OF CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION 173 (2006).

[40] Darren Fitzgerald, *CIETAC's New Arbitration Rules: Do the Reforms Go Far Enough?*, ASIAN DISP. REV., July 2005, at 51.

[41] Walter J. Duffy Jr. & Roger Hopkins, *Peeking over the Great Wall*, LEGAL UPDATES, May 2004, at 5; Zhao Xiuwen & Kloppenberg, *supra* note 31, at 450 (stating that Chinese arbitration law and practices are generally in agreement with international arbitration practices).

[42] Zhao Xiuwen & Kloppenberg, *supra* note 31, at 426.

[43] *See* Jerome A. Cohen, *Time to Fix China's Arbitration*, FAR E. ECON. REV., Jan. 2005, at 31; William Heye, *Forum Selection for International Dispute Resolution in China–Chinese Courts vs. CIETAC*, 27 HASTINGS INT'L & COMP. L. REV. 535, 553 (2004). *But see* Benjamin O. Kostrzewa, Comment, *China International Economic Trade Arbitration in 2006: New Rules, Same Results?*, 15 PAC. RIM L. & POL'Y 519, 530-31 (2006) (citing an American Chamber of Commerce survey of American companies that found CIETAC and arbitration in China to be fair and efficient, and that companies who had no arbitration experience in China have a negative view of arbitration in China).

[44] Kostrzewa, *supra* note 43, at 520.

The CIETAC International Arbitration Rules of 2005 ("CIETAC 2005 Rules") provide only half of the procedural framework for evidence disclosure. The other half is provided by the Arbitration Law of the People's Republic of China ("CAL"), which is the primary law regulating arbitration in China.[45] CAL was adopted and promulgated in 1994.[46] It was influenced by international arbitration legislation and practices outside of China, especially the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the Model Law on International Commercial Arbitration.[47] In eighty separate articles, CAL prescribes the mandatory provisions that CIETAC, and all other arbitration institutions, must follow.[48] CAL, as the *lex loci arbitri*, generally governs all phases of international arbitration in China. CIETAC rules may provide more specific standards as long as they do not conflict with CAL.[49]

III. COMPELLING PARTIES TO DISCLOSE EVIDENCE

A. Arbitrators Cannot Compel Parties to Disclose Evidence

Unfortunately for parties seeking to obtain evidence from an opposing party in the course of arbitration, international arbitrators in China lack the authority to compel unwilling parties to make such disclosures. Unlike the disclosure provisions contained in other institutional rules, the CIETAC 2005 Rules do not explicitly grant arbitrators the right to compel a party to disclose evidence. Only CIETAC Articles 37 and 38 provide a framework that arbitrators can use to deal with situations in which one party wants the other to produce evidence. Article 38 has stronger language than Article 37, granting arbitrators the power to "request" the delivery of "relevant materials, documents, or property and goods for checking, inspection and/or

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[45] Zhao Xiuwen & Kloppenberg, *supra* note 31, at 427.

[46] Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995) *translated in* China Int'l Economic and Trade Arbitration Commission Website, http://www.cietac.org.cn/english/laws/laws_5.htm (last visited Dec. 13, 2006) (P.R.C.) [hereinafter CAL].

[47] Zhao Xiuwen & Kloppenberg, *supra* note 31, at 428.

[48] *See* CAL *supra* note 46. Article 79 of CAL provides that "[t]he arbitration organization set up in cities where the people's governments of the municipalities, provinces and autonomous regions are located and other cities which have districts shall be reorganized according to the relevant provisions of this law. Those not reorganized shall be terminated in one year's time starting from the date of the implementation of this law. Other arbitration organizations set up before the implementation of this law and are not in conformity to the provisions of this law shall be terminated starting from the date of the implementation of this law." CAL, *supra* note 46, art. 79.

[49] Perloff, *supra* note 21, at 329-30.

appraisal" to a tribunal-appointed expert.[50] The article states that "the parties shall be obliged to comply."[51] Article 37 of the CIETAC 2005 Rules permits an arbitrator to "undertake investigations and collect evidence as it considers necessary" on its own initiative.[52]

Article 38 deals with expert witnesses and thus falls outside the scope of this piece. Although Article 38 requires parties to comply with an investigation conducted by an expert, it does not provide sanctioning powers. Further, the CIETAC 2005 Rules do not allow arbitrators to use Chinese courts to help gather evidence or to sanction parties for not complying with orders by the arbitrator. Despite the strong wording in Article 38, it still does not grant parties or arbitrators any real power to compel evidence disclosure.

In contrast to Article 38, Article 37 is worded more broadly. The article can be interpreted as giving arbitrators the authority to "investigat[e] and collect evidence" in a party's possession. However, the lack of explicit language more likely denies arbitrators the authority to compel parties to disclose evidence.[53] First, Article 37 is not often used to obtain evidence in arbitral proceedings; rather, arbitrators depend heavily on the evidence submitted by the parties.[54] Second, when a party actually petitions for the use of the article in order to compel the production of evidence,[55] arbitrators use the article's authority to conduct independent investigations, including site visits and interviews of witnesses and employees, and to hire experts, but not to force parties to disclose information or documents.[56] Thus, no article exists in the CIETAC 2005 Rules that can be used to compel a party to disclose evidence that may be detrimental to its case.

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[50] CIETAC International Arbitration Rules of 2005, art. 38 (Adopted by the China Council for the Promotion of International Trade and the China Chamber of International Commerce on Jan. 11, 2005, effective May 1, 2005) [hereinafter CIETAC 2005 Rules].

[51] *Id.*

[52] *Id.* art. 37.

[53] Duffy & Hopkins, *supra* note 41 (stating that "[d]iscovery basically does not exist. You are largely limited to supplying documentary evidence to support your own claim and to refute the complaint.").

[54] Interview with Guo Huaning, CIETAC Secretariat, Beijing China (Nov. 10, 2006) (on file with Journal) [hereinafter Guo Interview]. She stated: "Usually, the parties are responsible for their cases. If they say party B has that evidence, then they will try to find other supporting evidence. . . . Normally, arbitrators check evidence submitted by the parties and [do] not use [A]rticle 37." However, one arbitrator did believe that "arbitrators use this rule frequently." Email Interview with Helen Shi, CIETAC Arbitrator (Nov. 26, 2006) (on file with Journal) [hereinafter Shi Interview].

[55] Interview with Wang Yingmin, CIETAC Secretariat, Beijing China (Nov. 9, 2006) (on file with Journal) [hereinafter Wang Interview]. He said: "In my experience, the tribunal rarely take[s] up investigation. Normally one party applies or asks the tribunal to investigate. They censor or check the evidence and then decide whether to investigate."

[56] Interview with Jia Shen, CIETAC Secretariat, Beijing, China (Nov. 28, 2006) (on file with Journal) [hereinafter Jia Interview].

Further, CAL is almost identical to the CIETAC 2005 Rules regarding evidence collection and disclosure. Article 43 of CAL, like Article 37 of the CIETAC 2005 Rules, states that "[a]n arbitration tribunal may collect on its own evidence it considers necessary."[57] None of the other CAL provisions provide arbitrators with sanctioning powers or the ability to turn to the Chinese courts if a party refuses to disclose the evidence in its possession.

A recent case illustrates some of the drawbacks created by arbitrators' lack of power to compel disclosure of evidence. The case involved the sale of two complex machine presses by an American company to a Chinese company.[58] The buyer brought the dispute into arbitration, accusing the seller of delivering non-conforming goods.[59] The claimant hoped to regain all payments previously made and to return the machines.[60] However, in the course of arbitration, the seller discovered that the buyer had been using one of the machines without any complications.[61] If the arbitrators had the power to compel the buyer to testify or produce documents that could verify they were using one of the machines, the respondent could have been able to obtain a dismissal for half of the claims against it.[62] The lack of power to compel evidence disclosure forced the seller to rely solely on its own records and testimony that the machines were conforming, forcing the arbitral tribunal to determine its award based on their perception of the parties' trustworthiness.

Because there are no express provisions that deal with compelling evidence disclosure in either the CIETAC 2005 Rules or in CAL, arbitrators and parties are effectively deprived of the ability to compel evidence disclosure from a non-consenting party. Articles 37 and 38 of the 2005 CIETAC Rules and Article 43 of CAL are the only pertinent provisions related to obtaining evidence from a reluctant party. None of these provisions grant arbitrators explicit sanctioning powers to penalize parties for refusing to disclose evidence. This leaves parties with little or no recourse when a party refuses to disclose important evidence.

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[57] CAL, *supra* note 46, art. 43.

[58] CIETAC Arbitration Case, Beijing, China (Oct. 19, 2006). Out of confidentiality, the parties' names, along with any form of information that could be used to identify the parties, have been withheld.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

B. Civil Law Systems Generally Lack Mechanisms for Compelling Evidence Disclosure

Arbitrators in other civil law jurisdictions also lack the authority to compel evidence disclosure. In Germany, for example, there is a legal framework for forced evidence disclosure. While the Arbitration Rules of the German Arbitration Institute ("DIS Rules") permit arbitrators to "order the production of documents,"[63] the German Arbitration Law[64] is nearly silent on the powers of arbitrators to collect evidence. It stipulates only that "failing an agreement by the parties, and in the absence of provisions in this [law], the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate . . . to determine the admissibility of evidence, admit evidence and freely access such evidence."[65] The German Arbitration Law does, however, allow the tribunal to request court assistance in taking evidence and performing other judicial acts which the arbitrator is not empowered to carry out.[66] The arbitrators are "entitled to participate in any judicial taking of evidence and to ask questions."[67] Thus, German arbitrators can indirectly use the German Code on Civil Procedure, which permits courts to order the production of adverse evidence.

While some authority is granted to German arbitrators to compel evidence disclosure, that authority is severely restricted. Arbitrators do not have any explicit authority to compel parties to take testimonies under oath.[68] In addition, parties can only be compelled to produce documents that were previously referred to by one of the parties.[69] Because past practices of the German courts indicate they did not historically compel evidence

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[63] German Arbitration Institute Arbitration Rules, art. 27.1 [hereinafter DIS Rules].

[64] Act on the Reform of the Law relating to Arbitral Proceedings, Dec. 22, 1997, BGBl. I at 3224, *available at* www.sccinstitute.com/_upload/shared_files/lagar/tyska_lagen_om_skiljedom_eng.pdf (F.R.G.) [hereinafter GAL].

[65] *Id.* § 1042(4).

[66] *Id.* § 1050.

[67] *Id.*

[68] No provision exists in either the GAL or DIS Rules. *See* GAL, *supra* note 64; DIS Rules, *supra* note 63.

[69] Franz Schwarz & Johannes Keopp, *Germany*, *in* INTERNATIONAL ARBITRATION 2006: A PRACTICAL INSIGHT TO CROSS-BORDER INTERNATIONAL ARBITRATION WORK 185 (Global Legal Group 2006); Stefan Rützel, et al., *Germany*, *in* GETTING THE DEAL THROUGH–DISPUTE RESOLUTION 2006 (Gleiss Lutz 2006), www.gleisslutz.com/media.php/Veröffentlichungen/Downloads/Dispute%20Resolution%20Germany_2006.pdf?dl=1 (last visited Dec. 7, 2007) (noting "[a]s regards objects to be inspected or documents to be presented, there are no general disclosure obligations of the parties to the proceedings, or of third parties. Therefore, documentary evidence usually relates to documents submitted by one of the parties. If a document referred to is in the other party's possession, however, such party may be ordered by the court to produce it.").

disclosure, German arbitrators may also be reluctant to use all of the methods permitted for evidence collection.[70]

France, another civil law jurisdiction, also limits arbitrators' ability to collect evidence from the parties. French arbitration laws and institutional rules are written in broad terms like the CIETAC 2005 Rules and CAL. The International Chamber of Commerce Arbitration Rules ("ICC Rules") state that, "[a]t any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence."[71] Similarly, the French Arbitration Law in the Nouveau Code de Procedure Civile (New Code of Civil Procedure) ("N.C.P.C.") permits arbitrators to "enjoin" a party to produce an item of evidence.[72] However, neither the ICC Rules nor the N.C.P.C. allows arbitrators to compel parties to produce evidence, and arbitrators do not have a way to sanction parties who do not comply with their decisions or requests.[73] Furthermore, because of the lack of any permissive language granting arbitrators the authority to compel evidence disclosure in the N.C.P.C., the tribunal cannot petition French courts to help collect evidence from uncooperative parties.[74]

In Germany and France, both the institutional rules and the jurisdictional law on international arbitration are similar to those in China. French international arbitrators do not have the power to impose sanctions against parties who refuse to disclose evidence mandated by the arbitral tribunal, and parties seeking disclosure may not turn to the French courts for help. Although parties in Germany may seek help from German courts outside of the arbitration process, this practice is severely restricted and rarely used. These jurisdictions reflect the civil law tradition of refusing to require "discovery" or a wide range of evidence disclosure.

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[70] Schwarz & Keopp, *supra* note 69.

[71] International Chamber of Commerce Arbitration Rules, Art. 20(5) [hereinafter ICC Rules].

[72] Nouveau Code de Procedure Civile [N.C.P.C.], art. 1460(3) (Fr.).

[73] Perloff, *supra* note 21, at 349. Although correct in its assessment that production cannot be compelled, Perloff is incorrect in interpreting that N.C.P.C. Article 11(2) is applicable to arbitration. *Id.* N.C.P.C. Article 11(2) states: "[w]here a party holds evidence material, the judge may, upon the petition of the other party, order him to produce it, where necessary under a periodic penalty payment. He may, upon the petition by one of the parties, request or order, where necessary under the same penalty, the production of all documents held by third parties where there is no legitimate impediment to doing so." *Id.* art. 11(2). The N.C.P.C. expressly states that only Article 11(1) is applicable to arbitration; that article only states that parties are "held to cooperate" with investigation measures. There is no sanctioning mechanism. *Id.* art. 11(1).

[74] *See* N.C.P.C. arts. 1442-507.

C. Disclosure Rules in Common Law Jurisdictions Provide a Sharp Contrast to Rules in Civil Law Jurisdictions

Compared to the civil law system, common law jurisdictions generally permit arbitral tribunals to order a party to produce evidence. In England, both institutional rules and arbitration laws grant wide powers to arbitrators to collect evidence from parties. Arbitrators can compel parties to produce documents and to testify under oath. The London Center for International Arbitration ("LCIA") grants arbitrators the power to force a party to disclose information. Under Article 22.1 of the LCIA Arbitration Rules, arbitrators can order any party to make "any property, site or thing under its control and relating to . . . the arbitration available for inspection by the Arbitral Tribunal."[75] The LCIA Arbitration Rules also empower arbitrators "to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection . . . any documents or classes of documents in their possession."[76] Similarly, the English Arbitration Act permits arbitrators to direct a party to testify under oath and to make any property relating to the arbitration available for inspection, photographing, preservation, custody, or detention.[77] Additionally, under the English Arbitration Act, arbitrators may order parties to disclose documents.[78]

Like England, Singapore grants wide powers to arbitrators to collect evidence from parties through its institutional rules and arbitrational laws. The Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") expressly allow arbitrators to "order any party to produce to the Tribunal, and to the other parties for inspection . . . any documents or class of documents in their possession or power which the Tribunal determines to be relevant."[79] In addition to granting many other powers,[80] the SIAC Rules also permit arbitrators to "make orders or give directions to any party for interrogatories."[81] Like the SIAC Rules, the Singapore Arbitration Act grants arbitrators the power to order parties to produce

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[75] London Centre for International Arbitration Rules, art. 22.1(d) [hereinafter LCIA Rules].

[76] *Id*. art. 22.1(e).

[77] Arbitration Act, 1996, arts. 38(4)(a), 38(5) (Eng.).

[78] *Id.* art. 34(2)(d).

[79] Singapore International Arbitration Center Rules, art. 24(h) [hereinafter SIAC Rules].

[80] *Id.* arts. 24(c)-(k). Other powers bestowed on arbitrators by the SIAC Rules are permitting parties to amend pleading or submissions, extending time limits, ordering any property or item for inspection, preserving, storing, selling, or disposing of any property related to the dispute, directing parties to give evidence by affidavit, etc.

[81] *Id.* art. 24(i).

documents, answer interrogatories, give evidence by affidavit, and testify under oath.[82]

Similarly, the American Arbitration Association Rules ("AAA Rules") give arbitrators broad powers to collect evidence.[83] The AAA Rules expressly permit arbitrators to compel parties to produce "other documents, exhibits, or other evidence it deems necessary or appropriate" at any time during the arbitral proceedings.[84] *Chiarella v. Viscount Industries Co., Ltd.*[85] illustrates the expansive powers of arbitrators under the AAA Rules. In *Chiarella*, the district court rejected a plea to vacate the award by the plaintiff, who argued that the arbitrator had exceeded its authority by ordering full discovery, an in camera inspection of allegedly privileged documents, and an explanation, document-by-document, of the basis of the claimed privilege.[86] The court held that the AAA Rules "confer on arbitrators broad powers to ensure that evidence is presented at arbitration hearings in such a manner as to ensure that legal and factual issues are sufficiently developed."[87] The court rejected the plaintiff's plea on the grounds that the plaintiff had failed to show that such authority was not within the arbitrator's powers.[88]

In addition to the AAA Rules, Section 7 of the Federal Arbitration Act ("FAA") authorizes arbitrators to compel parties to disclose evidence. Under Section 7, arbitral tribunals in the United States "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[89] The courts have interpreted "any person" to include parties involved in the arbitration, as well as nonparties.[90] Parties can be held in contempt of court if they do not abide by the arbitral tribunal's order to disclose evidence.[91]

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[82] Singapore Arbitration Act, arts. 28(2)(a)-(g) (2001).

[83] Paul D. Friedland & Lucy Martinez , *Arbitral Subpoenas under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197, 201 (2003). Although the article's analysis is on Article 31(d) of the Commercial Arbitration and Mediation Center for the Americas Arbitration Rules, its analysis is important nonetheless because the language and scope of the American Arbitration Association ("AAA") Rules on international arbitration are similar to Article 31(d).

[84] International Dispute Resolution Procedures (Including Mediation and Arbitration), art. 19(3) (amended and effective Sept. 1, 2007).

[85] No. 92 Civ. 9310 (RPP), 1993 WL 497967 (S.D.N.Y. Dec. 1, 1993).

[86] *Id.* at *1-2.

[87] *Id.* at *4.

[88] *Id.*

[89] 9 U.S.C. § 7 (2006).

[90] Friedland & Martinez, *supra* note 83, at 202.

[91] 9 U.S.C. § 7 (2006).

England, Singapore, and the United States provide examples of common law jurisdictions that permit forced evidence disclosure. In all three jurisdictions, express rules and regulations grant arbitrators the broad power to compel parties to disclose evidence, to testify under oath, and to answer interrogatories.

D. Alternative Methods Are Available to Arbitrators and Parties to Compel Evidence Disclosure

Neither CAL nor the CIETAC 2005 Rules grant arbitrators or parties any authority to compel evidence disclosure. However, there are ways to circumvent these obstacles. Arbitrators may draw an adverse inference from a party's decision to not cooperate with the arbitral tribunal's request to disclose evidence. A party thus risks losing credibility and weakening its case by its refusal to comply with a disclosure request. A party may also ask a Chinese court to preserve evidence in the hands of an opposing party. The court will then take possession of the evidence, which is made available to the arbitrators for examination.

1. Arbitrators May Draw an Adverse Inference from a Party's Refusal to Comply with a Disclosure Request

Despite the apparent lack of options, arbitrators and parties can utilize a few alternative practices to compel evidence disclosure in Chinese international arbitration proceedings. The most convenient and pragmatic step is for arbitrators to "draw an adverse inference" from a party's inability or unwillingness to produce the evidence.[92] Professor Martin Hunter, an experienced arbitrator, defines this process succinctly:

> [T]he arbitrator may usually "draw an adverse inference"—namely, if he believes that the document(s), witness(es) or information is in existence and could have been supplied, he will make the assumption that the missing material would be adverse to the relevant party's interest.[93]

CIETAC arbitrators regularly draw adverse inferences when parties hide damaging evidence, despite being asked by the tribunal to produce it for inspection.[94]

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[92] Email from Martin Hunter, Professor of International Dispute Resolution, Nottingham Law School, Nottingham Trent University, to authors (Nov. 16, 2006) (on file with Journal) [hereinafter Hunter Email].

[93] *Id.*

[94] Guo Interview, *supra* note 54; Jia Interview, *supra* note 56.

A party's refusal to disclose evidence without justification can also influence the outcome of the award.[95] Kou Liyun, a CIETAC arbitrator, stated, "[i]t really happens in practice and . . . it will put the said party at a serious disadvantage, i.e. the final award may be in favor of the other party."[96] Arbitration scholars criticize the adverse inference alternative as inefficient and too lenient.[97] Nonetheless, arbitrators are authorized to draw adverse inferences, so parties have an incentive to comply with disclosure requests.[98] The party will have "to determine which is worse—the production of documents injurious to its case or the inferences that the arbitrators may draw."[99] Thus, parties in Chinese arbitration may rely on the arbitrators' ability to draw adverse inferences to encourage compliance. Chinese arbitrators may not be able to compel evidence disclosure through sanctions, but this alternative puts substantial pressure on the non-consenting party to cooperate.

2. Evidence Preservation May Be Used to Compel Evidence Disclosure

Parties can also force their opponents to disclose through the process of "evidence preservation," which is permitted under Article 18 of the CIETAC 2005 Rules and Article 68 of the CAL. Article 18 states that when a party applies for the preservation of evidence, CIETAC will forward the application "to the competent court at the place where the evidence is located."[100] Article 68 specifies that in international arbitration proceedings, the competent court is the Intermediate People's Court where the evidence is located.[101] A party can apply for evidence preservation whenever it fears that "the evidence might be destroyed or if it would be difficult to obtain the evidence later on."[102] Usually, a party submits an application for evidence

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[95] Shi Interview, *supra* note 54; Guo Interview, *supra* note 54. Guo describes a case in which Party *A* successfully convinced the tribunal that Party *B* had detrimental evidence in its possession. When Party *B* refused to turn in the evidence, the arbitrator wrote the award in favor of Party *A*. Guo Interview, *supra* note 54.

[96] Email from Kou Liyun, CIETAC Arbitrator, to authors (Nov. 12, 2006) (on file with Journal) [hereinafter Kou Email].

[97] Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199, 222 (1997).

[98] Grant Hanessian, *Discovery in International Arbitration*, 34 INT'L LAW NEWS 1 (2005), *available at* http://www.abanet.org/genpractice/magazine/2005/sep/discoveryintl.html.

[99] *Id.*

[100] CIETAC 2005 Rules, *supra* note 50, art. 18.

[101] CAL, *supra* note 46, art. 68.

[102] *Id.* art. 46. Article 46 prescribes that parties must apply to the Basic-level People's Court to preserve evidence in domestic cases. However, it contains language explaining when evidence preservation should be used. Although Article 68 relates to international arbitration, it does not contain any provisions other than prescribing parties to apply to the Intermediate People's Court. CAL makes it clear that in the absence of provisions in Chapter VII, special provisions on foreign-related arbitration, "other

protection to the CIETAC Secretariat, who then sends the application to the local court on behalf of the party, providing the party's contact information.[103] The process is relatively quick and easy. When court fees are fully paid, a party may get evidence preserved within one or two days.[104] Court fees are calculated based on the amount in dispute.[105] The evidence, however, must be "connected with the case," and it also must belong to the opposing party.[106]

Evidence preservation is not identical to forced disclosure.[107] For example, the courts cannot force a party to comply with evidence preservation. For the court to intervene and preserve the evidence, the requesting party must provide specific details about the location of the evidence, its importance to the case, and its physical description.[108] Furthermore, if the court cannot locate the evidence because of vague descriptions, or because it has been concealed, the court will not take any further investigatory action.[109] In contrast, forced disclosure, as practiced in common law jurisdictions, requires parties to comply with the arbitral tribunal's orders. Often requiring only that the evidence be related to the arbitration, requests for evidence disclosure may be broad in comparison to the specificity required for evidence preservation.

Despite these differences, parties can theoretically use evidence preservation to circumvent the lack of compelled disclosure mechanisms within Chinese international arbitration. Upon receipt of a request to preserve evidence, court officers retrieve the listed evidence and place it under court supervision.[110] No one can take possession of the evidence once it is under the court's supervision, but the tribunal sometimes examines the evidence.[111] Only after the dispute in arbitration is settled will the court release the evidence to its rightful owner.[112] An opposing party can, thus,

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relevant provisions" of CAL will apply. The absence of evidence preservation provisions in Article 68 means that Article 46 applies.

[103] Guo Interview, *supra* note 54.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] Interview with Cao Liujin, CIETAC Secretariat, Beijing, China (Nov. 26, 2006) (on file with Journal) [hereinafter Cao Interview].

[108] *Id.*

[109] *Id.*

[110] Guo Interview, *supra* note 54.

[111] *Id.*

[112] *Id.* (stating that, although the normal procedure requires the party to inform the courts that the case has been settled, CIETAC carries the burden of sending notice to the courts to release the preserved evidence or property).

petition the courts to "preserve" the evidence from a party in order for the tribunal to analyze the evidence.

Parties frequently use Article 68 of CAL in arbitration proceedings. Ms. Guo Huaning, a Secretariat of CIETAC, has witnessed many situations when the "preservation of evidence" successfully led to reconciliation and settlement.[113] In her experience, claimants commonly submit requests under Article 68 simultaneously with the arbitration application.[114] She describes it as a "kind of pressure" and gives an example of a case where the court took account books for preservation and the tribunal was permitted to inspect the books.[115]

Preservation of evidence can, therefore, serve as an indirect method of compelled disclosure in Chinese arbitration, because the evidence is taken under the auspices of the court and the tribunal is free to inspect and use it in their consideration of arbitral awards.

IV. COMPELLING NONPARTIES TO DISCLOSE EVIDENCE

A. Forced Disclosure of Evidence Held by Nonparties Runs Contrary to the Chinese Legal Philosophy on Arbitration

Whereas the CIETAC 2005 Rules briefly address the parties' obligations to cooperate with the arbitration process,[116] the CIETAC 2005 Rules and CAL are completely silent on the issue of nonparties. There is one provision in the CAL that relates to the collection of evidence from third parties. Article 43 of the CAL states that the parties are responsible for producing evidence to support their claims and that the tribunal "may collect on its own evidence it considers necessary."[117] This statutory language does not grant the arbitrators any power to subpoena nonparties to testify or produce documents. Furthermore, the CAL only permits the arbitral tribunal to petition the Chinese court for evidence preservation.[118] It does not empower arbitrators to ask the courts for assistance in evidence collection. CIETAC secretariat, Wang Yingmin, has stated "[the] Tribunal cannot do anything if a third party does not want to disclose."[119]

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] CIETAC 2005 Rules, *supra* note 50, art. 38(2) (stating that the parties shall be "obliged to comply" with the tribunal's power to request that the parties produce evidence to be examined by an expert or appraiser).
[117] CAL, *supra* note 46, art. 43.
[118] *Id.* arts. 46, 68.
[119] Wang Interview, *supra* note 55.

The lack of any authority over nonparties may derive from Chinese legal philosophy and history. As previously stated, the Chinese legal system was historically an authoritarian imperial system that tended to be harsh on all participants, including witnesses.[120] Sometimes, witnesses themselves were imprisoned or punished.[121] Thus, a culture emerged that stressed the maintenance of good relationships with others in the community.[122] Chinese arbitration proceedings reflect this culture today; Chinese parties tend to rarely rely on witness testimony, and when they do it is usually obtained through written statements.[123] Contemporary legal philosophy characterizes arbitration as "a closed box" containing only the two parties that had consented to the arbitration agreement; others cannot be "pulled" into this arbitration box.[124] Additionally, nonparties may not want to disrupt relationships that they have with both parties involved in the dispute.[125] Chinese international arbitration stresses the contractual nature of arbitration, believing that the act of binding a nonparty to arbitration proceedings is an injustice and an infringement of the nonparty's rights.[126] This is why arbitrators are not permitted to compel nonparties to cooperate in arbitration proceedings, including the disclosure of evidence.

B. Civil Law Jurisdictions Generally Do Not Grant Arbitrators Authority over Nonparties

As reflected in Chinese international arbitration practices, civil law jurisdictions generally do not grant arbitrators authority over nonparties. In Germany, although an arbitral tribunal has no authority to compel a nonparty to attend a hearing, to give testimony, or to disclose documents, the German Arbitration Law Section 1050 permits the parties to petition the German civil courts to help arbitrators with evidence collection.[127] In the absence of

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[120] Jones, *supra* note 6, at 11.

[121] *Id.*

[122] *Id.*

[123] Email from Sally Harpole, International Arbitrator, to authors (Dec. 17, 2006) (on file with Journal); Interview with Professor Tang Houzhi, Founder of CIETAC (Nov. 15, 2006) (on file with Journal) [hereinafter Tang Interview] (stating "[w]e do not rely on third party much . . . [they] might not be impartial").

[124] Guo Interview, *supra* note 54.

[125] Wang Interview, *supra* note 55.

[126] *See* Michael H. Bagot, Jr. & Dana A. Henderson, *Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 TUL. MAR. L. J. 413, 416 (2002). Although Bagot and Henderson address the issue of binding a third party into arbitration proceedings as an actual party, they also present arguments that can be used to protect nonparties against forced evidentiary disclosure.

[127] Zivilprozeβordnung [ZPO] [Civil Procedure Statute] Sept. 12, 1950, § 1050 (stating "[t]he arbitral tribunal or a party with the approval of the arbitral tribunal may request court assistance in taking evidence or performance of other judicial acts which the arbitral tribunal is not empowered to carry out. Unless it

an asserted legal privilege, the German Civil Code of Procedure (*Zivilprozeßordnung*) ("ZPO") allows the courts to compel a witness to appear and testify.[128] The courts may also order a nonparty to disclose documents.[129] However, Article 142 of the ZPO affords nonparties some protection; it provides that "[t]hird parties are under no obligation to produce the documents if the production cannot reasonably be required from them or if the information is privileged."[130]

In comparison, under France's N.C.P.C. "the arbitrator cannot address a request to [a] non-party."[131] The articles relating to arbitration in France make almost no mention of nonparties, except to provide that they cannot be forced to testify under oath.[132] In fact, the articles relating to arbitration expressly reject incorporation of N.C.P.C. Article 11(2), which permits a court to order any person to produce evidence.[133] Thus, nonparties cannot be compelled to testify before the arbitral tribunal or to produce any documents. In addition, as evidenced by a lack of language granting permission in the N.C.P.C., the tribunal cannot petition French courts to help collect evidence.[134]

Both Germany and France exemplify how civil law traditions are crippling to the ability of courts and tribunals to exercise authority over non-consenting third parties. Generally, if a nonparty does not want to cooperate, the court will not compel his or her compliance.

C. Evidence Disclosure Procedures Vary for Nonparties in Common Law Jurisdictions

Common law jurisdictions sharply contrast with their civil law counterparts in regard to nonparty evidence disclosure. Common law

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regards the application as inadmissible, the court shall execute the request according to its rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions.").

[128] Rützel, *supra* note 69. Witnesses can refuse to testify if they are close relatives to a party, are subject to professional secrecy, would incriminate themselves, would face direct financial loss, or would disclose business secrets. EUROPEAN COMMISSION, EXECUTIVE SUMMARY AND OVERVIEW OF THE NATIONAL REPORT FOR GERMANY at 2, *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/executive_summaries/germany_en.pdf [hereinafter European Commission's Executive Summary].

[129] European Commission's Executive Summary, *supra* note 128.

[130] Kaufmann-Kohler, *supra* note 19, at 1326 n.59.

[131] Perloff, *supra* note 21, at 349.

[132] *See* N.C.P.C. arts. 1442-507. Article 1461 states that third parties do not need to testify under oath. This probably only relates to cooperative third parties who choose to testify before the arbitral tribunal. The article does not grant the arbitral tribunal the authority to compel uncooperative third parties.

[133] Perloff, *supra* note 21, at n.150.

[134] *See* N.C.P.C. arts. 1442-507.

countries generally permit arbitrators to compel nonparties to disclose. In England, Article 38(5) of the English Arbitration Act permits the arbitral tribunal to direct any witness to be examined under oath.[135] If a nonparty refuses to recognize the powers granted to arbitrators under Article 38, then the party seeking testimony or documents can petition the English courts[136] to compel disclosure under Article 43 of the Act.[137] A party may issue a subpoena to a third party with permission from the arbitral tribunal.[138] However, the range of discovery under Article 43 of the English Arbitration Act is narrow.[139] Requests cannot be based on mere suspicion.[140] Parties can only request documents when they have knowledge of the documents' existence and can show that they are relevant to the arbitral proceedings.[141]

In Singapore, the evidentiary rules for nonparty discovery in international arbitration are even more liberal than the English rules. Whereas in England the arbitral tribunal has sole authority to subpoena a nonparty for testimony or document production, Singapore allows any party to the arbitration agreement to issue a subpoena.[142] This discovery power is restricted in two ways: the witness must be available in Singapore and the nonparty cannot be made to produce documents if those documents could not legally be compelled for production in a trial.[143]

In the United States, under Section 7 of the FAA, arbitral tribunals "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[144] American courts have uniformly interpreted "any person" to include nonparties.[145] Witnesses and nonparties, who have never entered into an arbitration agreement, are legally bound to appear before American arbitrators to provide whatever evidence they may possess that is of interest

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[135] Arbitration Act, 1996, 38(5) (Eng.).

[136] David Fraser, *Arbitration of International Commercial Disputes Under English Law*, 8 AM. REV. INT'L ARB. 1, 12 (1997).

[137] Arbitration Act, 1996, 43(1) (Eng.). It is important to note that there are limitations to the use of Article 43. A party cannot petition the courts without the permission of the Tribunal or the opposing party. In addition, the nonparty must be located within the United Kingdom and the arbitration proceedings must be in England, Wales, or Northern Ireland.

[138] Nathan D. O'Malley & Shawn C. Conway, *Document Discovery in International Arbitration – Getting the Documents You Need*, 18 TRANSNAT'L LAW 371, 377 (2005).

[139] *Id.*

[140] *Id.* at 378.

[141] *Id.*

[142] Singapore Arbitration Act, Art. 30(1) (2001).

[143] *Id.* arts. 30(2), (4).

[144] 9 U.S.C. § 7 (2006).

[145] Simpson & Kesikli, *supra* note 32; Stolt-Nielson SA. v. Celanese AG, 430 F.3d 567, 570 (2d Cir. 2005).

to the tribunal. A federal court may find a person in contempt for failing to obey the summons or subpoena from the arbitral panel. The court may impose the same penalties that are available against an uncooperative witness in federal court.[146]

Unlike the broad powers arbitrators have over nonparties during arbitration hearings, their authority over nonparties during pre-hearing stages is limited. Though generally permissive, common law jurisdictions are split over the degree of power granted to arbitrators over nonparties during pre-hearing stages. For example, in the United States, district circuits have diverging views on whether arbitral tribunals have the authority to issue subpoenas for testimony and documents from nonparties during the pre-hearing stages.

The Sixth Circuit Court of Appeals issued the most liberal interpretation of an arbitrator's powers under Section 7 of the FAA in *American Federation of Television and Radio Artists v. WJBK-TV*.[147] Looking to the FAA for guidance on labor arbitration, the court held that Section 7 granted arbitrators the power to compel nonparties to produce documents for parties to inspect during the pre-hearing stage.[148] Although the court refrained from determining whether Section 7 permits arbitral tribunals to subpoena nonparties to pre-hearing depositions, its decision imposed no restrictions on compelling nonparties to produce documents.[149] As long as the arbitrator deems the information relevant to the case, a subpoena for nonparty disclosure of documents must be enforced by the courts.[150]

The Third Circuit Court of Appeals came out on the other end of the spectrum. In *Hay Group, Inc. v. EBS Acquisition Corp.*,[151] the court held that pre-hearing discovery on nonparties is prohibited in arbitration.[152] The nonparty appellants sought to avoid compliance with a lower court order forcing them to disclose documents during the pre-hearing stage.[153] Using a strict textual interpretation, the court held that Section 7 of the FAA only

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[146] 9 U.S.C. § 7 (2006).

[147] 164 F.3d 1004 (6th Cir. 1999).

[148] *Id.* at 1009.

[149] *Id.* at n.7 (stating, "[w]e do not reach the question of whether an arbitrator may subpoena a third party for a discovery deposition relating to a pending arbitration proceeding.").

[150] *Id.* at 1010. The court held that the relevance of the information sought and the appropriateness for the issuance of a subpoena should be determined at the first instance by the arbitral panel, not the courts. The court, in dicta, then went on to explain that the court must give deference to the arbitral panel and assume that the arbitrators are experienced enough to screen for relevant information and to impose proper safeguards on sensitive materials.

[151] 360 F.3d 404 (3d Cir. 2004).

[152] *Id.* at 411.

[153] *Id.* at 405.

grants arbitrators the ability to subpoena nonparties to depositions and the disclosure of documents at the actual hearing, but not before it.[154] The court specifically rejected any "special needs circumstance" for which a nonparty must disclose documents prior to an arbitral hearing.[155]

Two other circuits have taken a more moderate stance on FAA Section 7. Like the Sixth Circuit, the Eighth Circuit upheld an arbitrator's implicit right to subpoena documents from a nonparty during the pre-hearing stage in *In the Matter of Arbitration Between Security Life Insurance Company of America and Duncanson & Holt, Inc.*[156] However, in dicta, the court determined that the nonparty seeking to avoid the subpoena in this case was "not a mere bystander pulled into this matter arbitrarily," but a "party to the contract that [was at] the root of the dispute." Therefore, the nonparty in this case was "integrally related to the underlying arbitration."[157] Taking the court's reasoning as a whole, a nonparty must be "integrally" related to the arbitration for the arbitrators to subpoena pre-hearing document production.[158]

In *Comsat Corporation v. National Science Foundation*,[159] the Fourth Circuit held that Section 7 did not grant an arbitrator the power to subpoena a nonparty for a pre-hearing deposition or document production "absent a showing of special need or hardship."[160] The court created this "special" circumstance exception because it believed that in complex cases, the efficiency of arbitration would be degraded, rather than enhanced, by limiting discovery.[161] It held that the plaintiff seeking to enforce the subpoena failed to show a special need or hardship because the plaintiff could obtain much of the desired information through the Freedom of Information Act.[162] Yet, the court expressly rejected an attempt to define

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[154] *Id.* at 407. The court used a two-part test in determining that Section 7 did not grant arbitrators the power to subpoena the disclosure of documents from nonparties during the pre-hearing stage. First, it looked at the clear language of the statute, which it interpreted as clearly prohibiting pre-hearing nonparty disclosure, similar to Rule 45 of the Federal Rule of Civil Procedures prior to its amendment in 1991. Prior to 1991, Rule 45 did not allow federal courts to issue pre-hearing document subpoenas on nonparties. The court then examined if following the literal, textual language of the statute would lead to an "absurd" result. It held it did not because forcing arbitral tribunals to only subpoena nonparties for actual hearings would restrict the ability of parties to force nonparties into arbitration when they never consented to an arbitration agreement.

[155] *Id.* at 411.

[156] 228 F.3d 865, 870-71 (8th Cir. 2000).

[157] *Id.* at 871.

[158] It is unclear whether the Eighth Circuit mirrors the Sixth Circuit in its Section 7 interpretation or if it requires the nonparty to be "integrally related." Simpson & Kesikli, *supra* note 32, at 283.

[159] 190 F.3d 269 (4th Cir. 1999).

[160] *Id.* at 271.

[161] *Id.* at 276.

[162] *Id.*

"special need" except to say that "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable."[163]

England and Singapore demonstrate how common law jurisdictions generally allow arbitrators to exercise authority over nonparties. However, even in common law jurisdictions, different evidentiary rules diverge in the extent to which they empower arbitrators to compel evidence disclosure by nonparties during the pre-arbitration stage. Most common law jurisdictions agree that arbitrators' powers to compel nonparty evidence disclosure ensure fair and equitable outcomes.

D. The Institutional Status of CIETAC May Influence Nonparties to Cooperate and to Disclose Evidence in Their Possession

Even in jurisdictions that do not grant arbitrators authority over nonparties, many arbitrators still ask nonparties to disclose evidence, recognizing that they have no power to enforce their request.[164] In some situations, the nonparty complies. In others, the party refuses to comply and the arbitrators must proceed with the arbitration hearing without the evidence.[165] In China, arbitrations generally fall under the latter category.

Although the arbitral tribunal cannot compel a nonparty to produce evidence, it can use CIETAC's institutional power to persuade the nonparty to cooperate with the arbitration proceedings. This is especially effective when the nonparty is a state entity, because Chinese culture places more emphasis on institutions than individuals.[166] Thus, in situations where an individual party might not be able to get a nonparty to cooperate, an institution such as CIETAC might be able to persuade a party to disclose.

A recent construction case provides an example of how CIETAC's institutional leverage may influence nonparties to cooperate in the dispute resolution process and disclose valuable evidence they may have.[167] A local administrative bureau (a nonparty) possessed a document that a foreign party needed but could not obtain directly.[168] The tribunal permitted CIETAC's Secretariat to issue a notice to the bureau, asking for assistance in producing the document.[169] The local bureau complied and made it available to

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[163] *Id.*
[164] Hunter Email, *supra* note 92.
[165] *Id.*
[166] Cao Interview, *supra* note 107.
[167] Guo Interview, *supra* note 54.
[168] *Id.*
[169] *Id.*

CIETAC.[170] This institutional leverage is potentially more common in Chinese international arbitration than other jurisdictions.[171]

Another recent CIETAC construction case provides further example of institutional influence over nonparties in the arbitration process. In that case, a labor company accused a construction corporation of failing to pay for services rendered.[172] The labor company offered several documents signed by the construction corporation's employee to prove that the labor company had properly rendered its services. The construction corporation claimed that the employee who signed the documents was not authorized to do so and that there was no evidence that the signer was even an employee of the respondent.[173] The arbitral tribunal utilized CIETAC and investigated the matter by reviewing the city's construction archive.[174] The tribunal found numerous instances where the same worker had signed on behalf of the respondent, showing that the employee was indeed authorized to sign the document in question.[175] After this evidence was collected the respondent quickly settled with the claimant.[176]

Thus, Chinese international arbitrators generally must allow nonparties to determine for themselves whether to cooperate with the arbitration process. They will attempt to influence nonparties to participate, using institutional leverage when possible. However, they are severely restricted by a lack of express power granted to them by either institutional rules or arbitration law to compel nonparties to cooperate.

V. PRE-HEARING EVIDENCE DISCLOSURE CONTRIBUTES TO THE TIMELY AND EFFICIENT RESOLUTION OF DISPUTES

Like rules in common law jurisdictions, CIETAC 2005 Rules permit pre-hearing evidence disclosure. Institutions primarily set such rules because national arbitration laws rarely address the pre-hearing stage. During a preliminary hearing, arbitrators may settle numerous procedural issues such as the daily and weekly schedule, the extent and manner of witness examination, the privileges the tribunal will recognize, the order of

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[170] *Id.*
[171] *Id.*
[172] Wei Chao, *Zi you xin zheng yu diao cha qu zheng* [*Discretional Evaluation of Evidence and Discovery*], 2 BEIJING ZHONG CAI [BEIJING ARBITRATION] 55-58 (2005) (P.R.C.).
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*

presentations, and other issues.[177] Arbitrators also regularly collect lists of prospective witnesses.[178] Furthermore, during the pre-hearing, arbitrators may also give the parties a list of legal questions that the tribunal determines are important for the parties to address.[179]

This section examines the pre-hearing stage separately because of its significance to the timely and efficient resolution of disputes.[180] One study suggests that when parties to litigation have a reasonable expectation of how the court will rule, the possibility of settlement is higher.[181] By extension, if parties are able to obtain more information on the dispute prior to the actual hearing, the chance of settlement may also be higher in international arbitration.[182] Pre-hearings are also useful procedurally for organizing the arbitration process and narrowing the issues at dispute.

A. The CIETAC Pre-Hearing Evidence Collection Procedures Are More Similar to Those of Common Law Jurisdictions

Pre-hearing evidence collection is practiced and explicitly permitted in arbitration institutions located in common law jurisdictions. In contrast, civil law institutions are silent about pre-hearing evidence collection. CIETAC, in this aspect, mirrors arbitration institutions in common law jurisdictions because it expressly grants arbitrators the power to collect evidence during the pre-hearing stage.

In common law jurisdictions, pre-hearing procedures are explicit and appear to be uniform across international arbitration institutions. In Singapore, for example, SIAC arbitral tribunals can require parties to submit witness lists[183] and answer questions drafted by the arbitrators.[184] To increase efficiency and save time during the actual arbitral hearing, SIAC even mandates that the parties participate in two rounds of "Statement of

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[177] Jack J. Coe, Jr., *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness–Some Thoughts Concerning Arbitral Process Design*, 2 PEPP. DISP. RESOL. L.J. 53, 65-66 (2002).

[178] *Id.*

[179] *Id.*

[180] Roseann Oliver & Frederic T. Knape, *Illinois Arbitrations: Pre-Hearing Discovery and the Right to a Full and Fair Hearing*, 13 CHI. B. ASS'N REC. 32, 36 (1999).

[181] Jason F. Darnall & Richard Bales, *Arbitral Discovery of Non-parties*, 2001 J. DISP. RESOL. 321, 332 (2001).

[182] *Id.*

[183] SIAC Rules, *supra* note 79, art. 23.1 (stating that "before any hearing, the Tribunal may require any party to give notice of the identity of witnesses it wishes to call, as well as the subject matter of their testimony and its relevance to the issues").

[184] *Id.* art. 22.4 (stating that "the Tribunal may in advance of hearings, submit to the parties, a list of questions which it wishes them to treat with special attention").

Evidence" exchanges.[185] The London Center for International Arbitration similarly allows tribunals to collect lists of witnesses[186] and pose pertinent questions to the parties.[187] Although it is silent about pre-hearing arbitrator questions, the American Arbitration Association Rules expressly grant arbitrators the authority to "conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures to expedite the subsequent proceedings."[188] The AAA Rules also allow the arbitrators to collect the names of witnesses before hearing the testimony.[189]

The ICC and the German Arbitration Institute, however, are silent about the pre-hearing evidence collection powers of arbitrators. The ICC requires that "Terms of Reference" be settled at the preliminary stages of arbitration.[190] The ICC states that these Terms of Reference will be drawn up by the Arbitral Tribunal, and must include decisions on the place of arbitration, applicable procedural rules, claims and counterclaims, and other subjects.[191] However, the purpose of the Terms of Reference is primarily organizational, providing arbitrators and parties with a way to gain more evidence.

Provisions of the CIETAC 2005 Rules addressing an arbitrator's power to collect evidence during the pre-hearing stage are similar to institutional rules in common law jurisdictions. Article 29 explicitly permits arbitrators to "issue procedural directions and lists of questions, hold pre-hearing meetings and preliminary hearings, and produce terms of reference, etc., unless otherwise agreed by the parties."[192] To increase party autonomy, Article 29 was amended with the phrase "unless otherwise agreed by the parties," essentially giving the parties the power to make changes to the arbitration procedures, so long as both parties agree.[193] The amendments also implemented other substantial changes to CIETAC 2005 Rules.[194] Prior

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[185] *See* Lawrence Boo, *Interim Measures and the Arbitral Institution: A Singapore Perspective*, *in* ICC INTERNATIONAL COURT OF ARBITRATION & SINGAPORE INTERNATIONAL ARBITRATION CENTER SYMPOSIUM ON INSTITUTIONAL ARBITRATION IN ASIA 202, 202-12 (Feb. 18-19, 2005).

[186] LCIA Rules, *supra* note 75, art. 20.1 (stating that "before any hearing, the Arbitral Tribunal may require any party to give notice of the identity of each witness that party wishes to call (including rebuttal witnesses), as well as the subject matter of that witness's testimony, its content and its relevance to the issues in the arbitration").

[187] *Id.* art. 19.3 (stating that "the Arbitral Tribunal may in advance of any hearing submit to the parties a list of questions which it wishes them to answer with special attention").

[188] American Arbitration Association Rules, art. 16(2).

[189] *Id.* art. 20(2).

[190] ICC Rules, *supra* note 71, art. 18.

[191] *Id.*

[192] CIETAC 2005 Rules, *supra* note 50, art. 29.

[193] Kostrzewa, *supra* note 43, at 527.

[194] *Id.*

to 2005, CIETAC's rules were silent about pre-hearing meetings, even though the first hearings often functioned as such.[195]

This departure from civil law custom is significant for Chinese international arbitration. Pre-hearing meetings and evidence collection increase the efficiency and speed of arbitration proceedings because they reduce the number of disputed issues and procedurally organize the hearing. They may also increase the likelihood of settlement.

B. Pre-Hearing Evidence Disclosures Are Rarely Used in Chinese International Arbitration

Despite the ability to hold pre-hearing meetings to set procedural guidelines, exchange evidence between parties, and collect further evidence, CIETAC arbitrators in practice do not hold preliminary meetings. Most CIETAC arbitrators are not accustomed to holding pre-hearing meetings.[196] When arbitrators do exercise the right to hold them, pre-hearing meetings usually only occur in complicated cases where the evidence proffered by the parties is complex and large in quantity.[197] Kou Liyun, a CIETAC arbitrator, states,

> [w]hether a pre-hearing procedure may be adopted . . . depends on the facts of each case. By virtue of the quantity and the complexity of evidences [sic] submitted, CIETAC arbitrators may set up a pre-hearing to make both parties clear [about which evidence will be presented and in what manner].[198]

Normally, however, pre-hearing meetings are strictly procedural; they deal with setting deadlines and agreeing on which procedural rules should govern the arbitration.[199] Less complicated cases rarely involve solicitation of evidence by the arbitrators or opposing party.

There are many reasons for the lack of pre-hearing meetings at CIETAC. Arbitrators have the sole authority to determine whether to conduct a preliminary hearing,[200] and as previously mentioned many are unaccustomed to holding such a hearing. CIETAC domestic arbitration

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[195] Tang Interview, *supra* note 123 (stating that "[v]ery frankly, the first oral hearing in CIETAC arbitration is the prehearing meeting"). As CIETAC Rules 2005 state that arbitrators may hold pre-hearings, Professor Tang was most likely referring to CIETAC Rules prior to 2005. *See also* Shi Interview, *supra* note 54 (stating that the first hearing will serve the purpose of a pre-hearing to exchange evidence).

[196] *See* Guo Interview, *supra* note 54. *See also* Shi Interview, *supra* note 54 (stating "I do not organize pre-hearing[s] to exchange evidence. The first hearing will serve for that purpose.").

[197] Wang Interview, *supra* note 55.

[198] Kou Email, *supra* note 96.

[199] Guo Interview, *supra* note 54.

[200] Jia Interview, *supra* note 56.

cases cannot have pre-hearing meetings.[201] The 2005 Rules expressly permit pre-hearings for international arbitrations, but this change is recent and time may be needed for awareness to expand. Furthermore, the way arbitrators are compensated may play a role in the success of these proceedings. Because CIETAC arbitrators are remunerated in a single fee rather than paid by the hour, arbitrators may be less inclined to spend additional time and resources on pre-hearing matters as they will not receive extra compensation for that pre-hearing work.[202] However, the payment scheme should not be a significant factor because pre-hearing meetings often help to narrow the focus of the arbitration and therefore decrease the time spent in an actual hearing, sometimes by an entire day or two.[203]

Though not often used in practice, it is still important to note that pre-hearing evidence collection is possible under CIETAC Rules. CIETAC Secretariats believe preliminary meetings increase the efficiency and speed of arbitration.[204] Likewise, CIETAC arbitrators, especially those experienced in international arbitration, view pre-hearing meetings as beneficial to the arbitral process.[205] Therefore, with the recent change in Rules, the use of pre-hearing meetings will likely increase dramatically in the near future. Parties involved with arbitrations should not only be proactive in petitioning arbitrators to hold pre-hearing meetings to exchange evidence, but should also lobby arbitrators to use their powers to collect evidence prior to the hearing, including issuing lists of questions to the opposing party.

VI. PRECAUTIONARY MEASURES: PLANNING AHEAD

Although this Article has illustrated that alternative courses can be taken when parties face the limitations on evidence disclosure in Chinese international arbitration, the most efficient and effective way to disclose evidence may be to contractually agree to it beforehand.[206] An evidence disclosure clause can either be placed into an arbitration agreement or agreed upon in a pre-hearing conference.[207] Either form can determine the

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[201] Guo Interview, *supra* note 54.

[202] *Id.* (stating "[t]he payment for arbitrator[s] is a little different here. If they [quote] a total price, then [pre-hearing] . . . is included.").

[203] *Id.*

[204] *See* Jia Interview, *supra* note 56. *See also* Wang Interview, *supra* note 55 (stating that pre-hearing exchange of evidence makes the procedure run more smoothly); *id.* (stating that pre-hearings make the parties more prepared).

[205] *See* Kou Email, *supra* note 96.

[206] Arthur W. Rovine, *Developments in International Litigation and Arbitration: The Scope of Discovery in International Arbitration Proceedings*, 5 TUL. J. INT'L & COMP. L. 401, 404 (1997).

[207] *Id.* at 404-05.

procedural rules, the amount and types of documents that can be disclosed, and the time limits spent on evidence collection.[208]

CIETAC 2005 Rules make the inclusion of a disclosure clause relatively easy because the rules stress party autonomy. The new regulations allow the arbitral tribunal wide discretion to determine procedural rules such as choosing an inquisitorial or adversarial nature, setting pre-hearing meetings, and deciding terms of reference.[209] However, each of these arbitral powers is prefaced with "unless otherwise agreed by the parties," which essentially gives parties the ability to conduct the arbitration as they wish.[210] In fact, the parties can agree to use other institutional rules rather than CIETAC Rules.[211] For example, parties can agree to use a common law institutional rule if they prefer more liberal evidence disclosure rules.

One set of rules that parties can contractually agree to use is the International Bar Association's Rules on the Taking of Evidence in International Arbitration ("IBA Rules"). The IBA Rules were meant to provide "mechanisms for the presentation of documents, witnesses of fact, expert witnesses and inspections, as well as for the conduct of evidentiary hearings."[212] Shortly after their adoption and publication in 1999, the IBA Rules or similar rules were implemented in practically all major international arbitrations.[213] The popularity of the IBA Rules can be attributed to the fact that they bridge the procedural gap between common law and civil law jurisdictions.[214] Though the IBA Rules generally grant disclosure powers to arbitrators, these powers are tightly restricted, reassuring parties and lawyers who are accustomed to civil law practices.[215]

The IBA Rules provision for compelling nonparty disclosure provides an example of a compromise between different legal practices. In Article 3, relating to documents, the IBA Rules state that "if a party wishes to obtain the production of documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may . . . ask [the Tribunal] to take whatever

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[208] Ho, *supra* note 97, at 224.

[209] Kostrzewa, *supra* note 43, at 527.

[210] *Id.*

[211] *Id.*; CIETAC 2005 Rules, *supra* note 50, art. 4(2).

[212] International Bar Association, *International Bar Association Rules on the Taking of Evidence in International Arbitration*, at 1 (June 1, 1999) [hereinafter IBA Rules].

[213] Hilmar Raeschke-Kessler, *The Contribution of International Arbitration to Transnational Procedural Law*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 647, 662 (ICC Pub. 2005).

[214] Michael Hwang & Andrew Chin, *Evidence and Discovery in Arbitration*, Presentation at the American Arbitration Association, ICC International Court of Arbitration, and the Singapore International Arbitration Centre Conference, Singapore (Oct. 3-4 2006).

[215] Raeschke-Kessler, *supra* note 213, at 662.

steps are legally available to obtain the requested documents."[216] However, the request must be limited to those documents that the party knows exist.[217] A party must be able to "identify the documents in sufficient detail and state why such documents are relevant and material to the outcome of the case."[218] Article 4 of the IBA Rules states that the Arbitral Tribunal may take whatever legally permissible steps it sees fit in order to obtain the testimony of a nonparty that is unwilling to voluntarily present evidence.[219] The party seeking to force the testimony of an uncooperative nonparty must identify the witness, describe the subjects of the testimony sought and state why testimony is relevant.[220] These restrictions ensure that discovery does not become a "fishing expedition," which can, and often does, occur in common law jurisdictions. Similar defenses and restrictions exist for parties who seek to protect themselves from the more invasive common law jurisdiction disclosure procedures.[221]

However, even where parties agree beforehand that they will use an institutional rule that permits forced disclosure, arbitrators may still be tied by the Chinese Arbitration Law. By agreeing to expand CIETAC 2005 Rules or substitute those rules with another institution's rules, the parties can bypass the limitations and weaknesses of CIETAC's evidence disclosure rules. However, true sanctioning power will still be absent due to the wording of CAL.[222] Article 4(2) of CIETAC 2005 Rules states that the "parties' agreement shall prevail except where such agreement is inoperative or in conflict with a mandatory provision of the law of the place of arbitration."[223] As previously mentioned, CAL provides no guidance in regard to compelling parties and nonparties of evidence disclosure. Therefore, even if the parties' agreement is not "in conflict" with the mandatory provisions of CAL, the arbitral tribunal is not able to rely on CAL to seek court assistance, except when preserving evidence or property. Whereas under the FAA parties and nonparties can be compelled to attend or held in contempt of court,[224] there is no punishment under CAL for parties and nonparties who do not cooperate with the arbitral tribunal's orders. The

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[216] IBA Rules, *supra* note 212, art. 3(8).
[217] *Id.*
[218] *Id.*
[219] IBA Rules, *supra* note 212, art. 4(10).
[220] *Id.*
[221] *Id.* arts. 3(3)(a)-(c).
[222] It is important to reiterate that the tribunal can draw an adverse inference from a party's lack of cooperation with the arbitration panel's orders, which can lead to an unfavorable award against the party. *See supra* notes 69-77 and accompanying text.
[223] CIETAC 2005 Rules, *supra* note 50, art. 4(2).
[224] 9 U.S.C. § 7 (2007).

Chinese Arbitration Law must, thus, be amended to provide arbitrators with the ability to seek Chinese court assistance in collecting evidence.

VII. CONCLUSION

Chinese international arbitration law limits the arbitrator's authority to compel the disclosure of evidence. Arbitrators are not able to compel parties to disclose evidence, nor can they ask nonparties to produce documents or to testify. However, CIETAC arbitrators may collect evidence during the pre-hearing stage. Unfortunately, this practice is rarely used. Despite these setbacks, there are alternative steps that parties and arbitrators can take. Parties may petition the Chinese courts to require the preservation of evidence, which thus places the desired evidence under court supervision for the arbitrators to freely inspect. Similarly, arbitrators can exercise their right to draw an adverse inference from an uncooperative or unresponsive party and render an award against that party. Arbitrators may also use CIETAC's institutional name and influence to persuade nonparties to cooperate with the arbitration process.

Although these options may potentially be used to obtain desired evidence, it is a far more efficient and prudent option for parties to agree beforehand on the extent of the arbitrator's evidence disclosure powers. The new CIETAC 2005 Rules promote this method by emphasizing party autonomy and allowing parties to adopt a different set of evidentiary rules. The trend in China regarding international arbitration is moving toward an increase in party autonomy and a more balanced approach to evidence disclosure procedures. Chinese lawmakers have incorporated aspects of both civil and common law arbitration procedures in an attempt to strike a balance. The rules neither permit broad, resource- and time-consuming evidence disclosure, nor deny all requests for compelling disclosure of evidence necessary for a just arbitral award.