

Document Production in Chinese Litigation and International Arbitration

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Abstract:

Nowadays, documents (especially contemporaneous documents) are considered best form of evidence in international arbitration.¹ However, document production is one of the areas in which there exist huge differences between different legal systems.² Some fundamental conflicts may occur when arbitration proceedings involve parties from China and other countries, although the legislation and practice of arbitration in China is gradually developing towards international standard over the last decade.

With the rapid growth of China economy, CIETAC (China International Economic & Trade Arbitration Commission), one of the biggest arbitral institutions in the world, receives a huge caseload per year, and other arbitral institutions such like BAC (Beijing Arbitration Committee) also has attained to a position of considerable influence in the field of international arbitration. However, the problems existing become the barriers to further development of Chinese international arbitration. Only by internationalization will China become the more attractive center of international arbitration, and document production, as one of the important areas in which Chinese international arbitration may conflict with international common practice, should be focus of research by arbitral practitioners and scholars in China. Unfortunately, no enough attention is paid on the subject till now.

In view of the close relationship between litigation and international arbitration in China, this article also covers the issue of document production in Chinese litigation.

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¹ Alan Redfern et al, *Law and Practice of International Commercial Arbitration* (4th ed, 2004), [6]–[69].

² It's submitted that China law is closer to civil legal system in so many aspects, e.g, the judges play an active role and have great discretion in determining admissibility of evidence, document is given more weight than witness testimony, etc.

I. THE RELATIONSHIP BETWEEN COURT PROCEEDINGS AND INTERNATIONAL ARBITRAL PROCEEDINGS IN CHINA

As mechanisms of dispute resolution, Arbitral proceedings are akin to court proceedings to some extent. Moreover, As to their resemblance, some experienced lawyers even think, arbitration proceedings are sometimes hardly distinguishable from proceedings before the ordinary courts in England, and likewise in domestic German arbitrations with German counsel and arbitrators, the approach taken in relation to disclosure requests may well be inspired to a large extent by the ZPO.³ It's more or less exaggerated. Flexibility is the spirit of arbitration, and that's one of the reasons why the parties choose arbitration other than litigation. Neutrality is another advantage of international arbitration. Use of strict evidentiary rules, e.g., Federal Evidence Rules, may make the party, who is unfamiliar with it, feel the arbitration in favor of the adverse party. So, it's submitted that strict evidentiary rules should not be used in arbitration, whether domestic or international. Otherwise, it's doubtful that international arbitration could still be the preferred method of international dispute resolution in future.

In fact, in international arbitrations which involve the participants from different legal cultures, to determine the procedural matters, the arbitrators will be influenced more or less by their education and practice, have to take the expectations of the parties into account, and may choose "internationalized" rules of evidence which is a mixture of rules of common law and civil law, such like IBA Rules of evidence.

Sometimes, arbitral procedure relies on the assistance of court, e.g., where material evidence has to be taken from nonparties, who refuse to produce it. Generally, when asked for assistance, the court will consider whether the requested assistance is conformity with their procedural rules. If the court proceedings itself doesn't admit some procedures, e.g., taking oath, it is more likely not to provide such assistance.

The arbitration in China is criticized for its "judicialisation" by many influential commentators.⁴ Due to the lack of detailed regulation on evidentiary matter in arbitration law and institutional rules, the arbitral tribunal relies too much on the evidentiary rules in Civil Procedure Law and the judicial interpretation by the Supreme People's Court of China. As a matter of fact, Chinese international arbitration is not well internationalized, partly because of the limitations placed on tribunal composition and qualification of counsels to large extent:

Firstly, in light of Chinese institutional rules, e.g, CIETAC Rules, the parties commonly have to appoint arbitrators in the CIETAC panel list, in which there are much fewer foreign arbitrators by comparison with Chinese arbitrators. Arbitrators outside the panel could only be designated

³ Rolf Trittman and Boris Kasolowsky, Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions, 31 UNSW Law Journal Volume 330, 337(2008).

⁴ See e.g., JIANG Xia, On Independence of evidence System in Arbitration, 31 Journal of Xiang Tan University 34,34(2007). SONG Chao-wu, De-judicialisation and the Approaches of Evidence in Arbitration, 18 Henan Social Science 61, 61(2010).

with the approval of the director of CIETAC according to art.21(2) of CIETAC Rules. More importantly, where the parties could not appoint jointly the presiding arbitrator, it's up to the designation of the director of CIETAC.⁵ In practice, the presiding arbitrator is often chosen among Chinese arbitrators, unless the parties agree otherwise.⁶

Second, qualification of foreigner as counsel practiced in Chinese arbitration seems to be restricted strictly. Although the leading institutions admit the qualification of foreigners practicing in Chinese arbitration, the regulation no.73 of Department of Justice promulgated in 2002 provides that the staff in foreign law office and representative offices should not deliver opinions or comments on the application of China law and on the facts related to Chinese law as a counsel in Chinese arbitral proceedings.⁷ Due to the controversies on qualification of foreigners in practice, Chinese acted as counsels in most arbitration cases in China.

Since the participants of Chinese international arbitration commonly come from China, the determination of evidentiary rules is influenced by Chinese legal culture to a larger extent. That results in the fact that Chinese international arbitration may be more akin to Chinese litigation at least in aspect of evidentiary rules.

Moreover, the problems existing in the Civil Procedure Law of China and judicial practice itself including the rules on document production (see part II), which many Chinese scholars suggest to revise, result in the barriers to assistance of taking documents in aid of Chinese international arbitration when it is sought (see part VI).

II. DOCUMENT PRODUCTION IN CHINESE LITIGATION: THE HISTORY AND DEVELOPMENT

In U.S. courts, broad pre-trial discovery is permitted. Each party has the duty to produce documents in his possession that are relevant or may lead to relevant, even those documents that are unfavorable to itself.⁸ By comparison, in other common law countries e.g., England, the scope of document production is narrower and the principle of Proportionality is highlighted after the Woolf Reform came into force in 1999.⁹ Anyway, it's different from the practice in civil law countries in aspect of scope of document production, and especially each party's duty to disclose the documents unfavorable to itself on its initiative.

In civil law tradition, the parties only produce the documents that they rely on, and the courts seldom request the parties to produce documents in their possession unfavorable to themselves. However, the situation is changing. Many civil law countries have accepted the approach that

⁵ Art.22(2) of CIETAC Rules provides that, Within fifteen (15) days from the date of the Respondent's receipt of the Notice of Arbitration, the presiding arbitrator shall be jointly appointed by the parties or appointed by the Chairman of the CIETAC upon the parties' joint authorization.

⁶ Jerome A. Cohen, *Time to Fix China's Arbitration*, 168 *Far Eastern Economic Rev.* 31, 33 (No. 2, 2005).

⁷ In June 2004, the provision is amended by the Department of Justice as "the representative offices and its staff should not deliver opinions or comments on the application of China law as a counsel in arbitral proceedings."

⁸ See Rule 26(b)(1) of the Federal Rules of Civil Procedure.

⁹ See Rule 31.7 of 1999 Civil Procedure Rules.

court may order the parties to produce documents relevant to dispute, which the parties is unwilling to disclose. Section 142 of ZPO is such an example.

The Chinese rules and practice on document production in court proceedings may be understood very well by combination with Chinese judicial reform in civil litigation. The reform has made much progress since open-up policy was adopted in China, which could be found in the legislation as well as in judicial interpretations, especially 2002 Some Provisions of the Supreme People's Court on Evidence in Civil Procedure (hereinafter referred to as "Provisions on Evidence"), although many problems still exist till now.

Before 1991, Chinese courts play an active and absolutely dominant role in civil litigation and have the power to determine whether or not to investigate documents and other evidences on their initiatives. The parties' burden of proof and procedural right are over-sighted to large extent. In 1991, Civil Procedure Law of China was revised as an important judicial reform, with the aim to promote procedural efficiency. The power of Chinese courts is restricted in light of art. 64 of Civil Procedure Law, which provides that,

"A party shall have the responsibility to provide evidence in support of its own propositions. With respect to the evidence that the party and its agent are unable to obtain themselves because of objective reasons or that the people's court considers necessary for the trial of the case, the people's court shall investigate and collect it."

Especially after Provisions on Evidence came into force in 2002, the burden of proof on the parties is even highlighted, and the judges investigate evidences on their initiates in very limited circumstances, and they usually do so only at the request of the parties for evidence collection. Pursuant to art.15 of Provisions on evidence,

"the evidence that people's court consider necessary for the trial" in art. 64 of Civil Procedure Law means the following circumstances: (1) where the evidence relates to the facts that may prejudice the state's interest, social public interest or legitimate interest of someone else;(2) where it relates to procedural matters irrelevant to substantial disputes, such as participation of additional parties, suspension of proceedings, termination of proceedings and challenge of the judge.

That follows that the judges will not investigate evidence on its initiatives usually. Moreover, art.17 of Provisions on evidence provide that,

"Parties may apply to the courts for evidence investigating, (1) where the evidences required are files hold by governmental bodies and necessary for courts to investigate itself;(2) where the materials to be gathered relate to state's secret, business secret, and personal privacy; (3) where other materials that parties and the agents are unable to collect due to objective reasons."

The item (3) above is problematic in practice because the wording "objective reasons" is obscure. The judges' willingness to investigate evidence is not enough for the following reasons: first, the trend of reform and judicial policy is to strengthen the parties' obligation to gather evidence all these years especially after 2002, the judges would prefer not to investigate evidence when the provisions is not clear. Secondly, lack of judicial resources or financial insufficiency enhances the courts' unwillingness to investigate evidence for the parties, on their

initiatives or at the request of the parties. Finally, there isn't the liability mechanism on judges' improper disapproval on the parties' application for investigating evidence.¹⁰ So, in practice, there are different "understandings" on "objective reasons" between the judges and parties, even between the judges.¹¹

Moreover, the law and judicial interpretation lack of detailed rules on application for courts' investigating evidence, such as in the aspect of the procedure of application, the scope and requirements of investigation (adopting US-style discovery or limited discovery), the parties' remedy when their application is refused, and the privilege recognized. Even if the judges approve the application, how to investigate and how to handle the case of non-cooperation is not clear due to lack of specific legal basis. Although the scope of court's investigation does not exclude taking evidence from the parties and the nonparties pursuant to the law and Provisions on Evidence literally, but the wordings is too general and vague, and in fact, it's aimed to empower the courts wide power (not duty or liability), not to establish a specific system on the parties' right of taking evidence and their procedural safeguard. The parties' right to apply for additional documents is not respected enough even if admitted in principle. Thus, while the trend of judicial reform strengthens the burden of proof on the parties and the court is not apt to investigate evidence, the procedural safeguard for parties' right of taking evidence is not established unfortunately.

Under Civil Procedural Law of China, there are no pre-hearing procedure till 2002. The system of "evidence exchange" (or "evidence disclosure") is established in Provisions on Evidence, and much different from document disclosure in common law countries as well as in civil law countries. In principle, the evidence exchange is preconditioned on parties' application, and the court will not organize evidence exchange on its initiative unless the case is complicated or covers plenty of evidence.¹² So pre-trial evidence exchange is not necessary procedure. More importantly, it doesn't deal with the scope of evidence exchange, under the Provisions on Evidence the parties always produce the evidences favorable to himself, not those unfavorable, for the reason that the parties have not explicit duty to produce the documents that the adverse parties rely on, unless the court, on its imitative or at the request of the adverse party, order the production of material documents in his possession; more importantly, in case of non-compliance of the party, no tough sanctions will be imposed mostly, except adverse inference drawn.¹³

So, although China try to draw some lessons from U.S. discovery by adopting the pre-trial evidence exchange, the evidence exchange cannot function so well as evidence disclosure in US and other countries, which is aimed to clear up issues, gather evidence (the parties have to produce evidence favorable or unfavorable to himself), avoid surprise and promote settlement.

¹⁰ ZHANG You-hao, *Document Gathering and Procedural Safeguard*, China Procuratorate Press, 2010,304.

¹¹ Precedent is not binding source of law in China.

¹² See art. 37 of Provisions on Evidence.

¹³ See art. 75 of Provisions on Evidence.

Where the relevant documents are in the possession of nonparties, in practice, it's difficult for the parties to take the documents in possession of nonparties if they choose not to produce them, unless the court excises their power to collect these documents. However, even not all the courts' order is effectively executed, and such is the case especially when the nonparty is governmental body, because of lack of tough sanction to be imposed on the nonparties, such like being held in contempt of court under US law in case of nonparties' failure to produce the requested documents.

In addition, while the attorney's responsibility of confidentiality provided in art.38 of Attorney Law of China, is much closer to attorney-client privilege in U.S., and "without prejudice privilege" is admitted in civil litigation¹⁴ and arbitration,¹⁵ other evidentiary privilege is not well established in China. The issue of privilege is not paid so much attention in China as in other countries, and this may has links with the fact that the duty to produce documents of the parties or nonparties is not so strict as that in other countries.

III. PRE-HEARING PROCEDURE IN CHINESE INTERNATIONAL ARBITRATION

The issue of document production is often linked with pre-hearing procedure. Pre-hearing evidence disclosure is practiced and explicitly permitted in court proceedings, as well as in arbitral proceedings conducted in common law countries. Although institutional rules are silent on pre-hearing procedure in civil law jurisdictions, pre-hearing evidence disclosure is also frequently used in arbitration process as an efficient procedural tool.

It is believed that in arbitral pre-hearing procedure, arbitrators and the parties may settle numerous procedural issues such as fixing daily schedule, determining evidentiary rules, and exchanging documents or other information. By means of evidence disclosure, the parties and arbitrators may become familiar with the relevant evidences, narrow the issues in dispute and even reach a settlement.

Like Civil Procedure Law of China, Chinese Arbitration Law (hereinafter referred to as "CAL") doesn't deal with pre-hearing procedure, too. However, 2005 CIETAC Rules permit Pre-hearing evidence collection.¹⁶ Other institutional rules, such like 2008 BAC Rules also confirm such procedure.¹⁷ However, Bi Yuqian, a Chinese well-known professor and BAC arbitrator indicates that the pre-hearing procedure is seldom used in practice of arbitration.¹⁸

¹⁴ See art. 67 of Provisions on Evidence.

¹⁵ See art. 40(8) of 2005 CIETAC Rules.

¹⁶ 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."

¹⁷ Art.32 of BAC Rules provide that "If the Arbitral Tribunal considers it necessary, it may, prior to the hearing, authorize the presiding arbitrator to summon the parties to exchange their evidence and jointly draw up a list of the disputed issues and define the scope of the hearing. Prior to the hearing or at any stage during the hearing, the Arbitral Tribunal also may, if necessary, require the parties to produce evidence and to respond to questions."

¹⁸ BI, Yu-qian, application of evidence Rules in arbitration proceedings, Beijing Arbitration, 2004(2), 46-47

Likewise, CIETAC arbitrators are reluctant to hold pre-hearing meetings, too, unless the dispute is complicated or relates to plenty of evidence.¹⁹

Although arbitration rules of Chinese leading institution expressly permit pre-hearings for international arbitrations, but for the reason of legal culture, most Chinese arbitrators are not accustomed to and attach little attention to pre-hearing procedures. Since the provision on pre-hearing procedure is provided in institutional rules recently, and time may be needed to expand such practice.

IV. PRODUCTION OF DOCUMENTS REQUESTED FROM THE PARTIES IN CHINESE INTERNATIONAL ARBITRATION

1. The power of Chinese tribunal to order document production

If the documents one party relies on to establish its cases are in the possession of the adverse party, who choose not to produce them, may arbitral tribunal, on its own initiative or at the request of one party, order the production of the documents?

In spite of cultural differences on width of the categories of documents to be produced, it now seems world-widely accepted that parties to international arbitration proceedings may apply to the arbitral tribunal for further production of relevant documents in the possession of the adverse party.²⁰ Further, due to arbitrators' wide discretion,²¹ they may order the parties to produce documents any time in international arbitration.

The common practice is reflected in IBA Rules, which borrows limited discovery, trying to strike balance between civil law cultures and common law cultures. Under IBA Rules, a party can bring a "Request to Produce"²² before the arbitral tribunal, where he believes that documents are in the possession of the adverse party. The arbitral tribunal has the discretion to determine whether to order the production from the adverse parties if the requirements are met.

As for the issue, it could be found that different views exist in Chinese commentators. Some Chinese scholars believe that the tribunal has no power to order the production of documents, and the parties have no legal duty to produce unfavorable evidence²³. Further, some of them believe that the tribunal could not draw adverse inference from the party's failure to produce the requested documents.²⁴

¹⁹ Bryant Yuan Fu Yang and Diane Chen Dai, *Tipping The Scale to Bring to Balanced Approach: Evidence Disclosure in Chinese International Arbitration*, 17 *Pac. Rim L. & Pol'y* 41,67 (2008).

²⁰ Rolf Trittman and Boris Kasolowsky, *Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions – The Development of A European Hybrid Standard for Arbitration Proceedings*, 31(1) *UNSW Law Journal* 330, 337(2008).

²¹ See e.g., art.19 (2)of Model Law, art. 20(1) of ICC Rules, art. 14(2) of LCIA Rules, art.16(1)of AAA International Rules.

²² Article 1 of IBA Rules provides, "Request to Produce" means a request by a Party for a procedural order by which the Arbitral Tribunal would direct another Party to produce documents.

²³ WU Ding-xi, etc, *How the parties choose the evidence gathering Rules in international commercial arbitration*, 16 *Journal of Tianzhong* 35, 37 (2001).

²⁴ *Id.*; QIAO Xin, *Comparative Commercial Arbitration*, Law Press, 2004, 282; LIU Jing-yi, *Commentary on Practice and Cases on Foreign-related arbitration*, People' Court Press, 2001, 160.

It's a kind of typical viewpoint among China scholars and practitioner. Although I believe they are representing the minority in China, that necessarily affects the practice in Chinese international arbitration to some extent. I think such viewpoint results in the great influence of the legal culture that "Nemo tenetur edere contra se (no one is bound to produce documents against himself)". Second, there exists misunderstanding about the private nature of arbitration. While contractual nature of arbitration is exaggerated, the judicial nature of arbitration is overlooked. As a matter of fact, the arbitral may excise the power other than those entrusted by the parties, as long as the law admits that.

While tribunal's power of ordering production of documents has become widely accepted, the common practice is also reflected in Chinese leading institutional rules, such as CIETAC Rules and BAC Rules, which represent the prevailing practice on the issue in China.

Modeled on the counterpart of Civil Procedure Law of China, art.43 of CAL provides that the arbitral tribunal may of its own initiative collect evidence, as it considers necessary. CIETAC Rules repeat such principle,²⁵ and further grant arbitrators the power to request the parties' delivery of relevant materials, documents, or properties and goods for checking, inspection or appraisal to a tribunal-appointed expert, "the parties shall be obliged to comply."²⁶

CAL doesn't provide further what circumstances is necessary for arbitral tribunal to collect evidence, so it's not obligatory, but discretionary for arbitral tribunal. It seems that the arbitral tribunal has the similar power to collect evidence like court pursuant to the provisions mentioned above, but such is not the case, to the contrary, there isn't supporting mechanism to ensure the power to excise effectively in collecting documents.²⁷

Article 37 and 38 of CIETAC Rules mentioned above provide a possible legal basis that arbitrators can use to deal with situations in which one party request the other to produce document.²⁸ Article 38 mainly deals with the parties' obligation to cooperate with expert witness. Article 37 can be interpreted as giving arbitrators the authority to "investigate and collect evidence" in a party's possession. However, article is not often used to obtain evidence in arbitral proceedings; rather, arbitrators depend heavily on the evidence submitted by the parties. Second, when a party actually applies for the use of the article in order to obtain additional evidence, arbitrators use the authority to conduct independent investigations, by means site inspection, interviews of witnesses and employees, designation of experts, but seldom to force the parties to disclose information or documents.²⁹ Chinese arbitrators are reluctant to issue orders for document production.³⁰

²⁵ See article 37 of CIETA Rules.

²⁶ See article 38 of CIETA Rules.

²⁷ See part V.

²⁸ Similarly, more like the provisions of leading international institutional rules, BAC Rules (art.43) provides that "...Prior to the hearing or at any stage during the hearing, the Arbitral Tribunal also may, if necessary, require the parties to produce evidence and to respond to questions."

²⁹ Bryant Yuan Fu Yang and Diane Chen Dai, *Tipping The Scale to Bring to Balanced Approach: Evidence Disclosure in Chinese International International Arbitration*, 17 *Pac. Rim L. & Pol'y* 41,48-49 (2008).

³⁰ TAO Jing-zhou, *Documentary Production in Chinese International Arbitration Proceedings*, ICCA International Arbitration Congress, Montreal 2006. (ICCA Congress Series No. 13), 613.

2. Scope of document production

As to the scope of document production, there are great conflicts between common law culture and civil law culture, especially civil law lawyer could not accept US-style discovery, which covers the documents are relevant or may lead to relevant and amounts to fishing expedition in their view.

Considering high cost of US style wide-range documents disclosure, which is criticized, several requirements have to be fulfilled if a party wishes to file a “request to produce” under IBA Rules: First, the request to produce is to be made within the time limit set by the arbitral tribunal for such a request. Second, the request to produce should contain: a description of an individual document or narrow and specific category of documents; a statement of relevance and materiality of the requested documents; an explanation on the fact the documents is in the possession, custody or control of the other party. Three, the documents are not protected by evidentiary privilege.

In China, the research on IBA Rules is insufficient although other arbitration issues are hot-debated topics.³¹ It follows that just a few Chinese arbitrators are familiar with IBA Rules, even if most of them know about IBA Rules. So it is more likely that Chinese arbitrators will take the Provisions on Evidence into account or make determination in light of his understanding on rules on document production.³² Under the influence of the tradition “Nemo tenetur edere contra se (no one is bound to produce documents against himself)” and “actori incumbit probatio” (in principle the burden of proof rested on the plaintiff), it is generally to be expected that Chinese arbitrators will handle document production in a restrictive way.³³ This approach may give rise to great injustice in case that the material documents one party rely on are in the possession of the other party, who don’t produce them voluntarily, and that the arbitral tribunal doesn’t order production of these documents.

However, China legal system is in the course of exploration for reforms these years, and scholars and practitioner may have access to different legal rules, principles, and ideas of western countries. It’s safe to say, everyone may have different understanding on the issue of document production in international arbitration. So it’s not surprising to see the two extremes in Chinese international arbitral practice: some arbitrators may not order production of even one document while the other arbitrators may order a US-style discovery of document in a few cases. That will bring about somewhat unpredictable outcome regarding to the approach of handling with production of documents and may give rise to surprise of the parties from outside China.

³¹ CNKI (Chinese National Knowledge Infrastructure) is the biggest and most prevailing database for academic research in China mainland. Today (Dec. 23, 2010), when I made a search by the keyword “arbitration” and then “evidence”, almost 90 articles were displayed. But when further research among the 90 articles is made by the keyword “IBA Rules”, none was displayed. Undoubtedly, IBA Rules were not attached sufficient attention to in China arbitration, although that’s incomplete statistics.

³² TAO Jing-zhou, Documentary Production in Chinese International Arbitration Proceedings, ICCA International Arbitration Congress, Montreal 2006. (ICCA Congress Series No. 13), 613.

³³ Id.

V. EXCEPTIONS TO DUTY OF PRODUCING DOCUMENTS: PRIVILEGE

Privileges are legally recognized rights to withhold certain testimony or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information.³⁴ They are the exceptions to the duty of the parties or nonparties to produce documents.

Privileges are admitted in almost all jurisdictions, although the scope and contents of them vary from country to country. The most important privileges include professional privileges such as attorney-client privilege, protection of business secrets, and privilege protecting sensitive governmental information.

Evidentiary privileges are not a well-established system under the laws of China in general. Chinese civil procedure is always in pursuit of “objective truth” and substantial justice of case in dispute, and national courts try to find out all facts at whatever cost and disregard social overall justice, which should be more important.

However, responsibility of confidentiality of attorney is very close to attorney-client privilege. Article 33 of 2001 Attorney Law of China provides that attorney shall keep confidential secrets of the State and commercial secrets of the parties that he comes to know during his practice activities and shall not divulge the private affairs of the parties.³⁵ At the same time, article 35 and 45 require that the attorneys not to conceal facts, and will be punished otherwise. In 2007 Attorney Law of China, the provisions on “no to conceal facts” are cancelled, and extend the scope of confidentiality to “the information that client and others are reluctant to be divulged during the attorney’s practice activities”. By comparison with 2001 Attorney Law of China, new law strengthens further the responsibility of confidentiality of attorney. However, it’s still not clear whether responsibility of confidentiality of attorney will also apply when judges or arbitrators order the production of the documents or information.

Besides responsibility of confidentiality of attorneys, “without prejudice privilege” is established in Chinese litigation and arbitration.

While privilege is not extended to in-house counsel in some civil law countries, e.g., France and Switzerland, China law does not differentiate between in-house counsel and external counsels, just like the law of US and England.

Fortunately, in preparing the amendment on evidence law of China, many scholars suggest establishing the system of privileges, although there are disparities on the scope and contents of privilege in those drafts of evidence law.³⁶ It is a clear tendency to introduce privilege into Chinese legislation.

³⁴ Berger, Evidentiary Privileges: Best Practice Standards versus/ and Arbitral Discretion, 22 *Arb. Int.* 501, 501(2006).

³⁵ See Art.38 of the Law of Attorneys of China 2007, art.33 and 35(5) of the Law of Attorneys of China 2001.

³⁶ See e.g., JIANG Wei, *The Draft and legislative Arguments of China Evidence Law*, Renmin University of China, 2004; BI Yu-qian, ZHENG Xu, and LIU Shan-chun, *Proposed Draft and Arguments of China Evidence Law*, Law Press, 2003.

Anyway, in Chinese international arbitration, in order to protect important social relationship and values, as well as the parties' expectation when they come from different countries, arbitrators in exercising discretion should admit privileges, and determine the suitable approach such as "most favorable nation principle" to handle this issue of privilege.³⁷

VI. THE REMEDIES FOR THE REFUSAL OF THE PARTIES OR NONPARTIES TO PRODUCE DOCUMENTS

1. Adverse inference Adverse inference is admitted as an efficient procedural tool to cope with the situation that the requested party refuses to obey the tribunal's order to produce documents. Article 9(4) of the IBA Rules also provides that if a party fails to produce a document "without satisfactory explanation", the arbitral tribunal may infer that such document would be adverse to the interests of that party. While China arbitration law doesn't deal with adverse inference, art. 75 of 2002 Provisions on Evidence makes provisions on it, and could be applied by analogy in arbitral proceedings. Besides, Some institutional rule also specify the issue, e.g., art.34 (6) of 2008 BAC Rules provides that if a party can prove that the other party possesses evidence and refuses to disclose it without any justifiable reason, and that such evidence would have had an adverse impact on the case of the party in possession of the evidence, adverse inferences may be drawn from such refusal to disclose the evidence.

Even if the institutional rule doesn't deal with adverse inference, drawing such inference is the implied power entrusted to the arbitrators, which derives from the parties' agreement to arbitrate, because it's fundamental tool for the tribunal to make clear the disputed fact. Where a party refuses to produce requested documents, the tribunal may take the Provisions on Evidence into account and draw adverse inference. In fact, adverse inference is often drawn In Chinese international arbitration.

However, drawing adverse inference as remedy may be not enough in some circumstances, where non-disclosure Of unfavorable documents may sometimes bring less adverse results than disclosure of them. Moreover, arbitral tribunal should draw adverse inference cautiously so as not to violate due process. By analysis of the case law from the Iran-United States Claims Tribunal, Sharpe has distilled general requirements for drawing adverse inferences: (a) The party seeking the adverse inference must produce all available evidence corroborating the inference sought; (b) The requested evidence must be accessible to the inference opponent; (c) The inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld; (d) The party seeking the adverse inference must produce prima facie evidence; (e) The inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference

³⁷ On the subject of Privilege, see e.g., Berger, Evidentiary Privileges: Best Practice Standards versus/ and Arbitral Discretion, 22 *Arb. Int.* 501, 507(2006).

sought.³⁸ It is thus clear that adverse inference is not always effective tool where the party refuses to produce the required documents.

2.Assistance by national court

In case of one party's non-compliance with the order to produce documents, whether assistance could be sought from national courts? That depends mainly the position of the state where arbitration is seated.

According to article 27 UNCITRAL Model Law, The arbitral tribunal or a party with the approval of the arbitral tribunal may request from competent court for assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidences. Most national legislation follows the Model Law approach.

For example, section 42 of the Arbitration Act 1996 permits the English court to make an order requiring a party to comply with a peremptory order of the arbitral tribunal. Similarly, section 7 of FAA authorized arbitrators to compel any person including the parties to disclose evidence. The persons can be held in contempt of court if they do not abide by the arbitral tribunal's order to disclose the evidence.³⁹ The courts' assistance could be also sought in many civil law jurisdictions, e.g. German, at the request of arbitral tribunal, to order production of documents and other evidence from a party to arbitration.⁴⁰

The law of China doesn't deal with the court's assistance in taking evidence. It is submitted in China that the parties or the arbitral tribunal couldn't seek assistance from national court to compel other parties to produce evidence due to lack of legal basis. According to Doctor YU Xi-fu, who are a judge of Shandong Superior Court of China, this may lie in two reasons: first, legislators pay insufficient attention to such issue and don't implement the policy of pro-arbitration to large extent. Second, in civil procedure itself, a reasonable and powerful mechanism of taking evidence from the parties and nonparties hasn't been established.⁴¹ the shortage of court proceedings necessarily affect the assistance of taking evidence for arbitration proceedings.

Since no assistance by national court could be sought, the provision in CAL on arbitral tribunal's great "power" of collecting evidence cannot be implemented effectively. If a party refuses to disclose evidences requested, there are no sufficient safeguard for the other party's procedural right to have access to the evidence it rely on.

3. Preservation of documents

³⁸ Sharpe, Jeremy K. Drawing Adverse Inferences from the Non-production of Evidence, 22 Arbitration International 549, 551(2006).

³⁹ 9 U.S.C. §7 (2006).

⁴⁰ Section 1050 of ZPO.

⁴¹ YU Xi-fu, Judicial Supervision and Assistance in International Commercial Arbitration, Intellectual Property Press, 2006, 338.

Preservation of documents can be alternative method to national court' assistance in taking of documents to some extent theoretically, because once the measure of evidence preservation is taken by courts, arbitral tribunal may have chance to examine it. Preservation of evidence is provided in article 18 of the CIETAC 2005⁴² Rules and Article 68⁴³ of the CAL. However, many requirements for the application of preservation of evidence have to be met, e.g., applicant has to establish that the requested evidence might be destroyed or would be difficult to obtain later on.⁴⁴ Moreover, in practice, the applicant is generally required to provide guarantees for evidence preservation.

Further, there are serious shortcomings on preservation of evidence in Civil Procedure Law of China and CAL. First, the national courts have exclusive jurisdiction in China. Where the parties apply for evidence preservation, the arbitration institution shall only transfer the application to the competent court, which, as for an international arbitration, is the intermediate people's court in the place where the evidence is located. The transfer of application by arbitral institution may increase cost and time⁴⁵ and delay in taking measures of evidence preservation. Secondly, China Arbitration Law only deals with application for measures of evidence preservation filed during the course of arbitration proceedings,⁴⁶ as it is that the arbitral institution transfers the application to national courts after the arbitral proceedings start. It follows that the application for evidence preservation should be during the course of arbitration proceedings.⁴⁷ As an exception, parties to maritime arbitration may apply to maritime courts for preservation of evidence prior to arbitral proceedings pursuant to article 72 of Maritime Procedure Law of China.

Thus, where evidence preservation is usually applied in case of urgency, e.g. a crucial document may be destroyed, if the measures of evidence preservation couldn't be taken in time, the crucial evidence will not be available, and the measures of evidence preservation granted during arbitration proceedings may be of little help or meaningless to the party who applies for it.

VII. DOCUMENT PRODUCTION FROM NON-PARTIES

⁴² See also art.15 of BAC Rules.

⁴³ Article 46 "In the event that the evidence might be destroyed or if it would be difficult to obtain the evidence later on, the parties may apply for the evidence to be preserved. If the parties apply for such preservation, the arbitration commission shall submit the application to the basic-level people's court of the place where the evidence is located."

⁴⁴ Art. 46 of CAL.

⁴⁵ No time limit are imposed by the CAL or arbitration rules, and cases show that it may take up to a week or even more. Cohen, Jerome Alan et al., *Arbitration in China: a practical guide*, Sweet & Maxwell Asia, 2004, 199.

⁴⁶ Pre-trial interim measures in court proceedings are not well developed in China, too. Although pre-trial property preservation is regulated in art. 93 of Civil Procedure Law of China, preservation of evidence isn't dealt with (except that evidence preservation is recognized according to intellectual property law of China, for example, in Art.50 of Copyright Law of China). In my opinion, the immaturity of courts proceedings is also a factor to affects the establishment of Pre-arbitral interim measures to some extent.

⁴⁷ Although the provision in CAL doesn't require explicitly that the application should be made after constitution of the arbitral tribunal, however, it is commonly held in practice that the wording of "transferring of arbitral institution" means the time of application should be after commencement of arbitral proceedings.

Arbitration is a creature of contract. The arbitrator's competence derives from the authority of the parties; an arbitral tribunal generally does not have the competence to decide issues concerning the persons who are not parties to the agreement, unless authorized otherwise by law. Anyway, if nonparties refuse to produce the document required, national court's assistance in taking documents is indispensable for the reason that arbitral tribunal could not exercise coercive power.

Common law countries generally allow arbitrators to exercise authority over nonparties. Section 7 of FAA authorized arbitrator to compel any person to disclose evidence. English Arbitration Act also authorizes the arbitral tribunal to direct nonparty to present documents and oral testimony. In case of non-compliance of the third parties, the party who try to seek documents can apply to the courts for assistance under US and England law.⁴⁸ In civil law jurisdictions such as Germany, although an arbitral tribunal has no authority to order a nonparty to produce documents, a party to arbitration can also apply to national courts for taking evidence pursuant to section 1050 of ZPO.

The CIETAC Rules and CAL are completely silent on the issue of production of documents from the nonparty. The arbitral tribunal in China has no power to order nonparty to produce the requested documents, then, whether the national court could provide assistance in such circumstances where nonparty refuses to cooperate?

Under the law of China, which is silent on the issue, national court will not grant assistance to compel non-party to produce evidence, including documents, too. It seems that, on one hand, contractual nature of arbitration is highlighted excessively in China, i.e. nonparty should not be compelled to enter into arbitration process; on the other hand, it has links with Chinese judicial situation that witnesses or nonparties cannot be compelled effectively to attend the hearings or produce evidence.⁴⁹

Can evidence preservation be alternative measure to taking document for non-parties, just like the case of taking document from the parties? Some experienced arbitral practitioner conclude that the answer is "no" and one of the requirements for evidence preservation is the evidence must belong to the adverse party.⁵⁰

However, DU Kai-lin, a judge, has a commentary on a case of evidence preservation, which he experienced.⁵¹ It seemingly indicates in the case that the object of the measure of evidence preservation may cover the evidence in the possession of nonparties.

⁴⁸ See Section 7 of FAA and article 38(5) and article 43(1) of the English Arbitration Act

⁴⁹ YU Xi-fu, *Judicial Supervision and Assistance in International Commercial Arbitration*, Intellectual Property Press, 2006, 338.

⁵⁰ Bryant Yuan Fu Yang and Diane Chen Dai, *Tipping The Scale to Bring to Balanced Approach: Evidence Disclosure in Chinese International Arbitration*, 17 *Pac. Rim L. & Pol'y* 41, 56 (2008).

⁵¹ DU Kai-lin, *commentary on a case of evidence preservation in arbitration: current arbitral system on evidence preservation to be improved*, *arbitration and law*, 2003 (1) : 70-72.

Y (a Japanese company) and B (a Chinese enterprise) had established jointly a Chinese-foreign equity joint venture, namely company T. Later on, Y applied to CIETAC for arbitration according to the arbitration agreement, alleging that B made unreal investment. After receipt of the application, B applied for evidence preservation in Aug.30, 2001, requesting reservation of the account books of Company T, which come into being before June 2001, on the ground that these account books can testify the disputed fact, and may be destroyed or altered by Y for the reason that T is in the control of Y actually.

In conformity with CAL, CIETAC transferred the application to the competent court, Nantong Intermediate People's Court of Jiangsu Province, to make determination.

As to whether interim measure could be taken on the evidence in possession of the nonparty, the controversy come up among the judges of Nantong intermediate court: some believe that the object of interim measure is not limited to the evidence in the possession of the parties according to art.46 of CAL. The others think that evidence preservation in arbitration should be restricted to the parties to the arbitration, and there is no legal basis to take interim measure against those who are not a party to the arbitration. By asking for and receiving the direction of the Superior Court of Jiangsu Province,⁵²Nantong Intermediate People's Court made the decision in support of the application of evidence preservation as B requested.

However, the nonparty (company T) in the case has exceptionally close relationship with the parties. If the allegation that T has been in the control of Y actually has been established, the evidence preservation only relates to the party to the arbitration, because company T is regarded as Y legally in view of their special relationship. The case could not be used to support that the evidence in the possession of nonparty could be object of evidence preservation in Chinese arbitration. Generally, in China, the courts are not inclined to take interim measures on the evidence in possession of nonparties in aid of arbitration.

VIII.CONCLUSIONS

In the last decade, Chinese arbitration practice has made great progress, which could be evidenced by amendment of institutional rules for many times. e.g., CIETAC Rules and BAC Rules to some extent.

However, it's not good enough due to the influence of traditional evidence rules in court proceedings, which is under the plan to reform. Pre-trial procedure, for example, provided in China arbitral rules as an efficient arbitration practice, is seldom used in Chinese international arbitration. Moreover, The Chinese arbitral tribunal usually may not excise discretion to order necessary production of documents, according to the international common practice, such as IBA Rules. This is disadvantageous to fact finding. More importantly, in Chinese civil procedure, mechanism of compelling the parties and non-parties to produce evidence is not

⁵² In most countries, direction of superior court given to the judges of inferior court or inferior court goes against the principle of judicial independence, but it is usual in China, especially where cases is complex.

well developed, and thus the courts are unlikely to provide sufficient assistance in aid of taking evidence for international arbitration pursuant to international standard.

The issue of privilege provides another example of possible conflict of legal cultures between China and other countries.⁵³ Privilege is admitted in most countries for the reason that special social relationship and values should be protected although the differences exist in scope and content. Unfortunately, it's not yet established generally in China. If privilege is over-sighted, that may affect the confidence of those businessmen who choose China as the seat of arbitration, for the reason that their legitimate expectation is not respected.

With the globalization, cross border transactions and disputes will continue to increase in the future, especially in China, the biggest market in the world. Chinese international arbitration never exists alone and should become more internationalized. Only by this way may China become more attractive center of international arbitration with good reputation.

⁵³ The issue of privilege is not the focus of practice and research in Chinese arbitration, partly because the procedural safeguard of gathering evidence is not sufficient. When the mechanism of compelling the parties and nonparties to produce evidence is well established in Chinese arbitration, Privilege, as balance of interest of those who have duty to produce evidence, will become more important.