

No Man Is an Island: Compelling Witness Evidence in Support of Arbitration Proceedings Seated in London

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Parties to arbitration proceedings seated in London may wish to compel evidence from witnesses located outside the English jurisdiction by applying to the English and/or foreign courts for assistance. This article provides an overview of the available methods and discusses some of the practicalities thereof, together with likely developments in this area as a result of the United Kingdom's imminent withdrawal from the European Union.

1 INTRODUCTION

In most arbitration proceedings witness evidence is given voluntarily and no issue of witness compulsion arises. In some cases, where a witness is unwilling to give evidence, this can be addressed by either (1) obtaining similar evidence from another source (witness or documentary); (2) if the witness is under the control of another party to the arbitration, an application to the arbitral tribunal (which can be invited to draw adverse inferences if the other party fails to call that witness); or (3) drawing attention to the other party's failure to call a particular witness whose evidence would clearly have been relevant (and inviting the tribunal to draw adverse inferences on that basis). Sometimes, however, critical evidence can only be obtained from a particular witness, and if that witness is unwilling to provide evidence voluntarily, the arbitral tribunal's powers to assist are limited. In such cases, the party seeking to obtain the evidence may wish to consider an application for the witness to be compelled to give evidence, made by the party or the arbitral tribunal either (1) directly to the relevant court of the country in which the witness is located (the 'requested court'), where this is possible as a matter of that country's local law; or (2) more typically, indirectly to the requested court via a court located in the seat of the arbitration (the 'requesting court'), where the requesting court

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has powers to ask for the assistance of the courts of the country in which the witness is located to take his or her witness evidence by compulsion.

This article explores the various methods for parties to arbitral proceedings to apply to the courts in the above circumstances. In particular, it looks at the powers of the English courts pursuant to sections 43 and 44 of the Arbitration Act 1996 ('the 1996 Act'). It is based on successful experience of making an application to the English courts to compel evidence from a number of witnesses located in Germany. Although the English courts' powers pursuant to section 44 exist in relation to arbitrations regardless of where they are seated, this article focuses on the use of those powers to compel evidence from witnesses located abroad in support of arbitrations seated in London; it addresses some of the practical considerations in making such an application, and it considers future developments in this area, particularly in the context of Brexit.

2 DIRECT APPLICATIONS TO THE REQUESTED COURT

2.1 WITNESSES LOCATED IN THE UNITED KINGDOM

2.1[a] *Compelling Attendance Before the Arbitral Tribunal*

A party to arbitral proceedings conducted in England, Wales, or Northern Ireland may (with the permission of the arbitral tribunal or the agreement of the other parties) apply to the English courts pursuant to section 43 of the 1996 Act for an order to secure the attendance before the arbitral tribunal of witnesses located in the United Kingdom, in order to give oral testimony or to produce documents or other material evidence.

2.1[b] *Compelling the Taking of Evidence*

Where the attendance of a witness, whether located within or outside of the jurisdiction of the English court, is not required before the tribunal, section 44 of the 1996 Act provides that, unless otherwise agreed by the parties, the English court has for the purposes of and in relation to arbitral proceedings the same power of making orders about, inter alia, the taking of witness evidence as it has for the purposes of and in relation to legal proceedings.¹ Section 44 therefore allows for

¹ It also empowers the court to make orders about (1) preservation of evidence; (2) inspection, photographing, preservation, custody, or detention of, taking samples from, observation of or conducting experiments on property which is the subject of arbitration proceedings or as to which any question arises in those proceedings; (3) the sale of any goods the subject of the proceedings; and (4) the granting of an interim injunction or the appointment of a receiver, but those powers are not discussed further in this article.

the taking of witness evidence by compulsion. However, the English courts have no jurisdiction to provide any relief under section 44 in respect of arbitrations carried out pursuant to the rules under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID”).²

Strictly speaking, the powers conferred by sections 43 and 44 of the 1996 Act are also exercisable in respect of witnesses located within the English jurisdiction if the seat of the arbitration is outside England and Wales or Northern Ireland, or if no seat has been designated or determined. However, the English court may refuse to exercise its discretionary powers under those provisions if, in its opinion, the fact that the seat of the arbitration is (or is likely to be) outside England and Wales or Northern Ireland makes it inappropriate to do so.³ Whilst the 1996 Act provides no further guidance as to when exercise of the court’s powers may not be appropriate, case law suggests that the English courts’ discretion is to be exercised very sparingly.⁴

Upon urgent applications by parties to arbitral proceedings, the English court may make such orders as it thinks necessary to preserve evidence or assets. In non-urgent cases, however, the court will act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.⁵ This requirement seeks to avoid unnecessary or tactical delays in arbitration proceedings by the introduction of extraneous or irrelevant evidence.⁶ The English court will act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively.⁷

As the focus of this article is on compelling evidence from witnesses located outside the English jurisdiction, applications in respect of witnesses located within the jurisdiction will not be considered further.

2.2 WITNESSES LOCATED IN OTHER COUNTRIES

Where a witness is located outside the English jurisdiction, parties to an arbitration seated in London may be able to compel the witness to give evidence by way of a

² *ETT Euro Telecom Int’l N.V. v. Republic of Bolivia* [2008] 2 Lloyd’s Rep. 421 (CA), cited in Robert M. Merkin & Louis Flannery, *Arbitration Act 1996*, 174 (5th ed., Informa Law 2014) 575 UNTS 159.

³ 1996 Act, s. 2(3).

⁴ It may be appropriate for the court to use its powers under s. 44 in respect of witnesses located within its jurisdiction in support of arbitrations seated outside the jurisdiction where, e.g. the relevant procedures of the curial law are similar to those of English law *Commerce & Industry Insurance Co. of Canada v. Lloyd’s Underwriters*, 1 Lloyd’s Rep. 219 at 223 (2002), cited in Sara Cockerill QC, *The Law and Practice of Compelled Evidence in Civil Proceedings* 87 (OUP 2011).

⁵ 1996 Act, s. 44(3) and (4).

⁶ Merkin & Flannery, *supra* n. 2, para. 15.6.

⁷ 1996 Act, s. 44(5).

direct application to the courts within whose jurisdiction the witness resides. However, this is only possible if such an application is permitted by the local law of the foreign jurisdiction.

In Germany, for example, section 1050 of the German Civil Code (Zivilprozessordnung or 'ZPO') provides that an arbitral tribunal or, with the consent of the arbitral tribunal, a party may request the court to provide support by taking evidence or by taking any other actions reserved for judges that the arbitral tribunal is not authorized to take. The German court will deal with the petition, unless it is deemed inadmissible, in accordance with its own relevant procedural rules. The court therefore has discretion as to whether or not to accede to a request. By ZPO, section 1025, an application may be made under section 1050 even if the seat of the arbitration is located outside Germany or has not yet been determined.

Other jurisdictions with similar laws include Algeria, Austria, Germany, Poland, Singapore, and Spain.⁸ It may also be possible to make an application directly to the US courts for the taking of evidence from persons residing in their districts in support of proceedings elsewhere under Title 28 US Code, section 1782 (a federal statutory provision), although there appears to be conflicting US case law as to whether the provision can be invoked in support of private arbitration proceedings.⁹

2.3 PROS AND CONS OF DIRECT APPLICATIONS TO FOREIGN COURTS

Whilst the efficiency and cost-effectiveness of a direct application to a foreign court may be appealing, the procedure is rarely invoked and is dealt with by few international instruments of judicial cooperation.¹⁰ Even if direct applications are possible as a matter of the foreign court's local law, the foreign court may deem them inappropriate in circumstances where the international community has set out procedures for transmitting requests indirectly via the courts of another country. It is likely, therefore, that the prospects of successfully obtaining the assistance of a foreign court are greatly improved when the request is received from a judicial body. Certainly the English courts tend to consider, as a factor in favour of granting inward requests from foreign courts for the taking of evidence from witnesses within the English jurisdiction, that the requesting court has exercised its discretion carefully before invoking the principle of comity.¹¹

⁸ Oliver L. Knöfel, *Taking of Evidence Abroad in Aid of Arbitration*, 5(2) J. Priv. Int. L. 281, 288 (2009).

⁹ Cockerill, *supra* n. 4, para. 5.31 and n. 62.

¹⁰ Knöfel, *supra* n. 8, at 286.

¹¹ See Cockerill, *supra* n. 4, para. 5.21 and n. 44.

A potential applicant should also bear in mind that the local law of a foreign court may not specify timeframes for dealing with direct requests. An indirect request governed by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters¹² ('the Convention') or the Taking of Evidence Regulation¹³ ('the Regulation') may well be quicker, and is likely to provide greater certainty as to timescale for the purposes of agreeing the procedural timetable of the arbitration. Further, as a matter of its national law, it may not be possible for the requested court to conduct hearings in private. This is the case with, for example, direct applications to the German courts pursuant to ZPO, section 1050.

3 INDIRECT APPLICATIONS TO FOREIGN COURTS VIA THE ENGLISH COURTS IN RESPECT OF WITNESSES LOCATED ABROAD

3.1 ARBITRATIONS SEATED OUTSIDE THE ENGLISH JURISDICTION

Where the seat of the arbitration and the witness are both located outside the English jurisdiction, section 43 of the 1996 Act will not be available and it is very unlikely that the English courts retain a residual jurisdiction under section 44. It has been suggested that if, in the above circumstances, an applicant could demonstrate to the English court that the courts of the jurisdictions where the witness was located and/or where the arbitration was seated lacked the relevant powers, and that there was some other reason for the English court to act (such as having in personam jurisdiction over the party who employed or otherwise had control over the witness), the English court might not regard it as inappropriate to make an order under section 44.¹⁴

3.2 ARBITRATIONS SEATED WITHIN THE ENGLISH JURISDICTION

The English courts have no direct jurisdiction against witnesses located in other countries. As an alternative to the direct procedure outlined above, however, parties to an arbitration seated in England, Wales, and Northern Ireland may be able to rely on the English court's powers under section 44(2)(a) of the 1996 Act to

¹² Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 Mar. 1970), 23 U.S.T. 2555, T.I.A.S. No. 7444.

¹³ Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

¹⁴ Merkin & Flannery, *supra* n. 2, at 182.

request the assistance of the foreign court to compel the witness to give evidence via one of the following:

- (1) an order for a letter of request under the Convention, for witnesses in countries which are Contracting States and where the Convention has entered into force between those countries and the United Kingdom¹⁵;
- (2) a request to a foreign court for assistance pursuant to the Regulation, in the case of witnesses in an EU Member State other than Denmark (the 'Regulation States');
- (3) for witnesses in Bosnia, Croatia,¹⁶ or Iraq, an order for a letter of request pursuant to bilateral conventions between the United Kingdom and those countries¹⁷; or
- (4) a letter of request pursuant to the inherent power of the English courts, for witnesses in a country which does not fall into any of the above categories and where the witness is compellable as a matter of local law (such as Egypt, Japan, and Sudan).¹⁸

Despite the obvious advantages to parties to arbitration proceedings seated in London of being able to use the English courts to secure the compulsion of witnesses located abroad, the power under section 44(2)(a) is reportedly 'rarely invoked'¹⁹ and there appears to be no known case dealing with the procedure.²⁰

Those wishing to invoke that power will need to consider which method to use and how to adapt the application to take account of the foreign country's structures and procedures. For example, whilst in common law countries the

¹⁵ Under Art. 39 of the Convention, where a country has acceded to the Convention after its entry into force, the accession has effect only as regards the relations between the acceding state and such Contracting States as have declared their acceptance of the accession. According to the Convention website, as of 18 Mar. 2019, the United Kingdom has not declared its acceptance of the accession to the Convention of the following countries: Albania, Andorra, Armenia, Bosnia and Herzegovina, Brazil, China, Colombia, Costa Rica, Croatia, Hungary, Iceland, India, Kazakhstan, Kuwait, Liechtenstein, Lithuania, Former Yugoslav Republic of Macedonia, Malta, Montenegro, Morocco, Republic of Korea, Romania, Seychelles, Serbia, Slovenia, and Sri Lanka.

¹⁶ Croatia has acceded to the Hague Convention but the United Kingdom has not yet (as of 18 Mar. 2019) accepted that accession, so the Convention has not entered into force between the two countries.

¹⁷ The United Kingdom also has bilateral conventions with a number of other countries which are either EU Member States or Contracting States to the Convention (*see* the commentary in the White Book, para. 34.13.7). In the case of EU Member States other than Denmark, a request by the English courts must be made pursuant to the Regulation. Where the jurisdiction in which the witness is located is a Contracting State to the Convention, a letter of request pursuant to the Convention is likely to be preferable to relying on a bilateral convention.

¹⁸ *See* Cockerill, *supra* n. 4, para. 5.17 and the commentary in the White Book, para. 34.13.5. Enquiries can be made of the Foreign Process Section (Room E14, RCJ) as to whether the local law permits the taking of evidence in a country with which no convention has been made. All the States of the United States enforce the attendance of witnesses under CPR, Rule 34.13, although the United States is also a Contracting State to the Convention.

¹⁹ Russell on Arbitration paras. 7–198 (24th ed., 2015).

²⁰ Merkin & Flannery, *supra* n. 2, at 181.

preparation of a case for trial is the private responsibility of the parties, in many civil law countries obtaining evidence is part of the function of the judiciary and any perceived interference with that function via the English courts could be viewed as interference with an aspect of the other country's sovereignty.

3.2[a] *The Convention*

(1) The Convention, which came into force in respect of the United Kingdom on 14 September 1976, has been ratified or acceded to by a large number of countries worldwide.²¹ It has taken effect in different forms in different countries, largely because the Convention permits countries to make specific reservations on particular issues, and is not in force between all the countries which have ratified and acceded to it. Broadly, the Convention allows in respect of civil or commercial matters the English courts to request (via a letter of request) the competent authority of another Contracting State to obtain evidence or perform some other judicial act (such as preservation of evidence and the performance of tests if permitted by the local law).²²

The judicial authority which executes a letter of request will apply its own law as to the methods and procedures to be followed, and will apply the appropriate measures of compulsion to the same extent as is provided for in its own domestic law for proceedings before that court.²³ This means that the witness may refuse to give evidence to the extent that he is able to do so under either (1) the national law of the requested court, or (2) English law (but in the second case only if the privilege or duty has been either specified in the letter of request or otherwise confirmed to the requested court by the requesting English court).²⁴ The requested court will comply with a request that a special method or procedure be followed unless this is incompatible with its own internal law or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties. Further, a letter of request must be executed 'expeditiously',²⁵ though no specific timeframe is laid down.

²¹ There are sixty-two Contracting Parties as of 1 Mar. 2019. An up-to-date list with full texts of relevant reservations made by each country, together with the languages in which each country will accept letters of request, is maintained on the Hague Conventions website at www.hcch.net. As noted by Cockerill, *supra* n. 4, para. 5.12 and n. 21, by virtue of the Evidence (Proceedings in Other Jurisdictions) Act 1975, the Convention also applies to Scotland, Wales, and Northern Ireland (subject to certain provisions), and has been extended by Order in Council to cover the Cayman Islands, Falkland Islands, Gibraltar, Akrotiri and Dhekalia, Isle of Man, and Guernsey.

²² Convention, Art. 1, and Cockerill, *supra* n. 4, para. 5.09.

²³ Convention, Art. 10.

²⁴ *Ibid.*, Art. 11.

²⁵ *Ibid.*, Art. 9.

3.2[b] *The Regulation*

(2) The Regulation, which entered into force on 1 July 2001 and has applied to the Regulation States including the United Kingdom since 1 January 2004, lays down procedural rules in respect of civil or commercial matters,²⁶ allowing a requesting court in one Regulation State to ask for (1) the requested court in another Regulation State to take evidence, or (2) itself to take evidence directly in another Regulation State. The concept of 'court' for the purposes of the Regulation does not include arbitral tribunals.²⁷ Unlike the Convention, which provides for the transmission of letters of request from one court to another via a central authority in the country where the witness is located, and where in practice letters of request issued by the English courts are passed to the Foreign Office to be transmitted by diplomatic channels, the Regulation provides (at least in theory) for the request to be transmitted directly from the requesting court to the requested court.²⁸ Each Regulation State must draw up a list of the courts competent for the performance of the taking of evidence according to the Regulation, indicating the territorial and, where appropriate, the special jurisdiction of those courts.²⁹

The Regulation aims to improve cooperation between the courts of EU Member States in the taking of evidence, its primary objective being that requests for the performance of the taking of evidence are executed expeditiously.³⁰ In relation to the matters to which it applies, the Regulation prevails over other provisions contained in bilateral or multilateral arrangements including the Convention.³¹ Unlike the Convention, the Regulation sets out specific time periods within which the requested court must acknowledge a request to the requesting court (seven days from the date of receipt of the request)³²; ask for missing information if necessary (thirty days from the date of receipt)³³ and execute the request (without delay and, at the latest, ninety days from the date of receipt).³⁴ If the requested court is not in a position to execute the request within ninety days

²⁶ An autonomous concept of Community law which is to be interpreted in the light of the objectives of the Regulation and of the EC Treaty and in particular in accordance with Art. 65 of the latter. See European Commission Practice Guide for the Application of the Regulation on the Taking of Evidence ('EC Practice Guide'), para. 7.

²⁷ *Ibid.*, para. 9.

²⁸ Regulation, Art. 2. This will involve the assistance of the Foreign Process Section of the Royal Courts of Justice.

²⁹ Regulation, Art. 2(2). The competent courts for each Regulation State are available on an online database at https://e-justice.europa.eu/content_taking_evidence-374-en.do?clang=en. Identifying the relevant competent court requires input of a postcode for the area where the witness is located.

³⁰ EC Practice Guide, *supra* n. 26, para. 4.

³¹ Regulation, Art. 21.

³² *Ibid.*, Art. 7.

³³ *Ibid.*, Art. 8.1.

³⁴ *Ibid.*, Art. 10.1.

of receipt it must inform the requesting court, giving the grounds for the delay as well as the estimated time needed for the execution of the request.³⁵ Requests and communications pursuant to the Regulation must be transmitted by the swiftest possible means which the requested Member State has indicated it can accept. The transmission may be carried out by any appropriate means, provided that the document received accurately reflects the content of the document forwarded and that all information in it is legible.³⁶

The evidence requested pursuant to the Regulation must be intended for use in 'judicial proceedings, commenced or contemplated.'³⁷ This allows the taking of evidence before the actual filing of the proceedings in which the evidence is to be used, for instance, if there is a need because the evidence would not be available later.³⁸ Although 'judicial proceedings' is not defined for the purposes of the Regulation, the term appears to be wide enough to encompass arbitration proceedings.³⁹ The requested court must execute the request in accordance with the law of the Member State where it is located, including applying appropriate coercive measures, where necessary, in the instances and to the extent provided for by the law of that Member State.

Execution of a request for the hearing of a person may only be refused by the requested court on one of five specified grounds:

- (1) the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence (a) under the law of the requested court's Member State, or (b) under the law of the requesting court's Member State (and such right has been specified in the request or clarified by the requesting court at the instance of the requested court);
- (2) the request does not fall within the scope of the Regulation;
- (3) execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary;
- (4) the requesting court does not provide missing information within thirty days of being requested to do so by the requested court; or
- (5) where an expert opinion is required, a deposit or advance towards the costs is not made within sixty days of being asked for by the requested court.⁴⁰

³⁵ *Ibid.*, Art. 15.

³⁶ *Ibid.*, Art. 6.

³⁷ *Ibid.*, Art. 1(2).

³⁸ EC Practice Guide, *supra* n. 26, para. 10.

³⁹ The EC Practice Guide states only that the Regulation applies to all civil and commercial proceedings whatever the nature of the court or tribunal in which they are taking place (para. 7).

⁴⁰ Regulation, Art. 14.

Whereas the Convention allows a requested court to refuse to execute a letter of request if the Contracting State addressed considers that its sovereignty or security would be prejudiced thereby,⁴¹ the Regulation essentially provides for an administrative process with no scope for the requested court to exercise its discretion whether or not to carry out the request. Nor does the Regulation contain any provision for the potential witness to challenge the order, although such provision may exist as a matter of the national law of the Member State where the requested court is located.

By Article 4 of the Regulation any request must include the following information:

- (1) details of the requesting and (where appropriate) the requested court;
- (2) the names and addresses of the parties to the proceedings and their representatives, if any;
- (3) the nature and subject matter of the case and a brief statement of the facts;
- (4) a description of the taking of evidence to be performed;
- (5) where the request is for examination of a person:
 - (a) that person's name and address;
 - (b) the questions to be put to the person or a statement of the facts about which the person is to be examined;
 - (c) where appropriate, a reference to a right to refuse to testify under the law of the Member State of the requesting court;
 - (d) any requirements that the examination is to be carried out under oath or affirmation, and any special form to be used; and
 - (e) where appropriate, any other information that the requesting court deems necessary;
- (6) where appropriate, any request for any of the following together with any information necessary for such a request:
 - (a) the execution of the request in accordance with a special procedure⁴² provided for by the law of the requesting court's Member State;
 - (b) the use of communications technology at the performance of the taking of evidence⁴³;

⁴¹ Convention, Art. 12.

⁴² Including, e.g. the manner in which the evidence is to be recorded, the way a witness is to be examined or the parties heard, or how an expert is to be appointed and heard or documents produced (EC Practice Guide, *supra* n. 26, para. 17).

⁴³ Pursuant to Art. 10(4) of the Regulation, the requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference. The requested court must comply unless this is incompatible

- (c) the presence of the parties and their representatives at the performance of the taking of evidence (if provided for by the law of the requesting court's Member State); or
- (d) the presence of representatives of the requesting court at the performance of the taking of evidence (if compatible with the law of the requesting court's Member State).

Each Regulation State must nominate a central body responsible for supplying information to its courts, seeking solutions to any difficulties which may arise in respect of a request, and forwarding, in exceptional cases, at the request of a requesting court, a request to the requested court. In practice, it appears that in the past the effectiveness of central bodies in carrying out their duties varied significantly between the Regulation States, and that central bodies were themselves involved in forwarding requests to the requested court more often than was intended under the Regulation.⁴⁴ Further, it appears that whilst the Regulation has imposed a greater uniformity of procedure for requests for the taking of evidence between the Regulation States, it has not entirely succeeded in stamping out the unpredictability which results under the Convention (where the ability of each Contracting State to make specific reservations on issues of particular importance to it means that the procedures can vary widely).⁴⁵ There remains a variation in the local procedures of courts giving effect to requests pursuant to the Regulation (for example, the rules as to a witness being asked to comment on documents, or the permissibility of cross-examination), and in the authors' experience the degree of expedition with which each court will act can vary significantly.

3.2[c] *Bilateral Conventions and the Inherent Power of the English Court*

(3), (4) In the case of witnesses located in a non-Convention and non-Regulation country, a letter of request will be required from the English High Court to the foreign court to cause the evidence to be taken, which may either ask for the interrogatories which accompany it to be put by the examiner (the usual procedure in many foreign courts, where the court alone puts the questions) or for the

with the law of the requested court's Member State or by reason of major practical difficulties (e.g. lack of the appropriate technology).

⁴⁴ *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Application of Council Regulation (EC) 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters* para. 2.2, COM(2007)769 final (5 Dec. 2007) ('Commission Report').

⁴⁵ See Cockerill, *supra* n. 4, para. 5.09 and n. 14.

witnesses to be examined *viva voce* upon the matters in question.⁴⁶ There is no guidance as to the expected timeframe for such a procedure.

4 APPLICATIONS UNDER SECTION 44 OF THE 1996 ACT: PRACTICAL CONSIDERATIONS

As stated above, this article is based on experience of making an application to the English courts pursuant to section 44 of the 1996 Act for requests under the Regulation to a number of German courts in respect of witnesses located in Germany. This section deals with some of the practical considerations in relation to such an application, many of which will apply equally to requests under the Convention.

4.1 APPLICATION TO THE ARBITRAL TRIBUNAL

Given the expense and time involved in making a request under section 44 for evidence to be taken by a foreign court, a party to an arbitration seated in London in need of such evidence should first consider alternative methods of achieving the same result, such as obtaining evidence voluntarily from another witness, compelling evidence from a witness located within the jurisdiction, or relying on documents or admissions.

Unless the matter can be agreed, a party seeking to obtain compelled witness evidence via a request pursuant to section 44 of the 1996 Act and the Regulation will need first to make an application to the arbitral tribunal,⁴⁷ being prepared from the outset to justify to the tribunal and the English courts the necessity of obtaining witness evidence in this manner. The party will need to identify an overseas address for each witness whose evidence is sought in order to determine the competent court in the Regulation State where the witness is located, and to allow the requested court to notify the witness of the hearing. It is vital to identify the correct witness and address to avoid any

⁴⁶ White Book, para. 34.13.9.

⁴⁷ Depending on the particular rules governing the arbitral proceedings in question, the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 ('IBA Rules') may be relevant to such an application. Pursuant to Art. 4(9) of the IBA Rules, if a party wishes to present evidence from a person who will not appear voluntarily at its request, the party may ask the arbitral tribunal to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the tribunal to take such steps itself. In its request to the tribunal, the party must identify the intended witness, describe the subjects on which the witness' testimony is sought and state why such subjects are relevant to the case and material to its outcome. The tribunal must decide on the request and shall take, authorize the requesting party to take or order any other party to take, such steps as the tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.

consequential delay from the request being transmitted to the wrong court. It is also advisable to seek advice in respect of procedures for the taking of evidence in the proposed requested court before making the application, so that suitable requests can be made in the application form itself. Where costs are an issue, initial advice on court procedure can be sought from a branch of the Foreign and Commonwealth Office local to the requested court. Eventually, however, advice from lawyers expert in the laws of the foreign jurisdiction will be required. Depending on the rules as to rights of audience in the requested court, it is likely that foreign lawyers will have to be instructed to attend the taking of evidence hearing in any event.

The application to the arbitral tribunal should be made as soon as possible in advance of the final arbitration hearing because, despite the time periods for responses and execution of requests provided for under the Regulation, in practice the time taken to execute a request can far exceed ninety days. In our experience, applications to the arbitral tribunal in November and to the English court in December led to witness hearings in Germany being timetabled anywhere between March and July of the following year. It would thus be wise to allow at least six months for witness evidence to be obtained in this manner, and in some cases more than six months has been required.⁴⁸ Delays can be compounded by the often lengthy periods taken for hard copy correspondence to travel between the courts of the Regulation States involved (around two weeks between Germany and the United Kingdom), or by applications made by the witnesses to the requested court asserting their rights to refuse to give evidence or claiming to be prohibited from doing so.

4.2 APPLICATION TO THE ENGLISH COURT

4.2[a] *Which Court*

The Senior Master has been nominated as the central body for England and Wales for the purposes of the Regulation. If an English court grants an order under section 44 of the 1996 Act it will send the form of request directly to the designated court in England and Wales.⁴⁹ The designated court then signs the request and transmits it directly to the requested court.

⁴⁸ Commission Report, *supra* n. 44, para. 21.

⁴⁹ That is, the appropriate competent court in the jurisdiction. The designated courts for England and Wales are listed in Annex C to Practice Direction 34A.

4.2[b] *Procedure*

The procedure for making the application to the English court is set out in rule 34.23 of the Civil Procedure Rules (CPR). Pursuant to rules 34.23(1) and (2), where a party wishes to take a deposition from a person who is outside the jurisdiction and in a Regulation State, the court has the power to order the issue of a request to the requested court in the other Regulation State. If the court makes an order for the issue of a request, the party who sought the order must file:

- (1) a draft request for the taking of evidence in Form A as set out in the annex to the Regulation;
- (2) a translation of the form (unless English is one of the official languages of the Regulation State where the examination is to take place, or the Regulation State has indicated that English is a language which it will accept);
- (3) an undertaking to be responsible for costs sought by the requested court in relation to
- (4) fees paid to experts and interpreters, and (b) the use of special procedures or communications technology (where requested by that party); and
- (5) an undertaking to be responsible for the court's expenses.

The High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (SI 1996/3215) ('the 1996 Order') permits arbitration proceedings under the 1996 Act to be started in either the Central London County Court Business List or the High Court. Either of those Courts has a discretion to transfer the claim to the other. The arbitration proceedings may be started in the Admiralty and Commercial Registry at the Royal Courts of Justice, London (Commercial list); the Technology and Construction Court Registry, St Dunstan's House, London Technology and Construction Court list (TCC list); or the District Registries of the High Court (either the Mercantile or TCC lists).⁵⁰ The choice of these courts will depend on the nature of the underlying arbitration proceedings (commercial or technical), the value of the underlying claim or counterclaim, and other matters including the balance of convenience.⁵¹

An application to the English court for an interim remedy under section 44 of the 1996 Act must be made by issuing an arbitration claim form in accordance with the procedure under Part 8 of the Civil Procedure Rules (CPR).⁵² The claim form must contain the information specified in rule 62.4 CPR, and the application must provide the information specified in rule 34.23 CPR in the form of an

⁵⁰ Practice Direction 62, para. 2.3.

⁵¹ 1996 Order, Art. 5(4).

⁵² Practice Direction 62, para. 8.1 and CPR, Rule 62.3.

accompanying witness statement and a draft Form A. In seeking to persuade the English court to exercise its discretion to make the order sought, the applicant is likely to find it useful to provide the same information to the court as that supplied to the arbitral tribunal, identifying the intended witness, describing the subjects on which the witness' testimony is sought, and stating why such subjects are relevant to the case and material to its outcome.

The English courts are likely to be sympathetic to applications for the taking of witness evidence abroad by parties to arbitration proceedings seated in London, on the basis that the tribunal cannot compel witnesses to attend and the parties cannot rely on section 43 of the 1996 Act. An order will usually be made if the English court is satisfied on the evidence before it that:

- (1) the witness is unwilling or unable to be present;
- (2) the application is made bona fide (but without going into the merits of the claim);
- (3) the application is made with a reasonable degree of promptness and so as not to cause unreasonable delay; and
- (4) the witness can give admissible evidence directly material to the issue or issues.⁵³

The arbitral tribunal will need to be satisfied as to the same matters in order to give its permission for the application to the English court to be made. Although the English court retains a discretion not to make the request pursuant to section 44 of the 1996 Act, it is suggested that in practice it would be unlikely to refuse to make the order unless the evidence before it was markedly insufficient.

Although a duly-certified translation of the completed Form A must be provided to the requested court (unless the Regulation State in which the requested court is located has indicated that it will accept forms in English), in our experience it is not necessary to provide the translation to the English court at the time of making the application. In cases where time is of the essence, the application to the English court can be pursued whilst the relevant translations are being obtained, and any order can make the transmission of the requests subject to the provision of certified translations.

A word of warning: incomplete forms and a lack of essential information are reported to be one of the main causes of delay in the operation of the procedure under the Regulation.⁵⁴ Despite the Regulation providing for direct transmission of requests from requesting to requested court, delays can be caused because requests are often sent via the central body in the Regulation State of the requested

⁵³ See Cockerill, *supra* n. 4, para. 5.23.

⁵⁴ Commission Report, *supra* n. 44, para. 2.3.

court. Further, although the request and subsequent communications should be transmitted by the swiftest possible means which the requested Regulation State has indicated it can accept, in practice contacts between the bodies designated by the Regulation are still almost exclusively paper-based, with adverse impacts on cost and effectiveness.⁵⁵

The application procedure presents an opportunity for an opponent to introduce strategic delay in order to prevent the application having to be made without its consent. It could be that a party will not know that it needs to compel witness evidence until it has (depending on the procedure adopted in the arbitration) obtained the production of documents and sufficiently advanced its case to know with certainty what witness evidence is required. This means that the window for obtaining that evidence can fall within the small period of time between the document production phase and preparation for the final hearing. For the reasons mentioned above, following the procedure to compel witness evidence can take time. If an arbitral tribunal is unwilling to adjourn the final hearing date to enable such witness evidence to be obtained (and any decision to that effect cannot be appealed), then an opponent may introduce delay in order to prejudice the applicant's chances of obtaining the relevant witness evidence in good time. In the event that a strategy of delay is successful it may, of course, be open to the applicant to ask the tribunal to draw an adverse inference from the conduct of the opposing party. However, we caution that there may be time involved in the battle for the arbitrator's permission to seek the assistance of the English court, and then (unless time is abridged) a respondent to the application to the English court is normally given twenty-one days to file evidence in response if it opposes an application, and should any oral hearing be required additional time will be needed for it to be listed.

4.2[c] *Evidence*

Where the request is for the examination of a person, the request must contain either the questions to be put to the person to be examined or a statement of the facts about which the person is to be examined.⁵⁶ At the hearing before the foreign

⁵⁵ See European Commission, *Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No. 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters*, Explanatory Memorandum s. 1, COM(2018)378 final (31 May 2018) ('EC Proposal'). As a result, the Commission is proposing, inter alia, the mandatory electronic transmission, as a rule, of requests and communications pursuant to the Regulation, and that other channels can be used only in exceptional cases, i.e. where the system is interrupted or not suitable for the transmission in question (e.g. transmission of a DNA sample as evidence).

⁵⁶ Regulation, Art. 4(1)(e).

court, the questioning will be limited to the questions or issues raised under the request. Although a simple list of relevant questions to be asked may simplify the task of the requested court in taking evidence, the disadvantage of providing such a list lies in the other party to the arbitration becoming privy to the questions to be asked months ahead of the hearing, creating a risk of satellite disputes and further delay whilst consent to the application becomes dependent on the finalizing of an agreed list of questions. Further, the questions have to be supplied to the English court (and in practice to the arbitral tribunal) several months ahead of the taking of evidence hearing, and cannot therefore be altered in the light of ongoing production of documents or other developments in the case, without further applications to the tribunal and the English court and the need for further agreement from the opposing party.

Instead, the applicant can choose to provide a 'statement of the facts' about which the witness is to be examined. Depending on how contentious the statement of facts is, it will need to be either agreed with the other party to the arbitration and/or approved by the arbitral tribunal, or settled by the requesting court after hearing submissions from the parties on the contents of the request to be transmitted. When drafting such a statement, the applicant should bear in mind how it is likely to be used by the requested court at the taking of evidence hearing. Once the statement of facts is submitted, the applicant is reliant on the requested court asking appropriate questions which flow from the statement of facts and the requested court's understanding of the case based on the application forms. If the local law of the requested court permits the parties to ask their own questions of the witness at the hearing (perhaps as a follow up to the preliminary questioning conducted by the judge) then there is a potential advantage in not having had to disclose a line of questioning to an opponent in advance. Whilst it may be that the questioning can range more freely if based on a statement of facts,⁵⁷ in our experience a judge may choose only to invite the witness to comment on the veracity of the facts as stated therein. Whilst we do not suggest that this approach would be adopted universally, it illustrates one means by which the procedure can be followed. This rigid approach may suffice for witness evidence sought only in relation to one discrete topic or where the facts are largely agreed, but may not allow adequate control of the questioning by an applicant where the facts are disputed, or ensure that, in factually complex cases, the witness is required to answer questions in adequate detail. This cannot be satisfactory when a witness is hostile and unwilling to answer questions cooperatively, which, by the very fact of the procedure under the Regulation having had to be used, they are likely to be. In every case it will be necessary for an applicant to decide whether it is willing to

⁵⁷ See Cockerill, *supra* n. 4, para. 6.19.

take the strategic risk of compelling a person to provide witness evidence under a procedure which may not allow sufficient control over the questions and answers.

4.2[d] *Taking of Evidence Hearing*

Our experience is based on the procedure under the Regulation being implemented in the German courts. Our practical points refer in part to the law in Germany, but are intended to be illustrative of the sorts of issues which may arise in similar jurisdictions.

The taking of evidence hearing presents a number of practical difficulties because whilst it is conducted in accordance with the law of the Regulation State where the requested court is located, the evidence obtained must accord with the rules and practices of the jurisdiction of the requesting court. Although Form A allows for 'special procedures' to be requested, the Regulation is silent as to how particular issues should be resolved, and in practice much is left to the discretion of the local judge in charge of the taking of evidence at the requested court. The familiarity of the requested court with the procedure under the Regulation and its willingness to accommodate particular requests can vary greatly depending on the character and experience of each local judge.

By way of example, the parties to the arbitration may attend the taking of evidence hearing if permitted by the requested court, which will be the court local to the witness' home residence. Local courts may not have rooms large enough to accommodate large legal teams. Furthermore, translators and their equipment may be required. The parties may also wish for transcribers to attend and prepare a transcript of the hearing in addition to the judge's record of evidence. Taking account of this in arranging the hearing can require a good deal of planning and liaison with the local court and the judge, and there may be unexpected bumps in the road if, for example, translators wrongly assume that the requested court will be able to supply the necessary equipment.

If a transcription of the hearing is permitted at the discretion of the requested court or as a matter of its local law, the parties will need to consider the implications of such a transcript existing alongside the judge's formal record of the witness evidence. Naturally, any conflict between the two records can give rise to argument. A transcript will, however, be available immediately whereas the production of the judge's formal record will depend in part on their workload. The judge's record will, once it is produced, in most cases then need to be translated into the language used in the arbitration.

It is likely that lawyers with rights of audience before the requested court will have to be instructed. If they have not otherwise been involved in the arbitration

proceedings, it may be difficult to brief them in sufficient detail for them to be comfortable questioning the witness (to the extent allowed by the requested court). It may be necessary to send lawyers more familiar with the underlying facts to provide support. Such supporting lawyers, unless they have rights of audience before the foreign court, may not be allowed to sit with local counsel during the hearing, which can impact adversely on communication over the questioning of the witness.

In Germany, the presiding judge of the requested court plays the principal role in obtaining witness evidence. If the judge agrees, the parties may be allowed to ask follow up questions, but cross-examination is unlikely to be permitted. In practice, where a witness fails properly to answer a question put by one of the parties or gives answers which are inconsistent, there is only limited opportunity for the question to be repeated and a proper response sought.

The procedure having been followed, a hearing date secured and all necessary arrangements for attendance made, the law governing the procedures of the requested court may then afford a witness the right to refuse to give testimony on certain grounds including self-incrimination. In such circumstances, in most European jurisdictions the parties to the arbitration will be afforded an opportunity to make written submissions on any such assertion in advance of the hearing, but the issue may not be determined until the hearing itself, which can have adverse costs implications, particularly where translators, transcribers, and lawyers have been booked to attend.

Further, a question arises as to the effect of a refusal to give testimony as a matter of the law of evidence applicable in the arbitration proceedings. On one analysis, as the compelled witness cannot properly be said to be giving evidence on behalf of any of the parties to the arbitration, the tribunal is unlikely to be able to draw an adverse inference from any refusal to answer a question. The witness may, however, be sufficiently connected to one of the parties, or the questions specific enough that a tribunal is willing to draw an inference from their refusal. The relevance of the national law of the requested court may also have to be taken into account. As a matter of German law, for instance, an inference cannot be drawn from a witness invoking the right to refuse to answer a specific question.

In Germany, it is not usual for witnesses to be asked to comment on written documents during a hearing, for transcripts of proceedings to be produced or for witness evidence to be taken on oath. Any request for the use of a court bundle, together with the contents of any such bundle, must be agreed with the other parties to the arbitration, and the permission of the requested court sought for any departure from its usual practice.

4.2[e] Confidentiality

One of the main difficulties for parties to an arbitration in making a request pursuant to section 44 of the 1996 Act and the Regulation lies in the potential loss of the confidentiality of the arbitration proceedings when pursuing a claim through courts where hearings are conducted in public. In practice, issuing the arbitration claim form in the English courts does not compromise confidentiality because the form must only be served on the other party to the arbitration and can be marked as confidential when filed. Any hearings in relation to the application will, under English law, generally be conducted in private by operation of CPR Rule 62.10. Whether or not the taking of evidence hearing can be conducted in private, however, will depend on the applicable law and procedure of the requested court. In Germany, for example, it is considered a matter of constitutional importance that court hearings are conducted in public, and the privacy with which the taking of evidence is conducted will depend very much on the discretion of the local judge. A German court receiving a request for assistance from an English court is likely to identify the relevant proceedings as English court proceedings and to proceed on the basis that its own hearings in support ought to be conducted in public.

5 FUTURE DEVELOPMENTS AND THE POSSIBLE EFFECTS OF BREXIT

The ability for parties to arbitration proceedings seated in London to request the assistance of foreign courts to compel witness evidence can be extremely useful. The Regulation has made a number of improvements to the procedures for requesting assistance indirectly which exist under the Convention, but the effectiveness of applications to foreign courts for assistance, whether made directly or indirectly, is still limited by high costs, delays, and lack of procedural certainty.

The European Commission recently proposed a number of improvements to the procedures under the Regulation, including:

- (1) Requests and communications having to be transmitted through a decentralized IT system composed of national IT systems interconnected by a communication infrastructure enabling the secure and reliable cross-border exchange of information between the national IT systems (except in unforeseen and exceptional cases where such transmission is not possible)⁵⁸;

⁵⁸ EC Proposal, *supra* n. 55, proposed Art. 6 of the Regulation.

- (2) direct taking of evidence by the requesting court via videoconference, if available to the respective courts, where it deems the use of such technology appropriate on account of the specific circumstances of the case⁵⁹; and
- (3) digital evidence taken in a Regulation State in accordance with its law not being denied the quality of evidence in other Regulation States solely due to its digital nature.⁶⁰

It has also been argued that the application of the Convention and/or the Regulation could be expanded to allow arbitral tribunals seated in either a Contracting State or a Regulation State (as the case might be) to be treated as requesting courts.⁶¹ This would speed up the process pursuant to each of those instruments by turning an indirect request for assistance to a foreign court into a direct one. If arbitration were included within the scope of both the Convention and the Regulation, then the wording of Article 1(2) of the Regulation⁶² would allow arbitral tribunals seated in a country which was only a Convention State (such as the United Kingdom post-Brexit) to compel evidence from a witness located in a Regulation State, by requesting (under the Convention) a court in a country which is both a Convention and a Regulation State to make a request under the Regulation to the court of the Regulation State where the witness is located. If the application of the Convention alone were expanded to include arbitral tribunals as suggested above, then following Brexit arbitrations seated in London would at least be able to make direct requests for assistance under the Convention to foreign courts in other Contracting States.

There is currently no indication that any such reforms to the Convention or the Regulation are imminent, however. Whilst the Convention will continue to apply after Brexit between the United Kingdom and those of the other Contracting States whose accession the United Kingdom has recognized, the process of requesting witness evidence to be taken abroad in support of arbitration proceedings seated in London would inevitably take a step backwards if the Regulation (and in particular the time periods for responses and execution of requests which it prescribes) ceases to apply. Nor would the United Kingdom be party to the proposed improvements to the Regulation, but would instead have to rely on the slower and less uniform procedures under the Convention.

⁵⁹ *Ibid.*, proposed Art. 17a.

⁶⁰ *Ibid.*, proposed Art. 18a.

⁶¹ See Knöfel, *supra* n. 8, at 307–08.

⁶² Specifically, that it does not limit the ‘judicial proceedings’ for which evidence can be sought to those within a Member State.

To fill the gap created by the Regulation ceasing to apply, the United Kingdom would have to negotiate bilateral conventions in respect of the taking of evidence with those Regulation States which are not signatories to the Convention (such as Austria, the Republic of Ireland, and Belgium) and/or recognize the accession to the Convention of several Regulation States, including Croatia, Hungary, Malta, and Slovenia. Alternatively, and subject to the agreement of all the remaining EU Member States, the United Kingdom could seek to negotiate some form of continued international cooperation over the taking of evidence with the Regulation States along the lines of the current Regulation.

There is currently no indication that this is likely, however. The European Commission's 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law' dated 18 January 2019 provides in respect of the Regulation that:

as of the withdrawal date, EU-27 Member States do not proceed further such pending judicial cooperation procedures involving the United Kingdom; and do not launch new such judicial cooperation procedures involving the United Kingdom on the basis of EU law. Such procedures may continue to be processed according to national law on judicial cooperation with third countries ... All national Central Authorities are advised to assess whether judicial cooperation procedures risk being pending on the withdrawal date and whether the procedure can continue under national law or a relevant international convention. Where this continuation under national law or a relevant international convention is possible, the Central Authority should consider submitting an additional request under the relevant national law/international convention which would be conditional upon the United Kingdom withdrawing from the Union without withdrawal agreement.⁶³

Similarly, a U.K. Ministry of Justice memorandum⁶⁴ provides that the Regulation will be revoked post-Brexit because it will cease to operate effectively. The memorandum states that the Regulation, although modelled in large part on the Convention, contains 'a more modern approach to the transmission of requests for ... taking of evidence across borders.' Whilst the U.K. Government recognizes that the Convention is 'potentially less effective and efficient in procedural terms' and that not all EU Member States have ratified the Convention, the United Kingdom can begin applying the Convention as a framework with Contracting States immediately after Brexit.

Given how rarely the above procedures for compelling witness evidence abroad are invoked, the lack of a replacement for the Regulation is unlikely in itself to cause contractual parties to move the seat of any arbitration proceedings

⁶³ See s. 4.

⁶⁴ Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018 (SI 2018/1257), Explanatory Memorandum.

out of the English jurisdiction. In any event, the United Kingdom is likely to be able to fall back on or put in place less procedurally-efficient arrangements for the taking of evidence in many of the countries currently governed by the Regulation. However, in order to maintain its competitiveness in the long-term as a seat for international arbitration, the United Kingdom should ensure not only that its participation in international measures for judicial cooperation over the taking of evidence is maintained at current levels, but also that it is able to benefit from future improvements in those arrangements.

