第四章 从法院(本地或海外/外国)获得证据

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1. 提前披露之五: 从法院获得其他有关诉讼的法院记录

1.1 公开审理/公开聆讯

英国法院的民事与刑事审理应面向公众是英国法律的一个基本原则,正如法治名言所说,司法公正不仅要做到,而且要以众人能看到的方式做到(Justice not only has to be done, it must be seen to be done)。在民商事诉讼中,争议双方不能通过协议排除法院公开审理。法院必须考虑公开审理与向公众展示法院程序的公共利益。笔者可先引用一些近期先例的说法,在 Al Rawi and Others v. The Security Service (2011) UKSC 34 先例, Dyson 勋爵说:

"There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times ... The open justice principle is not a mere procedural rule. It is a fundamental common law principle."

在 A v. BBC (2014) UKSC 25 先例, Reed 勋爵也说公开审理是英国宪法中的大原则, 法院必须公开受到公众的监督:

"It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny."

最后在与英国法治理念一样的新西兰,其法律委员会在《Access to Court Records》(2006)(Report 93)之 2.2 段做出了非常有针对性的总结,可节录如下:

"Open justice is a fundamental tenet of New Zealand's justice system. It requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties. It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done'."

关于公开审理的基本原则与少数让英国法院可偏离基本原则的例外情况可见《民事诉讼规则》(Civil Procedural Rule,简称"CPR") Rule 39.2,如下:

"39.2 General rule – hearing to be in public

(1) The general rule is that a hearing is to be in public.

...

- (3) A hearing, or any part of it, may be in private if—
 - (a) publicity would defeat the object of the hearing¹;
 - (b) it involves matters relating to national security²;
 - (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality³;
 - (d) a private hearing is necessary to protect the interests of any child or protected party⁴;

¹ 第一个例外就是公开审理会令有关的诉讼失去意义。

² 第二个例外是涉及国家安全。

³ 第三个例外与商业案件比较有关系,就是有关的案件本身涉及机密信息,例如是个人经济状况而公开审理会导致有关信息丧失机密性并会带来严重后果。这里要强调的是几乎每个商业案件都多多少少会涉及一些商业机密信息,但法院不会因为个别案件零散的机密信息就偏离公开审理的基本原则/公共政策。毕竟,如果争议方不希望公开商业机密信息,当初在定约时完全可以选择通过仲裁的方式解决争议。而且法院也有机制可以避免零散的商业机密泄露,例如可以将文件中的机密内容编辑涂黑等。只有像稍后介绍的Eurasian Natural Resources Corporation Ltd v. Dechert LLP (2014) EWHC 3389 (Ch)先例,公开审理的基本原则/公共政策与其他重要的公共政策(例如人权、人身安全、重大个人隐私等)发生冲突,法院才可能在权衡后做出不公开审理的命令。

⁴ 第四个例外是为了保护儿童或其他需要保护隐私的人士。

- (e) It is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing⁵;
- (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate⁶; or
- (g) the court considers this to be necessary, in the interests of justice⁷."

简单来说,要申请不公开审理并不容易,但也有成功的先例。例如在近期的 Eurasian Natural Resources Corporation Ltd v. Dechert LLP (2014) EWHC 3389 (Ch) 先例⁸,原告 Eurasian Natural Resources Corporation Ltd(简称 ENRC)是哈萨克 斯坦国企私有化后于 1994 年成立的公司,并于 2006 年在伦敦证券交易所 (London Stock Exchange, 或简称 LSE) 上市。ENRC 是国际上著名的铁矿(世 界第六大)、矾土(世界第五大)与其他自然资源的出口商。在2011年末,由于 举报信泄露与媒体上发布的一些文章,英国主要规管商业犯罪与欺诈的机构严重 欺诈调查署(Serious Fraud Office,简称 SFO)对 ENRC 可能存在的违反上市规 则的行为开始调查,特别是在刚果共和国对铜矿的收购与其他一些关联交易。 SFO 提醒 ENRC 对内部的不法行为存在自愿报告程序(self-reporting process), 可以"从轻发落"。因此 ENRC 委任了一家名为 Dechert 的国际律师事务所开始 在全球进行调查以决定是否开始自愿报告程序。但之后 Dechert 不断增加的律师 费引起了ENRC的注意,在约两年的时间里相关律师费用累计高达1,630万英镑。 在 2013 年 3 月 27 日, ENRC 决定终止对 Dechert 的委任, 转而委任另一家律师 事务所。但为了解除 Dechert 对 ENRC 的文件的留置 (lien), 必须先决定支付给 Dechert 的合理费用应是多少。这就需要法院在《Solicitor Act 1974》之 section 70 下对 Dechert 的收费进行核算(taxation)。

但如果进行公开审理,很有可能 SFO 会派人旁听。那么无可避免会有很多机密且非常敏感的材料/文件会被泄露,这会令 ENRC 将来在 SFO 持续进行的调查中处于严重不利的地位,而 SFO 的调查可能会带来刑事后果。这些材料/文件也一定会被 Dechert 披露给法院,以显示 Dechert 在调查中做了哪些工作、有什么收获等。这一来就会涉及法律业务特免权(Legal Professional Privilege,或简称 LPP)的问题,而根据有关法律,如果客户起诉前律师就应被视为对法律业务特免权弃权(但只是限定弃权并不对无关第三方弃权)9。法院负责核算费用的

⁵ 第五个例外是单方面申请(*ex parte*/without notice)的命令,例如冻结令(Freezing Order)或少数的第三方披露令(Norwich Pharmacal Order),公开审理就会导致申请失去意义。

⁶ 第六个例外是案件本身没有争议性,而只是涉及法院管理信托或去世的人士的遗产。在 Eurasian Natural Resources Corporation Ltd v. Dechert LLP (2014) EWHC 3389 (Ch)先例,法院也提到该先例的争议是律师的收费,而律师属于法院的"官员"(officer),所以律师的收费或许可以适用这种例外情况。但该案件是有争议性。

⁷ 这属于一个兜底性的说法,这在很多时候也是必要。因为社会上会发生的事件千奇百怪,没有办法在法律中一一针对,一些特殊的情况必须要交由审理的法官行使裁量权。而因为存在上诉机制,加上英国法官受统一的法律教育与培训,对裁量权的行使相对一致,不会对法律的肯定性产生太大影响。

⁸ 同一个系列的 SFO v. ENRC (2018) EWCA Civ 2006 上诉庭先例是一个对法律业务特免权(Legal Professional Privilege)非常重要的先例,在本书第九章与第十章有非常详细的介绍。

⁹ 关于这方面的介绍可见本书第十二章之 2.1 段与笔者《合约的履行、弃权与禁反言》一书第十章之 12.6.2

Senior Courts Costs Office 最开始的命令是公开审理。这也是 Dechert 坚持的,理由是公众已经知道了 ENRC 声称 Dechert 不合理多收律师费 (一些材料被神秘地泄露给了媒体),Dechert 希望通过公开审理维护自己的名誉。于是 ENRC 上诉,要求根据 CPR Rule 39.2(3)(c)与(g)进行不公开审理。

这也获得了高院的支持, Roth 大法官说:

"Should the hearing be in private? Although I have found that the waiver of LPP was only limited, so that the material remains protected by LPP as regards third parties, there remains the question whether the court here should therefore order that the costs application be heard in private. 10 CPR rule 39.2(3) gives the court a discretion, which I consider must be exercised in the interests of justice and the parties.

Here, ENRC has a very real concern that a public hearing will expose much of the material to the SFO and thereby prejudice its position. Part of the retainer of Dechert in this case was to assist ENRC in the fraud investigation and its dealings with the SFO, and so some of the privileged documents were created for that very purpose. I consider that there is the potential for very real prejudice to ENRC if the matter were heard in public. That is illustrated by the declared position of ENRC that if the order below stands, it will not proceed with its application. The effective protection of ENRC's rights therefore requires that the matter be heard in private.

By contrast, what legitimate interest has Dechert that the application should be heard in public? This is addressed in a brief witness statement from Mr Richard Harrison, ... exhibits a bundle of press articles which he says include reports that ENRC is 'suing Dechert for overcharging millions of pounds'. ... Nonetheless, I recognise Dechert's understandable concern to vindicate its reputation. But I consider that this concern will be entirely met by a public judgment determining the costs application. There is no question of this court directing that the costs judgment itself should be kept private ... I can see no need for the hearing itself to be in public, which is the issue on this appeal, in order adequately to protect Dechert's interests. Indeed, I would have thought that a public hearing might have a contrary effect since all the allegations advanced by ENRC regarding its overcharging would then be rehearsed before a public audience.¹²

段。

¹⁰ 这里是说虽然只是限定弃权(只在这个特定的诉讼中对 Dechert 弃权,有关限定弃权的课题可见本书第十二章之 2 段)但不对第三方弃权,但这只代表 SFO 不能在诉讼中直接使用有关的文件。但一旦 SFO 知道了存在有关的情况与 Dechert 获得有关文件/信息的途径,就可以通过别的方式进行调查,绕开特免权的问题。也就是说,即使有关文件/信息对 SFO 仍享有特免权的保护令 SFO 不能使用,一旦进行公开审理后 SFO 知道了内容,仍然会足够对 ENRC 带来严重的损害。

¹¹ 从 ENRC 表示如果公开审理是无可避免,就会放弃要求法院核算律师费的申请,也就是直接支付全数律师费投降,也可以看出其中应有一些不为人知的敏感内容,保持文件/信息的机密性对 ENRC 的重要性。

¹² Dechert 的证人证言中附上了大量针对 Dechert 不合理收取数百万英镑律师费的媒体报道。法官明白

Finally, it is not suggested that there is some particular public interest on the facts of this case for holding the hearing in public.¹³ I also consider it of some relevance that this is not adversarial litigation but the exercise of a supervisory jurisdiction by the court over its officers.¹⁴

Accordingly, the appeal will be allowed and the court will order that the hearing of the application and any subsequent assessment pursuant to sect 70 SA 1974 be heard in private."

上诉庭([2016] EWCA Civ 375)也支持了高院的判决,即如果申请人(在该先例就是 ENRC)还有正在进行的刑事调查,那么法院在根据 1974 年《Solicitors Act》之 section 70 对律师费进行核算时就应不公开审理。

1.2 非诉讼方想获得他人诉讼信息与文件的原因

公开审理的原则令公众或非诉讼方(non-litigant/non-party)可以获得他人诉讼的信息与文件。这对希望保持机密不要在媒体上报道¹⁵或被其他商业上的竞争对手知道的诉讼方(litigant)来说是很麻烦。典型的例子就是涉及一些家庭事务(特别是公众人物的家庭事务)的诉讼,显然诉讼方就不会想让家中的丑事每天在报刊中被报导。或是一些商业交易的诉讼,作为诉讼方的上市公司很可能因为公开审理时披露的信息被报道出来而股价暴跌(或暴涨)的不理性波动。又或是商业模式或产品细节如果被竞争对手知道会极大地影响将来的生意等。也正是为了保持机密性,越来越多这些类型的争议选择以仲裁的方式解决。

但正如 Shaw 勋爵在 Scott v. Scott (1913) AC 417 先例中所说,公开审理以确保司法公正是自由社会最肯定的保证。公开审理最显而易见的好处就是法官在知道有公共监督的压力下,不当或草率做出判决的情况会减少。¹⁶从这个角度来说,客观、有水平与健康的媒体的作用就至关重要。正如 John Donaldson 大法官在Attorney General v. Guardian Newspapers (No 2) (1990) 1 AC 109 先例里所说,媒体作为公众的耳目(eyes and ears of the general public)监督法院。

Dechert 是想通过公开审理来维护自己的名誉,但这个目的完全可以通过最终公开的判决书实现。不公开审理并不代表最终的判决书也不公开,如果最终的判决书对 Dechert 有利,那么 Dechert 完全可以维护自己的名誉。而且法官认为公开审理反而可能会对 Dechert 不利,毕竟这样一来所有 ENRC 声称 Dechert 不合理的收费都会被公开。而即使法院不支持大部分对 Dechert 的指控,只要在其中一两项指控中支持 ENRC 说是 Dechert 的收费过高/不合理就足以对 Dechert 造成更大的不利。从这里可以推断,事实上是否公开审理对 Dechert 的影响不大。Dechert 坚持要求公开审理更多是抓住了 ENRC 不愿意公开审理的心态,希望 ENRC 直接投降。这样做是为了保护自己的最大利益,说不上是对或错,只说前律师一旦"撕破脸"就可能会变成客户最大的敌人。

¹³ Dechert 也没有提出其他特殊的公共利益一定要公开审理。

¹⁴ 这就是在稍早的脚注 6 中提到的 CPR Rule 39.2 下第六种不公开审理的例外情况可能在该先例适用。

¹⁵ 如 Chan U Seek v. Alvis Vehicles (2004) EWHC 3092 (Ch); Guardian News and Media Ltd v. City of Westminster Magistrates Court (2013) QB 618; Blue v. Ashley (2017) EWHC 1553 (Comm)等先例。

¹⁶ 笔者对这符合人性的说法有感受。在小部分笔者参与的伦敦仲裁中,有个别敌视中方或因文化差异而不理解的西方仲裁员认定与裁决中方公司败诉是有一点"关起门打狗"的味道,感觉如果是在英国法院公开审理会有不同的结果。

另是, Toulson 大法官在 Guardian News and Media Ltd v. City of Westminster Magistrates Court (2013) QB 618 先例说: "at the heart of our system of justice and vital to the rule of law … the transparency of the legal process … not only the individual judge who is open to scrutiny but the process of justice."

言论自由也在《European Convention for the Protection of Human Rights and Fundamental Freedoms》之 article 10 下获得了保证。言论自由不仅包括了交流信息的权利也包括了搜寻与/或获得信息的权利。公开审理的原则与言论自由的权利要求法院允许公众特别是记者可以接触到法院诉讼的文件。

在众多涉及媒体的先例中,笔者可以 Guardian News and Media Ltd v. City of Westminster Magistrates Court 先例为例做简单介绍。该先例的案情有关美国声称两名英国公民有参与贪污,要求引渡。《卫报》向地方法院(Magistrates' Court)申请复印美国在要求引渡的程序中提到的一些文件。《卫报》的申请一开始被地方法院拒绝但在上诉到上诉庭后成功。上诉庭认为《卫报》申请复印这些文件有严肃的新闻目的,希望刺激社会公众对英国司法系统如何处理国际贪污与引渡被外国声称有犯罪嫌疑的英国公民进行有意义讨论,法院应该支持而非阻碍。法院提供文件就可让《卫报》不只是泛泛与简短地讨论这个议题,而是能够写出更具体的评论让公众理解并深入讨论。Toulson 大法官说:

"The Guardian has a serious journalistic purpose in seeking access to the documents. It wants to be able to refer to them for the purpose of stimulating informed debate about the way in which the justice system deals with suspected international corruption and the system for extradition of British subjects to the USA.

Unless some strong contrary argument can be made out, the courts should assist rather than impede such an exercise. The reasons are not difficult to state. The way in which the justice system addresses international corruption and the operation of the Extradition Act are matters of public interest about which it is right that the public should be informed. The public is more likely to be engaged by an article which focuses on the facts of a particular case than by a more general or abstract discussion."

而对想要开始诉讼的其他案件的潜在诉讼方来说,如果已经有类似或有关联的法院诉讼,那么自动有权或可以申请获得法院已经存在的诉讼的特定文件 (例如文书请求¹⁷或证人证言¹⁸) 就是十分重要。同一事件导致许多不同的诉讼方开始诉讼的情况是很常见,例如一个重大事故可能导致许多类似的交易受到影响。如果大家都去仲裁并保持机密,那么可能所有受影响的交易最后都要通过仲裁才能解决争议。但如果有一个交易选择法院诉讼,那么其他受影响的类似或关联交易就有了权威性的指引与参考,可以帮助进一步的诉讼或双方的和解谈判。目前为止对非诉讼方来说最普遍与完全合法的做法就是向法院申请有关文件:见 Law

¹⁷ 这文件是几乎肯定可以获得,可参阅本章之1.6.1段。

¹⁸ 关于获得证人证言有点复杂,将在本章稍后的 1.7.1 段有详细介绍。

Debenture Trust Corp (Channel Islands) Ltd v. Lexington Insurance Co (Application for Disclosure) (2003) EWHC 2297 (Comm); Dian AO v. David Frankel & Mead (2004) EWHC 2662 (Comm); Sayers v. SmithKline Feecham Plc (2007) EWHC 1346 (QB); R (on the application of Taranissi) v. Human Fertilisation and Embyology Authority (2009) EWHC 130 (Admin); HIH Nordbank v. Saad Air (2012) EWHC 3213 (Comm); Cape Intermediate Holdings Ltd v. Dring (2018) EWCA Civ 1795; The Chartered Institute of Arbitrators v. B, C and D (2019) EWHC 460 (Comm)等先例。

另一个常见与合法的例子是有关药品专利的争议,正如Floyd大法官在Pfizer Health AB v. Schwarz Pharma AG (2010) EWHC 3236 (Pat)先例所说:

"It is well known that third parties are often keen to inspect the Grounds of Invalidity in a patent action, in order to assist their own actual or intended attack on its validity..."

笔者自己的经验可以多年前的一宗案件为例。一艘船舶在德国不莱梅装货后 开往中国, 刚要驶出威悉河就撞上了石油码头发生爆炸, 导致船舶与码头全损并 造成了人员伤亡。船舶上的货物全损并最终由中国人保(PICC)赔付,但人保 在很多个月后仍然不能确定是否应该代位(subrogate)以船舶可能是不适航 (unseaworthy)为由向船东(除了全损的船舶外还拥有姐妹船,加上知道船东 有互保协会会承担这方面的责任)索赔。船舶不适航完全是人保的猜测,有关的 事故可能是由于船舶不适航 (例如主机或舵在开航时有问题), 但也可能是其他 免责的原因如航行疏忽(甚至是领航员疏忽),而当时没有任何办法找出真相或 做出有一定根据的猜测,更不用说有足够人保开始诉讼的详情(particulars)与 实体证据,只能按兵不动。但国际公约《海牙规则》针对货损货差索赔的1年时 效很快就将届临,笔者能想到的一个办法就是查看德国法院有没有相关的诉讼, 于是通过一个德国执业律师朋友知悉死亡人士的家属与石油码头的所有人在德 国法院对船东(与船东背后的互保协会)开始了诉讼。于是笔者委任了德国律师 在法院搜寻诉讼的文件,虽然当时诉讼仍在进行中。有关文件中的信息显示原告 指控船舶的舵发生了故障,导致船舶失去控制并撞上了石油码头,而当时是开航 后不久,有很强的不适航的味道,而船东也不像有否认或抗辩。这鼓励了人保开 始行动威胁船东会扣船,迫使互保协会做出了保函并最终达成了令人保满意的和 解赔偿。

本书针对的是英国法,所以介绍的也是英国法院(与/或其他普通法国家或地区法院)的做法。笔者理解"走出去"的中国公司或律师会遇到许多不同国家的法院与司法系统,免不了会面对许多取得各国法院的信息的不同做法。甚至会有个别国家法院没有法定与规范的做法,或没有公开审理的坚持,又或是能否获得法院记录或信息完全取决于委任的当地律师/人士与法官的私交,甚至会涉及贪污受贿等等。这种个别情况本章就不会涉及,这里的内容主要是针对英国法院(与/或其他普通法国家或地区的法院),包括介绍如何对法院诉讼文件进行提前

披露(early discovery)¹⁹与调查。在国际商业活动中,被商业人士广泛接受的争议解决方式大部分还是在这些有成熟司法机制的国家和地区的法院,而不会是一些司法混乱缺乏制度的国家和地区的法院。

1.3 公开审理与诉讼方限制非诉讼方获取信息的需求之间的权衡

传统上法院对民事/商事诉讼的文件或信息经常涉及诉讼方的隐私,不想公开的诉求做出权衡(balance)的方式是看有关的文件或信息是否会在公开审理(open trial)时被读出来。如果会,就属于进入了公有领域(public domain),可以被非诉讼方(non-litigant/non-party)获取。在以前的法院诉讼中,所有诉讼方要提出与依赖的文件、双方的案情与争辩等都要以口头的形式在公开审理时读出来,法官在开庭前不会提前阅读文件。所以记者或任何公众都可以在公开审理时听到所有的细节。而如果有关的诉讼是在内庭(chambers)不公开审理(in camera / in private),那么公众就不会获得有关的文件或信息。但这属于在本章之 1.1 段提到的可以不公开审理的例外情况。

如果说早年法院诉讼强调开庭时口头证据与争辩,文件寥寥可数,现在随着法院诉讼实践的改变(这将在本章之 1.5 段有详细介绍),书面争辩(written advocacy)与证据已经取代了口头争辩(oral advocacy)与证据成为诉讼的惯常做法。审理法官的传统做法是不提前阅读案件有关文件,只是好像一张白纸一样去开庭,让双方诉讼方代表律师通过陈述、证据与争辩在这张白纸上填上内容。但现在的做法也变为要求法官在开庭前阅读(pre-reading)大量的文件,而这些文件的内容不再在开庭审理时读出,最多只是会提到一些重点。也就是说非诉讼方或公众即使旁听了公开审理也不会听到全貌,这导致现在非诉讼方更为关心的是有否检查(inspect)与复印(copy)法院记录的权利,例如案情陈述(Statement of Case)、抗辩书与反索赔请求(Statement of Defence & Counterclaim)、争辩大纲(Skeleton Arguments)或开庭陈词(Opening Submissions)、代替主证据/主盘问(evidence-in-chief/examination-in-chief)的证人证言(Witness Statement)、专家证人报告(Expert's Report)、文件附件(Exhibits)等。

这方面的改变在 GIO Personal Investment Services Ltd. v. Liverpool and London Steamship Protection and Indemnity Association Ltd (1999) 1 WLR 984 先例 首次被提出来并认为非诉讼方应该有权检查代替了主证据/主盘问的证人证言与代替了口头开庭陈词(oral opening)的书面争辩大纲或书面开庭陈词。

一般来说,因为公开审理的基本原则/公共政策(open justice principle)²⁰, 所以法院会对让非诉讼方或公众检查与获得在开庭审理时被读出(或可以合理假

¹⁹ 主要是诉前披露(pre-action disclosure),但也可以是审前披露(pre-trial/pre-hearing disclosure)。

²⁰ Toulson 大法官在 Guardian News and Media Ltd v. City of Westminster Magistrates Court (2013) QB 618 先例 针对公开审理原则的目的说: "to ensure the public to understand and scrutinize the justice system of which the courts are the administrators."

设审理法官会提前或在审理过程中阅读)的文件采取宽松的态度。但针对其他许多类别的文件,仍要考虑其他互相冲突的公共政策/利益,如诉讼方的隐私(这是十分重要的考虑)、文件的机密性、公平审理的权利等。

CPR rule 5.4C 对此也已经有了针对,非诉讼方或公众可以向法院申请检查与获得的文件,包括自动获得或申请批准后才能获得两类,这将在稍后本章之1.6 段进一步介绍。在这里只简单说,这方面问题也不是表面看起来这么简单,因为在一个商业诉讼中涉及很多不同类别的文件时,不能简单把所有法院有的文件都向公众开放,让每个人都可以到法院把这些文件一箱箱拿走,然后仔细查看这些文件把有关诉讼方的祖宗十八代都摸得一清二楚。一个商业诉讼,双方诉讼方会给法院很多文件,这些文件有相当一部分也不是披露的诉讼方愿意与自动提供的,而是在强制披露下非要提供所有有关(relevant)甚至关系不大的文件。这些文件会是在开庭的时候收集在多个开庭案卷(Trial Bundles)中,在复杂的诉讼中会是有几十个甚至几百个案卷。尤其是现在存在大量的电子文件²¹,如果全部转换为纸质文件,可能要存放在几个仓库。这些案卷里的文件只会有少数在公开审理时被读出或要求法官查看,这种文件只要能够被识别出来就可让公众获取。毕竟,如果有关非诉讼方在开庭的时候作为旁听,也可以获悉这些文件。但大部分的当事方披露的文件根本不会在开庭的时候被提到。这一来,就要考虑被强制披露的诉讼方的个人隐私会更重要。

另外也要考虑到其他千变万化的情况,例如还是有相当部分的开庭审理是在内庭(chambers)进行,不向公众公开的(如 Eurasian Natural Resources Corporation Ltd v. Dechert LLP [2014] EWHC 3389 [Ch]先例,或针对未成年的案件等),另不少中间(interlocutory)申请也是在内庭进行。这一来,是否代表非诉讼方就一定不能获得与没有机会检查法院的文件?只说,这仍是由法院权衡,在显示了非常重大的公众政策/利益的时候,仍可以命令向非诉讼方提供文件。法院在做出权衡时,要看非诉讼方的申请是否成比例(proportionality)。考虑的因素包括:非诉讼方要求文件的目的,文件的类型与性质,诉讼方(特别是如果曾经在诉讼的披露过程中反对过披露)是否会因为非诉讼方或公众获得文件而受到损害,是否可以只让非诉讼方获得部分文件或一份文件的一部分而非所有文件等等。在权衡了诉讼方保护隐私的权利后,如果法院认为合适,也可以遮盖(redact/blank off/sealed up)部分内容或采取匿名的形式提供给非诉讼方,或是限定非诉讼方使用被提供的文件的目的。

1.4 商业仲裁的机密性

确保非诉讼方或公众不会获得诉讼的有关信息或文件最好的办法就是通过 仲裁解决争议。²²仲裁的机密性(confidentiality)与有限制的报道(即使是在法

²¹ 关于电子文件披露可见本书第八章的详细介绍。

²² 现在随着仲裁的推广,使用仲裁来解决争议的案件越来越多。部分领域的仲裁对透明度的要求越来越高,也需要公众对仲裁庭与仲裁程序进行监督,其中一个最典型的例子就是投资仲裁(investment arbitration)。

院进行撤销裁决书等仲裁相关的法律行动),已经被立法规定。例如在香港《仲裁条例》第 16 至 17 条就说:

"16.以非公开审理方式进行审理的法律程序

- (1) 除第(2)款另有规定外,在法院进行的本条例所指的法律程序的审理,须以非公开审理方式进行。
 - (2) 如 ——
 - (a) 任何一方提出申请; 或
 - (b) 法院在任何个别个案中,信纳上述法律程序应在公开法庭进行审理, 法院可命令该法律程序在公开法庭进行审理。

•••

17. 对以非公开审理方式进行审理的法律程序的报导的限制

- (1)本条适用于在法院以非公开审理方式进行审理的、本条例所指的法律程序(非公开法院程序)。
- (2)法院在审理非公开法院程序时,须应任何一方的申请,作出哪些关乎该程序的资料(如有的话)可予发表的指示。
 - (3)除非符合以下条件,否则法院不得作出准许发表资料的指示 ——
 - (a) 所有各方均同意该等资料可予发表;或
 - (b)法院信纳如发表该等资料的话,并不会透露任何一方合理地希望保密的任何事宜(包括任何一方的身分)。
 - (4)尽管有第(3)款的规定,如法院 ——
 - (a)就非公开法院程序作出判决;及
 - (b)认为该判决具有重大法律意义,

法院须指示该判决的报告可于法律汇报及专业刊物发表。

- (5)如法院根据第(4)款指示,判决的报告可予发表,但任何一方合理地希望 隐藏该等报告中的任何事宜(包括他是该方的事实),则法院须应该方的申请 —
 - (a)就采取何种行动以隐藏该等报告中的该项事宜,作出指示;及
 - (b)(如法院认为,按照根据(a)段作出的指示而发表的报告,依然相当可能会 透露该项事宜)指示在某段限期内不得发表该报告,该限期由法院指示,但

有说法是应将《仲裁法》进行修改,只有特定领域/类别的仲裁才能享有机密性,而其他所有的仲裁都应公 开审理让公众进行监督。 ,,

英国的《Arbitration Act 1996》中没有条文针对仲裁的私密性(privacy)或机密性。在 Saville 勋爵作为主席的 Departmental Advisory Committee 的报告中解释说是因为机密性有太多的例外情况,如果要在立法中一一针对会有很大困难,而立法条文也会阻碍这个领域的案例法针对一些目前难以预测但将来可能会出现的例外情况的发展。目前这方面的英国普通法地位是 Potter 大法官在 Ali Shipping Corporation v. Shipyard Trogir (1999) 1 WLR 314 先例中所说:

"While ... the boundaries of the obligation of confidence ... have yet to be delineated ... the manner in which that may best be achieved is by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in the light of the particular circumstances and presumed intentions of the parties at the time of their original agreement."

因此,仲裁的私密性与机密性是英国法律的默示地位,除非有一些法律规定的例外情况或是双方明示约定,否则是普遍性适用在伦敦仲裁。在英国法院进行的与仲裁有关的诉讼仍可以在内庭不公开审理(heard in chambers),判决书也以编辑或匿名的形式公布,非诉讼方一般也无法获得相关的法院记录。在 Glidepath Holding BV v. Thompson (2005) EWHC 818 (Comm)先例, Glidepath 声称 Thompson 先生等被告欺诈并开始诉讼,但因为双方存在仲裁协议,该法院诉讼程序中止(stay)让双方通过仲裁解决争议。 Onwuka 先生作为非诉讼方向法院申请获得该诉讼的法院记录。 Colman 大法官判是如果没有仲裁双方的同意或其他特殊原因(作为对仲裁机密性的例外),法院会支持保护仲裁程序的机密性而拒绝其他第三方/非诉讼方获得有关的法院文件(court documents)。

Ali Shipping Corporation v. Shipyard Trogir 先例也针对了可作为仲裁机密性的例外的特殊情况,其中一个例外情况是"公正利益"(interest of justice)。这一个课题在笔者的《仲裁法——从 1996 年英国仲裁法到国际商务仲裁》(2006 年)一书第十三章之 2 段有详论。

在近期的 The Chartered Institute of Arbitrators v. B, C and D (2019) EWHC 460 (Comm)先例中,案情涉及第一被告 B 是英国特许仲裁员协会(the Chartered Institute of Arbitrators,简称"CIArb")的一名仲裁员。第二被告 C 与第三被告 D 产生合约争议,B 被委任为独任仲裁员。C 对仲裁庭的公正性持有异议,B 作为仲裁员在开庭后认定他在案件中不存在利益冲突关系。C 上诉法院,根据《Arbitration Act 1996》之 section 24(1)(a)主张具有正当的依据怀疑该名仲裁员的公正性,请求法院撤换该名仲裁员。高院的 Hamblen 大法官认定,B 表面看来存在具有偏见的真正可能性,应将其赶走。之后 B 辞去仲裁员职务,而 CIArb 决定对其提出纪律指控(disciplinary charges),并将其提交至纪律审裁小组(disciplinary tribunal)。

在 2018 年 6 月 4 日, CIArb 根据 CPR rule 5.4C 向法院提出申请,请求法院命令允许它检查或获取(或命令 C 向它提供)下列文件:(1)案件陈述(Statements of Case);(2)证人证言(Witness Statements)与附件(Exhibits);(3)书面陈述以及争辩大纲(Written Submissions and Skeleton Arguments)。

Moulder 大法官行使了他的裁量权(discretion)支持 CIArb 并依赖了 Ali Shipping Corporation v. Shippard Trogir 先例中提到的公正利益这一仲裁机密的例外情况。仲裁员在提供服务的质量与标准方面能否保持高水平,特别是当仲裁员属于一个被公众认可的专业组织如 CIArb 时,能否保证会员达到明示条例规定的一个最低标准与操守,并让该专业组织能够执行这一个标准涉及重大的公众政策/利益。法院应该支持仲裁,也要支持与协助 CIArb 执行其标准。

在做出权衡时,Moulder 大法官也考虑到赶走仲裁员(B)的程序已经走完,而 B 也已经辞去仲裁员职务。Hamblen 大法官已在其判决中将相关文件的主要内容披露,即使这些文件不是已经进入了公有领域,仍是对 D 的伤害有限。所以 Moulder 大法官最终命令允许 CIArb 获得案情陈述、证人证言与附件。如果法院已经不再保存这些文件,就命令由 C 提供副本。

1.5 法院开庭时做法的改变

已经在本章之 1.3 段提到,近年来法院开庭时的做法有了很大的改变(事实上仲裁的开庭也是同样)。现在口头陈述/争辩(oral advocacy)已经逐渐被书面文件取代/补充,如争辩大纲(Skeleton Arguments)、开庭陈词(Opening Submissions)、代替主证据/主盘问(Evidence-in-chief/Examination-in-chief)的证人证言(Witness Statements)等。这种改变是为了提高开庭的效率与节省时间(开庭可以非常昂贵)。另一方面也可以确保双方在开庭前就已经知道双方的底牌,特别是可以提前对对方证人的传闻证据(hearsay evidence)进行调查,不会在开庭时被对方诉讼方突袭。

在十分近期的 Blue v. Ashley (2017) EWHC 1553 (Comm)先例,有关的争议是作为非诉讼方的媒体(《泰晤士报》)能否在开庭前获得证人证言²³。Leggatt 大法官对现在在 CPR 下民事诉讼中开庭时对盘问证人的做法的改变,说:

"Historically in civil cases (as it still is today in criminal proceedings) the giving of evidence by witnesses at a trial was an entirely oral process. First, counsel for the party calling the witness would ask questions to elicit evidence from the witness 'in chief'. Then counsel for the opposing party would cross-examine the witness.²⁴ Traditionally, the parties to the litigation and their counsel would have no

²³ 关于非诉讼方能否在开庭前获得证人证言可见本章之 1.7.1 段。

²⁴ 历史上民事诉讼的做法(今天刑事诉讼仍是同样做法)是证人的证据全部以口头做出。先是证人一方的代表大律师向证人提出针对性的开放式问题(specific open question)令证人说出主证据,也就是证人的"故事"或所知道的事实真相。之后对方代表大律师会反盘问/交叉盘问(cross-examination)证人,去丑化或澄

notice of what witnesses of fact called by opposing parties were going to say in evidence until they said it.²⁵ That began to change after provision for written witness statements was first introduced in certain parts of the High Court, including the Commercial Court, in 1986.²⁶ Under the modern CPR parties are required to serve witness statements in advance of a trial. A witness statement is defined in the Rules as 'a written statement signed by a person which contains the evidence which that person would be allowed to give orally': see CPR r 32.4.²⁷ The purpose of requiring such statements to be served is twofold. First, it enables parties to prepare for trial with notice of the evidence which the other side may adduce. This avoids unfair surprise and enables rebuttal evidence to be obtained where necessary and cross-examination to be better prepared. It also allows each party to make a fuller assessment of the strength of the other party's case, which may facilitate settlement.²⁸ The second purpose of witness statements is to make the trial process more efficient by saving the time that would otherwise be taken up by oral evidence given in chief. Instead of such oral evidence, the witness is simply asked to identify their statement and confirm their belief that its contents are true.²⁹"

最开始顺应这种做法上的变化的是上诉庭的 GIO Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Association Ltd (1999) 1 WLR 984 先例。当时的《Rules of the Supreme Court》(简 称 RSC) 不像 CPR 有明示针对, 所以法院是根据其有潜在管辖权合理改动自己 的程序(inherent jurisdiction to regulate own procedures)与公开审理原则(open justice principle)作出决定。在该先例,法院判是非诉讼方(non-litigant/non-party) 可以获得可被当做在法官面前读出来的文件(can be treated as read out in open court to the judge)。因此,非诉讼方表面(prima facie)有权获得取代主证据的 证人证言或代替口头开庭陈词的争辩大纲。

在CPR下的 SmithKline Beecham Biologicals SA v. Connaught Laboratories Inc (1999) 4 All ER 498 上诉庭先例, 法院判法官提前阅读有关的文件是现代的法院 诉讼中非常重要的一部分。法官是在开庭时还是审前在庭外读过有关的文件并没 有本质上的分别。

接着在 Barings Plc v. Coopers & Lybrand (2000) 1 WLR 2353 先例, 上诉庭说 是鉴于不可能知道法官到底有没有在审前读过有关的一些文件,唯一可行的解决

清他/她的所谓事实真相。

²⁵ 传统上做法是双方代表大律师不会被预先通知对方的证人会说什么,直至他/她在法庭上说了出来。

²⁶ 这历史上或传统上的做法在1986年开始在部分高院(特别是一般处理比较复杂的案件的商业法院)有 了改变。

²⁷ CPR 要求双方诉讼方在开庭前交换书面证人证言,内含所有证人要说的主证据并且签名。

²⁸ 这种做法上的改变主要有两个原因: (一)可以防止一方在开庭时突袭,双方审前都知道对方底牌就可 以更好地准备反盘问,如提前调查对方证人的证言,特别是涉及传闻证据(hearsay evidence)的部分(将 在本书第十二章之4.3.2.2段详述),是否属实或全面。这与传统做法上在开庭时才听到从而来不及调查, 只能让对方证人"自说自话"很不一样。(二)更全面知道双方底牌,就有更大的机会在开庭前达成和解。 29 节省开庭时间,因为主盘问会很花时间。

办法就是让反对非诉讼方/公众获得有关文件或信息的诉讼方(litigant)承担证明法官没有读过有关的文件因此文件没有进入公有领域(public domain)的责任。这显然是不容易证明,也对诉讼方希望能够保护隐私与机密十分不利。

在稍后的 Eurasian Natural Resources Corporation Ltd v. Dechert LLP (2014) EWHC 3389 (Ch)先例(已在本章之 1.1 段详细介绍),案情涉及原告要求法院核算(tax/assess)前律师 Dechert 高达 1,600 多万英镑的律师费。本书第十二章之 2.1.1.1 段在介绍限定弃权(Limited Waiver)时有提到针对这种法院程序,审理的费用法官(Costs Judge)要审阅部分当事方/客户的高度机密与敏感的特免权文件(privileged documents)以肯定律师的收费是否合理。问题是这些法官读过的文件是否进入了公有领域,任由非诉讼方或公众申请检查与获得?

Roth 大法官说法官读过或可以假设读过的为公开审理准备的文件,也可以不属于公开文件。正如 Woolf 勋爵在 Barings Plc v. Coopers & Lybrand 先例中所说: "This is subject to any circumstances of the particular case making it **not** in the interests of justice that this should be the position." (加黑部分是笔者的强调)

Roth 大法官说法院为了公正可以限制非诉讼方获得文件:

"I have no doubt that the present case is one where the interests of justice require that the reading by the costs judge of the papers should not have the effect of putting them into the public domain... Even if I were wrong in that conclusion, I consider that this court can still issue an order preventing further dissemination of the documents. Mr Hollander (Dechert 代表大律师) resisted that position, arguing that since the documents had 'entered the public domain' they were effectively out in the open and could no longer be subject to restriction. I regard that submission as misconceived. When I put it to Mr Hollander that in that case once a judge entered court and said to the parties at the start of the hearing that he had read the papers, the documents were thereby in the public domain and could no longer be subject to restriction, he submitted that the court would retain power until the conclusion of the hearing to restrain dissemination. But I do not see any logical reason why a cut-off should come at that point, so as to deprive an appellate court from imposing a restriction if, for example, it considered that the judge below had wrongly decided this very point." (加黑部分是笔者的强调)

1.6 非诉讼方在 CPR Rule 5.4C 下可获得的文件

CPR Rule 5.4C 下公众(public)或非诉讼方(non-litigant/non-party)可检查(inspect)与获得的法院记录比诉讼方在诉讼程序中能够获得的文件更局限,这显然是可以理解,毕竟他们不是诉讼的当事方或有关方。非诉讼方可获得的文件可分为两类,将在接下来的段节分别介绍。

1.6.1 第一类

第一类文件是文书请求/案件陈述(Pleadings 或 Statements of Case)与法院的公开命令或判决,除非有法院命令禁止提供给非诉讼方,否则非诉讼方可以随意获得。换句话说非诉讼方自动有权(as a matter of right)获得这一类文件。CPR Rule 5.4C(1)说:

- "(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
- (a) a statement of case, but **not** any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it... (b) a judgment order given or made in public (whether made at a hearing or without a hearing)." (加黑部分是笔者的强调)

非诉讼方想要获得这一类的两种文件只需要完成行政上的手续,即递交要求获得文件的表格与支付费用。更重要的是这属于单方面申请(ex parte),不需要法院批准,也不需要通知任何一方诉讼方,也就是说诉讼方因为没有被通知,所以不会知道也没有反对的机会。

而如果诉讼方不希望非诉讼方从中获得一些机密或敏感信息,最好的办法就是在文书请求的正文中只提及存在包含这些信息的文件但不节录内容,而将有关文件作为附件(Exhibits)。附件的特殊之处可见本章之1.7.2段的介绍。

对诉讼方来说另一个可行的办法是向法院申请在 CPR Rule 5.4C(4)下限制公众获得文书请求。法院可以拒绝向非诉讼方提供任何文件,或是只提供编辑过的版本,或限制可获得文件的非诉讼方的用途等。但鉴于这偏离了公开审理的基本原则,十分类似不公开审理,申请不会轻易成功。在 G&G v. Wikimedia (2009) EWHC 3148 (QB)先例,Tugendhat 大法官说:

"... hearings in private under CPR r.39(2)(3) and orders under CPR r.5.4C(4) were derogations from the principle of open justice, they must be ordered only when it was necessary and proportionate to do so, with a view to protecting the rights which claimants and others were entitled to have protected by such means. When such orders were made, they had to be limited in scope to what was required in the particular circumstances of the case."

1.6.2 第二类

第二类文件包括诉讼方向法院递交(file)并在法院档案记录或者与另一方当事方/法院之间交流的所有文件,也就是所谓的"法院记录"(records of the court),非诉讼方必须获得法院批准(permission)才能获得这一类文件。CPR Rule 5.4C(2)说:

"A non-party may, if the court gives permission, obtain from the records of the

court a copy of any other document filed by a party." (加黑部分是笔者的强调)

这立法条文所针对的文件看来可以比 Barings Plc v. Coopers & Lybrand (2000) 1 WLR 2353 先例中规定的可被视为在开庭时读出来的文件广泛得多。特别是如果宽松解释"法院记录"是可以包括所有法院拥有的文件,不论是双方当事方自愿、被强制、被对方或法院要求交出等。由于这些文件有很多(相比严格局限的第一类),也有不同类别与性质,所以与第一类文件不同,需要法院在面对非诉讼方(non-litigant/non-party)或公众(public)申请时行使裁量权(discretion)根据不同案件的情况决定哪份或哪几份文件可以批准被获得与容许检查。在 Dian AO v. David Frankel & Mead (2004) EWHC 2662 (Comm)先例,Moore-Bick 大法官对由于公开审理原则(open court principle)在法院开庭审理时读出来(或可假设在法院读出来)的文件与其他提供给法院存档但不会在开庭审理时针对的大量文件做出了区分。与开庭审理无关的法院记录包括法院为了行政目的要求诉讼方/当事方递交的文件、支持某个中间程序(interlocutory proceedings)申请(但该申请没有开庭)递交的文件等。

Floyd 大法官在 Pfizer Health AB v. Schwarz Pharma AG (2010) EWHC 3236 (Pat)先例将 Dian AO v. David Frankel & Mead 先例对 CPR Rule 5.4C(2)的解释的法律地位总结如下:

"I would summarise these principles as follows:

- i) There is no unfettered right to documents on the court file except where the rules so specify,³⁰
- ii) The requirement for permission is a safety valve to allow access to documents which should in all the circumstances be provided;³¹
- iii) The principle of open justice is a powerful reason for allowing access to documents where the purpose is to monitor that justice was done, particularly as it takes place;³²
- iv) Where the purpose is not to monitor that justice was done, but the documents have nevertheless been read by the court as part of the decision making process, the court should lean in favour of disclosure if a legitimate interest can still be shown for obtaining the documents;³³
- v) Where the principle of open justice is not engaged at all, such as where documents have been filed but not read, the court should only give access where there

³² 让公众监督法院程序是否公正是非诉讼方与公众能获得公开审理案件文件的十分有力的理由,特别是正在进行中的诉讼案件。

³⁰ 除非立法明确规定,否则非诉讼方是没有自由获得法院记录(records of the court)的权利。毕竟很多文件涉及诉讼方的隐私与机密(商业、财务、个人等方面),没有道理作为非诉讼方的第三方可任意获取。

³¹ 所以第二类文件不像第一类文件,要有非诉讼方需要法院批准才能获得文件这一道安全阀。

³³ 非诉讼方必须有合法利益,如是媒体或有其他有关的诉讼,而不能只是多管闲事(busybodies' charter)。

are strong grounds for thinking that it is necessary in the interests of justice to do so.³⁴"

但在 Slater & Gordon (UK) 1 Limited v. Watchstone Group Plc (2017) EWHC 3187 (Ch)先例,Prentis 大法官批评了 Pfizer Health AB v. Schwarz Pharma AG 先例,认为该先例只考虑了高院的 Dian AO v. David Frankel & Mead 先例而没有考虑上诉庭的 Barings Plc v. Coopers & Lybrand 先例。而上述节录的(iii)与(iv)都与Barings Plc v. Coopers & Lybrand 先例的判决有矛盾。Prentis 大法官在 Slater & Gordon (UK) 1 Limited v Watchstone Group Plc 先例支持了 Toulson 大法官在 Guardian News and Media Ltd v. City of Westminster Magistrates Court (2013) QB 618 先例做出的指引,即根据每个案件的不同事实对非诉讼方申请的理由与公开"法院记录"会对诉讼方带来的伤害权衡利弊:

"In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle... However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others." (加黑部分是笔者的强调)

对上述近期先例的一些对 CPR Rule 5.4C(2)的第二类"法院记录"的解读,本章接下去的 1.6.2.2 段会进一步针对与介绍更近期的一个权威性上诉庭先例。这也表示以前的先例,特别是针对 RSC 的先例不再是可靠的先例。

1.6.2.1 非诉讼方/公众向法院申请要求检查与获得第二类文件

非诉讼方(non-litigant/non-party)不必通知诉讼方(litigant)而可去"单方面"(ex parte/without notice)申请第二类文件,但法院一般会要求通知会受法院是否允许非诉讼方检查与获得文件的决定影响的诉讼方,这样一来诉讼方就可以提出反对。但要说服法院不批准非诉讼方的申请必须有特殊的理由,一方(甚至双方)诉讼方只是泛泛与简单说文件有机密性向公众公布会带来损失是不足够。Buxton 大法官在 Lilly Icos Ltd v. Pfizer Ltd (No 2) (2002) 1 WLR 2253 先例判决中列出了一些需要考虑的因素(其中也针对了知识产权案件的特殊性)作为指导,其中提到了这一点,说:

³⁴ 有说法是非诉讼方不能获得没有在公开审理时读出来的文件,因为这与公众监督司法程序没有关系。只有非诉讼方有很强的公共利益的原因时,才会例外。

- "It may be convenient to set out a number of considerations that have guided us.
- (i) The court should start from the principle that very good reasons are required for departing from the normal rule of publicity. That is the normal rule because, as Lord Diplock put it in Home Office v Harman [1983] 1 AC 280 ... 'Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial'. ... The already very strong English jurisprudence to this effect has only been reinforced by the addition to it of this country's obligations under articles 6 and 10 of the Convention (指《欧洲人权公约》).
- (ii) When considering an application in respect of a particular document, the court should take into account the role that the document has played or will play in the trial, and thus its relevance to the process of scrutiny referred to by Lord Diplock. The court should start from the assumption that all documents in the case are necessary and relevant for that purpose, and should not accede to general arguments that it would be possible, or substantially possible, to understand the trial and judge the judge without access to a particular document. However, in particular cases the centrality of the document to the trial is a factor to be placed in the balance.
- (iii) In dealing with issues of confidentiality between the parties, the court must have in mind any 'chilling' effect of an order upon the interests of third parties ...
- (iv) Simple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document. Those reasons will in appropriate cases be weighed in the light of the considerations referred to in sub-paragraph (ii) above.
- (v) It is highly desirable, both in the general public interest and for simple convenience, to avoid the holding of trials in private, or partially in private. In the present case, the manner in which the documents were handled, together with the confidentiality agreement during trial, enabled the whole of the trial to be held in public, even though the judge regarded it as justified to retain confidentiality in respect of a significant number of those documents after the trial was over. The court should bear in mind that, if too demanding a standard is imposed under CPR r 31.22(2) in respect of documents that have been referred to inferentially or in short at the trial, it may be necessary, in order to protect genuine interests of the parties, for more trials or parts of trials to be held in private, or for instance for parts of witness statements or skeletons to be in closed form.
- (vi) Patent cases are subject to the same general rules as any other cases, but they do present some particular problems and are subject to some particular considerations. As this court pointed out in SmithKline Beecham Biologicals SA v

Connaught Laboratories Inc [1999] 4 All ER 498, patent litigation is of peculiar public importance, as the present case itself shows. That means that the public must be properly informed; but it means at the same time that the issues must be properly explored, in the sense that parties should not feel constrained to hold back from relevant or potentially relevant issues because of (legitimate) fears of the effect of publicity. ...

In our view, the same considerations can legitimately be in the court's mind when deciding whether to withdraw confidentiality from documents that are regarded by a party as damaging to his interests if used outside the confines of the litigation in which they were disclosed." (加黑部分是笔者的强调)

1.6.2.2 法院如何行使裁量权?

已经提到过,非诉讼方(non litigant / non-party)或公众(public)向法院申请要求获得法院记录(records of the court)是需要法院批准。这对提供文件的诉讼方(litigant)来说是一道安全阀(safety valve)。

毕竟,第二类文件是会很大量,例如在近期的 Cape Intermediate Holdings Ltd v. Dring (2018) EWCA Civ 1795 上诉庭先例,案情涉及的争议是在笔者其他书籍有详及(如在《损失赔偿与救济》一书第四章之 4.3.3 段)的大量英国退休工人由于在工作期间曾经接触石棉(asbestos)而中毒并患上"间皮瘤"(mesothelioma),会在长达 40 年的潜伏期后病发并很快会死亡。Cape Intermediate Holdings Ltd v Dring 先例不是身为受害人的工人或其家属向前雇主或承保员工责任险(employees' liability)的保险人索赔损失,而是涉及了保险人在赔付工人或其家属后代位求偿(subrogated insurers)向石棉生产商(Cape Intermediate)与有关工人的前雇主要求分摊(contribute)赔付了的钱。有关分摊损失的英国《Civil Liability (Contribution) Act 1978》立法,在笔者《提单与其他付运单证》一书第五章之 17.2.9.4 段有介绍。

只说,这一个代位保险人的两个民事诉讼与分摊索赔,在推进了一段诉讼程序之后,有关当事方(parties)就达成和解。由于诉讼没有继续下去,所以也不存在有公开审理(open trial)与/或案例报告记录诉讼的详情。而本先例是作为非诉讼方的 Dring 先生向法院申请要求批准获得在诉讼的中间程序(包括在文件披露程序)中诉讼方向法院交出的文件。这些文件数量是非常大的,其中纸质文件有大概 5,000 页,共 17 个文件夹,电子文件更是多达了 45,000 页。

已经和解了的诉讼方在获得了有关申请的通知后,只有石棉生产商 Cape Intermediate 出来抗拒与反对法院批准。只要知道 Dring 先生的背景,就很容易理解这背后的原因。Dring 先生是一个名为"Asbestos Victims Support Groups Forum UK"或简称 AVSGF、涉及其他人数众多的石棉中毒受害人的组织代表。显然,对 Cape Intermediate 而言,如果让 Dring 先生获得所有这些在诉讼中全面披露的文件会是后患无穷,因为还有很多石棉中毒的受害人士与相关人士等着向

Cape Intermediate 提起损失索赔。所以 Cape Intermediate 不惜花费大量的诉讼费用去抗拒与反对申请与批准,而反对的理由显然就是文件涉及 Cape Intermediate 作为诉讼方的隐私与机密(包括商业机密)。

在该上诉庭先例,Hamblen 大法官说法院在行使裁量权(discretion)时要考虑与权衡以下 5 个因素:

"As to the principles to be applied when the court is considering whether and how to exercise its discretion to grant permission for copies to be obtained by a non-party of the records of the court under 5.4C(2) the court has to balance the non-party's reasons for seeking copies of the documents against the party to the proceedings' private interest in preserving their confidentiality. Relevant factors are likely to include:

- (1) The extent to which the open justice principle is engaged;
- (2) Whether the documents are sought in the interests of open justice;
- (3) Whether there is a legitimate interest in seeking copies of the documents and, if so, whether that is a public or private interest;
 - (4) The reasons for seeking to preserve confidentiality;
- (5) The harm, if any, which may be caused by access to the documents to the legitimate interests of other parties."

这里只简短以本先例解读以上的因素。首先是(1)与(2),较早的诉讼是庭外和解,根本没有开庭审理。但在公开审理的大原则(open justice principle)下,是有一些文件可以合理假设会在法院开庭审理(如果有)中被读出来或被法官开庭前后阅读。至于(3)有关 Dring 先生的申请,显然在此先例是为了公共利益(public interest),也就是为了其他人数众多的石棉中毒受害人,而不是为了私人利益,例如为了写小说或论文或一个自己的相关案件。涉及合法的公共利益时,法院就更加应该宽松考虑申请。

最后是(4)与(5),可以说 Cape Intermediate 要求法院为它保护机密的原因,以及法院如果批准申请会带来对 Cape Intermediate 的损害表面看是很说得通的。因为接了下来的索赔,在举证方面就可能容易很多,加上这些索赔涉及金额是非常庞大的,在保险可能是赔不了或赔不足情况下会要了 Cape Intermediate 的命,导致破产等等。这是笔者在不知道案件详情的情况下随便讲讲,因为还是要看个别案件的特定案情决定。

只说, 法院在行使裁量权时需要考虑上诉庭所讲的因素, 至于最后的决定是因人(法官)而异。但只要考虑的方向与因素是正确的话, 就没办法批评是错误行使裁量权的判法了。

1.6.2.3 法院记录包括了哪些文件?

CPR Rule 5.4C(2)规定法院有管辖权(jurisdiction)与裁量权(discretion)去 决定非诉讼方(non-litigant/non-party)或公众(public)可检查(inspect)与获 得法院记录 (records of the court)。但 CPR 没有定义"法院记录"到底是包括哪 些文件。虽然一些先例有涉及过,但是直到 Cape Intermediate Holdings Ltd v. Dring (2018) EWCA Civ 1795 上诉庭先例,才有机会权威性针对这个方面。在上一小段 已经提到,该先例涉及大量的文件。如果从字面意思宽松解释,"法院记录"可 以包括几乎所有法院拥有或托管的文件,这也是 Dring 先生作为申请人所主张的 解释。但提出抗拒与反对的 Cape Intermediate 认为"法院记录"只包括为了有关诉 讼而必须"正规制作"(formally create)的文件。显然, Cape Intermediate 的主 张就会大幅度减少非诉讼方可获得的文件,也就是不包括最机密与敏感的"已经 存在的文件"(existing documents),其中主要是在法院诉讼的披露程序中被强制 要求披露的有关(争议)文件(relevant documents)。笔者随意猜测在这大量披 露的已经存在的文件中显然会涉及以前 Cape Intermediate 的业务与营运的文件记 录,其中可能会有10年、20年前已经有关于石棉中毒的危险与怎样减低工人长 时间暴露的风险的报告,但 Cape Intermediate 为了业务或其他原因不去向客户提 出或跟进。又或是 10 年、20 年前就已经有受害工人威胁提起诉讼,但被 Cape Intermediate 私下和解掉等等。这些文件一旦被披露,在将来的其他同类诉讼中 对 Cape Intermediate 来说会是致命。

该先例的一审支持了 Dring 先生或 AVSGF 的主张,就是广泛解释"法院记录",只要是法院在有关案件所拥有的文件都属于"法院记录"。这导致 Cape Intermediate 马上以紧急为由向高院单方面(*ex parte*/without notice)申请禁令(injunction)阻止法院把这些文件交出给 Dring 先生。高院的 Phillips 大法官也作出了临时禁令,直至双方有机会出庭争辩。临时禁令内容也包括了如果 Dring 先生与他的代表律师已经获得了部份文件(事实也是如此),就不准去查阅/检查并必须退还给法院,也要文书告知 Cape Intermediate 的代表律师有关他们已经查阅了什么文件等。

由于这个争议(立法规定的"法院记录"包括了什么文件)的重要性,被批准直接上诉去上诉庭。上诉庭支持 Cape Intermediate 的主张,也就是只局限在法院保存的在诉讼程序中正规制作的文件。Hamblen 大法官说:

"The 'records of the court' are essentially documents kept by the court office as a record of the proceedings, many of which will be of a formal nature. The principal documents which are likely to fall within that description are those set out in paragraph 4.2A of Practice Direction 5A, together with 'communication between the court and a party or another person', as $CPR\ r\ 5.4C(2)$ makes clear. In some cases there will be documents held by the court office additional to those listed in paragraph 4.2A of Practice Direction 5A, but they will only be 'records of the court' if they are of an analogous nature."

上述 Hamblen 大法官提到的 CPR PD 5A 是指 CPR 下法院的操作指引的 "PRACTICE DIRECTION 5A - COURT DOCUMENTS",其中 para. 4.2A 从(a)至(p)列出了双方诉讼方都可以向法院取得的一系列特定文件。例如(c)是索赔书(Claim Form,相等于以前的告票)与双方的文书请求(Statements of Case或以前被称为 Pleadings)。另有(e)是送达证明(Certificate of Service),(h)是向法院申请各种不同命令的通知(Application Notice),(j)是法院公开作出过的判决或命令,(l)是文件清单(List of Documents)³⁵,(m)是存钱入法院通知(Notice of Payment into Court,这是诉讼方[通常是被告]为和解与保护诉讼费用的一种做法³⁶)与(p)是上诉通知(Notice of Appeal)等。

Hamblen 大法官也说到了当事方或诉讼方与法院的书信往来也属于法院记录。还会有其他千变万化的文件,但必须是与 CPR PD 5A para. 4.2A 列出的文件本质上类似的文件才可能属于是法院记录。

这一来,披露程序中的文件清单是法院记录之一,但这不包括清单中双方诉讼方所列出的文件。而用来作为证据去支持向法院作出各种申请(如中间禁令)的证人证言与附件会是法院记录,但双方诉讼方在开庭审理前同时交换的证人证言(与专家报告)由于通常是不要求同时递交给法院,就不是法院记录。Hamblen大法官针对这方面说:

"This will include a list of documents, but not the disclosed documents themselves. It may include witness statements and exhibits filed in relation to an application notice or Part 8 proceedings (see CPR r 8.5), but not usually witness statements or expert reports exchanged by the parties in relation to a trial. Such statements and reports are not generally required to be filed with the court and they will typically be provided to the court only as part of the trial bundles."

而重要的开庭案卷(Trial Bundles),在此先例估计也是 Cape Intermediate 最为重视与包含大量隐私与机密文件的一项,明确是不被包括在 CPR Rule 5.4C(2)的法院记录中。Hamblen 大法官给了多个不包括的原因,可节录如下:

"Trial bundles cannot be regarded as being part of the 'records of the court' for a number of reasons ... in particular:

(1) Trial bundles are provided for the judge. They are for the judge to use, mark, annotate, re-order or edit as he or she thinks fit. In so doing, no judge would consider that they were adulterating 'records of the court'.

³⁵ 在本书第七章之 9.3 段有介绍。

³⁶ 见《仲裁法——从开庭审理到裁决书的作出与执行》(2010年)一书第一章之 5.3.3.3.6.1 段。

- (2) Trial bundles may pass through the court office en route to the judge, but the court office has no interest in or role in relation to trial bundles, other than acknowledgment of their receipt.
- (3) Trial bundles are routinely destroyed by the judge or (if applicable) his/her clerk after the conclusion of proceedings. This would not be appropriate if they were "records of the court". But nor, often, would it be appropriate to return the judge's bundles, not least because they are likely to contain comments and annotations. Whilst redaction of comments/annotations might be possible that would probably have to be carried out by the judge or his/her clerk and would in any event reveal the fact of comment/annotation. In many cases there would therefore need to be the creation of a new set of unmarked trial bundles.
- (4) Trial bundles are not stored in the court office, nor are they only taken out of the office with the permission of the court, as paragraph 5.5 of Practice Direction 5A requires.
- (5) The administrative burden for the court office storing trial bundles would be enormous, particularly if they had to be retained as 'records of the court' even after the conclusion of proceedings. Trial bundles routinely run to thousands of pages and multiple bundles. In heavy commercial litigation, for example, there will often be over 100 files of trial documents.
- (6) The procedure for obtaining copies of documents from the 'records of the court' involves the court office taking and providing copies. Such a procedure clearly contemplates a limited copying exercise. It cannot have been intended that court officers would have to copy thousands of documents, as would be the case with many trial bundles.
- (7) The application for permission for copies to be obtained requires 'the document or class of document' to be identified paragraph 4.3 of Practice Direction 5A. A trial bundle is not a 'document or class of document'."
- 这一来,不属于法院记录,法院没有管辖权让非诉讼方或公众检查与获得的文件(除非在公开审理时被读出来或可假设被读出来)是: 开庭案卷(Trial Bundles)、开庭审理双方交换的证人证言与专家报告(Trial Witness Statements/Trial Expert's Reports)³⁷、争辩大纲(Trial Skeleton Arguments)或开庭陈词或结案陈词(Opening or Closing Submissions)、庭审记录(Trial Transcripts)。

³⁷ 但没有开庭审理,这证人证言(Trial Witness Statement)也就变不了主证据,更加不会有反盘问。这份文件也就变了是与公开审理原则(Open Justice Principle)无关。在 CPR Rule 32.13(1)下将证人证言提供给非诉讼方或公众检查,将在本章稍后的 1.7.1 段针对。

但法院在普通法下还有一个潜在的管辖权 (inherent jurisdiction) 去批准非诉讼方或公众检查与获得法院记录以外的文件。Guardian News and Media Ltd v. City of Westminster Magistrates Court (2013) QB 618 先例确认说可根据公开审理原则(open justice principle)在不同案件适用,也就是说虽然没有立法权力,但只要立法也没有禁止,法院仍有潜在管辖权作出批准。这可节录 Charles Hollander QC 的《Documentary Evidence》(2018 年,第 13 版)一书之 6-08 段所说如下:

"... Guardian also confirms that, subject to any statutory provision, the courts have an inherent jurisdiction to determine how the open justice principle should be applied. It follows that, even in the absence of a relevant statutory power, unless they are precluded by statute, the courts have power at common law to grant access to documents if the open justice principle requires this.

The problem with this, is that CPR 5.4C makes express provision for the circumstances in which in civil cases the court may make documents available. So the jurisdiction is based on the common law, how does it interreact with the specific provisions of CPR 5.4C? This is problematic. Thus in Blue v Ashley (2017) EWHC 1553 (Comm), in the light of Guardian, Leggatt J said that the court had an inherent jurisdiction to make orders giving effect to the principle of open justice notwithstanding not being covered by any express rule. Previous authorities had looked at the power to make orders depending on whether the case fell within CPR 5.4C. But if the court is not limited by the rule, how can one determine in any given case whether an order should be made? And what is the status of those authorities which rely on the limitations in 5.4C as a reason for not making an order?" (加黑部 分是笔者的强调)

1.6.3 在公开审理时读出来或应被当做已经读出来的文件

一般来说,法院会允许非诉讼方(non-litigant/non-party)或公众(public)获得在公开审理时读出来或应被当做已经读出来的文件。根据 Guardian News and Media Ltd v. City of Westminster Magistrates Court (2013) QB 618 上诉庭先例,在公开审理原则(open justice principle)下如果没有什么特别原因,这类文件理所当然应该提供给非诉讼方或公众,申请人向法院要求批准时看来也不必证明是为了什么合法原因。这可节录 Charles Hollander QC 的《Documentary Evidence》(2018年,第 13 版)一书之 6-09 段所说如下:

"In the light of Guardian, if a document has been read out or treated as read out in open court, the default position will be access. In Slater & Gordon (UK) 1 Ltd v Watchstone Group Plc Deputy Registrar Prentis held that as a result of Guardian, some previous authorities which suggested that there was a burden on the applicant had to be treated with caution." (加黑部分是笔者的强调)

以上提到的曾经要求作为申请人的非诉讼方提供证据说明获得文件的原因,

但现在不再可靠的先例是指 Dian AO v. David Frankel & Mead (2004) EWHC 2662 (Comm)与 Pfizer Health AB v. Schwarz Pharma AG (2010) EWHC 3236 (Pat) 等先例。但申请人不提供证据也有危险,在 Blue v. Ashley (2017) EWHC 1553 (Comm)先例,Leggatt 大法官就在申请人没有提供任何证据的情况下,推定(infer)申请人想要在开庭审理前获得在中间程序开庭时提到的一份证人证言(Trial Witness Statement)的目的,是提前对证人在接下去的开庭审理时会提供的证据作出报道。Leggatt 大法官认为这与公开审理原则无关而拒绝批准。

至于这是针对中间程序的开庭还是针对实体争议的开庭并不重要。在 Cleveland Bridge UK Ltd v. Multiplex Constructions (UK) Ltd (2005) EWHC 2101 (TCC)先例,媒体在针对实体争议的开庭前要求获得双方的文书请求(Statements of Case),而这些文书请求在之前的中间程序针对特定披露(specific disclosure)的公开审理中已经被提及。Wilcox 大法官说:

"There can be no legitimate distinction drawn between decisions made in interlocutory proceedings and those at final trial when the requirement for open justice is considered. Interlocutory decisions may often be decisive as to the whole or a significant part of a complex case."

另在 Chan U Seek v. Alvis Vehicles (2004) EWHC 3092 (Ch)先例,案情有关军车制造商 Alvis Vehicles 在 20 世纪 90 年代将一批军车卖给了外国政府,新加坡商人 Chan U Seek 声称他可以从中抽取佣金但 Alvis Vehicles 否认。在公开审理时,双方都有证人出庭接受盘问并以证人证言代替主证据(evidence-in-chief)。因为其中一位证人要在几天后才有时间接受盘问,所以开庭暂停推迟几日继续。在期间双方达成了和解(settlement),和解协议机密(至于如何保持机密可见本章之1.7.6 段)。但随后作为非诉讼方的《卫报》认为 Chan U Seek 的争辩大纲中提到的部分内容公众会有兴趣(估计交易背后涉及一些政治敏感信息)。于是《卫报》向法院申请获得证人证言³⁸,Chan U Seek 不反对,但 Alvis Vehicle 反对。法院最后判是 Alvis Vehicle 无法证明《卫报》获得有关文件会对它带来什么真正的损害,支持了《卫报》的申请。

1.6.4 没有在公开审理时读出来的文件

这种情况经常遇到,例如在 Chan U Seek v. Alvis Vehicles (2004) EWHC 3092 (Ch)先例与 Cape Intermediate Holdings Ltd v. Dring (2018) EWCA Civ 1795 上诉庭先例,双方诉讼方在开庭审理前达成和解。或是类似 Eurasian Natural Resources Corporation Ltd v. Dechert LLP (2014) EWHC 3389 (Ch)先例的情况或是中间程序的命令等,需要在内庭(Chambers)不对外公开审理。在这种案件,非诉讼方(non-litigant/non-party)或公众要检查与获得法院在作出决定时应该查阅过的文件,就有一定的难度与举证责任。主要是此时公开审理原则(open justice principle)

³⁸ 关于证人证言,可见本章稍后的1.7.1 段。

不适用,申请人需要显示法院应提供这些特定文件的其他合法理由(legitimate reason)。这可节录 Charles Hollander QC 的《Documentary Evidence》(2018 年,第 13 版)一书之 6-10 段所说:

"Here different principles apply. A starting point in determining when access should be given to documents on the court file which are not treated as read out in open court is to recognise that third parties cannot be in a better position than the parties themselves. If a party wishes to use documents disclosed for a purpose other than for the purpose of the proceedings, an application must be made under CPR 31.22. Such an order requires special circumstances to be shown. So the test must be at least as stiff for a non-party. Moreover, the starting point is that open justice, as Toulson LJ mad clear in Guardian, is to enable the public to understand and scrutinise the justice system of which the courts are the administrators. In a case where the documents have not been read in open court, that principle will not normally be engaged so some special reason needs to be demonstrated. But as with CPR 31.22, there will be cases where it is possible to cross the necessary threshold. The cases will be fact-specific but the court is likely to have in mind the principles set out above as a starting point."

例如在 Sayers v. SmithKline Feecham Plc (2007) EWHC 1346 (QB)先例,法院是允许作为申请人的美国卫生及公共服务部部长获得有关疫苗诉讼中被告(生产疫苗的公司)提供的一份专家报告,并在美国的同类诉讼中使用。但原告(受疫苗影响的集体受害人)反对,其中的理由之一是违反 ECHR 之 Article 8 与《Data Protection Act 1998》。法院认为申请涉及重大的公共利益,所以批准了申请。而针对原告的忧虑,法院命令在披露有关的专家报告前,要遮盖所有涉及个人隐私的信息。

另在 Pfizer Health AB v. Schwarz Pharma AG (2010) EWHC 3236 (Pat)先例,案情涉及一个药品专利(patent)的争议,但原告中途撤案(discontinued)。作为申请人的非诉讼方向法院申请获得该案中的有关文件。法院批准了申请,因为申请人也在这个行业,所以有合法理由知道诉讼方相互指控的原因。

在 Cape Intermediate Holdings Ltd v Dring 先例,上诉庭推翻了一审命令后并没有另作出命令批准 Dring 先生在公开审理原则下可以检查与获得什么特定文件(肯定比一审要局限多了)。但看来是 Dring 先生代表石棉受害人组织 AVSGF 申请文件是为了一个合法的公共利益(legitimate public interest),所以鼓励双方当事方合作同意 Cape Intermediate 提供检查的文件。如果不能同意,再向上诉庭申请最后命令。

1.6.5 非诉讼方的申请必须明确特定文件与类别

在 CPR Rule 5.4C(2)下,申请获取法院记录(records of the court)与/或其他 开庭审理的大量文件时,必须明确是哪一份特定文件或哪一类特定文件。 在 Dian AO v. David Frankel & Mead (2004) EWHC 2662 (Comm)先例,非诉讼方要求获得诉讼方递交给法院的所有文件以对其他有关诉讼提供帮助。但 Moore-Bick 大法官拒绝了这一个没有明确任何特定文件的申请,认为 CPR Rule 5.4C(2)下不允许非诉讼方检查整个法院的档案或以钓鱼取证/摸索证明(fishing expedition)方式³⁹要求法院记录。但针对申请中特定或明确指出的公开审理的文件,Moore-Bick 大法官认为非诉讼方证明了自己利益相关并且有合法理由(但本章之 1.6.3 段已经提到申请人没有举证责任),所以支持了这部分的申请。

在 Pfizer Health AB v. Schwarz Pharma AG (2010) EWHC 3236 (Pat)先例,非诉讼方泛泛要求所有可被允许(allowable)获得的法院记录。法院判这不是一个适当的申请,于是非诉讼方将申请的文件范围限制在了关于药品专利的有效性的文件,包括:(1)抗辩书;(2)被告有关专利无效的反索赔与修改后的反索赔;(3)被告认为专利无效的理由与修改后的理由;(4)对法院命令的申请;(5)有关专利有效性测试的文件。

因为诉讼双方都没有反对,法院最终允许非诉讼方获得:(1)修改后的专利无效的理由;(2)Stephen Francis Jones 的第二份证人证言(但不包括附件);(3)Robert Wallis 博士的专家报告(但不包括附件);(4)原告要求修改其中一个有关专利规格的程序的原因陈述(Statement of Grounds);(5)被告针对该申请的反对陈述(Statement of Opposition)。

Dian AO v. David Frankel & Mead 先例中说相比已经结束的诉讼,法院更愿意让非诉讼方获得进行中的诉讼的有关文件(作为非诉讼方的申请人有合法利益做出申请)。这是因为公开审理原则(open justice principle)最主要的目的是监督进行中的法院诉讼程序,而不是在程序完成后"事后诸葛亮"地挑毛病或是个人原因如写小说。但在 Slater & Gordon (UK) 1 Limited v. Watchstone Group Plc (2017) EWHC 3187 (Ch)先例,Prentis 大法官批评了这种说法,认为既然公开审理原则是公共政策就不应该随着时间过去就有所改变。

1.7 特定类型的文件

1.7.1 证人证言 (Witness Statement)

非诉讼方在 CPR Rule 5.4C(2)下只可以获得法院记录(records of the court),这通常不包括开庭审理的证人证言,因为证人证言只是诉讼双方交换而没有递交给法院(即使之后被包括在了开庭案卷中)。在 British Arab Commercial Bank v. Algosaibi Trading Services (2011) EWHC 1817 (Comm)先例,Flaux 大法官说在商

³⁹ 在《Dicey, Morris & Collins, The Conflict of Laws》(2012 年,第 12 版)之 Para.8-103 说: "Fishing' arises where what is sought is not evidence as such, but information which may lead to a line of enquiry which would disclose evidence; it is a search, a roving enquiry, for material in the hope of being able to raise allegations of fact."

业法院证人证言不属于法院记录的一部分,因此 CPR Rule 5.4C(2)不适用。

但在本章之 1.6.2.3 段已经提到,Hamblen 大法官在 Cape Intermediate Holdings Ltd v. Dring (2018) EWCA Civ 1795 上诉庭先例中说,针对 CPR Part 8程序(适用在部分争议,如不需要法院认定事实的争议),证人证言通常属于法院记录的一部分。在之后的 The Chartered Institute of Arbitrators v. B, C and D (2019) EWHC 460 (Comm)先例,Moulder 大法官也确认了这个说法。

如果证人证言因为法院在 CPR Rule 3.2(3)(b)下做出的命令或因为双方自愿递交给法院,那么情况就会有所不同,例如在审理前复核(pre-trial review 或 PTR) ⁴⁰时被递交给法院。另外,诉讼方申请法院作出中间程序命令时也会向法院递交证人证言(或誓章[affidavit])作为支持申请的证据,从而成为法院记录或法院档案(court file)的一部分。在涉及药品专利的 Pfizer Health AB v. Schwarz Pharma AG (2010) EWHC 3236 (Pat)先例,法院允许非诉讼方获得为了支持对中间命令的申请而做出的证人证言。

如果真的有开庭审理,非诉讼方可以根据 CPR Rule 32.13(1)检查代替主证据的书面证人证言:

"A witness statement which stands as evidence in chief is open to inspection during the course of trial unless the court otherwise directs."

表面看来,CPR Rule 32.13(1)没有给非诉讼方在公开审理前或中途和解(因而不会开庭让证人出庭作证)的诉讼中获得证人证言的权利。本段稍后介绍的Blue v. Ashley (2017) EWHC 1553 (Comm)先例解释了这背后的原因,简单说,代替主证据的书面证人证言的内容会有倾向性(偏袒证人一方当事方)、不真实或乱指控他人(进而会是诽谤)等等。在开庭审理时,对方诉讼方/当事方可以通过反盘问(cross-examination)丑化主证据,不真实或乱指控之处会被纠正(证人自己也会改口)等等。但如果没有开庭只是让公众或非诉讼方看证人证言这份文件,就会带来严重误解与后果(例如证人被其他人起诉诽谤)。另根据该立法条文的用字非诉讼方只是有权检查(inspect)证人证言而不是获得复印件。但在《Documentary Evidence》(2018 年,第 13 版)一书之 6-14 段说 CPR Rule 32.13(1)的目的是让旁听公开审理的非诉讼方能够跟上反盘问的内容。所以法官会倾向于对在证人出庭作证前就向非诉讼方提供证人证言宽松对待。Flaux 大法官在 Arab Commercial Bank v. Algosaibi Trading Services (2011) EWHC 1817 (Comm)先例也支持这种说法:

"… in the context of a situation where it is anticipated that the witness will give evidence … the court would have had **an inherent jurisdiction** to say it is appropriate that (非诉讼方) should have the witness statements now **before the witnesses go into**

⁴⁰ 通常法院会在一些复杂案件召开审理前复核,时间会在开庭审理前 10 周或以上。作用是看双方是否已经履行了法院之前做出的中间命令(如披露特定文件等),并对即将来临的开庭做出程序上的指令。法院也会肯定双方知道对方的说法与立场/地位,以免开庭时被对方突袭或没有准备好出庭。此外也会看双方会否趁机达成和解等等。

the witness box so they do not have to be produced on a piecemeal basis."(加黑部分是笔者的强调)

这带来了一个问题,就是非诉讼方在开庭前多久才能获得证人证言?根据刚刚节录的 Flaux 大法官的判词,法院在证人进入证人席前不久才有潜在管辖权将证人证言提供给非诉讼方。

在近期的 Blue v. Ashley 先例,高院判非诉讼方不能在开庭前提前获得证人证言。Leggatt 大法官判诉讼方提前递交的证人证言⁴¹在开庭前都不属于进入了公有领域,因为该证人可能不会在开庭时被传召出庭作证,他提交的证人证言也就不会成为开庭审理的证据。Leggatt 大法官说:

"It is, however, important to notice that it is only when a witness is called to give oral evidence in court that their statement becomes evidence in the case: see CPR r 32.5. Until then, its status is merely that of a statement of the evidence which the witness may be asked to give. Thus, it quite often happens that a party serves a witness statement from a person who is not in the event called to give oral evidence at the trial. In that event the person's statement may be admissible as hearsay evidence and may then be admitted in written form; or the statement may not be put in evidence at all—in which case it never becomes part of the material on which the case is decided.

When a witness statement forms part of the evidence given at a trial, the principle of open justice requires that a member of the public or press who wishes to do so should be able to read the statement—in just the same way as they would have been entitled to hear the evidence if it had been given orally at a public hearing in court. That is the rationale for the right of a member of the public under CPR r 32.13 to inspect a witness statement once it stands as evidence-in-chief during the trial, unless the court otherwise directs. But there is no corresponding right or reason why a member of the public or press should be entitled to obtain copies of witness statements before they have become evidence in the case."

Leggatt 大法官分析了提前向非诉讼方提供证人证言的利弊,认为带来的损害是超过了好处,虽然可以让非诉讼方(在该先例就是《泰晤士报》)在开庭时能跟上反盘问的内容,但损害是更明显:

"I also accept the argument ... that there are positive reasons why it is generally undesirable for witness statements to be made public before such statements are put in evidence at a court hearing. A witness statement may contain assertions

⁴¹ 在 Blue v. Ashley (2017) EWHC 1553 (Comm)先例,Ashley 先生逾期申请递交一份专家证人报告(expert evidence)。为了准备针对该申请的开庭,双方制作了一份案卷,其中包括 Ashley 先生与 Blue 先生将在针对实体争议的公开审理上作为主证据的证人证言。法官被要求阅读这两份证人证言,并且双方在针对该申请的争辩时都有提到这两份证人证言。

which are defamatory of another party and the truth of which is disputed.⁴² When such assertions are made by a witness in evidence given in court, the witness is protected by immunity from suit.⁴³ As explained by Lord Wilberforce in Roy v Prior [1971] AC 470:

'The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover, the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence.'

The safeguards referred to by Lord Wilberforce do not apply to statements made by a prospective witness which have not been given in evidence. Yet if such statements were made public pursuant to an order of the court, a person who complained that a statement contained assertions that were untrue and defamatory of him would have no recourse against the author of the statement, who would not be responsible for its publication, nor against the publisher (who would be protected by qualified privilege unless the publication was malicious) and at the same time would also lack the opportunity for rebuttal and correction provided by the trial process. 44 That does not strike a fair balance between the relevant interests. In addition, fair and accurate reporting of proceedings is promoted if a witness statement is put into the public domain only when it becomes evidence and its contents can also be tested and contested in a public trial."

在更近期的 Cape Intermediate Holdings Ltd v. Dring (2018) EWCA Civ 1795 上诉庭先例,Hamblen 大法官说到法院在开庭审理时与开庭审理后都可以批准非诉讼方或公众检查与获得证人证言(与专家报告),无论是开庭审理结束还是开庭中途和解,重点是看证人证言是否正式已经成为了法院证据的一部分。Hamblen 大法官说:

"Under CPR 32.13 non-parties have the right to inspection of witness statements which stand as evidence in chief during the course of the trial. The current rule provides as follows:

'(1) A witness statement which stands as evidence in chief is open to inspection

⁴³ 证人在开庭时做出这种指控是享有豁免权的保护,Wilberforce 勋爵在 Roy v. Prior (1971) AC 470 先例解释这是为了鼓励证人能无畏无惧地在庭上作证去说出真相,不担心得罪任何其他人。

⁴² 开庭前把证人证言这份文件公开给公众会有不理想的后果。证人证言通常有对其他人的指控,真实性有争议,甚至可能会构成诽谤。

⁴⁴ 如果法院下令把书面证人证言公开给公众,认为自己被诽谤的人士不能起诉证人(因为文件不是证人自己公开或提供的),也不能去起诉法院(有特免权),还因为最终没有开庭审理导致没有机会反驳或纠正该不真实的指控。

during the course of the trial unless the court otherwise directs.

- (2) Any person may ask for a direction that a witness statement is not open to inspection.
- (3) The court will not make a direction under paragraph (2) unless it is satisfied that a witness statement should not be open to inspection because of
 - (a) the interests of justice;
 - (b) the public interest;
 - (c) the nature of any expert medical evidence in the statement;
 - (d) the nature of any confidential information (including information relating to personal financial matters) in the statement; or
 - (e) the need to protect the interests of any child or protected party.
 - (4) The court may exclude from inspection words or passages in the statement.'

Unless a contrary order is made, non-parties accordingly have a right of inspection of such witness statements 'during the course of the trial'. ...

Whilst it is correct that it is only 'during the course of the trial' that a non-party may inspect witness statements as of right, in my judgment it does not follow that the court may not allow such inspection thereafter. There may be just as important reasons for seeking to understand proceedings the day after a trial concludes or settles as during the trial itself. If termination of the trial is a complete cut off point, the working of the rule would often be arbitrary; cases may settle at any time, and the likelihood of settlement will usually be unknown to non-parties. Whilst the fact that the trial has terminated and the passage of time may well be relevant to the exercise of the court's discretion to allow inspection of a witness statement, I consider that it should be recognised that the court has inherent jurisdiction to allow inspection after trial of a witness statement which otherwise falls within the pre-conditions for inspection set out in the rule.

In my judgment witness statements in this context includes experts' reports ... An expert whose report stands as his evidence in chief is providing witness evidence, for which his report stands as his statement. This is supported by the reference to expert medical evidence in CPR 32.13(3)(c). Even if that be wrong, I consider that the court's inherent jurisdiction to allow non-parties access to experts' reports should mirror that in relation to witness statements." (加黑部分是笔者的强调)

1.7.2 附件 (Exhibit)

证人证言、专家报告与争辩大纲常常带有附件, 且可能数量巨大。简单说附

件就是一些其他文件(许多是私人文件与在诉讼前已经存在的文件),这些文件并非为诉讼准备而只是为了支持证人证言、专家报告或争辩大纲等,一般只会提及⁴⁵但不会在开庭时被读出。

公众一般可以在开庭后获得证人证言、专家报告与争辩大纲,原因是非诉讼方可以在公开审理时旁听、记录,并在之后引用与复制,这与让公众获得有关文件是没有区别,也符合公开审理原则(open justice principle)。但针对附件与其他类似的文件(尽管这些文件被诉讼方自愿披露,可被认为是诉讼方自己令文件丧失机密性),法院要考虑与权衡的因素更多,如:(1)申请的时间;(2)机密性;(3)文件的版权;(4)第三方的权利等。例如,证人证言中提到的文件是否在商业上或其他方面非常敏感?或者文件是否涉及与第三方的机密交流而第三方曾经要求不能泄露?又或是如果作为非诉讼方的申请人如果能获得文件,那么文件的的全部内容就会被报道或公开?

近期针对这方面的重要先例是 GIO Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Association Ltd (1999) 1 WLR 984 先例,尽管当时英国法院仍是旧的《Rules of Supreme Court》(简称 RSC),但道理也是一样。在该先例非诉讼方在 RSC Ord. 38, r. 2A 下要求检查(inspect)文件并要求获得证人证言中提到的文件。非诉讼方还要求获得争辩大纲、文书请求中提到的所有文件、法官被要求看过的所有文件或需要阅读的清单上的所有文件或在公开审理时提到的所有文件。这申请被法院拒绝,Potter 大法官说:

"It should be noted that the authorities I have quoted and other leading statements on the question of public justice (see for instance Scott v. Scott [1913] A.C. 417, per the Earl of Halsbury, ..., and per Lord Shaw, ..., Rex v. Governor of Lewes Prison, Ex parte Doyle [1917] 2 K.B. 254 ... per Viscount Reading C.J. and Hodgson v. Imperial Tobacco Ltd. [1998] 1 W.L.R. 1056, ..., per Lord Woolf M.R.) deal with the matter in broad terms of 'open doors,' the right of the press and the public not to be excluded, and the need for public announcement of the court's decision. They do not condescend to greater particularity than that and they certainly do not seek to suggest that, in devising and applying its procedures for the expeditious dispatch of judicial business, the public should be given access to such documentary material as may be before the court by way of evidence

. . .

So far as concerns documents which form part of the evidence or court bundles, there has historically been no right, and there is currently no provision, which enables a member of the public present in court to see, examine or copy a document simply on the basis that it has been referred to in court or read by the judge. If and in so far as it may be read out, it will 'enter the public domain' in the sense already

⁴⁵ 这提到的文件在本书第六章之 5 段有针对,也提到在 CPR Rule 31.14(1)(b)下需要提供有关文件让对方诉讼方可以查阅,但这不针对非诉讼方或公众。

referred to, and a member of the press or public may quote what is read out, but the right of access to it for purposes of further use or information depends upon that person's ability to obtain a copy of the document from one of the parties or by other lawful means. There is no provision by which the court may, regardless of the wishes of the parties to the litigation, make such a document available to a member of the public. ..." (加黑部分是笔者的强调)

而在 CPR 下的法律地位可见 British Arab Commercial Bank v. Algosaibi Trading Services (2011) EWHC 1817 (Comm)先例,Flaux 大法官说:

"Exhibits are not covered by CPR r.32.13 and, correspondingly, they are not covered by 32.12. Although ... the rule is cast very widely, it only refers to witness statements and I am simply not prepared to accept that it covers exhibits to witness statements as well. .." (加黑部分是笔者的强调)

在近期的 Nestec SA v. Dualit Ltd (2013) EWHC 2737 (Pat)先例,Birss 大法官不愿意依赖潜在管辖权的说法,认为如果法院存在所谓的潜在管辖权,在起草CPR Rule 5.4C(2)时就会这样明示规定。该先例的案情涉及专利争议,非诉讼方要求法院根据 CPR Rule 5.4C(2)与潜在管辖权提供证人证言的附件与在反盘问中向证人提到的证据与文件(图片、视频与电子邮件等)。Birss 大法官针对法院是否拥有允许非诉讼方获得附件的潜在管辖权说:

"... an important point is that CPR rule 32.12 and 32.13 does not permit a third party having access to exhibits. This is a key problem. ... The rules could have before drafted to permit access to subject to safeguards to both witness statements and other documents, but the rules are not drafted in that way... that cannot have been accidental ..."

《Documentary Evidence》(2018年,第13版)一书之6-15段总结说:

"In British Arab Commercial Bank v. Algosaibi Trading Services, Flaux J held that the position had not changed from GIO in relation to exhibits to witness statements. In other words, if the documents exhibited did not of itself fall within the ruling in Smith Kline Beecham and Barings (so that they were treated as having been read out in open court, normally because they have been included in the hearing or trial bundles and treated as having been read by the judge), the court may not make an order for access..."

最后在 Cape Intermediate Holdings Ltd v. Dring (2018) EWCA Civ 1795 上诉 庭先例, Hamblen 大法官也同样总结说除非有关附件在公开审理时被读出来, 否则法院没有让非诉讼方检查与获得证人证言的附件的潜在管辖权, 说:

"In my judgment there is no inherent jurisdiction to allow inspection of exhibits to trial witness statements simply because they are or were exhibited. The same would apply to documents referred to or exhibited to experts' reports. It will be different if they are read or treated as being read in open court. Moreover, if it is apparent that,

notwithstanding the exercise of a non-party's rights to inspect documents under CPR 5.4C and under the court's inherent jurisdiction and a consideration of the transcript, it is not possible to understand the statement/report without seeing a particular document or documents exhibited, attached or referred to, then I consider that the court would have inherent jurisdiction to allow inspection, as it would be necessary to do so to meet the principle of open justice, as further discussed below."

1.7.3 开庭案卷(Hearing/Trial Bundle)

根据 CPR Rule 39.5(2)原告在开庭前必须准备好包括了双方披露的所有文件的开庭案卷。制作开庭案卷是典型的开庭前的准备工作,主要是为了在开庭时容易寻找(search)与确定(identify)提到的是哪一份文件。而众所周知开庭案卷内的文件大部分(可能高达 95%)都不会也没有必要在开庭时提到或与案件真正有关联,会在开庭时提到与读出或要求去看的内容只是一小部分。这是因为开庭案卷包含披露程序中披露的大部分文件,其中的很多文件(特别是 CPR 之前在对有关文件的定义非常广泛的"Peruvian Guano 考验"⁴⁶下)根本说不上是诉讼方自愿披露。因此,在 Riddick v. Thames Board Mills Ltd (1977) QB 881 先例,上诉庭判是另一方诉讼方与他的律师⁴⁷默示保证不会将披露的文件用于诉讼以外的用途,这被称为是"Riddick 原则"(Riddick Principle)。但这个 Riddick 原则不适用于一方主动披露的文件。

Denning 勋爵解释 Riddick 原则背后的原因是:

"Discovery ... is a most valuable aid in the doing of justice. The court orders the parties to a suit - both of them - to disclose on oath all documents in their possession or power relating to the matters in issue in the action ... The court insists on your producing them so as to do justice in the case.

The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties.⁴⁸ That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information.⁴⁹ The balance comes down in the ordinary way in favour of the public interest of discovering truth, i.e., in making full

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⁴⁶ Brett 大法官在 Compagnie Financiere v. Peruvian Guano (1882) 11 QBD 55 著名先例对什么算是需要披露的有关(relevant)文件给出了一个十分广泛的定义。特别是包括了文件表面看来是无关但会带来"一连串质询"(a train of enquiry)的文件,这容易被滥用去钓鱼取证/摸索证明(fishing expedition)。这在 1882 年问题不大,因为当时文件有限,但在大量制作文件的现在就不可行。所以英国 1999 年生效的新的民事诉讼规则 CPR 替代了"Peruvian Guano 考验",CPR Rule 31.6 的标准披露(standard disclosure)是另一种"有帮助或有妨害考验"(Help or Hinder Test)。这方面课题在本书第二章脚注 1 与第七章之 7 段有针对。

⁴⁷ 见 Harman v. Home Office (1983) 1 AC 280 先例。

⁴⁸ 强制披露文件是为了在双方的争议中找出事实真相的公共政策/利益。

⁴⁹ 但这与另一个保护隐私与个人机密资料的公共政策/利益有冲突。

disclosure⁵⁰...

Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The court should, therefore, not allow the other party – or anyone else – to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed.⁵¹"

因此,可以想到作为非诉讼方的第三方想要得到法院允许获得所有开庭案卷中的文件会是更加困难。这是因为有保护文件中的隐私与机密信息的公共政策,没有理由另一方诉讼方在 Riddick 原则下必须默示担保不会将文件用于其他用途(这无可避免会泄露给其他第三方,也就破坏了文件的私密性/机密性),但同时法院又可以批准作为非诉讼方的第三方获得文件。从另一个角度看,非诉讼方或公众对披露文件的(会包含高度敏感与机密信息)的权利也不应该比当事方/诉讼方的权利(文件不用于诉讼以外的用途)更大。

Potter 大法官在 GIO Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Association Ltd (1999) 1 WLR 984 先例中认为公众是无权获得开庭案卷。Flaux 大法官在 British Arab Commercial Bank v. Algosaibi Trading Services (2011) EWHC 1817 (Comm)先例也引用并跟从了 Potter 大法官的判决。其中的原因可见 Davies v. Eli Lilly & Co (1987) 1 All ER 801 先例中,上诉庭的判决如下:

"The right is peculiar to the common law jurisdictions. In plain language litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why, they ask, should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object. But, that said, there have to be safeguards. The party who is required to place all or most of his cards face up on the table is entitled to say, 'Some of these cards are highly confidential. You may see them for the purpose of this litigation but, unless their contents are disclosed to all the world as part of the

⁵⁰ 两者权衡之下仍是找出事实真相的公共利益优先。

⁵¹ 法院必须持平,所以要对强制披露文件的披露方做出保护,即不让这些文件使用在除在本案件中找出真相外的任何其他用途。而保障文件不会流出去被使用在其他会影响披露方的用途,也会鼓励披露方坦率与公平合理地做出披露。

⁵² 英国诉讼是要求双方把自己的底牌公开给对方,有些人士(如来自大陆法系国家)会是难以理解为何要向对方公开与披露会否定自己的文件/信息。

⁵³ 答案是诉讼并不是战争或一场游戏,不允许"兵不厌诈"或是要通过间谍或反间谍去刺探对方的信息或瞒骗对方等行为。对法院而言,它需要知道双方所有的有关信息与事实才能做出正确与公平的判决。

evidence given in open court, those contents must be used for no other purpose.' ⁵⁴This is only fair, because, as has been well said, discovery of documents involves a serious invasion of privacy which can be justified only in so far as it is absolutely necessary for the achievement of justice between the parties. ⁵⁵" (加黑部分是笔者的强调)

另也有一个实践方面的考虑,一般来说开庭案卷的卷数都很多,如果非诉讼方(人数可以很多)简单就能获得所有的开庭案卷,对法院来说工作负担太重。

总结以上所讲,非诉讼方无权获得所有的开庭案卷。但 Bingham 大法官在 SmithKline Beecham Biologicals SA v. Connaught Laboratories Inc (1999) 4 All ER 498 先例中说仍会有例外情况:

"Public access to documents referred to in open court (but not in fact read aloud and comprehensibly in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what was in theory, and what was in practice, passed into the public domain."

但另在近期 Cape Intermediate Holdings Ltd v. Dring (2018) EWCA Civ 1795 先例,上诉庭判是:

"GIO is clear authority that there is no inherent jurisdiction to allow inspection of trial bundles – see also the decision of Flaux J in the British Arab Commercial Bank case."

这里要重申:

- (1) 在本章之 1.6.2.3 段提到根据 CPR PD 5A para. 4.2A(l), 文件清单 (List of Documents) 这一份文件本身属于法院记录 (records of the court)。
- (2) 如果开庭案卷中有个别文件在公开审理时被读出来或应被当做已经被读出来,在公开审理原则(Open Justice Principle)下法院会批准非诉讼方检查与获得。

1.7.4 争辩大纲/开庭陈词(Skeleton Arguments/Opening Submissions)

关于作为非诉讼方的第三方获得争辩大纲/开庭陈词的法律地位,与较早前本章之 1.7.1 段提到的证人证言与专家报告等基本上是一样。在公开审理原则(open justice principle)下,法院在公开审理开始后就会批准非诉讼方检查与获得这份文件。这可见 Potter 大法官在 GIO Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Association Ltd (1999) 1

⁵⁴ 诉讼方被要求公开与披露的底牌可能会是高度机密,除非有关文件的内容在公开审理时被公开,否则不能被使用在其他方面。

⁵⁵ 这也公平,因为强制披露是涉及严重侵犯隐私。

WLR 984 先例所说,如下:

"If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or a skeleton argument treated as such) which is not read out, or even summarized, in open court before the calling of the evidence, ⁵⁶ it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case, has in fact taken place in the privacy of his room and not in open court. ⁵⁷ In such a case, I have no doubt that, on application from a member of the press or public in the course of the trial, it is within the inherent jurisdiction of the court to require that there be made available to such applicant a copy of the written opening or skeleton argument submitted to the judge. ⁵⁸"

在 R (on the application of Davies, James and Gaines-Cooper) v. HMRC (2010) EWCA Civ 83 先例,上诉庭允许作为非诉讼方的申请人获得 HMRC 的争辩大纲。在该先例,申请人是一位大律师,申请获得 HMRC 的争辩大纲的理由是帮助他更好地建议他的客户并且更好地准备他所著的这方面的法律书籍的新版。Ward 大法官批准了申请人的申请,认为既然争辩大纲属于开庭辩论的一部分在开庭时被提到,并且各种法律报告的编写者都可以得到,就没有理由拒绝。

1.7.5 法院命令 (Court Orders)

非诉讼方(non-litigant/non-party)或公众(public)自动有权获得公开审理后法院做出的命令,这是本章之 1.6.1 段提到的第一类文件,并且不能在 CPR Rule 5.4C(4)下申请限制公众获得这些命令。但在适当的情况下,诉讼方可在 CPR Rule 39.2(3)下申请不公开审理,这方面在本章之 1.1 段有详论。这一来如果非诉讼方想要获得有关的不公开审理的法院命令就必须向法院申请。如果诉讼方达成和解并将和解协议转为双方同意的法院命令(Consent Order)的形式,那么一般来说非诉讼方或公众可在 CPR Rule 5.4C(1)下获得该双方同意的法院命令。另也可见本章之 1.6.2.3 段提到 CPR PD 5A para. 4.2A 段的(j)。

1.7.6 和解与汤姆林命令(Tomlin Orders)

诉讼双方在诉讼过程中的任何时间都可以达成和解,也经常能够达成和解。和解协议要得到法院的批准并做出相应的法院命令,例如中止法院程序、相关的费用命令等。而如果诉讼方违反了双方同意的法院命令(Consent Order)可能会

56 在现在的诉讼,口头开庭陈词通常被开庭前双方交换的书面争辩大纲/开庭陈词所替代。双方代表大律师顶多有短暂的时间(如 1 小时不等)口头总结一下争辩的重点,就马上要向证人取证了。

⁵⁷ 所以一个无可争议的结论是这一个重要的司法程序,也就是告诉法官双方争辩的争议,发生在法官的私人办公室(也就是开庭前的阅读)而不是在开庭时。

⁵⁸ 如果报刊/非诉讼方/公众申请这份文件,法院完全有潜在管辖权去下令提供。

被判是藐视法院。

双方同意的法院命令与法院判决中的命令一样,非诉讼方无需法院允许就自动有权(as a matter of right)获得。在很多案件中诉讼一方或双方不希望和解协议的内容被作为非诉讼方或公众的第三方知道。其中的原因可以有很多,例如和解内容可能会导致被告在公众面前被解释为承认责任,而这是被告不想见到的情况。或是被其他同类案件中还没有达成和解的其他诉讼方提前知道了他会做出让步的底线,这显然对他会是很不利。

与法院诉讼不同,因为仲裁的机密性,所以不存在这方面的问题。即使仲裁 庭做出了双方同意的裁决书(Consent Arbitration Award),令双方可以履行和解 协议,裁决书仍然保持机密,其他第三方不会知道。

针对法院诉讼,为了避免第三方可以轻易知道和解协议的内容,Tomlin 大法官在 Dashwood v. Dashwood (1927) WN 290 先例创立了 Tomlin Order 的形式。Tomlin Order 可以保持和解协议的机密性,并且令诉讼方针对和解协议的履行保持原本的诉讼程序继续存在。例如如果对方不严格履行和解协议,诉讼方不必重新开始一个新的诉讼就可以向法院申请禁令(injunction)或履约指令(specific performance)。在 CPR Rule 40.6 与 Practice Direction 40B s.3 有针对 Tomlin Order的规定。

Tomlin Order 会在正文部分包括双方希望法院做出的命令,但是和解协议的 具体内容会被包括在命令的附件中。由于附件不属于 Tomlin Order 的一部分,所 以非诉讼方在没有经过法院批准时是没有权利获得。但实际上法院人员将 Tomlin Order 与附件一起交给申请的非诉讼方的情况并不少见,因此最好只是在 Tomlin Order 中提到和解协议,而和解协议的内容分开制作另一份文件不递交给法院。

Ramsay 大法官在 Community Care North East v. Durham County Council (2012) EWHC 959 (QB)先例解释了将和解协议内容合并进双方同意的法院命令与作为 Tomlin Order 的附件的区别,说:

"... where the terms are contained in a schedule to the Tomlin order the position is different from the terms being incorporated as part of a consent order... a party can settle a case and seek a court order in one of two ways. First it can seek to incorporate the terms of the settlement within the body of the order so that those terms are part of the court order. The alternative way is by way of a Tomlin order under which the parties seek a stay of the proceedings on terms that the parties will comply with the agreement in the schedule, with liberty to apply to enforce those terms. The court approves and orders the consent order in the first case but only approve and orders the terms of the order but not the terms of the schedule in the second case."

正如 Steyn 勋爵在 Sirius International Insurance Co v. FAI General Insurance Ltd (2004) UKHL 54 先例中所说,Tomlin Order 实际上是一份商业合约。因此除

非是之后有新证据表示和解协议是通过欺诈的方式获得,否则是不能攻击和解协议的有效性:见 Zurich Insurance Co Plc v. Hayward (2011) EWCA Civ 641 先例⁵⁹。因此,与违反双方同意的法院命令会属于藐视法院不同,违反 Tomlin Order(与附件中的和解条文)属于违反合约。在 CPR Part 83 提到的执行法院命令的方式适用于双方同意的命令,不适用于 Tomlin Order。

1.7.7 法院诉讼对文件机密性的保护

现在越来越多的争议涉及一些敏感领域,例如涉及国防与安全领域,侵犯知识产权,违反竞争法,一些高尖科技产品(如药物、电子芯片、发动机等)的研发与生产,或是如果被其他竞争对手知道商业机密会对公司产生致命打击等。这一来,很多公司就十分担心一些机密或商业敏感资料在法院诉讼的公开审理中被泄露给对方当事方或公众。

首先要明确什么属于商业机密(trade secret),这不能由诉讼方自说自话决定。 英国《The Trade Secrets (Enforcement, etc.) Regulations 2018》对商业机密的定义 是:

" 'trade secret' means information which—

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question, (不是有关从业人士通常能够获得)
 - (b) has commercial value because it is secret, and (因为是机密而有商业价值)
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. (有权合法控制商业机密的人士采取了合理措施以保证其机密性)"

避免在诉讼中泄露商业机密的一种做法是转向由仲裁解决争议,在订立有关商业合约时就加入一条仲裁条文。仲裁一个众所周知的优点是机密性(confidentiality),仲裁开庭不公开,所以除非双方当事方同意,否则第三方不能参加开庭,也不会留下仲裁程序的公开记录。虽然并非所有国家与地区都默认仲裁的机密性,例如澳大利亚、美国与瑞典就都认为仲裁方没有保密的默示责任。但这个问题也容易解决,可以加入明示(express)的仲裁机密条文以填补欠缺的法律默示地位。而英国虽然在 Ali Shipping Corporation v. Shipyard Trogir (1999) 1 WLR 314 先例中认为仲裁双方有默示责任保持仲裁中披露的信息的机密性,包括裁决书的结果与裁决理由,但有一些例外(exceptions)情况。如双方同意、

⁵⁹ 在 Hayward v. Zurich Insurance Company Plc (2016) UKSC 48 最高院先例,保险公司胜诉,和解协议无效。

法院命令与批准、合理地有需要、为了公正与公共利益等。这方面可见笔者《仲裁法——从 1996 年英国仲裁法到国际商务仲裁》(2006 年)一书第十三章。

而英国与其他普通法国家也发展出一系列措施确保法院诉讼不会导致商业机密被披露。法院作出命令确保机密性的最著名的先例是 Church of Scientology of California v. Department of Health and Social Security (1979) 1 WLR 723 先例。在该先例,被告担心一旦原告知道了一些特定文件中的个人的名字,可能会骚扰、威胁甚至敲诈他们,Brandon 大法官说:

- "1. A party to litigation has a prima facie right of unrestricted inspection of the documents of which discovery has been made by the other party so far as may be necessary to dispose fairly of the case or for saving costs.
 - 2. A party is not entitled to use his right of inspection for any collateral purpose.
- 3. If it is shown that there is a real risk of a party using his right for a collateral purpose, the court has power to impose restrictions on such right in order to prevent or discourage him from doing so. I think that this power is derived from the inherent jurisdiction of the court to prevent abuse of its process."

接着在 Roussel Uclaf v. ICI (1990) RPC 45 先例,上诉庭也确认了以下原则:

"Each case has to be decided on its own facts and the broad principle must be that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The object to be achieved is that the applicant should have as full a degree of disclosure as well be consistent with adequate protection of the secret. In so doing, the court will be careful not to expose a party to any unnecessary risk of its trade secrets leaking to or being used by competitors. What is necessary or unnecessary will depend upon the nature of the secret, the position of the parties and the extent of the disclosure ordered. However, it would be exceptional to prevent a party from access to information which would play a substantial part in the case as such would mean that the party would be unable to hear a substantial part of the case, would be unable to understand the reasons for the advice given to him and, in some cases, the reasons for the judgment. Thus what disclosure necessary entails not only practical matters arising in the conduct of a case but also the general position that a party should know how the case he has to meet, should hear matters given in evidence and understand the reasons for the judgment."

目前英国法院在 CPR 下保护文件机密性的措施有:

- (一)密封法院记录(Sealing the Court File),这已经在本章之 1.6.1 段与 1.6.2 段介绍,本段不再重复。
 - (二)成立机密会(Confidentiality Club 或 confidentiality Rings),简单说就

是对谁可以接触到被披露的机密文件,怎样才允许复制文件,文件可以在哪里看与信息可以怎样传播作出各种不同但能与案件要求配套的限制。在 Smith & Nephew Plc v. Convatec Technologies Inc (2014) EWHC 146 (Pat)先例, Birss 大法官介绍这种做法说:

"At the stage of disclosure it is well established that in a proper case a confidentiality scheme or 'club' can be set up. ... The scheme may be arranged by order of the court but is often arranged by an agreement between the parties, albeit always subject to the Court's jurisdiction. The scheme provides that documents in disclosure which are identified as confidential are identified as being part of the scheme. For the documents in the scheme, access to them and their use by the receiving party and its legal team will be expressly restricted. Commonly the documents will be accessible to the solicitors and counsel and relevant independent experts who are to give evidence in the case. Commonly also the documents will be accessible only to named individuals at the receiving party. The system is flexible and there are many variations. In some cases signed undertakings are required from some or all of the persons to whom the documents are to be disclosed. In some rare cases it is fair to restrict access to the documents even further.

As the case progresses evidence can be prepared which deals with the confidential information covered by the scheme. There may be parts of the witness statements and experts' reports which are kept confidential under the scheme as well."

在一些涉及专利的法院诉讼(特别是美国诉讼⁶⁰)与仲裁⁶¹会成立机密会,只有双方律师与专家可以接触有关文件,他/她们往往要向法院做出保证(collateral warranty 或 undertaking),不会向任何其他人士(包括客户)披露参阅了的机密文件的内容。英国普通法下,IPCom v. HTC Europe (2013) EWHC 52 (Pat)先例与 Unwired Planet International Ltd v. Huawei Technologies Co Ltd (2017) EWHC 3083 (Pat)先例都曾有只允许诉讼双方的外部人士(律师与专家)参阅有关文件(for external eyes only)的做法。

但仅律师可以参阅的做法也有一定的问题,这在新加坡 China Machine New Energy Corp v. Jaguar Energy Guatemala LLC (2018) SGHC 101 先例中可能有显示。在该先例,双方的争议之一就是仲裁庭作出仅律师可以参阅的披露命令是否违反自然公正。从双方的争辩中可以看出,仅律师可以参阅的做法确实在一定程度上会影响诉讼当事方完整争辩案件的机会。因为律师不能就有关机密文件的内容与客户沟通,而律师毕竟不是有关行业的从业人士,即使有专家的帮助也无法达到

⁶⁰ 美国诉讼中所谓的 "AEO (Attorneys' Eyes Only) 保密令"可见 Hanson v US Airports Air Cargo, 2008 WL 4426909 (D Conn 2008); Gerffert Co Inc v. Dean, 2012 WL 2054243 (EDNY 2012); HSqd v. Morinville, 2013 US Dist LEXIS 37356 (D Conn 2013)等先例。

⁶¹ 在新加坡 China Machine New Energy Corp v. Jaguar Energy Guatemala LLC (2018) SGHC 101 先例, 有关的仲裁中就有仅律师可以参阅(Attorneys' Eyes Only 或简称 AEO)的做法。在本章下一段会非常简单地介绍。

最好的效果。所以是否作出仅律师可以参阅的命令还是要仲裁庭(法院也是同样)根据每个案件不同的事实,在个别机密文件被另一方当事方知道会对希望保持机密的一方造成的损害与对另一方完整争辩案件造成的影响之间作出权衡。在 TQ Delta LLC v. Zyxel Communications UK Limited (2018) EWHC 1515 (Ch)先例,Carr 大法官首先分析了 IPCom v. HTC Europe 先例与 Unwired Planet 先例,认为前者的有关文件与争议并不十分相关,而后者是双方同意,所以法院作出这样的判决。Carr 大法官认为只有在非常特别的情况下才能批准只允许外部人士参阅文件,并提到法院的考虑说:

"An external eyes only tier enables a blanket exclusion of access by one of the parties to the relevant parts of key documents. This is incompatible with the right to a fair hearing under Article 6 of European Convention on Human Rights, and with the principles of natural justice. It is incompatible with the obligations of lawyers to their clients. The principles on which solicitors are obliged to act on behalf of clients instructing them require the sharing of all relevant information of which they are aware."

虽然在成立机密会时,仍然可以限制不允许诉讼方内部管理层成为机密会成员接触有关文件,但仍会增加诉讼方的顾虑。所以在诉讼开始时,双方律师可以考虑约定只有外部律师与专家证人才能接触到有关机密文件。根据 TQ Delta LLC v. Zyxel Communications UK Limited 先例,这样的约定有效。

但最后一提,英国《The Trade Secrets (Enforcement, etc.) Regulations 2018》 生效后,s.10(6)规定至少要有一位来自诉讼方的人士。

- (三)不公开审理(hearing in private),这也已经在本章之 1.1 段介绍(包括著名的 Eurasian Natural Resources Corporation Ltd v. Dechert LLP [2014] EWHC 3389 [Ch]先例),这里只强调申请不公开审理并不容易。在 Global Torch Ltd v. Apex Global Management Ltd (2013) EWHC 223 (Ch)先例,申请人申请不公开审理的理由之一是如果审理时对方提出一些严重的不实指控会影响两位沙特王子的名誉。但 Mance 大法官不接受这个理由,因为无论是民事还是刑事,事实上大多数诉讼都会影响当事方的名誉,这一般不足够令法院偏离公开审理(open trial)的基本原则。
- (四)限制使用披露的文件。根据 CPR Rule 31.22(1),披露的文件只能在有关的诉讼中被使用,除非: (1) 文件向法院读过或被法院读过,或在公开审理时被读出来或可被当做已经被读出来; (2) 法院允许; (3) 披露文件与拥有文件的一方同意。在 CPR Rule 31.22(2)下,法院可以作出命令限制或禁止使用被披露的文件,即使文件被法院读过或在公开审理时被读出来。在 Smith & Nephew Plc v. Convatec Technologies Inc 先例,争议有关 Smith & Nephew 生产的银离子伤口敷料是否侵犯了 Convatec 的专利。诉讼过程中,Smith & Nephew 披露的文件中涉及商业机密,包括生产过程、与规管机构的交往、商业策略等,而这些机密与敏感信息因为涉及争议核心,所以不能被遮盖 (redact)。双方在披露阶段成立了机

密会,并申请了开庭到判决作出前这一阶段在 CPR Rule 31.22(2)下限制使用披露的文件的临时命令。之后 Smith & Nephew 申请在 CPR Rule 31.22(2)下的永久命令禁止使用这些文件。最后法院对涉及生产与检验过程、商业策略的文件作出了永久命令,但与规管机构交往的文件不是商业机密或专有知识,也不会伤害 Smith & Nephew 的利益,所以没有作出命令。

笔者可将诉讼程序阶段每一步对泄露商业机密的担心与可能的解决办法总结为以下表格:

诉讼程序阶段	担心的问题	可能的解决办法
诉讼程序的任何 阶段	对方诉讼方有将机密信 息泄露给第三方的危险	如果有必要,可以向法院申请禁令
对方递交案件陈 述	公众可以获得案件陈述	在 CPR Rule 5.4C 下获得法院命令,完全或部分密封法院记录
己方递交案件陈述	公众可以获得案件陈述	在案件陈述或文书请求(statement of case 或 pleadings)中只提及机密文件但不引用内容,而是将机密文件作为案件陈述的附件,并在 CPR Rule 5.4C下获得法院命令保护机密性
	对方诉讼方可以获得在 案件陈述中提到的机密 文件副本	避免在案件陈述中提到机密文件
	对方诉讼方的所有高管 与雇员都可以获得案件 陈述中作为附件的机密 文件	设置一个机密会,只有机密会内的成员才能接触到作为附件的机密文件
法院记录中的其 他文件	在 CPR Rule 5.4C 下,第 三方可以向法院申请获 得机密文件	在第三方申请时在法院提出反对,如果诉讼方在公开审理阶段就申请了保护机密文件的措施可以最大限度降低第三方申请成功的机会

文件披露	控制披露的机密文件范 围与能接触到机密文件 的人员	将文件中与案件无关的机密信息 遮盖,并设置机密会,只有机密 会成员才能接触到没有被遮盖的 机密信息
开庭	希望不公开审理	在 CPR Rule 39.2 下向法院申请
公开审理	公开审理时被读出来的 文件不再在默示保证的 范围内,所以可以被提供 给第三方	在 CPR Rule 31.22(2)下向法院申请限制对方诉讼方对在开庭时被提到的文件的使用
	公开审理时旁听的人士可以听到机密信息	与对方诉讼方同意在开庭时不把 机密信息读出来,或向法院申请 允许有针对性地短期不公开审理
	公开审理时旁听的媒体公开报道	向法院申请报道限制
	第三方申请获得开庭时 被读出来的文件	一般来说法院都会批准,但是如果在开庭阶段申请了以上保护可以最低限度减低对方申请成功的概率
法院判决	法院判决中包含机密信 息	向法院提出申请要求遮盖,但最 终决定权还是在法院

最后可去一提,虽然英国法院对机密的保护看来是已经十分完善,商业仲裁相比法院诉讼的一个经常被宣扬的优点好像不再存在,但进一步分析会发现并非如此。因为法院诉讼的基本精神与起点是必须要公开审理,个别案件法院是否愿意作出保护机密的命令与保护的程度,还是要看法院与个别法官的裁量权。这一来,就可能出现中国公司认为是高度机密的信息,但英国法官因为文化差异觉得没有必要保护机密的情况。但商业仲裁的基本精神与起点是刚好相反,即使是在没有什么机密可言的案件中,仍是一律对第三方保密。这是英国法律的默示地位,不需要提前申请,仲裁员与所有参与的人士都要严格遵守。考虑到即使是与商业或技术机密无关的争议,商业人士通常仍不希望公开被大众知道,所以商业仲裁在这一方面仍是有优势。而仲裁双方当事方之间对机密文件(例如商业机密)的保护,也有类似"机密会"的做法,如仲裁庭可以作出只允许外部律师接触与查

阅(inspect)的命令: 见新加坡 China Machine New Energy Corp v. Jaguar Energy Guatemala LLC 先例。唯一比不上法院的就是仲裁庭对双方代表律师(可以是世界上任何国家的律师甚至可以不必是执业律师)的专业操守缺乏像法院一样的阻吓力与约束力。

1.7.8 机密会在国际仲裁的操作

在国际仲裁中机密会的做法相对法院诉讼没这么常见,但也有实例。这里可以举两个例子。首先是笔者(杨大明律师)最近的一次在伦敦仲裁中机密会操作的实际经验。案件涉及的行业业内公司不多,这些公司在某些国家与地区有合作或共同经营关系,而在某些国家与地区又是竞争者。笔者代表的中国公司与外国公司签署了一份长期合作协议。该长期合作协议明示规定如果一方的控制权有了变更,另一方可以终止这份长期合作协议。

结果外方与另一家公司合并,所以中方决定行使权利终止协议。但外方认为这属于违约/毁约,开始伦敦仲裁向中方提出过亿美元的巨额索赔。在披露过程中,中方提出特定披露,要求外方披露其与最终合并的公司之间的书信来往及它们合并的协议。外方声称它们合并的协议中有大量有关行业的业内资料,除了高度保密外,如果中方知道了这些数据,也会协助它的竞争地位,进而影响有关地区的开放竞争与消费者,构成垄断。但笔者代表中方坚持申请,因为这些文件内应该会有一些对外方非常不利的证据。

最终,仲裁庭作出以下命令:

- (1) 这些文件只能披露给笔者一人查阅,不可以披露给任何其他人,包括中方(客户)、任何证人或专家、甚至笔者在欧华律师事务所的团队。
- (2) 笔者收到文件后要在短时间内决定有否与案件有关的内容。如果有, 必须尽快向仲裁庭作出书面申请。
- (3)在决定是否作出申请时,笔者无法向中方(客户)拿指示。因为如果 拿指示就会令中方猜到文件的内容。所以,笔者要先拿到客户不可更改的授权容 许笔者以自己对内容是否有关与重要的判断替该客户决定是否作出申请,而客户 会承认及接受这个决定。
- (4)收到文件后,笔者把自己隔离,单独查阅有关文件及决定是否作出申请。

透过这过程,外方非常害怕笔者查阅这些机密文件与稍后作出申请会成功获得文件,加上其他原因,结果这仲裁没有打下去,外方以一个非常低的数目(应该都不足够支付它自己的律师费)就放弃向中方的索赔并达成和解。

另一个例子是新加坡的 China Machine New Energy Corp v. Jaguar Energy Guatemala LLC (2018) SGHC 101 先例。简单说,案情涉及一个危地马拉的工程

合约,双方产生争议后,外方在一个仲裁地是新加坡的国际商会(ICC)仲裁向中方索赔巨额损失。而最后中方被仲裁庭判败诉,要赔偿高达 1 亿 3 千万美元。中方作为败诉方向新加坡法院申请撤销(set aside)裁决书,但被新加坡法院驳回。中方申请撤销裁决书的其中一个主要理由是仲裁庭曾经命令外方披露的一些文件只准中方的律师查阅(Attorneys' Eyes Only 或简称 AEO),但中方自己不准查阅,这属于违反自然公正。新加坡高院判仲裁庭根据 ICC 仲裁规则与潜在的案件管理权力(inherent case management power)可以作出这种命令。特别在该先例,仲裁庭在作出这个披露命令时还有保护措施(safeguard),中方可以稍后申请个别文件让某个特定雇员查阅,但中方从来没有作出过申请。所以不能说仲裁庭的命令剥夺了中方表达自己的案件的权利,或不平等对待双方。

最后在该新加坡先例中也提到了这种做法在国际仲裁中相对少见。笔者认为 其中的原因可能是国际仲裁中代表当事人的律师来自各个国家与地区,律师的职 业操守缺乏统一的标准,仲裁庭的监督与惩罚措施也有限,所以不像法院一样有 足够的信心作出这种命令,会有所保留。

2. 提前披露之六:向证据地法院求助以获取海外/外国的证据(文件与口头)

2.1 简介

随着国际化的趋势,世界愈来愈小,从而产生了大量移民及流动人口、国际商业与民间交往与许多跨国公司,这导致诉讼时常常需要面对去外国取证的复杂问题。例如涉及国际商贸或其他民事争议,常遇上是一份关键文件⁶²或被要求提供口头证据的主要证人的所在地是外国的情况,而他不愿意合作主动提供。这情况也可发生在任何种类的诉讼,例如一宗完全是本地的侵权案件,但主要证人较早时移民去了外国并且不愿意在开庭审理时回国到本地法院作证。也可能是居住在外国的主要证人虽然愿意作证但年纪太大或健康状况堪忧,无法去本地法院作证。当然针对这种情况,今天也有一个选择是开庭时让愿意配合的证人通过视频链接(video link)的方式作证与接受盘问,所以研究和制订国际私法条约的专门性政府间国际组织海牙国际私法会议(Hague Conference on Private International Law)做出了在《关于从国外调取民事或商事证据的海牙公约(Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters)》(在本章之后会简称为《海牙证据公约》)下以视频链接的方式取证的指引。但这种变通做法不适用于不愿意配合的证人,另也会有一些少见的情况如证人所在的国家/地区无法进行视频链接:见涉及古巴的 Peer International Corp v. Termidor Music

 $^{^{62}}$ 这里指的是纸质文件,至于获取外国的电子文件/数据这个复杂与被政治化的问题,在本书第一章之 1 段的脚注 1 与本章之 2 2.10 段有简单介绍。

Publishers Ltd (No.3) (2005) EWHC 1048 先例。而对于有些跨国公司,可能存放了所有重要文件的总部/母公司在美国。如果一家公司与美国总部/母公司在英国或日本或中国的联营公司或总代理等独立法人产生了争议,就会涉及去美国取证的问题。

如果外国的第三方不愿意合作提供文件证据或口头证据,英国63本土的法院 是没有管辖权强制他提供。证据本身好像其他实物(res 或英文的 a thing,如传 统的船舶与货物),有很强的地域性(territorial),是受所在地法院的管辖。即 使英国法院对外国的第三方有管辖权,例如美国或中国银行在伦敦有分行,但有 关的文件存放在海外(如北京总行),诉讼方是不能要求法院传召第三方作为证 人(witness summons)出庭提供文件证据(subpoena duces tecum):见 Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation (1986) 2 WLR 453; Masri v. Consolidated Contractors International (UK) Ltd (No.4) (2009) UKHL 43 等先例。原 因也可以理解,英国法院强制第三方提供存放在外国的文件可能会令他违反外国 法律而要面对惩罚64,同时也会被外国视为是侵犯了它的主权。这显然是十分敏 感的事,必须小心对待。所以即使第三方(因为在伦敦有分行)受英国法院的管 辖并成功向他送达传召证人的传票,但如果他的有关文件是存放在国外,英国法 院仍要十分小心处理,只有在例外的案件才会强制要求披露:见 London and Counties Securities Ltd v. Caplan (unreported, 26 May 1978); R v. Grossman (1981) 73 Cr App R 302 等先例。一个典型的例子是美国或中国银行受美国或中国法律 管辖,可能对客户有保密的法律责任,不应在外国法院(如英国法院)的命令下 被强制要求披露这些文件。因此如果诉讼方想要获得这些文件,必须通过《海牙 证据公约》或在本章之 2.1.1 段提到的其他合法方式获得。

口头证据也是同样的地位,Tomlinson 大法官在 Vitol SA v. Capri Marine Ltd (2008) EWHC 378 (Comm)先例中说:

"... it is axiomatic that a party cannot compel a witness in a foreign country to attend a trial in England and Wales – see the note to that effect at CPR 34.13.1."

唯一的例外情况是《Senior Courts Act 1981》之 section 36 规定在特殊程序下可以传召在英国境内的海外/外国证人。例如,一位通常居住在沙特阿拉伯的人士在爱丁堡参加一个商务会议,可以在苏格兰被送达传召到庭的命令: Kuwait Airways Corp v. Iraq Airways Co (2010) EWCA Civ 741 先例。

⁶³ 本章主要针对英国的法律与做法,包括对《海牙证据公约》这一重要的国际公约的解释。这首先是因为本书针对的就是英国法与普通法。此外英国(尤其是伦敦)是金融、银行、贸易、保险/再保等众多商业活动的国际中心和国际诉讼与仲裁中心,所以英国的法律与做法对走出去的中国的公司的重要性超过其他国家/地区。即使是在中国或其他国家的诉讼/仲裁,在英美搜集证据的可能性也超过其他国家/地区。最后英国有更多的案例可以帮助彻底理解课题。

⁶⁴ 例如将在本章之 2.2 段脚注 72 介绍的 The "Heidberg" (1993) 2 Lloyd's Rep 324 先例。

2.1.1 英国法院在海外/外国的取证的管辖权与权力

在英国本土,即使证人不愿意配合出庭提供文件与口头证据,法院也可以在CPR Rule 34.2 下传召证人(witness summons)出庭提供特定文件或口头证据。在 Masri v. Consolidated Contractors International (UK) Ltd (No.4) (2009) UKHL 43 先例,贵族院确认只对在英国的人士做出传召证人出庭的传票(《Senior Courts Act 1981》之 section 36 下的"subpoena",司法改革后对应的是 CPR 下的"witness summon")。而要强制外国证人,就会涉及他所在地的法律/法院了。即使证人自愿合作,有些国家也会对外国法院前来调查/收集证据并向证人监誓(administer an oath)采取敌意态度。有不少大陆法国家视取证为司法行为(judicial function),外国法院不通过官方途径而私下通过代理人取证是侵犯该国司法主权。

这一课题有许多复杂的方面与知识,就英国法院来说,它能做到的对企图去海外取证的当事方的协助只是要求外国法院/司法机关行使权力提供帮助。英国法院可以根据以下公约/协议/法规提出要求:

(一)首先也是最重要的是 1954 年与 1970 年的《海牙证据公约》⁶⁵。英国针对《海牙证据公约》也有《Evidence (Proceedings in Other Jurisdictions) Act 1975》的立法,相应地协助外国法院向英国法院申请对住在英国的人士取证:见 Rio Tinto Zinc v. Westinghouse Electric (1978) AC 547; State of Minnesota v. Philip Morris Inc (1998) ILPr 170; First American Corp v. Zayed (1999) 1 WLR 1154 等先例。

(二)国家之间的双边协议。在《The White Book Service 2013: Civil Procedure》一书之 34.13.7 段有所有双边协议的列表,读者另也可查看网站<http://webarchive.nationalarchives.gov.uk/20130102175004/http://www.fco.gov.uk/en/publications-and-documents/treaties/lists-treaties/bilateral-civil-procedure>。例如英国与德国的1928年《The Anglo-German Convention》(比1970年的《海牙证据公约》操作简单)。此外,英国还有与非《海牙证据公约》的签约国阿尔及利亚(Algeria)的双边协议(11/07/2006, Treaty Series No.16/2010 Cmd 7919),与阿联酋(United Arab Emirates)的双边协议(7/12/2006, TS 001/2009 Cmd 7535)等。

(三)欧盟针对成员国法院之间协助调取民事或商事证据的法规 Council Regulation (EC) No.1206/2001,或简称《EU Evidence Regulation》⁶⁶。英国对应的立法规定就是 CPR Rule 34.23 与 PD 34A paras.7-10。当然在英国退出欧盟后该法规就不再适用,回到了要根据《海牙证据公约》或与其他国家之间的双边协议规定的地位。加上这方面的课题与中国公司的关系不会太大,所以笔者不再详细针对。

⁶⁵ 读者可在<https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>查看全文。

(四)即使没有任何公约/协议/法规,英国法院也有发出请求书(Letter of Request)的潜在管辖权。在这种情况下,虽然外国法院没有公约/协议/法规责任协助英国法院,但如果认为英国法院的请求适当,也可能提供帮助。类似的《Evidence (Proceedings in Other Jurisdictions) Act 1975》也适用在其他外国法院/裁判庭作出的请求书,无论该国家是否属于《海牙证据公约》的签约国:见《Phipson on EVIDENCE》(2018年,第 19 版)一书之 Para. 8-37。除了国际友好与礼让的原则,这样的立法规定的目的可见 Rio Tinto Zinc v. Westinghouse Electric (1978) AC 547 先例所说:"It is our duty and our pleasure to do all we can to assist that court, just as we would expect the [foreign court] to help us in the circumstances."在 USA v. Philip Morris Inc (2004) EWCA Civ 330 先例,上诉庭也有类似的说法。

这个潜在管辖权历史悠久,正如 Donald Nicholls 勋爵在 Panayiotou v. Sony Music Entertainment (UK) Ltd (1994) Ch 142 先例中说:

"Before 1884, and leaving aside India and British colonies, there were two methods of taking evidence overseas for use at a trial: under a commissioner pursuant to a writ of commission, and before an examiner pursuant to an order to that effect. The governments of several countries objected to the examination of their subjects in their own countries by examiners appointed by the English court. So the letter of request was introduced to meet this difficulty. The English court addresses a request to the foreign court, seeking its assistance by conducting an examination of witness who is within the jurisdiction of the foreign court. To this end RSC Order 37, r.6A was introduced in 1884: If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. ..."

这种潜在管辖权在今天被英国法院行使得不多,但在破产程序中不算罕见: 见 Nortel Networks SA, Re (2009) EWHC 206 (Ch)先例。

2.1.2 诉讼方主动在海外/外国取证

当然英国法院也任由当事方主动采取行动通过外国法院取证,例如,诉讼方可以根据《US Code》Title 28, s.1782 直接向美国法院申请要求取证。只有在外

68 但不少国家政府反对英国法院委任讯问官在自己国家境内取证,已经提到过证据有很强的地域性,尤其是在一些大陆法国家。例如中国《民事诉讼法》第二百七十七条就禁止外国机关或个人在中国境内调查取证。

⁶⁷ 在 1884 年前,除了英国殖民地,英国法院为了审理案件需要去外国取证只有两种办法:一是通过监誓令状(writ of commission)由一位特派员(commissioner)取证,或是在类似命令下通过讯问官(examiner)取证。显然,他们这时代替了法院,但最后考虑有关证据并做出判决的仍是法院的审理法官。

⁶⁹ 请求书的做法就是为了解决这个问题,英国法院向外国法院发出请求书,寻求外国法院的帮助以盘问在外国法院管辖权内的证人。

国取证会导致英国诉讼出现不合情理(unconscionable)的情况时,英国法院才会干预: 见 South Carolina Insurance Co v. Assurantie Maatschappij "De Zeven Provincien" (1987) AC 24; Joyce v. Sunland Waterfront (BVI) Ltd (2011) 19 FCR 213 等先例。

例如在 Benfield Holdings Ltd v. Elliott Richardson (2007) EWHC 171 (QB)先例,英国法院作出禁令限制英国诉讼程序的原告 Benfield 为了同步进行中的美国诉讼向 Aon 的证人录取口供书(deposition)。该先例涉及的 Benfield(母公司在百慕大)与 Aon(总部在芝加哥)都是在全球营运的主要与有竞争关系的保险与再保公司。在 2006 年秋,大量 Benfield 的专业选择性再保(specialist facultative reinsurance)小组员工跳槽到了 Aon。Benfield 声称是 Aon 与 Richardson 先生(前专业选择性再保小组组长,之后跳槽到 Aon)串谋(conspiracy)策划的。

除了母公司或总部,两个集团企业的其他公司大多是英国公司。毕竟伦敦是世界上最重要的保险与再保险市场,所以业务主要是英国的分公司在操作。因此Benfield 在英国法院开始了针对 Aon 的诉讼,声称 Aon 串谋并错误影响与诱导欧洲、美国、澳大利亚、新西兰、南美、英国的员工与客户。而 Aon 的抗辩是员工辞职与换工作都是自愿,属于正常的雇佣程序。Benfield 在英国开始诉讼程序后不久,同一集团一间在美国特拉华州注册的公司在纽约开始了针对两位前员工(Talbott 先生与 Garner 先生)、Richardson 先生与两家美国境内的 Aon 分公司的诉讼。也就是说同时存在了两个针对的几乎是相同诉因的有重叠的诉讼,只是英国诉讼涉及的范围更广,毫无疑问属于主要诉讼(lead action)。英国的诉讼推进地更快,已经确定在 2007 年 3 月 5 日开庭,但美国诉讼的开庭时间还没确定。

在美国诉讼中,Benfield 申请并获得了提前以口供书录取包括 Talbott 先生与 Garner 先生在内的 4 位 Aon 员工证词的权利。Benfield 也申请录取 Mahoney 先生与 Sisson 先生的证词,理由是他们是两个 Aon 美国分公司的管理代理人(managing agents),但因为证据不足被法院拒绝。除此之外,Benfield 也希望录取 Reynolds 先生与 Fox 先生的证词,但没有提出申请只是说会保留权利。Aon 向英国法院申请禁令,禁止 Benfield 在美国法院为美国诉讼申请录取 Mahoney 先生、Sisson 先生、Reynolds 先生与 Fox 先生的证词。Aon 声称 Benfield 申请录取证词的真正目的不是为了美国诉讼,而是想影响马上就要进行的英国诉讼开庭并在诉讼过程中单方面提前获取证据方面的优势。

英国法院基于以下考虑做出了限制 Benfield 在美国获得证据/录取口供的禁令:

(一)英国诉讼程序属于主要诉讼,双方同意英国是最适合解决双方争议的 地点,双方在责任方面的争议在英国法院做出判决后应被解决,应属于一事不再 审 (res judicata) 70。

- (二)英国诉讼马上就要开庭,虽然双方都由称职律师代表,但考虑双方律师为了开庭要进行大量准备工作的压力,除非有十分有说服力的原因,否则不应打扰律师的准备工作。
- (三)毫无疑问有关的 4 位证人将在开庭时提供证人证言与口头证据,即使证人不愿意出庭, Benfield 也可以向法院申请以传召证人(witness summons)的方式强制他们出庭。
 - (四)英国诉讼程序中披露的文件并不比美国诉讼程序中的少。
- (五)英国 CPR Rule 32.4 规定证人证言(加上真实声明[statement of truth]的确认),除了非常有限的几种例外情况(如特免权),必须包括证人在开庭时希望依赖的所有口头证据。也就是说,Benfield 在交换证人证言后就可以知道这4位证人将在开庭时做出的口头证据。
- (六)之后 Benfield 就可以根据证人证言准备它认为合适的反盘问(cross-examination)的问题,当然前提是 Benfield 自己也按照法院命令/立法规定同时做出了文件披露并交换了它希望在开庭时依赖的证人证言。
- (七) 法官同意 Aon 的说法,认为 Benfield 没有为了美国诉讼录取口供书的迫切与真正需要。加上如果之后 Benfield 有了真正的需要,完全可以向英国法院申请解除在本先例做出的限制或禁令。
 - (八)也就是说,支持 Aon 的申请,不会对 Benfield 造成任何损害。
- (九)相反,如果允许 Benfield 在开庭前就盘问证人并录取口供书会给 Aon 与证人带来真正的不公平与损害,而英国法院是不可能允许 Aon 对 Benfield 的证人有相同的做法。

最后法官总结说 Benfield 没有给出好的理由解释既然 4 位证人会在 3 月开庭时被反盘问,为什么还要在开庭前提前反盘问并录取口供书。这会扰乱英国诉讼程序,这种单方面扰乱开庭准备与重复反盘问的行为,在程序上与法律上都对Aon来说是不公平与不合情理。

2.2 外国当事方(原告或被告)的文件

一般来说外国当事方若是成为英国法院诉讼的原告或被告,披露文件(discovery /disclosure)不应是问题,这包括在英国境内与在外国的文件。其中的原因或逻辑是"你自愿加入这个游戏(诉讼),就要按照游戏规则来玩"(If

⁷⁰ 这课题可参阅《合约的履行、弃权与禁反言》一书第九章。

you join the game, you play according to the local law): 见 Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation (1986) 2 WLR 453; South Carolina Insurance Co v. Assurantie Maatschappij "De Zeven Provincien" (1987) AC 24; The "Heidberg" (1993) 2 Lloyd's Rep 324 等先例。正如 Hoffmann 大法官在 Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation 先例中说:

"... the discovery ... from ordinary parties to English litigation who happen to be foreigners. If you join the game you must play according to the local rules. This applies not only to plaintiffs but also to defendants who give notice of intention to defend. The recent decision of the Court of Appeal in the South Carolina Insurance case (1986) QB 348 shows that adherence to local rules requires also forbearance from taking advantage of more advantageous rules available elsewhere. Of course, a party may be excused from having to produce a document on the ground that this would violate the law of the place where the document is kept. But in principle, there is no reason why he should not have to produce all discoverable documents wherever they are.

Hoffmann 大法官的判决虽然只针对了根据英国法院 CPR 规定要披露的文件证据,但口头证据也是同样的道理。

但如果是针对在外国的第三方(非诉讼方)取证(文件证据或口头证据)就会更加敏感,因为证据的问题有严格的地域限制(strict territorial limited)。而英国法院不应对单纯是为了披露而被加入作为共同被告的外国第三方做出披露令,因为虽然形式上是命令诉讼方披露,但本质上是命令第三方披露:见Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation; Fusco v. O'Dea (1994) 2 ILRM 389; Mercantile Group (Europe) AG v. Aiyela (1994) QB 366 等先例。

而即使确实是英国法院诉讼程序的当事方,也有可能需要在国外取证。例如,被告不合作与不愿意出庭,虽然一般来说这种情况法院会做出缺席判决(default judgment)或对被告不利的判决(因为他/她不提供证据反驳),但也有情况是非要被告的证词不可。在这种情况下,原告就需要在被告所在的国家取证。又或是虽然被告愿意出庭抗辩,但因为各种原因无法出国,所以不得不在国外取证等。在这种情况下,《海牙证据公约》(针对非诉讼方的第三方⁷⁴)不适用。英国法下,CPR Rule 34.8 规定了可以在讯问官面前在外国录取口供书,如果需要还要

⁷² 当然当事方可以以披露有关文件会违反文件所在地的法律为由拒绝披露。例如在 The "Heidberg" (1993) 2 Lloyd's Rep 324 先例,案情涉及在法国波尔多的一起船舶碰撞事故。作为共同被告的船上货物发货人与保险人都是法国公司,英国法院命令两位被告做出披露并让原告检查文件。但两位共同被告声称这在法国法律下是被禁止的,否则就会构成刑事犯罪,要求法院撤销命令。但 Cresswell 大法官认为被告提交的证据无法证明如果被告遵守了法院的披露命令会在法国法律下构成刑事犯罪。

⁷¹ 否则会对双方当事方(其中一方或双方都在外国)造成不公平。

⁷³ 原则上讲,当事方没有理由不全面披露有关的文件,无论文件的所在地是哪里。

⁷⁴ 这与本书第二章之 4 段介绍的第三方披露令(Norwich Pharmacal Order)针对的第三方不同,可以仅仅只是证人(mere witness),无须介入(mixed)了有关错误行为(wrongdoing)。

在盘问前披露有关的文件: 见 Settebello Ltd v. Banco Totta & Acores (1985) 1 WLR 1050 先例。

对外国的证人取证有很多不同的程序,其中最常见的是法院向外国司法机关发出请求书(letter of request)。英国法院在行使该权力时要考虑到在外国取证的敏感性,同时也要避免不必要的花费、延误与不便。因此,英国法院相对来说较不愿意批准原告(是他自己选择在英国诉讼)在外国取证的申请,特别是他自己需要的证据:见 Berdan v. Greenwood (1880) 20 ChD 764 先例。在 News International Plc v. Clinger (unreported, ChD, 16 August 1996)先例,原告为了支持自己对冻结令(Freezing Order)75的申请,向法院要求在外国取证。根据两国有关的双边民事诉讼程序公约,法院同意原告在讯问官(法官自己)面前在以色列反盘问被告,但被告是否接受盘问纯属自愿。

但法院对被告的申请有不同的态度,在有些案件中虽然英国法院是有管辖权的适格(competent)法院,但现实是除非被告可以在外国取证/作证(例如被告因为各种原因无法在开庭审理时去英国),否则就无法作证支持抗辩。为了避免这种被告无法为自己抗辩的压迫与不公平的情况,法院会更加愿意行使权力让被告可以在外国取证/作证:见 Ross v. Woodford (1894) 1 Ch 38; Debtor (No.2283 of 1976), Re (1979) 1 All ER 434 先例。法院必须同意证人无法到庭接受盘问是因为健康问题⁷⁶,或在少数情况是要前往英国的花费不成比例⁷⁷,并且证人的证据是重要⁷⁸。当然有时也会有其他原因,例如签证问题等。

正如在本章之 2.1 段提到,现在视频链接是一种常见的替代方法。但在涉及 古巴的 Peer International Corp v. Termidor Music Publishers Ltd (No.3) (2005) EWHC 1048 先例,因为技术问题通过视频链接的方式作证效果不理想,仍需要 法院发出请求书并指定一位法官作为特别讯问官 (special examiner) 去古巴取证。也有一些案件中海外证人的可信度尤为重要,即使在外国取证也需要法官自己作为录取口供书(deposition)的特别讯问官,亲身感受证人作证与被反盘问的过程与他/她的可信度。

如果在外国取证会令原告失去在公开审理时反盘问的机会,法院可能不会做出有关命令:见 Hardie Rubber Co Pty Ltd v. General Tire and Rubber Co (1973) 129 CLR 521 先例(在日本进行反盘问有困难)。这会是考虑到这种自说自话的口头证据价值有限,不值得花费大量时间与金钱取证。

可顺便一提,有时反而是在国际仲裁中的做法更有弹性与没有那么敏感。笔者很多香港仲裁(或新加坡仲裁等)需要在中国内地取证(原因可能是因为来不

⁷⁵ 这课题可参考本书第三章。

⁷⁶ 见 Berdan v. Greenwood (1880) 20 ChD 764; Haynes v. Haynes (1962) 34 DLR (2d) 602 (BC)等先例。

⁷⁷ 见 Wong Doo v. Kana Bhana (1973) NZLR 1455 先例。

⁷⁸ 见 Hardie Rubber Co Pty Ltd v. General Tire and Rubber Co (1973) 129 CLR 521; Lucas Industries Ltd v. Chloride Batteries Australia Ltd (1978) 45 FLR160 等先例。

及办签证或是因为证人是政府高官),但完全不需要中国内地的司法机关介入。 笔者也记得在约 20 年前,有一个有关韩国与美国买卖直升飞机的香港仲裁,仲 裁员要飞到韩国向当时的韩国总统取证。当然他是自愿作证,不存在强制。

2.3 《海牙证据公约》

2.3.1 简介

1970 年《关于从国外调取民事或商事证据的海牙公约(Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters)》(简称《海牙证据公约》)是国与国之间有关协助取证的主要国际公约。在 Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation (1986) 2 WLR 453 先例,《海牙证据公约》被描述为:

"... all it sets out to do is to provide an orderly and mutual system for obtaining documents from persons not subject to the jurisdiction of the applicant state but subject to the jurisdiction of the respondent state."

《海牙证据公约》在 1976 年 9 月生效,其中 Article 1 提到该公约的目标或目的是:

"In civil or commercial matters a judicial authority of a contracting state may, in accordance with the provisions of the law of that state, request the competent authority of another contracting state, by means of a letter of request, to obtain evidence⁷⁹, or to perform some other judicial act."

截止 2018 年 6 月,《海牙证据公约》有 61 个签约国,包括澳大利亚、巴巴多斯(Barbados)、巴西、中国、塞浦路斯(Cyprus)、捷克、丹麦、芬兰、法国、德国、以色列、意大利、卢森堡、摩纳哥(Monaco)、荷兰、挪威、萄葡牙、俄罗斯、新加坡、韩国、西班牙、瑞典、土耳其、英国与美国等国。另《海牙证据公约》在 1954 年有一个较早的版本,针对的问题与公约内容也是大同小异,签约国有日本、澳大利亚、比利时、埃及、匈牙利、波兰、土耳其、黎巴嫩、摩洛哥、罗马尼亚、瑞士、前苏联等国。

《海牙证据公约》包括两个部分:第一章针对一个签约国司法机关要求另一签约国的有关机构协助强制取证;第二章针对一个签约国通过大使馆、领事或私人在另一签约国取证,后者的法院不必直接参与。

⁷⁹ 这包括文件证据与口头证据,在英国对应《海牙证据公约》的《Evidence (Proceedings in Other Jurisdictions) Act 1975》立法之 s.2(2)提到这包括对任何实体财产的检验、照相或保存,对实体财产进行实验,对有关人士进行医疗检查与提取血样等,有关实物证据可参阅本书第五章。在 Goncharova v. Zalotova (2015) EWHC 3061 (QB)先例,死因裁判官(coroner)为了协助一个涉及亲子关系的俄罗斯诉讼,提供了死者血样。

2.3.2 公约的第一章

《海牙证据公约》的第一章是针对审理案件的国家法院向外国签约国正式提出协助取证的要求,强制在它管辖内的人士提供与披露文件或提供口供书(deposition)或答复质询(interrogatories)。每一签约国应指定一个中央机关(central authority)负责接收来自另一签约国司法机关的请求书/嘱托书(Letters of Request),并将其转交给执行请求的主管机关。英国是外交部与高院的高级聆案官(Senior Master of the Supreme Court),美国、法国与德国是司法部,中国是司法部司法协助交流中心(Ministry of Justice of China, International Legal Cooperation Center,简称ILCC),中国香港是政务司司长(Chief Secretary for Administration)与高等法院司法常务官(Registrar of the High Court)。

这请求书要使用取证国家的语言,这会涉及翻译工作。但除非签约国已提出保留,也应接受英文或法文的请求书。根据《海牙证据公约》第三条的规定,请求书应载明:

- "(一)请求执行的机关,以及如果请求机关知道,被请求执行的机关;
- (二)诉讼当事方的姓名和地址,以及如有的话,他们的代理人的姓名和地址;
 - (三) 需要证据的诉讼的性质, 及有关的一切必要资料;
 - (四) 需要取得的证据或需履行的其他司法行为。

必要时,请求书还应特别载明:

- (五) 需询问的人的姓名和地址:
- (六) 需向被询问人提出的问题或对需询问的事项的说明;
- (七) 需检查的文书或其他财产,包括不动产或动产;
- (八)证据需经宣誓或确认的任何要求,以及应使用的任何特殊格式:
- (九) 依公约第九条需采用的任何特殊方式或程序。"

《海牙证据公约》建议与英国法院目前使用的请求书范本将在本章之 2.5 段介绍。被要求取证国家会把请求转交法院并依照该国的法律与做法处理,包括强制证人,指令一位法官或独立律师去监督取证与反盘问等。申请人(取证方)往往会任命一位在取证国家的称职律师(competent lawyer)以提供协助。例如律师会建议是以质询还是以宣誓作出的口供书(deposition upon oath)方式取证会令法院较易接受,或协助反盘问。而被强制的证人或是争议的敌对方(原告或被告)也可能出面要求取证国家法院拒绝申请。这当然可能会令诉讼变得昂贵,但本来海外取证就是昂贵的做法。

至于取证方对质询或口供形式取证的决择,前者比较简单与费用低,但后者 灵活运用可在盘问中套出证人许多有用的资料,是事前想不到的,全是看证人当 场的反应与盘问者的精明能临场变通挖出来的"内幕"消息/资讯。

2.3.2.1 何谓民事与商业事件?

《海牙证据公约》只针对民事与商业事件(civil or commercial matters)的取证而不针对刑事。但有难以区分到底是否属于民事与商业事件的情况,而在这种情况下应根据什么国家法律或国际习惯等去区分也存在疑问。在英国贵族院的State of Norway's Application, Re (Nos. 1 and 2) (1990) 1 AC 723 先例,判是对提出要求的国家与被要求的国家两者的法律与习惯做法都要考虑。所以,英国若是被外国要求取证,它先会考虑提出要求的外国是否把事件列为民事与商业事件。如果是,英国再考虑自己的法律与习惯做法(英国比较宽松)之后再作最后决定。例如,如果涉及税务问题即在很多国家不被接受为民事与商业事件。但在英国法下,税务问题属于民事与商业的范畴。协助外国法院取得有关该国税法(revenue law)的诉讼需要的证据,不属于直接或间接执行了外国的税法。

在 1989 年 4 月,海牙国际私法会议的一个特别委员会认为应对《海牙证据公约》中的"民事与商业"有一个公约自己的定义与解释,而不应只看要求协助的国家或被要求协助的国家的法律,或是把两国法律加在一起考虑。委员会认为现在的国际实践中公法与私法中存在一定的灰色地带,即使破产、保险与雇佣合约逐渐普遍被认为是属于民事与商业事件。此外国际商业活动中存在很多商业诈骗的情况,例如国际贸易中倒签提单⁸⁰,这应属于民事与商业事件还是刑事案件?

2.3.2.2 拒绝要求的情况

《海牙证据公约》第十二条规定了被要求的取证国家拒绝请求书要求的情况:

- "只有在下列情况下,才能拒绝执行请求书:
- (一) 在执行国, 该请求书的执行不属于司法机关的职权范围: 或
- (二)被请求国认为,请求书的执行将会损害其主权和安全。

执行国不能仅因其国内法已对该项诉讼标的规定专属管辖权或不承认对该 事项提起诉讼的权利为理由,拒绝执行请求。"

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⁸⁰ 这课题请参阅笔者《提单与其他付运单证》(2016年)一书第六章之7.1.6段。

以英国为例,法院在证人或第三方或争议的敌对方⁸¹反对下拒绝外国法院要求的情况有不少,如:

- (一)取证影响英国国家安全,这不需要详情或证明,只要当局/内阁大臣 (Secretary of State) 出一封信就是结论性证据。
- (二)取证会影响英国主权: 见 Rio Tinto Zinc v. Westinghouse Electric (1978) AC 547 先例。在该先例涉及美国司法局/联邦贸易局调查/收集证据,将来用在美国大陪审团调查(Grand Jury investigation),并且是针对英国的商业利益。这被英国法院认为是美国行使过度管辖权(Exorbitant Jurisdiction)的做法。之后英国也另已有《Protection of Trading Interests Act 1980》的立法防止这种情况。

另外,根据《Evidence (Proceedings in Other Jurisdictions) Act 1975》之 s.9(4) 的规定,法院不会执行针对君主或君主的官员或仆人(即英国政府官员)取证的请求书: 见 Pan American World Airways Inc's Application, Re (1992) 1 QB 854 先例。

- (三)为了进行诉前披露或取证(Pre-trial 或 Pre-action Discovery)而不是为了审理案件而需要提前披露或取证(Early Discovery):见 Radio Corporation of America v. Rauland Corporation and Another (1956) 1 QB 618 先例。美国的诉讼方经常根据《Evidence (Proceedings in Other Jurisdictions) Act 1975》在英国申请获取证据。但英国根据《海牙证据公约》第二十三条,在签署与批准《海牙证据公约》时声明不执行旨在进行诉前取证与调查的请求书。
- (四)对文件证据的要求需要是已经确定的特定文件,例如是某次会议的记录(Minutes)或某天向主管机构申请批文的信函等。不允许要求的证据(无论是文件证据或是口头证据)是要该海外证人全面披露有关争议/争端的证据,更不用说是钓鱼取证/摸索证明(Fishing Expedition)⁸²。至于有关请求的真正/主要目的是调查或钓鱼取证/摸索证明,还是为了诉讼获得重要证据,是由英国法院决定。

在《Phipson on EVIDENCE》(2018 年,第 19 版)一书之 Para.8-44 说:

"… not only must the documents be separately described as individual documents rather than a class … The requirement for documents to be specified is relaxed in at least two fields. First, in the context of ancillary relief applications in divorce proceedings, and in a line of authority that the requirement is relaxed⁸³… Secondly, so long as the classes of documents are specified, it is not necessary for the Financial Conduct Authority to specify particular documents when seeking documents

⁸¹ 见 Boeing v. PPG Industries Inc (1988) 3 All ER 839 先例。

⁸² 见本章之 2.3.2.3.3 段。

⁸³ 见 Charman v. Charman (2006) 1 WLR 1053(向外国法院作出的请求书); Jennings v. Jennings (2009) SC (Ber) 62(外国法院向英国作出的请求书)等先例。

in aid of a foreign request under s.171 of the Financial Services and Markets Act 2000. "

- (五)违反英国法律。例如 Penn-Texas Corporation v. Murat Anstalt (1964) 1 QB 40 先例,法院针对《Foreign Tribunal Evidence Act 1856》立法中的"人士"(person)一词解释说"法人"是法律虚构出来的说法,实际并不存在也不能出庭接受盘问或回答质询(interrogatories)。所以请求书可以要求一个作为第三方的海外有限公司的法人提供文件证据,但不可以要求该公司法人提供口头证据。而如果法人派一位代表或总经理出庭,这也只是该公司代表(proper officer)个人的口头证据,在宣誓下凭他/她的个人记忆与了解作证。所以请求书的要求也应该是针对某些董事或高管,而不只是公司法人。
- (六)与必须足够明确是什么特定文件证据一样,要求的证人也应明确是谁与要提出的问题。例如在较早的 Rio Tinto Zinc v. Westinghouse Electric 先例,请求书中除了几位列名的证人外也泛泛包括任何知道事实的人士(such other person who has knowledge of the facts),Diplock 勋爵认为要求明显过份(obviously excessive)。另在 Atlanta Gas Light Co v. Aetna Casualty & Surety (unreported, 7 February 1993)先例,美国法院要求英国的非海险保险人组织(London Non-Marine Association)指定对以下事项最有资格作供(who are most qualified to testify on its behalf on the topics below)的 1 个或多个证人的请求书也被 Steel 大法官拒绝执行,认为美国法院没有考虑这不知名证人的口供是否有关或可否被接受 (admissible)。在 Smith v. Phillip Morris Company Inc (2006) EWHC 916 (QB)先例,有关的请求书是为了美国的诉讼申请口头证据,但由于范围太宽泛属于调查而不是取证的性质,被法院拒绝执行。
- (七)太过于"欺压"(oppressive)证人。例如要求给予专家证据(expert evidence)或需要第三方花费太多的时间与做太多工作,当然这也只是在极例外的情况。
- (八)拒绝要求也会发生在程序上。例如申请人以誓章(affidavit)形式单方面申请(*ex parte*/without notice)取得法院命令。但之后证人或第三方可去抗辩以取消该命令,理由可能在程序上例如是誓章有不正确之处或没有给予一个全面与坦率的陈述: Overseas Programming v. Cinematographische Commerz-Anstalt and Induna Film (The Times, 16 May 1984)。

2.3.2.3 不能在请求书中要求的证据

2.3.2.3.1 诉前披露 (pre-trial discovery)

在本章之 2.3.2.2 段已经提到, 《海牙证据公约》第二十三条规定:

"签约国可在签署、批准或加入时声明,不执行普通法国家的旨在进行审判

前文件调查的请求书。"

除了捷克、以色列与美国外,大部分国家都在这一条文下做出了声明/宣告(declare)。英国声明不接受诉前披露: "not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents." (HMSO Cmnd 6727, 1976)

这也体现在《Evidence (Proceedings in Other Jurisdictions) Act 1975》之 section 2(4):

"An order under this section shall not require a person - (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

2.3.2.3.2 发现文件/全面披露

在请求书(letter of request)下要求取证(文件证据)只能是为了开庭审理 之用,英国不允许:

- (一)要求证人自动说出他手头有什么有关文件,例如给一份文件清单(List of Documents)。
- (二)要求证人像在正式披露中要求诉讼的敌对方(不是第三方)自动列出 所有有关文件一样的全面披露(general discovery)。英国要求申请人针对性列明 要披露什么特定文件。

文件清单与全面披露的做法在 CPR 之前的 RSC 下也只会在诉讼双方之间正常与相互披露⁸⁴的程序中使用,不会用在传召第三方出庭(subpoena *duces tecum*)的情况。所以可以理解在同样的立场下,也不会允许用在同样是针对第三方(只不过是在海外的第三方)的请求书。Diplock 勋爵在 Rio Tinto Zinc v. Westinghouse Electric (1978) AC 547 先例提到请求书中必须每份文件分开描述(individual documents separately described)。当然这样做会很不方便,所以 Fraser 勋爵在 Asbestos Insurance Coverage Cases, Re (1985) 1 WLR 331 先例进一步解释说:

"... I do not think that by the words 'separately described' Lord Diplock intended to rule out a compendious description of several documents provided that the exact document in each case is clearly indicated ... an order for production of the

⁸⁴ 在本书第七章有详细介绍。

respondent's 'monthly bank statements for the year 1984 relating to his current account' with a named bank would satisfy the requirements of the paragraph, provided that the evidence showed that regular monthly statements had been sent to the respondent during the year and were likely to be still in his possession. But the general request for 'all the respondent's bank statements in 1984' would in my view refer to a class of documents and would not be admissible.⁸⁵"

另在 Panayiotou v. Sony Music Entertainment (UK) Ltd (1994) Ch 142 先例, Donald Nicholls 勋爵说:

"In accordance with English legal procedures ... discovery of documents is obtainable only from persons who are parties to the action. In the normal way, parties are compelled to produce for inspection all their documents relating to matters in issue in the action. Persons who are not parties are not subject to such a wide, far-reaching obligation. They can be compelled to give evidence at the trial, ... But it is established that a subpoena to produce documents cannot be drawn so widely as to amount to requiring the witness to give discovery. The object of the subpoena is to compel the witness to produce of corroborating or challenging a witness, or because they may lead to a train of inquiry which may result in the discovery of evidence or may, in some other way, advance one party's case or damage the other's. Nor is the witness to be required to undertake an unfairly burdensome search through his records to find this or that document or to see if he has any documents relating to a particular subject matter. All this is well established in relation to a subpoena to produce documents at the trial... The English courts apply a similar approach to the production of documents under a letter of request."

2.3.2.3.3 钓鱼取证/摸索证明(fishing expedition)

在上一小段节录的 Donald Nicholls 勋爵的判决中提到,英国法律是明确不允许钓鱼取证/摸索证明 (fishing expedition) 的情况。在 Asbestos Insurance Coverage Cases, Re (1985) 1 WLR 331 先例, Fraser 勋爵针对《Evidence (Proceedings in Other Jurisdictions) Act 1975》之 section 2(4)也说: "it is to be construed so as not to permit mere 'fishing' expeditions."

什么属于或不属于钓鱼取证/摸索证明可先节录 Kerr 大法官在 State of Norway's Application, Re (1987) QB 433 先例的判决如下:

⁸⁵ Fraser 勋爵认为请求书中的文件要分开描述,不表示当事方不能只对几份文件简略描述。只要这个描述足够显示是哪几份特定的文件,就可以接受。例如说明是"1984年中国银行的月结单"是有足够针对性与清楚显示是中国银行的12份月结单,是可以接受。但如果说"1984年所有银行的月结单"就太广泛了,也有调查到底有哪些银行的账户的嫌疑。

"although 'fishing' has become a term of art for the purposes of many of our procedural rules dealing with applications for particulars of pleadings, interrogatories and discovery, illustrations of the concept are more easily recognized than defined. It arises in cases where what is sought is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence. It is the search of material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence to support allegations of fact, which have been raised bona fide with adequate particularization...."

另《Dicey, Morris & Collins on The Conflict of Laws》(2012 年,第 15 版)一书之 8-103 段对什么是钓鱼取证/摸索证明有一个笔者认为很好的定义,即诉讼方要求的不是证据(针对双方的争议/争端)而是为了调查,希望披露的文件会带出其他他/她原本不知道的有关与有用的证据或新的争端/事项:

"'Fishing' arises where what is sought is not evidence as such, but information which may lead to a line of enquiry which would disclose evidence; it is a search, a roving enquiry, for material in the hope of being able to raise allegations of fact."

由于请求书中要求的文件证据必须是有足够详细描述的特定文件,所以判断是否属于钓鱼取证/摸索证明相对容易。但如果是口头证据,判断起来就会更困难。正如 Kerr 大法官在 State of Norway's Application, Re 先例举例说如果有足够的细节,那么问 X 是否是信托的委托人(settler of a trust)就属于一个合法与有针对性的问题。但如果答案是否定的,那么接下来补充的问题就会是"那么谁是委托人?",这就属于钓鱼取证/摸索证明。在 Charman v. Charman (2006) 1 WLR 1053 先例,Wilson 大法官建议说:

"Thus in my view (a) in so far as they seek production of documents, the orders for the letter of request ... could not lawfully have been made if they represent an attempt to go 'fishing'; and (b) in so far as the letter of request seeks the taking of oral evidence, it may be preferable to conduct its initial appraisal not by reference to 'fishing' but by asking, perhaps in effect only slightly differently, whether the intention is to obtain (witness) evidence for use at trial and there is reason to believe that he has knowledge of matters relevant to issues at trial."

但也有权威说法是面对外国法院作出的请求书,被要求的法院不应该过多考虑有关的争议或争端的细节以决定第三方的口头证据是否有关与可被接纳。在 Asbestos Insurance Coverage Cases, Re (1985) 1 WLR 331 先例,贵族院说:

"... should not be astute to examine issues in the action and the circumstances of the case with excessive particularity for the purpose of determining in advance whether the evidence of that person will be relevant and admissible. That is essentially a matter for the requesting court."

这个问题在 First American Corp v. Zayed (1999) 1 WLR 1154 先例得到了解

决,上诉庭判是如果证据显示有足够理由相信被要求披露的人士可能有对诉讼争议有关的证据,就不能以钓鱼取证/摸索证明的理由拒绝。另可见 Honda v. KJM Superbikes (2007) EWCA Civ 313(向外国法院作出的请求书); Land Rover North America Inc v. Windh (2005) EWHC 432 (QB)(不属于钓鱼取证/摸索证明)等先例。

2.3.2.3.4 Panayiotou v. Sony Music 先例

高院的 Panayiotou v. Sony Music Entertainment (UK) Ltd (1994) Ch 142 先例 显示了漫无边际的披露与在《Evidence (Proceedings in Other Jurisdictions) Act 1975》之 section 2(4)下提供明确的特定文件的区别,前者不被允许而后者被允许。 该先例涉及英国著名歌星 George Michael 先生想要求美国法院协助一些文件的 披露。在该先例,原告 George Michael 先生(与他的两间公司)与 CBS UK Ltd 订立了相当长年数的经纪合约,内容包括他作为发片歌手(recording artist)的所 有作品(包括唱片、演出、演唱会等)。之后 CBS UK Ltd 被索尼音乐集团 (Sony Music) 收购, 改名为 Sony Music Entertainment (UK) Ltd, 成为索尼音乐集团下 的一部分。后来,George Michael 先生开始诉讼要求法院宣告有关合约条文不合 理,属于非法限制贸易(unlawful restraint of trade),因此他不受合约约束。但 在披露阶段,由于很多文件属于并存放在索尼音乐集团下的其他公司(特别是美 国、加拿大、澳大利亚、日本、德国、奥地利与瑞士的公司),而这些公司属于 独立的实体(independent entities)不属于诉讼方,所以原告要求这些名义上的"第 三方"披露有困难。但这些文件对找出索尼音乐集团在全球到底获取了多少利润 至关重要,所以原告向英国法院申请向纽约法院发出请求书,要求纽约法院协助。 因为索尼音乐集团在美国营运的 Sony Music Entertainment Inc (SMEI) 公司属于 对索尼音乐集团其他公司的中心授权机构,被告将 George Michael 先生的作品授 权给 SMEI, SMEI 再分授权给其他公司。George Michael 先生希望 SMEI 提供一 些特定的文件,如分授权合约等。

Donald Nicholls 大法官考虑了原告要求的每一类文件,例如分授权合约、SMEI 与其他著名歌手(如 Michael Jackson 先生)的唱片合约、SMEI 从分被授权方(sub-licensees)获得的版权费、SMEI 针对 George Michael 先生的唱片发出的账单或支付要求等文件被认为可以被列入请求书。但显示 SMEI 在生产、发行、出售、营销、推广 Michael Jackson 先生的唱片的花费的文件(包括有关的交易商的价格列表、折扣记录、股价波动报告等),索尼音乐的内部记录与备忘录等文件被认为是典型的通过漫无边际的披露企图调查与寻找信息,不被允许加入请求书。

2.3.2.4 证人的特免权(privilege)

特免权是一个很大的课题,将在本书第九至十三章有详细针对。这特免权除适用在诉讼双方的披露(与开庭)外,也适用在《海牙证据公约》要求证人或第

- 三方提供与披露文件,例如是他与律师的通讯就受法律业务特免权(legal professional privilege)保护。当然除了英国外,提出要求或被要求取证的外国的法律也会另有其它类别或不同范围的特免权,应顾及两国法律。例如在 Rio Tinto Zinc v. Westinghouse Electric (1978) AC 547 先例就涉及美国宪法第五修正案的特免权。另多举两个先例如下:
- (一)在 Securities and Exchange Commission v. Stockholders of Santa Fe International (unreported, 23 February 1984)先例,银行抗拒披露的理由一是这会违反卢森堡对银行守秘的法律,二是银行对客户保密的责任不应破坏,这属于公众利益特免权(public interest privilege),但这两个理由都不被英国法院接受。对第一个理由,英国法院在理解卢森堡法律后,认为这个风险只是乱想出来的(fanciful)。而对第二个理由,法院认为不能以银行与客户之间的机密关系隐藏不当或欺诈的行为是更重要的公众利益:
- "... there is also clearly a public interest, and a very strong one, in not permitting the confidential relationship between banker and client to be used as a cloak to conceal improper or fraudulent activities."
- (二)在 Overseas Programming v. Cinematographische Commerz-Anstalt and Induna Film (The Times, 16 May 1984)先例,在美国的版权诉讼中需要在英国取证,而证人以自证其罪特免权(self-incrimination privilege)抗辨。但英国《Supreme Court Act 1981》之 Section 72 禁止证人在这种涉及知识产权的诉讼中以自证其罪特免权作为抗拒披露(包括以 Anton Piller Order 的方式强制披露)的理由。所以英国法院在该先例拒绝了证人的抗辩。

2.3.3 公约的第二章

《海牙证据公约》的第二章针对的是另一种在外国签约国取证的方法,即外交官员、领事代表和特派员取证,第十五条规定:

"在民事或商事案件中,每一签约国的外交官员或领事代表在另一签约国境 内其执行职务的区域内,可以向他所代表的国家的国民在不采取强制措施的情况 下调取证据,以协助在其代表的国家的法院中进行的诉讼。

签约国可以声明,外交官员或领事代表只有在自己或其代表向声明国指定的适当机关递交了申请并获得允许后才能调取证据。"

根据第十五条的第二段宣告要有批准/批文的国家有丹麦、挪威、萄葡牙与瑞典等,而新加坡则不允许这第二章做法。中国《民事诉讼法》第二百七十七条也有相应规定:

"外国驻中华人民共和国的使领馆可以向该国公民送达文书和调查取证,但 不得违反中华人民共和国的法律,并不得采取强制措施。 除前款规定的情况外,未经中华人民共和国主管机关准许,任何外国机关或者个人不得在中华人民共和国领域内送达文书、调查取证。"

但大使/领事馆官员不一定能胜任取证的工作,例如美国在伦敦的大使馆就拒绝提供这种服务。这一来,再加上取证方希望有经验与有相关法律知识人士担任讯问官(examiner)与/或特派员(commissioner),因此在《海牙证据公约》第十七条针对了私人(private person)/特派员取证(他/她一般是由审理案件的外国法院任命):

- "第十七条 在民事或商事方面,合法地被指定为此事特派员的人员可以不 受约束地在签约国进行有关另一签约国法院所受理诉讼的查证行为,如果
- (一)他得到证据调查地国指定的主管机关的概括许可,或对特定案件的个 别许可。
 - (二) 他遵守主管机关许可时规定的条件。

签约国可以声明本条规定的查证行为无须得到预先许可而进行。"

虽然《海牙证据公约》第十七条最后规定签约国可以声明查证行为无须得到预先许可而进行,但除了芬兰与英美三个国家外,其余都要先有批准/批文。对英美来讲,它们对外放松是希望其它国家也会同样回报,因为许多情况国与国之间涉及对等(reciprocity)。所以在英国,有无数为了美国诉讼的取证(证人给予宣誓后口供书)根本无需麻烦英国法院,也不必让后者知悉。取证方只需要简单地送达一份口供书通知(notice of deposition),要求在英国的证人出面。

而外国法院若是向在英国的证人发出传召到庭的命令(subpoena),英国的证人也可以不理会,反正英国证人不在外国法院管辖范围。但他会有所顾忌,例如像美国这类强大国家,如果藐视法院有机会再踏足美国时会有后患,所以即使美国法院管辖不到,他也不敢漠视这传召到庭的命令。与英美相反的另一极端做法是有国家把外国人在它境内监誓(administer an oath)也当作是触犯刑法。故取证方必须小心什么是合法,什么是非法。而非法取得的证据英国法院(如果审理案件)也不一定能用上,所以任命取证当地的一位称职律师给予正确法律意见是十分重要。再次强调《海牙证据公约》的第二章只适用在证人自愿作证(willing witness)的情况,否则就只能根据第一章要求外国法院协助了。但涉及要求取证国家协助强制证人作证除了浪费时间与金钱外,外国国家法院指令的法官或其它人士对取证方来说比不上他自己能控制指令的讯问官与/或特派员的适合。

读者也许会有疑问,证人既然自愿作证为何不干脆在审理的国家法院在开庭审理时作证?答案是十分简单,例如证人身体不好或另有重任/工作,不能或不愿意出国,或是去不了审理的国家,所以只能以这种方法取证。而这种证人在海外的监誓证供(commission evidence)即使是根据英国以前的《Civil Evidence Act 1968》也可以被采纳(admissible)作为呈堂证据,更不用说新的《Civil Evidence Act 1995》更宽松对待传闻证据(hearsay evidence)。但监誓证供有一个缺点是

审理的法官本人并未目睹作供的证人,而诉讼敌对方若有高水平证人出庭作供与接受反盘问,只看了口供书的审理法官或会在不知不觉中受到感染或产生潜在偏见(imputed bias)。特别是在一些涉及商业欺诈或不诚实的案件,审理法官能够目睹与感受双方证人作证时的状态有一定的重要性。一种克服这个缺点的方法是在审理法官同意与取证国家不反对的情况下,把审理法官指令为讯问官亲自去外国取证。另一种现在比较普遍的办法是在开庭时或开庭前,外国的证人以视频链接的方法作供并接受反盘问。最理想的当然是能在开庭审理时出庭作证与接受反盘问,在与对方证人的证词有正面矛盾时,也可防止对方证人看见没有人可以对质/反驳就信口开河。

2.4 海外文件持有人在英国有分行/分支的情况

这方面涉及今天有许多的跨国公司/集团在世界各地开分行/分支,若是有关英国诉讼的文件是由伦敦的分行/分支持有,英国法院显然可在当事方申请后传召证人出庭提供文件证据(subpoena duces tecum/witness summons),或是给予一个第三方披露令(Norwich Pharmacal Order)要求提供/披露资料。但若是有关文件是在海外,在总行或在其它国家的分行,不属伦敦分行/分支,英国法院就会犹疑了,一般也不肯做出这种命令。毕竟持有文件的外国总行/分行要遵循它们所在地的法律,例如某些文件必须机密。这种命令会被视为侵犯外国的国家主权(sovereignty),除非是紧急追踪一笔被窃的金钱(hot pursuit in an action to trace embezzled funds)等例外情况:见 London and Counties Securities Ltd v. Caplan (unreported, 26 May 1978)先例。这正是做出全球冻结令时会同时做出的资产披露令,这方面在本书第三章有详细介绍。

在 XAG v. A Bank (1983) 2 All ER 464 先例,案情涉及一家美国银行被美国法院传召到庭提供/披露一些伦敦分行持有的文件。银行以此行为违反英国法律要求为客户保密为由抗拒,并成功在英国申请禁令。

另在英国的 Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation (1986) 2 WLR 453 先例,原告在英国法院获得传召证人出庭提供文件证据的命令,强制一家美国银行(它有伦敦分行, 故受管辖)让他可以根据《Bankers' Books Evidence Act 1879》之 r.7 查阅被告的银行账目,但这命令后来被法院取消。

2.5 CPR 下有关请求书的条文

在此可先详细介绍针对这种去外国(对英国而言)向海外证人取证做法的 CPR Rule 34.13,如下:

"Where a person to be examined is out of the jurisdiction -- letter of request⁸⁶

- 34.13—(1) Where a party wishes to take a deposition from a person outside the jurisdiction, the High Court may order the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is. ⁸⁷
- (2) A letter of request to a judicial authority to take the evidence of that person, or arrange for it to be taken. ⁸⁸
- (3) The High Court may make an order under this rule in relation to county court proceedings.⁸⁹
- (4) If the government of a country allows a person appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose.⁹⁰
- (5) A person may be examined under this rule on oath or affirmation or in accordance with any procedure permitted in the country in which the examination is to take place.⁹¹
- (6) If the High Court makes an order for the issue of a letter of request, the party who sought the order must file--
 - (a) the following documents and, except where paragraph (7) applies, a translation of them--
 - (i) a draft letter of request;
 - (ii) a statement of the issues relevant to the proceedings;
 - (iii) a list of questions or the subject matter of questions to be put to the person to be examined; and
 - (b) an undertaking to be responsible for the Secretary of State's expenses. 92

⁸⁶ 这一条文就是针对请求书的做法。

⁸⁷ 若当事方想向海外证人取证(口供书),高院可发出请求书给有关证人所在地的司法机关求助。

⁸⁸ 请求书可以要求外国司法机关取证,或只是容许安排取证(如任由当事方/申请人安排口供书甚至视频链接)。

⁸⁹ 高院可以协助下级法院(地方法院)发出此请求书。注意是这条文没有说去协助商事仲裁,这是因为《海牙证据公约》(Hague Convention)并不适用在商事仲裁,这可见本章之 2.9 段的介绍。

⁹⁰ 若是外国法院允准英国高院去直接指定一位讯问官(examiner),高院会去指定。这种讯问官一般是职业律师。

⁹¹ 证人可以宣誓或誓言或根据所在地法律的规定进行取证程序。

⁹² 申请人/当事方必须呈交以下文件(除非是 CPR Rule 34.13 [7]规定的例外情况,否则应加上外文翻译本): (i) 草拟的请求书;(ii) 诉讼的有关争端与事项的书面陈述;(iii) 要向海外证人提出的问题列表或纲要;

- (7) There is no need to file a translation if--93
 - (a) English is one of the official languages of the country where the examination is to take place; or
 - (b) a practice direction has specified that country as a country where no translation is necessary."

以下也可节录一份请求书的范本:

"To the Competent Judicial Authority⁹⁴ of [国家]

- I [名字] Senior Master of the Queen's Bench Division of the Supreme Court of England and Wales respectfully request the assistance of your court with regard to the following matters. 95
- 1. A claim is now pending in the [法院部门名称] Division of the High Court of Justice in England and Wales entitled as follows (set out full title and claim number) in which [原告名字] of [地址] is the claimant and [被告名字] of [地址] is the defendant. 96
- 2. The names and addresses of the representatives or agents of (set out names and addresses of representatives of the parties).⁹⁷
 - 3. The claim by the claimant is for:--98
 - (a) (set out the nature of the claim)[索赔是什么]
 - (b) (the relief sought, and)[寻求的法律救济]
 - (c) (a summary of the facts.)[有关事实的纲要]
- 4. It is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties that you cause the following witnesses, who are resident within your jurisdiction, to be examined. The names and addresses of the

⁽iv) 向政府保证会支付所有的费用。

⁹³ 不需要外文翻译本的例外情况包括英文也是该国官方语言之一,如澳大利亚、加拿大(除了魁北克省)、荷兰、新西兰与美国。

⁹⁴ 收信人的外国司法机关名称。

⁹⁵ 英国高院的高级聆案官谨向贵国贵院提出以下要求。

⁹⁶ 目前有一个诉讼在英国法院进行(并写明案件名称与法院编号),其中原告是(名字与地址),被告是(名字与地址)。

⁹⁷ 当事方在当地代理人(律师)的名字与地址。

⁹⁸ 索赔是有关什么(并加上详情)。

witnesses are as follows:-- 99

5. The witnesses should be examined on oath or if that is not possible within your laws or is impossible of performance by reason of the internal practice and procedure of your court or by reason of practical difficulties, they should be examined on accordance with whatever procedure your laws provide for in these matters. ¹⁰⁰

6. Either/

The witnesses should be examined in accordance with the list of questions annexed hereto. 101

Or/

The witnesses should be examined regarding (set out full details of evidence $sought)^{102}$

- $\it N.B.$ Where the witness is required to produce documents, these should be clearly identified. 103
- 7. I would ask that you cause me, or the agents of the parties (if appointed), to be informed of the date and place where the examination is to take place. 104
- 8. Finally, I request that you will cause the evidence of the said witnesses to be reduced into writing and all documents produced on such examinations to be duly marked for identification and that you will further be pleased to authenticate such examinations by the seal of your court or in such other way as is in accordance with your procedure and return the written evidence and documents produced to me addressed as follows:-- ¹⁰⁵

Senior Master of the Queen's Bench Division Royal Courts of Justice, Strand London WC2A 2LL England."

英国的政府法务部(Government Legal Department)对请求书有长达 40 页的十分详细与有帮助性的指导,有兴趣的读者可通过以下网址下载: http://www.tsol.gov.uk/

102 或该证人应被盘问有关的证据(列明是什么证据)。

⁹⁹ 为了公平的审理,需要允许住在贵院管辖范围内的以下证人接受盘问。该证人名字与地址是……

¹⁰⁰ 该证人应在宣誓下或可根据贵国法律的做法或规定接受盘问。

¹⁰¹ 该证人应以附件所列出的问题接受盘问。

¹⁰³ 若是文件证据,必须列出明确的是什么特定文件,如某一天某一份的检查报告或某一段时间内与某人之间的通讯。

¹⁰⁴ 请贵国贵院告诉我(高院的高级聆案官),或告诉当事方代表律师,进行盘问的时间与地点。

 $^{^{105}}$ 也请贵国贵院把取证以书面记录并对有关文件加上标记(容易找有关部分),再加上贵院的盖印,送一份到下列英国地址给我。

 $Publications/Scheme_Publications/letter_of_request.pdf >_{\circ}$

2.6 英国法院对协助外国审理法院取证的态度

在这方面的起点是为了国际友好(international comity)尽量协助外国法院, 在 Rio Tinto Zinc v. Westinghouse Electric (1978) AC 547 先例提到:

"It is our duty and our pleasure to do all we can to assist that court, just as we would expect the (foreign) court to help us in the circumstances. 106"

在本章之 2.3.3 段已经提到,这种国与国之间的协助重视对等(reciprocity)。但对英国而言,它垄断了世界上大部份的国际商业诉讼,也因此赚取了天文数字的收益。例如一家跨国的律师所每年能赚上亿英镑,而这种大型跨国律师所在英国有不少。还有其它吃法律饭且可能赚更多的大律师(barrister)、专家等等更是数不胜数,一个人的产值比得上中国一家大中型企业。相比之下,其它国家特别是发展中国家,能审理几宗这类案件呢?而处理这类国际案件都会涉及去外国取证,所以英国法院肯定是友好与宽松了,因为它求人的机会是大得多。

首先针对自愿作供的证人(willing witness)或愿意自动披露文件的无辜第三方/非诉讼方(non-party),英国法院完全是放任不去理会。在本章之 2.3.3 段已经提到,美国诉讼经常在英国取证,证人给予宣誓后作口供并接受反盘问,在口供书(deposition)签字等。这包括了其它细节,例如任命一位称职的讯问官(examiner,经常会任命一位英国律师或大律师),要安排合适的取证地点、录音录像和记录等等,当然这完全是私人的安排。在香港,笔者记得香港国际仲裁中心(HKIAC)就曾被借用来取证之用。

而针对要强制取证(文件或口头证据)的情况,就要根据《Evidence (Proceedings in Other Jurisdictions) Act 1975》向英国法院提出请求。为了表现友好与宽松,该立法不仅对《海牙证据公约》签约国适用,也对其他任何国家与地区适用。根据该立法的 Section 1,向法院/高院提出申请时要说服法官这取证要求来自外国法院与外国诉讼是民事案件¹⁰⁷。在 Section 2(2)对可强制披露的证据分类如下:

- "(a) for the examination of witnesses, either orally or in writing;
- (b) for the production of documents;
- (c) for the inspection, photographing, preservation, custody or detention of any property;

¹⁰⁶ 英国法院有责任与愿意尽力协助外国法院取证,希望将来外国法院也会在同样情况下"回报"来协助英国法院取证。

¹⁰⁷ 英国对外国刑事案件另有《Crown Court Amendment Rules 1991》(SI No. 1288)的立法针对。

- (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;
 - (e) for the medical examination of any person;
- (f) without prejudice to paragraph (e) above, for the taking and testing of samples of blood from any person."

至于是否批准请求的裁量权在法官,而可以拒绝请求的各种情况已在本章之2.3.2.2 段介绍。

2.7 在外国法院起诉取证

另一个可行办法是索性在取证国家起诉第三方,但这不是要向本是第三方的被告索赔或追求任何救济(relief),而只是为了取证(文件或口头证据)。到底能否合法这样做要看当地的法律,而允许这样做的最重要的一个国家是美国。根据美国《US Code》Title 28, s.1782 的联邦立法(Federal Statute),美国应协助外国法院强制在美国取证¹⁰⁸:

"(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege. (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."(加黑部分是笔者的强调)

¹⁰⁸ 见 Malev Hungarian Airlines v. United Technologies International Inc (1993) I.L. Pr.422, US Ct. of Appeal; Re Euromepa S.A., 51 F.3d. 1095 (2d. Cir., 1995); In re Metallgesellschaft A.G., 121 F.3d 77 (2d. Cir., 1997)等先例。

在美国法院做出命令前必须满足 3 个要求: 见 Perez Pallares, Re, 2010 WL 419372 (D Colo, 20 October 2010); Schmitz v. Bernstein Liebhard Lifshitz LPP, 376 F 3d 79 (2d Cir 2004)等先例。这 3 个要求是:

- (一)被要求披露的人士¹⁰⁹住在接受申请的美国地方法院(US District Court) 管辖区域或可在管辖区域被找到:
 - (二)是为了在外国裁判庭(foreign tribunal)¹¹⁰前进行的司法程序¹¹¹取证;
- (三)是由外国或国际裁判庭或任何利益相关人士(interested person)做出的申请。

在权威的 Intel Corp v. Advanced Micro Devices Inc, 542 US 24 (2004)先例,美国最高院做出了以下指引:

- (一)任何利益相关人士都可以根据 Section 1782 取证,包括非诉讼方,例如向欧盟竞争委员会(EU Competition Commission)投诉的人士。
- (二)"裁判庭"包括案件调查官(investigating magistrates)、行政裁判庭(administrative tribunals)、仲裁庭(arbitral tribunals)、准法律机构(quasi-judicial agencies)与在公约下成立的法院(conventional courts),但有关程序必须有一定的裁决功能。
 - (三) 只需要合理预期会有外国裁判庭的程序, 而无需待决或即将开始。
 - (四)不要求有关的证据在外国程序中也会被要求披露(discoverable)。¹¹²
 - (五)地方法院要考虑的因素包括:

109 这里的"人士"不包括美国政府: 见 Al Fayed v. Central Intelligence Agency, 229 F 3d 272 (DC Cir 1997) 先例。

¹¹⁰ 注意,有先例判这里是包括国际商事仲裁的仲裁庭: 见 Application of Technostrogexport, Re, 853 F Supp 695 (SDNY 1994); Republic of Ecuador v. Bjorkman (D Colo, 9 Aug 2011) (UNCITRAL 仲裁); Application of Winning (HK) Shipping Co Ltd, Re (SD Fla, 30 Apr 2010) (在 LMAA 规则下进行的伦敦仲裁)等先例。但也有许多地区判不包括国际商事仲裁的仲裁庭: 见 National Broadcasting Co v. Bear Stearns & Co, 165 F 3d 184 (2d Cir 1999) (ICC 仲裁); El Paso Corp v. La Comision Ejecutiva Hidroeclectricia Del Rio Lempa, 2009 WL 2407189 (5th Cir, 6 Aug 2009); Application of Operadora DB Mexico, Re, 2009 WL 2423188 (MD Fla, 4 Aug 2009) (ICC 仲裁); Guo, Re, 18-MC-561 (JMF) (SDNY, 25 Feb 2019) (CIETAC 仲裁)等先例。在其他领域,进行税务审核的税务机关(tax authorities)会被认为属于裁判庭: 见 Minatex Finance SARL v. SI Group Inc, 20087 WL 3884374 (NDNY, 18 Aug 2008)先例。但这不包括外汇管制部门的负责人: 见 Fonseca v. Blumenthal, 620 F 2d 322 (2nd Cir 1980)先例。

¹¹¹ 该程序必须有一定的裁决功能 (adjudicative function): 见 Letters Rogatory, Re, 385 F2d 1017 (2d Cir 1967) 先例。这包括在法院待决的破产程序: 见 Lancaster Factoring Company Ld v. Mangone (1998) IL Pr 200 先例。这程序可以是将来而不是待决的程序: Request from Ministry of Legal Affairs of Trinidad and Tobago, Re, 848 F2d 1151 (11th Cir 1988)先例。但不包括不再听取证据的上诉: 见 Euromepa SA v. R Esmerian Inc (1999) IL Pr 694 (US Ct of Appeals 2nd Cir)先例。

¹¹² 见 Application by Bayer AG, Re (1999) IL Pr786 (US Ct of Appeals, 3rd Cir); United Kingdom v. US, 238 F3d 1312 (11th Cir 2001)先例。

- (1) 被要求披露的人士是否参与了外国诉讼程序,或已经接受外国法院的管辖权;
- (2) 外国诉讼程序的性质与特点;
- (3) 外国裁判庭对这种取证做法的接受性;
- (4) 有关申请是否是为了规避外国取证的限制113;
- (5) 有关申请是否对被要求披露的人士(毕竟是第三方)负担过重。

向美国地方法院的申请可以是单方面申请(*ex parte*):见 Letters Rogatory from Tokyo District, Re, 539 F2d 1216 (9th Cir 1976)先例。但诉讼的对方或被要求披露的人士在知悉后也可以申请撤销法院命令。地方法院有命令、限制、拒绝披露的广泛裁量权(discretion):见 Euromepa SA Re, 51 F3d 1095 (2d Cir 1995)先例。要求协助的申请可向美国司法部(Department of Justice)提出,司法部会转交有关地方法院执行,例如向证人发出传召到庭以给予口供或提供文件的命令。重要的是如果地方法院愿意协助,披露的范围可能比审理案件的法院所允许的广泛得多,因为美国自己的披露范围十分广泛。例如美国的诉前披露在英国就会被认为是钓鱼取证/摸索证明(fishing expedition)¹¹⁴。

这些区别可能导致审理的法院(如英国法院)认为以该立法在美国法院取证的一方会对被要求披露的一方负担过重、不公平、欺压或困扰(oppressive or vexatious)。在英国贵族院 South Carolina Insurance Co v. Assurantie Maatschappij "De Zeven Provincien" (1987) AC 24 先例,审理是在英国法院,而其中一方当事方(被告)去美国以此立法取证。已经多次提到美国允许广泛的诉前披露,根本不理会是否是钓鱼取证/摸索证明。这一来,对方当事方(原告)可就恼火了,向英国法院申请禁令不准被告这样做。因为案件是由英国法院审理,所以对被告有管辖权,但贵族院判:

- (一)如何取证是当事方自己的事情,这包括在外国法院起诉,只要是合法英国法院就不理会。这是英国法院的对抗制(adversarial system)下的其中一个大原则,即当事方自己调查取证、举证,法院不理会他是通过什么方法取得证据。Templeman 勋爵在 Tay Bok Choon v. Tahansan Bhd (1987) 1 WLR 413 先例就说:"In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender."
- (二)只要取证方法在外国是合法与不会造成欺压或困扰。至于怎样会造成 欺压或困扰,其中一个考虑是在英国审理的案件已经进行到了什么阶段。例如在

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¹¹³ 见 Gianola, Re, 3 F3d 54 (2nd Cir 1993); Metallgesellschaft AG, Re, 121 F3d 77 (2d Cir 1997); Intel Corp v. Advanced Micro Devices Inc, 542 US 24 (2004); Servico Pan Americano de Protection, Re, 354 FSupp 2d 269 (SDNY 2004)等先例。

¹¹⁴ 见 Radio Corporation of America v. Rauland Corporation and Another (1956) 1 QB 618 先例。

Bankers Trust International v. PT Dharmala Sakti Sejahtera (1996) CLC 518 先例,一方当事方也去美国以此立法取证,但 Mance 大法官认为当时已经开了庭只等待判决,取证方是为了上诉而作准备,于是就作出禁令不准这样做。其他类似的先例有: Glencore International v. Exeter Shipping (2002) 2 All ER 1; Benfield Holdings Ltd v. Elliott Richardson (2007) EWHC 171 (QB)¹¹⁵等。

在最近的 Kiobel v. Cravath, Swaine & Moore LLP, No. 17-424 (2d Cir, 10 July 2018)先例,美国上诉庭判地方法院滥用了法院在 Section 1782 下的裁量权。该先例简单的案情是 Kiobel 女士与其他 11 位尼日利亚原告于 2002 年在纽约对与著名荷兰石油公司 Royal Dutch Shell(简称 Shell)有关联的 4 位被告开始诉讼¹¹⁶(简称 Kiobel 诉讼),声称 Shell 协助与教唆尼日利亚政府违反国际法。根据有关的机密令(confidentiality order),大部分 Shell 披露的文件只可以用在 Kiobel 诉讼(及相关诉讼)的用途。最后 Kiobel 女士在 Kiobel 诉讼中的救济请求(relief)被驳回。

多年后,Kiobel 女士在荷兰再次对 Shell 提起诉讼。在 2016 年 10 月,Kiobel 女士的代理律师根据 Section 1782(a)向美国地方法院做出申请,要求法院传召 Shell 在早已是终局的 Kiobel 诉讼中的代表律师事务所 Cravath, Swaine & Moore LLP 到庭,提供 Shell 在 Kiobel 诉讼(及相关诉讼)中披露给原告的文件。地方法院同意了 Kiobel 女士的申请,认为(1)Kiobel 女士在荷兰的诉讼中需要有关的文件;(2)已经十多年过去了,Shell 很可能已经不再拥有有关的文件;(3)提供文件不会对 Cravath, Swaine & Moore LLP 造成什么负担。地区法院命令双方可以就以什么条件提供有关的文件签订一个新的协议。

但这个判决被上诉庭推翻,上诉庭指出在美国最高院的 Intel Corp v. Advanced Micro Devices Inc.先例中提到法院做出判决时要考虑的因素之一就是被要求提供文件的人士是否是诉讼方。如果被要求披露的人士是诉讼方,那么审理法院(在此先例是荷兰法院)应有管辖权,而无需美国法院介入提供帮助。在 Kiobel v. Cravath, Swaine & Moore LLP 先例,虽然表面看来是针对作为非诉讼方的律师事务所,但文件实际上是属于 Shell 的,而 Shell 是诉讼方。另一个要考虑的因素是有关申请是否是为了规避外国取证的限制,Kiobel 女士的律师承认在荷兰是不太可能被允许获得诉前披露,因此上诉庭认为 Kiobel 女士的申请是为了避开荷兰的限制。特别是 Kiobel 女士的申请是申请 Shell 的律师披露文件,如果一旦诉讼方将文件交给美国律师,对方诉讼方在别的国家原本无法取得的文件(如特免权的原因)就变为可以取得,这显然会影响客户与律师之间的关系与交流。更重要的是,Shell 在 Kiobel 诉讼中是在机密令下提供的文件,而机密令明示禁止 Kiobel 女士在其他诉讼中使用有关的文件。地区法院做出的命令等于在没有 Shell 同意的情况下更改了机密令,这会降低大众对机密令的信心。

¹¹⁵ 该先例在本章之 2.1.2 段有详细介绍。

 $^{^{116}}$ Kiobel v. Royal Dutch Petroleum, 456 F Supp 2d 457 (SDNY 2006)先例。

虽然上诉庭推翻了地区法院的判决,但并不代表美国的律师事务所与他们的客户就可以高枕无忧了。Kiobel v. Cravath, Swaine & Moore LLP 先例中一个特殊的情况是 Shell 在 Kiobel 诉讼中是在机密令下披露的文件,对于那些没有机密令保护的文件,仍可能被美国法院强制要求披露。

2.8 美国法院的立场与做法

2.8.1 允许广泛诉讼前/审理前披露的原因

已经多处提及美国法院对诉前(pre-action)或审前(pre-trial)的披露采取十分放任与开明的态度,也没有钓鱼取证/摸索证明(fishing expedition)的顾虑。与英国相反,美国认为双方当事方提前能把对方的证据/底牌知道得愈多愈好,这可令双方能早日达成庭外和解,或若是需要开庭审理可加快与妥善安排(例如开庭时间方面)。英国虽然仍禁止钓鱼取证/摸索证明,但新的 CPR 已经进一步向美国靠拢,把原本只局限在死亡与受伤的案件(《The Rules of the Supreme Court 1965》Order 24, rule 7A)的诉前披露议定书(Pre-action Protocol)¹¹⁷扩大到所有民事案件。美国法律也认为这样做的优点是:(一)一方或双方当事方可以尽早了解全面真相(to get the whole story),而不是片段了解;(二)更有效地收集证据(effective way to gather evidence);(三)去找出重要的新证人与/或线索,例如讲到某会议时另有第三方在场,他/她会是潜在的证人,不论是否愿意协助;(四)可以保留证据,例如证人老迈、病重、即将出国或船员随船开航;(五)可以亲自观察证人;(六)可以与对方接触及看对方的和解意图等。

有说法是美国在披露是一个极端,大陆法的国家根本没有披露文件又是另一个极端,而英国是中间的立场。总体看应该是英国、美国对证据的收集与准确认定事实比大陆法系国家强,虽然两种制度也在日益靠拢。美国对诉前或审前的披露尤其是广泛,而被要求披露的对象与方法会是多种,如提供文件证据、有反盘问的口供书(deposition)、书面的质询(interrogatories)、要求承认事实通知(notice of request to admit fact)等。

虽然这种做法的本意并不是让当事方乱来,挖出对方一些与争议无关的事实,但这情况经常发生,毕竟任何合理估计会带来一些可采纳证据的披露的事件(all matters reasonably calculated to lead to the discovery of admissible evidence)都包括在内。而即使是传闻证据(hearsay evidence)将来不能被法院采纳(inadmissible),也不是拒绝披露的理由。至于在海外/外国的证人或持有文件的第三方,美国虽然是《海牙证据公约》的成员国,但该公约被美国认为太局限与太受到约束了,例如取证国家(如英国)不允许钓鱼取证/摸索证明。因此美国有做法是将美国自己的一套强加在外国的证人或第三方身上,例如对不在美国法院管辖范围内的

¹¹⁷ 这课题可参阅本书第二章之2段。

外国第三方做出传召到庭(subpoena)命令,这经常带来美国与外国之间的磨擦。

2.8.2 文件证据

而在美国的提前披露主导是在取证方的律师手中,他/她完全不受法院控制,也无需任何批准就可向任何人提出披露的要求。若涉及文件证据,第一步会是向对方提出广泛的有关争议的文件要求,无论是有利或不利的文件都要披露。在查阅文件后,找出有关人士并列为证人,再进一步对他/她做出反盘问或质询。另一方法是先找出并对一个了解对方手中有什么文件的证人做出一份口供书(deposition),然后根据内容向对方要求提供看来有关的文件。

一般文件要原封不动的交出,而如果文件内有敏感资料如商业机密(这文件会来自无辜第三方),法院会做出保护令(protective order)。例如是取证方只能把文件用在诉讼而不准向外人透露与/或只准什么人查阅,或是下令案件完结后退还或销毁文件等等。美国法律也接受一些有特免权(privilege)的文件是不必去披露,不论是提前披露或是在诉讼中正常的自动披露,例如对方与律师之间的通讯。若涉及海外证人,就要依赖当地法院根据《海牙证据公约》协助强制,例如在香港法院命令下,住在香港的证人被迫去美国领事馆做出口供书。

2.8.3 证人

若涉及口头证据而且想反盘问证人,就会是以口供书(deposition)的方法来取证了。对象可以是争议敌对方,例如是可能的被告(potential defendant)或其雇员,也可以是对部分有关事实有了解的无辜第三方等。证人若不自愿作供,可能要求有管辖的地方法院做出传召到庭(subpoena)命令。这些都在美国立法的《Federal Rules of Civil Procedure》(简称 FRCP)有规定。

若是证人有合理理由拒绝作出口供是可向法院申请把传召到庭命令撤销,例如取证地点距离他居住或工作的地点超出 100 英里,即使在 FRCP 下原告(申请人)本应承担证人所有费用并预先支付给法院,否则传召到庭命令无效。证人在被传召后常会马上任命律师教导怎样处理,律师会有一系列的标准指引告诉证人在做出口供时应如何应对。有许多指引是与正式开庭作为证人是相同的,例如一定要讲真话,不要发脾气、失控,听清楚问题才好回答,不要多讲题外话,不要带不想披露的文件出席等等。

取证会在律师所进行并没有法院官员参与,证人常会有律师陪同并且随时可去咨询与协助准备作供。这种在美国的律师训练证人(coaching the witness)的情况在英国是不允许的。证人也可去参阅文件/档案以备作供,但若在作供时提及,他/她会被要求披露这些文件,即使这些文件原来未被要求披露。由于法院不参与,整个取证过程可能失控,双方经常吵架。有些地方法院定下了一些规则,例如针对证人的律师应以什么措辞/语言提出反对,不要不恰当地训练证人等,但仍是管不了太多。若取证时有争议要记录在案,或是马上要求法院作出决定(例

如重要之处仍未有答案,非要马上解决不可),或是留待稍后才要求法院作出决定。取证中每一句话都会录音与/或有速记员记录下来,之后准备与打印一份誊本(transcript),这份证据将来可用在法院审理。

2.8.4 优点

美国的广泛提前披露的优点已经在本章之 2.8.1 段提到,笔者也想到这套做法真能把真相挖出来。一个典型的例子是克林顿总统的艳事,若不是检察官史塔尔(Kenneth Starr)先生有精明的头脑与法律的知识能充分利用这套做法协助调查/收集证据,就不可能把克林顿总统逼到死角。对付克林顿总统绝非易事,他思维高、技巧更高,讲话永远为自己留有余地、不留把柄。最初,史塔尔先生是从零开始,若是民事诉讼,可说是根本无法去拟定有详情的文书请求(plead with particulars)。但史塔尔先生把路温斯基小姐的好友与白宫的雇员传召到庭,要求她们在宣誓后接受反盘问与做出口供书(deposition)并提供文件(这些都是调查/收集证据的程序),结果把什么真相都挖出来,例如是一些私人电话与内容,有关文件(日记、电话录音带、电子邮箱等)与证物。估计她们原先不想讲,即使讲也不会讲得这么透,反正是事不关己。但一被精明与技巧高(skillful)的律师反盘问,往往是避无可避。回答中又不敢讲假话,因为这涉及犯罪(发假誓),反正这又不涉及自己的重大利益,何必不讲真话呢?最后史塔尔先生连路温斯基小姐也传召到庭去做出口供书。她并未想抖出真相,"出卖"克林顿总统,但也有犯罪的顾虑,结果又是令真相曝露。

2.8.5 缺点

这套做法的缺点也不少,大致有以下几点:

(一)太昂贵,证人/第三方也会被迫花费律师费用与做大量工作。像一些著名的大案件在诉前披露会花费天文数字的金钱。例如在享特两兄弟起诉"七姊妹"(七大石油公司)指后者违反反垄断法(anti-trust violations)的 Nelson Bunker Hunt v. Mobil Oil Corp, 75 Civ 1160 (EW) (SDNY 1987)先例,就涉及了大量诉前披露与调查/收集证据的工作,可以说是用尽了一切方法。最后证人证言加上披露的文件等等有成千上万的文件。而享特两兄弟在仲裁败诉后想以仲裁庭拒绝细看这大量文件为由撤销裁决书,但被法院拒绝:

"Fundamental fairness does not require that an arbitrator must hear any and all evidence a party may wish to offer, regardless of its length, repetitiveness or irrelevance."

(二)有关法律太多太复杂。除了《Federal Rules of Civil Procedure》外,许多地方法院另外订立自己针对披露的规则(据知在 94 个联邦地区共有接近5,000 个不同的本地规则),内容互有矛盾。像洛杉矶法院据悉有 31 条本地规则(local rules),另有 434 条分规则(sub-rules)与 275 个常备命令(standing orders),

加起来共 3 大本,被笑言是: "拿都拿不起来,逞论去阅读(hard even to lift, let alone read)。"

- (三)有不少看法是这套做法被滥用,这在没有法院的监督,只是任由双方各怀不同目的、各为其主的律师一手操纵的情况下是免不了的结果。美国法院太忙,诉前披露涉及的工作量太大,法院要管也有心无力,而不同法官也有不同看法,甚至可能不懂这一套做法。
- (四)笔者见过仲裁条文试图局限美国式的披露,明示披露的范围必须由仲裁庭批准与必须局限在特定文件(specific documents)等。英国《Arbitration Act 1996》之 section 34 明确规定以双方当事方同意为准(subject to the right of the parties to agree any matter),之后才谈及仲裁员有关文件披露等的权力。

2.9 商事仲裁在这方面的困难

2.9.1 在仲裁中强制境内证人出庭作证或提供文件

商事仲裁针对双方当事方之间的披露在强制力与威吓程度上远比不上国家法院。英国《Arbitration Act 1996》把命令双方当事方披露的权力下放给仲裁庭,但涉及要求不自愿(unwilling)的无辜第三方/非诉讼方(non-party)作供或提供文件就需要法院协助去强制了,即通过法院传召证人出庭提供口头证据(subpoena *ad testificandum*)或文件证据(subpoena *duces tecum*)。在《Arbitration Act 1996》之 s. 43 规定说:

- "43 (1) A party to arbitral proceedings may use the same court proceedings as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.
- (2) This may only be done with the permission of the tribunal or the agreement of the other parties. ¹¹⁹
 - (3) The court procedures may only be used if -
 - (a) the witness is in the United Kingdom, and
- (b) the arbitral proceedings are being conducted in England and Wales¹²⁰ or, as the case may be, Northern Ireland ..."

¹¹⁸ 强制在开庭时作证或提供文件。

¹¹⁹ 要先获得仲裁庭批准或双方当事方之间同意(但如果第三方不愿自动作证或谈条件才予合作,就仍需要法院强制)。

¹²⁰ 这法院程序只能用在身在英国的证人与仲裁在英国的情况,即不会强制在英国的证人去为外国仲裁作证。

而在美国仲裁,美国的仲裁法(《United States Arbitration Act》,9 U.S. Code §1)在 Section 7 明示仲裁庭可以命令第三方出庭作证与/或提供估计是对争议重要的文件。该条文也说明地方法院可以协助执行这个仲裁庭的命令。在 Commercial Metals Co v. International Union Marine Corp, 318 F Supp 1334 (SDNY 1970)先例,仲裁庭在承租人申请下传召船东出庭提供文件证据,交出一些有关它在违反租约时赚取的利润的文件以计算损失。船东向法院申请撤销这个传召到庭命令但被拒绝,法院说:

"In the first place we would not be likely to interfere with the arbitrators' exercise of their broad powers with respect to damages, at least as long as the evidence sought could conceivably be relevant to their inquiry.... Since it appears that the records which are the subject of the subpoena might be relevant to the arbitrators' inquiry in this case, defendant's motion is denied."

2.9.2 《海牙证据公约》不适用在商事仲裁

但注意上一段所讲都是针对在境内(仲裁地)的证人与第三方。涉及海外/外国取证,就只好求助仲裁地法院(如果是伦敦仲裁就是英国法院)通过请求书(letter of request)要求要去取证的国家协助了。但大问题与困难是《海牙证据公约》不适用在商事仲裁:见 Commerce & Industry Co of Canada v. Certain Underwriters at Lloyd's of London (2002) 1 WLR 1323 先例与《Phipson on EVIDENCE》(2018年,第19版)一书之 Para.8-40。其原因可节录 Gary Born 先生的《International Commercial Arbitration》一书:

"It is sometimes suggested that the Hague Evidence Convention is available in aid of international arbitral proceedings. The text of the Convention provides little support for such suggestions. Article 1(2) of the Convention provides that 'A Letter [of Request] shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated'.

Despite the arbitrator's adjudicatory powers and responsibilities, it is difficult to describe an arbitral tribunal as 'judicial authority'. It is equally difficult to conceive that the Convention's drafters contemplated that arbitral tribunals would be permitted to send letters of request directly to foreign Central Authorities or courts. It is somewhat more plausible that a tribunal could apply to a national court in the arbitral seat and request that it issues a letter of request, which could be executed pursuant to the Hague Evidence Convention. There is little authority on the question..."

在 Commerce & Industry Co of Canada v. Certain Underwriters at Lloyd's of London 先例,案情涉及一个有关再保(re-insurance)合约的纽约仲裁。仲裁的开庭时间已经确定,争议双方与仲裁庭都希望获得两位常驻伦敦的保险经纪人(潜在证人)的证据。证据内容主要有关他们作为争议双方的代理人的言行,但

两位潜在证人拒绝作证。于是仲裁庭向英国法院发出请求书,要求英国法院在《Evidence (Proceedings in Other Jurisdictions) Act 1975》之 Section 1 下协助取证。在本章已经多次提到《Evidence (Proceedings in Other Jurisdictions) Act 1975》是对应《海牙证据公约》的国内立法,其中 Section 1 规定:

"Application to United Kingdom court for assistance in obtaining evidence for civil proceedings in other courts.

Where an application is made to the High Court ... for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, and the court is satisfied: - (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ('the requesting court') exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom, and"

一审法院的Langley 大法官命令两位潜在证人在伦敦接受讯问官的盘问以录取在仲裁审理中会使用的证词。但这个决定被 Moore-Bick 大法官推翻,有关的命令也被撤销。Moore-Bick 大法官说:

"... the word 'tribunal' ... is a word capable of covering a wide variety of persons and bodies charged with responsibility for making decisions. It is, of course, the expression normally used when referring to a private arbitral body, but can equally well be used to refer to a court. I think it would be surprising if, in a statute whose primary purpose is to give effect to the Hague Convention, Parliament had intended to put private lay tribunals abroad on the same footing as judicial bodies exercising functions on behalf of other states... In the context of this section I think the word 'exercising jurisdiction ... in a country or territory outside the United Kingdom' are not used in a merely geographical sense. They are used in the sense of exercising control over the relevant country or territory and denote the exercise of a jurisdiction of a public and not a private nature..."

在《联合国国际贸易法委员会国际商事仲裁示范法》(UNCITRAL Model Law,简称《示范法》)的工作报告中(可参阅 Howard M. Holtzmann 先生的《A Guide To The UNCITRAL Model Law On International Commercial Arbitration》一书)有大量涉外商事仲裁去外国取证的可行性的讨论,也曾想在《示范法》内特别针对,但最后放弃了并希望对这个问题更有针对性的《海牙证据公约》将来有附件(protocol)针对以协助商事仲裁。这在该书的 761 页有提及说:

"The Commission was also in agreement that the question of international assistance in the taking of evidence in arbitral proceedings should not be governed by the model law. It noted that the Hague Conference on Private International Law was studying the possibility of preparing a protocol to the 1970 《Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters》 to extend its application to arbitral proceedings and that the Hague Conference would be interested in the

views of arbitration experts whether such a protocol would be desirable."

但在《Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention》(28 Int'l Legal Mat. 1556, 1566-67, 1989)中提到这个问题曾在 1985 年被讨论过,但认为没有将《海牙证据公约》延伸到商事仲裁的足够需求,最后不了了之,说:

"the matter had been discussed in 1985 and it was felt there was no demand for making such an extension. The laws of some countries did however provide for judicial assistance in obtaining evidence for arbitration, and the Convention could then possibly be used to obtain evidence located abroad. Although the wording of the English text of Article 1, paragraph 2 of the Convention seemed to exclude this possibility, the French text was more general."

总结以上所讲,目前《海牙证据公约》不适用在商事仲裁中去外国签约国取证的情况。笔者可节录 Alan Redfern 与 Martin Hunter 合著的《Law and Practice of International Commercial Arbitration》(2004 年,第 4 版)一书的 365-366 页所说:

"TAKING EVIDENCE OVERSEAS

The Hague Convention of 1970 does not apply to arbitration. Accordingly, there is no method of compelling a witness who is not within the jurisdiction of the court of the place of arbitration to give testimony. ¹²¹ However, some states have legislation which enables arbitral tribunal sitting in other countries to obtain evidence from witnesses within their jurisdiction¹²², either at the request of the arbitral tribunal itself, or on the application of a party. The Model Law also envisages this possibility; it is to be hoped that countries adopting new legislation based on the Model Law will add this facility as a feature of court support for the arbitral process."

在《Arbitration in Hong Kong – A Practical Guide》(2017 年,第 4 版)之 Para.24.050(笔者杨良宜与刘瑞仪律师合著)说:

"Investigation and collection of evidence is often difficult in international trade and shipping as quite often such work has to be conducted internationally or at least in more than two countries or jurisdictions. Subpoenas of witnesses or serving of a witness summons does not apply to witnesses residing outside the jurisdiction. However, it is frequently the case that overseas witnesses are the most important witnesses in shipping and international trade arbitration. The Hague Convention of

¹²¹ 商事仲裁无法强制海外/外国的证人出庭作证,更无法提前取证(文件与/或口头证据)。

¹²² 例如瑞典,可见 1929 年《The Swedish Act》之 S.12。

1970 on the 'Taking of Evidence Abroad in Civil or Commercial Matters' does not apply to arbitration. A party in the middle of a string of contracts can be left 'high and dry' when being claimed against, without the necessary information and evidence to assist in the defence or grounds on which to consider settlement."

2.9.3 各国本土的法律对仲裁取证的帮助

目前的解决办法还是依靠各国本土的法律,例如在本章之 2.7 段已经提到美国《US Code》Title 28, s.1782 的联邦立法下,美国应协助外国法院(有部分先例判包括外国仲裁庭)在美国境内强制取证,笔者在这里不再重复。

英国是另一个重要的国际经济与金融中心,许多仲裁地是其他国家或地区(例如北京或新加坡)的国际仲裁会发现一些拥有关键性证据的第三方(如经纪与代理人、保险人、技术顾问、银行等)的所在地都在伦敦,受英国法院的管辖。与美国法院一样,英国法院也可以根据《Arbitration Act 1996》之 s.44 协助外国仲裁庭取证,但 s.2(3)也明确说明如果法官认为不适合(inappropriate),英国法院就可以拒绝行使管辖权。而申请人必须有很好的理由才能说服英国法院帮助外国仲裁庭,例如除此之外申请人没有其他获得有关证据的渠道。而如果英国法院认为申请人有其他渠道获得有关证据,例如可以申请仲裁地法院的帮助,就很有可能认为不适合做出任何命令。正如 Morison 大法官在 Econet Wireless Ltd v. Vee Networks Ltd (2006) EWHC 1568 先例中针对是否帮助尼日利亚的仲裁,说:

"Absolutely no reason is advanced in support of a proposition that the English court should make an order in support of a Nigerian arbitral process and there is no such reason that can now be advanced. In other words, unless Econet could show a good arguable case for arbitration in London, the court's powers under section 44 could not be invoked. The Judge may well have been misled into thinking that it did not matter who was right about the location of the seat of the arbitration because of the statutory provisions to which counsel had drawn attention. In fact, none of the Respondents had or have any connection with this country and had the long arm reach of section 44 been invoked the first question would have been: 'why are you asking for an order from this court?' ... English Law is not the procedural law of the Nigerian arbitration and nor are there assets here. As Mr Brindle QC (被申请人代表 大律师) submitted on behalf of the Respondents, 'The natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration, especially where the curial law of the arbitration is that of the same country'. I agree."

另在 U&M Mining Zambia Ltd v. Konkola Copper Mines Plc (2013) EWHC 260 (Comm)先例,Blair 大法官也说:

"Russell on Arbitration (23rd edn),..., adding that where the seat of the arbitration is abroad, the court will need a very good reason to exercise its jurisdiction under s. 44. I accept this as a correct statement of the law, noting

however that it runs contrary to U&M's case, because it recognises that the power to grant interim relief is not confined to the court of the seat. What it shows, in my view, is that a party may exceptionally be entitled to seek interim relief in some court other than that of the seat, if for practical reasons the application can only sensibly be made there, provided that the proceedings are not a disguised attempt to outflank the arbitration agreement."

至于在《示范法》中针对法院协助取证的条文是第27条,可节录如下:

"COURT ASSISTANCE IN TAKING EVIDENCE

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

另在香港《仲裁条例》(第 609 章)第 60 条也规定:

"原讼法庭就仲裁程序所具有的特别权力

- (1) 原讼法庭可应任何一方的申请,就已在或将会在香港**或香港以外地方展 开的任何仲裁程序**,作出命令——
 - (a) 指示由仲裁庭、仲裁程序的一方或专家检查、拍摄、保存、保管、扣 留或出售任何有关财产;或
 - (b) 指示从任何有关财产检走样本,或对任何有关财产进行观察或试验。
 - (2)
- (3) 本条授予的权力,可由原讼法庭行使,不论仲裁庭是否可根据第 56 条就同一争议行使类似的权力。
 - (4)
 - (5)
- (6) 就已在或将会在香港以外地方展开的仲裁程序而言,只有在该仲裁程序 能引起一项可根据本条例或任何其他条例在香港强制执行的仲裁裁决(不论是临 时裁决或最终裁决)的情况下,原讼法庭方可根据第(1)款作出命令。
 - (7)
- (8) 在根据第(1)款就在香港以外地方进行的仲裁程序而行使权力时,原讼法庭须顾及以下事实——

- (a) 该权力是附属于在香港以外地方进行的仲裁程序的;及
- (b) 该权力的目的,是为利便在香港以外地方的、并对该仲裁程序具有基本司法管辖权的法院的程序,或具有基本管辖权的仲裁庭的程序。"

(加黑部分是笔者的强调)

2.9.4 将仲裁庭的命令/指令转为法院命令执行

针对将仲裁庭的命令与/或指令(order and direction)转为法院命令执行,在《Arbitration Act 1996》之 section 42 规定法院可以执行仲裁庭的最后敦促令(peremptory order):

- "(1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.
 - (2) An application for an order under this section may be made—
 - (a) by the tribunal (upon notice to the parties),
- (b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or
- (c) where the parties have agreed that the powers of the court under this section shall be available.
- (3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.
- (4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.
- (5) The leave of the court is required for any appeal from a decision of the court under this section."

而香港《仲裁条例》(第 609 章)在这方面是走得更远,第 61 条规定香港 法院可以协助执行外国仲裁庭的命令/指令:

"(1)**仲裁庭就仲裁程序而作出的命令或指示**,不论是在香港**或香港以外地** 方作出的,均可犹如具有同等效力的原讼法庭命令或指示般,以同样方式强制执 行,**但只有在原讼法庭许可下,方可如此强制执行**。

- (2)凡任何一方寻求强制执行在香港以外地方作出的命令或指示,则除非该方能显示,该命令或指示属仲裁庭可就仲裁程序而在香港作出的命令或指示的类型或种类,否则原讼法庭不得批予强制执行该命令或指示的许可。
- (3)原讼法庭如根据第(1)款批予许可,可按有关命令或指示的条款,登录判决。
- (4)如原讼法庭决定根据第(1)款批予许可,或决定拒绝根据第(1)款批予许可, 任何人不得针对该决定提出上诉。
 - (5)本条所提述的命令或指示,包括临时措施。"(加黑部分是笔者的强调)

但以上立法强制不自愿的海外/外国的第三方/非诉讼方作证或提供文件的效果仍不能令人满意。假设一个瑞典或新加坡的仲裁庭针对在香港的当事方作出提供文件或口头证据的命令或指示(order or direction),但该当事方不合作,就可以根据上述节录的立法条文向香港原诉法庭(Court of First Instance)申请作出强制令。如果国际上有更多国家/地区有同样的仲裁法立法规定,香港(或北京、上海等地)仲裁的仲裁庭作出的命令或指令也可去这些国家/地区的法院寻求协助。但笔者的考虑是仲裁庭对其他无辜第三方/非诉讼方(non-party)没有管辖权,无法针对这些人作出命令或指令,所以即使海外/外国的仲裁法愿意协助强制执行仲裁庭命令或指示,仍然解决不了问题。

看来,这个问题还是要留待《海牙证据公约》针对商事仲裁作出附件来解决。 在 1985 年国际商事仲裁还处于起步阶段,所以当时的需求不大。但如果今天海 牙国际私法会议(Hague Conference on Private International Law)再对这个问题 进行讨论,看是否需要通过附件将《海牙证据公约》延伸到在商事仲裁,可能有 不一样的结论。

2.10 规管机构获得海外/外国证据的权力

除了诉讼,本书也针对规管(Regulatory)。由于规管机构的性质,规管调查的对象常常是一些在全球营运的国际性公司。规管调查的违法违规行为,如行贿、洗钱、使用童工等,也常常发生在其他国家。正如英国严重欺诈调查署(Serious Fraud Office,简称 SFO)前总监 David Green CB QC 在 2014 年所说,SFO 面对的是一些国际上最顶级、拥有大量资源与有律师帮助的犯罪:

"...the SFO is not a regulator, an educator, an advisor, a confessor, or an apologist...the SFO is a law enforcement agency dealing with top end, well-heeled, well-lawyered crime. We enforce the law in our specialist field."

加上在电子时代将文件转移到外国的皮包公司或服务器存储是非常容易,所以如果规管机构无法取得海外/外国的证据,将很难全面有效地展开调查找出违法违规的真相与证据。最近的 R (on the application of KBR Inc) v. The Director of

the Serious Fraud Office (2018) EWHC 2368 (Admin)先例就涉及这方面的争议。

SFO 怀疑 Unaoil 涉嫌参与了行贿活动,于是在 2016 年开始了对 Unaoil 的调查。而在调查中发现一间名为 KBR Ltd 的公司从 1996 年就开始委任 Unaoil 提供所谓的咨询服务。于是 SFO 在 2017 年开始对 KBR Ltd 的调查,怀疑 KBR Ltd 通过 Unaoil 行贿。

根据《Criminal Justice Act 1987》之 Section 2(3)规定 SFO 有权做出通知(可称为 Section 2 通知书)强制个人或公司回答问题或提供文件:

"The Director may by notice in writing require the person under investigation or any other person to produce at [such place as may be specified in the notice and either forthwith or at such time as may be so specified,] any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified [description] which appear to him so to relate."

根据 Section 2(13),如果没有遵守通知书要求且没有合理理由,将构成刑事犯罪。

SFO 在 2017 年 4 月对 KBR Ltd 做出了 Section 2 通知书,而 KBR Ltd 一开始也遵守了通知书的要求。但到了 2017 年 6 月,SFO 开始怀疑 KBR Ltd 的母公司,在美国注册的 KBR Inc 在 KBR Ltd 与 Unaoil 的交往中扮演了重要角色,包括向 Unaoil 做出大量付款。在 2017 年 7 月,SFO 与 KBR Inc 安排了在伦敦对调查召开会议,SFO 要求 KBR Inc 派出雇员/要员而不能只是律师参加。估计这里就是计划要向 KBR Inc 做出 Section 2 通知书,但如果只有律师参加,精明的律师可能会表示没有授权代表客户接受通知书。在会议中,SFO 对 KBR Inc 做出了 Section 2 通知书要求 KBR Inc 提供一些在美国的文件,并将通知书送达给了参加会议的 KBR Inc 的公司秘书(corporate secretary)。

KBR Inc 基于以下 3 个原因向法院申请对 SFO 在 7 月做出的第二份 Section 2 通知书进行司法复核(judicial review),务求否定该通知书的合法性:

(一) SFO 要求美国公司提供在英国境外的文件属于越权(ultra vires);

(二)在 SFO 根据有关的相互法律协助协定(Mutual Legal Assistant Treaty) ¹²³有权向美国有关机关要求帮助的情况下, SFO 行使《Criminal Justice Act 1987》

¹²³ 因为本案涉及规管(还没有诉讼)与刑事犯罪调查,所以《海牙证据公约》不适用。这里的相互法律协助协定(Mutual Legal Assistant Treaty)是两个管辖区域或以上互相订立条约,向其他管辖区域索取和获得各种各样的证据,包括银行记录、商业记录、电邮内容、传真文件和证供等,以便进一步侦察在其管辖区域发生的跨国刑事案件和作出检控。英国有相关的《Crime (International Co-operation) Act 2003》立法,与英国订立相互法律协助协定的国家或地区的名单可在

https://www.gov.uk/government/publications/international-mutual-legal-assistance-agreements 下载。香港也有相关的《刑事事宜相互法律协助条例》(第 525 章)立法,与香港订立相互法律协助协定的国家或地区的名单可在 https://www.doj.gov.hk/sc/laws/table3ti.html 下载。

之 Section 2 下的权利是法律错误:

(三)向只是临时出现在英国参加会议的公司秘书送达 Section 2 通知书是错误的。

但这3个理由都被法院拒绝:

(一)这是该先例最重要的争议。KBR Inc 认为《Criminal Justice Act 1987》之 Section 2(3)不能在境外实施(operate extra-territorially),因此 SFO 不能对外国公司做出 Section 2 通知书要求提供存放在海外/外国的文件。而 SFO 则认为《Criminal Justice Act 1987》之 Section 2(3)没有地域限制,相反立法规定了 SFO有权调查与起诉跨境犯罪。再加上在该先例 KBR Ltd 作为 KBR Inc 的英国子公司,双方相互之间并不独立营运(inter-dependent),而是有足够联系与密切关系。

法院在分析了双方的争论与大量先例后认为, Section 2(3)必须能在一定的情况下在境外实施, 否则英国公司也可以通过将文件放在外国服务器的方式抗拒 Section 2 通知书的要求, 这显然会影响 SFO 调查英国有管辖权的复杂跨境犯罪案件的能力。法院认为正确的解释是只要外国公司与英国有足够的联系(sufficient connection), SFO 就可以向该外国公司做出 Section 2 通知书, 要求提供存放在海外/外国的文件。有关判决可节录如下:

"Accordingly, I would conclude that the extraterritorial ambit of s.2(3) is capable of extending to some foreign companies in respect of documents held abroad. For my part, however, I would not go further and say that the reach of s.2(3) extended to all foreign companies in respect of documents held abroad, subject only to the safeguards or limitations in ss. 1 and 2 of the CJA 1987. As it seems to me, the right answer ... is a 'nuanced answer': s.2(3) extends extraterritorially to foreign companies in respect of documents held outside the jurisdiction when there is a sufficient connection between the company and the jurisdiction. It may be noted that the potential relevance of the documents to the investigation is not the basis of the challenge.

As it seems to me, a number of considerations strongly support this conclusion:

- i) First, the starting point, as already suggested, is that s.2(3) has at least some extraterritorial reach in respect of UK companies with documents held outside the jurisdiction. That is a matter of subject matter jurisdiction. By contrast with SOCA v Perry (Nos 1 and 2) [2012] UKSC 35, this is not a question of judicial legislation; here, provided only that the starting point is well-founded, s.2(3) already has some extraterritorial application a feature which any construction of s.2(3) needs to accommodate. The question is the extent of the extraterritorial ambit in respect of foreign companies.
 - ii) With regard to foreign companies the 'sufficient connection' test strikes a

careful balance between facilitating the SFO's investigation of serious fraud with an international dimension and making excessive requirements in respect of a foreign company with regard to documents abroad. The existence of some extraterritorial reach guards against the risk of SFO investigations being frustrated or stymied while the requirement of a 'sufficient connection' justifies the extraterritorial application of s.2(3) by reference to the foreign company's own actions linked to the UK. This is, accordingly, a principled balance.

- iii) As demonstrated, the test is consistent with that adopted in the insolvency area ..., where other important public interests are involved. Here, as there, it avoids the adoption of rigid, extreme and, to my mind, indefensible lines. ...
- iv) Furthermore, the SFO accepts that any s.2(3) notice must be given to a person (individual or corporate) within the jurisdiction. There is no question, therefore, of the notice being sprung on some unsuspecting corporate entity out of the jurisdiction without prior warning.
- v) The test is easily workable. The Director would be required to apply his mind to the test before exercising his power to issue a s.2(3) notice. No practical difficulties are involved; instead practicality and common sense justify both the extraterritorial reach and the limit suggested.
- vi) The test is necessarily fact specific, thus permitting practical justice in the individual case. There would not be a closed list of factors but it is likely that relevant factors would closely resemble those referred to by Sir Donald Nicholls V-C in Paramount (此先例在接下去介绍)." (加黑部分是笔者的强调)

关于什么是"有足够联系"以满足 Section 2(3)向外国公司做出通知书的平衡, Gross 大法官引用了 Donald Nicholls 大法官在 Paramount Airways Ltd, Re (1993) Ch 223 先例中列举的应考虑并综合做出权衡的各种因素或情况:

"Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it...whether the defendant acted in good faith. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections."

在此先例,法院认为 KBR Inc 批准了 KBR Ltd 与 Unaoil 的合约与安排,也 批准与处理了所谓的行贿付款(也就是 SFO 调查的核心),所以不可能将 KBR Inc 从 SFO 对 KBR Ltd 行贿行为的调查中剥离出来。因此 KBR Inc 与英国有足够联系,SFO 可以在英国境内¹²⁴向 KBR Inc 做出通知书。

(二)法院同意 SFO 的观点,相互法律协助协定与《Criminal Justice Act 1987》是独立的两种权利。SFO 可以自由行使裁量权(discretion)决定是否做出 Section 2 通知书。SFO 也可能有现实的理由选择做出 Section 2 通知书而不是通过相互法律协助协定要求外国有关机关(如香港是律政司司长)协助,例如要求可能被外国有关机关无视、怠慢或是操作的时间上会有延误等。

(三)双方都同意 Section 2 通知书必须对当时在境内的个人或公司(代理人)做出。法院认为《Criminal Justice Act 1987》中根本没有提到任何关于"送达"(service)的问题,引入 CPR 关于法院文件送达的要求是不恰当的。¹²⁵公司秘书并非碰巧或因为个人原因出现在英国,而是代表公司参加与规管调查有关的会议。所以当时她可以代表公司接受 Section 2 通知书,而不需要满足其他任何的形式要求。

总结以上所讲,只要外国的公司与被调查的英国公司有足够的联系,并且有代表出现在英国,SFO 就可以做出 Section 2 通知书,强制要求外国的公司提供保存在海外/外国的文件以协助 SFO 调查。而如果外国公司不遵循,就会构成刑事犯罪。

在现在的电子时代,大量电子文件¹²⁶被上传到云端(Cloud)。云服务的营运商的服务器可能在海外,这一来如果法院做出的搜查令/披露令无法在域外执行,营运商就可以数据存储在海外为由拒绝披露。这对规管机构的调查会非常不利,美国政府与微软从 2014 年开始的针对是否应披露被存储在爱尔兰服务器的个人邮箱数据的案件¹²⁷就是一个很好的例子。为了应对这种情况,美国在 2018 年刚刚通过了《Clarifying Lawful Overseas Use of Data Act》(或简称《Cloud Act》)。其内容可分为两个部分,一个是美国的电子服务商应披露其拥有(possess)、托管(custody)或掌控(control)的数据,无论该数据是存储在美国境内或境外:

"A provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States." (加黑部分是笔者的强调)

 $^{^{124}}$ 但 SFO 不能乱在境外向管辖不到的外国公司做出 Section 2 通知书,所以在此案 SFO 一定要要求 KBR Inc 要派出雇员/要员到英国境内参加会议。

¹²⁵ 即使是向外国人士送达告票或传票,也有同样的做法或手法,即在外国人士前来英国公干或旅游时向他、她亲自送达。这一来,就可让英国法院有了管辖权与可以启动诉讼程序。

¹²⁶ 本书第八章对电子文件披露有详细介绍。

¹²⁷ 在《Cloud Act》被通过后,该案件的判决已经没有实际意义,所以司法部请求撤回起诉: United States v. Microsoft Corp, 584 US __ (2018)。

另一个部分是《Cloud Act》也允许适格外国政府(qualifying foreign government)在与美国政府签订行政协定(executive agreement)后,向美国境内的组织直接发出要求调取数据的命令。至于什么属于适格外国政府,《Cloud Act》规定要考虑外国政府的国内立法与众多其他因素,包括对其国内法的执行,是否提供了对隐私和公民权利足够的实质和程序上的保护等。除此之外,《Cloud Act》也对外国政府直接发出调取数据命令要满足的要求有所规定,由于篇幅有限,这里就不再节录。

在同样的背景下,英国也开始推进《Crime (Overseas Production Orders) Bill》立法。其中一个最重要的原因是现行的相互法律协助程序¹²⁸是复杂且缓慢,难以满足英国规管机构的需求。而估计满足《Cloud Act》对适格政府的要求也是英国推进该立法的其中一个考虑,毕竟美国是最大的英国公司境外资料存储地。根据《Crime (Overseas Production Orders) Bill》,在适当人士的申请下,英国法院可以作出境外披露令(Overseas Production Order),要求个人或公司直接交出境外的电子数据:

"A judge may, on an application by an appropriate officer, make an overseas production order against a person in respect of electronic data if each of the requirements for the making of the order is fulfilled."

而有权提出申请的适当人士有:警官(constable)、税务及海关官员(officer of Revenue and Customs)、金融市场行为监管局指定人员(person appointed by the Financial Conduct Authority to conduct an investigation)以及国务大臣制定的规管规则中指定的人员(person of a description specified in regulations made by the Secretary of State)。在英格兰、威尔士和北爱尔兰还包括 SFO 成员、经认可的金融调查员(accredited financial investigator)、反恐金融调查员(counter-terrorism financial investigator)。在苏格兰则还包括地方检察官(procurator fiscal)。

最后要强调的是无论是《Cloud Act》还是《Crime (Overseas Production Orders) Bill》,针对的都是电子数据而非纸质文件。针对纸质文件,SFO 还是需要依赖《Criminal Justice Act 1987》之 Section 2 与相互法律协助协定下的权力与做法。

¹²⁸ 针对民事诉讼的《海牙证据公约》的做法也同样十分昂贵与复杂。