

Kluwer Arbitration Blog

Securing Witness Evidence: English Courts to the Rescue of Foreign Arbitrations

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In *A and B v C, D and E* [2020] EWCA Civ 409, the English Court of Appeal issued on 19 March 2020 an order compelling a non-party to arbitration proceedings seated in New York to give evidence in support of the arbitration.

The Arbitration

The dispute arose under two settlement agreements between A and B on the one hand (the “Claimants”), and C and D on the other (the “Respondents”), in relation to the exploration and development of an offshore oil field in a central Asian state (the “State”). The settlement agreements entitled the Claimants to a percentage of the proceeds from the sale of the Respondents’ respective interests in the oil field to the State in 2002.

The Claimants commenced arbitration seated in New York under the settlement agreements. One of the main issues in dispute was the nature of certain payments, described as “*signature bonuses*”, made by the Respondents to the State. The Respondents argued that these payments were deductible from the sale proceeds as costs. The Claimants alleged that these payments were bribes, and therefore not properly deductible.

The Claimants relied upon the fact that G, an individual who negotiated the sale on behalf of the State, had historically been indicted by a US court for corruption charges. In this respect, they were seeking the evidence of E, an individual who negotiated the questioned payments directly with G on behalf of the Respondents. E was resident in England, outside the jurisdiction of the courts of the arbitral seat, and was not prepared to give evidence in New York, where the hearing was due to take place. The only means to adduce E’s evidence in the arbitration was therefore an order by the English courts compelling him to give evidence either at the evidentiary hearing or prior to the hearing through means which would then allow the evidence to be adduced at the hearing (for instance, a video recording).¹⁾

On 13 November 2019, the tribunal granted the Claimants permission to apply to the English courts in order to compel E’s testimony.

Legal Basis of the Application to the English Courts

The Claimants applied to the English courts under section 44 of the English Arbitration Act 1996, seeking an order permitting them to take E's evidence by deposition under English Civil Procedure Rule 34.8.²⁾

Section 44(1) of the Arbitration Act provides that the court has the same powers to make orders for the purposes of and in relation to arbitral proceedings as it has in "*legal proceedings*". Section 44(2) lists a number of matters in respect of which the court has such powers, which include the "*taking of the evidence of witnesses*".

The Position in Earlier Case Law

The English High Court **concluded** that the English courts did not have jurisdiction to grant the order sought against E, who was not a party to the arbitration. Although Mr Justice Foxton noted that the plain wording of section 44 of the Arbitration Act suggested the contrary, he felt compelled to reach the conclusion he did due to existing case law. He did however note that, in the absence of this case law, he saw "*considerable force*" in the argument that (at least certain provisions of) section 44 could be used to make orders against non-parties.

In particular, two earlier decisions of the High Court concluded (although one of them *obiter*) that section 44 of the Arbitration Act did not empower English courts to make orders against non-parties to the arbitration.³⁾ These judgments concerned orders in respect of different matters listed in section 44(2), and not the taking of witness evidence. On the contrary, in the only case that had dealt with an order for the taking of witness evidence under section 44(2)(a), the High Court judge found that he had jurisdiction to make the order, but declined to use his discretion to do so. Notably, in this latter judgment, whether section 44 covered orders against non-parties was not argued.

The Court of Appeal Judgment

In the Court of Appeal, Lords Justices Flaux, Newey and Males **overturned the decision of the High Court**. They found that section 44(2)(a) grants an English court the power to make an order for the taking of witness evidence in support of an arbitration seated outside of England and Wales by way of deposition from a witness who is not a party to that arbitration. The reasoning of the court was as follows:

1. Section 44(1) read together with the definition of "*legal proceedings*" in section 82(1)⁴⁾ grants an English court the same powers to make orders in relation to arbitration proceedings as it has in relation to domestic civil proceedings.
2. Section 44(1) must also be read together with section 2(3). Section 2(3) provides that the power conferred by section 44 is exercisable even if the seat of the arbitration is outside England and Wales, thereby explicitly permitting English courts to make orders in support of foreign arbitrations.
3. The wording of section 44(2)(a) is wide enough to cover all witnesses, irrespective of whether

they are a party to the arbitration. There was no basis to limit “*witnesses*” exclusively to parties to the arbitration, and it would be fair to say that this provision was principally directed against witnesses who are not under the control of the parties to the arbitration. Witnesses are often not parties to the dispute. The reference to witnesses ought not to connote only party witnesses.

4. The English court has the power to order evidence to be given by deposition in domestic civil proceedings under Civil Procedure Rule 34.8. Therefore, section 44(2)(a) confers upon the court the power to order the same in relation to foreign arbitration proceedings. Although there are situations in which an English court may only issue a letter of request, as opposed to an order for deposition, in support of foreign court proceedings, this was irrelevant. Section 44(1) looks solely to the powers English courts have in respect of domestic court proceedings, and not to the powers they have in respect of foreign court proceedings.
5. Subject to the “*gateways*” of section 44(1) and 44(4) which set out when the court may exercise its power,⁵⁾ the courts enjoy a discretion as to whether to issue an order or not. In particular, section 2(3) allows courts to decline to issue an order in aid of a foreign arbitration, when it considers the foreign seat makes it inappropriate to do so.

An Important but Limited Confirmation

The judgment of the Court of Appeal empowers English courts to assist with the [taking of witness evidence](#) in foreign arbitrations. Parties arbitrating across the globe are therefore able to apply to the English courts for assistance with the taking of witness evidence, even if the witness is not a party to the arbitration. England’s position as a jurisdiction that can step up to support arbitrations, no matter where they are seated, will allow this practice to develop and grow in the future.

The English courts enjoy discretion in making orders for the taking of witness evidence in foreign arbitrations. They may decline to do so if they find that, in the circumstances of the particular case, the fact that the seat is located outside the jurisdiction makes the granting of the order inappropriate.

However, the judgment of the Court of Appeal is limited in scope. While it resolved the question whether section 44(2) of the Arbitration Act may be used to obtain orders for the taking of witness evidence against non-parties, it explicitly left open the question whether other powers granted by section 44(2) are exercisable against non-parties. Parties seeking such orders against non-parties to the arbitration (including, for instance, interim injunctions and orders for the preservation of evidence) will still need to overcome the hurdle of earlier case law suggesting this is not possible. However, the reasoning of the Court of Appeal in *A and B v C, D and E* will likely guide these future developments as English courts consider and analyse the scope of section 44(2) of the Arbitration Act.

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References

- ?1 Failure to comply with such an order made by an English court may trigger contempt of court proceedings.
- ?2 Civil Procedure Rule 34.8 allows a party to apply for an order for a person to be examined before a hearing takes place. This evidence is referred to as a deposition.
- ?3 *Cruz City Mauritius Holdings v Unitech Limited* [2014] EWHC 3704 (Comm); *DTEK Trading SA v Morozov* [2017] EWHC 94 (Comm).
- ?4 Legal proceedings “means civil proceedings in England and Wales in the High Court...”.
- These “gateways” are: (i) whether the English court has the same power to grant orders in domestic civil proceedings, and (ii) if the case is not one of urgency, whether the application to the English court is made with the tribunal’s leave or written agreement of the other parties to the arbitration.
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