

COMPELLED TO TESTIFY: ENGLISH COURT OF APPEAL CONFIRMS POWER TO ORDER NON PARTY WITNESS TO GIVE EVIDENCE IN A NEW YORK-SEATED ARBITRATION

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UK International Arbitration Alert

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The English Court of Appeal recently held in *A and B v C, D and E* that Section 44 (2)(a) of the Arbitration Act 1996 (the "Act") can be used to compel a UK-based witness to give evidence in a foreign-seated arbitration, despite not being a party to the arbitration agreement, reversing an earlier decision of the English Commercial Court. The decision is likely to be of significant interest in the context of parties' increasing willingness to invoke the powers of national courts to support arbitral proceedings seated in other countries.

FACTUAL BACKGROUND

The dispute in question was the subject of arbitration proceedings seated in New York, and arose out of two agreements between the appellants and each of the first two respondents regarding the exploration and development of an oilfield in Central Asia.

Under these agreements, the appellants were entitled to a percentage of the net sale proceeds upon the first two respondents selling their respective interests in the field (which they duly did).

A central issue of the arbitration was the nature of specific payments made by the first two respondents to the Central Asian government in connection with the sale of their interests in the field, recorded as "signature bonuses", and if these amounts were deductible as costs in calculating the sums due to the appellants. The appellants argued that the sums were paid as bribes and as such were not properly deductible. They argued that an individual (referred to as "G" in the judgment), who negotiated the payment on behalf of the Central Asian government, was indicted almost 20 years ago in the US for violations of the US Foreign Corrupt Practice Act.

The third respondent, whose evidence the appellants sought, was the lead negotiator for the first two respondents and negotiated directly with G. He resided in the UK. The Tribunal granted the appellants permission to make an application to the English Court to compel his testimony. The appellants submitted that under Section 44(2)(a) of the Act the English Courts had the power to grant an order for the examination of the third respondent.

SECTION 44 OF THE ACT

Section 44 of the Act provides:

"Court powers exercisable in support of arbitral proceedings.

1. *Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*
2. *Those matters are —*

the taking of the evidence of witnesses;

the preservation of evidence;

making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings —

for the inspection, photographing, preservation, custody or detention of the property, or

ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

the sale of any goods the subject of the proceedings;

the granting of an interim injunction or the appointment of a receiver."

Section 2(3) of the Act confirms that the powers granted under Section 44 "*apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined.*"

DECISION OF THE COMMERCIAL COURT

Foxton J determined that he should follow the decisions of two English Commercial Court cases, *Cruz City 1 Mauritius Holdings v Unitech Limited* [2014] EWHC 3704 (Comm) and *DTEK Trading SA v Morozov* [2017] EWHC 1704 (Comm), in which it had been held that Section 44 of the Act did not include the power to make an order against a non-party.

The applicant argued that Section 44(2)(a) permits orders to be made against non-parties as it refers to the taking of evidence of witnesses, even if this is not the case for other subsections of 44(2). They argued that the difficulties the Court had found with making orders against non-parties in *Cruz City* and *DTEK* came from the need to serve such an order out of jurisdiction, which was not an issue in this case as the third respondent resided in the UK. However these arguments were unsuccessful and the High Court ruled that the Court did not have jurisdiction under Section 44 of the Act to order non-parties to give evidence.

Foxton J did not find the argument that some powers under Section 44(2) can be exercised against non-parties and others cannot to be an attractive one, in the absence of some language justifying a differential treatment of the various subsections.

DECISION OF THE COURT OF APPEAL

The appellants submitted that on the statutory language alone, Section 44(2)(a) gave the Court power to make orders against a non-party. They highlighted the general power given to the tribunal by Section 38(5) which drew the distinction between "party" and "witness" – which indicated that "witness" was not limited to someone who was a party. The third respondent argued that the wording of Section 44, such as the opening wording of Section

44(1) "unless otherwise agreed by the parties", demonstrates that the Court's powers are intended to be intra-party and not exercisable against non-parties.

Overturning the decision of the Commercial Court, the Court of Appeal found that the English Court did have jurisdiction under Section 44(2)(a) to make an order for the taking of the evidence of the third respondent as a non-party. Flaux LJ, delivering the leading judgment, found the wording of the Act clearly distinguishes between "witness" and "parties" when it is necessary to do so and as such it is evident that the wording of Section 44(2)(a), "the taking of the evidence of witnesses", applies to all witnesses and not just those that are a party to the arbitration.

The Court of Appeal found that the wording of Section 44 as a whole does not point to the Court's powers under Section 44(2)(a) being restricted to parties. The opening words of Section 44(1) provide a two-part test which has to be satisfied before the Court can exercise its powers: 1) that the parties have not agreed to contract out of the Court having power and 2) that, save in the case of urgency or agreement between the parties, any application to the Court is made with the permission of the tribunal. Providing the two conditions were satisfied (as they were in this case), there is nothing to restrict the power of the Court to make whatever order in relation of the taking of evidence from witnesses it could have made in civil proceedings in the High Court – including the power under CPR 34.8 to make an order for the evidence to be taken by deposition.

The Court of Appeal was fortified in its conclusion by the fact the same decision was reached in *Commercial & Industry Insurance Co of Canada v Certain Underwriters at Lloyd's* [2002] 1 WLR 1323, which is the only decision at first instance which directly deals with the question as to whether the Court can make an order under Section 44(2)(a) for the deposition of a non-party witness under CPR 34.8 for a foreign-seated arbitration.

COMMENT

The Court of Appeal has provided some welcome clarity to what had been described as the "long standing controversy" as to whether Section 44(2)(a) of the Act applies to non-parties, on which there have been conflicting statements by a number of judges at first instance. Many in the global arbitration community will welcome the Court's findings that it was able to order a non-party witness resident in England to be deposed in support of a New York seated arbitration.

The Court of Appeal's ruling may be of particular interest to parties in foreign-seated arbitrations, where a witness with potentially relevant evidence resides in England. Such a witness may, of course, be willing to give evidence voluntarily. However, if they are unwilling to do so, the English Court now has the power pursuant to Section 44(2)(a) of the Act, to compel the witness to give evidence. It should be noted that the Court retains discretion whether or not to make an order under Section 44(2)(a). As Moore-Bick J observed in *Commerce & Industry Insurance Co* "the greater the likely inconvenience to the witness, the greater the need to satisfy the Court that he can give evidence which is necessary for the just determination of the dispute."

Section 44 of the Act is a non-mandatory provision and so the parties can agree to disapply its provisions. Following this ruling, it will be interesting to see how many parties choose to do so.

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