

Court confirms power to order taking of evidence from non-parties to a foreign-seated arbitration

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Introduction

In *A v C*(1) the Court of Appeal considered whether Section 44(2)(a) of the Arbitration Act 1996 empowers the courts to issue orders for taking the evidence of a witness who is resident in the United Kingdom but not a party to an arbitration agreement. In considering the seemingly contradictory first-instance authorities, the Court of Appeal concluded that Section 44(2)(a) gives the courts a discretionary power to order such a deposition, including in respect of foreign-seated arbitrations. The judgment offers much-needed guidance for parties which have identified non-party witnesses who hold potentially relevant evidence but are unwilling to give evidence voluntarily.

Background

Unless the parties have agreed otherwise, Section 44 of the Arbitration Act empowers the courts to make certain orders regarding arbitral proceedings in legal proceedings, including:

- the taking of witness evidence (Section 44(2)(a));
- the preservation of evidence (Section 44(2)(b)); and
- the granting of interim injunctions (Section 44(2)(e)).

Section 43 of the act further empowers the courts to use normal court procedures to secure the attendance of witnesses in an arbitration where that witness resides in the United Kingdom.

The courts typically act only if the arbitral tribunal cannot exercise the requisite powers and has permitted a party to seek the courts' assistance. Section 2(3) of the act provides that Sections 43 and 44 may both apply to arbitrations seated outside England and Wales at the discretion of the court.

These provisions have been considered in a series of first-instance court judgments, including three recent cases which reached somewhat divergent conclusions.

Commerce and Industry Insurance

This case was the sole authority on Section 44(2)(a) and concerned a similar application for the taking of evidence from witnesses resident in the United Kingdom by an arbitral tribunal seated in New York.(2) Despite considering that he had the power to order a deposition under Section 44(2)(a), Justice Moore-Bick did not exercise his discretion to do so. However, the issue as to whether Section 44 applied to non-parties was not considered.

Cruz City

This case concerned an application from outside the jurisdiction for a freezing injunction against a non-party.(3) The application was brought under Section 44(2)(e) of the Arbitration Act; however, Justice Males opined in obiter comments that Section 44 did not confer powers on the court to make orders against non-parties.

DTEK

This case concerned an application for permission to serve outside the jurisdiction under Civil Procedure Rule (CPR) 62.5(1)(b) in respect of an application against a non-party under Section 44(2)(b).(4) The judge heard arguments on the scope of Section 44 and confirmed the conclusion in *Cruz City*.

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Facts

The appellant and first and second respondents owned and operated a joint venture for the exploration of an oil field in Central Asia. The parties had entered into two settlement agreements, pursuant to which the appellant was due certain payments from the first and second respondents further to the sale of their ownership interests in the oil field in 2002. In calculating the payments due to the appellant, signature bonuses paid to a Central Asian government were deducted by the first and second respondent. The signature bonuses had been agreed by an intermediary acting for the Central Asian government and the first and second respondents' lead negotiator, the third respondent. Following the indictment of the intermediary for breaches of the US Foreign Corrupt Practice Act 1977, a dispute arose as to whether the signature bonuses were in fact bribes and therefore not deductible.

The appellant launched arbitration proceedings in New York. The third respondent – who was not a party to the arbitration agreement – was resident in England and refused to go to New York to give evidence in the arbitration. Therefore, on 13 November 2019 the arbitral tribunal granted the appellant permission to apply to the High Court of England and Wales to compel his testimony.

The appellant applied to the High Court for an order that the third respondent's evidence be taken under deposition pursuant to Section 44(2)(a) of the Arbitration Act. In broad terms, the appellant argued that Section 44(2)(a) should extend to third parties even if the other subsections of Section 44 do not because the language of Section 44(2)(a) refers broadly to the taking of evidence from 'witnesses', which typically include non-parties. The appellant further submitted that the decisions in *Cruz City* and *DTEK* could be distinguished because service in those cases was outside the jurisdiction, whereas the third respondent was resident in England.

High Court decision

While recognising the "considerable force" (5) of the appellant's arguments, Justice Foxton ultimately accepted the third respondent's submissions that the language and structure of Section 44, and the decisions in *Cruz City* and *DTEK*, precluded its application to non-parties. However, in dismissing the application, Foxton noted that if he had been empowered by Section 44(2) to order a deposition, he would have exercised his discretion to depose the third respondent.

The appellant appealed to the Court of Appeal, arguing that Foxton had erred in law in his consideration of Section 44 and the *Cruz City* and *DTEK* decisions. The third respondent also served a notice seeking to uphold the decision on the additional grounds that:

- Foxton had applied the wrong test in concluding that he would have exercised his discretion under Section 44(2); and
- even if an order could be made against a non-party resident in the United Kingdom under Section 44, any such order could not be made in support of a foreign-seated arbitration.

Court of Appeal decision

The Court of Appeal overturned Foxton's decision and granted the order to depose the third respondent. Lord Justice Flaux concluded that:

[s]ection 44(2)(a) does give the court power to make an order for the taking of evidence by way of deposition from a non-party witness in aid of a foreign arbitration, whatever the scope of the other heads of the subsection and whether or not they also apply in relation to non-parties. (6)

In reaching this decision, the court – which included Lord Justice Males, the judge in *Cruz City* – declined to address whether *Cruz City* and *DTEK* had been correctly decided under Sections 44(2)(b) and (e) respectively. The court preferred to address only the narrow issue as to whether Section 44(2)(a) granted the disputed powers to the court. The court considered numerous factors in reaching its decision, including as follows:

- The use of the term 'witnesses' in Section 44(2)(a) was not synonymous with 'parties', and there was no justification to limiting the statutory provisions of Section 44(2)(a) in this way.
- The language used in the remainder of Section 44 and the other relevant provisions of the Arbitration Act did not point against the court's wider powers under Section 44(2)(a).
- There was no justification in the language of the act for limiting the application of Section 44(2)(a) to domestic arbitrations.
- If Section 44(2)(a) did not permit the court to order depositions, it would have little or no content in the context of a foreign arbitration.
- The correct analogy in considering the scope of Section 44(2)(a) was not the steps which the High Court could take in support of foreign court proceedings, but rather the powers that it

has in relation to civil proceedings in the High Court itself, which include the power to depose witnesses under CPR 34.8. The anomaly created by this approach – namely, that the court can order a deposition in support of a foreign arbitration but cannot support foreign court proceedings in the same way without a request – did not itself justify limiting Section 44(2)(a).

- The fact that Section 44(2)(a) would therefore apply to non-parties, whereas the remainder of Section 44(2) would not, was justified by the language of the act.

In considering the exercise of the court's discretion under Section 44(2)(a), the court approved the test which had been established by Moore-Bick in *Commerce & Industry Insurance* and correctly applied by Foxton in his first-instance judgment. This test focuses on the nature of the proceedings, the relevance of the evidence and the likely inconvenience to the witness.⁽⁷⁾

Comment

This judgment will be helpful for parties in foreign-seated arbitrations which have identified third-party witnesses in the United Kingdom who possess relevant oral evidence or documents but are unwilling to give evidence voluntarily. In confirming the courts' powers to order the taking of a deposition, the Court of Appeal gave a clear route to parties seeking to ensure that evidence is heard.

However, the judgment does have its limitations. While the Court of Appeal clarified the scope of its powers under Section 44(2)(a) in support of arbitration proceedings, there are now questions as to the scope of the other subsections of Section 44(2) which still need to be clarified by the courts. As matters stand, an application under these subsections may be unlikely to succeed at first instance insofar as it concerns non-parties to an arbitration agreement.

For further information on this topic please contact [Marie Berard](#) or [Alastair Livesey](#) at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or alastair.livesey@CliffordChance.com). The Clifford Chance LLP website can be accessed at www.cliffordchance.com.

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Endnotes

- (1) *A v C* (Taking evidence for a foreign-seated arbitration) [2020] EWCA Civ 409.
- (2) *Commerce and Industry Insurance v Certain Underwriters at Lloyd's* [2002] 1 WLR 1323.
- (3) *Cruz City I Mauritius Holdings v Unitech Limited* [2014] EWHC 3704 (Comm).
- (4) *DTEK Trading SA v Morozov* [2017] EWHC 1704 (Comm).
- (5) *A v C* (Taking evidence for a foreign-seated arbitration) [2020] EWHC 258 (Comm) at [18].
- (6) At [35].
- (7) *Commerce and Industry*, p1330.

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