ENGLISH COURT OF APPEAL CONFIRMS COURTS' POWER TO TAKE WITNESS EVIDENCE IN SUPPORT OF FOREIGN ARBITRATIONS

A and B v C, D and E [2020] EWCA Civ 409

Introduction

By a decision handed down on 19 March 2020 in *A and B v C, D and E* [2020] EWCA Civ 409, the English Court of Appeal held (reversing the decision of the court below) that the English courts do have jurisdiction under Section 44(2)(a) of the Arbitration Act 1996 to grant orders for taking evidence by deposition from non-party witnesses in aid of foreign arbitrations.

Background

In the underlying arbitration (which was seated in New York) there was an issue as to whether certain payments made by the first and second respondents to a Central Asian government (which were described as "signature bonuses") were deductible from the sums due to the appellants out of the proceeds of sale from a Central Asian oil field or, as the appellants contended, whether they were bribes and therefore not properly deductible.

The third respondent had been the lead negotiator who had directly liaised with the individual who negotiated the payment on behalf of the Central Asian government in question (and who had been indicted almost 20 years previously for violations of the US Foreign Corrupt Practices Act).

As the third respondent was not prepared to travel to New York in order to give evidence to the tribunal, the tribunal granted permission for the appellants to apply to the English courts to compel his testimony. The appellants applied under Section 44(2)(a) of the Arbitration Act 1996 seeking an order permitting the third respondent's evidence to be taken by deposition.

Section 44 of the Arbitration Act 1996 concerns "*Court powers exercisable in support of arbitral proceedings*", and provides (in part) as follows:

> "*(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—*
>
> *(a) the taking of the evidence of witnesses …*".

At first instance, Foxton J held that Section 44(2)(a) of the Arbitration Act 1996 was not available to compel, in aid of a foreign-seated arbitration, the testimony of a witness who was not a party to the arbitration. The appellants appealed to the Court of Appeal.

Decision

The Court of Appeal (Flaux LJ; Newey LJ; Males LJ) allowed the appeal.

The terms of Section 44 of the Arbitration Act 1996 had to be read together with the Act's other provisions on the scope of application (Section 2(3)) and the definition of "*legal proceedings*" (Section 82(1)). When that was done, it was clear that the English court had the same powers under Section 44(2)(a), as regards taking witness evidence in support of arbitration proceedings, as it did in relation to civil court proceedings. There was no justification for limiting Section 44(2)(a) to apply only in respect of domestic arbitrations – it applied to arbitrations regardless of where they were seated.

In light of the fact that the Arbitration Act 1996 clearly delineated between "*parties*" and "*witnesses*", there was no justification for interpreting the two to be the same when it came to Section 44(2)(a). The wording "*taking of the evidence of witnesses*" covered all witnesses, not just those who were parties to the arbitration (as Males LJ noted in his short concurring judgment, it is relatively rare in the context of modern commercial arbitrations for a witness to be a party to the arbitration).

It was argued that the limitation upon a non-party's rights of appeal (contained in Section 44(7)) against a decision made under Section 44 militated against the court having the power to grant orders against third parties under that section. However, the Court of Appeal held that any such "*anomaly*" was insufficient to justify the restrictive interpretation of Section 44(2)(a) that the third respondent contended for.

Much of the debate in the first instance court and on appeal surrounded the correctness of the decisions in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm) and *DTEK Trading SA v Morozov* [2017] Bus LR 628. The Court of Appeal expressed a desire to leave a decision as to whether those two cases were correctly decided to an occasion when that issue arose directly on appeal. However, as one of the judges in the Court of Appeal (Males LJ) had been the judge in *Cruz City*, he gave a short concurring judgment explaining that the narrow question of whether Section 44(2)(a) applied to allow the taking of evidence of a witness in support of a foreign arbitration did not, in fact, directly arise in either *Cruz City* or *DTEK*.

Concluding Remarks

The judgment of Flaux LJ provides some important guidance and clarity upon the question (described by Foxton J as "*a long-standing controversy, on which there are conflicting statements by a number of judges*") of whether the English courts can compel witness testimony in support of a foreign-seated arbitration – a power that will likely be of great interest to international commercial arbitration practitioners, particularly in circumstances where a tribunal is unable to effectively compel testimony.