Witness must testify in Central Asian bribery dispute

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The English Court of Appeal has ruled that a UK-based witness can be compelled to give evidence in a New York-seated arbitration over alleged bribes paid to a Central Asian government despite the fact that he is not a party to the arbitration agreement.

In an anonymised judgment yesterday, a three-judge bench held that section 44 of the English Arbitration Act 1996 – which governs court powers exercisable in support of arbitral proceedings – allows orders for the taking of evidence of witnesses who are non-parties in support of a foreign arbitration.

However, the court declined to address whether other powers available under section 44 could also extend to non-parties.

The ruling clears the way for the witness to be deposed before a court examiner and his videotaped testimony to be provided to the arbitral tribunal. The arbitrators had agreed to delay the evidentiary phase of the arbitration while the English proceedings were pending.

(The identity of the parties has not been disclosed but the dispute closely resembles a long-running feud between Colorado oil tycoon Jack Grynberg and subsidiaries of BP and Norway's Statoil, described in more detail at the end of this article.)

The successful appellants were represented by **Richard Lissack QC** and **Leonora Sagan** of Fountain Court Chambers and **Teresa Rosen Peacocke** of Outer Temple Chambers, instructed by Cooke Young & Keidan.

The two counterparties in the arbitration used **Ben Carroll** of Linklaters, while the witness was represented by **Angeline Welsh** and **Felix Wardle** of Essex Court Chambers, instructed by Bryan Cave Leighton Paisner.

The dispute being arbitrated in New York concerns two settlement agreements relating to the exploration and development of an oilfield off the coast of Central Asia. The agreements entitled the appellants to a percentage of the net sale proceeds if the counterparties sold their interests in the field, which they did in 2002.

A central issue in the arbitration is the nature of certain payments – described as "signature bonuses" – made by the counterparties to the Central Asian government and

whether those amounts are deductible as costs in calculating the sums due to the appellants.

The appellants contend that the sums paid were bribes and are therefore not deductible. They rely upon the fact 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 by a US court for violations of the US Foreign Corrupt Practices Act (FCPA).

The witness, who is resident in England, was the lead negotiator for the counterparties who negotiated directly with G.

The witness was not prepared to go to New York to give evidence so the arbitral tribunal gave the appellants permission to apply to the English courts to compel his testimony.

In a ruling last month, **Mr Justice Foxton** in the High Court found he had no jurisdiction under section 44 to make such an order to someone other than a party to the arbitration agreement.

The judge added that he would otherwise have granted the order, suggesting that section 44's requirement that the arbitral proceedings are "conducted in England" would extend to a New York-seated tribunal hearing video evidence from a witness in England.

Foxton J acknowledged the "long-standing controversy" over the scope of section 44 and said there was "considerable force" in arguments that it could extend to non-parties. However, he was ultimately guided by contrary reasoning in two prior decisions by the High Court in *Cruz City v Unitech* and *DTEK v Morozov*. While these cases had focused on other powers available under section 44, the judge found their reasoning was equally applicable to an order for the taking of evidence.

Before the Court of Appeal, the appellants argued that the judge should have found that section 44 allowed an order for taking of evidence of a witness who is not a party but who is located within the jurisdiction; and that this power can be exercised even if the seat of arbitration is outside England and Wales.

The witness argued that Foxton J's decision should be upheld on different grounds – that even if orders under section 44 could be made against non-parties, an order for the taking of evidence could not be made against a third party in England in support of a foreign-seated arbitration.

The latest judgment was authored by **Lord Justice Flaux** and by **Lord Justice Males** (who had decided the *Cruz City* case while a High Court judge).

In the ruling, the Court of Appeal was satisfied that section 44 did confer power to make an order for the taking of evidence from a non-party witness in aid of a foreign arbitration, whatever the scope of other powers under section 44. It preferred to leave for another day the "wider question" of whether *Cruz City* and *DTEK* were wrongly decided.

Flaux LJ said it was clear that, provided other limitations in section 44 are satisfied, the English courts have the same power to order taking of evidence in relation to arbitrations, whatever their seat, as the High Court or county court has in relation to civil proceedings. There was "no justification" for limiting this power to domestic arbitrations.

There was also no basis for construing "witnesses" in section 44 as synonymous with "parties", he said – with Males LJ also observing it was rare in the context of modern commercial arbitration for a witness to also be a party.

The witness had argued it would be anomalous for the court to have the power to order a deposition in aid of a foreign arbitration when its power to do so in aid of a foreign court proceeding (outside the EU) is constrained by the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (which requires an inward request from the foreign court).

However, the judges found that the alleged anomaly did not undermine their conclusions about the language of section 44. In any event, they noted that the 1996 Act provides sufficient protection against misuse of the power, with the court having the discretion to refuse to grant the order where it is inappropriate.

Finally, the Court of Appeal rejected the witness's arguments that Foxton J, in holding he would have exercised his discretion to grant the order, had applied the wrong test and should have required the appellants to demonstrate his evidence would have an important bearing on the outcome of the arbitration.

Sam Roberts of Cooke Young & Keidan, counsel to the appellants, says: "We are pleased that the English court has taken a common-sense approach to interpreting its powers in support of ongoing arbitrations. This should prove to be a valuable tool in aid of ongoing arbitrations seated overseas, and hopefully this judgment will pave the way for practitioners and parties to make further use of those powers in appropriate cases in future."

Linklaters, which acted for the counterparties, said it was unable to comment. The latest judgment does not record any arguments by the counterparties regarding whether section 44 reached non-parties. Before the High Court, they made no submission on that question but simply argued that, if such a power existed, no proper case for exercising it had been made out.

Latest iteration of a decades-long feud?

While counsel in the English proceedings have declined to confirm or deny a connection, the dispute bears striking similarities with a long-running fight relating to the offshore Kashagan field in the Caspian Sea. That field was likewise the subject of two settlement agreements, which Grynberg concluded in 1999 with BP and Statoil.

Grynberg commenced New York-seated arbitrations against those companies in 2003. It was part of his case in those arbitrations that "signature bonus" payments made by BP and Statoil should not be treated as costs in calculating his share of the net profits from the field because the payments constituted bribes in violation of the FCPA.

US arbitrator **Stephen Hochman** was appointed to hear both cases but Grynberg successfully applied to the Supreme Court of the State of New York to have him disqualified in 2014 after the arbitrator repeatedly refused to rule on the nature of the signature bonuses. The court directed that the cases should be consolidated before a new three-member tribunal.

A number of documents relating to the dispute were originally filed under seal in the New York courts but later become publicly available as a result of an unsuccessful civil suit that Grynberg initiated against the consortium members in the US courts. A lengthy summary of the saga, published by mediator **Norman Solovay** in 2017, is available here.

The reference in the English Court of Appeal's judgment to the two-decade-old indictment of "G" on FCPA charges seems likely to relate to James Giffen, a US businessman indicted in 2003 for bribing Kazakh officials.

US authorities accused Giffen of paying US$80 million in bribes to Kazakhstan's then-president Nursultan Nazarbayev and two other officials out of fees he and a New York merchant bank called Mercator had received in oil deals they brokered for the government, or from payments owed to the government from oil transactions.

The indictment included a reference to a US$175 million "signature bonus" that a consortium of oil companies agreed to pay the Kazakh government in a production-sharing agreement. The case against Giffen was dismissed after he asserted he committed the acts based on a grant of authority from the US government.

Grynberg has previously sued Giffen in the US courts and has sought to compel him to give testimony in other proceedings he brought against various oil companies – without success.

Statoil, which changed its name to Equinor two years ago, declined to comment. BP did not respond to a request for comment.

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

In the England and Wales Court of Appeal

Bench

- **Lord Justice Flaux**
- **Lord Justice Newey**
- **Lord Justice Males**

Counsel to A and B (appellants)

- **Richard Lissack QC** and **Leonora Sagan** of Fountain Court Chambers
- **Teresa Rosen Peacocke** of Outer Temple Chambers
- Cooke Young & Keidan

Partner **Sinead O'Callaghan**, senior associate **Sam Roberts** and associate **Elizabeth Meade** in London

Counsel to C and D (respondents)

- Linklaters

Partner **Ben Carroll** in London

Counsel to E (the witness)

- **Angeline Welsh** and **Felix Wardle** of Essex Court Chambers
- Bryan Cave Leighton Paisner

Partner **Graham Shear** in London

In the English Commercial Court

Bench

- **Mr Justice Foxton**

Counsel to A and B (claimants)

- **Teresa Peacocke** of Outer Temple Chambers
- Cooke Young & Keidan

Partner **Sinead O'Callaghan**, senior associate **Sam Roberts** and associate **Elizabeth Meade** in London

Counsel to C and D (first and second defendants)

- Linklaters

Matthew Weiniger QC

Counsel to E (the witness)

- **Angeline Welsh** of Essex Court Chambers
- Bryan Cave Leighton Paisner

Partner **Graham Shear** in London