

International Arbitration and Complex Commercial Litigation

English Court of Appeal Compels Third Party to Give Evidence in Foreign Arbitration

By: [Jason Yardley](#), [Elizabeth Shimmin](#) and [Andrew Diver](#)

The recent case of *AB v CDE*^[1] demonstrated the English Courts' willingness to support foreign-seated arbitrations and, in particular, to compel third parties to give evidence by way of deposition in non-English arbitral proceedings. The decision concerns the long-standing controversy as to the ambit of section 44 of the Arbitration Act 1996 (the Act) and whether the supportive measures set out in that section can be ordered against non-parties to the arbitration. While the decision in *AB v CDE* is limited to orders for the taking of evidence from witnesses (s.44(2)(a)), it is nonetheless a significant one and could open the way for other supportive powers under section 44 of the Act, such as orders relating to property or the granting of interim injunctions, to be used against third parties.

Background

The application to the English Court arose out of on-going arbitral proceedings in New York between the appellants and the first and second respondents concerning the exploration and development of an oil field in Central Asia. One of the central issues concerned the nature of certain payments made by the first and second respondents in the course of negotiations with the Central Asian government and, in particular, whether such payments amounted to bribes.

The appellants sought witness evidence from the respondents' chief negotiator, E, who was not party to the arbitration. E is resident in England and was not prepared to go to New York to give evidence. The tribunal granted the appellants permission to make an application to the English Court to compel E's testimony by deposition under CPR Rule 34.8. The question for the English Court was whether it could assist a foreign arbitration in this way.

Section 44 of the Act

Section 44 of the Act provides that unless the parties have agreed otherwise, the Court has "*the same power*" to order the supportive measures set out in that section for arbitral proceedings as it has in relation to civil proceedings in the English High Court. Such measures include the granting of interim injunctions, the making of orders for the preservation of evidence and, relevantly for the present case, "*the taking of the evidence of witnesses*" (section 44(2)(a)).

The third respondent, E, argued that the Court had no jurisdiction under section 44 to make orders other than against parties to the arbitration, arbitration being a consensual means of dispute resolution to which the parties have signed up in advance (and third parties necessarily have not). E relied on two High-Court decisions. The first, *DTEK Trading SA v Morisov*^[2], concerned an application for an order for the preservation of evidence held by a non-party under section 44(2)(b) and the second, *Cruz City 1 Mauritius Holdings v Unitech Ltd*^[3], concerned the gateways for service of an interim injunction application on a third party outside the jurisdiction but, obiter, considered the availability of interim injunctions against third parties under section 44(2)(e). In both cases, the High Court determined that section 44 powers were not applicable against third parties. However, these decisions have been the subject of academic criticism.

The appellants sought to distinguish the prior decisions, focusing on the availability of an order for the taking of evidence only and not the availability of other section 44 measures against third parties.

First Instance

At first instance, Mr Justice Foxton made clear that “*without the benefit of prior authority*” he could see “*considerable force*” in the view that jurisdiction under section 44 could be exercised against a non-party. However, he did not consider that the language of section 44 justified differential treatment as between the different supportive powers, such that he was not persuaded that some measures could be ordered against third parties and others not. Based on the previous High Court authorities ruling out orders under sections 44(2)(b) and (e), therefore, he refused the appellants’ application under section 44(2)(a), albeit with some reluctance, and granted permission to appeal.

Court of Appeal

The Court of Appeal reversed the judgment, with Lord Justices Flaux, Newey and Males (who had given the first-instance judgment in *Cruz City*) finding that section 44(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 foreign arbitration. Their Lordships looked to the relevant sections of the Act and CPR: (i) section 44(1) of the Act grants the court “*the same power*” to make orders as it has for the purposes of legal proceedings; (ii) section 82(1) of the Act defines “*legal proceedings*” to include civil proceedings in the High Court; (iii) under CPR Rule 34.8, the High Court may order evidence to be given by deposition; and (iv) section 2(3) of the Act specifies that section 44 applies to arbitrations wherever their seat.

Notably, however, the Court of Appeal was careful to limit itself only to the narrow question as to whether section 44(2)(a) (the taking of evidence of witnesses) may be ordered against third parties and avoided addressing the availability of the other measures under section 44 as against third parties. As a result, the Court of Appeal left open the issue of whether the earlier first-instance judgments remain good law and suggested that the matter be addressed when those issues arise directly on appeal.

Comment

This is a welcome judgment. The English judiciary has extended its support for international arbitration, and it is now clear that the Courts can compel a third party to give evidence in foreign-seated arbitration. Practitioners should be alive to whether non-parties resident in England might provide useful witness evidence in domestic or foreign-seated arbitrations.

Most significantly, however, having clarified the ambit of one of the provisions of section 44, it is hoped that this judgment will open the door for the application of the other provisions of section 44 of the Act against third parties to be re-examined.

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

[2] [2017] EWHC 1704 (Comm)

[3] [2014] EWHC 3704 (Comm)



Contact Us



Jason Yardley

iyardley@jenner.com | [Download V-Card](#)



Elizabeth Shimmin

eshimmin@jenner.com | [Download V-Card](#)



Andrew Diver

adiver@jenner.com | [Download V-Card](#)

[Meet Our International Arbitration Team](#)

[Meet Our Complex Commercial Litigation Team](#)

Practice Leaders

Charlie Lightfoot

Co-chair, International Arbitration

clightfoot@jenner.com

[Download V-Card](#)

Jason Yardley

Co-chair, Complex Commercial

Litigation

jyardley@jenner.com

[Download V-Card](#)

[Unsubscribe](#) | [Manage Preferences](#)

Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729.