Evidence from Third Parties in Arbitration – Where are we now?

Evidence from third parties is often difficult to obtain in the arbitration context: few people want to voluntarily appear to give evidence (generally you should be wary of potential witnesses that are overly keen to give evidence). Using methods of compulsion (where available) can appear antagonistic and the cooperation that might have otherwise existed can then evaporate.

Moreover, given that the agreement to arbitrate does not, generally, bind non-parties, such mechanisms as do exist often will not extend to third parties. In contrast, and generally, court litigation does have powers that extend to third parties.

In this article recent developments in the US and England are considered. The key points are:

- In the US:
    - 28 U.S.C. §1782 is no longer available for private arbitration tribunals (i.e. commercial disputes whether under institutional rules or not) rather it is restricted to tribunals which a state has clothed with governmental authority.
    - It seems likely that BIT claims under ICSID rules can still access §1782.
    - Additional circumscription of §1782 might come from other threshold tests such a 'reasonable contemplation'.
- In the UK:
    - §44 AA 1996 permits depositions of third parties resident in the United Kingdom in support of foreign-seated arbitration proceedings
    - A court application for non-party disclosure can be served outside the jurisdiction (at least in respect of documents within the jurisdiction) and the same is likely to apply in respect of similar applications in an arbitration context.
    - Tribunals cannot themselves issue Letters of Request and a Court doing so may well run foul of Art 1 of the Hague Convention and / or local statutes giving effect to the Convention.
    - It might be possible to secure the attendance of a witness for a foreign seated arbitration by using §43 AA 1996 and changing the venue (temporarily) to the UK.
    - Any request to a third party to produce documents must either identify the documents individually or by reference to a class so that it is possible to identify the documents to be produced with sufficient certainty to leave no real doubt.

The United States

The law chosen by the parties to apply to the arbitral procedure—or lex arbitri—which will generally be the law of the jurisdiction in which the seat is found, may permit third party disclosure in some circumstances. In the US, §7 of the Federal Arbitration Act ("FAA") authorizes a tribunal in an arbitration seated in the US to order a non-party to testify at a hearing, which testimony can be compelled by the relevant district court. So far, so good. This is conventional wisdom of a court exercising its supervisory jurisdiction to assist arbitration proceedings within the jurisdiction of the court.

Assistance for an overseas arbitration is more difficult. In the United States, 28 U.S.C. §1782[1] is a federal statute that allows parties to a legal proceeding outside of the United States to apply to a U.S. federal court for the purpose of obtaining evidence. If the application is granted, this evidence can be used in the proceeding outside of the United States. While versions of §1782 have existed for 150 years, it only began to be widely used after 2004, when the U.S. Supreme Court issued the seminal decision, *Intel Corp. v. Advanced Micro Devices, Inc*. In *Intel*, the Supreme Court clarified numerous matters, including the discretionary factors courts should consider when deciding whether to allow a §1782 subpoena to issue. Notably, however, the Supreme Court did not definitively state whether international arbitration tribunals qualified as foreign tribunals for §1782's purposes. Since *Intel* parties to arbitrations conducted outside of the United States have increasingly attempted to use §1782 to obtain evidence from third parties, which would otherwise be unobtainable in a typical arbitration. In the most significant decision in recent times, this fruitful avenue has, however, now come to an end in the US for private arbitrations. In *ZF Automotive v. Luxshare*, the U.S. Supreme Court shut down any ability for foreign private arbitration parties to use the American court system to seek evidence outside of the arbitral process.

Under §1782, a court has power to grant discovery when the person from whom discovery is sought resides in the same district as the district court, and the discovery is for use by a "foreign or international tribunal." A circuit split had developed regarding the interpretation of §1782 with respect to the question of whether the reference to "foreign tribunals" covers foreign private arbitrations. On one side of the split were the Second, Fifth and Seventh Circuits. The Second Circuit reasoned that, in light of its legislative history, the phrase "foreign or international tribunals" was intended to cover only "governmental entities," and not "private tribunals" such as international commercial arbitral tribunals. On the other side of the split, were the Fourth and Sixth[2] Circuits. The Fourth Circuit noted that Congress replaced the language restricting the application of §1782 to only "judicial proceeding pending in any court in a foreign country" with the more encompassing language "proceeding in a foreign or international tribunal." Its conclusion was that Congress intended §1782 to be used before "not only foreign courts but before all foreign and international tribunals," including arbitrations.

The Supreme Court granted certiorari in two cases (later consolidated) presenting the question of applicability of §1782 to arbitration: *ZF Automotive US, Inc. v. Luxshare, Ltd*. ("Luxshare") and AlixPartners, LLP, et al. v. Fund for Protection of Investors'. The first case involved Luxshare, Ltd., a company based in Hong Kong, and ZF Automotive, a Michigan based automotive parts manufacturer and subsidiary of a German corporation. Luxshare alleged fraud in a sale transaction with ZF Automotive for concealing information about the transaction price. The contract stated that all disputes would be exclusively settled under the rules of the German Arbitration Institute ("DIS"), a

[1] § 1782 provides in relevant part as follows: The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

[2] *Abdul Latif Jameel Transportation Co. v. FedEx Corp,* 939 F.3d 710 (6th Cir. 2019)

private dispute resolution organization in Berlin. In anticipation for arbitration, Luxshare filed an *ex parte* application under §1782 to obtain information from ZF and two of its senior officers. The U.S. District Court for the Eastern District of Michigan granted the request and the Sixth Circuit denied ZF's request for a stay.

The second case was an ad hoc arbitration between Lithuania and The Fund for Protection of Investors' Rights in Foreign States, a Russian corporation and assignee of a Russian investor in a failed Lithuanian bank, AB bankas SNORAS ("Snoras"). Snoras was nationalized and assigned the CEO of New York-based AlixPartners as a temporary administrator. The administrator issued a report on Snoras's financial status leading to the commencement of bankruptcy proceedings, as Lithuanian authorities declared Snoras insolvent. The Fund claimed that Lithuania expropriated investments from Snoras and initiated an arbitral proceeding under a bilateral investment treaty. The Fund then filed a §1782 application to obtain information from AlixPartners. AlixPartners resisted discovery and argued that the ad hoc arbitration was a private adjudicative body, not included under the meaning of §1782. The District Court disagreed and granted the discovery request. Because this was an investment treaty-based arbitration, and not an ordinary commercial arbitration, the Second Circuit affirmed, finding that the ad hoc tribunal was "foreign or international" for purposes of §1782.

On June 13, 2022, Justice Barrett authored a unanimous opinion in the consolidated cases, holding that (1) the phrase "foreign or international tribunal" in §1782 does not include private arbitration tribunals and (2) to be classified as a "foreign or international tribunal", the tribunal in question must be "imbued with governmental authority" conferred by one or multiple nations. The Supreme Court had already signalled in 2021 its interest in resolving the split under §1782 in *Servotronics Inc. v. Rolls Royce Plc* but the case was withdrawn before the Supreme Court could decide it. The Court found that by itself, "tribunal" does not explicitly implicate either a governmental or private body and is too broad to shed light on the question. But when "foreign" or "international" is added to the phrase, the meaning is elucidated. To the Court, a "foreign tribunal" refers to a tribunal belonging to a foreign nation rather than any tribunal located in a foreign nation. As to the word "international," the Court found that it means "involving or of two or more 'nations,' or 'nationalities'" thereby entailing that those nations have "imbued the tribunal with official power to adjudicate disputes." The Court noted that, when Congress established the Commission on International Rules of Judicial Procedure to modernize §1782, Congress instructed the Commission to improve judicial assistance "between the United States and foreign countries." The Court thus determined that the replacement of the word "courts" by "tribunals" simply broadened the range of governmental and intergovernmental bodies covered by the statute, not its scope from public to private. Having established that only governmental and intergovernmental tribunals are included in §1782, the Court could turn to the applicability of §1782 to the cases at hand.

With respect to Luxshare, the Court found that the result was straightforward as there was no governmental involvement in this procedure between private parties. §1782 was inapplicable. With respect to AlixPartners, the Court noted that the issue was more complicated because a sovereign was involved and the consent to arbitrate existed in a treaty, rather than a contract. The Court determined that the controlling question was whether Lithuania or Russia intended to confer governmental authority on the arbitral tribunal. The Court concluded that the parties did not: the ad hoc tribunal was not formed by the treaty, and it operated independently of the signatory-nations. Finding no indicia of governmental authority, the Court concluded that the signatory nations did not "cloth[e] the panel with governmental authority." §1782 was thus not applicable.

The Supreme Court has now made clear that US discovery is not available in the commercial arbitration practitioners' toolkit. In fairness, US discovery was unavailable to arbitration parties in U.S.-seated arbitrations—who, as mentioned above, have only §7 of the FAA as an instrument to compel the testimony of third-party witnesses at hearings[3]. There is no apparent reason for foreign arbitration parties to be given the tactical advantage of US discovery where such advantage is denied to parties to arbitrations seated in the United States. In this sense, the decision arguably makes US law more uniform, and arbitration proceedings more efficient and predictable by removing the prospect of extensive (and expensive) discovery in the US. At the same time, it should be noted that the Supreme Court did not entirely reject the notion that §1782 could be utilized in foreign arbitral proceedings, so long as the "foreign tribunal" is imbued with governmental authority. Quite where the line will be drawn remains to be seen. Plainly, for example, §1782 is available to assist English (or any other country) based court proceedings. But quite where the line is in arbitration remains less clear. As to disputes between private investors and sovereign states, the Court's decision narrows the circumstances under which discovery can be sought but does not categorically prohibit use of §1782. For example, the decision—which examined an ad hoc arbitral panel deliberately created as an alternative to governmental bodies—does not address investor-State arbitration administered by the World Bank Group's International Centre for Settlement of Investment Disputes, a forum established by the ICSID Convention and its State parties to settle disputes under most international investment treaties, numerous investment laws, and many contracts. The awards are binding as a matter of public law in all the ICSID member states. It is likely that parties will continue to seek to invoke §1782 for aid in ICSID arbitration, as it is possible that future courts will find that ICSID investor-state tribunals may very well qualify as "international tribunals" (tribunals instilled with governmental authority by multiple nations) under § 1782. Similarly, for proceedings involving standing arbitrators nominated by governments or transnational bodies. An example could be proceedings conducted under the EU-US Privacy Shield Framework, future adjudicators of disputes arising under the European Union's trade and investment agreements, and the proposed Multilateral Investment Court within the framework of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL).

Lawyers being lawyers will consider whether when one door closes can another be opened, or indeed can more doors be closed (depending on which side you are on).

Over the years, the courts have generally held that an applicant meets the §1782 threshold by showing the following: "(1) the person from whom discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) the discovery [is] for use in a proceeding before a foreign tribunal, and (3) the application [is] made by a foreign or international tribunal or 'any interested person.'"[4]

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[3] And, for example, §3102 of the New York Civil Practice Law and Rules,

[4] *In re Guo*, 965 F.3d 96, 102 (2d Cir. 2020); *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015). This is the formulation used by the Second Circuit, which is the regional federal appellate court covering New York, Connecticut and Vermont. Other circuits formulate the test somewhat differently, some with four elements rather than three (the Eleventh Circuit, for example, uses a nominally four-factor test, but it is substantively the same as the Second Circuit's test. According to the Eleventh Circuit, A district court may not grant an application under § 1782 unless four statutory requirements are met: (1) the request must be made "by a foreign or international tribunal" or by "any interested person"; (2) the request must seek evidence, be it the testimony or statement of a person or the production of a document or other thing; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and, finally, (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance: *In re Furstenberg Finance SAS*, 877 F.3d 1031, 1034 (11th Cir. 2017), citing *In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007)) but the basic requirements are the same.

For example, the requirement that the evidence must be "for use" in an overseas proceeding does not mean that the evidence must be admissible in the foreign court or tribunal: the "for use" requirement means only that the applicant will be able to make some use of the evidence in the course of the foreign proceeding.[5]

A "proceeding" includes if no actual proceeding abroad had been filed yet. But the "proceeding" must be within 'reasonable contemplation'[6] but need not be 'pending' or 'imminent.'[7] The Second and Eleventh Circuits both require a factual demonstration from the applicant that shows a lawsuit is in prospect. As the Eleventh Circuit in 2014 put it, "*a district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time*."[8] The Second Circuit's test is substantively similar[9]. The proceedings cannot be merely speculative: if the applicant "d[oes] not provide any detail as to the potential form of litigation it intended to pursue, nor does it provide legal theories under which it intended rely in such litigation," then it has failed to show that a lawsuit was reasonably contemplated[10]. Especially fatal to an application is anything that suggests the applicant is using §1782 to help decide whether or not to sue. Use of "whether" or "possibly" is often a giveaway. In *Mangouras v. Squire Patton Boggs*[11], the applicant was hoping to prove that certain persons had lied in earlier proceedings. In deciding that the application should not have been granted, the court quoted Mangouras' attorney: "*discovery is going to help us determine whether or not these individuals knew what they were testifying to was false*."

The leading case to date on what suffices to show litigation is "reasonably contemplated" is the Eleventh Circuit decision - *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*,[12]. In that case, the applicant had conducted an internal investigation and audit. Those steps indicated that certain former employees likely had engaged in fraudulent practices. The applicant was contemplating a civil, and later criminal, action in Ecuador. The reason it had not yet sued is that Ecuadorian law requires the plaintiff to annex its evidence to its pleading – evidence it did not yet have, but was seeking in the §1782 application. So, the combination of an applicant's legitimate and detailed explanation of its ongoing investigation, its intent to commence a civil action against its former employees, and the valid reasons together sufficed to show "reasonable contemplation." The factual investigation played an important role. The applicant had flushed out the key facts that formed the basis of their future lawsuit and presented them to the court. It also explained the basis for liability and identified the court in which the action would be commenced. The cases that uphold §1782 applications for evidence in as-yet-unfiled actions tend to focus on the applicant having actually developed the basis for the foreign case.

These issues take on special importance in civil law countries, where procedural rules often require that the document initiating a lawsuit also include with it at least some of the evidence the plaintiff relies on. Sometimes a plaintiff may have a valid claim, but to support that claim, will need a document it does not have. So §1782 may be an option in that situation, but only if the lawsuit is "within

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[5] *Mees*, supra
[6] *Intel*, supra, at 259
[7] *Intel*, at 543. Intel rejected prior case law in the lower courts had held that the foreign proceeding had to be either pending or imminent, meaning that it was "very likely to occur and very soon to occur," In re Ishihara Chemical Co., 251 F.3d 120, 125 (2d Cir. 2001)
[8] *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.,* 747 F.3d 1262, 1270 (11th Cir. 2014).
[9] *Certain Funds v. KPMG, LLC* 798 F.3d 113 (2d Cir. 2015).
[10] In re Wei, 2018 WL 5268125, case no. 18-mc-117, slip op. at 2 (D.Del. Oct. 23, 2018).
[11] 980 F.3d 88, 102 (2020)
[12] 747 F.3d 1262, 1270 (11th Cir. 2014)

reasonable contemplation." These additional requirements for §1782 may also be in the sights for some and may appear in the Supreme Court before too long.

England and Wales

Similarly, to §7 FAA, in England and Wales, §43 of the Arbitration Act 1996[13] (the "AA") allows English courts (with the permission of the tribunal or the agreement of the other parties to the arbitration) to issue a witness summons ordering the attendance of the witness before the tribunal in order to give oral testimony, or even to produce documents or other material evidence, where a witness is in the United Kingdom and the arbitration is being conducted in England and Wales.

§44 of the AA gives the court power to make the same orders for the taking of evidence as it would have had had the proceedings been before the Court.

In contrast to the US restrictions on the use of §1782, the English Court of Appeal recently opened the door to third party disclosure in A and B v C, D and E [2020] EWCA Civ 409 ("A v. B") by permitting depositions of third parties resident in the United Kingdom in support of foreign-seated arbitration proceedings.

The Appellants and the First and Second Respondents were co-venturers in an oil field in Central Asia, and were parties to a New York seated arbitration. An issue arose in the arbitration as to the nature of certain payments made by the First and Second Appellants and whether those amounts were properly deductible when quantifying sums due in respect of certain interests in the oil field. Although the evidential hearing in the New York Arbitration had concluded, the Appellants obtained permission from the tribunal to bring an application in the High Court under § 44(2)(a) of the AA[14] for an order for the compulsory taking of evidence from an individual in England who worked for their counterparties as the lead commercial negotiator of the production-sharing agreement (the Third Respondent).

The Third Respondent opposed the application at first instance on the basis that the Court had no jurisdiction under § 44 to make an order against someone other than a party to the arbitration agreement. Alternatively, even if there was such jurisdiction, no sufficient case had been made out

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[13] Section 43 provides:
(1)A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence. (2)This may only be done with the permission of the tribunal or the agreement of the other parties. (3)The court procedures may only be used if— (a)the witness is in the United Kingdom, and (b)the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland. (4)A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings

[14] § 44 provides
(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;
(b)the preservation of evidence;
….

(5)In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
…
(7)The leave of the court is required for any appeal from a decision of the court under this §.

for exercising it by the Appellants. The Third Respondent cited two previous decisions by the Commercial Court: *Cruz City I Mauritius Holdings v Unitech Limited*,[15] which concerned an attempt to serve an application for a freezing injunction against non-parties to the arbitration agreement out of the jurisdiction, and *DTEK Trading SA v Morozov*,[16] which concerned an application against a non-party under § 44(2)(b) and/or (c).

No submissions were made by counsel for the First and Second Respondents on the issue of whether the High Court had authority to make such an order, but the First and Second Respondents did support the submissions made by counsel for the Third Respondent that no proper case for the exercise of any power had been made out (essentially making the same submissions that the First and Second Respondents had made in the arbitration when opposing the Appellants' application to the arbitral tribunal for permission to seek such an order).

In the High Court, Foxton J held that the Court did not have jurisdiction to make such an order against a non-party to an arbitration agreement, finding that the language and structure of § 44 did not support "*differential treatment*" of the various powers listed in that part of the Arbitration Act. The Judge therefore held that the reasoning in *Cruz City* and *DTEK* was persuasive and applicable in the present circumstances: both cases held that § 44 did not include the power to make an order against a non-party. In other words, despite the previous decisions relating to other powers under §44(2), Foxton J held that the principle applied equally to other sub-section.

That fact notwithstanding, the Judge acknowledged that, in the absence of prior decisions directly on point that he was bound to follow, there was considerable force in the argument that the jurisdiction under §44 could be exercised against a non-party in an appropriate case. He noted that granting injunctions constituted one such example: a Court order could give a right to be heard to non-arbitrating parties, and that would necessarily involve a fundamental departure from the bilateral nature of consensual arbitration.

On appeal, the Appellants argued that irrespective of the scope of the other sub-section under §44, §44(2)(a) gave the Court the same power in relation to the taking of evidence from a witness for an arbitration as the Court would have in civil litigation before English courts, which is available even to a foreign-seated arbitration by virtue of §2(3)(b)[17].

The Court of Appeal allowed the appeal, but without addressing whether other sub-sections of §44 could similarly allow for non-party orders. The Court also left open the question of whether the two authorities relied upon at first instance were decided correctly.

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[15] [2014] EWHC 3704 (Comm)
[16] [2017] EWHC 94 (Comm)
[17] §2(3) provides:
(3)The powers conferred by the following §s apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—
(a)§ 43 (securing the attendance of witnesses), and
(b)§ 44 (court powers exercisable in support of arbitral proceedings);
but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

The Court accepted the Appellants' argument that the English Court has the same power in respect of "the taking of evidence of witness" under § 44(2)(a) as it has in civil proceedings before the High Court or a county court, on the basis of §44(1) which provides that:

"*unless otherwise agreed by the parties, the Court has for the purpose of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purpose of and in relation to legal proceedings*".

This includes the power to order evidence to be given by deposition, which is available in civil proceedings under CPR 34.8.

The Court also clearly held that the power to order a deposition can be made in support of a foreign-seated arbitration (rather than only in support of a UK-seated arbitration). §44(1) is to be read in light of §2(3), which provides that the Court's powers exercisable in support of arbitral proceedings under §44 also apply to foreign-seated arbitrations. Thus, the application of §44(2)(a) cannot be construed to be limited to domestic arbitrations alone.

The Court held that the pertinent question under §44(2)(a) is what power would an English court have in relation to the taking of evidence of witness in a civil proceeding, as opposed to what power it would have for the purpose of foreign court proceedings. On this basis, the Court rejected the Third Respondent's suggestion that in the same way the Court's power to compel a witness based in England to give evidence in support of a foreign court proceedings is conditioned upon an incoming letter of request from a foreign court or tribunal in accordance with sections 1 and 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, the Court's power in the case of a foreign-seated arbitration should similarly be constrained. Whilst recognising that its interpretation of § 44(2)(b) produced an anomaly whereby the Court can order a deposition in support of a foreign-seated arbitration but not foreign court proceedings in the absence of an incoming letter of request, the Court noted that the specific discretion under §2(3) to consider the appropriateness of an order in the case of a foreign-seated arbitration, the requirement in §44(4) that permission of the tribunal or agreement of the parties must first be obtained, and the Court's general discretion in the exercise of its power provide sufficient safeguards against misuse of the power to order a deposition.

As regards the construction of the term "witness" in §44(2)(a), the Court held that the term would cover all witnesses, including a non-party, given that a witness is rarely also a party. As the Appellants had pointed out, § 38(5) clearly distinguishes between a "party" and a "witness". As such, there is no basis in equating "party" with "witness" for the purpose of §44(2)(a).

The Court also rejected the following arguments put forward by the Third Respondent:

- that certain phrases in §44, such as the opening phrase "unless otherwise agreed by the parties" in §44(1), undermined the Court's alleged power to make non-party orders. However, the Court did not view those phrases as restrictions on the Court's power to make orders, including an order against a non-party.
- Having acknowledged the limitation in §44(7) on a non-party's right of appeal, the Court found that such anomaly, which is more apparent than actual, does not justify a restrictive interpretation of § 44(2)(a) as argued.
- The Court rejected a narrow construction of the power to order a deposition due to its limited application, as the exercise of the power is a matter of judicial discretion and not jurisdiction.

- The Court pointed out that §44(2)(a) would be left with little or no content in the context of foreign-seated arbitrations if non-party orders were not permitted.

The immediate practical outcome of this decision is that parties involved in a foreign-seated arbitration may now rely on §44(2)(a) to compel a witness present in England to give evidence by way of deposition, if the tribunal is unable to secure that witness' attendance. More importantly, the significance of this decision lies in the Court's readiness to interpret §44(2)(a) broadly.

Although it remains to be seen how the operation of §44 as a whole will be interpreted going forward, and whether it would apply to non-parties in all circumstances, it does appear that a broad construction of §44 can be applied to all sub-section, which may result in a greater range of interim relief in support of both domestic and foreign-seated arbitrations.

Finally:

(a) the Court noted that the same conclusion had been reached by Moore-Bick J in *Commercial & Industry Insurance Co of Canada v Certain Underwriters at Lloyd's*[18] which on that point, the Court found its reasoning to be compelling;
(b) since §44 is not a mandatory provision of the AA, parties can agree that it shall not apply (and so it is important to check, for example, that the relevant arbitration agreement or institutional rules do not exclude the parties' rights to apply to the courts for this purpose);
(c) as with an application for a witness summons pursuant to §43, English courts should only consider an application under §44 that is made with the tribunal's permission or the parties' written agreement, and with notice to all parties and the tribunal. Therefore, parties do not have an unfettered right to apply to the court under §44 and, instead, the applicant party will likely have to persuade the tribunal that the evidence is material and cannot be obtained from any other witness that is willing to give evidence;
(d) in any event, in relation to applications to secure evidence in aid of foreign arbitrations, the English courts may refuse to exercise their power if, in the court's opinion, it would be inappropriate to do so in light of the fact that the seat of arbitration is outside of England and Wales. In *Commerce & Industry Insurance Co (Canada) v Lloyd's Underwriters*[19], the Court considered that it was inappropriate to order the examination of unwilling witnesses, on the basis that there were differences between the foreign curial law and English law (namely, that under the foreign curial law, the witnesses would also be required to give oral evidence if they were deposed, which was not the case under English law). The court also considered it to be relevant that there was insufficient evidence to enable an assessment of whether the witnesses' evidence would be important to the outcome of the arbitration.
(e) the decision has received some criticism, so, while it has opened the doors to such applications against third parties, there may remain challenges for applying parties in seeking to rely on that decision;
(f) the scope of A v. B may have been enlarged by a recent High Court decision: *Gorbachev v Guriev and others*[20]. English compulsory process is an exercise of sovereignty and is unavailable in foreign countries. The English court cannot, therefore, directly compel a person to attend the English (or any other) court to give evidence or produce documents. Recalling that the pertinent question is the power of the English Court in proceedings before it, the High Court has held that an application for non-party disclosure is covered by gateway (20) in

[18] [2002] 1 WLR 1323
[19] [2002] 1 W.L.R. 1323
[20] [2022] EWHC 1907 (Comm)

paragraph 3.1 of PD 6B. This gateway allows a claimant to serve a claim form out of the jurisdiction with the permission of the court where a claim is made under an enactment which allows proceedings to be brought. The court ruled that an application for disclosure against a non-party was a "claim" and was made by a "claim form" in the context of CPR 6. The issue arose in proceedings relating to a dispute about a business in Russia. The claimant wished to obtain non-party disclosure of certain documents held by a firm of English solicitors, crucially, the documents were in England. The solicitors alleged that the documents were held on behalf of overseas trustees, so the claimant sought permission to serve the disclosure application on them, out of the jurisdiction. This decision conflicts with *Nix v Emerdata Ltd*[21], where a different High Court judge held that gateway (20) did not cover the situation, however, this later decision contains a fuller and more convincing analysis and is likely to be the preferred authority. Importantly, it opens the door to involving overseas parties into domestic document production issues.

Letters of Request

Another possibility is to investigate free standing procedures for obtaining evidence which are available in the target jurisdiction such as §1782. An outwards Letter of Request is one of the possible solutions to consider. This was the view taken in *DTEK*, where Sara Cockerill QC (as she then was) drew on the technical operation of the Letter of Request jurisdiction to exempt it from the general reasoning which was otherwise said to rule out the application of §44 to non parties, namely that a Letter of Request was not an order directed at a non party, but rather a request addressed to a foreign court for assistance. However, in light of the English authorities on inwards Letters of Request, and particularly the decision of Moore-Bick J (as he then was) in *Commerce & Industry Insurance*[22] to the effect that a private arbitration tribunal cannot issue a valid Letter of Request, it would be unwise for a Tribunal to seek to issue a request itself. Therefore, if attempting this option, it would appear to be the case that first, a party should seek the agreement of its counterparty to an application to the English Court for the issue of a Letter of Request, failing which it should apply to the Tribunal for permission to make that application, pursuant to §44(4). The application would then proceed pursuant to §44(1) and (2)(a), and in substance should reflect the usual practice in making an application for the issue of a Letter of Request to the Senior Master of the Queen's Bench Division of the High Court, no doubt exhibiting any reasoning by the Tribunal as to the necessity and relevance of the evidence, if any such pronouncement has been made.

Naturally, there would also need to be compliance with the requirements of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (the "Hague Convention"), as well as any particular rules of the foreign jurisdiction. In particular it should be noted that Art 1 of the Hague Convention which state that "*A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings*". This plainly creates an issue for arbitral proceedings. Although outwards Letters of Request are typically subjected to the same standards as those applied to inwards Letters of Request as a matter of practice, they are not directly caught by the statutory language in §1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "Evidence Act").

The reverse scenario to consider looks much like that which confronted Foxton J in A v. C, a prime example of which would be a US seated arbitration with a non-party witness located in England, from whom testimony or documents were sought: an inwards Letter of Request. The English Court has no

[21] [2022] EWHC 718 (Comm)
[22] Op cit

inherent jurisdiction to assist a foreign court, rather it derives its power to act in aid of a foreign court[23] from the Evidence Act. The Evidence Act is the domestic statute that effectively implements the Hague Convention in the United Kingdom.

However, in an arbitral context there is the potential difficulty alluded to by Foxton J in A v. C – namely, compliance with the UK's statutory requirements for inwards Letters of Request which are contained in § 1(b) of the Evidence Act, which provides that: "…*the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated*…". Given that *Commerce and Industry Insurance Co* is authority for the proposition that the reference to "court or tribunal" in defining the "requesting court" in §1(a) of the Evidence Act does not extend to a private arbitration tribunal, Foxton J was, it is suggested, correct to note the potential issue, namely whether the English court would have jurisdiction to respond to a Letter of Request issued in support of a foreign arbitration. Clearly there is scope for argument that § 1(b) can be read broadly to cover circumstances where civil proceedings have been instituted before a Tribunal under the supervision of the requesting court, but such a submission would also need to contend with the language of the Hague Convention itself, as mentioned above.

Mindful of this potential difficulty, Foxton J then engaged in a brief discussion of a novel approach to the operation of §43 of the AA (which permits the Court to secure the attendance of a witness). §43(3) provides that the Court's machinery may only be used if the witness is in the UK and the arbitral proceedings "are being conducted in the UK".

Foxton J observed that the wording "conducted in England and Wales" has not been subject to judicial consideration, but: "*clearly involves something less than an English-seated arbitration (given the contrast between the language in s.43(2)(a) and s.2(3)), and it is generally accepted by commentators that it would include a foreign-seated arbitration holding a hearing in England and Wales for the purpose of taking the witness's evidence*". Taking that reasoning further, he suggested that he saw: "*considerable attraction in the argument that a tribunal which sat in New York to hear video-evidence from a witness in England, in circumstances in which the taking of witness's evidence was subject to the tribunal's overall management of the arbitration and the obligation of confidentiality attaching to the arbitration proceedings, was conducting proceedings in England and Wales for the purposes of s.43(2)(b). The requirement appears largely directed to ensuring that the witness does not need to travel abroad in order to give evidence (Mustill & Boyd, Commercial Arbitration 2001 Companion p.323). It would be unfortunate if s.43(2)(b) required the tribunal and the parties' representatives to fly into this jurisdiction simply for the purpose of satisfying the territorial requirement for a s.43 order.*"

It is not entirely clear whether Foxton J envisaged an order having to be expressly made by the foreign seated Tribunal in advance of the evidential hearing at which the evidence was to be given, i.e. so as to change the venue (as opposed to the seat) of an evidential hearing, although this would likely be a prudent step to take in order to make the argument more straightforward. In any case, the suggestion appears to have the merit of neatly sidestepping the problems which may be encountered in attempting to use the Letter of Request regime.

[23] Whilst the E(POJ)A refers in § 1 to "a court or tribunal … exercising jurisdiction … outside the United Kingdom" it was held in *Commerce and Industry Insurance Co of Canada v Lloyd's Underwriters* [2002] 1 WLR 1323 that this does not extend to private arbitral tribunals (on the facts the arbitral tribunal that had made the request directly was seated in New York).

Finally, it should be noted that the judicial approach to §43 has been to view it as a limited jurisdiction, such that this innovation cannot be seen, for example, a wide ranging English equivalent to §1782 (in the arbitration context). In *Tajik Aluminium Plant v Hydo Aluminium AS*[24]; the Court of Appeal stated that a witness summons to produce documents to the court involved the exercise of the court's coercive powers. The person to whom it is addressed is at risk of being in contempt of court if they fail to comply. Accordingly, the witness summons should either identify the documents individually or by reference to a class of documents or things so that it is possible to identify the documents to be produced with sufficient certainty to leave no real doubt in the mind of the person to whom the summons is addressed about what they are required to do. That is the test. Anything less was unfair to the witness; it also made supervision and enforcement by the court extremely difficult. The Court of Appeal also expressed the view, albeit obiter, that previous first instance authority to the effect that §43 could not be used to invoke third party disclosure under Part 31 CPR, was correct.

Finally, US discovery rules are much broader than their English equivalents as regards obtaining evidence from non parties and this often means that US Letters of Request (or other routes to the same end) are issued, but the English court refuse to give them effect, or significantly cuts down their scope. Assistance from English counsel is thus helpful in giving the best opportunity for success.

Conclusion

The divergence in the approaches of the US and English courts reflects the difficulty that the arbitration community faces in ensuring that parties have access to relevant evidence whilst respecting the fundamental principle of arbitration that it only binds those that have agreed to be bound. Given the significance of this issue, and the fact that there remains uncertainty, it is likely that the boundaries of the courts' powers will continue to be tested.

[24][2005] EWCA Civ 1218; [2006] 1 W.L.R. 767, CA; [2005] 4 All E.R. 1232, CA