Obtaining Cross-Border Evidence from Non Parties in Support of Arbitration

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The decision of Mr Justice Foxton in ***A & Another v C & Others*** [2020] EWHC 258 (Comm) might be thought to be an unremarkable application of a relatively settled, albeit controversial, view of the scope of section 44 of the Arbitration Act 1996. However, the decision is of interest because of the *obiter* comments which accompanied it, which shed some further light on how the problem of obtaining cross-border evidence from non parties in support of arbitration may be approached in subsequent cases.

The central question for the Court in ***A v C*** was whether section 44 of the Arbitration Act 1996 can be used in order to obtain an order for a deposition from a witness in England & Wales for an arbitration seated in the US. In line with the dicta of Males J (as he then was) in ***Cruz City 1 Mauritius Holdings*** [2015] 1 All ER (Comm) 305, and the decision of Sara Cockerill QC (as she then was) in ***DTEK Trading SA v Morozov*** [2017] EWHC 94 (Comm) ("***DTEK***"), the judge held that the answer was no, section 44 could not be used against non parties to the arbitration, although perhaps with an indication that he might have approached things differently had the matter been free of prior authority.[2] Though there has been significant academic criticism of this position,[3] it is not really surprising that further steps in this debate will have to await the issue arising before an appellate court on some future occasion.

For the time being then, for the practitioner, that leaves a further question hanging in the air: can evidence be obtained from non parties in support of an arbitration where there is a cross-border issue *at all*, and if so, how? In that regard, Foxton J's discussion of some of the potential alternatives is of particular interest, and it would appear that the response to this second question is, at its highest, 'sometimes', albeit that even then, a measure of judicial creativity may be required in order to reach that result.

English seated arbitration, evidence abroad (outside of the EU)

Before coming to the decision of Foxton J, it is helpful to consider an initial scenario which involves an English seated arbitration, but a non party witness located abroad, from whom

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[2] ***A v C***, paras 18-20.
[3] For example, **Merkin and Flannery on the Arbitration Act 1996 (6th)** at 44.7.5, as noted in ***A v C***, para 17.

testimony or documents are sought. This appears to have been the basic fact pattern which Sara Cockerill QC (as she then was) analysed in ***DTEK***.

One possibility here is to investigate free standing procedures for obtaining evidence which are available in the target jurisdiction. An example, at least insofar as litigation is concerned, is section 1782 of Title 12 of the United States Code in the US, which allows a party to proceedings outside the US to apply directly to the US court to obtain evidence for use in the non-US proceedings. However, the availability (or otherwise) of the section 1782 mechanism in support of a non-US arbitration, as opposed to non-US litigation, remains the subject of differing views from different Federal courts. As can be seen from the fact that the answer may be different even within a single country such as the US, this type of approach has the potential to vary greatly from case to case depending on the location of the relevant evidence, and would need to be investigated afresh each time with local counsel.

Another possibility is that the foreign arbitration statute is more generous than the (current) interpretation of section 44 of the Arbitration Act 1996, such that orders against non parties are expressly available. Again, however, that is likely to be a position that is extremely variable from one jurisdiction to another.

Assuming that these possibilities are both unavailable, 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 section 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.[4]

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 and Industry Insurance Co of Canada v Certain Underwriters at Lloyd's of London*** [2002] 1 WLR 1323 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 section 44(4). The application

[4] ***DTEK***, para 47, cited with approval in ***A v C***, paras 24-25.

would then proceed pursuant to section 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.[5]

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 section 1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "**Evidence Act**"). As a result, one potential objection identified by Foxton J in relation to inwards Letters of Request (discussed below) can be sidestepped, at least at the English end of the proceedings. However, the point may well arise in the foreign jurisdiction if the relevant statutory language under consideration by the foreign court is in similar terms, i.e. it may have a jurisdiction limited to evidence required for proceedings in Court, rather than for proceedings in a private arbitral tribunal. This is perhaps not unlikely, given the terms of 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*" (emphasis added).

Accordingly, if there were no free-standing procedure available in the foreign jurisdiction, if the foreign jurisdiction takes a similar view to England & Wales in the interpretation of its arbitration statute, and if the foreign court were also to resolve that a Letter of Request had to issue from an English court for the purposes of substantive proceedings before that court (rather than for arbitration), then it may be the case that an English seated tribunal is simply unable to obtain evidence from non parties outside of the jurisdiction (if it will not be voluntarily given).

Foreign seated arbitration (outside of the EU), evidence in England & Wales

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 & Wales, from whom testimony or documents were sought.

[5] A mirror image example would be that the US discovery rules are much broader than their English equivalents as regards obtaining evidence from non parties. This often means that US Letters of Request are issued, but the English court refused to give them effect, or significantly cuts down their scope. No doubt there may be variants of foreign practice which could cause difficulties with an outwards Letter of Request.

Two routes are (currently) closed in this scenario – firstly, the use of section 44 of the Arbitration Act 1996, as has now been determined by the consistent line of first instance authority, and second, the use of section 25 of the Civil Justice and Judgments Act 1982 (Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings), which in section 25(7)(b) expressly excludes "*provision for obtaining evidence*" from the definition of interim relief.

However, another two routes remain potentially open, both of which were canvassed by Foxton J in the course of his judgment.

The first is again to use the Letter of Request mechanism, although this time it would be inwards rather than outwards. That approach would envisage the party seeking the evidence obtaining the permission of the foreign Tribunal or agreement of the other party in the arbitration (as appropriate) to be able to apply to the foreign Court, and to then apply to the foreign Court to have it issue a Letter of Request. If issued, it would then be subject to the usual application before the Senior Master on arrival in England & Wales, and, if necessary, could be resisted by the party which was the subject of the request in the normal way. However, that approach gives rise to a potential difficulty alluded to by Foxton J – namely, compliance with the UK's statutory requirements for inwards Letters of Request which are contained in section 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…*" (emphasis added)

As noted above, given that ***Commerce and Industry Insurance Co of Canada*** stands for the proposition that the reference to "*court or tribunal*" in defining the "*requesting court*" in section 1(a) of the Evidence Act does not extend to a private arbitration tribunal, Foxton J was correct to note (without further comment) the potential issue,[6] namely whether the English court would have jurisdiction to respond to a Letter of Request issued in the circumstances under consideration. Clearly there is scope for argument that section 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.[7]

[6] ***A v C***, para 25.
[7] Although it should be noted that State parties are not bound to implement the Hague Convention word for word into their domestic legislation.

Mindful of this potential difficulty, and seemingly encouraged by the terms of a conditional offer made for the giving of evidence voluntarily by video link from England, Foxton J then engaged in a brief discussion of a novel approach to the operation of section 43 of the Arbitration Act 1996.

Section 43 (Securing the attendance of witnesses) provides that:

> "*(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.*"

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*".[8]

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.*"[9]

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 before

[8] ***A v C***, para 29.
[9] ***A v C***, para 30.

that Tribunal to a venue in England & Wales, 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.

Finally, it should be noted that the judicial approach to section 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 section 1782 USC (in the arbitration context). In ***Tajik Aluminium Plant v Hydro Aluminium AS*** [2005] EWCA Civ 1218; [2006] 1 W.L.R. 767, the Court of Appeal held that a witness summons under Part 34 CPR which was issued for the purposes of an arbitration had the same strict requirements as the *subpoena duces tecum* (an approach which is applied under the Letter of Request regime). This therefore necessitates the identification of individual documents, or a compendious description of such individual documents.[10] The Court of Appeal also expressed the view, albeit *obiter*, that previous first instance authority to the effect that section 43 could not be used to invoke third party disclosure under Part 31 CPR, was correct.[11] Whilst that approach is not free from criticism, overall it means that Foxton J's potential solution in ***A v C*** would come to the same position as would be the case if the Letter of Request regime were applied.

The European Footnote

From the perspective of relations with the UK, until 31 December 2020, there remains a distinct position as regards obtaining cross-border evidence within the EU. Article 68(b) of the EU Withdrawal Agreement provides for the continued application of the Taking of Evidence Regulation[12] in relation to requests received before the end of the transition period, which is given domestic effect via the European Union (Withdrawal Agreement) Act 2020.

However, a very similar problem to that described in relation to the Hague Convention arises as concerns using the Taking of Evidence Regulation in the arbitration context, due to the wording of Article 1(2), which states "*A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated*" (emphasis added). In fact, the proposed updates to the Taking of Evidence Regulation which are currently under

[10] The crux of the reasoning, at para 27 of the judgment of Moore-Bick LJ, was that a witness summons would be backed by a penal sanction, which means that a witness must know what they have to do with specificity, because it would be unfair to them, and difficult for the court to supervise and enforce if it were otherwise.
[11] ***Tajik Aluminium***, para 20.
[12] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

discussion would define a court as "*any judicial authority in a Member State which is competent for the performance of taking of evidence according to this Regulation*"[13] - an approach which has been expressly criticised as excluding private arbitration tribunals.[14]

Conclusion

The decision of Foxton J takes the same view of section 44 as other first instance authority - something which is more acutely problematic when it comes to the question of injunctions as against non parties, and which will surely attract appellate attention before long.

However, for the time being, as far as seeking to obtain evidence abroad for use in English seated arbitrations are concerned, unless there are free standing applications which can be made in the foreign jurisdiction or a more generous arbitration statute as regards non parties, there is a real risk that a foreign court may refuse to apply the Letter of Request regime, which means that it may not be possible to get at such evidence unless it is given voluntarily. That is not, in reality, a problem which can be rectified domestically – although it may be a point for the members of the Hague Conference on Private International Law, including the UK, to consider in its reporting on the operation of the Hague Evidence Convention.

In relation to obtaining evidence in England & Wales for use in a foreign seated arbitration, there are also doubts as whether the English High Court would approve the use of the Letter of Request regime, but Foxton J appears to have fashioned a potential alternative method for evidence to be obtained using section 43. Ultimately, this should secure the same outcome as if the Letter of Request regime were used, though that approach of course has its own drawbacks in terms of its ties to the witness summons and through it, the historically narrow view taken by English courts as to the limits of what could be required by a *subpoena duces tecum*.

[13] http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640133/EPRS_BRI(2019)640133_EN.pdf (p. 5).
[14] Ibid., p. 7.