

## Evidence to Assist a Foreign Arbitration : Case Law

### Statement of Law

The English Court has power to order the taking of evidence by way of deposition from a non-party witness for the purpose of supporting a foreign arbitration.

### ***A & Anor v. C & Others [2020] EWCA Civ 49***

The Court of Appeal so held - when allowing an appeal by the Claimants A & B against the refusal by Mr Justice Foxton (in the Lower Court) to grant an Order allowing them compulsorily to obtain evidence from the Third Defendant E resident in England by deposition - for the purpose of employing it in an arbitration seated in New York between the Claimants and the First and Second Defendants, C & D.

### The Arbitration Act

The Arbitration Act 1996: Lord Justice Flaux said that Section 44(2)(a) of the Arbitration Act 1996 gave the Court such power for a number of related reasons.

**Reason 1** : The wording of the provisions in the Arbitration Act 1996 (the “1996 Act”) made it clear that (with certain limitations) the English Court had the same powers in relation to arbitrations (wherever they were) as they had in relation to civil proceedings before the English courts. There was no basis, in the language of the 1996 Act, to limit the application of these powers to domestic arbitrations.

**Reason 2** : The key phrase in Section 44(2) (a) “**the taking of the evidence of witnesses**” was apt as a matter of language to cover all witnesses - not just those who were party to the arbitration.

The Court noted that in the context of modern commercial arbitration it was rare for a witness also to be a party, and indeed the 1996 Act clearly distinguished between the status of someone who was a party to the arbitration and a person who was solely a witness thereto.

**Reason 3** : There was no basis to confine the words “**the taking of the evidence of witnesses**” so as to exclude depositions.

**Reason 4** : None of the other relevant sub-sections of the 1996 Act (under S.44) pointed against the Court having the power to make an Order against third parties for depositions under 44(2)(a).

**Reason 5** : The power to order a deposition was generally only to be used in limited circumstances (such as where the witness was unfit or otherwise unable to attend the trial). There was no reason to construe the power narrowly simply because it might only be seldom used.

The question whether to exercise the power in a particular case was one which went to **discretion** not to **jurisdiction**.

**Reasons 6** : If Section 44(2)(a) did not permit the Court to order evidence by deposition, it had little or no content in the context of a foreign arbitration.

### Conclusion

Whatever the position in relation to Orders against non-parties under other heads of 44(2) the Court did possess the authority under S.44(2)(a) to make an Order for a deposition to be taken from the Third Defendant as a non-party.

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