Neutral Citation Number: [2020] EWHC 258 (Comm)

Case No: CL-2019-00740

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
IN THE MATTER OF AN ARBITRATION CLAIM

The Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 12/02/2020

Before :

MR JUSTICE FOXTON

- -

Between :

(1) A
(2) B

Claimants

- and –

(1) C
(2) D
(3) E

Defendants

Teresa Rosen Peacocke (instructed by **Cooke, Young & Keidan LLP**) for the Claimants
Matthew Weiniger QC of **Linklaters LLP** for the First and Second Defendants
Angeline Welsh (instructed by **Bryan Cave Leighton Paisner LLP**) for the Third Defendant

Hearing date: 29th January 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE FOXTON

The Honourable Mr Justice Foxton:

1. This is the hearing of the Claimants' application for an order under s.44(2)(a) of the Arbitration Act 1996 for an order for the taking of the evidence of the Third Defendant ("E") in England, so that it might be adduced in an arbitration being conducted in New York between the Claimants and the First and Second Defendants ("the New York Arbitration").

2. The Claimants and the First and Second Defendants are co-venturers in an oil field in Central Asia. An issue has arisen in the New York Arbitration as to the nature of certain payments made by the First and Second Defendants known as "Signature Bonuses", and whether those amounts are properly deductible when working out how much is due to the Claimants in respect of their 15% interest in the field.

3. The evidential hearing in the New York Arbitration has taken place. However, the Claimants have been given permission by the arbitration tribunal to bring this application for the compulsory taking of the Third Defendant's evidence in England. That application is opposed by Ms Welsh for the Third Defendant on the basis that the Court has no jurisdiction under s.44 of the Arbitration Act 1996 to make an order against someone other than a party to the arbitration agreement, and because, even if there is such jurisdiction, no sufficient case has been made out for exercising it (and certainly not in the terms of the draft order sought). Mr Weiniger QC did not make submissions on the issue of whether the Court has power to make such an order, but he supports Ms Welsh's submissions that no proper case for the exercise of any power has been made out (essentially making the same submissions which the First and Second Defendants had made in the arbitration when opposing the Claimants' application to the arbitration tribunal for permission to seek such an order).

4. I am very grateful to all the advocates for their submissions. In this judgment, I shall follow the same course as the parties, and deal with the issue of jurisdiction first, followed by the issue of discretion.

The relevant statutory and procedural provisions

5. It is necessary to begin with ss.43 and 44 of the Arbitration Act 1996. S.43 provides:

> "Securing the attendance of witnesses.
>
> (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."

6. S.44 provides:

"Court powers exercisable in support of arbitral proceedings.

(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;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(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.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or

other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section."

7. S.2(3) of the Act makes it clear that ss.43 and 44 apply to arbitrations with a seat outside England and Wales (such as the New York Arbitration), albeit 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".

8. CPR 62.5(1) makes provision for service of arbitration claims out of the jurisdiction. CPR 62.5(1)(a) addresses applications to challenge arbitration awards brought under ss.67, 68 and 69 of the Arbitration Act 1996. CPR 62.5(1)(b) provides for service out where:

"the claim is for an order under section 44 of the 1996 Act".

9. CPR 62.5(1)(c) applies where the claimant seeks some other right or remedy from the court affecting an arbitration, arbitration agreement or arbitration award and either (i) the seat of the arbitration is or will be within England and Wales or (ii) where no seat of the arbitration has been designated or determined and, by reason of a connection with this jurisdiction, the court is satisfied that it is appropriate to exercise its powers for the purpose of supporting the arbitral process.

10. It will be apparent (as one would expect) that there is no power to serve an application for relief under s.43 of the Arbitration Act 1996 out of the jurisdiction, and that the power to serve applications under CPR 62.5(1)(a) and (c) is essentially concerned with arbitrations with an English seat (or at least no other seat). However, for applications for relief under s.44 of the Arbitration Act 1996, there is no required nexus with this jurisdiction at the gateway stage before service out can be effected, beyond the fact that the application in question is for relief under s.44.

The authorities on the application of s.44 to persons other than the arbitrating parties

11. At first blush, the language of s.44 lends some support to the Claimants' argument that orders can be made against non-parties. The language of s.44(1) – providing the court has same power in relation to the matters mentioned as it has for the purposes of and in relation to legal proceedings – would suggest that, in the provisions which follow, the Court has the same power to make orders against non-parties to the arbitration as it would in legal proceedings to make orders against non-parties to the litigation. Further, s.44(2)(a), the provision specifically in issue here, refers to "the taking of evidence of witnesses", which might suggest that it is principally concerned with securing evidence from witnesses who are not in the control of the arbitrating parties. However, on analysis, the position is more complex, as becomes clear from a review of the authorities.

12. It is not necessary in this judgment to consider all of the authorities which have considered, or at least touched upon, this issue, because they were reviewed

extensively in two judgments of this Court which I consider in more detail below: Cruz City I Mauritius Holdings v Unitech Limited [2014] EWHC 3704 (Comm), a decision of Males J, and DTEK Trading SA v Morozov [2017] EWHC 1704 (Comm), a decision of the-then Sara Cockerill QC.

13. However, any discussion of this issue must begin with Commerce and Industry Insurance Co of Canada v Certain Underwriters at Lloyd's [2002] 1 WLR 1323. As Ms Rosen Peacocke pointed out, this is the only case which was specifically concerned with an application under s.44(2)(a) for the taking of evidence of a witness for the purposes of an arbitration with a seat outside England and Wales. In that case the arbitration tribunal (which was sitting in New York) had issued a letter of request for the taking of evidence in this jurisdiction of certain Lloyd's brokers. Armed with that "letter of request" from the arbitration tribunal, one of the arbitrating parties obtained a "without notice" order for the taking of the brokers' evidence under s.1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975. The witnesses applied to set aside the order, contending (correctly) that the arbitration tribunal was not a "tribunal" for the purposes of the 1975 Act. However, on the day of the set-aside application, the applicant changed tack and applied for an order for the taking of the witnesses' evidence by way of deposition under s.44(2)(a) of the Arbitration Act 1996.

14. Moore-Bick J was clearly of the view that he had jurisdiction under s.44(2)(a) to make an order directly against the (unwilling) witnesses. However, the issue of whether the court's power under s.44(2) was limited to making orders against the arbitrating parties does not appear to have been argued. In the event, Moore-Bick J decided not to make an order under s.44(2)(a) as a matter of discretion. As a result, it was not necessary for the Court to frame an order, from which it would have become apparent whether the Court was making a coercive order against the witnesses requiring them to attend for the deposition, and the precise basis on which it was doing so.

15. The decision in Cruz City concerned an attempt to serve out of the jurisdiction an application for a freezing injunction against non-parties to the arbitration agreement. The injunction was sought to assist the execution of an arbitration award, against subsidiaries of the award debtor. The immediate question for decision by the Court was whether service out of the jurisdiction against a non-party to the arbitration agreement was possible under CPR Part 62.5(1)(c), the terms of which have been set out above. However, one of the arguments which Males J had to consider when deciding that question was whether CPR Part 62.5(1)(b) permitted service on non-parties (because the applicants argued that if such service was possible under CPR Part 62.5(1)(b), this should also be the case for CPR Part 62.5(1)(c)). Males J reviewed the authorities which had considered the question of whether the Court had jurisdiction under s.44 to make orders against non-parties, noting at [47] that "some judges have expressed the view that it does, albeit not (as I read the cases) as a matter of final decision, although the question has also been described as 'not straightforward'". Males J then set out the reasons why he had concluded that the better view was that s.44 did not include any power to make an order against a non-party. He set out those reasons at [48]-[50] of the judgment:

"48. First, there are several indications in section 44 itself that it is intended to be limited to orders made against a party to the arbitration "for the purposes of and in relation to" which the court's powers are to be exercised:

a. The section is expressed by the opening words of subsection (1) to be subject to contrary agreement between the parties, which must mean the parties to the arbitration agreement. While it would theoretically be possible that the availability of remedies against non-parties should depend on the parties' agreement, it seems much more likely that Parliament contemplated an agreement between the parties to the arbitration as to the powers which one party could invite the court to exercise against the other.

b. Subsection (4) provides that, except in cases of urgency, the court can only act on an application made with the permission of the arbitral tribunal or the agreement in writing of "the other parties" — which clearly means the other parties to the arbitration. It is possible, I suppose, that Parliament intended to empower arbitrators to give permission for an application to be made against a non-party, but that seems surprising in view of the consensual nature of arbitration and the fact that arbitrators generally have no jurisdiction over non-parties. It would be surprising too if the arbitrators were empowered to give such permission without hearing from the non-party, although to allow a non-party even this limited standing to make submissions to the arbitrators (for which purpose it would generally need to know something about the arbitral proceedings) seems hard to reconcile with the private and confidential nature of arbitration.

c. Subsection (5) provides that the court shall act only if the arbitrators have no power or are unable for the time being to act effectively. But that will always be the case where an order is sought against a non-party.

d. Similarly, subsection (6), which allows the court to hand back to the arbitral tribunal the "power to act in relation to the subject matter of the order", can have no application to an order made against a non-party.

e. The effect of subsection (7) is that there can be no appeal from any order under section 44 unless the first instance court gives permission. It would be surprising if in the exceptional case of an order against a non-party, backed up by the sanction of contempt proceedings, the non-party's right of appeal was limited in this way. A non-party has not agreed to the finality and promptness of decision making which are meant to be the hallmarks of arbitration and which provide the rationale for curtailing a party's rights of appeal.

f. None of these indications is conclusive, but together they suggest, to my mind, that the section is simply not concerned with applications against non-parties.

49. Second, section 44 is one of only a few sections of the 1996 Act which applies even if the seat of arbitration is outside England and Wales or Northern Ireland:

see section 2(3). While such an order could always be refused as a matter of discretion in the absence of any connection with this country, it seems unlikely that Parliament intended to give the English court jurisdiction to make orders against non-parties in support of arbitrations happening anywhere in the world.

50. Third, paragraphs 214 to 216 of the report of the Departmental Advisory Committee on Arbitration Law, which explain the background to and purpose of section 44, contain nothing to suggest that it was intended to confer jurisdiction on the court to make orders against non-parties. This is something which, if it was intended, could be expected to be stated with clear words. Instead, the report merely recognises that orders under section 44 may affect third parties, but that is rather different from saying that orders may be made against third parties".

16. Males J's conclusion on the scope of s.44 was strictly obiter – because the issue as to the status of s.44 only arose as part of an argument as to the scope of CPR 62.5(1)(c), and because he concluded that even if s.44 (and consequently CPR 62.5(1)(b)) extended to orders against non-parties, this did not affect his conclusion that CPR 62.5(1)(b) did not. Nonetheless, he clearly received full argument (in apparent contrast to the position of other judges who have referred to this issue), and his judgment, together with the judgment in DTEK, represent the most extended treatment of the subject.

17. DTEK was a case in which the Court was concerned with an application against a non-party (it would seem under s.44(2)(b) and/or (c)), which came before Sara Cockerill QC on the claimant's application for permission to serve out under CPR 62.5(1)(b). In the course of that application, Mr Smith QC mounted a strong challenge to Males J's conclusion in Cruz City. Those grounds of challenge, which are essentially those advanced before me and which are marshalled in *Merkin and Flannery on the Arbitration Act 1996* (6th) ¶44.7.5, were considered by the judge, together with the various authorities. Referring to the terms of s.44 (in what is ultimately an issue of statutory construction), she agreed with "Males J.'s conclusion that the wording is more suggestive of applications confined to the arbitration parties than otherwise" ([42]). At [56] she concluded:

"Having, therefore, carefully considered the judgment in the Cruz City I v Mauritius Holdings case … and the line of authorities which precedes it in the light of Mr Smith's detailed and helpful submissions, I consider that while there is plainly an argument as to this issue, I am clear in my own mind that the right answer is what which Males J reached".

18. Approaching this question without the benefit of prior authority, I can see considerable force in the arguments advanced in favour of the view that the jurisdiction under s.44 could, in an appropriate case, be exercised against a non-party. Those parts of s.44 which are suggestive of orders against arbitrating parties might reflect the fact that this was the dominant, but not exclusive, focus of the drafter. The fact that court injunctions can have legal force against non-parties even when the order is not made against them (as the Departmental Advisory Committee on Arbitration Law recognised in paragraphs 214 to 216) reflects the fact that a court order will engage interests, and give a right to be heard, to non-arbitrating parties, and will therefore necessarily involve a fundamental departure from the bilateral nature of

consensual arbitration. For example, a court injunction against an arbitrating party can place a non-party who interferes with it in contempt of court, and a non-party affected by the order has the right to apply to vary or discharge the order. A power to make an order directly against a non-party would go further than this, but it might be said only incrementally. It has been held in Hong Kong that the court has power to make orders against non-parties under s.45(2) of the Arbitration Ordinance (Cap 609), albeit (as the court noted), the wording of that provision differs significantly from s.44 (Company A and ors v Company D and ors [2018] HKCFI 2240 at [26]-[41]).

19. However, the reasoning of Males J in Cruz City and of Sara Cockerill QC in DTEK is also persuasive, and the decisions represent the two most extensive and recent treatments of this issue in the Commercial Court. This issue last came before this Court, in Trans-Oil International SA v Savoy Trading KP [2020] EWHC 57 (Comm), on an application for a freezing order against a non-party to the arbitration agreement on Chabra grounds. The applicant had submitted that "the issue of whether orders can be made against third parties to an arbitration agreement under Section 44 is controversial, that the point is still open and there are conflicting authorities" ([56]). Moulder J referred to the decisions in Cruz City and DTEK and noted that "no substantive arguments were advanced on behalf of the applicant as to why this court should not follow the decisions in those two authorities, which considered in detail the cases relied upon by the applicant, and in which the judges gave reasoned decisions" ([40]). She followed and applied those decisions.

20. I have concluded that, like Moulder J, I should follow the decisions in Cruz City and DTEK. If, therefore, the Claimants are to succeed in establishing before me that the Court has jurisdiction to make an order against the Third Defendant under s.44(2)(a), they need to distinguish the present application from the reasoning in Cruz City and DTEK, and this was essentially the course which Ms Rosen Peacocke took before me.

21. Two arguments were advanced:

    i) First, that s.44(2)(a) permits orders to be made against non-parties because it refers to the taking of the evidence of witnesses, even if this is not the case for other sub-sections of s.44(2).

    ii) Second, that the difficulties with making orders against non-parties in the Cruz City and DTEK cases arose from the need to serve the applications out of the jurisdiction, which issue does not arise in this case because the Third Defendant is resident here.

Does s.44(2)(a) extend to non-parties even though other sub-sections of s.44 do not?

22. The argument that s.44(2)(a) extends to non-parties, whatever the position may be for other types of s.44 order, is advanced by Merkin and Flannery in the course of their criticism of the Cruz City and DTEK decisions. There are three reasons why I do not agree with this suggestion.

23. First, the language and structure of s.44, the introductory words of s.44(1), and the provisions on which Males J and Sara Cockerill QC placed emphasis in reaching their conclusions, apply to all of the powers in s.44(2). In these circumstances, any attempt

to distinguish Cruz City and DTEK on the basis that they were concerned with different s.44(2) sub-powers would not represent a meaningful distinction from those cases, but simply a decision not to follow their reasoning. In any event, the argument that some powers under s.44(2) can be exercised against non-parties and others cannot is not an attractive argument in the absence of some language justifying a differential treatment of the various sub-sections in this respect.

24. Second, as Sara Cockerill QC noted in DTEK at [47], in so far as s.44(2)(a) is concerned with the English Court issuing letters of request to foreign courts for the taking of evidence of non-parties, these are not coercive orders directed at a non-party but requests made of a foreign court which may or may not choose to exercise its own coercive powers over a potential witness. As the matter is put in the leading monograph on the subject (Sara Cockerill QC, *The Law and Practice of Compelled Evidence in Civil Proceedings* ¶5.03), "the English courts have no direct jurisdiction against the witness abroad so as to compel him to give evidence. It can and will, however, in appropriate cases ask a foreign court to do what it can to help".

25. It is, therefore, possible for s.44(2)(a) to be invoked without the court making an order directly against a non-party: either because it involves a request to a foreign court rather than an order against a non-party by the English court, or because it involves ordering the deposition to proceed, but not making a coercive order against the witness that he or she attend (an issue I address below). That said, the suggestion that the English court has power under s.44 to request a foreign court to exercise its coercive powers to procure evidence for use in an English arbitration, but no power to use its own coercive powers in response to a request from a foreign court for the purposes of an arbitration with a seat outside England and Wales, is not a wholly happy one. The issue of whether the English court would have jurisdiction under the Evidence (Proceedings in Other Jurisdictions) Act 1975 to respond to a request made by a foreign court for the purposes of procuring evidence for a foreign-seated arbitration, and whether such a request would satisfy the requirement of s.1(b) of that Act 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", was not debated before me, and I say no more about it.

26. Finally, applications for coercive orders against non-party witnesses under s.44(2)(a) might be said to raise additional complications over and above those which arise in relation to such applications under other sub-sections. If the court's power under s.44(2)(a) is the "same power of making orders" as it has "for the purposes of and in relation to legal proceedings", then that might suggest it has powers equivalent to CPR 34.8. However, an order under CPR 34.8 does not have coercive effect against the witness, and does not require the witness to attend (Stuart v Balkis (1884) 50 LT 479). If a witness refuses to attend a deposition ordered by the court under CPR 34.8, the examiner will fill in a certificate of non-attendance, at which point the party requiring the deposition may apply to court under CPR 34.10 for an order requiring the witness to attend. That order is coercive in effect, and as the notes to the White Book record at para. 34.10.1, "persons who fail to comply with orders to attend are in contempt of court and committal proceedings may be taken against them". The RSC predecessor to CPR 34.10, RSC Order 39 r 4, provided that "the attendance of that

person before the examiner … may be enforced by writ of subpoena in like manner as the attendance of a witness … at a trial may be enforced".

27. S.43 of the Arbitration Act 1996 makes specific provision for securing the attendance of witnesses for arbitration hearings, but in terms limited to securing the attendance before the tribunal rather than before an examiner, and only when "the arbitral proceedings are being conducted in England and Wales". The first of these restrictions may reflect a desire to ensure that the coercive powers of the Court could not be used to require witnesses to attend for pre-hearing deposition (Merkin and Flannery ¶43.2).

28. It might be said that, if s.44(2) orders cannot generally be made against non-parties, it would be surprising if coercive orders could nonetheless be made against non-party witnesses under s.44(2)(a), when s.43 already makes specific provision for securing the attendance of witnesses, but does so subject to two limitations which are not found in s.44.

29. Before leaving s.43, I should mention one other issue which did not feature in argument before me, but which arises from the terms of the offer which the Third Defendant made (subject to certain conditions) to provide a witness statement and give evidence by video link to the tribunal from England. There appears to be no authority on the issue of what is required for an arbitration to be "conducted in England" for the purposes of s.43(3)(b). It 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: see for example Merkin and Flannery ¶43.5.

30. Those commentators suggest that "at the very least, the parties will be required to hold a hearing within the jurisdiction (at what might be a considerable cost)". However, I see 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.

Does the fact that service out of the jurisdiction is not required provide a relevant point of distinction in this case?

31. Ms Rosen Peacocke understandably laid considerable emphasis on the fact that it was not necessary in this case for the Claimants to serve the s.44(2)(a) application out of the jurisdiction, because the Third Defendant is resident here. Her submissions that the difficulties in seeking s.44 relief against non-parties only arise where the application must be served out of the jurisdiction mirror the view expressed in Merkin

and Flannery, who, following their trenchant criticism of the Cruz City and DTEK decisions referred to above, state at ¶44.7.5:

"Furthermore, it cannot be controversial to suggest that section 44 can be used as a basis for making orders against third parties based *within* the jurisdiction, because the court may exercise *in personam* jurisdiction in those circumstances against the non-party. In truth, the issue only really arises because of the (poorly) drafted relevant provisions of the CPR concerning service out of the jurisdiction under CPR Part 62 … Suffice it to say that a little appellate light on this issue would be most welcome".

32. While I endorse the latter remark, I do not agree with the preceding comments. There are contexts in which the Court has jurisdiction to make an order, but the person against whom the order is sought is outside the jurisdiction, and the Court has no power under the CPR to permit service there. This was held to be the position in relation to s.12(6) of the Arbitration Act 1950, a provision in similar (but not identical) terms to s.44 of the 1996 Act, in Unicargo v. Flotec Maritime S de RL and Cienvik Shipping Co. Ltd (The Cienvik) [1996] 2 Lloyd's Rep. 35, in which Clarke J. held that s.12(6) gave the court power to make orders against non-parties to the arbitration agreement, but that the relevant procedural code (in that case the Rules of the Supreme Court) contained no provision which allowed service of such an application against a non-party to the arbitration agreement out of the jurisdiction (whereas they did permit such service against a party to the arbitration agreement).

33. However, the gateway for service out created by CPR 62.5(1)(b) requires nothing more than that "the claim is for an order under section 44 of the 1996 Act". In summary, the position is not that applications against non-parties under s.44 have failed because it is not possible to serve those applications out of the jurisdiction. It is that applications to serve s.44 claims against non-parties out of the jurisdiction have failed because s.44 has been held not to apply to non-parties.

Conclusion on jurisdiction

34. For these reasons, I have decided that:

    i) I should follow the reasoning in Cruz City and DTEK and hold that the Court does not have jurisdiction under s.44 to make an order against a non-party to the arbitration agreement; and

    ii) the reasoning in those cases is equally applicable to an application under s.44(2)(a) or where it is not necessary to serve the application out of the jurisdiction.

Discretion

35. In case this matter goes further, I have considered the issue of whether, had I concluded that I had power to make an order under s.44(2)(a) against the Third Defendant, it would be appropriate to do so, including having regard to the terms of s.2(3)(b) (given that the arbitration has its seat in New York).

36. In Commerce & Industry Insurance Co, Moore-Bick J at [20] made the following observation about the evidence which should be adduced in support of a s.44(2)(a) application against a reluctant witness:

> "This should normally include an explanation of the nature of the proceedings, identification of the issues to which they gave rise and grounds for thinking that the person to be examined can give relevant evidence which justifies his attendance for that purpose. The greater the likely inconvenience to the witness, the greater the need to satisfy the court that he can give evidence which is necessary for the just determination of the dispute."

37. In this case, the Claimants have explained in broad outline the reasons why the Third Defendant's evidence is of sufficient relevance to justify his giving evidence for the purposes of the arbitration. The adequacy of that explanation was attacked by Ms Welsh and Mr Weiniger QC on a number of grounds. However, in circumstances in which there is no suggestion of any particular inconvenience to the Third Defendant in attending to be deposed in this jurisdiction, I am satisfied that the Claimants have shown a sufficient justification for his attendance, subject to two caveats which I address below.

38. I have reached this conclusion for the following reasons:

    i) The issue of the nature of the "Signature Bonus" is clearly an issue of importance in the New York Arbitration.

    ii) The Third Defendant was the lead commercial negotiator for the First and Second Defendants of the Production Sharing Agreement dated in the 1990s under which the Signature Bonus was payable, and he was involved in negotiating the Signature Bonus.

    iii) The negotiations of the Production Sharing Agreement took place over 20 years ago, and the Third Defendant has understandably pointed to limitations in his ability to recollect the detail of events which occurred at that time. However, the account given in evidence of the Third Defendant's initial conversation with the Claimants' private investigator Mr Casewell on the subject in October 2019, and the nature of the issues which arise in relation to the Signature Bonus issue, are such that there is sufficient prospect of the Third Defendant having relevant evidence to give (even if only that nothing particularly memorable happened). There is also the prospect of the Third Defendant's recollection being assisted by being shown contemporaneous documents.

    iv) It is the case that the arbitral tribunal have already heard evidence from one individual involved in negotiating the Production Sharing Agreement, Z who was the assistant general counsel responsible for drafting and negotiating the agreements. However, given the different roles of Z and the Third Defendant and their respective focus on legal and commercial matters, there is a sufficient possibility that the Third Defendant may have relevant evidence to give, notwithstanding the evidence already given by Z, for example confirming Z's evidence.

v) While the points made by the Defendants as to the reasons why the Third Defendant's evidence is unlikely to add to that given by Z may prove to have weight, I do not believe it would be appropriate for the Court hearing a s.44(2)(a) request to delve too deeply into the evidence given in the hearing to date or to assess the relative weight of different evidence, that being pre-eminently a matter for the arbitral tribunal.

39. The first caveat is that the list of proposed topics which the Claimants have indicated they will ask the Third Defendant about is too broad, extending to a whole series of topics which do not directly address the Signature Bonus issue. For example they include "the history of negotiations between [the Third Defendant] … and G … *including but not limited to* the negotiation of the Production Sharing Agreement and Signature Bonus payment" and the "Respondents' knowledge of and due diligence concerning … the country conditions in Central Asia … and G's authority to negotiate" (emphasis added). It is clear from the Commerce and Industry Insurance Company case that the English court will not allow s.44(2)(a) to be used to conduct a US-style deposition exercise for the purpose of ascertaining what the witness might say on particular topics, rather than adducing the evidence of the witness on the relevant issues. Had I concluded that I had jurisdiction to make the order sought, I would have required the Claimants to produce an amended version of the schedule attached to the draft order, in which the topics on which the Third Defendant was to be questioned were more closely focussed on the Signature Bonus issue.

40. The second caveat arises from the fact that on 17 January 2020, the Third Defendant's solicitors made an open offer to the Claimants to resolve this application on the basis that:

i) The Third Defendant would be provided with various documents relating to the New York Arbitration.

ii) He would then produce a witness statement addressing the permitted topic of enquiry and any other subjects he wished to include.

iii) The Third Defendant would then give evidence by video-link to the arbitration tribunal, or, if the tribunal did not agree to this procedure, before an examiner.

(all subject to certain other conditions as set out in that letter). The First and Second Defendants' solicitors confirmed their broad approval to this proposal, subject to certain additional conditions, in a letter of 27 January 2020.

41. If evidence is to be taken from the Third Defendant for the purposes of the New York Arbitration, it is clearly preferable for that evidence to be given direct to the arbitral tribunal, if possible. Leaving aside for this purpose the issues of costs raised in the Third Defendant's letter, the general approach set out in that letter appears to me reasonably to balance the interests of the arbitrating parties and the Third Defendant, and any s.44(2)(a) order which I made would have been along the broad outlines of the letters of 17 and 27 January 2020.

Conclusion

42. For the reasons set out above, the Claimants' application is dismissed. I will hear the parties on any consequential matters.