COURT ORDERS FOR ORAL EVIDENCE AND DISCLOSURE BY NON-PARTIES IN SUPPORT OF FOREIGN ARBITRATION PROCEEDINGS: THE CHANGING PICTURE IN ENGLAND

JONATHAN SCHAFFER-GODDARD*

I. INTRODUCTION 1113
II. THE RELEVANT PROVISIONS OF THE ARBITRATION ACT 1996 1115
III. THE ORDERS UNDER 44(2) THAT MAY BE MADE IN RELATION TO THE TAKING OF EVIDENCE 1118
A. *Witness Testimony* 1118
B. *Documents* 1120
IV. CONCLUSION 1123

I. INTRODUCTION

The availability of orders from national courts supporting the taking of evidence from third parties to foreign arbitration proceedings is a topic which has long exercised commentators, academics, and practitioners[1] in the United States with

* Jonathan Schaffer-Goddard is a barrister and a member of chambers at 4 Pump Court in London. In 2022, he received his LLM from NYU School of Law as a Starr Foundation Global Law School Scholar and winner of the Law School's International Business Regulation, Litigation, and Arbitration Award. He is seeking admission in New York state and intends to practice across both jurisdictions, with a focus on complex commercial disputes, transnational litigation, and arbitration. This article has benefited immensely from the review and comment of Professor Linda Silberman and Teresa Rosen Peacocke. All errors and omissions remain the author's own.

1. *See, e.g.*, Linda Silberman, *Discovery, Arbitration, and 28 U.S.C. §1782: Rules or Standards?* (NYU School of Law, Public Law Research Paper No. 21-21, October, 2021), https://ssrn.com/abstract=3858904; LUCAS BENTO, THE GLOBALIZATION OF DISCOVERY: THE LAW AND PRACTICE UNDER 28 U.S.C. § 1782 (2019); Hagit Muriel Elul & Rebeca E. Mosquera, *'28 U.S.C. Section 1782: U.S. Discovery in Aid of International Arbitration Proceedings', in* INTERNATIONAL ARBITRATION IN THE UNITED STATES, (Laurence Shore et al. eds., 2017); John Fellas, *Using Section 1782 in International Arbitration*, 23 J. LONDON CT. INTL. ARB. 379, 380 (2007); Jenna M. Godfrey, *Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. §1782(a)'s Application to Private International Arbitration Proceedings*, 60 AM. U.L. REV. 475 (2010).

respect to the scope of 28 U.S.C. §1782.[2] The ability to obtain such orders are particularly valuable for a party to an arbitration when the third-party will not voluntarily comply with a request for documents or witness evidence or the third-party is outside the reach of the arbitral tribunal or the courts of the juridical seat. However, following the newest decision of the U.S. Supreme Court in *ZF Automotive US, Inc. v. Luxshare*, there is no longer any scope for the use of §1782 in foreign commercial arbitrations or *ad hoc* investor-state arbitration proceedings under a bilateral investment treaty. Rather, the U.S Supreme Court has limited §1782 to "governmental or intergovernmental adjudicative bodies."

In light of this, the recent decision of the Court of Appeal in England and Wales in *A v. C* [2020] 1 WLR 3504, which resolved a split in decisions of the High Court on the scope of similar powers in England, is of particular interest.[3] *A v. C* confirmed the power of the English courts to make an order that a third-party resident in the jurisdiction sit for an English deposition[4] at the request of a foreign commercial arbitral tribunal. However, the Court did not address the production of documents by third parties.

---

2. 28 U.S.C §1782 (reading in relevant part: "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. . . 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. . . 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*").*

3. *See also* Jack Alexander & Daniel Brinkman, *Non-Party Orders in Support of Arbitral Proceedings*, 136 L. Q. Rev. 539 (2020) (providing a helpful survey of the scope of such relief in other jurisdictions).

4. The role of a deposition in English civil procedure should not be confused with the much more expansive American practice. A key difference being that the English deposition is generally *in place of* rather than a precondition for live testimony at a hearing (although CPR rule 34.11(4) does permit the court to require a deponent to attend a hearing and give evidence orally after giving a deposition).

This also indicates a key difference between s.44 and § 1782 (and a key similarity to § 7 of the Federal Arbitration Act (9 U.S.C. § 7)): While § 1782 may be utilized for pre-trial discovery, s.44(2)(a) (and § 7 FAA) are for securing evidence for a hearing.

This paper considers the scope of the relief available in England following *A v. C* and argues that the holding in *A v. C* opens up the powers of the English court to make orders against third parties for the production of documents as well as witness testimony.

This topic is of general interest to practitioners in the United States and elsewhere whose clients may seek such relief in support of arbitrations seated outside of England. This is particularly so following the loss of §1782 as a means of obtaining evidence in foreign commercial arbitrations or *ad-hoc* investor-state arbitration proceedings under a bilateral treaty. It is also of particular interest given the upcoming review of the Arbitration Act 1996[5] by The Law Commission in the United Kingdom, which has indicated that it will consider *"the courts' powers exercisable in support of arbitration proceedings,"*[6] as well as the possibilities for legislative reform in the United States following the decision of the US Supreme Court in *Luxshare*.[7]

II. The Relevant Provisions of the Arbitration Act 1996

The Arbitration Act 1996 ("the Act") is the national arbitration law for England and Wales and Northern Ireland. For the purposes of this discussion, the relevant sections are 2(3), 43 and 44.

Section 44(2) sets out a closed list of the matters in which the Court may make orders in support of arbitral proceedings. This is not an open-ended power to make orders in support of arbitrations. The matters include:[8]

(a) the taking of the evidence of witnesses;
(b) the preservation of evidence;

---

5. *See generally* Sara Cockerill, *Orders in Support of Arbitration: Section 37 Senior Courts Act, Section 44 of the Arbitration Act 1996* 3 J. Bus. L.246 (2021) (presenting an argument on the need for what she considers to be infelicities in the statutory language to be clarified in any future changes to the Act).

6. *Review of the Arbitration Act* 1996, Law Commission: Reforming the Law, https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/ [https://perma.cc/ZE9V-L2Q3] (last visited April 7, 2022).

7. See Silberman, *supra* note 1, for proposal.

8. Section 44(2)(d) and (e) provide for other orders which are not applicable to the preservation or provision 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;
>
> *[. . .]*

With respect to these matters, the Court has "*the same power of making orders. . . as it has for the purposes of and in relation to legal proceedings*" (s.44(1)). This means that in relation to the matters in the closed list in 44(2), the powers of the Court do not exceed the powers it has during ordinary proceedings in the High Court or County Court.[9] Therefore, the scope of these orders is always going to be far more limited than the provisions formerly available under §1782 which encompassed discovery under the U.S. Federal Rules of Civil Procedure (FRCP), a far broader power to obtain documents and testimony than s.44 provides for.[10]

Furthermore, the power to make orders under s.44 is a non-mandatory provision, meaning the parties can contract out of it.[11] These orders will simply not be available to the parties if the rules they are arbitrating under exclude s.44.[12]

---

9. Arbitration Act 1996, s.82(1).

10. The English authorities have suggested that the powers should be exercised by the Court *in the same manner* as they would be exercised in civil litigation. Whether that is correct may be open to doubt: the same power can be exercised in different ways, and it may be that one manner of exercising the power is more suited to international arbitrations than domestic civil litigation.

11. *See* A v. C [2020] 1 WLR 3504, 3517 (Eng. & Wales) for a confirmation of this power by the Court of Appeal. There is much to recommend this approach: the intervention of the Court has the potential to disrupt arbitral proceedings, and respect for party autonomy ought to permit an agreement between the parties to exclude such a right. While there is very little authority on this subject, the position is likely the same under Federal Arbitration Act §7, Pub. L. No. 68-401 (GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION at 2598-2599 (3rd Ed, 2021)).

12. *See supra* note 9, s.4(2) & 4(3). *But see* Enka Insaat Ve Sanayi AS v. OOO Ins. CO. Chubb [2020] UKSC 38, ¶¶75 – 92 (U.K.). Assuming that s.44 is procedural rather than substantive (a point which has not been de-

Save in the case of urgency (s.44(3)), the Court will not make such an order unless a request is made with the permission of the Arbitral Tribunal or on agreement between the parties (s.44(4)). There is no scope in non-urgent cases for a party to unilaterally seek an order. This also differs from the scheme under 28 U.S.C. §1782, where the statutory language envisions that an application may be made by "*any interested person.*"[13]

The requirement that the parties either agree or the tribunal permits the application to the Court is of particular importance given the prospect of such applications and orders to generate satellite litigation and slow down and disrupt the progress of an arbitration.[14]

The powers under s.44 are exercisable both in relation to arbitrations seated in England and, by virtue of section 2(3) of the Act in relation to arbitrations seated outside of England.[15] However, where exercised with respect to a foreign arbitration, section 2(3) provides that "*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*

---

cided, but appears likely to be the case), choice of a foreign law (s.4(5)) will only exclude the powers under s.44 if the parties have chosen a foreign procedural law for an English-seated arbitration.

13. *See* In re MoneyOnMobile, Inc., 2019 WL 2515612, at *2 (N.D. Cal.) (holding that the claimant in the arbitration was an "interested person"). *See also* In re Application of Caratube Int'l Oil Co., 730 F.Supp.2d 101, 104 (D.D.C. 2010). *Contra*, RESTATEMENT (FIRST) OF INT'L COMMERCIAL AND INVESTOR-STATE ARBITRATION §3.5 cmt. D, Reporters' Note (AM. LAW INST. 2019) (noting that powers under §1782 should not be exercised "except when that request is supported by the tribunal in the arbitral proceeding").

14. The good sense of this limitation can be seen by the adoption (prior to the decision in Luxshare) of similar requirements by U.S. courts when exercising their powers under § 1782. *See* Interglobe Enters. Pvt Ltd v. Gangwal, Case No. 19-24257-MC-Gayles/Otazo-Reyes (S.D. Fla. 30 Apr. 2020) (denying a petition under §1782 where Tribunal considered it "neither helpful nor necessary"). However, other Courts refused relief in the absence of evidence that the arbitral tribunal would be receptive. In re Application of Babcock Borsig AG, 583 F.Supp.2d 233 (D. Mass. 2008).

15. This must be the case, as the plain words require such a reading. The implications of this are that the powers available in support of a foreign arbitration are more easily exercised than powers in support of foreign litigation. *See* Cockerill, *supra* note 5, 246-258.

so." Therefore, as a starting point, section 2(3) makes any orders under s.44 in support of foreign seated arbitrations, subject to the exercise of the Court's discretion.[16]

Finally, and for completeness, as it is not addressed further in this piece, s.43(1) gives the Court the powers to make a witness summons, requiring the named person to appear before the Tribunal to give evidence or produce documents. This power is limited by s.43(3), which requires that the witness be in the United Kingdom and that the proceedings are being conducted in England and Wales.[17] This means that the arbitral hearing to which the summons relates must occur in the jurisdiction, not that the arbitration must be seated in England.[18] Failure to comply with a witness summons risks a finding of contempt of court.[19]

III. The orders under 44(2) that may be made in relation to the taking of evidence

The scope of the orders under s.44(2) have been the subject of a number of first instance decisions and a recent Court of Appeal decision. However, the picture of the relief available is not always clear. Practically, what will normally be sought is either witness testimony or documents, and thus, this piece focuses on these two categories.

A. *Witness Testimony*

Following the decision of the Court of Appeal in *A v. C*,[20] it is now clear that where the witness is within the court's jurisdiction,[21] the English Court has the power to order that they

16. The existence of and exercise of discretion is also a feature of §1782 (Intel Corp. v. Advanced Micro Devices, Inc. 542 U.S. 241 at 247 (2004) ("We caution, however, that §1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals.").

17. This power under s.43 is a close comparator to § 7 FAA in terms of the powers it gives the court to compel attendance and production of evidence.

18. A v. C EWHC 258 (Comm), ¶¶29-30 (Eng. & Wales).

19. *See* Tajik Aluminium Plant v. Hydro Aluminium AS, [2006] 1 W.L.R. 767, 772 (Eng. & Wales).

20. A v. C [2020] EWCA Civ 409.

21. The position when the witness or documents are not in the jurisdiction is more complicated and is not addressed further here. But the rules on

give evidence for a foreign seated arbitration by way of deposition.[22] That this power existed with respect to third parties to a foreign arbitration was previously not clear. In *Commerce and Industry Insurance Co of Canada v. Certain Underwriters at Lloyd's of London* [2002] 1 WLR 1323 (Eng. & Wales) the High Court had considered that a power to make such an order existed but refused to exercise the discretion under s.2(3) to make an order under s.44(2)(a).[23]

However, following the decision in *Commerce*, the application of s.44(2)(a) to third-party evidence in a foreign arbitration was thrown into doubt for some time by the holdings in *Cruz City 1 Mauritius Holdings v. Unitech Ltd* [2014] EWHC 3704 (Comm) (Eng. & Wales) and *DTEK Trading SA v. Morozov* [2017] Bus LR 628 (Eng. & Wales).

Cruz City concerned the serving an application for a freezing injunction out of the jurisdiction against non-parties to the arbitration (which implicated both the rules on serving out the jurisdiction and s.44(2)(e)). The Court went beyond s.44(2)(e) and held that s.44 as a whole did not apply to non-parties.[24]

DTEK also involved an application under s.44(2)(b) and an application to serve out of the jurisdiction. In that case, Mrs. Justice Cockerill held that *Cruz City* was correct and s.44

---

service out of the jurisdiction allow for service out where an order under s.44 is sought (CPR r. 62.5(1)(b)). While not decided in A v. C, the clear reading of s.44 along with r. 62.5(1)(b) likely means that the extraterritorial application of s.44 is permissible. Because this power would apply to a witness outside the jurisdiction, this would be an even broader power than that held to exist under § 1782 in Sergeeva v. Tripleton Intern, Ltd., 834 F3d 1194 (11th Cir 2016).

22. This refusal was on the basis that a deposition is ordered under CPR r 34.8, and the differences between a UK and US deposition are significant, but what was sought in Commerce, *infra* note 26 was a US deposition. This position is the same position under the Evidence (Proceedings in Other Jurisdictions) Act 1975. *See* Refco Capital Markets v. Credit Suisse First Boston [2001] EWCA Civ 1733; [2002] CLC 301. *See also* commentary in SARA COCKERILL QC, THE LAW AND PRACTICE OF COMPELLED EVIDENCE IN CIVIL PROCEEDINGS (2nd Ed, 2011), Chapter 2.

23. Commerce and Industry Insurance Co of Canada v. Certain Underwriters at Lloyd's of London [2002] 1 WLR 1323, 1329B – 1330A.

24. [2014] EWHC 3704 (Comm), ¶46 – ¶51.

as a whole did not apply to non-parties.[25] In particular, the Judge held that s.44(1)(a) was concerned with letters of request in aid of arbitration.[26]

The decision in *A v. C* therefore marks an important turning point. By holding that s.44(2)(a) allows for orders for the taking of the evidence of a third-party in support of a foreign seated arbitration, using the court's deposition powers, the decision widened the scope of available relief.

While comparatively limited to the discovery previously available in support of international arbitrations in some circuits under 28 U.S.C. § 1782, the power to obtain witness testimony by way of a CPR r 34.8 deposition under s.44(2)(a) remains a valuable one for parties seeking oral evidence that they otherwise cannot obtain.

However, *A v. C* left open the question of whether *Cruz City* and *DTEK* were correctly decided in respect to the other orders available under s.44(2).[27]

B. *Documents*

The case law on s.44 treats requests for the production of documents as coming under s.44(2)(b) or (c). However, this is incorrect. There is no power to obtain documents under either s.44(2)(b) or (c); if that power exists at all, it exists under s.44(2)(a).

In *Assimina Maritime Ltd v. Pakistan National Shipping Corpn (The Tasman Spirit)* [2005] 1 All ER (Comm) 460 (Eng. & Wales), an order to provide documents under both s.44 and s.43 was successfully sought against a third-party British marine survey company in the context of an arbitration between a ship owner and charterer.[28] However, as surveyed above, the court in *DTEK* rejected any such power when considering a request under s.44(2)(b) for a document held by a third-party

---

25. [2017] Bus LR 628, 641H ("Section 44 is designed primarily to cover applications between the parties to an arbitration agreement. Applications against a third party would be the exception, not the rule.").

26. [2017] Bus LR 628, 639D.

27. *See* case cited *supra,* note 20 ¶¶35, 57.

28. The lack of reference to s.2(3), the use of s.43 without comment and the fact that the underlying matter was a shipping dispute suggests strongly that it was an English seated arbitration.

in Ukraine.[29] Rather, the Court considered that it would have the power under s.44 to issue a letter of request to the courts in Ukraine for the specific document.[30] In refusing to follow *The Tasman Spirit*, the Court in *DTEK* deprecated the decision on the basis that was *ex parte*[31] and, therefore, had not received full argument. That characterization is not entirely correct. The hearing in *The Tasman Spirit* occurred with permission of the Tribunal and was not contested by either the third-party or the other party to the arbitration who had notice of the hearing.[32]

While *DTEK* was not overruled by *A v. C*,[33] the decision in *DTEK* must be in some doubt. The reasoning of the Court of Appeal in *A v. C* is forceful in context of subsections (b) and (c), and the holding in *DTEK* is unlikely to survive challenge.

Nevertheless, both *DTEK* and *The Tasman Spirit* entirely miss a crucial point: subsections (b) and (c) do not provide a power to make orders for the production of documents. Instead, such power may be found in subsection (a).

As *The Tasman Spirit* observed, section 44(2)(b) is a corollary of the search order power in section 7 of the Civil Procedure Act 1997,[34] which allows for an order permitting the search of premises and seizure of evidence without prior warning. This is a heavy power of the court, exercised *ex parte*, without notice to the respondent, in private and often on an urgent basis. It is often sought before proceedings are commenced. A search order is obtained when there is a real

---

29. *See* [2017] Bus LR 628, 630G (describing the document in issue in the arbitration and the need for it to be preserved and produced for examination as "unsurprising"). Unlike The Tasman Spirit where the document was in England, any order under s.44(2)(b) in DTEK would have needed to be served on the third-party in Ukraine.

30. [2017] Bus LR 628, 642D-F. This was also the approach separately assumed in Silver Dry Bulk Co Ltd v. Homer Hulbert Maritime Co Ltd [2017] 1 All ER (Comm) 791 (Eng. & Wales), where the parties argued the case on the basis that the powers under s.44(2) were for the issuing of letters of request.

31. [2017] Bus LR 628, 642C.

32. [2005] 1 All ER (Comm) 460, 464.

33. Cockerill, *supra* note 5, and [2020] 1 WLR 3504, 3516.

34. Search orders are also referred to as "search and seizure" orders and "*Anton Piller* orders".

possibility of evidence being destroyed.[35] It is not a tool for disclosure.

The Tasman Spirit also noted that section 44(2)(c) is the corollary of section 34(3) of the Supreme Court Act 1981, which permits the inspection or photographing and taking of samples in litigation. This appears to be correct, as the provisions are almost identical in their language. However, s.34(3) of the Supreme Court Act 1981 does not apply to documents,[36] which is apparent when one considers the clear wording relating to documents in s.34(2) of the same Act. Given this, it is unlikely that s.44(2)(c), which contains no wording that would allow a different interpretation, covers documents at all. This is an obvious but surprising lacuna which the courts have not yet considered, and one which, unless filled radically, reduces the usefulness of s.44.[37]

However, this lacuna can be filled. Where provision of specific documents is required, relief may be available under s.44(2)(a). While the language of "*the taking of the evidence of witnesses*" does not obviously relate to the provision of documents, the power to order a deposition under s.44(2)(a) clearly does, as it includes the power to order *"the production of any document which the court considers is necessary for the purposes of the examination."*[38]

While the point has not yet been argued, it is likely that any court not able to order such relief under s.44(2)(c) would order it under s.44(2)(a). This has the benefit for any applicant that such power is affirmatively available against third parties following the decision in *A v. C.*

---

35. A search order can be ordered against third parties to proceedings. *See* Koldyreva v. Motylev [2020] EWHC 3084 (Ch) (Eng. & Wales). Whether subsection (b) is entirely coincident with the search order power remains to be seen.

36. *See* MATTHEWS AND MALEK, DISCLOSURE at 4.57 (5th ed. incorporating third supplement, 2021), for a commentary on s.34(3) (*citing* Huddleston v. Control Risks Information Services Ltd [1987] 1 W.L.R. 701 (Eng. & Wales)).

37. Nevertheless, the powers in s.44(2)(b) and (c) remain available for applicants and following A v. C will likely be considered to apply to third parties.

38. CPR r 34.8(4).

IV. Conclusion

Following the decision of the Court of Appeal in *A v. C*, the scope of relief available to parties to a foreign seated arbitration against third parties in England and Wales is clearly greater than it was previously. While the law with respect to orders relating to evidence in s.44(2)(b) and (c) was not settled by *A v. C*, it appears very likely that those subsections also apply to third parties. However, they likely do not allow orders to produce documents. If that power exists, it must exist under s.44(2)(a). Therefore, applications by parties to foreign seated arbitrations seeking documents from third parties should be made under s.44(2)(a) as well as s.44(2)(c).

While the scope of relief under s.44 is much more circumscribed than what was available under § 1782 in the U.S., s.44 nevertheless represents a valuable tool for parties to commercial or investor-state arbitrations seeking evidence or testimony from third parties in England and Wales. This is even more so following the decision in *Luxshare*.