BRYAN CAVE
A Broader Perspective
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Compelling Witnesses and Document Production in International Arbitration Proceedings using the English Courts

Arbitration is based on consent. An arbitral tribunal derives its powers from an agreement between the parties. Whilst this grants procedural flexibility, it can pose difficulties if witnesses need to be compelled to attend hearings, or if crucial documents are in the hands of a non-party. Obvious problems exist if a key employee no longer works for a party and cannot be directed to assist, or if a party employed an independent contractor who is unwilling to become involved in the arbitration.

The Arbitration Act 1996 (the "**Act**") provides some ways to redress this balance. Two sections of the Act allow the English Court to compel witnesses to give evidence and/or to produce documents for hearings. This power is not just confined to arbitrations with their seat in England. Section 2(3) of the Act provides that these powers can apply to an arbitration with its seat outside England & Wales or Northern Ireland subject to the caveat 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 so.*"

Given London's position as a global financial and legal hub as well as a home for the world's elite, it is highly likely that witnesses and documents which may be required for arbitral proceedings may be present in England. These powers are therefore not just relevant to those conducting arbitrations in London. They should be considered by practitioners worldwide.

Witnesses and Documents Within the UK/Arbitration in England & Wales

Witnesses

Where a witness is in the United Kingdom and arbitral proceedings are being conducted in England & Wales, section 43(1) of the Arbitration Act 1996 provides that:

> *"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."*

These powers may only be exercised by permission of the tribunal or after agreement between the parties.

What this means is that a party to an arbitration can obtain a witness summons (formerly known as a subpoena) from the English Court to:

- require a witness in England to attend to give oral evidence at an arbitral hearing; and/or
- require such a witness to produce documents for an arbitral hearing.

It is not a requirement that the seat of the arbitration is in England, only that the arbitration is being conducted in England. A sensible practice would therefore be to convene an arbitration hearing in England in order to receive evidence and documents from the witness in question, if this is permitted by the relevant arbitral rules.

The Act refers to the Court's powers in litigation. These powers are limited to securing evidence or documents for use at trial. They do not give the Court power to allow wide-ranging depositions and document production for pre-trial discovery. These powers are therefore narrower than the powers available to the US Federal Courts under 28 U.S. Code § 1782. Arbitral proceedings may not allow for neat procedural labelling of matters as relevant to discovery or a final hearing but the basic distinction has to be borne in mind in establishing the limits of the assistance that the English Court can provide.

The case of England and Wales Cricket Board Ltd v Kaneria [2013] EWHC 1074 (Comm) is significant in demonstrating the scope of the assistance the English Courts can provide to proceedings that fall within the meaning of "*arbitration*". It was held in this case that appeal proceedings held under the disciplinary regulations of the England and Wales Cricket Board bore all the hallmarks of arbitration and were therefore arbitral proceedings for the purposes of the Act. The High Court therefore agreed to issue a witness summons to require a crucial witness to attend the disciplinary hearing.

Documents

A witness summons can require a witness to produce relevant documents instead of, or as well as, giving live evidence. If a witness summons to produce documents is requested, that summons should set out in as much detail as possible:

- The specific documents which a witness has in their possession; and
- The issues to which the documents relate.

The Court will not be satisfied with identification of certain classes of documents. Documents must be identified individually.

This is a much narrower power than the third party disclosure available in High Court litigation, or depositions under 28 U.S. Code § 1782.

In Tajik Aluminium Plant v Hydro Aluminium AS [2005] EWCA Civ 1218, the Court of Appeal confirmed that the powers of the Court to issue a witness summons in support of an arbitration did not extend to obtaining general disclosure of documents from a non-party. It held that "*ideally each document should be individually identified*" although it might not be possible to do so in every case. The relevant test was whether documents had been identified clearly enough "*to leave no real doubt in the mind of the person to whom the summons is addressed about what he is required to do*." The Court of Appeal gave the following example:

- A request for "monthly statements for the year 1984 relating to your current account with a named bank" would be sufficiently clear and obvious.
- A request for "all your bank statements for 1984" would probably not be.

In Peters v Andrew [2009] EWHC 1511 it was held that there was no reason to set aside a witness summons granted to ensure the production of telephone bills by non-parties to arbitration proceedings, where an arbitral tribunal had found that it needed to see the documents to reach its decision and where the intrusion was very limited and there was no other obvious way of obtaining he information. It is worth assuming that the Court may take a narrower view of its powers than it would when issuing a witness summons in litigation.

In The Lorenzo Halcoussi [1998] 1 Lloyd's Rep 180, Mr Justice Steyn (as he then was) observed that: *"Since the purposes of the arbitral process are expedition, cost effectiveness and finality, it may fairly be said that in considering a [witness summons in aid of arbitration] the Court will be vigilant to ensure that it was issued for the legitimate purpose only, and that it was not cast too widely."*

A witness summons cannot be served out of the jurisdiction – the witness must be in England when served with the summons. However, the English Court may refuse to issue a witness summons in support of an arbitration being conducted under foreign procedural law if the foreign seat would make a witness summons "*inappropriate*". If there are differences between English arbitral law and the relevant law of the foreign seat, the English Court will exercise its power sparingly. Any such application to the English Court must therefore explain why it is appropriate for the English Court to assist a foreign arbitral tribunal.

Witness and Documents Outside the UK/Arbitration Outside the UK

Where a witness is overseas, the English Court can issue a Letter of Request to a foreign court to ask the foreign court to examine a witness in that court's jurisdiction. The English Court will also enforce Letters of Request from foreign courts and can require a witness to be examined before trial, and also require a witness to provide documents for a trial. This procedure cannot be used to obtain pre-trial discovery of testimony and documents of the type familiar to US lawyers. The relevant law uses the term "*deposition*" but that should not confuse US lawyers – under English law such a deposition is only aimed at securing evidence for trial.

These powers of the Court are made available to support arbitral proceedings thanks to section 44 of the Act, which states that:

"*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*".

Section 44(2)(a) makes it clear that such "*matters*" include "*the taking of the evidence of witnesses*". This provision of the Act gives the Court powers to conduct depositions and to issue and to enforce letters of request in support of arbitrations, subject always to the caveat that action by the English Court should not be "*inappropriate*".

Commerce and Industry Insurance Co of Canada v Certain Underwriters of Lloyds [2002] 1 WLR 1323 - Mr Justice Moore-Bick held that a foreign arbitral tribunal cannot of itself issue a Letter of Request to the English Court. The proper approach was for a party to a foreign arbitration to apply to their courts for a Letter of Request to be sent to the English Courts. The English Court would then consider whether to enforce that Letter of Request.

Econet Wireless Ltd v Vee Networks Ltd & Ors [2006] EWHC 1568 (Comm) - Mr Justice Morrison described the powers granted by section 44 of the Act as a "*long arm reach*" and went on to say that when the Court is faced with such an application "*the first question [should be]: 'why are you asking for an order from this court?'*". An applicant needs to be able to answer that question immediately. The Judge suggested good reasons might be that the arbitration is to be conducted under English procedural law, or that an order was sought in respect of assets in this jurisdiction. It follows that a good reason to ask the English Court for assistance in taking evidence might be that crucial witnesses and documents are in England.

Guidance suggests that the English Courts will be wary of making such an order if foreign procedural law is very different to English law.

These powers are actually rarely used and (unlike the powers in the Act to order injunctive relief) are not widely appreciated. However, they are useful tools for parties to an international arbitration looking to obtain evidence from persons in England. As such they ought to be studied by practitioners worldwide.

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If you have any questions or would like additional information on this topic, please do not hesitate to contact either Robert Dougans at +44 (0)20 3207 1214 or robert.dougans@bryancave.com or Maria Gritsenko at +44 (0)20 3207 1227 or maria.gritsenko@bryancave.com or Nabeel Osman at +44 (0)20 3207 1236 or nabeel.osman@bryancave.com. You can also contact any member of our Commercial Litigation Client Service Group to discuss further.