

SUBPOENAS ISSUED BY AUSTRALIAN COURT IN SUPPORT OF ARBITRAL PROCEEDINGS

13 July 2018 | Australia

Legal Briefings - By **Leon Chung, Mitch Dearness and Phoebe Winch**

Businesses who participate in international arbitration should be aware of the mechanisms available to assist them with the arbitral process, including where assistance can be obtained from the courts in support of that arbitration. Such assistance can include not only subpoenas for witnesses to attend to give evidence but also issuing subpoenas for the production of documents, compelling individuals to answer questions during examination and compelling parties to comply with document production orders made by the tribunal. Courts can also provide assistance with, amongst other things, the appointment and removal of arbitrators, setting aside arbitral awards (for example, on the basis that the tribunal lacks jurisdiction) and ordering interim measures in relation to an arbitration (for example, freezing orders).

In a recent judgment handed down on 15 June 2018, Croft J of the Victorian Supreme Court granted an application made under s 23 of the *International Arbitration Act 1974* (Cth) (**Act**) for the issue of subpoenas for the cross-examination of two persons not party to the arbitration proceedings.¹ The decision is consistent with Australian courts generally playing a supportive role to international arbitration proceedings.

The subpoenas were issued in the context of an international arbitration seated in Victoria between Esposito Holdings Pty Ltd (**Esposito**) as claimant and UDP Holdings Pty Ltd (**UDP**), William Yan Sui Hui, and 5 Star Foods Pty Ltd (**5 Star**) as respondents, and Antonio Patrick Esposito as the second respondent by counterclaim.

The application was made by UDP in advance of the final hearing of the arbitration, which commenced on 6 July 2018 before the sole arbitrator. The hearing follows applications to set aside a partial award and arbitrator disqualification proceedings which were heard in the Federal Court and which we wrote about [here](#).

BACKGROUND

The arbitral proceedings arose in the context of ongoing disputes in relation to the sale of a business. In 2013, Esposito agreed to sell 5 Star to UDP (a special purpose vehicle set up by Mr Hui) pursuant to a share sale contract. Esposito obtained a partial award for the outstanding sums, subject to various set-offs and counterclaims made by the other parties.

The primary factual issue for determination at the final arbitral hearing was whether 5 Star had been overcharging one of its largest customers.²

The arbitrator gave permission to UDP to apply to the Court for leave to issue two subpoenas – one to a former employee of a wholly owned subsidiary of 5 Star and another to an employee of the customer who is said to have been overcharged. Both individuals had previously given evidence about the alleged overcharging at a compulsory examination before the Supreme Court. Their attendance at the arbitration was sought to facilitate their cross-examination in respect of that testimony.³

DECISION

The application was determined on the papers. Esposito did not file any submissions in response to UDP's application.⁴

Croft J noted that it had jurisdiction to issue the subpoenas sought.⁵ As the arbitration was to be conducted in Victoria, his Honour expressly stated that it was not necessary to consider the question of the Court's jurisdiction in respect of arbitral proceedings being conducted overseas.⁶

Croft J then identified the two issues to be established by UDP under s 23 of the Act, namely:

- a. the application is made with the permission of the arbitral tribunal; and
- b. the issue of each subpoena is reasonable in all the circumstances.

PERMISSION OF THE ARBITRAL TRIBUNAL

In respect of the first element, the arbitral tribunal in this instance gave unconditional permission for the present application to be made on the basis that no party to the arbitration objected to that course. Croft J noted that this position was in contrast to the position taken by a differently constituted tribunal in these proceedings in *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd*,⁷ which conducted an “informed evaluation” of the prospects of the Court issuing the subpoenas sought before granting permission.

Croft J held that it was not for this Court to comment on the various approaches adopted by arbitral tribunals to the grant of permission in accordance with s 23 of the Act. Rather, in his Honour’s view, it was sufficient to observe that the Act requires parties to obtain permission from the tribunal before applying for the issue of subpoenas, and that such permission has been obtained.⁸

REASONABLENESS OF ISSUE OF SUBPOENAS

As to the question of reasonableness, Croft J noted as a starting point that the Court ought not to act as a mere “rubber stamp” upon the grant of permission by the arbitral tribunal for a party to apply for the issue of a subpoena.⁹ The Court’s inquiry into the reasonableness of the use of coercive powers against non-parties is necessary to guard against the imposition of an unwarranted burden on strangers to the arbitration. This does not, however, detract from the supportive role Australian courts generally provide to the arbitral process.

The Court relied on the following factors in finding that it was reasonable in all the circumstances to issue the subpoenas:

- a. both individuals were publicly examined in relation to 5 Star’s affairs and other companies previously before the Supreme Court;
- b. as part of their reply lay evidence, UDP and 5 Star had filed with the arbitral tribunal statements of intended evidence from the individuals in which each witness will affirm and adopt the evidence given in the examination. Whilst Croft J acknowledged that the transcripts of the prior public examination could likely have been tendered in the arbitration without their attendance, they were not cross-examined at the examination and, having regard to the clear relevance of their evidence to the issues in dispute, his Honour accepted UDP’s submission that their cross-examination would likely be of sufficient utility to render the issuance of the subpoenas *prima facie* reasonable; and
- c. UDP has undertaken that the individuals will be provided with conduct money and will be reimbursed for any reasonable expenses incurred by them in connection with their attendance at the arbitration.¹⁰

For the aforementioned reasons, the Court was satisfied that it was reasonable in all the circumstances to issue the subpoenas sought and, accordingly, held that UDP had leave to issue the subpoenas as sought.

IMPLICATIONS FOR YOUR BUSINESS

Croft J's decision is consistent with the supportive role that courts are to play towards arbitral proceedings. However, it is clear that support should not be regarded as synonymous with mere acquiescence. In the context of s 23 of the Act, this means that while the Court will not act as a "mere rubber stamp" upon the grant of permission by the tribunal to a party seeking leave to issue a subpoena, its role is not to second guess the tribunal's decision. This is so even if the approach adopted by the tribunal in deciding to grant permission differs from the approach adopted by a prior, differently constituted tribunal in the same proceedings.

The question in relation to the assistance Australian courts will provide to arbitral proceedings seated overseas is, of course, a separate one. It remains to be seen whether the decision of the Federal Court in *Samsung C&T Corporation, Re Samsung C&T Corporation*¹¹ (that s 23 did not allow for an Australian court to grant leave to issue a subpoena in relation to an arbitration seated outside Australia) will be followed by other Australian courts.

ENDNOTES

1. *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* [2018] VSC 316 (**Judgment**).
2. Judgment at [5].
3. Judgment at [6].
4. Judgment at [4].
5. Judgment at [8].
6. Citing *Samsung C&T Corporation, Re Samsung C&T Corporation* [2017] FCA 1169.
7. [2015] VSC 183.
8. Judgment at [10].
9. Citing *Aurecon Australasia Pty Ltd v BMD Constructions Pty Ltd* (2017) 52 VR 267.
10. Judgment at [14]-[16].
11. [2017] FCA 1169.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



LEON CHUNG
PARTNER, SYDNEY

+61 2 9225 5716
Leon.Chung@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close