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ENSURE SMOOTH SAILING: SEEKING A SUBPOENA IN SUPPORT OF ARBITRATION

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Legal Briefings – By **Leon Chung, Guillermo Garcia-Perrote and Samara Cassar**

A recent decision of the Federal Court of Australia sheds light on how to effectively seek a subpoena from a court in support of arbitration proceedings.

TAKEAWAYS

The Court is not overly prescriptive in setting out the criteria for the grant of a subpoena, but this is not to confuse the Court as giving the arbitral tribunal carte-blanche, simply providing a rubber-stamp to subpoena requests.[1]

Parties should circumnavigate this uncertainty by being purposive in the documents sought in the subpoena. This is particularly important in arbitration proceedings where assistance from the court is needed, in order to avoid delay and ensure the effectiveness of the subpoena being sought.

CONTEXT

This decision of the Federal Court of Australia in *Mountain View Productions LLC v Keri Lee Charters Pty ltd* [2022] FCA 161 resolved a piece of litigation brought in relation to an arbitration seated in Queensland, in which a Brisbane company, Keri Lee Charters Pty Ltd (the claimant in the arbitration), alleged that its 55-metre luxury motor yacht sustained $12.85 million worth of damage during charter.

The respondent in the arbitration, a Californian company, Mountain View Productions LLC, made an application to the Federal Court for a non-party to the dispute (another Queensland business) to be issued a subpoena to produce documents under s 23(3) of the *International Arbitration Act 1974* (Cth) (IIA). Damage to the vessel was apparent by contrasting the reports prepared before and after the hire of the vessel. On the respondent's submission, the reports were deficient in that they omitted existing damage to the vessel.

SEEKING A SUBPOENA IN SUPPORT OF ARBITRATION

A party who wishes to subpoena a person to come before an arbitral tribunal and/or produce documents listed in a subpoena must first receive consent from the tribunal.[2] As set out in the decision, in reaching its determination, the arbitral tribunal will consider the effect the subpoena may have on the proceedings generally (ie whether it will cause delay, disruption, or indeed assist the arbitrators); whether the subpoena is being sought for a genuine purpose; and crucially, that the requesting party is not using the subpoena as a tactic to draw out proceedings.[3]

The Federal Court is alive to the fact that arbitrators are best placed to assess the relevance of the documents sought in the subpoena –they are most familiar with the issues in dispute and how they might be proved. The Court is therefore reticent to challenge arbitrators' conclusions on whether the document and/or person sought in the subpoena are relevant, save in a clear case.[4]

DECISION

The issue here was not strictly of relevance, but of reasonableness. Central to the concern of the Court was the fact that the documents sought were not delimited by a specific time-period; the subpoena merely noted that 'all documents' exchanged between the companies with respect to the repair and charter of the vessel were to be produced. In practice, this meant (assuming the documents existed) producing documents that were created more than a decade prior to the events that were subject to the dispute.

The Court held that this aspect of the subpoena was unreasonable, since producing such a wide range of documents would have no legitimate forensic purpose. In particular, the Court observed that if the subpoena requested documents which spanned a more limited time frame, this would be 'amply sufficient' and reasonable. Therefore, the court ordered the subpoenas but imposed a limitation of documents brought into existence within the period commencing two years prior to the charter in issue.

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1. *Mountain View Productions LLC v Kerri Lee Charters Pty Ltd* [2022] FCA 161 [13] citing *Australian Gas Light Co v ACCC* [2003] FCA 1101 [8] (French J).

2. *International Arbitration Act 1974* (Cth) s 23(2).

3. *Mountain View Productions LLC v Kerri Lee Charters Pty Ltd* [2022] FCA 161 [10].

4. *Ibid. at* [12-13].

KEY CONTACTS

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

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