Helping Hands: Australian Courts and Facilitating the Taking of Evidence in Foreign-Seated Arbitrations

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Abstract

With a recent English court decision granting parties to a foreign-seated arbitration an order to compel the taking of evidence of a witness residing in the UK, England has further showed how it is a jurisdiction which supports international arbitration. In order for Australia to do the same, its legislative regime which governs international arbitration would benefit from an amendment to allow Australian courts to facilitate foreign-seated arbitrations to take evidence from parties residing within Australia.

Introduction

A state's municipal court system plays an integral role in the implementation of international arbitrations as judiciaries supervise arbitral proceedings and can intervene in specific situations only. This state support of international arbitration was ratified in the New York Convention ('NYC'),[1] which has the overriding purpose of ensuring that international arbitration works effectively across multiple jurisdictions and results in awards which can be enforced globally.

Municipal court assistance in taking evidence for foreign-seated arbitrations is one way in which international arbitration is supported to truly be a dispute resolution procedure which seamlessly works across multiple jurisdictions. In a recent decision from the English Court of Appeal (civil division), such support was seen to have been granted to parties to a foreign-seated arbitration.

A & B v C & ORS [2020] EWCA CIV 409[2]

The central issue in this proceeding concerned an application to the High Court in England, made by parties to an arbitration seated in New York, for an order compelling a person who resided in the UK to give evidence, as this person was refusing to travel to New York to give evidence in the arbitral

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[1] *Convention on the Recognition and Enforcement of Foreign Arbitral* Awards signed 10 June 1958, 330 UNTS 4739 (entered into force 7 June 1959) ('New York Convention').

[2] *A & B v C & Ors* [2020] EWCA Civ 409.

proceeding. The factual background to *A & B* is summarised at paras [3] through [5] of the English Court of Appeal's judgment:

> The dispute being arbitrated in New York arises in the context of two settlement agreements between the appellants and the first and second respondents respectively in relation to the exploration and development of an oil field off the coast of Central Asia. Under those agreements the appellants were entitled to a percentage of the net sale proceeds if the first and second respondents sold their respective interests in the field, which they did in 2002. A central issue in the arbitration is the nature of certain payments made by the first and second respondents to the Central Asian government described as "signature bonuses" and whether those amounts are deductible as costs in calculating the sums due to the appellants.
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> The appellants contend that the sums paid were bribes and so not properly deductible. They rely upon the fact that G, who negotiated the payment on behalf of the Central Asian government, was indicted almost 20 years ago by a US court for violations of the US Foreign Corrupt Practices Act. The third respondent, who is resident in England, was the lead negotiator for the respondents who negotiated directly with G.
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> The third respondent was not prepared to go to New York to give evidence and, on 13 November 2019, the tribunal granted the appellants permission to make an application to the English Court to compel his testimony. The appellants seek an Order permitting them to take his evidence by deposition under CPR 34.8.

The basis for the application is found in s 44 of the *English Arbitration Act 1996* ('*English Act*'), which permits parties to a foreign-seated arbitration to seek an order from the English Court to take evidence by deposition under English *Civil Procedure Rules 1998* r 34.8. *Civil Procedure Rules* r 34.8 allows a party to apply for an order for a person to be examined before a hearing takes place (a deposition). Section 44(1) of the *English Act* provides that the court has the same powers to make orders for the purposes of and in relation to arbitral proceedings as it has in legal proceedings. Section 44(2) of the *English Act* then goes on to list various matters in which the court can exercise such powers, including the taking of the evidence of witnesses.

In dealing the application, the English court found that s 44(2)(a) of the *English Act* grants it the power to make an order for the taking of witness evidence in support of an arbitration seated outside of the United Kingdom by way of deposition from a witness who is not a party to that arbitration.

The English court noted that s 44(1) when read together with the definition of legal proceedings in s 82(1) of the *English Act*, means civil proceedings in the High Court of either England or Wales.

Accordingly, this grants an English court the same powers to make orders in relation to arbitration proceedings as it has in relation to domestic civil proceedings. When read together with s 2(3) of the *English Act*, the power conferred by s 44 is exercisable even if the seat of the arbitration is outside of the United Kingdom. Thus, the English courts have powers to make such orders in support of foreign arbitrations. Because the English court has the power to order evidence to be given by deposition in domestic civil proceedings under *Civil Procedure Rules* r 34.8, s 44(2)(a) thus allows the court to make the same order in relation to foreign arbitration proceedings.

The English court also found that the wording of s 44(2)(a) is wide enough to cover all witnesses, regardless of whether or not they are parties to the arbitral proceeding. The English court's reasoning was that it was improper to limit the definition of witnesses to mean exclusively to parties to the arbitration, as witnesses are often not parties to the dispute. The English court noted that s 44(2)(a) was principally directed against witnesses who are not under the control of parties to an arbitration.

However, the ability for the English courts to grant an order compelling evidence for a foreign seated arbitration is not completed unrestricted. The English court referred to the 'gateways' described in ss 44(1) and 44(4) which set out when the court may exercise its power. One of these restrictions is whether the English court has the same power to grant orders in domestic civil proceedings, which as described above, the court does possess under *Civil Procedure Rules* r 34.8. The other restriction is whether the application to the English court has been made with the tribunal's leave. Despite these gateways, the English court retains discretion as to whether or not to grant the order sought, as s 2(3) allows courts to decline to issue an order in aid of a foreign arbitration, when it considers the foreign seat makes it inappropriate to do so.

Such a judgment is a warm welcome to parties participating in international arbitrations, knowing that the UK's arbitration friendly legislative regime allows for evidence to be compelled to be given in support of arbitral proceedings seated elsewhere.

Australian Position

Australia's position on supporting foreign-seated arbitration in taking evidence is much different to that of England's. Australia's relevant legislation regarding international arbitration is the *International Arbitration Act 1974* (Cth) ('*IAA*'). On the topic of courts assisting arbitral parties in securing evidence for arbitral proceedings, the *IAA* provides (emphasis added):

22A Interpretation

In this Division:

court means:

(a) in relation to arbitral proceedings that are, or are to be, conducted in a State—the Supreme Court of that State; and

(b) in relation to arbitral proceedings that are, or are to be, conducted in a Territory:

(i) the Supreme Court of the Territory; or

(ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory; and

(c) in any case—the Federal Court of Australia.

23 Parties may obtain subpoenas

(1) A party to arbitral proceedings commenced in reliance on an arbitration agreement may apply to a court to issue a subpoena under subsection (3).

(2) However, this may only be done with the permission of the arbitral tribunal conducting the arbitral proceedings.

(3) The court may, for the purposes of the arbitral proceedings, issue a subpoena requiring a person to do either or both of the following:

(a) to attend for examination before the arbitral tribunal;

(b) to produce to the arbitral tribunal the documents specified in the subpoena.

(4) A person must not be compelled under a subpoena issued under subsection (3) to answer any question or produce any document which that person could not be compelled to answer or produce in a proceeding before that court.

(5) The court must not issue a subpoena under subsection (3) to a person who is not a party to the arbitral proceedings unless the court is satisfied that it is reasonable in all the circumstances to issue it to the person.

(6) Nothing in this section limits Article 27 of the Model Law.

The above provisions are found in div 3 of the *IAA* and work in addition to the provisions of the Model Law adopted in pt 5 sch of the *IAA*.

The Australian Federal Court in *Samsung C&T Corporation*,[3] commented on the application of the above provisions in circumstances similar to the UK's *A & B* proceeding, whereby Samsung sought an application from the Federal Court to issue subpoenas for the production of documents in relation to arbitral proceeding seated in Singapore. The application is summarised at para [1] of the Federal Court's judgment:

[3] *Samsung C&T Corporation* [2017] FCA 1169 *('Samsung').*

> In this application, filed on 5 September 2017, the Applicant, Samsung C&T Corporation (with Republic of Korea Registration Number 110111-0015762) (Samsung), seeks leave to issue subpoenas for production of certain documents in relation to arbitral proceedings between it and Duro Felguera Australia Pty Ltd (Duro) in Singapore International Arbitration Centre (SIAC) Case No ARB065/16/JJ (Arbitration).

The Federal Court dealt with the application by firstly considering whether or not it has jurisdiction to make the orders sought by Samsung. In ruling on the interpretation of s 22A, the Federal Court found that it did not have jurisdiction to issue the subpoenas sought by Samsung. The reasoning for its decision was based on basic principles of statutory interpretation and held that an order of the type described under s 23 can only apply to parties to an international arbitration seated in Australia due to the definition of 'court' under ss 22A(3) div 3 of the *IAA*.[4] The Federal Court's findings on the wording of s 22A are as follows:

> I am satisfied that the context and purpose of s 22A and the IAA more generally supports a construction that it applies to arbitral proceedings seated in a State or Territory of Australia. […] s 22A(c) does not proceed on the footing that there is a further category of geographical locations for arbitrations beyond those held in a State or Territory. Allowing for a third type of arbitral proceedings to be included, in the absence of clear words to that effect, would be inconsistent with the purpose of the IAA and indeed the purpose of the amendments that introduced both ss 22A and 23. The options and choices afforded under such provisions of pt III of the Act are therefore limited to parties who have commenced their arbitral proceedings in Australia.

Because the Federal Court had found it did not have jurisdiction to make the orders sought by Samsung, it did not address the remaining issue of whether or not in the current circumstances it would be reasonable to make the orders sought. The Federal Court then concluded its judgment by recommending that parties utilise the Hague Convention on Evidence to obtain the types of orders it was seeking from the Federal Court regarding s 23 of the *IAA*.[5]

[4] Ibid [48].

[5] *Samsung* (above n 4)[51].

The implications of the Federal Court's decision in *Samsung* received criticism at the time it was released,[6] and in light of the English court's arbitration friendly decision seen in *A&B*, those critiques are worth revisiting.

The first critique regards the use of the Hague Convention on Evidence as an alternative means to obtain the evidence sought. While possible, only if the relevant states in question are all parties to the Hague Convention on Evidence, this alternative is inefficient for a number of reasons. Firstly, this process is more cumbersome and time consuming than parties seeking assistance from the courts directly. When ascertaining documents is time critical (such as in support of Mareva injunctions for example), parties do not have the luxury of time and the delay to obtain critical documents can have detrimental effects for parties. As identified earlier in this article, the aspect of urgency was also noted by the English court in *A&B* as being a factor in it exercising its discretion to order the taking of evidence.

Secondly, it does not appear practical for parties to an arbitration to be forced to seek recourse through another convention, when their agreement to arbitrate their dispute is already governed by the NYC. The purpose and objective of the NYC, and by reference international arbitration, is for seamless dispute resolution which spans across different jurisdictions. This objective and purpose is disrupted by the implications of *Samsung* and the wording of ss 22A and 23 of the *IAA* by failing Australian courts to provide appropriate assistance to parties in foreign-seated arbitrations.

Thirdly, s 23(6) explicitly states that '[n]othing in this section limits Article 27 of the Model Law'. Article 27 of the Model Law[7] provides:

> The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.
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> The court may execute the request within its competence and according to its rules on taking evidence.

Thus, the Federal Court's interpretation of s 22A appears at odds with what s 23(6) states in that the definition of ‘court’ does indeed limit the application of art 27 of the Model Law. While strictly speaking the Federal Court's interpretation was premised on s 22A and s 23(6) states that nothing in

[6] See for example: Georgia Quick et. al., 'Not so fast: The Federal Court does not have jurisdiction to issue subpoenas for foreign-seated arbitrations' (23 October 2017) https://www.ashurst.com/en/news-and-insights/legal-updates/the-federal-court-does-not-have-jurisdiction-to-issue-subpoenas-for-foreign-seated-arbitrations/, accessed 10 June 2020.

[7] United Nations Commission on International Trade Law *UNCITRAL Model Law on International Commercial Arbitration* 1985 (amended in 2006), which is annexed to the *IAA* in sch 2 and is adopted in the *IAA*.

'this section', being s 23, limits art 27, it is nonetheless an inconvenience to the smooth application of international arbitration.

After having its application refused in the Federal Court, Samsung then repeated its application in the Supreme Court of Western Australia again seeking subpoenas from the court. Chief Justice Martin in hearing the application granted Samsung's application and gave the subpoenas sought. Accordingly, the Supreme Court of Western Australia adopted a more pro-arbitration approach to the Federal Court, giving the *IAA* some credibility as to its application in such circumstances. However, these contrasting decisions have created bifurcated authorities on the interpretation of the provisions of the *IAA*. Regretfully, there is no published reasons of Martin CJ's decision, and so the Federal Court's decision is the only decision publicly available on this point, which risks deterring future parties from seeking similar relief under the provisions of the *IAA*.[8]

Accordingly, the implications of the *Samsung* decisions appear unsavoury to the international arbitration community and poses a somewhat hidden risk for parties with arbitrations seated outside of Australia. While the Federal Court's judgment was based on the interpretation of ss 22A and 23 of the *IAA*, that interpretation contrasts the ethos of the NYC and objectives of international arbitration. This calls the question to be asked, do ss 22A and 23 of the *IAA* require amendment to that Australian courts are able to consistently facilitate foreign-seated arbitrations in the same way as English courts?

Legislative Reform

Recently, the Chartered Institute of Arbitrators (CIArb) published a set of guiding principles or key characteristics that make a seat an appropriate and effective forum in which to conduct international arbitration,[9] the London Rules.[10] One of these characteristics which is of critical importance is obviously the *lex arbitri* (law of the seat) and its legislative regime which governs all aspects of the arbitral proceeding.

[8] The author would like to thank the editors of Resolution Institute and Mr Simon Bellas, partner at Jones Day, for this information.

[9] As described by Professor Doug Jones AO in a recent article: 'Arbitration in Australia – Rising to the Challenge' (March/April 2020) 191 *Australian Construction Law Newsletter* 6, 7.

[10] The London Centenary Principle Drafting Team, 'The Chartered Institute of Arbitrators London Centenary Conference' (July 2015) 81(4) *CIArb Journal* 404 ('London Principles').

In commenting on Australia's legislative framework on international arbitration, one of Australia's leading scholars and practitioners, Professor Doug Jones AO, holds Australia's *lex arbitri* in high regard:[11]

> the legislative framework within which both domestic and international arbitration occurs in Australia is as good if not better than that available in any other jurisdiction in the world, serving to enhance Australia's attractiveness as a seat for arbitration.

Yet while Australia's legislative regime makes it an attractive option as a seat for international arbitrations, its shortcoming lies in facilitating the international arbitration community where it is not the seat of the relevant arbitral proceeding. This point is exemplified in the application of ss 22A and 23 of the *IAA* in *Samsung*. Perhaps the intended purpose behind not allowing Australian courts to facilitate foreign-seated arbitrations in taking evidence is to encourage parties to choose Australia as the seat of the arbitration. Regardless of the rationale behind the wording of ss 22A and 23 of the *IAA*, the cross-jurisdictional appeal of international arbitration would increase as more countries include provisions within their legislative regimes which allow appropriate court supervision of foreign-seated arbitral proceedings.

State support of arbitration is recognised in art 2 of the NYC:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

While it may be too bold a statement to say that Australia is not adequately meeting its obligations under the NYC in failing to allow its courts to assist foreign-seated arbitral proceedings in the taking of evidence, Australia's courts' inability to do so does not further the aims and objectives of the NYC.

To address this issue, a simple amendment to the *IAA* would be required. As seen in the Federal Court's decision in *Samsung*, it is difficult to reach a conclusion that Australian courts do have jurisdiction to issue subpoenas in support of foreign seated-arbitrations due to the wording of the relevant provisions in the *IAA*. Firstly, the specific definition of court as meaning 'in relation to arbitral proceedings that are, or are to be, conducted in a State—the Supreme Court of that State' could be removed. Secondly,

[11] Jones AO (above n 10), 6, 8.

an additional provision could be added to clarify the Australian courts' jurisdiction to issue subpoenas in support of foreign seated arbitrations.

Concluding Remarks

As other jurisdictions show support for international arbitration by facilitating foreign-seated arbitral proceedings, the attractiveness of international arbitration as a whole grows. This results in all jurisdictions which significantly participate in international arbitration benefiting from increased use of it as a means of dispute resolution. The overriding purpose and ethos of the NYC, as well as the aims of international arbitration, further support states making changes to their legislative regimes to allow their municipal courts to provide appropriate support to foreign-seated arbitrations where needed