SUBPOENAS IN AID OF ARBITRATION: *UDP HOLDINGS PTY LTD V ESPOSITO HOLDINGS PTY LTD & ORS* [2018] VSC 316

In the recent case of *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd & ors* [2018] VSC 316 the Supreme Court of Victoria approved the issuance of subpoenas compelling two witnesses to attend before an arbitral tribunal seated in Melbourne and give evidence pursuant to s 23 of the *International Arbitration Act* 1974 (Cth) ("the Act"). The application arose out of a long-running dispute concerning the sale of a food business. The Court's judgment provides useful guidance on the circumstances in which it will issue subpoenas in aid of arbitration as well as the meaning s23(4) of the Act.

Key issues

- A Court with jurisdiction may issue a subpoena in support of an arbitral proceeding if the tribunal has approved issuance and it is reasonable in all the circumstances to do so.
- Section 23(4) of the Act should not be construed in such a way as to warrant substantive review of the Tribunal's decision to grant permission for issuance of the subpoenas relevant to the application.
- This case is a helpful reminder that the Courts are available to parties to an arbitration to ensure that all the required evidence is produced.

THE FACTS

This arbitration arose out of a dispute relating to the sale of a business. The primary issue was whether the seller was in a breach of a warranty that the business was not overcharging one of its largest customers. The arbitration was conducted in Melbourne.

In support of the arbitration Justice Croft issued a subpoena requiring Ms Barry (a former CFO of the business) and Mr Jeffery (a director of the one of the business's largest customers) to appear at the proceedings and give evidence. In prior court proceedings, both Ms Barry and Mr Jeffery had previously given evidence in relation to the alleged overcharging, and both parties to the arbitration intended to use Ms Barry and Mr Jeffery's evidence before the arbitral tribunal. Previously (more than three years ago), the same judge had issued subpoenas compelling the production of documentation in relation to the same dispute (see *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* [2015] VSC 183) (***Eposito v UDP***).

THE COURT'S DECISION

Justice Croft applied s23 of the Act holding that a Court may issue a subpoena on behalf of an arbitral proceeding if the Court (1) has jurisdiction, (2) would issue a subpoena in its own proceedings, (3) the tribunal approves the issue of a subpoena, and (4) the issue of a subpoena is reasonable in all the circumstances.

In considering the application, Justice Croft noted that the Court's role was not to "*act as a mere rubber stamp upon the grant of permission by the arbitral tribunal*", but to take a principled approach. Quoting from his own judgments in both *Esposito v UDP* and *ASADA v 34 Players and One Support Person* [2014] VSC 635, Justice Croft emphasised that the Court should provide "*assistance and support for arbitral processes, and not 'heavy handed' intervention, or in effect, duplication of the functions of the tribunal*". This is particularly the case in the grant of subpoenas which entail the "*imposition of an unwarranted burden on strangers to the arbitration*".

As the arbitral tribunal had clearly granted permission to subpoena, the main issue for consideration was whether

the issuance of subpoenas by the Court was reasonable in all the circumstances. In this case, the evidence of the relevant witnesses related to testimony given in public (in the Victorian courts) and so it would have been possible for the transcripts to have been tendered as evidence in the arbitration. However, the application was made because of the need to cross-examine those witnesses in the arbitration. The need for cross-examination and the fact that the applicant had offered to reimburse the witnesses for their expenses incurred in connection with attendance at the hearing persuaded Justice Croft that it was reasonable to issue the subpoenas.

COMMENTARY

If a party to arbitral proceedings requests the attendance of a witness and that witness refuses to attend, the requesting party's only remedy will be to ask the arbitrators to draw an adverse inference – something arbitrators are generally reluctant to do and which may be of limited evidentiary value in any event. The ability to seek a subpoena from the courts of the seat solves this problem, effectively making it possible for parties to arbitral proceedings to borrow the coercive powers of the courts to secure the evidence that they need in the arbitration. Subpoenas in aid of arbitration are, therefore, an important element of modern arbitration practice.

For this reason, all lawyers actively engaged in the practice of international arbitration in Australia should familiarise themselves with Justice Croft's decision in *UDP Holdings*. The judgment confirms that while the Australian courts will not take a subpoena application under s23 of the Act lightly, the threshold for granting the application is relatively low and the Court enjoys a good degree of discretion to determine the application in a way that best supports the arbitration (without disregarding the rights of the potential witnesses). This decision also confirms that Courts exercising their powers under s23 of the Act should not be concerned with the merits of the subpoena application under Australia law. For example, Australian judgments regarding subpoena applications in relation to Court proceedings emphasise the circumstances where subpoenas may be refused, such as where there is no apparent relevance between the subject matter of the subpoena and the fair disposition of the proceedings (see *Apache Northwest Pty Ltd v Western Power Corporation* (1998) 19 WAR 350, 376). While such arguments were not made in relation to the arbitration proceedings in the *UDP Holdings* case, they would arguably be relevant under s23(4) of the Act which requires the Court to refrain from issuing a subpoena that would compel a witness to answer a question in the arbitration hearing that they could not be compelled to answer in proceedings before a Court.

Justice Croft addressed this issue directly in his judgment. His Honour held that, in this case, were no circumstances that would prevent him from issuing a similar order if the case was being heard in the Court. Further, His Honour held that "*in any event, in order for sub-s 23 (4) of the Act to be given practical operation, it must be construed as limiting the effect of a subpoena issued under s 23 of the Act, rather than requiring the Court to be satisfied that a proposed subpoena would not be in violation of sub-s 23(4) of the Act.*" This interpretation is consistent with the view taken by Justice Croft that the Court's role is to support and assist the arbitration: it is not for the Court to consider whether the arbitral tribunal was right or wrong in its decision to grant permission to issue the subpoena (although the Court may consider the *effect* of such a subpoena). This approach is also consistent with the legislative intent of the Act, which is that the Courts should not duplicate the judicial function of arbitral tribunals while exercising their powers in accordance with the Act. It is common for arbitral tribunals to make decisions on the attendance of witnesses at hearings (including in relation to subpoena applications), with reference to the *IBA Rules on the Taking of Evidence in International Arbitration* (**IBA Rules**). The IBA Rules provide that orders for the attendance of witnesses will only be made where production of those witnesses is relevant and material to the proceedings (see Article 8(5) of the IBA Rules).

Finally, it bears noting that, in the *UDP Holdings* case, the subpoenas were sought in relation to arbitral proceedings being conducted in Australia. The Court was not asked to consider its powers under s23 of the Act in relation to arbitration proceedings *outside* of Australia. Justice Croft acknowledged this difference adding a footnote referencing the decision in *Samsung C&T Corporation, Re Samsung C&T Corporation* [2017] FCA 1169. In that case, the Court considered that s23 did *not* allow for an Australian Court to issue a subpoena in aid of an arbitration conducted overseas. It remains to be seen whether *Samsung* will be followed by other Australian Courts (see our article: https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Australia/Clifford-Chance-LLP/No-requirement-to-provide-evidence-or-documents-in-foreign-seated-arbitration).

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