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COMMENTARY

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IN SHORT

The Situation: Parties to contracts on major projects with a connection to Australia frequently arbitrate disputes elsewhere.

The Development: The Federal Court of Australia ("FCA") held that Australian courts do not have jurisdiction to issue subpoenas for foreign-seated arbitrations.

Looking Ahead: Until the decision is clarified, parties need to consider alternative procedures to obtain evidence in Australia for arbitrations seated outside the country.

A recent decision in the Federal Court of Australia (*Samsung C&T Corporation, in the matter of Samsung C&T Corporation* [2017] FCA 1169) calls into question the capacity of Australian courts to issue subpoenas in respect of arbitration proceedings seated outside Australia.

This decision has significant implications for participants in international projects and transactions with a connection to Australia. It remains to be seen whether it will be followed, and whether it results in any amendment to Australia's arbitration laws. Until the position is clarified, affected parties now ought consider alternative procedures based in contract, arbitral procedure or international treaties for obtaining evidence in Australia for foreign arbitrations.

> The decision will have widespread implications, as Australian entities are frequently involved in international projects and transactions subject to agreements to arbitrate disputes outside Australia.

The Case

Samsung C&T Corporation ("Samsung") and Duro Felguera Australia Pty Ltd ("Duro") are parties to an arbitration seated in Singapore concerning disputes arising from the Roy Hill Project in Western Australia.

Samsung applied to the FCA for leave to issue subpoenas against third parties in Australia under section 23 of the *International Arbitration Act 1974* (Cth) ("IAA").

Gilmour J found that Australian courts do not have the power to grant subpoenas in respect of foreign-seated arbitrations, because under the IAA:

- Section 22A, which identifies the "courts" empowered to act under the IAA, ought to be read narrowly; and
- The power to grant subpoenas did not expressly extend to arbitrations seated outside Australia, unlike other IAA provisions.

Gilmour J also found force in the policy behind the IAA of promoting Australia as an arbitral seat.

Notably, the Court also said that a means of obtaining third-party evidence remained available to Samsung, namely under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention").

What Now for Gathering Evidence in an International Arbitration?

The decision will have widespread implications, as Australian entities are frequently involved in international projects and transactions subject to agreements to arbitrate disputes outside Australia. The decision is important for international participants in major building and construction projects located in Australia, where much often turns on documents held by parties up or down the contracting chain.

Following this ruling, the options for obtaining evidence from third parties in Australia to support an arbitration seated elsewhere are less clear and less streamlined. The decision will attract attention from both the courts and lawmakers. The following alternative options may apply:

- **State Supreme Courts**: Parties may be able to approach State Supreme Courts to issue subpoenas in foreign-seated arbitrations. The Western Australian Supreme Court, for example, took the opposite

view (albeit not in published reasons) in allowing Duro to issue subpoenas in relation to the same dispute (Jones Day acted for Duro on that application).

- **Require Production of Documents in the Contract(s)**: This could be achieved through clauses requiring lower-tier contractors to: (i) provide documents upon written request; and (ii) "step down" requests to subcontractors. To be effective, this would need to be implemented project-wide. Enforcement would potentially be complex and time-consuming, especially where documents are held several steps up or down the contracting chain.

- **Multiparty Arbitration Agreements**: Such agreements are becoming more common as the complexity of contracting arrangements increases, and they could give the arbitral tribunal jurisdiction to order production.

- **Third-Party Benefit Clauses**: Contracts could make provision for third-party rights to access documents, where the governing law permits.

- **Hague Evidence Convention**: Parties to an arbitration may be able to gather evidence from third parties through a "letter of request" under the Hague Evidence Convention. These are issued to the central authority of a state party to the Convention, requesting documents from a party within its jurisdiction. However, it is far from clear that the Convention is a panacea. The Convention operates in respect of "judicial authorities" and "judicial proceedings", so it is questionable whether it even applies to arbitration. Moreover, it is available only to proceedings within a state party's jurisdiction, which excludes important commercial and arbitral jurisdictions such as the United Arab Emirates, Malaysia, Indonesia and Japan.

- **Australia as the "Seat"**: The decision applies only to foreign-seated arbitrations, so one option is to designate an arbitral seat within Australia. This will not be feasible or appropriate for all projects, such as where international parties desire a "neutral" or more familiar venue.

THREE KEY TAKEAWAYS

1. In establishing a project procurement strategy, consider what third-party documents are likely to be required in the event of any dispute, and tailor the approach.
2. Consider contractual provisions for compulsory production by third parties, particularly in situations where there is a "contracting chain".
3. Devise and implement a strategy for collecting and managing documentary evidence—including from third parties—at the outset of any dispute. Collection from third parties (such as under the Convention processes) can be complex and time-consuming.

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