FEDERAL COURT OF AUSTRALIA

Samsung C&T Corporation, in the matter of Samsung C&T Corporation [2017] FCA 1169

|  |  |
| --- | --- |
| File number(s): |  |
|  |  |
| Judge(s): | **GILMOUR J** |
|  |  |
| Date of judgment: | 5 October 2017 |
|  |  |
| Catchwords: | **ARBITRATION** – international arbitration – application for leave to issue subpoenas – whether the Federal Court of Australia has jurisdiction to give leave to issue subpoenas under s 23 of the *International Arbitration Act 1974* (Cth) for foreign-seated arbitral proceedings |
|  |  |
| Legislation: | *Extradition Act 1988* (Cth) ss 6, 12, 19(2)(a), and 19(3)*Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) sch 1 s 3*International Arbitration Act 1974* (Cth) ss 2D(c), 2D(d), 3(1), 15(2), 16(1), 16(2), 18, pt III div 3, 22(1), 22A, and 23, sch 2 (UNCITRAL Model Law on International Commercial Arbitration) arts 1(2), 1(3)(b)(2), 7 (option 1), 27, and 35*International Arbitration Amendment Act 2010* (Cth) s 16*International Arbitration Amendment Bill 2009* (Cth)Revised Explanatory Memorandum, International Arbitration Amendment Bill (Cth) 2010*Evidence Act 1906* (WA) ss 115–118*Rules of the Supreme Court 1971* (WA) O 39International Arbitration Act (Singapore) (Cap 143A, 2002 Rev Ed) ss 3, 13(2)UNCITRAL Arbitration Rules 2013*Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*,opened for signature on 18 March 1970, 847 UNTS 241 (entered into force on 7 October 1972) arts 1 and 2  |
|  |  |
| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27*AssetInsure Pty Ltd v New Cap*; *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross & Ors* (2012) 248 CLR 378*Director of Public Prosecutions of the Commonwealth v Kainhofer* (1995) 185 CLR 528*Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331 *Rinehart v Rinehart (No 3)* [2016] FCA 539*Western Australian Planning Commission v Leith* [2017] HCA 7  |
|  |  |
| Date of hearing: | Heard on the papers |
|  |  |
| Date of last submissions: | 13 September 2017 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 53 |
|  |  |
| Solicitor for the Applicant: | Herbert Smith Freehills |

ORDERS

|  |  |
| --- | --- |
|  | WAD 146 of 2017 |
| IN THE MATTER OF SAMSUNG C&T CORPORATION (WITH REPUBLIC OF KOREA REGISTRATION NUMBER 110111-0015762) |
|  | SAMSUNG C&T CORPORATION (WITH REPUBLIC OF KOREA REGISTRATION NUMBER 110111-0015762)Applicant |

|  |  |
| --- | --- |
| JUDGE: | GILMOUR J |
| DATE OF ORDER: | 5 October 2017 |

THE COURT ORDERS THAT:

1. The application filed on 5 September 2017 for leave to issue subpoenas pursuant to s 23 of the *International Arbitration Act 1974* (Cth) be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GILMOUR J:

## Introduction

1. 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).
2. The present application is one of two applications for leave to issue subpoenas that have come before this Court in the matter. The first application was heard by me on 21 March 2017 and I granted leave to issue subpoenas (First Application). However, for reasons which follow, I have concluded that my decision to grant leave was not only wrong, but was clearly wrong. Accordingly, I refuse leave and dismiss the present application (Second Application).

## Background

1. Both Samsung and Duro have places of business within Australia. The Arbitration is an 'international commercial arbitration' pursuant to Art 1(3)(b)(2) of the Model Law, found in sch 2 of the *International Arbitration Act* (Cth) (IAA), as the place (seat) of arbitration nominated by the parties is Singapore, being a State other than the State (Australia) in which the parties' places of business are located.
2. The Arbitration is governed by the UNCITRAL Arbitration Rules 2013 and administered by the SIAC (Tribunal) and subject to the governing law of Western Australia.

### History of this matter

1. As Samsung outlined in its submissions for the First Application, its solicitors had advised the Tribunal by letter dated 6 December 2016 of its intention to seek the issue of a letter of request under The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (The Hague Evidence Convention). This course, which would need to have been given effect upon application to the Western Australian Supreme Court, is the course that is ordinarily taken in such matters. Samsung was informed by Duro that it did not object to Samsung seeking the documents but Duro maintained that s 23 of the IAA was the appropriate production mechanism. Thus, Samsung on 13 December 2016, by application to the Tribunal, requested that it issue a letter pursuant to The Hague Evidence Convention and also permit Samsung to apply to an Australian court for the issue of subpoenas under s 23 of the IAA. The Tribunal then issued a procedural order, upon the parties agreeing a subpoena protocol, permitting Samsung to apply to this Court, and also permitting Duro to do the same also pursuant to s 23. Duro has not made any such applications before me in this matter.
2. I heard the First Application on 21 March 2017 and made orders granting Samsung leave to issue subpoenas. The First Application was not opposed and was brought before the Court on an urgent basis. The solicitors for Duro appeared in the hearing on a limited basis, specifically for an order that certain of Samsung’s documents supporting the First Application be admitted as confidential.
3. There was no real contradictor in the hearing of the First Application. Samsung provided detailed written submissions in support of the First Application, on the basis of which, at the conclusion of the hearing, I granted the relief sought.
4. Before me now is the further Second Application for leave to issue subpoenas to recipients that are not parties to the Arbitration and are persons located in Australia. Samsung brought the First and Second Applications under s 23 of the IAA, having on both occasions obtained the arbitral tribunal’s permission to do so. There are a number of issues that arise in making orders permitting the issue of subpoenas under s 23. The threshold question is whether this Court has jurisdiction to make such orders.
5. Samsung requested that the Second Application be assessed on the papers. Samsung had by then already filed detailed written submissions in support of its Second Application, which, as with the First Application, was not opposed. I acceded to this request but required Samsung to provide additional detailed written submissions on an issue not previously exposed, namely the construction of s 22A of the IAA bearing on the question of jurisdiction. Samsung lodged supplementary submissions going to this issue on 13 September 2017.

## Issues for consideration

1. Section 23 of the IAA provides as follows:

(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.

1. The issues to be addressed before s 23 can apply are:
2. whether this Court has jurisdiction to issue the subpoenas; and
3. whether this Court is satisfied (pursuant to s 23(5) of the IAA) that issuing the subpoenas sought is reasonable.
4. Samsung, relying on the orders made in respect of the First Application, submitted that the Court needs to determine, in relation to the Second Application, only issue (2) of the above – namely, whether it is reasonable in all the circumstances to issue the further subpoenas sought in Samsung's present application.

## The first issue: jurisdiction

1. As to the jurisdiction issue, the relevant questions are whether this Court is a ‘court’ for the purposes of s 23, and, informing this, whether the arbitral proceedings referred to in that provision include foreign arbitral proceedings or whether they are confined to those commenced in a State or Territory of Australia. It is to these questions that s 22A is relevant, which provides:

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.

1. The proper construction of s 22A, which bears on the issue of jurisdiction was, as I mentioned, not the subject of submissions in relation to the First Application. I have now considered this question, taking into account Samsung’s supplementary submissions, and have resolved it adversely to Samsung. In my opinion, s 23 concerns domestic arbitral proceedings commenced in a State or Territory of Australia, and does not include foreign-based arbitral proceedings. Accordingly, this Court has no jurisdiction to grant leave to issue subpoenas relating to an arbitration commenced in Singapore.

### Samsung’s submissions on jurisdiction

1. Samsung, in its submissions for the First Application, identified the issue of jurisdiction in broad terms, but confined its answer to a consideration of s 23, as follows:

The text, history, context and objects and purposes of the IAA strongly support an interpretation that s 23 applies to an arbitration seated in Singapore where there is a sufficient territorial nexus between the subpoenas sought and Australia.

1. Samsung submitted in relation to the First Application that this Court does have the jurisdiction and power to issue the subpoenas sought under s 23 of the IAA under a wider interpretation of that section, which Samsung submitted was the preferable interpretation. Samsung put that, for the resolution of the issue of jurisdiction, it must be appreciated that a party to arbitral proceedings commenced in reliance on an ‘arbitration agreement’ may apply, pursuant to s 23(1) of the IAA, to ‘a court’ to issue a subpoena under s 23(3). Samsung submitted that an ‘arbitration agreement’ is broadly defined as a written agreement to submit to arbitration all or any differences which have arisen between parties in respect of a defined legal relationship: ss 15(2), 16(2) and sch 2, art 7 (option 1) of the IAA. It further submitted that there is no territorial restraint on the definition of 'arbitration agreement' in the Act.
2. Whilst Samsung, in relation to the First Application, mentioned s 22A in a footnote, it made no submissions as to the proper construction of this section. Specifically, in that footnote, Samsung stated that:

By reason of the definition of ‘court’ in s 22A of the *International Arbitration Act*, this Honourable Court is the *appropriate* court for an application under s 23 for subpoenas to be issued in support of a foreign seated arbitration.

1. This was no more than an assertion, and did not condescend to any analysis as to the proper construction of s 22A.
2. When the same issue arose in relation to the Second Application, as I mentioned, I requested that Samsung provide further submissions to the Court on the operation of s 22A.
3. Samsung’s further submissions commenced with the observation that pt III, div 3 of the IAA applied to ‘any arbitration to which the Model Law applies’: s 22(1). It submitted that the Model Law applies to the arbitration between Samsung and Duro; that the arbitration is seated in Singapore and subject to Singapore’s International Arbitration Act (Cap 143A, 2002 Rev Ed) (SIAA) which, by s 3, gives the Model Law the force of law in Singapore: *Rinehart v Rinehart (No 3)* [2016] FCA 539 at [83]. Samsung then submitted that the SIAA vests the Singaporean courts with the power to summon witnesses by subpoena but only where the witness is located within Singapore (s 13(2)) and that accordingly the IAA provides the only mechanism for issuing subpoenas in support of a Singapore seated arbitration to non-parties to the arbitration who are based within Australia. Samsung identified only the requirement that any arbitration be one to which the Model Law applied before s 23 can apply to it (per s 22(1)) as a limitation on the purported jurisdiction to issue subpoenas in support of foreign-seated arbitrations.
4. Moreover, Samsung submitted that even if there is a territorial limitation on this Court’s power to issue subpoenas under s 23, the territorial nexus between Australia and the arbitration in question is real and substantial, and would overcome issues of territorial limits on jurisdiction.

### Statutory interpretation

1. The modern task of statutory interpretation focuses on text, context and purpose: *Western Australian Planning Commission v Leith* [2017] HCA 7 at [128]; *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331 at [86]–[87]; *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross & Ors* (2012) 248 CLR 378 at 388–390 at [23]–[26].
2. The text of s 22A is the starting point in its interpretation: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46–47 [47]. In s 22A, the meaning of ‘court’, variously, is determined by reference to the geographic location of the arbitral proceedings in question.
3. As Samsung correctly submits, it is evident from the reference in s 22A(a) to a Supreme Court of a ‘State’ that ‘State’ in the context of s 22A is a reference to a state of Australia: cf the definition of ‘State’ as meaning Australia and any foreign country in s 16(2) of the IAA. Samsung relies upon s 22A(c) to ground jurisdiction. The construction question is then what meaning the phrase ‘in any case’ has and whether it extends to include foreign-seated arbitral proceedings.
4. Samsung submitted that an ambiguity arose in the phrase ‘in any case’ because the phrase can be read:
* narrowly and restrictively, as limited to ‘in any case in which arbitral proceedings are, or are to be conducted, in a State or Territory of Australia’; or
* broadly as ‘in any case, whether or not the arbitral proceedings are, or are to be conducted, in a State or Territory of Australia.’
1. Samsung further submitted that the broader reading of ‘in any case’ as it appears in s 22A(c) is to be preferred as it is more consonant with the natural and ordinary meaning of the legislative text as well as the purpose and objects of the IAA. To this end, Samsung stated:

A narrow and restricted reading limiting the Federal Court's jurisdiction to only those arbitral proceedings being conducted in Australia would involve unnecessarily reading words into subsection (c), contrary to settled principles of statutory construction. Nor is there any textual or contextual basis for grafting any negative implication on to the words "in any case" from the geographical limitations expressly stipulated in subsections (a) and (b)

1. I do not accept these submissions. A broader interpretation would unnecessarily read words of significance into s 22A(c), particularly where elsewhere in the IAA the Parliament has turned its mind to specify similar expansions of jurisdiction based on geographical location. I will return to this point later in the reasons. The second point made by Samsung is not sufficiently substantiated.
2. In some cases, where there is an ambiguity as to the meaning of a particular word or phrase, there may be guidance available if it has been used and interpreted elsewhere. In *Director of Public Prosecutions of the Commonwealth v Kainhofer* (1995) 185 CLR 528, the High Court considered the construction of a statutory provision containing the phrase ‘in any case’.
3. *Kainhofer*, whilst not entirely analogous, is nonetheless of some assistance, concerned as it was with alternatives contained within a statutory provision. The case concerned a magistrate’s power under s 12 of the *Extradition Act 1988* (Cth) (Extradition Act) to issue a warrant for the arrest of an ‘extraditable person’. One of the questions in the case was what ‘supporting documents in relation to the offence’ had to be produced to the magistrate, pursuant to s 19(2)(a) of the Extradition Act, to assist the magistrate’s determination in relation to an extradition offence.
4. Section 19(3) provided:

(3) In paragraph [19](2)(a), ‘supporting documents’, in relation an extradition offence, means:

(a) if the offence is an offence of which the person is accused – a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence, or a duly authenticated copy of such a warrant;

(b) if the offence is an offence of which the person has been convicted – such duly authenticated documents as provide evidence of:

(i) the conviction;

(ii) the sentence imposed or the intention to impose a sentence; and

(iii) the extent to which a sentence imposed has not been carried out; and

(c) *in any case*:

(i) a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence; and

(ii) a duly authenticated statement in writing setting out the conduct constituting the offence.

 (emphasis added)

1. At 552–554, Gummow J (who agreed with the majority but provided separate reasons) considered what other classification applied to supporting documents that were given ‘in any case’ for the purposes of subsection (c) above. His Honour noted at 553 that:

The answer depends upon the classification of the extradition offence established by pars (a) and (b) of s 19(3). If the offence is one for which the person has been convicted, then there must be provided the duly authenticated documents set out in par (b). If, on the other hand, the offence is one for which the person is ‘accused’, then what is required is the duly authenticated arrest warrant specified in par (a). If the person was neither accused nor convicted, then all that would be required as supporting documents would be those identified in par (c), as required ‘in any case’…

The result, in the present case, would be that, if the respondent fell within neither par (a) nor par (b), all that would be required would be the documents specified in par (c). *Either the phrase ‘in any case’ in par (c) identifies the classifications of offence in pars (a) or (b) or includes some other class of case.*

(emphasis added)

1. Gummow J held that the latter, wider interpretation was not the preferable construction of ‘in any case’ in this instance, in light of the definition of ‘extraditable person’ in s 6 of the Extradition Act. Gummow J appeared to give preference to a narrower interpretation of s 19(3)(c) given that, to be an ‘extraditable person’ and thus subject to the Act, a person had to be either accused or convicted of an offence. Allowing for a third type of offence in s 19(3)(c) would be inconsistent with this requirement.
2. Gummow J therefore held, at 554, that:

The classification in s 19(3) of that which is required for the necessary ‘supporting documents’ assumes that extradition is sought either in respect of an offence of which the person is accused or in respect of an offence of which the person has been convicted. It does not proceed on the footing that there is a further category of offences in respect of which the person is neither accused nor convicted.

1. A phrase, which is of wide signification, is limited by its context: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Lexis Nexis, 7th ed, 2011) at 47 [2.24]. Context, in the sense of the surrounding text, is the starting point. In s 22A, the meaning of ‘court’ is determined by reference to the geographical location of the arbitration proceedings in question. The context for ‘in any case’ here is the territorial specification in the preceding s 22A(a) and (b), which would limit the phrase’s wide signification.

#### Model Law

1. An important part of the context for s 22A within the IAA is the Model Law, found in sch 2 of the IAA. Importantly, art 27 of the Model Law 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. The court may execute the request within its competence and according to its rules on taking evidence.

1. As Samsung acknowledged in its earlier First Application submissions, the provisions of the Model Law (including art 27), by reason of art 1(2), apply only if the place of arbitration is in the territory of the (legislating) State. Legislating States may, of course, expand their courts’ jurisdiction in particular respects to foreign seated arbitrations. Such is the case under the IAA in relation to the enforcement of foreign awards, to which I will shortly return.
2. However, in those earlier submissions, Samsung also put that neither the terms nor the legislative history of s 23 suggest that it is legislatively implementing art 27 only, and that therefore the territorial limitation introduced by art 1(2) was irrelevant as a factor pointing towards a narrower interpretation of s 23. As a result, Samsung submitted, s 23 was not subject to any express territorial restriction limiting it to arbitrations seated in Australia. Whatever else may be said about this submission, art 27 is not concerned with the jurisdictional issue raised by s 22A(c). Rather it concerns whether a court may be requested to give assistance as to the taking of evidence by a party to arbitration with the arbitral tribunal’s approval. This would include, for example, requests made by letters of request.

#### Foreign arbitration agreements and awards

1. Part II of the IAA reinforces these conclusions as to the reach of s 22A(c). Part II was specifically inserted to deal with foreign arbitration agreements and awards, with, for example, ‘foreign award’ defined to refer to an award made ‘in a country other than Australia’: s 3(1).
2. The IAA otherwise makes provision for conferral of jurisdiction to enforce arbitral awards (domestic) through art 35 of the Model Law which provides that:

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

1. As the Model Law covers the field by virtue of s 21 of the IAA, this would appear to be the only way for a domestic award in an international arbitration to be enforced: Justice Stephen Rares, ‘The Federal Court of Australia’s International Arbitration List’ (Paper presented at the Senior Counsel Arbitration Seminar of the New South Wales Bar Association, 14 September 2011) at [5]–[6]. Article 35, on a plain reading, would appear to cover both domestic and foreign awards. However, for the purposes of the IAA, the Parliament turned its mind to provide expressly for foreign awards and agreements in pt II. There is, by contrast, no express provision for foreign arbitral proceedings (taking place ‘in a country other than Australia’) in s 22A.
2. Furthermore, in the objects of the IAA set out in s 2D, separate provision is made for the recognition and enforcement of arbitral awards generally (in s 2D(c)) and the obligations Australia has in respect of recognising and enforcing foreign awards specifically (in s 2D(d)).
3. The specification of ‘foreign’ awards and arbitration agreements in pt II and the objects of the IAA points against a presumed intention that s 22A be read expansively to include foreign-seated arbitral proceedings.
4. Samsung submitted, for the Second Application, that ‘[t]here is nothing in the legislative history to support a narrow and restricted interpretation of subsection (c) of s 22A’. Earlier, in relation to the First Application, it had submitted that ‘[t]he legislative context also strongly supports the wider interpretation of s 23’. Leading commentators on the IAA have observed that pt III (including ss 22A and 23) was introduced to encourage international arbitration taking place in Australia: Malcolm Holmes and Chester Brown, *The International Arbitration Act 1974: A Commentary* (2nd ed, Lexis Nexis, 2015) at 5. Indeed, prior to the introduction of pt III provisions in 2010, the Commonwealth Attorney-General, in a media release issued on 21 November 2008 to outline the need for review of the IAA, cited the intention of ‘developing Australia as a regional hub for international commercial dispute resolution’: Attorney-General’s Department, ‘Australian Government Moves to Modernise International Arbitration’ (Press Release, 21 November 2008).
5. As Holmes and Brown note at 6:

On 21 November 2008, the Commonwealth Attorney-General announced a review of the Act and released a discussion paper to stimulate debate about the future of the Act (the Review). The Review resulted in, first, the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth), which conferred jurisdiction under the Act on the Federal Court of Australia *concurrently* with that of the Supreme Courts of the states and territories; and second, the International Arbitration Amendment Act 2010 (Cth), which involved a major revision of the Act and the adoption of the 2006 amendments to the Model Law.

(emphasis added)

1. Section 3 of sch 1 of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) added the phrase ‘(c) in any case – the Federal Court of Australia’ to the end of s 18, among other changes which effectively replicated for this Court the jurisdiction that State and Territory Supreme Courts had to exercise certain functions and powers under the IAA. Section 16 of the *International Arbitration Amendment Act 2010* (Cth) added s 22A in full in terms (unchanged since then) that are near-identical to the terms of s 18, including the concurrent jurisdiction of this Court.
2. The significance of concurrent jurisdiction is apparent in the discussion that led to the changes. In its 2008 discussion paper on the review of the IAA, the Federal Government suggested the conferral of exclusive jurisdiction over IAA matters to this Court. This proposal was met by significant opposition from the Chief Justices of State and Territory Supreme Courts: see Chief Justices of the States and Territories, Submission to Attorney-General’s Department, *Review of the International Arbitration Act 1974 (Cth)*, 10 December 2008, 1. The Court was then, in 2008, given jurisdiction over IAA matters identical (or, concurrent) to that given to State and Territory Supreme Courts, rather than exclusive jurisdiction. This would support an interpretation of s 22A(c) that limits this Court’s jurisdiction to that of the State and Territory Supreme Courts.
3. Indeed, returning to the revised explanatory memorandum for the bill introducing pt III provisions including ss 22A and 23, the *International Arbitration Amendment Bill 2009* (Cth), the justification given for these changes was as follows, at [59]:

The following items amend Part III of the Act which gives the force of law to the Model Law as the primary arbitral law governing the conduct of *international commercial arbitrations in Australia*.

(emphasis added)

1. 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. To paraphrase Gummow J in *Kainhofer* in relation to the somewhat analogous statutory text there, 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.
2. Samsung’s alternative submission was that a territorial nexus would overcome the territorial limits on jurisdiction. Samsung made this submission primarily by reference to the ‘constitutional conceptions of predominant territorial nexus inherent in the federal compact and the nature of judicial power’. This submission was rather faintly put and I do not accept it.
3. Finally, as I noted at [5] above, Samsung’s solicitors had originally intended to seek the issue of a letter of request under the Hague Evidence Convention, which it would have sought to effect through the Western Australian Supreme Court. However, at [20] above, I also noted Samsung’s further submission that because the Singaporean courts have no jurisdiction to issue subpoenas to persons outside Singapore, s 23 was the only available avenue for Samsung to achieve that end. This is not so.
4. Singapore and Australia are both contracting parties to The Hague Evidence Convention. Under art 1 of that Convention, the central authority of the requesting state may send a letter of request to the central authority of another contracting state for the taking of evidence. The letter must be executed by a judicial authority of the requested state that is competent to do so under its own law (art 2), which in this case would be the Western Australian Supreme Court. Parties may apply to the Western Australian Supreme Court for assistance in obtaining evidence in a court or tribunal which is outside Western Australia: *Evidence Act 1906* (WA) ss 115–118; *Rules of the Supreme Court 1971* (WA) O 39.

## The second issue: reasonableness

1. There is, in light of my conclusion as to the first issue, no need to consider the second issue.

## Conclusion and order

1. Samsung’s application, for the above reasons, fails, and I will refuse leave to issue further subpoenas, and dismiss the application.

|  |
| --- |
| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour. |

Associate:

Dated: 5 October 2017