NZ High Court Compels Witness to Give Evidence in International Arbitration

The New Zealand High Court has recently confirmed in ***Dalian Deepwater Developer Limited v. Sveinung Dybdahl***[1] that it has the jurisdiction to compel a witness residing within its jurisdiction to give evidence in an international arbitration taking place outside New Zealand (NZ) under Section 184 of the New Zealand Evidence Act, 2006.

The applicant in this case filed an application in the High Court seeking assistance to obtain evidence for an arbitration proceedings being conducted before the **London Court of International Arbitration (LCIA)**. The arbitration proceedings arose out of a repudiatory breach of a construction contract between the Applicant and Cosco (Dalian) Shipyard Ltd. The respondent, Mr. Dybdahl, was the former Managing Director of Dalian Develop Management which provided management and advisory services to the Applicant and had submitted a written statement in relation to the dispute being arbitrated. However, he subsequently left his employment and began working with Cosco in an independent capacity and refused to appear as a witness in the arbitration proceedings. The applicant approached the High Court for an order compelling the respondent to attend the hearing in London by video/audio link or in the alternative, be deposed by an examiner appointed by the high Court, with counsel participating in the deposition.

[1] Dalian Deepwater Developer Limited v. Sveinung Dybdahl [2015] NZHC 151.

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The primary contention raised by the Respondent was that the High Court did not have the jurisdiction to grant the application under Section 184 of the Evidence Act[2] because an LCIA Tribunal could not be considered a ***"requesting court"*** as provided in Section 182, which reads:

"Requesting court means any court or tribunal exercising jurisdiction in a country or territory outside New Zealand."

The respondent claimed that *"tribunal"* should be restricted to *"tribunals exercising public authority over a geographic area"*. It was their contention that the definition of "tribunal" is coloured by the term *"requesting court"* which necessarily meant that a tribunal must perform a public judicial function to fall with the ambit of Section 182, for example, the UK Competition Appeals Tribunal.

The respondent also was also argued that Article 27 of the **New Zealand Arbitration Act[3]**, 1996, which provided only NZ-seated arbitrators assistance of the Court in taking evidence, represented a deliberate choice made by the NZ legislators to not allow overseas-seated arbitrators this assistance. The Court did not accept this reasoning preferred by the Respondent.

It opined that jurisdiction "*in a country or territory outside New Zealand"* did not imply jurisdiction over a country or territory outside NZ. Furthermore, a plain meaning of *"exercising jurisdiction"* could not imply exercising public judicial authority as was contended by the Respondent because such interpretation would significantly limit the concept of jurisdiction.

Thus, the Court concluded that when *"an arbitral tribunal is conducting an arbitration at place which is not in New Zealand, then I consider that the plain meaning of the definition of requesting court extends to such an arbitral tribunal."* It

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[2] Section 184: Application to High Court for assistance in obtaining evidence for civil proceedings in another court. The High Court or a Judge may exercise the powers conferred by section 185(1) if an application is made to the High Court or a Judge for an order for evidence to be obtained in New Zealand and the court or Judge is satisfied– (a) that the application is made to implement a request issued by or on behalf of a requesting court

[3] Article 27 of the Arbitration Act 1996 provides for the Court assistance in taking evidence - The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

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then proceeded to consider whether it should exercise its discretion and compel the respondent to given evidence in the arbitral proceedings. It held that the reasons preferred by the respondent - that he was tired of the dispute and did not want to jeopardise his commercial relationship with Cisco - could not preclude him from giving evidence. Thus, the Court granted the application.

This decision is significant since it is the first time that the NZ High Court has ruled on this issue. The judgement will be very helpful for overseas-seated tribunals in obtaining evidence under Section 184. While, discretion still vests with the Court in granting an application, the question of jurisdiction has been decided in favour of overseas arbitral tribunals.

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