Case Note

Samsung C&T Corporation v Duro Felguera Australia Pty Ltd [2016] WASC 193

Cari-Dee Le[1]

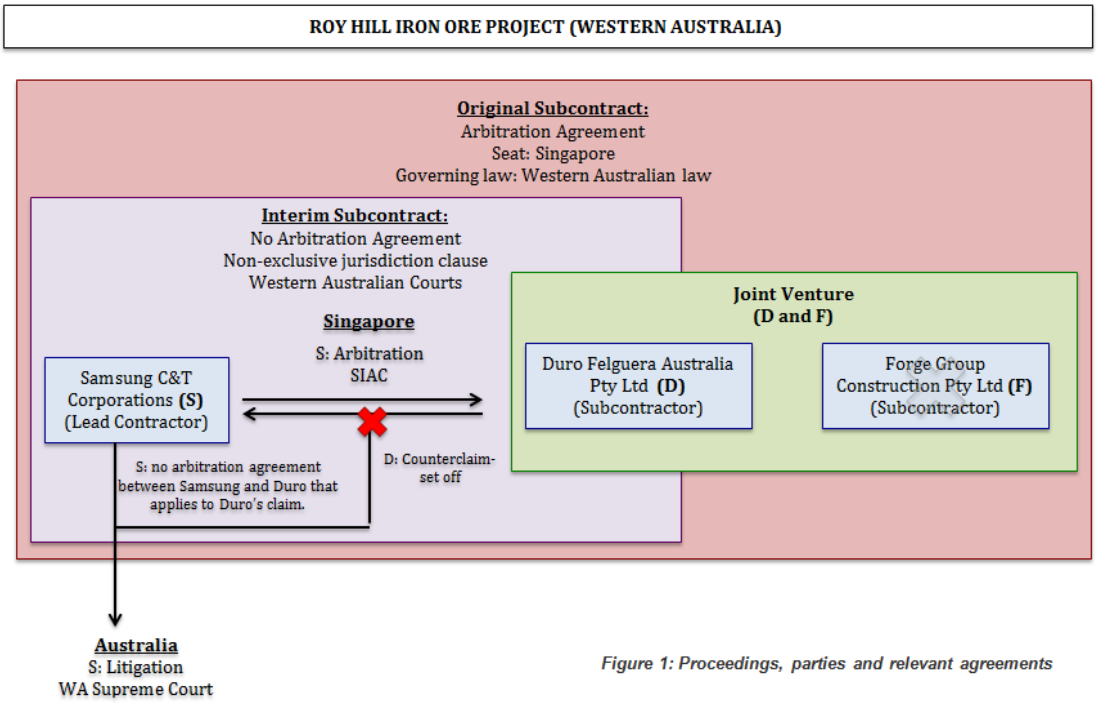

Figure 1: Proceedings, parties and relevant agreements

Abstract

The Supreme Court of Western Australian recently considered the role of Australian courts in dealing with jurisdictional challenges over the existence and scope of an arbitration agreement in the case of *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd*[2]. The decision, however, has received much criticism as it narrows the role of the arbitral tribunal and arbitral seat and threatens to undermine the well accepted principle of *kompetenz-kompetenz* enshrined in international commercial arbitration.

Background

The case of *Samsung v Duro* involved two subcontracts. The defendant, Duro Felguera Australia Pty Ltd (**Duro**), and the plaintiff, Korean industrial giant Samsung C&T Corporation (**Samsung**), were party to both subcontracts. Samsung was the lead contractor in the $10 billion Roy Hill Iron Ore Mining, Rail and Port Project (**Project**). Duro was in an unincorporated joint venture with Forge Group Constructions Pty Ltd (**Forge**). Under the first subcontract (**Original Subcontract**), Samsung engaged both Duro and Forge

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[2] [2016] WASC 193 (**Samsung v Duro**).

to provide engineering and construction services to it and perform works in relation to the Project. The Original Subcontract contained an arbitration agreement designating Singapore as the seat and Western Australian law as the governing law.[3] (See Figure 1)

In February 2014, Forge went into voluntary administration. Samsung terminated the Original Subcontract and entered into the second subcontract with Duro (**Interim Contract**). The Interim Contract was made on the same terms as the Original Subcontract save for any terms that were specifically modified.[4] Western Australian law was also the governing law of the Interim Contract. There was no arbitration agreement however in its place, there was a jurisdiction clause submitting disputes to the non-exclusive jurisdiction of the Supreme Court of Western Australia.[5]

The Dispute

In late 2015, considerable disputes arose between the parties and in March 2016, Samsung initiated arbitral proceedings against Duro under the Original Subcontract, requesting that the Singapore International Arbitration Centre (**SIAC**) administer the arbitration. In its response to Samsung's notice of arbitration, Duro sought to raise claims under the Interim Subcontract by way of counterclaim and set off.

Samsung objected to the jurisdiction of the arbitral tribunal to entertain the claims made by Duro on the grounds that the claims arose under the Interim Subcontract, which contained no agreement to refer disputes to arbitration. Albeit a constituted arbitral tribunal was poised to determine the jurisdiction question, Samsung applied to the Supreme Court of Western Australia, seeking the following declaratory relief:

(a) that the claims were within the scope of the Interim Subcontract agreement;
(b) that the parties had not agreed to resolve Duro's claims by arbitration; and
(c) that the proper forum for determining the claims was the Supreme Court of Western Australia.[6]

[3] Ibid at [8].

[4] Ibid at [55].

[5] Ibid at [9]-[10].

[6] Ibid at [11].

Duro sought to strike out the proceedings on the basis that the Court did not have jurisdiction to grant the relief sought and in the alternative, it applied to stay the proceeding pursuant to section 7(2) of the *International Arbitration Act 1974* (Cth) (**IAA**) or Article 8 of the *UNCITRAL Model Law on International Commercial Arbitration (1985)* (**Model Law**) as the matter was capable of being settled by arbitration.[7]

The Court's Decision

Justice Le Miere first considered the question of pre-emptive court declarations and declined to grant the declaratory relief sought by Samsung. His Honour stated *in obiter* that declaratory relief is discretionary and as such, the Court had jurisdiction to entertain the application sought by Samsung.[8] It was held that neither the IAA nor the Model Law prohibits the court's jurisdiction to grant declaratory relief with respect to the existence of an arbitration agreement.[9] His Honour did not however consider it necessary to decide on whether the discretion should be exercised as the Court had resolved to stay the proceedings in favour of arbitration.

In reaching his decision, Le Miere J considered whether the terms in the Original Subcontract, particularly the arbitration agreement, were incorporated into the Interim Subcontract. His Honour held that the arbitration clause was incorporated and the claims made by Duro were consequently arbitrable. At first blush, this outcome appears to suggest that Australia is a pro-arbitration nation, however the decision has received much scrutiny.

Justice Le Miere held that the incorporation of the arbitration agreement was a question of contractual interpretation, which depended on whether the arbitration clause was inconsistent with the jurisdiction clause in the Interim Subcontract. His Honour relied on several principles to determine the approach to be applied to the construction of an arbitration agreement under Australian law. Firstly, there is a presumption that rational business people intend to resolve all disputes arising out of the same or related subject matter in the same forum. Notwithstanding the presumption, where there a risk of fragmentation of resolution of disputes arising from the express terms of an agreement, these terms must be given effect. Lastly, whether a jurisdiction clause is inconsistent with and supersedes an earlier arbitration agreement is ultimately a question of construction. The words of an agreement should be given effect in so far as it is commercially rational to do so.[10]

The Court held that the Interim Subcontract jurisdiction clause could be construed in a manner consistent with the arbitration agreement, relying on the following well settled principles:

1) the term "proceedings" in the jurisdiction clause could be interpreted to mean any Court proceedings that are permissible under the arbitration agreement;[11]
2) the jurisdiction clause was also non-exclusive and thus did not restrict the parties' ability to contest jurisdiction;[12] and
3) such construction had commercial convenience. The Interim Subcontract required Duro to complete particular work that was previously the subject of the Original Subcontract. Accordingly,

[7] Ibid at [12].

[8] Ibid at [24].

[9] Ibid at [27].

[10] Ibid at [66].

[11] Ibid at [68].

[12] Ibid at [69].

> it would be an inconvenience to hear the disputes in separate forums and potentially cause fragmentation of dispute resolution methods.[13]

On the question of the standard of review on a stay application, his Honour identified two competing approaches. The first line of authority commands the Court to undertake a prima facie assessment of the application, namely that it should apply a prima facie review to the question of the validity and scope of the arbitration agreement when considering a stay application under Article 8 of the Model Law. If this lower standard is satisfied, the Court should stay the proceedings and allow the arbitral tribunal to determine any challenge to the question of validity. [14] This is the preferred attitude in some Asia-Pacific jurisdictions, such as Singapore and Hong Kong. Notwithstanding this trend, his Honour preferred the English approach to adopt a full review and determine the matter on the balance of probabilities.[15]

While the 'full review' approach may confer greater clarity and efficiency in resolving such preliminary matters, the decision increases the burden of proof on a party seeking to stay proceedings. A further concern is the potential conflict with Article 16 of the Model law which allows an arbitral tribunal to determine its own jurisdiction. In this respect, a full review may intrude on the independence of the arbitral tribunal and thus discord with the well accepted principle of *kompetenz-kompetenz*.

Final Comments

While this decision confirms various well-established principles and ultimately arrived at the correct conclusion, certain aspects of the judgment have received great criticism. There is the risk of inconsistency between the judgments given by an Australian Court and a decision on jurisdiction by an arbitral tribunal or the Court at the seat (in this case, Singapore). The increased burden on parties to establish an arbitration agreement on the balance of probabilities when seeking to stay proceedings (as oppose to the lower '*prima facie*' standard) is a further legitimate concern. It is foreseeable that parties may seek to streamline and interfere with the arbitral process by initiating court proceedings. Perhaps what is most troubling is that the derogation from the interpretation of the Model Law in other jurisdictions in the Asia Pacific and the aversion towards court intervention may potentially undermine the confidence in Australia as a leading-edge international arbitration nation. These apprehensions once again confirm the importance of drafting contracts and any supplementary agreements, expressly including an arbitration agreement where desired.

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[13] Ibid at [70].

[14] Ibid at [36].

[15] Ibid at [37].