



A Greater Role for Australian Courts in Foreign Arbitral Proceedings?

In the recent decision of *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd*,¹ the Supreme Court of Western Australia declined to make a declaration as to the effect of an arbitration agreement, instead granting a stay in favour of arbitration.

The Court confirmed that arbitration and jurisdiction agreements should be interpreted in a commercially pragmatic manner, taking account of the risk of fragmentation of proceedings. However, while the Court did not grant the declaration sought by Samsung, it said that it had jurisdiction to do so outside the framework of the Model Law. This reflects a relatively wide view of the Court's role in international commercial arbitration, which in practical terms may mean a narrower role for both arbitral tribunals and for the courts at the arbitral seat.

Background

Duro Felguera Australia Pty Ltd ("Duro") is a subcontractor of Samsung C&T Corporation ("Samsung") on the Roy Hill Iron Ore Project in Western Australia ("Project"). Samsung commenced arbitral proceedings against

Duro in Singapore, and Duro brought counterclaims and claims by way of set-off. Samsung then applied to the Western Australia Supreme Court for a declaration that there was no arbitration agreement between Samsung and Duro that applied to Duro's claims.

Duro and Samsung were party to two successive subcontracts on the Project. Under the first subcontract, Samsung engaged an unincorporated joint venture of Duro and Forge Group Construction Pty Ltd ("Forge"). That subcontract contained an arbitration agreement, which designated Singapore as the seat and was governed by Western Australian law.

In February 2014, an administrator was appointed to Forge, and Samsung allegedly terminated the first subcontract for Forge's insolvency. Samsung and Duro then entered into a further subcontract, the "Interim Subcontract", which was "on the same terms as the [first] Subcontract as modified by the terms set out in this [document] and its schedules for the performance of" a subset of the works that were to be performed under the first Subcontract. The Interim Subcontract said that Western Australian law applied,

¹ [2016] WASC 193. The name of the defendant, Duro Felguera Australia Pty Ltd, is spelled incorrectly in the judgment heading as "Duro Felbuera".

and it contained a non-exclusive jurisdiction clause in the following terms:

Each party irrevocably submits to the non-exclusive jurisdiction of courts exercising jurisdiction in Western Australia and courts of appeal from them in respect of any proceedings arising out of or in connection with this agreement. Each party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

In March 2016, Samsung commenced arbitral proceedings under the first subcontract. In its response to Samsung's notice of arbitration, Duro counterclaimed and asserted a set-off based on claims arising under the Interim Subcontract.

In April 2016, Samsung applied to the Supreme Court of Western Australia for the following declarations about Duro's Interim Subcontract claims:

- The claims were within the scope of the Interim Subcontract jurisdiction agreement.
- The proper forum for determining the claims was the Supreme Court of Western Australia.
- The parties had not agreed to resolve the claims by arbitration.

In response, Duro applied for a stay of proceedings under section 7(2) of the *International Arbitration Act 1974 (Cth)* ("Act") or Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), or pursuant to the inherent power of the Court.

Interpretation of the Contracts

The Court considered whether the Interim Subcontract contained a (further) arbitration agreement by incorporating the terms of the first subcontract's arbitration clause (as modified by the Interim Subcontract). In the context of the language of the Interim Subcontract, this depended on whether the arbitration clause was inconsistent with the Interim Subcontract jurisdiction clause, which was a matter of construction.

The Court summarised the approach to the construction of arbitration agreements under Australian law as follows:

- Commercial parties will be presumed to have intended to resolve all disputes arising out of the same or related subject matter in the same forum.
- Where a risk of fragmentation of resolution of disputes arises from the clear terms of an agreement or agreements, these terms must be given effect.
- Whether a jurisdiction clause is inconsistent with and supersedes an earlier arbitration agreement is a question of construction.

The Court found that the Interim Subcontract jurisdiction clause could be read in a way that is compatible with the arbitration agreement. In particular, the "proceedings" that were the subject of the jurisdiction agreement could be read as referring to Court proceedings that are permissible under the arbitration agreement. Further, the jurisdiction clause was non-exclusive and therefore did not purport to specify how all differences and disputes were to be resolved.

The Court adopted this construction as it had commercial convenience in its favour. A different interpretation would have resulted in a fragmentation of dispute resolution methods, given that the Interim Subcontract provided for Duro to continue a subset of the works that were the subject of the original subcontract. The Court's approach to this question is founded on well-settled principles and is likely to be entirely unsurprising to those familiar with this area of law.

Declaratory Relief

The Court addressed the question of whether it had jurisdiction to grant the declaration sought by Samsung. The Court referred to the general sources of its power to make declarations and noted the *kompetenz-kompetenz* principle, including as reflected in the Model Law, before stating:

Neither the Act nor the Model Law has removed the jurisdiction of the court to grant declaratory relief in relation to the existence of an arbitration agreement. The court has jurisdiction to grant the declaratory relief sought by Samsung. Declaratory relief is discretionary.

This raises a question that is not directly discussed in the Court's reasons, namely: is jurisdiction to grant declaratory relief in relation to the existence of an arbitration agreement compatible with Article 5 of the Model Law? That Article provides: "In matters governed by the Model Law, no court shall intervene except where so provided by the Model Law".

For now, the decision appears to give rise to some uncertainty about whether the Court has an inherent jurisdiction to intervene in arbitration. It remains to be seen whether, following this decision, other parties finding themselves in an unhappy arbitral predicament seek to invoke the inherent jurisdiction of Australian courts.

Stay

Duro's application for a stay turned on whether the matter before the Court was within the scope of an arbitration agreement. More specifically, the critical question was whether the Interim Subcontract contained an arbitration agreement. If it did, "the Duro Claims [would] clearly fall within" the scope of the arbitration agreement.

The Court approached this question by adopting a "full merits" approach (reaching a final view on the question), rather than a *prima facie* approach. The latter approach would have involved the Court carrying out only a *prima facie* review of the existence and scope of the arbitration agreement and leaving a final decision on these questions to the arbitral tribunal.

The "full merits" approach represents a relatively broad understanding of the Court's role in arbitration, as it entails the Court making the first decision on the arbitral tribunal's jurisdiction, and doing so without deference to the decision of the tribunal. In this respect, the full merits approach entails a narrower view of *kompetenz-kompetenz/compétence-compétence*.

While the question is by no means settled, the weight of authority among the more significant Model Law jurisdictions, particularly in Southeast Asia, appears to favour a *prima facie* assessment of both existence and scope in the context of a stay application under Article 8 of the Model Law. However, his

Honour preferred English decisions following the full merits approach. In this respect, the decision seems an exception to two general trends: toward convergence in the interpretation of the Model Law in different jurisdictions and toward greater authority to arbitral tribunals and less court intervention.

One possible difficulty for parties following this decision is the risk of inconsistency between a judgment on a stay application under Article 8, and a decision on jurisdiction of the arbitral tribunal and the Court at the seat under Article 16(3). While the judgment does not address this issue in the context of the stay application, His Honour said in another context that there was no risk of such inconsistency because "no relief is sought against the arbitrators nor is any declaration as to the scope of the arbitrator's jurisdiction being pursued" in the arbitral proceedings. The Court also took the view that, because Western Australian law applies, a "decision by this court would be of assistance to the High Court of Singapore" in any challenge to the tribunal's ruling on jurisdiction.

In summary, the Court's adoption of the "full merits" approach entails a relatively broad role for the Court in arbitral proceedings. For parties to arbitration agreements having some connection with Western Australia, but with a seat in another jurisdiction, this has the potential to create additional procedural complexity and cost.

Conclusion

The Court's approach to interpreting arbitration and jurisdiction agreements confirms well-established principles. In contrast, the decision reflects a relatively wide view of the Court's role in international commercial arbitration, potentially at some expense to the arbitral tribunal's power to decide its own jurisdiction, and of the powers of the courts at the arbitral seat to review such a decision. Following the decision, parties to international arbitral proceedings (or at least those with a connection to Western Australia) may well consider raising challenges to jurisdiction before Australian courts outside the usual procedures for doing so under the Model Law, either as an alternative, or in addition, to doing so before the arbitral tribunal.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Simon Bellas

Perth

+61.8.6214.5711

sbellas@jonesday.com

Stephen McComish

Perth

+61.8.6214.5710

smccomish@jonesday.com

Kenneth P. Hickman

Perth

+61.8.6214.5742

khickman@jonesday.com

Kristian Maley

Perth

+61.8.6214.5720

kmaley@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.