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Reaching A Settlement Before the Arbitration Hearing

Darius Chan (Norton Rose Fulbright)/March 3, 2011 /Leave a comment
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Will a court injunct arbitral proceedings if parties, before an arbitration hearing, allegedly reach a settlement agreement and a dispute subsequently arises over the existence of such an agreement? Is the tribunal *functus*?

Recently, the Singapore High Court in ***Doshion Ltd v Sembawang Engineers and Constructors Pte Ltd*** [2011] SGHC 46 ("*Doshion*") rightly held that no injunction would lie in such an instance. It is a decision to be welcomed.

In that case, the two parties were parties to arbitration proceedings under certain construction contracts ("the Sub-Contracts"). The arbitration was scheduled to start on 28 February 2011. The claimant contended that an oral settlement was reached between the solicitors for the parties on 15 February 2011 and the arbitration proceedings should be terminated as of that date. The defendant denied the existence of any settlement.

The defendant characterised the claimant's argument as one where the tribunal had become *functus officio* because of the settlement. The defendant cited a recent English High Court decision of ***Martin Dawes v Treasure & Son Ltd*** [2010] EWHC 3218 ("*Dawes*") and contended that the issue of whether an arbitrator was functus went to the jurisdiction of the arbitrator, which was a matter for the arbitrator to decide.

In finding for the defendant, the Singapore High Court's reasoning was built on three pillars:

(a) the arbitrator was not *functus* since the tribunal had not even begun to hear the dispute;

(b) adopting the commercially sensible approach in ***Fiona Trust & Holding Corp v Privalov*** [2007] UKHL 40, that an dispute over the existence of an settlement agreement would be caught by the ambit of the arbitration agreement in the Sub-Contracts; and

(c) in any event, any dispute about the scope of an arbitration agreement was a matter for the arbitral tribunal based on the doctrine of *kompetenz-komptenz*.

It was not strictly necessary for the defendant to characterize the plaintiff's argument as one relating to *functus officio* – the plaintiff faced an uphill task from the get go. Section 6 of Singapore's International Arbitration Act (the Act incorporates the Model Law) requires a court to refer the dispute to arbitration

unless the agreement was “null and void, inoperative or incapable of being performed”. In ***Tjong Very Sumito v Antig Investments Pte Ltd*** [2009] SGCA 41, the Singapore Court of Appeal astutely held that in line with its prevailing philosophy of judicial non-intervention in arbitration, the Court would interpret the word “dispute” in Section 6 broadly, and would readily find that a dispute existed unless the defendant had unequivocally admitted that the claim was due and payable. In circumstances where the defendant prevaricates (*ie*, first making an admission and then later purporting to deny the claim on the ground that the admission was mistaken, or fraudulently obtained, or was never made), the matter would ordinarily still be referred to arbitration. The Court’s approach is commendable in giving full effect to the parties’ specified mode of dispute resolution.

When we apply this reasoning to *Doshion*, whether any alleged settlement was reached before or during the arbitral hearing would not, as a matter of principle, affect the question of which fora decides whether the settlement exists. It is important to ask the right question. That question is whether the underlying dispute remains unresolved. Any settlement would be in relation to the underlying dispute arising out of the Sub-Contracts. Accordingly, any dispute about the settlement originates from the underlying dispute. To answer the question, any dispute about the settlement means that the underlying dispute remains unresolved. So unless the defendant unequivocally admits the claim or acknowledges that there has been a settlement such that there is no longer a dispute, the Court will refer the matter to arbitration. Conceptually, since any prevarication by the defendant on the admission of the claim would be a matter to be referred to arbitration, any prevarication by the defendant on the settlement of the claim must have the same outcome.

This reasoning based on first principles would have been sufficient to dispose of *Doshion*. The claimant did not, and presumably could not, show that there had been a waiver of the arbitration agreement or an agreement to end the tribunal’s jurisdiction.

The going only gets tougher for the claimant if it embarks on the *functus officio* route. Akenhead J in *Dawes* rejected the argument that a tribunal becomes *functus* once a settlement has been reached during arbitral proceedings.

In *Dawes*, the claimant (Dawes) engaged a contractor (Treasure) to carry out construction works at his country estate. Disputes arose and Treasure commenced arbitration proceedings before Mr Ian Salisbury. After the parties had pleaded their respective cases, they agreed upon a settlement. However, the scope of the settlement was not documented in a consent order or final award. Subsequently, Dawes issued his own arbitration notice in respect of related disputes but appointed a different arbitrator. Treasure asked Mr Salisbury to rule

that he retained jurisdiction in relation to the "new" dispute, and that it had been compromised by the settlement agreement. The first arbitrator ruled in favour of Treasure on both points, which was challenged by Dawes on the ground that Mr Salisbury was already *functus officio* after the settlement.

In dismissing Dawes' application, Akenhead J relied on, *inter alia*, Section 51 of the English Arbitration Act 1996. Section 51 provides that if parties settle the dispute during arbitral proceedings, the tribunal shall terminate the substantive proceedings and, if so requested, produce a consent award. Accordingly, Akenhead J held that the settlement of a dispute after it had been referred to arbitration, but before any final award, did not generally bring an end to the arbitrator's jurisdiction and make him functus officio. Even if the dispute was settled "there remains a jurisdiction to terminate the substantive proceedings and to resolve issues of costs or any other matters in dispute". That jurisdiction was otherwise not statutorily limited, and neither did parties preclude or limit such jurisdiction in their settlement.

Akenhead J also observed that Mr Salisbury "would undoubtedly still have retained jurisdiction if there had been an issue between the parties as to whether there was any settlement at all. He would still have been the arbitrator to resolve the underlying disputes which would include ruling upon a defence that the claim had been settled."

The Model Law's counterpart of Section 51 of the English Arbitration Act is found in Article 30 which deals specifically with settlement. The lesson taught by the two cases highlighted here is that if a party wants to put an end to a tribunal's jurisdiction immediately after settlement, it will generally have to show an agreement to end the tribunal's jurisdiction, whether as part of the settlement itself or as a separate agreement. Unfortunately for the claimant in *Doshion*, there is no shortcut.

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