RECOGNITION OF FOREIGN MERGERS UNDER AUSTRALIAN LAW: THE SAMSUNG C&T AND CHEIL INDUSTRIES MERGER

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Legal Briefings – By **Shane Kyriakou** and **Nick Baker**

SUMMARY

- As a matter of private international law, the status of an entity will usually be governed by the law of the country of that entity's incorporation.
- Foreign mergers may be recognised by Australian courts where the transaction involves one company ceasing to exist as a legal person and another company (a 'universal successor') taking on all rights and obligations of the former.
- Complex cross border mergers require expert legal advice in the 'home' jurisdiction and all material jurisdictions where the merging companies conduct their business.

Unlike certain United States, EU and other jurisdictions, Australia has no true merger regime where two or more entities can merge with certain entities ceasing to exist as legal persons and the 'surviving' entity continuing with all of the rights and obligations of the entities that merged into it.

Despite that, Australian entities dealing with foreign companies may encounter the effects of a foreign merger. Herbert Smith Freehills has, for example, been advising Samsung C&T in relation to English and Australian aspects of its US$8b Korean law merger with Cheil Industries and has subsequently represented the merged Samsung entity in two important and successful proceedings in the Supreme Court of Western Australia.

THE KOREAN MERGER

On 1 September 2015, Samsung C&T and Cheil Industries merged under the Korean Commercial Code (**KCC**). Under the KCC, a merger is a transaction between two or more entities after which only one entity will survive. The KCC provides that "*a surviving company or a company newly incorporated in consequence of a merger shall succeed to the rights and obligations of the company which disappeared*". The KCC has some exceptions, for example, a surviving entity may not succeed to particular rights or obligations. In the case of Samsung C&T and Cheil Industries, the merger was one in which no exceptions applied and the surviving entity, Cheil Industries, succeeded to all of the rights and obligations of Samsung C&T which disappeared.

THE CASES IN THE SUPREME COURT OF WESTERN AUSTRALIA

Following the Korean merger, two of the merged Samsung entity's counterparties have challenged the recognition of the merger by Australian law as a means to resist paying out construction bonds in the Supreme Court of Western Australia:

- *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2015] WASC 484, an application by Duro to restrain Samsung from calling certain bonds issued by Duro to secure the performance of the now defunct Forge Group's obligations as a subcontractor on the Roy Hill iron ore project, and
- *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASC 49, an application by Laing O'Rourke similar in nature to the Duro application.

In both the Duro and Laing O'Rourke cases the court recognised the doctrine of universal succession as set out in the landmark House of Lords case *Bank of Greece and Athens v Metliss* [1958] AC 509. The Supreme Court of Western Australia made the following important comments:

- "*it may be provided by the law of the place of incorporation that on one company ceasing to exist as a legal person, another company shall become the universal successor to the totality of the first company's rights and obligations*",
- "*New [Samsung C&T]'s succession to the rights of Old [Samsung C&T] under the contracts occurs by operation of law and no separate assignment or other contractual or legal steps are needed for such succession to take effect*", and

- "*The succession was 'the very essence' of the merger transaction and an 'essential incident' of the creation of New Samsung. Both the existence and the rights and liabilities of the merged entity are therefore issues as to its 'status', which must be determined by reference to the law of New Samsung's domicile, the law of the Republic of Korea*".

The Duro matter has been appealed to the Court of Appeal of Western Australia.

COMMENTARY - DEALING WITH FOREIGN COUNTERPARTIES

With the increasing globalisation of business, Australian companies are frequently entering into contracts with foreign entities. In many cases, this will make perfect sense, particularly where the foreign entity provides better credit than an Australian subsidiary. It will become increasingly important for Australian companies to understand the laws that their foreign counterparties operate under and the means by which they can obtain greater certainty in their contracts.

With offices in over 20 jurisdictions, Herbert Smith Freehills is a global law firm experienced in the structuring, negotiation and execution of cross border M&A transactions and advising on the effects of those transactions.

MORE INFORMATION

For information regarding possible implications for your business, contact Shane Kyriakou or Nick Baker.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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