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A welcome decision from Singapore: the second *Persero* case*

PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia),¹ a recent judgment of the Singapore High Court (HC) enforcing a 'binding' but not 'final' decision of a dispute adjudication board (DAB) under the FIDIC Conditions of Contract for Construction 1999 (the 'Red Book'), is to be welcomed because it: (1) emphasises the importance, when interpreting the FIDIC disputes clause, of facilitating the cash flow of contractors; and (2) rejects the contention that failure to comply with a 'binding' but not 'final' decision is to be interpreted as giving rise to a separate dispute from the dispute underlying the DAB decision.

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The new case ('*Persero II*') is a successor to a case between the same parties, *CRW Joint Operation (Indonesia) v PT Perusahaan Gas Negara (Persero) TBK* ('*Persero I*'), in which the HC² and later the Singapore Court of Appeal (CA)³ had set aside a final award of an International Chamber of Commerce (ICC)

tribunal enforcing the same 'binding' but not 'final' decision of a DAB that is involved in the new case.⁴

Accepting guidance from the CA in *Persero I*, CRW Joint Operation, an Indonesian entity (CRW), began in 2011 a second ICC arbitration against PT Perusahaan Gas

Negara (Persero) TBK (PGN), an Indonesian company, in which CRW requested a partial or interim award to enforce the same 'binding', but not 'final', decision of the DAB as in *Persero I*. CRW maintained that it would continue in the same arbitration to seek a final award on the merits of the claims underlying the DAB decision.⁵

A majority of the arbitral tribunal issued an interim or partial award compelling PGN to comply with the DAB decision, which PGN then sought to have set aside under the Singapore International Arbitration Act (IAA).⁶ After a careful analysis of the disputes clause in the Red Book, subclauses 20.4 to 20.7, the HC dismissed PGN's setting aside application.

The Red Book's disputes clause

The HC in *Persero I* had found⁷ that the failure by a party to comply with a binding, but not final, DAB decision gave rise, under clause 20 of the Red Book, to a dispute separate from the dispute that had formed the subject matter of the DAB decision. If it gave rise to a separate dispute then it should be the subject of a separate reference to the DAB for decision under subclause 20.4, a separate notice of dissatisfaction with that decision under that subclause and a separate attempt at amicable settlement under subclause 20.5, before that dispute could be referred to arbitration.

While the CA had not adopted this theory,⁸ nevertheless the HC began its analysis by distinguishing between: (1) the parties' underlying dispute which formed the subject matter of the DAB decision (the 'primary dispute'); and (2) the dispute which arose from PGN's failure to pay CRW pursuant to the DAB decision (the 'secondary dispute').⁹

The HC then referred to the issue before it as being whether CRW was entitled to enforce the DAB decision by way of an interim award, which is final and binding, without the tribunal having first to determine the underlying merits of the DAB decision.¹⁰

The purpose of the Red Book's disputes clause

The HC noted that the dispute-resolution regime contained in subclauses 20.4 to 20.7 has two objectives:

'First, they establish arbitration as the sole method for the parties to resolve their disputes with finality [...]. Second, they establish a contractual security of payment regime, intended to be available to the

parties even if no statutory regime exists under the applicable law'.¹¹

The HC then described the purpose of security of payment regime:

'The central purpose of a security of payment regime is to facilitate the cash flow of contractors in the construction industry. Contractors invariably extend credit to their employer by performing services or providing goods in advance of payment. Contractors are also almost invariably the party in the weaker bargaining and financial position as compared to their employer. A payment dispute between an employer and a contractor takes time and money to settle on the merits and with finality. Doing so invariably disrupts the contractor's cash flow. That disruption can have serious and sometimes permanent consequences for the contractor. That potential disruption gives the employer significant leverage in any negotiations between the parties for compromise. If the contractor's payment claim is justified, that disruption and its consequences for the contractor are unjustified. [...]

'A security of payment regime addresses the imbalance between contractor and employer. Its driving principle is the aphorism "pay now, argue later". When a dispute over a payment obligation arises, the regime facilitates the contractor's cash flow by requiring the employer to pay now, but without disturbing the employer's entitlement (and indeed also the contractor's entitlement) to argue later about the underlying merits of that payment obligation [...].'¹²

The HC then noted that a security of payment regime has three essential features:

- '(a) First, it establishes a quick and relatively inexpensive procedure by which a contractor can secure from a neutral body a binding interim adjudication of its right to receive a disputed payment.
- (b) Second, it gives a successful contractor a quick and relatively inexpensive way of compelling a recalcitrant employer to comply with the interim adjudication.
- (c) Third, it ensures that the interim adjudication does not in any way preclude the parties from, in the fullness of time, arriving at a resolution of their payment dispute on its merits and with finality.'¹³

The HC then found that the Red Book gave effect to this philosophy:

'There is a clear contractual intent in the Red Book's security of payment regime to implement the three essential features I have identified [...] and to compel an obligor to pay now and argue later. The DAB is the neutral body empowered to make the interim adjudication. Clause 20.4[4] obliges an employer who has failed before the DAB to pay now. Most importantly for present purposes, cl 20.4[4] gives the contractor a correlative right to be paid now, without waiting for the final dispute to be resolved with finality. This is a substantive contractual right in and of itself. It is this right which forms the foundation of the secondary dispute. Clauses 20.6[2] and 20.6[3] permit the parties to argue later. Clause 20.4[7] makes the DAB decision final if neither party gives notice of dissatisfaction within 28 days.'¹⁴

The HC then stated that one can adopt either a 'two-dispute' approach (as the HC had done in *Persero I*) or a 'one-dispute' approach to subclauses 20.4 to 20.7.¹⁵

The two-dispute/one-dispute issue

The two-dispute approach

The HC found that 'the clearest indication' in favour of the two-dispute approach is subclause 20.7 (which applies to 'final and binding' decisions), as it is drafted on the basis that the secondary dispute is a distinct dispute, which can be referred to arbitration separately. Subclause 20.7 creates 'an express shortcut to arbitration' by exempting the contractor from the three conditions precedent to arbitration in subclauses 20.4 and 20.5, namely, the conditions to refer a dispute to a DAB, to give a notice of dissatisfaction and to attempt amicable settlement.¹⁶ The exemption from these stages would not be necessary, the HC stated, unless subclause 20.7 adopted the two-dispute approach.¹⁷

However, the HC noted two major difficulties. First, where a DAB decision is *not* final, the Red Book provides no shortcut to arbitration of the secondary dispute which is equivalent to subclause 20.7, implying that a contractor holding a non-final DAB decision must comply with the above three conditions precedent to arbitration, in


addition to having to do so in respect of the primary dispute. The HC noted that:

'This delay upon delay is directly opposed to the intent of any security of payment regime to give the contractor a quick means of compelling the employer to "pay now".'¹⁸

Secondly, a contractor who attempts to pursue, as a separate dispute, a secondary dispute which arises from a non-final DAB decision will

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find itself 'enmeshed in an infinite recursive loop'¹⁹ which the HC described as follows:

'Only a "dispute *in respect of which* the DAB's decision (if any) has not become final" comes within cl 20.6[1] [...] Those words envisage that *every* "dispute" which goes to arbitration under cl 20.6 must be preceded by a DAB decision *in respect of that* "dispute". That appears to be so whether the dispute is in respect of the employer's breach of a primary obligation under the Red Book or of its secondary obligation to give prompt effect to a DAB decision. [...]

On the two-dispute approach, so long as an employer serves successive notices of dissatisfaction – whether for tactical or genuine reasons – the contractor has an obligation to refer the

successive secondary disputes which arise once again to the DAB. The result of adopting the two-dispute approach therefore is to compel the contractor to secure an infinite series of DAB decisions, each of which is not complied with, but none of which gets the contractor any closer actually to commencing an arbitration to compel the employer to "pay now".²⁰

The HC also concluded that:

'Applying the two-dispute approach to a non-final DAB decision is thus inconsistent with the "pay now" feature of a security of payment regime. It is also inconsistent with the "argue later" feature of a security of payment regime. [...]

The difficulty arises because cl 20.6 gives the employer and the tribunal the right to open up the DAB decision in *every* arbitration, even one which is concerned *only* with the secondary dispute. Thus cl 20.6[2] gives the arbitral tribunal the express power to open up, review and revise a decision of the DAB. Further, cl 20.6[3] gives the parties the liberty to raise before the tribunal evidence or arguments which were not put before the DAB or which do not appear in the notice of dissatisfaction.'²¹

The HC therefore found that, for the Red Book's security of payment regime to work, there must be no possibility of inquiry into the primary dispute when a tribunal considers the secondary dispute alone. In that situation, the HC stated that the second and third paragraphs of subclause 20.6²² fail to ensure the deferral of arguments on the merits of the primary dispute.²³

In conclusion, as to the two-dispute approach, the HC found that:

'Adopting the two dispute approach, in light of the drafting of cll 20.4 to 20.7, makes it far too easy for an employer to frustrate the "pay now" aspect of the security of payment regime and to claim legitimately that settling the secondary dispute alone with finality without hearing the employer on the merits of the primary dispute precludes it from "arguing later" about the primary dispute.'²⁴

The one-dispute approach

The HC found that the one-dispute approach permits the drafting of the Red Book's dispute-resolution regime to be reconciled with its 'contractual intent to create a working security of payment regime'.²⁵ The HC stated that:

'The starting point for the one-dispute approach is that the Red Book's dispute-resolution regime could not have intended

"dispute" in cl 20.4[1] to be given a recursive definition with the attendant unworkability [...]. The one-dispute approach therefore interprets "dispute" as meaning *only* a primary dispute: a dispute about the parties' primary obligations under their contract. "Dispute" does not mean a subsidiary dispute which arises *within* or *about* the dispute-resolution regime once it is invoked. In short, on the one-dispute approach, "dispute" does not mean a dispute about a dispute. That

type of second-order dispute is merely a subsidiary aspect of the primary dispute and is to be subsumed in and resolved in the very same dispute-resolution procedure invoked to resolve the primary dispute.

On the one-dispute approach, therefore, once a party refers the primary dispute to the DAB under cl 20.4[1], that is the one and only “dispute” within the meaning of and for the purposes of the Red Book’s dispute-resolution regime. That remains the position even after the DAB has rendered its interim adjudication on the primary dispute and even if one or both parties issue notices of dissatisfaction with that decision. The parties’ dissatisfaction with the DAB’s decision on the primary dispute is simply another aspect of that primary dispute. So too if a recalcitrant employer breaches its obligation to give prompt effect to that DAB decision under cl 20.4[4], that breach is simply another aspect of that primary dispute. That breach, and the secondary dispute it gives rise to, is not a separate “dispute” within the meaning of cl 20.4[1].²⁶

The HC noted that since the secondary dispute is not a separate dispute within the scope of

subclause 20.4, it goes straight to arbitration because it is an integral part of the primary dispute, and the conditions precedent for the primary dispute have been satisfied.²⁷

The main difficulty with the one-dispute approach, the HC said, arises because subclause 20.7 adopts the two-dispute approach.²⁸ The only way to avoid this interpretative difficulty, the HC concluded, is simply ‘to ignore its implications’ when analysing the position of a contractor holding a non-final DAB decision.²⁹

The HC’s conclusion

Adopting the one-dispute approach and applying it to non-final DAB decisions, the HC found, gives effect to the essential features of the parties’ contractual security of payment regime.³⁰

‘First, [...] the one-dispute approach prevents the contractor becoming trapped in an infinite recursive loop.’³¹

Second, the one-dispute approach acknowledges that cl 20.6 envisages *one* arbitration arising out of *one* DAB decision which settles with finality all aspects of the parties’ dispute, comprising both the primary dispute and the secondary dispute. [...]’³²

Third, in the absence of any contractual indication, the one-dispute approach indicates with clarity when in an arbitration an employer may legitimately invoke cl 20.6[2] and 20.6[3] and when it may not. [...] [U]nder the one-dispute approach the employer can invoke cl 20.6[2] and 20.6[3] only when the tribunal determines with finality the *primary* dispute, but not otherwise. [...]’³³

Fourth, the one-dispute approach prevents an employer from behaving tactically and raising the spectre that compelling it to “pay now” on the secondary dispute will somehow preclude it from “arguing later”

on the primary dispute. If it is the same tribunal in the same arbitration which will determine both the primary and the secondary dispute with finality, no unfair or unjust preclusion could conceivably arise on the primary dispute.’³⁴

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The arbitration

As stated above, the majority of the arbitral tribunal, taking the view that CRW’s arguments reflected better the intention underlying the Red Book’s dispute-resolution regime,³⁵ held that PGN was obliged immediately to pay the amount of the DAB decision.

The HC approved the majority’s award, stating:

‘The majority thereby upholds the parties’ agreed security of payment regime, as expressed by their choice to contract on the Red Book form. It has issued an award which, it believes, gives effect to the interim finality of the DAB decision by compelling PGN to “pay now” without precluding it from “arguing later”. On the majority’s view, therefore, nothing in its interim award precludes the same tribunal from determining the primary dispute on its merits and with finality in a future, final award even though both the interim award and the final award are ultimately founded on the one dispute.’³⁶

Contrary to PGN's arguments,³⁷ in the HC's view, there was no inconsistency between the tribunal's interim award and the IAA.³⁸

Conclusion

The HC has contributed to a better understanding of the FIDIC disputes clause by interpreting this clause in light of its purpose – facilitating the cash flow of contractors in the construction industry – and by concluding, quite properly, that the one-dispute approach best furthers that purpose. While the HC's judgment has been appealed to the CA (Singapore's highest court), and the author of these lines is not a Singapore lawyer, he does not find PGN's arguments for setting aside the award to be convincing.

Notes

- * This is a much condensed version of an article on the same subject entitled 'Singapore Contributes to a Better Understanding of the FIDIC Disputes Clause: The Second Persero Case' published in the January 2015 issue of the ICLR. The views expressed herein are those of the author and not necessarily those of any firm or organisation with which he is affiliated. © Copyright 2015.
- 1 The judgment of the HC dated 16 July 2014, [2014] SGHC 146.
 - 2 [2010] SGHC 202.
 - 3 [2011] SGCA 33.
 - 4 The author has criticised the Singapore courts' decisions in *Persero I* in several earlier articles. See, for example, his 'How Not To Interpret The FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in *Persero*' [2012] ICLR 4.
 - 5 HC judgment, paras 13 and 103–107.
 - 6 The tribunal comprised Alvin Yeo, SC, Chairman, Neil Kaplan QC and David Bateson. Mr Bateson dissented.
 - 7 Possibly because CRW had itself (unwisely, in the author's view) characterised PGN's non-payment of the DAB's decision as a 'second' dispute (see the HC's judgment in *Persero I*, para 30).
 - 8 Correctly, in the author's view, see his 'How Not To Interpret The FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in *Persero*', [2012] ICLR 4, 8, especially footnote 28.
 - 9 HC judgment, para 6.
 - 10 HC judgment, para 15.
 - 11 *Ibid.* Statutory adjudication schemes for domestic construction disputes exist in Singapore, England, Australia, New Zealand and certain other common law jurisdictions.
 - 12 HC judgment, paras 23–24.
 - 13 HC judgment, para 25.
 - 14 HC judgment, para 33.
 - 15 HC judgment, para 37.
 - 16 HC judgment, para 43.
 - 17 *Ibid.*
 - 18 HC judgment, para 45.
 - 19 HC judgment, para 46.
 - 20 HC judgment, paras 46 and 47.
 - 21 HC judgment, paras 48 and 49.
 - 22 The second and third paragraphs of subclause 20.6 provide as follows: 'The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute. Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.'
 - 23 HC judgment, para 52. The HC also found that, as subclause 20.6 does not restrict the employer from invoking the second and third paragraphs of subclause 20.6, the employer must raise the primary dispute as a cross-claim or counterclaim in the arbitration as otherwise, apparently under the Singapore law of the 'doctrine of abuse of process' (or 'extended doctrine of *res judicata*'), it may be precluded from asserting that claim later. (HC judgment, paras 53(a) and 54.)
 - 24 HC judgment, para 57.
 - 25 HC judgment, para 58.
 - 26 HC judgment, paras 59–60.
 - 27 HC judgment, para 61.
 - 28 HC judgment, para 64.
 - 29 HC judgment, para 65.
 - 30 *Ibid.*
 - 31 HC judgment, para 71.
 - 32 HC judgment, para 72.
 - 33 HC judgment, para 73.
 - 34 HC judgment, para 74.
 - 35 HC judgment, para 113.
 - 36 HC judgment, para 115.
 - 37 HC judgment, paras 120–122.
 - 38 HC judgment, para 137.

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