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ENFORCEMENT OF DAB DECISIONS UNDER FIDIC CONTRACTS: PITFALLS AND SOLUTIONS – PT PERUSAHAAN GAS NEGARA (PERSERO) TBK v. CRW JOINT OPERATION [2010] SGHC 202

Paul Teo
Consultant of Hogan Lovells Lee & Lee, Singapore

Introduction

Those who are engaged in international project contracting will no doubt be familiar with the FIDIC[i] forms of contracts and the requirement therein for disputes to be referred to a Dispute Adjudication Board ("DAB")[ii] for its decision in the first instance. One of the potentially difficult issues in this area relates to the enforcement of a DAB decision by means of arbitration. Many have found this issue problematic and it would appear to us that a large part of the problem may be due to the fact that the wording and significance of the relevant FIDIC provisions are not always fully understood. In the recent decision of *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2010] SGHC 202* ("PGN case"), the Singapore High Court had the opportunity to consider this issue. This brief note will touch upon the key aspects of the PGN case and highlight both the potential pitfalls posed by the language of the relevant FIDIC provisions and the practical solutions that may be adopted to avoid the problems.

Background of Case

Under a contract which was based upon the FIDIC Conditions of Contract for Construction (1st Edition, 1999) ("1999 Red Book") but with modifications, PT Perusahaan Gas Negara (Persero) TBK ("PGN") engaged CRW Joint Operation ("CRW") to design, procure, install, test and pre-commission a pipeline and an optical fibre cable in Indonesia ("Contract"). While the Contract was being performed, a dispute arose between the parties over certain variation order proposals and requests for payments submitted by CRW.

Pursuant to Clause 20.4 (see excerpts below)[iii], the parties referred the dispute to a DAB which had been appointed. The DAB heard the dispute and made several decisions, all of which were accepted, save for one which required PGN to pay CRW the sum of US$17,298,834.57. In accordance with the Contract, PGN submitted a Notice of Dissatisfaction ("NOD") in respect of that decision. The matter remained unresolved and CRW subsequently brought an arbitration against PGN in an attempt to enforce the DAB decision. Following a hearing which was conducted before an arbitral tribunal comprising three arbitrators, a majority final award was rendered holding that the DAB decision in question was binding and that PGN had an obligation to make immediate payment for the sum of US$17,298,834.57 to CRW.

CRW subsequently took out an application before the High Court of Singapore to register the award as a judgment in Singapore. In response, PGN applied to Court to set aside the registration order. PGN also applied to Court to set aside the arbitral award pursuant to Section 24 of the Singapore International Arbitration Act and Article 34(2) of the UNCITRAL Model Law.

The Decision

The Court found in favour of PGN and set aside the award which had been obtained by CRW under Article 34(2)(a)(iii) of the UNCITRAL Model Law.

In reaching its decision, the Court discussed the fundamental distinction between an arbitration contemplated under Clause 20.6 and one contemplated under Clause 20.7, as follows:

- Clause 20.7 is confined to that narrow category of cases where a DAB decision had become "final and binding" - meaning that neither party had submitted an NOD after the receipt of the DAB decision and the unsuccessful party had failed to comply with that decision - and such a "final and binding" decision is sought to be enforced against the non-complying party by means of arbitration. This provision does not involve an enquiry into the merits of the DAB decision. There is a "lacuna" in that Clause 20.7 does not confer any right on a successful party to bring an arbitration against an non-complying party for a DAB decision that is merely "binding" (as opposed to "final and binding"); and

- On the other hand, Clause 20.6 sets out the procedure for parties to bring a "fresh" arbitration which will be decided on the merits. An arbitration under Clause 20.6 will have to be referred to a DAB in the first instance for its decision.

The Court held that:

- In seeking to enforce the DAB decision against PGN by means of arbitration, CRW had erroneously conflated the provisions of Clause 20.6 and Clause 20.7;

- Given that an NOD had been submitted by PGN, the DAB decision in question was not "final and binding" (though it was "binding") and hence, Clause 20.7 did not apply;

- The real dispute was whether the DAB decision in question was correct and consequent to that, whether CRW was entitled to payment of the amount that the DAB had decided was due and payable by PGN. CRW however tried to limit the dispute to whether payment of the said sum should be made immediately and in so doing, CRW wrongly relied on Clause 20.6 and failed to satisfy the following requirements under Clause 20.6:

  - the matter had to be referred to the DAB for its decision in the first instance;

  - the arbitral tribunal (which is vested with the "full power" under Clause 20.6 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") had to review the merits of the DAB decision and then either confirm or revise the correctness of that decision;

- In the circumstances, given that neither of the above requirements had been met, the majority tribunal had exceeded its powers by rendering a final award on a dispute which had not been referred to the DAB for its decision and which was outside of the scope of the parties' arbitration agreement as contained in the Contract. Accordingly, the majority award was set aside under Article 34(2)(a)(iii) of the UNCITRAL Model Law; and

- The Court also held, obiter that it would be possible for a successful party such as CRW to rely upon Clause 20.6 to obtain an interim or provisional award, pending a final determination of the dispute at large, as a means of enforcement. On the facts, however, CRW had not sought an interim or provisional award and the majority tribunal had also proceeded to render a final award in the matter.

Commentary

The PGN case provides a timely reminder of the fundamental yet often overlooked distinction between Clause 20.6 and Clause 20.7. Whether a DAB decision should be enforced by means of arbitration under Clause 20.6 or Clause 20.7 will depend entirely on whether a valid NOD had been submitted and consequently, whether the DAB decision is "final and binding" (no NOD submitted) or merely "binding" (valid NOD submitted).

To summarise the position, a DAB decision may be enforced by means of arbitration under a FIDIC contract in one of two ways:

- Where the DAB decision is "final and binding", the party seeking to enforce the decision has to bring an arbitration against the non-complying party under Clause 20.7. The arbitral tribunal will not be required to review the merits of the DAB decision; and

- Where the DAB decision is merely "binding", the party seeking to enforce the decision has to bring an arbitration against the non-complying party under Clause 20.6. The arbitral tribunal must be asked to review the merits of the DAB decision and then either to confirm or revise that decision.

As can be seen from the PGN case, it is critical to ensure that the DAB decision is enforced by arbitration under the correct provision, so that the eventual award will be less susceptible to being challenged by the unsuccessful party and set aside by the Court.

For drafting purposes, it should be noted that the wording of Clause 20.7 of the 1999 Red Book (specifically the term "final and binding") has been retained in both the FIDIC Multilateral Development Bank Harmonised Edition forms published in 2005 (as amended in 2006) and 2010. To avoid the problem posed by "final and binding"

requirement, the wording of Clause 20.7 (or the corresponding provisions) could be amended so as to exclude the "final and binding" requirement altogether. One way to do this would be adopt the wording used under the FIDIC Conditions of Contract for Design, Build and Operate Projects (1st Edition, 2008) ("the Gold Book"), which provides as follows:

> "*In the event that a Party fails to comply with any decision of the DAB,* ***whether binding or final and binding****, then the other Party may, without prejudice to any other rights which it may have, refer the failure itself to arbitration under [Clause 20.8] for summary or other expedited relief, as may be appropriate.*" (bold emphasis added)

Finally, and as mentioned above, even if the "final and binding" requirement has been retained, it remains open for the successful party to rely upon Clause 20.6 to obtain an interim or provisional award, pending a final determination of the dispute at large. CRW did not pursue this option in the PGN case, but this is an approach that can potentially be adopted to overcome the "final and binding" requirement imposed by the wording of Clause 20.7.

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[i] Fédération Internationale des Ingénieurs-Conseils: the International Federation of Consulting Engineers.

[ii] Also termed "Dispute Board" in some of the FIDIC contracts.

[iii] Excerpts from the 1999 Red Book as follows, with bold emphasis added:

"*20.4 Obtaining Dispute Adjudication Board's Decision*

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

...

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. **The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below**. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*] neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties."

"20.6 *Arbitration*

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,

(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and

(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 *[Law and Language]*.

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. … "

"20.7 *Failure to Comply with Dispute Adjudication Board's Decision*

In the event that:

(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*],

(b) the DAB's related decision (if any) has become final and binding, and

(c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [*Arbitration*], Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference."