

Insight: Construction

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Singapore: The Second *Persero* Case*

A judgment of July 16, 2014 of the Singapore High Court enforcing a “binding” but not “final” decision of a dispute adjudication board under the FIDIC Conditions of Contract for Construction 1999 (the so-called “Red Book”) is to be welcomed.**

PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) emphasises the importance, when interpreting the FIDIC disputes clause, of giving effect to its intention to facilitate the cash flow of contractors, and denies that failure to comply with a “binding” but not “final” decision of a dispute adjudication board is to be interpreted as giving rise to a dispute separate from the one underlying the dispute adjudication board decision itself.

Known as *Persero II*, the new case is a successor to an earlier one between the same parties (*Persero I*). In *Persero I*, CRW Joint Operation had begun in 2009 an ICC arbitration against another Indonesian company, PT Perusahaan Gas Negara (Persero) TBK, for the sole purpose of giving prompt effect to a “binding” but not “final” decision of a dispute adjudication board. The arbitral tribunal had granted in 2009 the relief sought by CRW but the Singapore courts set aside its final award in 2011, holding that the arbitral tribunal was not entitled to enforce such a decision by way of a final award without addressing the merits in the same arbitration.

As a result, CRW Joint Operation began thereafter in 2011 a second ICC arbitration against PT Perusahaan Gas Negara (*Persero II*), requesting an interim award to enforce the same “binding”, but not “final”, decision of the dispute adjudication board as in *Persero I*, as well as a final award on the merits of the claims underlying the dispute adjudication board’s decision.

A majority of the arbitrators upheld CRW’s request and ordered PT Perusahaan Gas Negara, by an interim award, to pay the amount of the dispute adjudication board decision. The latter company then applied to have the award set aside.



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* A detailed article on this case entitled “Singapore Contributes to a Better Understanding of the FIDIC Disputes Clause: The Second *Persero* Case” will be published in the January 2015 issue of *The International Construction Law Review*. An adapted version of the condensed article herein was published in the November 10, 2014 issue of *Global Arbitration Review*.

** A “binding” dispute adjudication board decision is one with which a party has expressed dissatisfaction within 28 days of its being rendered, whereas a “final and binding” decision is one with which neither party has expressed dissatisfaction within that period.

The High Court's analysis

For the purposes of interpreting the FIDIC disputes clause, sub-clauses 20.4 to 20.7, the Singaporean High Court noted that it established a security of payment regime, which is designed:

"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 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 [in arbitration] about the underlying merits of that payment obligation [...]"

In *Persero I*, the High Court had found that the failure by a party to comply with a binding, but not final, dispute adjudication board decision gave rise, under clause 20 of the Red Book, to a secondary dispute separate from the primary dispute that had formed the subject matter of the dispute adjudication board decision (the two dispute approach).

If this were so, then the secondary dispute, and not just the primary dispute, would be subject to (1) a separate reference to the dispute adjudication board for a decision under sub-clause 20.4, (2) a separate notice of dissatisfaction with that decision under that sub-clause, and (3) a separate attempt at amicable settlement under sub-clause 20.5 before that dispute could be referred to arbitration.

In *Persero II*, the High Court rejected the two-dispute approach for two reasons:

First, where a dispute adjudication board decision is not final, the High Court said, the Red Book provides no shortcut to arbitration of the secondary dispute equivalent to the one in sub-clause 20.7 (that applies to "final and binding" decisions). This absence might be construed as implying that a contractor holding a non-final dispute adjudication board decision must comply with the above three conditions precedent to arbitration, in addition to having to do so in respect of the primary dispute. However, the High Court 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.""

Second, a contractor who attempts to pursue, as a separate dispute, a secondary dispute which arises from a non-final dispute adjudication board decision will find itself "enmeshed in an infinite recursive loop"; as under the literal wording of the FIDIC disputes clause:

"[...] On the two-dispute approach, so long as an employer serves successive notices of dissatisfaction the contractor has an obligation to refer the successive secondary disputes which arise once again to the [dispute adjudication board]. The result of adopting the two-dispute approach therefore is to compel the contractor to secure an infinite series of [dispute adjudication board] 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.""

Thus, the two-dispute approach is inconsistent, the High Court found, with both the "pay now" and "argue later" feature of a security of payment regime.

On the other hand, the High Court 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." Since, under this approach, the secondary dispute is not interpreted as being a separate one, it goes straight to arbitration because it is an integral part of the primary dispute, for which the conditions precedent to arbitration will have already been satisfied. Accordingly, the High Court upheld the interim award of the majority of the arbitrators.

Facilitating cash flow

The High Court 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 that the one-dispute approach best furthers that purpose. While the court's judgment has been appealed, PT Perusahaan Gas Negara's arguments on appeal do not appear convincing.

Case reference:

PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) [2014] SGHC 146