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Commentary

Singapore Court Should Not Have Set Aside ICC Award Enforcing Dispute Adjudication Board Decision

By
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[Editor's Note: Chris Seppälä is a partner in White & Case LLP, Paris, and Special Advisor to the FIDIC Contracts Committee. *Responses are welcome.]*

On July 13, 2011, the decision of the Singapore High Court in PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation, No. [2010] SGHC 202, which was reported in the August 2010 issue of MEALEY's International Arbitration Report, ("Singapore Justice Sets Aside Award Ordering Payment of $17 Million", Vol. 25, #8), was endorsed by the Singapore Court of Appeal (CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33). The result is that a perfectly sound award of an ICC arbitral tribunal enforcing a Dispute Adjudication Board (DAB) decision in favor of a contractor under the FIDIC Conditions of Contract for Construction, 1999 (the "Red Book") has been definitively set aside in Singapore on the basis of reasoning which the author suggests, with respect, is flawed in several respects.

I. The Facts

The case involved a contract between PT Perusahaan Gas Negara (Persero) TBK (PGN) a publicly owned Indonesian company, as employer, and CRW Joint Operation (CRW), as contractor, for the construction of a pipeline. The contract was based on the Red Book and was governed by Indonesian law. A dispute arose between the parties about the value of thirteen "Variation Order Proposals" (VOPs) submitted by CRW. The parties referred the dispute to a single person DAB, which valued the VOPs at US$ 17,298,834.57 and ordered PGN to pay them. PGN issued a notice of dissatisfaction with the DAB decision and refused to pay the sum.

CRW subsequently filed a Request for Arbitration with the ICC seeking to oblige the PGN to "promptly give effect" to the "binding" DAB decision, in accordance with Sub Clause 20.4 of the Red Book. The place of arbitration was Singapore. The majority of the arbitral tribunal (chairman Alan J. Thambiayah and co-arbitrator Neil Kaplan CBE QC SBS) found that CRW was entitled to immediate payment of the sum and that the DAB decision was binding on, and to be given immediate effect by, the parties. The other co-arbitrator, H. Priyatna Abdurrasyid, issued a dissenting opinion on separate grounds.

As reported in the August 2010 issue of this publication, PGN then sought, and was granted, an order from the Singapore High Court setting aside the award in Singapore. The Singapore Court of Appeal upheld that decision, although it relied on slightly different grounds from those relied on by the High Court.

II. The Flaws

Both of the Singapore Courts were, regrettably, influenced by the ill-founded assumption that a "binding" decision of a DAB (that is, one that has been the subject of a notice of dissatisfaction) should not be enforced by arbitration due to the perceived "gap" in Sub-Clause 20.7. More specifically, the author maintains, with respect, that the Court of Appeal made no less than four errors in its reasoning.

First, it failed to understand what the arbitral tribunal was appointed to decide, as it misread the Terms of Reference for the arbitration. **Second**, it

misinterpreted Sub Clause 20.7 of the Red Book, as it failed to take account of the history of the clause. **Third**, it misinterpreted Sub Clause 20.6 of the Red Book as requiring a re hearing of the dispute on the merits and failed to appreciate that, as the employer had not filed a counterclaim, the arbitral tribunal could not, under the ICC Rules, grant the employer affirmative relief. **Fourth**, it misinterpreted the arbitral tribunal's final award as not adequately protecting the employer's right to commence a separate arbitration with respect to the merits of the DAB decision. The award, as drafted, was fully adequate to do so.

III. Conclusions

Although it is somewhat understandable that national courts may occasionally misinterpret an industry specific form of contract like the Red Book, it is less excusable for courts in a country that is seeking to be an international arbitration center, such as Singapore, to set aside an award because it misread the Terms of Reference in an ICC arbitration and failed to take account of the procedure for counterclaims provided in the ICC Rules. To that end, this case provides further reason why international construction disputes should be allowed to be settled finally by international arbitration with only the most minimal court oversight. The author explains his full views in a forthcoming article entitled "How Not to Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in the Persero Case", which will be published in the January 2012 issue of *The International Construction Law Review*, London. ■

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