

# ENFORCING DAB DECISIONS UNDER THE FIDIC 1999 RED BOOK

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## 1 INTRODUCTION

- 1 This case summary discusses the recent decision of the Singapore Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33, which expands upon the concept of a ‘Final Partial Award’ published by a tribunal to enforce a Dispute Adjudication Board (**DAB**) decision under sub-cl 20.6 of the *Federation Internationale de Ingenieurs Conseils (FIDIC) Conditions of Contract for Construction* (1<sup>st</sup> Edition, 1999) (**1999 Red Book**). This is the first judicial case in which this issue is considered.
- 2 The Court of Appeal upheld the High Court’s decision to set aside a final award issued by the Majority Members in the ICC International Court of Arbitration Case No 16122/CYK under the Singapore *International Arbitration Act* (the **IAA**). The Court of Appeal dismissed CRW’s application on the basis that the Majority Members had breached their jurisdiction and breached the rules of natural justice by failing to review the merits of the DAB’s decision and accord PGN the opportunity to defend its position.

## 2 FACTS

- 3 PT Perusahaan Gas Negara (Persero) TBK (**PGN**) entered into a contract with CRW Joint Operation (**CRW**) to design, procure, install, test and pre-commission an optical fibre cable in Indonesia (**the Contract**). The Contract adopted the General Conditions of the 1999 Red Book.
- 4 A dispute arose between the parties regarding 13 different variation proposals issued by CRW to PGN. In accordance with the procedure set out in sub-cl 20.4 of the Contract, the dispute was referred to a DAB. The DAB issued a decision in favour of CRW for the sum of US\$17,298,834.57.
- 5 In accordance with the procedure set out in the Contract PGN issued a notice of dissatisfaction (**NOD**) alleging the amount awarded by the DAB was excessive. On 13 February 2008 CRW filed a request for arbitration pursuant to sub-cl 20.6 of the Contract with the ICC, with the seat of the arbitration being Singapore. The purpose of CRW’s request was to give ‘*prompt effect to the adjudicator’s decision*’.

- 6 PGN filed its response submitting that the DAB's decision was not yet final and binding as PGN had issued a NOD in accordance with terms of the Contract. PGN further submitted that the DAB's decision ought to be re-opened and that CRW's request for prompt payment of the amount of the DAB's decision should be rejected.

## 2.1 ICC Arbitration

- 7 CRW referred to arbitration not the underlying dispute which formed the basis of the DAB decision but rather a 'Second Dispute' as to whether PGN was obliged to comply with the DAB decision and pay the sum of US\$17,298,834.57.

- 8 Following arbitration proceedings in Singapore, the Arbitral Tribunal issued a Final Award in favour of CRW entitling CRW to immediate payment of the sum of US\$17,298,834.57. In reaching this conclusion the Arbitral Tribunal found that PGN was not entitled in the arbitration to request the Arbitral Tribunal to open up, review and revise the DAB's decision.

## 2.2 Singapore High Court

- 9 CRW sought to enforce the Final Award in Singapore and on 7 January 2010 an order giving effect to CRW's application was made (**Enforcement Order**). PGN filed a separate application in the High Court in Singapore to have the Enforcement Order and Final Award set aside.

- 10 The High Court set aside the Final Award under the IAA on the basis:

- (a) the Majority Members had issued a final award on the Second Dispute even though the dispute had not been referred to the DAB in accordance with the provisions set out in the Contract; and
- (b) even if the Second Dispute was referable to arbitration, the Contract did not entitle the Arbitral Tribunal to make the DAB's decision final without first hearing the parties on the merits of the decision.

- 11 In effect the High Court's decision meant that where a contractor such as CRW was seeking to enforce a DAB decision for payment it needed to:

- (a) first refer back to the DAB the dispute as to whether payment is owing, which is a timely process; and

- (b) frame the Request for Arbitration so that the contractor is challenging the underlying disputes, which the DAB has already made a decision on and not solely whether immediate payment is owing.

### 3 COURT OF APPEAL

12 CRW appealed the High Court decision and on 13 July 2011 the Court of Appeal dismissed CRW's appeal.

13 In reaching the conclusion that CRW's appeal should be dismissed the Court of Appeal held that the scope of the Arbitral Tribunal's jurisdiction was defined by sub-cl 20.6 of the Contract and the terms of reference (**TOR**) of the arbitration. The Court of Appeal held that sub-cl 20.6 of the Contract and TOR made it clear that the Arbitral Tribunal was to decide not only whether CRW was entitled to immediate payment but also additional issues of fact or law which the Arbitral Tribunal deemed necessary to decide.

14 Sub-cl 20.6 of the Contract provides:

*'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...*

*The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer and decision of the DAB 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'.*

15 The Court of Appeal held that it was quite plain that a reference to arbitration under sub-cl 20.6 of the Contract in respect of a binding but non final DAB decision is clearly in the form of a rehearing so that the entirety of the parties' disputes can be resolved afresh, and therefore the Majority Members had not issued its Final Award in accordance with sub-cl 20.6 of the Contract.

16 In coming to this conclusion the Court of Appeal referred to the Dispute Board Federation September 2010 newsletter noting the ICC decision (in which Kennedys acted for the successful party), where the tribunal made it clear that whilst the DAB's decision was enforceable under a partial award the subject matter of the DAB decision could be opened up, reviewed and revised by the arbitral tribunal in the same arbitration in accordance with sub-cl 20.6 of the 1999 Red Book.

- 17 In reaching the conclusion that the Final Award should be set aside, the Court of Appeal noted that this issue turned on whether the Majority Members had the power to issue the Final Award without opening up, reviewing and revising the Adjudicator's decision. The Court of Appeal held that the Majority Members had exceeded their jurisdiction (contrary to Art 34(2)(iii) of the Model Law) by failing to consider the merits of the DAB's decision prior to the making of the Final Award.
- 18 The Court of Appeal noted that they found it difficult to understand why the Majority Member ignored the clear language of sub-cl 20.6 of the Contract to "finally settle" the dispute between the parties and instead abruptly enforce the DAB's decision without reviewing the merits of that decision.
- 19 The Court of Appeal noted the Majority Members should have made an interim award in favour of the CRW for the amount assessed by the DAB and then proceeded to hear the parties' substantive dispute afresh before making a final award. Accordingly, the Court of Appeal held that the Final Award was not issued in accordance with sub-cl 20.6 of the Contract.
- 20 The Court of Appeal also held that the Majority Members had breached the rules of natural justice (contrary to s24(b) of the IAA) by failing to allow PGN an opportunity to present its case on the DAB decision. In addition, the Court of Appeal held that PGN suffered real prejudice as a result.

#### **4 IMPLICATIONS**

- 21 This decision will have a number of implications for contractors and tribunals alike in which DAB decisions under the 1999 Red Book (and indeed the 1999 Yellow and Silver Book equivalents) are referred to arbitration:
- (a) from a contractor's perspective if it wishes to enforce payment of a DAB decision it needs to refer the DAB's underlying decision itself to arbitration, in the course of which it could seek an interim award for payment of the DAB's decision. Like CRW, this may not be a contractor's first inclination in circumstances where the DAB's decision is in its favour; and
  - (b) from the Tribunal's perspective, if it intends to issue an award for payment of the DAB decision, it needs to ensure that it is a final interim award pending its determination of a final interim or partial award on the underlying issues.
- 22 One issue the Court of Appeal did not address was the High Court's view that a dispute between the parties concerning immediate payment of the DAB

decision (which will always be disputed by the employer) must first be referred to the DAB prior to the contractor seeking a final interim award from the Tribunal. With respect, we do not consider this to be the intended purpose of sub-cl 20.4. If a DAB has given its decision, it has clearly done so on the understanding that *“The Decision shall be binding on both Parties who shall promptly give effect to it...”* (sub-cl 20.4), and it would be otiose for the contractor to spend a further 112 days under sub-cl 20.4 to go through a procedure of having the DAB confirm this.

23 Importantly, for the guidance of readers, the authors have been involved in the enforcement by arbitration of numerous DAB decisions in which a referral back to the DAB was not deemed to be necessary for the effective enforcement of a DAB decision by an arbitral tribunal. One such case was referred to by the Court of Appeal.

24 The reader should note that sub-cl 20.9 of the *FIDIC Conditions of Contract for Design, Build and Operate Projects (1<sup>st</sup> ed, 2008)* (**the Gold Book**) addresses this situation by providing for a situation whereby a failure to comply with a DAB decision can itself be referred to arbitration rather than the underlying dispute. Sub-cl 20.9 states:

*‘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 it may have, refer the failure itself to arbitration under Sub-Clause 20.8 [Arbitration] for summary or other expedited relief, as may be appropriate...’*

25 It is the authors’ view that there is already a settled practice at the level of international arbitration where DAB decisions can be enforced directly by an arbitral tribunal, at least on a temporary basis pending a Final Award. It is significant that the Court of Appeal shares this view (to our knowledge being the first common law Court to rule on this), at least with respect to binding but not final DAB decisions rendered under the 1999 FIDIC Conditions of Contract.

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