PERSERO 2 – Singapore Court of Appeal rules DAB decisions are enforceable by way of interim award

Written by Taner Dedezade

On 27 May 2015, the 160-page reserved judgement of the Singapore Court of Appeal ("CA") was handed down in Persero 2 - PT Perusahaan Gas Negara (Persero) TBK ("PGN") v CRW Joint Operation ("CRW")[1]. It will be regarded a triumph for contractors wishing to enforce DAB decisions. The CA ruled that the interim award issued by the arbitral tribunal ordering enforcement of the DAB's decision should stand. Using the concept of an "inherent premise", the CA made two important findings: 1) it was not necessary for the Contractor to refer the failure to pay (the secondary dispute) back to the DAB; and 2) it was not necessary for him to refer the merits (the primary dispute) in the same single arbitration as his application to enforce.

The 64-page judgement of Chief Justice Sundaresh Menon (with whom Justice Quentin Loh agreed) forms the majority judgement of the CA ("CA Majority"). Justice Chan Sek Keong ("CA Dissenting Judge") delivered a 96-page dissenting judgement. The CA Majority upheld: (1) the interim award ordering PGN to pay CRW c.US$17m ("the Adjudicated Sum"); and (2) the lower court's order granting CRW leave to enforce the interim award in the same manner as a court judgement.

By way of background, the DAB in November 2008 made a decision ordering PGN to pay CRW the Adjudicated Sum. PGN served a notice of dissatisfaction ("NOD"). In 2009, CRW sought to enforce the Adjudicated Sum without referring the merits to arbitration. The arbitral tribunal, by a majority, issued a final award enforcing the Adjudicated Sum. The High Court set aside the award and the Court of Appeal upheld that judgement with an endorsement that it would be permissible to enforce provided the merits were also referred in the same arbitration. In 2011, pursuant to the CA's guidance in Persero 1, CRW started arbitral proceedings again, this time seeking to enforce the DAB's decision in an interim award as well as referring the merits to arbitration. Again, there was a majority award enforcing the DAB's decision. This time, both the High Court and the CA Majority agreed with the arbitrators.

Interpretation of Sub-Clause 20.4 of the 1999 Red Book

The CA Majority emphasised that "it may be vital that parties promptly comply with a DAB decision" and that "it is of general importance that contractors are paid promptly where the contract so provides..." It summarised its interpretation of the effect of a NOD on a DAB decision by holding:

a) a DAB decision is immediately binding once it is made;

b) the parties are obliged to give effect to it promptly until such time as it is overtaken or revised by either an amicable settlement or a subsequent arbitral award;

c) a NOD does not and cannot displace the binding nature of a DAB decision or the parties' concomitant obligation to promptly give effect to and implement it.

These conclusions were also reached by the South Gauteng High Court in South Africa in two recent cases.[2] Whilst I agree with all three points, in my view, they do not help with the next stage of enforcing that decision nor with resolving the issues in Persero 2 or any other similar situation.

Point 1: Is it necessary to refer the secondary dispute back to the DAB?

In order to get round the nonsense of the necessity of a re-referral to the DAB (which arguably arises as a result of the first sentence of Sub-Clause 20.6), the CA Majority drew upon two strands of support:

- An article written by Christopher Seppälä[3] (one of FIDIC's contract draftsmen) and

- the FIDIC Guidance Memorandum[4] dated 1st April 2013 ("FIDIC Guidance").

The CA Majority concluded that: (a) there was an inherent premise embedded within a DAB decision that a sum to be paid was payable forthwith; and (b) here the dissatisfaction expressed in the NOD inherently extends to the requirement that payment of the Adjudicated Sum be made forthwith and so there is nothing further to be referred back to the DAB.

Whilst at first sight the concept seems an ingenious and neat mechanism to avoid the nonsense, there are some difficulties with the logic underlying it: Both the FIDIC Guidance and the publications by Mr Seppälä explain that it was FIDIC's intention that 'binding' but not 'final' DAB decisions should be capable of reference to arbitration under Sub-Clause 20.6 - without Sub-Clauses 20.4 [Obtaining a DAB's decision] and 20.5 [Amicable Settlement] being applicable. In my view that is irreconcilable with the "black and white" of the 1999 Red Book contract because the only clause in the General Conditions concerning the enforceability of DAB decisions which dis-applies Sub-Clauses 20.4 and 20.5 is Sub-Clause 20.7.

In my view, properly analysed, neither of the above strands relied upon by the CA Majority in fact supports their judgement. Whatever was intended by FIDIC is irrelevant. It is the wording of the contract itself that needs to be interpreted by reference to the intentions of the parties at the time of entering into the contract.

So where does the concept of an inherent premise come from?

The CA Majority have not adequately explained the concept of the "inherent premise". It is not clear whether this is a rule of law or construct particular to Singapore. Is it akin to an implied contract term at common law? In England, there will be no implied term unless that term is necessary and would have been obviously so to an independent observer at the time when the parties entered into their contract.

There are said to be two inherent premises – one in the DAB's decision and one in the NOD. Is that something that both parties would have assumed to be so at the time of entering the contract? Are they so obvious that they should be implied? In my view the answer is no. The CA Majority's concept that the inherent premise is generated at the time of the DAB decision therefore appears to be entirely novel.

A much more cogent objection to the CA Majority's finding is however the fact that Sub-Clause 20.4 expressly requires that the NOD shall set out the matter in dispute and the reason(s) for the party's dissatisfaction. If the NOD does not do so with respect to the payment term, then no inherent premise should be implied.

Point 2: Is it necessary for there to be a single arbitration dealing with both the merits and non-payment of the DAB's decision?

In Persero 1, the CA held that the 1999 Red Book *"requires the parties to finally settle their differences in the same arbitration, both in respect of the non-compliance with the DAB's decision and in respect of the merits of that decision…consistent with the plain phraseology of Sub-Clause 20.6 which requires the parties' disputes in respect of any binding DAB decision which has yet to become final to be "finally settled by international arbitration". Sub-Clause 20.6 clearly does not provide for separate proceedings to be brought by the parties before different arbitral panels even if each party is dissatisfied with the same DAB decision for different reasons."*

The CA Majority, disagreeing with the CA in Persero 1, found that a paying party's failure to comply with a binding but not final DAB decision is itself capable of being directly referred to a separate arbitration under Sub-Clause 20.6. The Majority CA reasoned that as the NOD (through the implied premise above) addressed the need to make prompt payment of that sum: *"the dispute over the paying party's failure to promptly comply with its obligation to pay the sum that the DAB finds it is liable to pay is a dispute in its own right which is capable of being 'finally settled by international arbitration' "*.

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In my opinion, in order to resolve this issue, it is necessary in the first place to resolve the issue of whether enforcement of a binding but non-final decision can be "finally settled" by arbitration. In my 2012 paper *"Mind the Gap"*[5] I argued that following a NOD, a DAB decision will amount only to interim relief because the decision must be referred to arbitration to finally resolve the dispute. I further argued that it follows that an arbitral tribunal should not issue a final award in relation to interim relief. Accordingly, I disagree with the judgement of the CA Majority that it is appropriate for a final award to be given (for the purposes of enforcement only) in a separate arbitration.

The Dissenting Judement

The CA Dissenting Judge considered that the interim award should have been set aside because:

- The secondary dispute is not a dispute that was referable to arbitration under 20.6;
- The arbitrators had no mandate to issue the interim award;
- Even if they did have the mandate, the interim award was, and was intended to be, a provisional award that fell outside the ambit of an "award" as defined in s.2 of the Singapore International Arbitration Act (IAA") and therefore was not enforceable under s.19 of the IAA in the same manner as a judgement.

Space does not permit detailed examination here of this extensive but minority judgement.

Conclusion

Everyone in the international construction community probably agrees that, as a matter of policy, it is desirable for a DAB's decision to be enforceable. Many commentators have gone into print with arguments to fit this policy desire. The CA Majority have clearly been influenced by much of this literature. Whilst those same commentators (and indeed anybody wishing to enforce a DAB's decision) may be rejoicing, in my view what we are left with in Persero 2 is a CA Majority judgement that lacks intellectual rigour. Whilst it may be the last word we hear from Singapore, it certainly does not represent the last word in this debate.

[1] [2015] SGCA 30.

[2] Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV v Bombela Civils JV (Pty), SGHC Case No. 12/7442 which was then affirmed in the case of Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd, Case No. 06757 / 2013.

[3] "Sub-Clause 20.7 of the FIDIC Red Book does not justify denying enforcement of a 'binding' DAB decision" (2011) 6(3) CLInt 17

[4] FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1st April 2013

[5] [2012] Int ALR 4 153

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