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The Finality of Interim Arbitral Awards in Singapore – How 'Final' is 'Final'?

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Singapore's longstanding reputation as an arbitration friendly jurisdiction was reinforced in 2010 with the legislature's adoption of the 2006 amendments to the *UNCITRAL Model Law on International Commercial Arbitration*. The 2006 UNCITRAL amendments concerned, among other matters, the use of interim awards in international arbitration, and recognised *"the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to … the granting of interim measures"* (General Assembly Resolution 61/33 on 4 December 2006).

Since 2010, under section 12(1) of Singapore's *International Arbitration Act* (IAA), an arbitral tribunal has the power to make orders or give directions to any party for interim injunctions and interim awards. Under section 12A, the High Court has the power to make these interim orders into court orders. Section 19B provides that an award, whether final or interim, made by an arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties, and that an arbitral tribunal must not vary, amend, correct, review, add to or revoke the award.

An interesting question arose in relation to these provisions of the IAA in the High Court of Singapore's recent decision in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) and another matter* [2014] SGHC 146 (PT Perusahaan); essentially, **how does a final award affect an interim award made previously in the same arbitration (when both are final and binding under the IAA)**?

Background

PT Perusahaan Gas Negara (Persero) TBK (PGN) and CRW Joint Operation (Indonesia) (CRW) entered into a contract (Contract) based on the FIDIC 1999 Red Book for the design, procurement, installation, testing and pre-commissioning of a pipeline to convey natural gas from South Sumatra to West Java, Indonesia. A dispute arose in respect to variation claims under the Contract, and the matter was taken to the Dispute Adjudication Board (DAB) constituted under the Contract. The DAB found against PGN, requiring it to pay over US$17m to CRW (DAB Decision).

The Contract contained a provision requiring compliance with the DAB Decision. However, although PGN accepted this obligation, no payment was made to CRW. In response to this, in 2009 CRW instituted arbitral proceedings to compel PGN to comply with its obligations under the

contract to make payment (referred to in the High Court judgement as the *Secondary Dispute*). PGN argued that it could not be compelled to comply with the DAB Decision unless the arbitral tribunal heard the merits of the dispute first put to the DAB (referred to in the High Court judgement as the *Primary Dispute*). The 2009 tribunal held that PGN was required to comply with the DAB Decision and issued a final award for the sums decided in the DAB Decision (2009 Award). The Tribunal also left it open to PGN to commence a separate arbitration to deal with the Primary Dispute.

PGN successfully appealed the award in the High Court to have the 2009 Award set aside. The High Court's decision was affirmed by the Court of Appeal albeit on different grounds. The Court of Appeal found inter alia that the tribunal should not have granted a final award for the sums decided in the DAB Decision without also hearing the merits of the Primary Dispute. It opined that the Secondary Dispute should have been dealt with by way of an interim or partial award; the merits of the Primary Dispute should have been dealt with subsequently in the same arbitration proceedings and decided by way of a final award.

In 2011, CRW instituted further arbitral proceedings and sought an interim or partial award to enforce the DAB Decision and a final award for the same sum or such sums as assessed by the Tribunal if it decided to review and revise the DAB Decision. The 2011 Tribunal issued an interim award compelling PGN to comply with the DAB Decision (2011 Interim Award). CRW obtained leave from the High Court to enforce the 2011 Interim Award against PGN, and PGN applied to the High Court to set aside the award.

Issues before the High Court

Among a raft of issues raised in the proceedings, the High Court was required to determine whether the 2011 Interim Award was final and binding pursuant to the IAA and therefore enforceable against PGN.

PGN argued that the 2011 Interim Award was a *provisional* award intended to have finality only until the Tribunal rendered an award on the Primary Dispute (which would be the final award in the arbitration) and that the IAA does not permit *provisional* awards under section 19B(1) of the IAA. Accordingly, PGN asserted that the Tribunal did not have the power to award provisional relief.

CRW asserted that the 2011 Interim Award was not provisional, but final and binding on the Secondary Dispute pursuant to section 19B(1). This needed to be read in conjunction with the Tribunal's award, which had set out that it was final and binding *"pending the final resolution of the* [Primary Dispute] *raised in these proceedings"* (para 16(c)). The eventual final award in respect to the Primary Dispute would not vary the interim award because that award would determine with finality a different dispute: the Primary Dispute.

The Decision

The High Court held that the 2011 Interim Award was final and binding on the subject matter of the Secondary Dispute in accordance with section 19B of the IAA, that being, CRW's undisputed substantive right to be "paid now" and PGN's substantive obligation to "argue later". Consequently, the 2011 Interim Award acknowledged that CRW's substantive, but provisional, right to be paid promptly was *final*, and did not require that other aspects of the dispute be resolved

with finality.

The High Court also held that section 19B did not prohibit "provisional" awards, being awards which grant relief intended to be effective for a limited period (para 128). PGN argued that the IAA deliberately omitted the term "provisional" from section 19B as awards under the IAA were meant to be final, however the High Court held that the legislature sought to avoid the use of *"confusing nomenclature"*, as opposed to employing a measure to restrict the content of an award under section 19B of the IAA. Further, the High Court held that section 19B did not operate to *"override the parties' autonomy to agree in their contract that they should have substantive provisional rights which, like all substantive rights, are enforceable"* (para 136).

In respect to a final award varying the 2011 Interim Award, the High Court held that although section 19B(2) prevents a tribunal from varying, amending, correcting, reviewing, adding or revoking an award made under the IAA, the 2011 Interim Award would not be effected by the final award in a way that contravenes that section. Rather, the 2011 Interim Award, by its terms (*"pending the final resolution of the Parties' dispute raised in these proceedings"*), ceased to be effective only when the Tribunal had resolved with finality every aspect of the dispute before it.

Conclusion

In *PT Perusahaan*, the High Court of Singapore decisively held that any future final award given by the Tribunal would not affect the 2011 Interim Award; the final award related to a different subject matter and the interim award *"ceased to be effective"*. This being said, the High Court's decision was largely dependent on the wording of the 2011 Interim Award – *"pending the final resolution of the Parties' dispute raised in these proceedings"* – rather than the application of the IAA. Accordingly, it remains perceivable for a situation to arise where a final award amends the content of an interim award contrary to section 19B.

The High Court confirmed that parties may agree to permit a tribunal to issue "provisional" awards for the purposes of granting relief effective for a limited period. According to PT Perusahaan, a provisional award is binding, but not final, as it is only effective for a limited period. This position appears contrary to section 19B of the IAA which states that *"[a]n award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding"*.

To avoid a predicament, parties to an international arbitration may consider requesting that the tribunal be required to expressly set out the intended application of any interim award within the award to avoid conflicts with any final or other interim award issued in the proceedings.

PGN has appealed the High Court's decision in *PT Perusahaan* to the Court of Appeal, the hearing of which is to commence shortly in January 2015.

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