Kluwer Arbitration Blog

Another (Unsuccessful) Challenge to the Finality of Interim Arbitral Awards in Singapore and Enforcing DAB Decisions on International Projects under FIDIC

Eugene Tan (Clyde and Co) and Rupert Coldwell (Clyde & Co.) · Monday, June 15th, 2015 · Clyde & Co.

Introduction

As reported by Clyde & Co for the Kluwer Arbitration Blog on 12 January 2015, the Singapore High Court released its decision in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146 relating to PT Perusahaan Gas' (*PGN*) unsuccessful appeal of an interim arbitral award made in favour of CRW Joint Operations (*CRW*), which required PGN to comply with a dispute adjudication or avoidance board (*DAB*) decision given under a 1999 FIDIC Red Book Conditions of Contract (*1999 Red Book*). The full text of that report can be read here.

We report below on the Court of Appeal's recent decision in *PT Perusahaan Gas Negara (Persero) v CRW Joint Operation (Indonesia)* [2015] SGCA 30 (*Perusahaan*), released on 27 May 2015.

In short, the Court of Appeal's decision in Perusahaan addressed significant concerns that Singapore's international arbitration legislation threatened the enforceability of interim arbitral awards made in Singapore, by confirming that interim awards made under Singapore's *International Arbitration Act* (*IAA*) are final and binding. The Court of Appeal's decision is also significant as it confirms that DAB decisions under the 1999 Red Book must be complied with promptly, in turn reinforcing the "pay now, argue later" principle central to the DAB procedure.

(Not so) brief background of proceedings

A dispute arose between the parties in respect to variation claims made by CRW under a 1999 FIDIC Red Book contract (*Contract*) for the design, procurement, installation, testing and pre-commissioning of a pipeline to convey natural gas from South Sumatra to West Java, Indonesia. CRW referred the matter to the DAB constituted under the Contract, which required PGN to pay over US$17m to CRW (*DAB Decision*). Despite the fact that the Contract contained a provision requiring PGN to comply with the DAB Decision, it refused to do so. A plethora of arbitral and court appeal proceedings followed.

A. 2009 Arbitration and related appeal proceedings

In 2009, CRW instituted arbitral proceedings to compel PGN to comply with the DAB Decision (the *Secondary Dispute*). PGN argued that it could not be compelled to comply unless or until the tribunal revised and made a determination on the correctness of the merits of the DAB Decision (the *Primary Dispute*). The tribunal issued an award which found that PGN was required to comply with the DAB Decision.

On appeal, the High Court of Singapore set aside the award, and the Court of Appeal upheld the High Court's decision. The Court of Appeal held that inter alia the tribunal should not have granted a final award requiring compliance with the DAB Decision without revisiting the merits of the DAB Decision (i.e. without dealing with the Primary Dispute). Further, it held that the Secondary Dispute should have been dealt with by way of an interim or partial award, after which, in the same arbitration, the merits of the DAB Decision should have been dealt with by way of a final award.

B. 2011 Arbitration and related appeal proceedings

In 2011, CRW returned to arbitration, seeking two awards; *first*, an interim or partial award permitting it to enforce the DAB Decision against PGN, and *secondly*, a final award for the sums determined in the DAB Decision (i.e. dealing with the Primary Dispute). CRW was successful on its first ground, and the 2011 tribunal issued an interim award compelling PGN to comply with the DAB Decision (*Interim Award*). CRW obtained leave from the High Court to enforce the Interim Award against PGN, and PGN applied to the High Court to set aside the award.

Back in the High Court, PGN argued that the Interim Award was a "provisional" award intended to have finality only until the 2011 tribunal rendered an award on the merits of the DAB Decision (i.e. the Primary Dispute), and that section 19B of the IAA did not permit such provisional awards. Accordingly, PGN asserted that the 2011 tribunal did not have the power to award provisional relief. In response, CRW asserted that the Interim Award was not "provisional", but final and binding pursuant to section 19B(1). This was argued as particularly so when it was read in conjunction with the Interim Award, which stated that it was final and binding "*pending the final resolution of the [Primary Dispute] raised in these proceedings*". CRW went on to argue that the 2011 tribunal's final award (in respect of the Primary Dispute) would not vary or otherwise affect the final and binding nature of the Interim Award (in respect of the Secondary Dispute) because it would determine (and would be final and binding in respect of) a different dispute, being the merits dispute; the Primary Dispute.

The High Court held that the Interim Award was final and binding on the subject matter of the Secondary Dispute under 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 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 Court of Appeal decision

Chief Justice Sundaresh Menon delivered the Court of Appeal's majority judgment (being the judgment of Menon CJ and Loh J). Chan Sek Keong SJ delivered a dissenting judgment.

Essentially, PGN's case on appeal consisted of two arguments.

Firstly, PGN argued that the Interim Award was inconsistent with s 19B of the IAA, on the basis

that both CRW and the 2011 tribunal envisaged that the Interim Award would be "*subject to future variation*" (see paragraph 26). Referring to particular terms of the Terms of Reference of the 2011 arbitration, CRW's Statement of Claim, and the Interim Award itself, PGN argued that CRW essentially sought only one relief in those arbitral proceedings, being to enforce the DAB Decision. Consequently, as argued, PGN asserted that CRW never intended for the Interim Award to finally resolve the Primary Dispute, and that CRW was aware that any interim award made in the arbitration could subsequently be varied by a final award.

The Court of Appeal rejected PGN's first argument on the basis that Clause 20.4 of the Red Book imposed "*a distinct contractual obligation on the parties to comply promptly with a DAB decision once it is issued*" (see paragraph 54). It found that this is the case regardless of whether the DAB Decision is revised or opened up, or whether or not a later tribunal concludes contrary to that DAB Decision. Under section 19B of the IAA, the Interim Award would be final and binding in respect to the specific issue that it dealt with, i.e. the 2011 tribunal's declaration that PGN must comply with the DAB Decision.

Secondly, PGN argued that the effect of Clause 20.4 of the Contract was so that the DAB Decision ceased to be binding as soon at the 2011 tribunal made any award on the Primary Dispute, i.e. on the merits of the decision. Because the Interim Award made findings in respect to certain merit arguments of the DAB Decision, PGN argued that the DAB Decision, and PGN's obligation to pay the sums in it promptly, no longer applied. However, PGN did not explain in any detail its legal basis for this argument, that is, it made no reference to which of the specific grounds for setting aside an arbitral award under section 24 of the IAA or Article 34(2) of the Model Law it intended to rely upon.

The Court of Appeal considered that if PGN succeeded in this or its first argument, it may very well have established that the Interim Award was subject to revision, it was not final, and therefore contrary to section 19B of the IAA. If this were so, the next logical step to be taken was that the 2011 arbitration, which rendered the Interim Award, would not have been conducted in accordance with the parties' agreed procedure (i.e. in accordance with the IAA, being the governing law of those arbitral proceedings). On this basis, the Interim Award would have been contrary to Article 34(2)(a)(iv) of the Model Law.

Notwithstanding, the Court of Appeal rejected PGN's second argument on the basis that, in the event that the DAB Decision ceased to be binding following an arbitral review of it, such an occurrence would not automatically render the Interim Award unenforceable or liable to be set aside. The Court of Appeal did not directly reject PGN's arguments in this respect, but held it was PGN's onus to prove that this was the correct process to follow, but that it had not discharged that onus.

In any case, the Court of Appeal held that it would not be commercially sensible to read Clause 20.4 of the 1999 Red Book in such a way, as the key purpose of the Interim Award was to serve the proper purpose of the DAB procedure under that clause, that is, ensuring prompt payment of any amount under a DAB decision.

Comments

The Court of Appeal's decision in *Perusahaan* will no doubt be welcomed in international arbitration circles as it confirms the final and binding nature of an interim arbitral award issued

under Singaporean international arbitration legislation. *Perusahaan* also provides useful clarification as to the process of adjudication before DABs, and the rules of enforcement of decisions made by the DAB, under the 1999 Red Book. We make a few comments below.

A. Clarifying enforcement of DAB decisions under the 1999 Red Book

The Court of Appeal reached a few important conclusions in respect to the operation of Clause 20 of the 1999 Red Book. Firstly, it confirmed that there was no need to refer a dispute back to the DAB in order to determine whether one of its decisions made previously was binding, as a precondition to commencing arbitral proceedings to achieve the same (see paragraphs 64 to 69). Furthermore, the Court of Appeal confirmed that arbitration could be commenced to enforce a DAB decision (see paragraphs 77 to 82). Secondly, the Court of Appeal expressly disagreed with its earlier decision in 2009, to set aside the arbitral award in 2009. In its earlier decision in respect to these proceedings ([2011] SGCA 33), the Court of Appeal required all parties' differences over the DAB Decision to be settled in one arbitration (i.e. both the Primary and Secondary Disputes). However, the Court of Appeal's latest decision the subject of this post acknowledged that the dispute in respect of the enforcement of the DAB Decision under Clause 20.4 (the Secondary Dispute), and the dispute over the merits of the underlying DAB Decision (the Primary Dispute) could be resolved in separate arbitral proceedings (see paragraphs 83 to 88).

The Court of Appeal's explanations of the operation of Clause 20 of the 1999 Red Book sheds light on the doubts arising under that provision. Namely, it confirms that a party required to pay an amount in accordance with a DAB decision under those Conditions of Contract must do so *promptly*. The DAB procedure is intended to resolve disputes in the first instance, the resolution of which may be subjected to arbitral review at some later stage, and that any decision made by the DAB must be complied with. Therefore, DAB decisions under FIDIC are binding, but not final, where a notice of dissatisfaction is given within the contractually stipulated timeframe.

If a party fails to comply with a DAB decision, the counter-party may apply for a final award to enforce the DAB decision or request an interim award from an arbitral panel requesting that the decision be enforced, separately from its request for a final award on the merits of that DAB decision. Under section 19B of the IAA, that interim award (such as the Interim Award in *Perusahaan*) would be final and binding in respect of its declaration that the recalcitrant party comply with the DAB decision. Although a party may challenge the merits of the DAB decision in the same arbitration, the interim award stands as a final and binding arbitral award.

The decision therefore reinforces the "pay now, argue later" principle that is crucial to the success of DABs under the FIDIC suite of contracts in resolving disputes and ensuring the security of payment on large international projects.

B. Characterisation of the forms of international arbitral awards

Finally, we comment on the Court of Appeal's guidance in respect of the various terms given to interlocutory awards in arbitral proceedings, namely, final, interim, partial or provisional awards. The difference between the terms can be significant. The Court of Appeal referred to Gary Born's text to consider the nuances between these terms used for interlocutory orders in international arbitration, which we summarise below:

• "Partial" and "interim" have slight differences; "partial" awards finally dispose of part, but not all, of a parties' claim in arbitration, where as "interim" awards do not dispose finally of a

particular claim but instead decide a preliminary issue relevant to the disposition of that claim. Both are capable of being recognised and enforced by domestic courts, and both are susceptible to being set aside.

• "Provisional" awards differ once again, which are intended to protect a party from damage during the course of the arbitral process (for example, for the preservation of assets or evidence, or to order the provision of security), but do not definitively or finally dispose of either a preliminary issue or a claim in an arbitration. The High Court's appeal decision relating to the 2011 arbitration (referred to above) held that section 19B did not prohibit "provisional" awards, which it considered to be an award granting relief which was intended to be effective only for a limited period. PGN argued that the IAA deliberately omitted the term "provisional" from section 19B because awards under the IAA were meant to be final, but the High Court held that the legislature merely sought to avoid the use of "*confusing nomenclature*", rather than intending to employ a measure to restrict the content of an award under that section. The High Court also 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*".

• Lastly, there are three possible definitions of a "final" award, namely that such an award is of preclusive effect, achieves a sufficient degree of finality at the arbitral seat, or otherwise disposes of all remaining claims in an arbitral proceedings.

We will be sure to report if there are any further developments in these proceedings.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Monday, June 15th, 2015 at 7:07 am and is filed under Interim Award,

Singapore

You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.