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INSIGHT

Security of payment under FIDIC contracts: more secure, for now

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The High Court of Singapore recently handed down an important judgment in relation to the enforceability of Dispute Adjudication Board (DAB) decisions under the FIDIC forms of contract.[1] This topic has long attracted attention in international construction circles, and in 2011 was the subject of a decision by the Singapore Court of Appeal. The 2014 judgment, which follows the approach taken by the Court of Appeal in 2011, provides welcome clarity on the way in which, in Singapore at least, DAB decisions under FIDIC contracts may be enforced.

"Pay now, argue later"

In his judgment, Justice Vinodh Coomaraswamy focused on one of the key concerns of the construction industry: security of payment. Justice Vinodh Coomaraswamy noted that contractual security of payment mechanisms play a vital role in the industry by promoting cash-flow and protecting vulnerable contractors. In this regard, most construction contracts contain a mechanism which provide for a speedy adjudication of payment disputes, while allowing each party to have such disputes fully and finally decided on the merits at a later date ("pay now, argue later"). The Judge stressed that an essential feature of such adjudication mechanisms is enforceability: to be effective they need to provide successful contractors with "a quick and relatively inexpensive way of compelling a

recalcitrant employer to comply with the interim adjudication".[2]

FIDIC security of payment mechanism

Under the major FIDIC forms of contract (which includes the 1999 Red, Yellow & Silver Books), the adjudication mechanism is set out at clause 20. This allows either the contractor or the employer to refer a dispute (broadly defined) to a one or three member panel of the DAB (as specified in the contract). The DAB is required to give its decision within 84 days of the matter being referred. As disputes can be of any nature and either party may seek enforcement, Justice Vinodh Coomaraswamy noted that the DAB procedure under FIDIC is not solely concerned with security of payment, but nonetheless that it is one of its key objectives. This is supported by the fact that DAB decisions are immediately binding under clause 20: it requires the employer to "pay now". This is a "substantive contractual right".[3] Clause 20 also deals with the enforcement of DAB decisions; however, it is in this area that difficulties arise, as were acutely felt in the case.

The central problem with enforcement under clause 20 lies in the fact that the FIDIC Books only expressly provide for enforcement by arbitration when a DAB decision has become "final and binding" (clause 20.7). This occurs if neither party has issued a notice of dissatisfaction within 28 days of the DAB decision. If a party has issued a notice of dissatisfaction, then the DAB decision is "binding" and the only way to proceed to arbitration is through clause 20.6, which allows the parties to have their dispute "finally settled", provided that certain conditions have been met, including that there has been a DAB decision on the dispute in question. As first articulated by Professor Bunni, this presents a "gap". And a gap which many recalcitrant employers may take advantage of to avoid making contractual payments.

Background to the case

In the present case, the contractor, CRW, had been engaged by PGN, an Indonesian state-owned energy company, to construct and install a gas pipeline in South Sumatra. The project had suffered from delays and disruption. The contractor had taken a dispute over additional amounts owed to it to the DAB in accordance with the terms of the contract, which adopted clause 20 of the FIDIC Red Book in substantially un-amended terms. The DAB determined that an amount of just over USD 17 million was owed to the contractor. The employer issued a notice of dissatisfaction, but did not commence arbitration proceedings to have the dispute decided fully on its merits, or make payment under the interim binding DAB decision, which it agreed it was under a contractual duty to do.[4] In response, the contractor issued an arbitration notice which sought enforcement of the DAB decision. This was disputed by the employer on *inter alia* the grounds that clause 20.6 did not allow for enforcement of a binding DAB decision. The contractor was successful at arbitration and a final award was issued in its favour.

The employer subsequently applied to set aside the final award. The matter was taken to the High Court and then to the Court of Appeal in 2011. The 2011 Court of Appeal was quick to identify the difficulty successful parties faced in enforcing binding but not final DAB decisions under clause 20.6 of the FIDIC terms of contract. In seeking to resolve this anomaly, the Court of Appeal held that an arbitration pursuant to clause 20.6 should allow for the interim enforcement of a DAB Decision, while also allowing the parties to have the substantive dispute considered on the merits. The Court of Appeal observed that:

> *"The practical response is for the successful party in the DAB proceedings to secure an interim or partial award from the arbitral tribunal in respect of the DAB decision pending the consideration of the merits of the parties' disputes in the same arbitration....*

> *....sub-cl 20.6 contemplates a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved. The respondent to the proceedings may raise the issues which it wishes the arbitral tribunal to consider either in its defence or in the form of a counterclaim."*[5]

As a consequence, CRW issued a fresh arbitration where it sought enforcement of the DAB decision by way of an interim award, and left it open to PGN to pursue arguments on the merits. Following the Court of Appeal's guidance, the arbitrators held (in majority) that an interim award should be issued on the enforcement of the DAB decision, before the arguments on the merits were heard.

The present case

Again, the arbitrators' award was disputed by the employer and the case once more found itself, in a slightly different guise, before the Singapore High Court. This time, PGN argued that interim awards were not permissible pursuant to Singapore's International Arbitration Act (IAA), and, while not disputing it was in breach of the contractual obligation to give effect to the binding DAB decision,[6] objected to enforcement on the ground that the award was "interim". The central argument put forward was that section 19B of the IAA requires all arbitration awards to be "final and binding". If an award is of an interim nature for payment of monies, then it would fall outside of the scope of the Act and therefore be unenforceable.

In rejecting this argument and finding for the contractor, the Judge focused on the purpose and objective of security of payment regimes, and the "substantive provisional right" which FIDIC provided for the enforcement of DAB decisions (i.e. "pay now"). The Judge held that where a contract gives the parties a substantive, contractual right to provisional relief ("pay now"), the IAA does not "override the parties' autonomy to agree in their contract that they should have substantive provisional rights which, like all substantive rights, are enforceable".[7] The award "decided with finality CRW's substantive but provisional right to be paid promptly".[8] It also preserved the parties right to "argue later" on the merits of the case.

This case makes clear that (for now) binding adjudication awards under FIDIC are enforceable in Singapore. It also serves as a poignant reminder of the purpose of security of payment regimes and that "delay upon delay is directly opposed to the intent of any security of payment regime to give the contractor a quick means of compelling the employer to 'pay now'".[9] However, as the case is now subject to appeal, this thorny issue will no doubt be subject to further debate. For the contractor involved in this case, quick enforcement of its right to prompt payment remains elusive.

If you would like further information on any issue raised in this update, please contact Eugene Tan or Tia Starey.

[1] PGN v CRW [2014] SGHC 146

[2] Paragraph 25

[3] Paragraph 33

[4] Paragraph 14

[5] CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33, Paragraphs 66 and 67

[6] Paragraph 14

[7] Paragraph 136

[8] Paragraph 137

[9] Paragraph 45

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