

# ENFORCEABILITY OF DISPUTE ADJUDICATION BOARD'S DECISION IN FIDIC CONTRACTS

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Legal Briefings

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There have now been four court judgments in Singapore relating to the enforceability of a Dispute Adjudication Board's ("DAB") decision under the FIDIC Red Book form of contract. The latest judgment in the case of PT -v- CRW was handed down on 27 May 2015 and is discussed in greater detail in the annexed note. It now appears that the way should be clear for the Contractor to enforce the DAB's decision but it has taken him nearly seven years to reach this point. What lessons can be drawn from this saga?

## THE DAB AND ENFORCEMENT

DAB's were introduced into FIDIC's Rainbow Suite with the primary aim of ensuring prompt payment to the Contractor of interim instalments of the Contract Price, notwithstanding that the underlying dispute would eventually be finally determined in other proceedings.

It has to be said that the six and half year wait in this case to enforce the DAB's decision hardly represents "prompt" payment. In jurisdictions where statutory adjudication is not in force, this issue may present real problems for Contractors and provide a windfall for Employers. The Court of Appeal's decision (reached by a majority) should now enable the Contractor to enforce the interim award in Singapore in the same manner as a judgment.

## WHERE ARE WE NOW?

Even now, the Contractor in this case may not be home and dry. If the Employer has assets in Singapore the current judgment may be sufficient to be effective. If there are no assets in Singapore, the Contractor will have to enforce the interim award in either the Employer's country of incorporation or elsewhere where the Employer has assets. This will take time and it may be that further partial awards or even the final award in the underlying dispute will be issued by the arbitrators in the meantime.

However, the Singapore Court's decision is likely to have persuasive effect in other jurisdictions and certain headline points emerge:

- Unlike the earlier Court of Appeal in Singapore, this Court has decided that the issue of prompt payment alone can be referred to arbitration without needing to refer the merits of the underlying dispute.
- This Court has decided that, even where (as in Singapore) local legislation only provides for enforcement of awards which finally dispose of an issue, then an award made in relation to the issue of prompt payment (whether interim, partial or final) can be enforced. It also decided that such an award is not "provisional". The provisions of the Singapore International Arbitration Act are in fact very similar to the UNCITRAL Model Law, which has been adopted in many jurisdictions.
- Even if a partial award has been made in the arbitration on the underlying dispute subsequent to the interim award on prompt payment, this does not affect enforcement of the interim award, since the true effect of such a partial award is a step of the process of reaching a final award.
- As a practical matter, enforcement of an award on prompt payment should be sought in the jurisdiction where the paying party has assets.
- Although the FIDIC form of contract does not make provision for enforcement of DABs' decisions where no notice of dissatisfaction is given, that does not preclude the receiving party from seeking enforcement of a decision by way of interim award. However the FIDIC Guidance Memorandum of 2013 (where adopted) puts the matter beyond doubt and treats both binding and non-binding decisions equally.

## **THE CONTRACT**

Many construction contracts now include provisions for "quickfire" dispute resolution pending final determination through arbitration or litigation. In some countries (such as the UK) there is statutory provision for compulsory adjudication. In other countries it is for the parties to decide whether they wish to adopt this approach.

The FIDIC Suite of contracts, which is widely used internationally, makes such provision through the use of a DAB. This must reach a decision within 84 days of reference to it and its decision is binding on both parties who must "promptly" give effect to it, unless until it is revised by settlement or an arbitration award. Either party can give a notice of dissatisfaction, following the decision, within 28 days after receiving it.

In that case, the decision remains temporarily binding and the dispute may be referred to arbitration. If no notice of dissatisfaction is given within 28 days, the DAB's decision becomes final and binding and failure to comply with it can be referred to arbitration.

## **THE "GAP"**

This case highlighted an apparent gap in the contract as it does not explicitly say that a failure to comply with a temporarily binding decision (that is to say where notice of dissatisfaction has been given) can be referred to arbitration as a precursor to enforcement. If it is possible to do so, then the resultant award should be capable of enforcement internationally by virtue of the New York Convention, to which most countries are signatory.

By contrast, where "quickfire" dispute resolution has a statutory background, it is usually possible to refer a failure to comply directly to the Court (bypassing arbitration, even if applicable) on the basis that this is the intention of the legislation. This case was decided in Singapore but under Indonesian law, where there is no such legislative background.

## **THE CONTRACT AND THE HISTORY**

The contract related to design and installation of a pipeline to convey natural gas. A dispute arose as to valuation of variation orders which was referred to the DAB. It made a decision in November 2008 and ordered some \$17m to be paid by the Employer to the Contractor. The Contractor first commenced an arbitration seeking a declaration that the Employer had an immediate obligation to pay the sum awarded by the decision.

The Arbitrators agreed and issued a "Final Award" to this effect. The Contractor sought to enforce this in the Singapore Court, but the Employer successfully maintained that the Arbitrators had exceeded their jurisdiction. The Singapore Court of Appeal decided that the agreed arbitral procedure had not been complied with, in that only the issue of enforceability of the DAB's decision had been referred to the arbitrators, not the underlying dispute.

Following a comment by the Singapore Court of Appeal, the Contractor then commenced a second arbitration in 2011 seeking a final determination that the Employer was liable on the merits to pay the adjudicated sum and also, pending that final determination, a partial or interim award for the same sum with interest, which amounted to enforcement of the decision.

The arbitrators produced an award ordering the Employer to promptly pay the adjudicated sum, pending final resolution of the underlying dispute.

The Contractor then applied to enforce the interim award. The Employer maintained that the award was provisional and could be varied by a future interim award which meant that it was not enforceable by virtue of the applicable Singapore International Arbitration Act. The High Court found that the interim award was, in effect, final and binding since a future award could not vary the decision that the Employer must pay the adjudicated sum promptly. Any future award might decide that, on the merits, the adjudicated sum was too high but, at that point, it would simply require the Contractor to return the excess to the Employer, but would not vary the interim award.

On appeal, the Employer maintained that the interim award had only interim finality and pointed out that the arbitrators had, subsequent to the last Court decision, made a partial award in which they addressed some of the underlying disputes and found that some of the heads of claim within the issues covered by the DAB's decision should be dismissed. This award was stated to "revise" the previous interim award. The Employer submitted that this supported its argument that the interim award was only meant to have interim finality.

## **THE COURT OF APPEAL'S DECISION**

The Court of Appeal dismissed the appeal by a 2-1 majority. The Court of Appeal first gave its view on the definition of the various types of award in question. It described a "partial" award as one which finally disposes of part but not all of the parties' claims. A final award is one which disposes of all remaining claims. An interim award does not dispose finally of a particular claim but instead decides a preliminary issue. All these types of awards were capable of being enforced by the Singapore Court. By contrast, a provisional award cannot be so enforced and is issued to protect a party from damage during the course of the arbitration. It does not dispose of either a preliminary issue or a claim. An example would be an award for preserving assets.

The Court then considered the conditions of the FIDIC contract and noted that clause 20.4(4) imposed an obligation on the parties to promptly give effect to a DAB's decision. This obligation continued unless and until the decision was revised either by amicable settlement or an arbitral award. A notice of dissatisfaction might lead to either of these results but does not displace the binding nature of a DAB's decision. It is not necessary for a dispute over the binding effect of a non-final DAB decision to be referred back to the DAB before it is referred to arbitration for an award enforcing it.

The Court also decided that the DAB's decision contained an inherent premise that it is payable forthwith. This would only be displaced if the DAB had expressly found otherwise. Therefore there was nothing further to be referred back to the DAB. The Court also noted that, by way of clarification, FIDIC had issued a guidance memorandum in 2013 explaining that its intention was as set out above in drafting clause 20. The Court concluded that its interpretation supported the "vital objective of safeguarding cash flow in the building and construction industry".

The Court also held that it was not necessary for the Contractor to refer the underlying dispute to arbitration at the same time as the dispute about prompt payment. It held that the Employer's failure to promptly comply with its obligation to pay was a dispute in its own right which was capable of being finally settled by arbitration. In this respect it disagreed with the previous decision of the Singapore Court of Appeal and the Lower Court. However it was open to the Employer to raise the merits of the underlying disputes by either a counterclaim in the Contractor's arbitration or lodging a fresh request for arbitration.

Even if the Contractor did (as here) place both disputes before the same arbitrator, the arbitrator was entitled to make an interim or partial award which finally disposed of the question of whether the adjudicated sum should be promptly paid. This award would not be varied in the future course of the arbitration. The later partial award did say that it "revised" the interim award on prompt payments but its real effect was to take a step in reviewing the merits of the parties underlying dispute.

The Court held that at the final award stage an account would have to be taken and if the Contractor had been found to be overpaid, then an order for repayment could be made. However, in the meantime the interim award was final and binding as regards the issue of prompt payment.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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