

**LAW: ADJUDICATION – PROVIDING SECURITY AND STAY OF ENFORCEMENT
PROCEEDINGS**

Lau Fook Hong Adam v GTH Engineering & Construction Pte Ltd [2015] SGHC 141

In Summary

This Singapore High Court decision of 25 May 2015 addressed issues regarding the changes in the *Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract)* ("**SIA Conditions 2005**") and the 2011 update. In particular, whether a party had to provide security to commence proceedings.

Facts

The Plaintiff and Defendant were engaged in an employer-contractor relationship under a building and a construction contract that incorporated the *Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract)* ("**SIA Conditions 2005**"), was entered into.

The Defendant was unable to complete its work by the completion date and the architect issued a delay certificate. The architect then only issued the completion certificate on 3 March 2011, certifying that the Defendant had completed its works.

In 2012, the architect reminded the Defendant to submit its "final claim" pursuant to *clause 31(11)* of the *SIA Conditions 2005*. The Defendant then served on the architect a payment claim "Progress Claim No. 16A (Final Account)" which did not specify which period of time for works done by the Defendant, it related to.

However, *SIA Conditions 2005* does not contain a *Clause 31(11)(a)*. Both the quantity surveyor and Defendant had proceeded on the incorrect basis that it was the *SIA Conditions 2011* that governed the final claim procedure instead of the *SIA Conditions 2005* incorporated into the contract.



Issues

The key issues that the parties alleged were:

- (a) Whether the Plaintiff could file an application to resist enforcement of an Adjudication determination if he had not provided the security required, pursuant to *O95 r 3 of the Rules of Court* and *Section 27(5) of the Building and Construction Industry Security of Payment Act ("SOP Act")*. This provision requires the Plaintiff to provide security for the unpaid portion of the adjudicated amount that he is required to pay, in consequence of the adjudication determination at the time of the filing of the application.
- (b) Whether the Plaintiff could be granted a stay of enforcement.
- (c) Was there a breach of natural justice arising from the adjudicator's failure to consider the Final Account and final certificate issued on 25 September 2014.

Holding of the High Court

The claim was dismissed in the High Court as the Plaintiff was not allowed to make the application because challenges against adjudication determinations must be regarded as effectively setting aside applications governed by *Section 27(5) of the SOP Act*. The Plaintiff was, in fact, attempting to disguise his application as something other than a setting aside application so that he could evade the statutory requirement to provide security for the unpaid portion of the adjudicated amount. As the Plaintiff had failed to provide security, its application was found to be improper or even an abuse of process and the application was dismissed in its entirety.

On the issue of the stay of enforcement, The Plaintiff did not produce any objective evidence of any risk of insolvency that the Defendant may face and has not shown in any way that there exists the possibility that any money paid to the Defendant would subsequently be irrecoverable if the dispute was resolved in the Plaintiff's favour. There was also nothing to suggest that a different outcome would emerge at the conclusion of further "substantive proceedings" that will fully and finally resolve the parties' dispute. The Plaintiff had thus not met the "high threshold" required justifying a grant of stay of enforcement.

Providing Security – Legislative Purpose behind Section 27(5) of the SOP Act and Order 95 Rule 3(3) of the Rules of Court

There were several underlying concerns that the Court took into account when arriving at the decision. First was the fact that *SOP Act* provides a legislative framework for contractors to receive prompt payments for works done pursuant to building and construction.

Second, because of the legislative purpose behind the enactment of *SOP Act*, Adjudication determinations are granted temporary finality in furtherance of the purpose. They may be enforced in the same manner as a judgment or an order of Court pursuant to *Section 27(1) of the SOP Act*, but they are only interim in nature and any underlying payment dispute resolved by the adjudication determination may be reopened at a later time in more “substantive proceedings”- proceedings brought to obtain a final and binding determination of the full price payable for the work done.

Further, the Court recognized that *SOP Act* sought to provide contractors and sub-contractors with valuable rights in light of the vulnerability of the liquidity-dependent industry which they operate in by laying down strict statutory requirements that apply to each juncture of the claim process.

The availability of these rights must be secured via strict observance of these statutory requirements, especially so when the requirements are clearly enacted to further the primary objective of the *SOPA* to

The statutory regime contemplates only the prescribed avenues available to a dissatisfied party. To take a looser approach would undermine the objective and intent of the statutory framework under the *SOP Act* to safeguard the contract’s expectation of cash flow when certain conditions are met.

Third, despite the temporary finality, the Court was quick to clarify that parties still had other avenues of relief to challenge the Adjudication determination - by either applying for a review of an adjudication determination, pursuant to *Section 18(2) of the SOP Act*, or applying to the Court to set aside the Adjudication determination.

Providing Security – A Strict Requirement

However, in either circumstance (whether by applying for a review or applying to the Courts), the Court’s position remains, that the party seeking to challenge the determination has to fork out the unpaid adjudicated amount as payment to the claimant in the case of a review of the adjudication determination, pursuant to *Section 18(3) of the SOP Act*, or as payment into Court as security for the unpaid portion of the adjudicated amount, pursuant to *Section 27(5) of the SOP Act and Order 95 Rule 3(3) of the Rules of Court*.

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This strict requirement (to fork out the unpaid adjudicated amount), protects the successful claimant's right to be paid by guarding that claimant against the risk of the respondent becoming insolvent and the risk of the respondent dissipating assets to avoid payment. It also ensures that the claimant would be paid immediately upon the conclusion of the setting aside application in the event that the application is dismissed.

Stay of Enforcement

On the issue of a stay of enforcement of an adjudication determination, the Court affirms that such applications must be premised upon enforcement proceedings being brought in the first place. This would mean that any stay application should properly be made by way of summons in the enforcement proceedings itself and not by way of originating summons, which the Plaintiff had opted to do.

Concluding Views

The Court remains firm on issues regarding the SOP Act and are active in seeking the legislative purpose behind the particular legislation and deciding in light of such considerations, to uphold the intentions of the drafter. Further, it is also interesting to note how the Court was unimpressed by the Plaintiff's attempt to disguise his application so as to evade the statutory requirement to provide security.

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**LAW: ARBITRATION – SETTING ASIDE AWARD UNDER THE INTERNATIONAL ARBITRATION
ACT (“IAA”)**

Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30

In Summary

This Singapore Court of Appeal decision of 27 May 2015 considered the finality of a Dispute Adjudication Board's decision and its relationship to a final arbitration award.



Facts

The appeals are brought by the Appellant (PT Perusahaan Gas Negara (Persero TBK)) (“PGN”), an Indonesian company that owns and operates gas transmission systems in Indonesia. The Respondent is a group consisting of three Indonesian limited liability companies. The Appellant engaged the Respondent to design, procure, install, test and pre-commission a pipeline to convey natural gas from South Sumatra to West Java. The parties' relationship was governed by a Contract. The Contract was in turn governed by Indonesian Law and also adopted a modified version of the *FIDIC* (International Federation of Consulting Engineers) *Red Book* (1999 Edition) and made provisions for disputes to be referred to the Disputes Adjudication Board (“**DAB**”)(*Clause 20.4[1]*). Each party is entitled to insist on having the DAB's decision re-opened and decided afresh by ICC arbitration. The DAB's decision is binding on both parties.

The dispute resolution clause provided that if either party was dissatisfied with the DAB's decision, they could give a Notice of Dissatisfaction (“**NOD**”) within 28 days and if not, the DAB's decision becomes final and binding. Where an NOD was given, both parties shall attempt to settle the dispute amicably before commencing arbitration but if no amicable settlement was reached, arbitration may be commenced on the 56th day after the NOD.

Unless settled amicably, any dispute where the DAB's decision has not become final and binding shall be finally settled by ICC arbitration. If a DAB decision became final and binding but a Party failed to comply with it, the other Party could refer the failure to arbitration.

In 2009, the Respondent instituted arbitral proceedings to compel the Appellant to comply with the DAB Decision while the Appellant 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 Tribunal issued an Award in favour of the Respondent, with the Appellant is being required to comply with the DAB Decision. On the Appellant's appeal, the High Court set aside the award and the Court of Appeal upheld the High Court's decision.

In 2011, the Respondent sought Arbitration proceedings against the Appellant again, seeking 2 Awards: an interim or partial Award permitting it to enforce the DAB Decision and a final award for the sums determined in the DAB Decision. The Respondent was successful on the first ground.

The Appellant argued that the Interim Award was a "provisional" award intended to have finality only until the 2011 tribunal rendered on the awards of merits of the DAB Decisions. 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*. (The Respondent's undisputed substantive right to be "paid now" and the Appellant's substantive obligation to "argue" later). The Interim Award acknowledged that the Respondent's substantive but provisional right to be paid promptly was final and did not require that the other aspects of the dispute be resolved with finality.

Issues

There were 2 main issues in the case:

- (a) Whether a majority Arbitral Award ordering PGN to pay CRW should be set aside;
- (b) Whether the Order of Court granting CRW leave to enforce the Interim Award against PGN in the same manner as the court judgment should be set aside.

Holding of the Court of Appeal

The Court of Appeal allowed the appeal on the basis that the DAB decision was binding on both parties. *Clause 20.4* did contain a substantive obligation to comply with the DAB's decision waiting any re-opening of case and final merits decision in the Arbitration. The giving of a NOD prevents a DAB decision from being final but does not dismiss its binding effect.

Clause 20.4

The Court reasoned that intentions behind *Clause 20.4* would be “completely undermined if the receiving party were restricted to treating the paying party's non-compliance as a breach of contract that sounds only in damages and must be pursued before the available domestic courts.” Thus, *Clause 20.4* of the Red Book imposed a distinct obligation on parties to promptly comply with a DAB decision which may be referred to Arbitration without first invoking *Clauses 20.4 and 20.5* of the Red Book. This obligation to promptly comply is distinct from the merits of a DAB decision, which may be subsequently revised by an Arbitral Tribunal.

If this obligation was not complied with, parties could enforce it by another separate Arbitration proceeding or by an interim award in which receiving parties need not go through procedures of a reference to a DAB followed by an interlude for possible amicable settlements.

As the intention of *Clause 20.4* is clear regarding parties' ability to promptly comply with a DAB decision (regardless of any disagreement or dissatisfaction with it) *Clause 20.4* thus “...serves the vital objective of safeguarding cash flow in the building and construction industry, especially that of the contractor, who is usually the receiving party.”

International Arbitration Act – Interim Awards

Section 19B(1) of the IAA was enacted to clarify the position that all Awards, regardless of when they were made in Arbitration proceedings, would have the effect of being final and binding. *Section 19B* operates to render the Interim Award *final and binding* in relation to the matter at issue in the Award - PGN's obligation to make prompt payment to CRW of the Adjudicated Sum awarded under DAB No 3.

However, PGN's right to have the underlying merits of DAB No. 3 reviewed at the 2011 Arbitration was not prejudiced by the fact that *Section 19B* renders the issue determined under the Interim Award *res judicata* (a matter already judged). This is due to the fact that the Interim Award only deals with whether PGN had an obligation to promptly comply with DAB No 3 even though it had issued a NOD in respect of that decision; the Interim Award is not indicative about the underlying merits of DAB No 3.

Any Award decided upon DAB No. 3, whether resolved on the merits or not, would not vary the Interim Award but, where it is made an account would have to be excluded from the amounts actually due and any payments that had been made. This could potentially include reversing in whole or part, a payment that had been made pursuant to DAB No. 3 or pursuant to the Interim Award.

Concluding Views

Given that the Court of Appeal was not unanimous on the decision, this area of the law seems only temporarily settled. However, the bench was helpful to explain the differences between partial, interim, provisional and final awards in the case to decide that there was no basis for the Interim Award to be a Provisional Award.

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