CONSTRUCTION: ICC award should not have been set aside

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In July the Singapore Court of Appeal – the city-state's highest court – upheld a decision setting aside an ICC award enforcing a dispute adjudication board decision in favour of a contractor under the FIDIC Red Book. **Chris Seppälä**, a partner at White & Case LLP in Paris and Special Advisor to the FIDIC contracts committee, says the court was wrong.

Chris Seppälä

The case, *CRW Joint Operation v Perusahaan Gas Negara*, involved a contract between a publicly-owned Indonesian company (the employer) and an Indonesian joint operation (the contractor) for the construction of a pipeline. The contract was based on the FIDIC Conditions of Contract for Construction, 1999 (the Red Book) and was governed by Indonesian law. A dispute arose between the parties about the value of 13 variation order proposals submitted by the contractor. The parties referred the dispute to a single-person dispute adjudication board, which valued the variations at US$ 17 million and ordered the employer to pay them. The employer refused to do so and issued a notice of dissatisfaction with the dispute adjudication board decision.

The contractor then filed a request for arbitration with the ICC seeking to oblige the employer to "promptly give effect" to the "binding" dispute adjudication board decision, in accordance with sub-clause 20.4 of the Red Book. The governing substantive law was that of Indonesia and the place of arbitration was Singapore. The majority of the arbitral tribunal (chairman Alan Thambiayah and co-arbitrator Neil Kaplan CBE QC SBS) found that the dispute adjudication board decision was binding on, and to be given immediate effect by, the parties and that the contractor was entitled to immediate payment of the sum. The other co-arbitrator, H Priyatna Abdurrasyid, issued a dissenting opinion on separate grounds.

Subsequently, the employer obtained an order from the Singapore High Court setting aside the award. The contractor appealed to the Singapore Court of Appeal, which dismissed the appeal. Although the courts based their respective judgments on somewhat different grounds, the assumption that a "binding" decision of a dispute adjudication board (that is, one that has been the subject of a notice of dissatisfaction) should not be enforced by arbitration, due to a perceived "gap" in sub-clause 20.7, featured heavily in their reasoning.

In *GAR's coverage* of the Court of Appeal judgment, **Philip Jeyaretnam SC** of Rodyk & Davidson in Singapore, counsel to the employer, was quoted as saying that the judgment "gives valuable guidance to international construction lawyers dealing with [dispute adjudication board] decisions." While Mr. Jeyaretnam's skills as an advocate are not to be doubted, the guidance that the judgment offers is highly questionable, as the Court of Appeal made no less than four errors in its reasoning.

First, it failed to understand what the arbitral tribunal was appointed to decide, as it misread the terms of reference (drawn up under the ICC Rules) for the arbitration. Second, it misinterpreted sub-clause 20.7 of the Red Book, as it failed to take account of the history of the clause. Third, it misinterpreted sub-clause 20.6 of the Red Book as requiring a rehearing of the dispute on the merits and it also failed to appreciate that, as the employer had not filed a counterclaim, the arbitral tribunal could not, under the ICC Rules, grant the employer affirmative relief. Fourth, it misinterpreted the arbitral tribunal's final award as not adequately protecting the employer's right to commence a separate arbitration with respect to the merits of the dispute adjudication board decision. The award, as drafted, was fully adequate to do so.

It is, perhaps, understandable that national courts may occasionally misinterpret an industry-specific form of contract like the Red Book. It is less excusable for the highest court of a country that is an international arbitration centre to allow an award to be set aside because it misread the terms of reference in an ICC arbitration and failed to take account of the procedure for counterclaims provided for by the ICC Rules.

Cases referenced

CRW Joint Operation v. Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33.

A fuller account of Seppälä's views on this case will appear in a forthcoming article in The International Construction Law Review *in January 2012.*