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Enforcement of DAB Decisions: *The Final Piece of The 'Persero' Jigsaw Supports The Immediate enforcement of DAB Decisions Via Arbitration.*

By Christopher Miers

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In an important judgment dated 27th May 2015 the Singapore Court of Appeal handed down a majority decision in favour of the immediate enforceability of Dispute Adjudication Board decisions under the FIDIC 'Red Book' Conditions of Contract 1999.

This is the final stage in a long series of the 'Persero' disputes in PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation which will be well known to most commentators in the field of international DABs and will be welcome news to those, like me, who are active in the field of DABs and to parties seeking to make effective use of the FIDIC Clause 20 provisions.

The dispute before the Court referred to a 2006 agreement between PT Perusahaan Gas Negara (Persero) TBK (PGN) and CRW Joint Operation (CRW) to design, procure, install, test and pre-commission a pipeline to convey natural gas from South Sumatra to West Java, under modified FIDIC Red Book contract terms. A decision by the DAB in 2008 was objected to by PGN who issued a Notice of Dissatisfaction (NOD). Following non-payment by PGN, CRW commenced arbitration in 2009 claiming, essentially, a declaration that PGN was obliged immediately to pay CRW the adjudicator awarded sum. The majority of the arbitral tribunal agreed with CRW and issued a Final Award that the DAB decision had to be given prompt effect, and that service of an NOD did not alter that position.

CRW sought to enforce the Final Award via the Court in Singapore, and PGN applied to have the Final Award set aside on various grounds. The judge who heard PGN's application found in favour of PGN [1], and set aside the Final Award on the basis that the arbitrators exceeded their jurisdiction in converting the DAB decision into a Final Award without first determining the correctness of the DAB's decision. CRW appealed, but the Court of Appeal upheld the judges' decision [2]. This, of course, gave much consternation amongst the international DAB community about the enforceability of the FIDIC Red Book Clause 20 provisions.

CRW then commenced a second arbitration in 2011, seeking a final determination that PGN was liable on the merits to pay CRW the DA be adjudicated some awarded, and pending that final determination, a partial or interim award for the same sum, with interest.

The arbitral tribunal unanimously agreed that the DAB decision was binding on the parties even though PGN had issued an NOD. Further, the majority of the tribunal found that the DAB decision could and should be enforced by an interim award. The arbitral tribunal therefore made an interim award ordering PGN to promptly pay CRW the sum awarded under the DAB decision, pending the final resolution of the parties underlying dispute.

PGN still declined to pay the DAB decided sum, and CRW applied to the Court for leave to enforce the interim award in the same manner as a court judgment. PGN challenged the

application, but the Judge held that none of PGN's grounds of challenge were sustainable [2]. PGN filed notices of appeal.

Compliance with a DAB Decision notwithstanding service of a NOD

In its decision, the Singapore Court of Appeal referred to many of the leading articles which have been published commenting on the earlier Persero judgments, and also referred to the FIDIC Guidance Memorandum. The Court conclude very clearly that service of a Notice of Dissatisfaction does not relieve a party from complying with a DAB Decision, stating at para 57:

"In our judgement,the following propositions cannot persuasively be disputed and bear emphasis:

1. A DAB decision is immediately binding once it is made…
2. The corollary of a DAB decision being immediately binding once it is made is that the parties are obliged to promptly give effect to it until such time as it is overtaken or revised by either an amicable settlement or a subsequent arbitral award.
3. The fact that a DAB decision is immediately binding once it is made until and unless it is revised by either an amicable settlement or anarbitral award is significant.…the issuance of an NOD self-evidently does not and cannot displace the binding nature of a DAB decision or the parties' concomitant obligation to promptly give effect to and implement it."

The Court recognised that "it is of general importance that contractors are paid promptly where the contract so provides…" [2] and that "… it may be vital that parties promptly comply with a DAB decision."[3]

Enforcement of the non-compliance by arbitration

In respect of enforcement of a DAB decision by arbitration, the Court differentiated between partial interim arbitration awards, provisional awards and final awards [4], and addressed the question as to whether the obligation to comply promptly with a DAB decision where compliance entails payment of a sum of money determined by the DAB, if it is not complied with, is capable of being enforced by way of a separate arbitration, or, for that matter, by way of a separate interim award within the same arbitration which is also concerned with the underlying merits of that DAB decision.

The Court stated that in their judgement the obligation was capable of being enforced by arbitration in the manner described [5]. The Court held that a dispute over a paying party's failure promptly to comply with its obligation to pay a sum that a DAB decided it is liable to

pay, is a dispute in its own right which is capable of being referred to a separate arbitration, distinct from an arbitration as to the merits. [6]

The full judgement in PT Perusahaan GasNegara (Persero)TBK v CRWJoint Operation [2015] SGCA 30 can found here [7]

[1] PT Perusahaan GasNegara(Persero)TBK v CRWJoint Operation [2010] 4 SLR 672
[2] CRWJoint Operation v PT Perusahaan GasNegara(Persero)TBK [2011] 4 SLR 305
[3] PT Perusahaan GasNegara(Persero)TBK v CRWJoint Operation (Indonesia) and another matter [2014] SGHC 146
[4] Para 74
[5] Para 72(d)
[6] http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15640-pt-perusahaan-gas-negara-persero-tbk-v-crw-joint-operation-indonesia-and-another-matter-2014-sghc-146

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Building Control in Dubai – A Variety: *How approval processes can differ across one city*

By Nick Hutsteiner

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Dubai as a city has grown rapidly since just before the turn of the Millennium, almost quadrupling in size and population in the span of barely twenty years. The city's appearance and character have changed drastically, and fast. So how did the city administration cope with this astonishing rate of development, particularly in the real estate sector?

The answer is it didn't, or more to the point, it did not have to. Rather than expand the capacity of the centralistic municipality and its departments, the leadership of the emirate followed the old Roman maxim of 'divide et impera': It simply created new authorities to manage urban development of the large swathes of virgin land intended for development as free zones and freehold areas.

As a result, and depending on where a building project is located in Dubai, consultants would have to apply for building permits to different authorities. In Dubai proper (that is everything outside the free zones and freehold areas) to Dubai Municipality, and in those new freehold areas to separate building authorities, some of which were and are effectively private entities.

This is less surprising than it may seem at first. After all, a whole lot of Dubai is owned by essentially private investment vehicles, many of which are majority owned by the ruler of Dubai. Largely unconstrained by checks and balances or public consultation mechanisms which – sometimes frustratingly – slow down urban development in democratic countries, Dubai's leadership was able to kick start the extensive expansion of the city by creating self-managed mini cities whilst retaining control of the land itself. Freehold is actually a misnomer for these new areas; Land and property are usually held only on long leases.

Although these new building authorities adhere to standards and building regulations based on international models (e.g. North American NFPA regulations or ASHRAE guidelines) and give the appearance of a 'public' authority status, they were and are nonetheless instituted and controlled by the private master developers that own the land. Development in the new freehold areas would then often be spearheaded by the master developer by providing basic infrastructure such as road and utility networks, or the construction of a well-publicized landmark project, which proved very effective in attracting private investment to the new districts.

It has been clear that this formula works ever since 1979, when a decree by the then ruler of Dubai established Jebel Ali Free Zone around the man-made port of Jebel Ali, thirty kilometers south of the city of Dubai. Since its inception, Jebel Ali Free Zone Authority (JAFZA) has managed and administered licensing, excise duty collection and building permitting in this zone. JAFZA is owned by 'Dubai World', a behemoth of a government-owned investment company, which in turn is majority owned by the ruler himself.

One of the first new districts being created in the early 2000s was the twin business hub of Media City and Internet City (et.al.), owned by TECOM investments, part of Dubai Holding, also majority owned by the ruler of Dubai. Similarly, the development of the new CBDs of Business Bay and DIFC was managed by Dubai Properties Group, also part of Dubai Holding. In these freehold areas, licensing and building permitting was governed by TECOM's own 'Dubai Technology and Media Free Zone Authority'.

Effectively, most of these freehold areas were initially, or still are owned by the ruler of Dubai and governed by authorities that are separate from, and independent of Dubai Municipality. But rather than blurring the (already blurred) lines between state and ruling family, such arrangements plainly demonstrate the ruler to be the custodian of the emirate and its lands – excluding those specifically allocated to public uses or leased or owned by individuals. Capable of owning almost everything, he can equally bestow land by decree to public and semi-governmental entities, or his own private investment companies, and so single-handedly drive exceptionally swift development.

Meanwhile back in the old town across the Creek, Dubai Municipality had continued doing what it had been doing in the past – governing and administering Dubai proper, including land allocation and registration, planning and building control, waste management, undertaking less glamorous projects such as the extension of a public sewer network (not yet completed all over Dubai), and of course tending to the thousands of flowerbeds lining the motorway hard shoulders.

The crash of the real estate sector in 2009 changed this. As projects in freehold areas first stopped altogether, and then underwent slow transmogrification and eventually, resuscitation years later, the regulatory framework changed surreptitiously. Responsibilities shifted between the new building authorities and some were either split up or consolidated in renamed bodies, or dissolved altogether. JAFZA now only regulates activities within Jebel Ali Free Zone; responsibilities for licensing and building control in other 'Dubai World' owned developments such as Nakheel, Dubai Ports and Drydocks, Dubai Maritime City have been devolved onto a new authority, 'Trakhees'. Other semi-governmental master developers and their building authorities, such as 'Mizin' only live on as web cache cadavers and their regulatory responsibilities were subsumed by Dubai Municipality.

Even TECOM's 'Dubai Technology and Media Free Zone Authority' had to relinquish building control in the Business Bay development to Dubai Municipality.

This poses challenges to consultants working on projects that were resuscitated after the hiatus of economic downturn. Dubai Municipality, which was much less affected by the downturn than the private authorities, had continued to develop new regulations and work on its accessibility. For example, 'Green Building Regulations' came into force by Emiri decree in 2008 which the private sector freehold areas and their subordinate authorities had had the liberty to circumnavigate. A new UAE fire code was released in 2011, and the entire approval process at the DM 'Department of Buildings and Housing' moved to an online web portal in May 2012. Today, DM requires BIM models (for large projects) to be submitted as part of building permit applications. Consultants working on recently re-started projects in Business Bay find themselves now in the situation of having to produce BIM models retrospectively and at great expense to satisfy Dubai Municipality submission requirements which differ greatly from TECOM's earlier requisites.

This highlights the ups and downs of the still very young Dubai private property sector. Whilst the delivery of freehold area developments has taken a big knock, the experiment clearly works for Dubai and private investors. In the background, however, Dubai Municipality has been restored to an important role in managing the development of the city.

Nick Hutsteiner *is a Chartered Architect with more than 20 years of experience in construction. He has a substantial track record in the design, planning and design management of a range of international projects including strategic master planning and feasibility studies. He has a wealth of experience in complex construction projects in the Middle East. Nick is a permanent consultant for Probyn Miers.*

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Final Certificates and the "Conclusive Evidence" Clause under JCT: *An update*

By Katerina Hoey

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A Final Certificate is issued at the end of the defects liability period by the Contract Administrator to indicate that a construction contract has been fully completed. It has the effect of releasing all remaining money due to the contractor, including retention; all must have been remedied, all adjustments to the contract sum must have been agreed and all claims settled.

Clause 1.9 (in the 2011 edition) of the JCT Standard Building Contract effectively grants the parties up to 28 days to challenge the Final Certificate by commencing adjudication, arbitration or other proceedings. The final certificate is then only conclusive in relation to matters that are not in dispute. Where proceedings have already been commenced in relation to a dispute, the conclusiveness of the Final Certificate is subject to the findings of those proceedings. A number of technology and construction cases (London) have dealt with these matters.

In Bennett v FMK Construction Ltd [2005] EWHC 1268 (TCC), part 8 proceedings dealt with the effect of procedural difficulties regarding the validity of a notice of adjudication challenging the Final Certificate.

FMK disputed the validity and correctness of the Final Certificate. A notice of intention to refer the dispute to adjudication was served within the 28 day period. The application to the adjudicator nominating body ("ANB") and subsequent referral notice were both served outside of the 28 days.

When this was drawn to the adjudicator's attention, he resigned. FMK immediately re-served the referral notice, the same adjudicator was appointed and proceedings were stayed pending determination of whether the Final Certificate was conclusive evidence of its contents.

Bennett's claim was that the first notice of adjudication had proven to be ineffective and FMK was relying upon a second notice which had been served after the 28 day period. Bennett argued that this would allow a party disputing a Final Certificate to do no more than serve a notice of intention within the prescribed 28 days; it could then bring further proceedings at any later, convenient, time.

Havery J accepted that; "… if the referring party abandons adjudication proceedings by simply not pursuing them, then the salvo in clause 30.9.3 [1] ceases to apply." However, he went on to state that in this case the adjudication was not abandoned. He concluded that the first notice of adjudication was sufficient to prevent the Final Certificate from becoming conclusive evidence, even though that first notice was later replaced by a second notice of adjudication which, while identical to the first, was served outside the prescribed period.

In University of Brighton v Dovehouse Interiors Ltd [2014] EWHC 940 (TCC), Practical Completion had been certified on 30 October 2012, but various disputes between the parties relating to time, money, incomplete works and defects resulted in the Final Certificate not being issued until 9 December 2013.

Both parties agreed to extend the 28 day period, under clause 1.9.2, to 66 days in an attempt to resolve their differences. Dovehouse served a notice of adjudication on day 65; unfortunately it identified the wrong ANB and gave an address for the University that differed from that indicated in the contract.

As a result of the ANB being incorrect, the adjudicator resigned, by which time the agreed 66 day period had expired. Dovehouse served a second notice of adjudication, this time identifying the correct ANB. The University applied under Part 8 for a declaration as to the effect of the Final Certificate.

Consistent with Bennett, Carr J held that: the service of a notice of adjudication (as opposed to a referral notice) commenced adjudication proceedings for the purposes of clause 1.9 and this had the effect of triggering the saving proviso relating to the Final Certificate; The application to the wrong ANB, whilst problematic for the referral notice, did not affect the notice of adjudication's validity; The identification of a different address to that stated in the contract particulars was not sufficiently material to invalidate the notice. Carr J also confirmed that if the adjudication proceedings were not pursued, then the saving proviso would fall away:

Bennett and Dovehouse appear to state the current law concerning the conclusive nature of a Final Certificate and the ability to challenge via adjudication within the prescribed time period.

More recently Marc Gilbard 2009 Settlement Trust v OD Development and Projects Ltd [2015] EWHC 70 (TCC), examined the situation where legal proceedings were commenced during the 28 day period.

A Final Certificate was issued on 3 December 2013 and OD issued part 7 proceedings on 20 December 2013, disputing its validity and correctness.

13 months on, OD sought to commence adjudication on the matters in dispute in the Part 7 proceedings. The Trust then issued Part 8 proceedings as to the proper interpretation of clause 1.9.3. They argued that OD was barred from bringing further proceedings because the Final Certificate would provide conclusive evidence in any proceedings issued outside the 28 day period.

Coulson J found in favour of the Trust, stating that conclusive evidence clauses were aimed at providing certainty and clarity. He also stated obiter that clause 1.9, or any similar provisions in other standard forms, is not contrary to the 1996 HGCRA.

This robust approach is consistent with business common sense and confirms existing case law as follows:

- Proceedings to challenge a Final Certificate must be commenced within 28 days, or other prescribed time limit;
- Any proceedings started within the 28 day time period must be pursued and not abandoned if the salvo in clause 1.9.3 is to apply; and
- Supplementary or additional proceedings cannot be commenced after the 28 day (or other prescribed) time limit has expired.

[1] Equivalent to 1.9.3 in the 2011 edition

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