

Residual discretion not to set aside an arbitral award



By S. Sharma

In its decision dated 13 July 2011, in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33*, the Court of Appeal ruled that the court may, in its discretion, refuse to set aside an arbitral award, despite one or more of the grounds for setting aside the award having been established. However, the Court declined to exercise such residual discretion in the case before it.

Background

CRW Joint Operation (CRW) and PT Perusahaan Gas Negara (Persero) TBK (PGN) entered into a contract involving the construction of a pipeline and an optic fibre cable in Indonesia, which incorporated the provisions in the 1999 FIDIC Red Book. A dispute adjudication board (DAB) constituted pursuant to the contract ruled in CRW's favour. CRW issued an invoice for the amount stated by the Adjudicator, but PGN rejected it on the grounds that it had filed a Notice of Dissatisfaction (NOD). CRW filed a Request for Arbitration, pursuant to sub-clause 20.6 of the 1999 FIDIC Conditions of Contract to give effect to the Adjudicator's decision. In its Answer to the Request for Arbitration, PGN requested the Tribunal to open up, review and revise the Adjudicator's decision.

There were two preliminary issues before the Tribunal, namely:

- a) whether CRW was entitled to immediate payment notwithstanding the filing of the NOD by PGN; and
- b) whether PGN was entitled to request the Tribunal to so revisit the Adjudicator's decision.

If the answer to the second issue was yes, the Tribunal would issue appropriate directions for the rehearing, in consultation with the parties. By a majority, the Tribunal decided that CRW was entitled to immediate payment. It also held that PGN was not entitled to request the Tribunal to rehear the merits of the Adjudicator's decision but that PGN's right to revise the

Adjudicator's decision in fresh proceedings was reserved. The Tribunal issued its decision in a Final Award.

Court's decision

The Court analysed the dispute resolution scheme and the relevant clauses of the 1999 FIDIC Red Book. This judicial analysis makes intriguing reading. The Court reviewed its discretionary power to set aside arbitral awards, limited to setting aside based on the grounds under Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law) and section 24(b) of the International Arbitration Act (Cap 143A, 2002 Revised edition)(IAA).

In the instant case, the Court found that under sub-clause 20.6 of the 1999 FIDIC Conditions of Contract and the Tribunal's Terms of Reference, the Tribunal should have made an interim order for the payment of the sum and proceeded to hear the parties on the substantive dispute before rendering a final award. The Court found the failure of the majority of the Tribunal to consider the merits of the Adjudicator's decision before making the Final Award meant that it had exceeded its jurisdiction in making the award. The Court found the grounds for setting aside based on excess of jurisdiction under Article 34(2)(a)(iii) of the Model Law and on breach of the rules of natural justice under section 24(b) of the IAA were made out. The Court accepted that it had discretion to set aside an arbitral award even though grounds for setting aside had been made out, but this was only if no prejudice had been sustained by the aggrieved party. It found that PGN had suffered real prejudice as a result of the majority members of the Tribunal acting in excess of their jurisdiction and also in breach of the rules of natural justice. As such, the Court found it had no basis to invoke its residual discretion to refuse to set aside the Final Award.

It is left to future cases to provide further guidance on the exercise of the court's residual discretion.

ATMD Bird & Bird LLP

2 Shenton Way, #18-01 SGX Centre 1,
Singapore 068804

Tel: (65) 6534 5266 (GEN)
(65) 6428 9819 (DID)

Email: s.sharma@twobirds.com

www.twobirds.com