SQUIRE PATTON BOGGS

CONSTRUCTION MATTERS

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Australia and Singapore – Partnering for Success

Australia and Singapore appear set to forge a stronger partnership for success with the recent signing of a Comprehensive Strategic Partnership (**CSP**) in Singapore.

The CSP, which was first announced in August 2014 as part of the Eighth Meeting of the Singapore-Australian Joint Ministerial Committee, is aimed at strengthening the bilateral ties between Australia and Singapore. The CSP will involve new levels of cooperation and exchange between Australia and Singapore in areas such as trade, economic and foreign affairs, defence and security and People-to-People fields.

In a joint declaration by the Prime Ministers of Australia and Singapore on the CSP, it was stated:

> *'The foundation of the Australia-Singapore partnership is our shared strategic perspective and complementary economies…*
>
> *We share an ambitious vision for cooperation and seamless economic integration between our two countries over the next decade and beyond. We support an open, rules based trading system and greater trade liberalisation, globally and regionally…'*

One of the first sectors of business that is tipped to benefit from the CSP, is construction and agriculture, with a recent announcement that Australia and Singapore will begin working towards mutual recognition of standards for construction products and agribusiness.

In support of the CSP, Standards Australia and SPRING Singapore, Australia and Singapore's national standards bodies, announced the signing of a Memorandum of Understanding on 29 June 2015, pursuant to which the two organisations will seek to 'collaborate on the development and promotion of standards of mutual interest, potentially in the sectors of building and constructions.' Standards Australia indicate that 'Greater parity and alignment in the adoption, use and application of business-friendly standards will help increase market participation and reduce operating costs for both Australian and Singaporean exporters and investors.'

Insolvent Contractors and Their Rights to Enforce Adjudication Determinations - *Hamersley Iron Pty Ltd v James* [2015] WASC 10

Overview

The recent decision of *Hamersley Iron Pty Ltd v James* [2015] WASC 10 confirms that an insolvent company may seek to enforce an adjudication determination provided:

a) the right to payment accrued **prior** to termination of the contract; and

b) no counterclaim exists in favour of the other party.

Facts

During 2012, Hamersley Iron Pty Ltd (Hamersley) and Forge Group Constructions Pty Ltd (Forge) entered into a construction contract for the design and construction of fuel hubs (Contract). In February 2014, Forge submitted a payment claim on Hamersley, seeking AU$14,335,778.07 (Claim). Following this, administrators and receivers and managers were appointed in respect of Forge. Hamersley then terminated the Contract. Hamersley disputed the Claim and, in March 2014, Forge lodged an adjudication application under the *Construction Contracts Act* (2004) (WA) (CCA) (Adjudication Application).

In its response to the Adjudication Application, Hamersley contended that Forge had failed to demonstrate that the remaining work in the Contract was complete. Furthermore, Hamersley argued it was entitled to a 'set-off' (estimated cost to complete the work plus other charges less the balance of value of work under the Contract and securities) (Counterclaim) under the Contract and section 553C of the *Corporations Act 2001* (Cth) (Corporations Act). This section allows the set off of amounts otherwise payable when there have been "mutual dealings" between an insolvent company and another party.

The adjudicator did not accept this submission as he was not satisfied that the completion of the outstanding work under the Contract exceeded the unpaid balance. He determined that Hamersley was to pay AU$641,607.33 (plus GST) to Forge (Determined Amount).

Following Hamersley's failure to make payment, Forge applied to the Supreme Court of WA (Court) for leave under section 43 of the CCA to enforce the adjudication award. Hamersley applied to the Court to set aside the determination and objected to Forge being granted leave to enforce. Hamersley presented evidence that showed the Counterclaim greatly exceeded the Determined Amount. Additionally, Hamersley argued that, due to Forge's insolvency, if it was to pay the Determined Amount, Hamersley would be unable to receive payment if the Counterclaim was successful.

Held

Beech J dismissed Hamersley's application to set aside the determination but stayed Forge's application for leave, pending the outcome of Hamersley's Counterclaim. The Court found there was "a serious question to be tried" in relation to whether the Counterclaim exceeded the Determined Amount. Additionally, the Court found the Counterclaim constituted "mutual dealings" within the meaning of section 553 of the Corporations Act. Therefore, the net balance remaining between the parties required ascertainment before further action.

In reaching this decision, Beech J affirmed that the "pay now, argue later" policy underlining the CCA was to ensure money flows along the contracting chain. By enforcing timely payment, delays due to complex disputes are avoided. As insolvency removes a company from the "chain" altogether, Beech J ruled that allowing an insolvent company to enforce an adjudication award is inconsistent with the CCA's policy justification. Furthermore, the purpose behind section 553 of the Corporations Act is to do 'substantial justice between the parties'. This purpose would be defeated if Forge was allowed to enforce its determination.

Implications

Usually, adjudication determinations can be enforced as judgments, and a set off or counterclaim will not be a valid reason to prevent this. However, a determination may not be enforced if an applicant is insolvent, and the respondent can properly establish that there is a serious question to be tried that the balance of money lies in the applicant's favour.

Consequently, before an insolvent company applies for adjudication or enforces determinations, it is prudent to consider if the respondent has a serious and substantial counterclaim. If so, the utility of adjudication or enforcement should be questioned.

Enforceability of Dispute Adjudication Board Decisions – PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30

The Singapore Court of Appeal has provided clarity on the enforceability of Dispute Adjudication Boards (DAB) decisions.

While recent years have seen an increased usage of DABs, particularly on international construction projects, there has been some uncertainty as to the enforceability of DAB decisions. In a significant case for the purposes of international arbitration involving the FIDIC forms, in particular, such arbitrations seated in Singapore, the Singapore Court of Appeal in the case of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30 (delivered in May 2015), provided a measure of certainty in this regard, in deciding that clause 20.4 of the FIDIC Red Book requires parties to comply with any decision of the DAB in a prompt manner. The case is also notable because it provides clarification on the status of interim awards under the Singaporean International Arbitration Act.

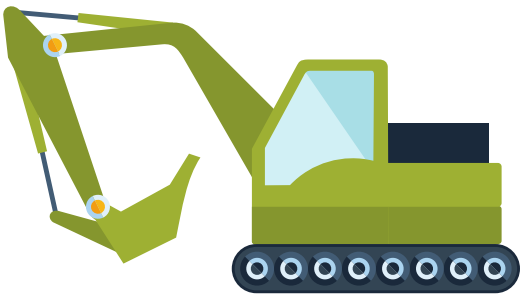
Persero engaged CRW under a contract to design, procure, install, test and pre-commission a gas pipeline in Indonesia. The contract entered into in 2006 and was based on the FIDIC Red Book. In 2008, the DAB made a decision in favour of CRW for an amount in excess of US$17 million. The DAB mechanism included in the 1999 FIDIC forms of contract was intended to provide a quick, efficient and cost-effective method of obtaining immediately binding awards through the DAB mechanism in Clause 20 of the conditions.

However, as *Persero* illustrates, the experience of contractors (in whose favour monetary DAB awards would usually be) can be quite the opposite. It would be an understatement to have called the enforcement process in this case arduous.

While the relevant DAB decision was made in 2008, it was only after two sets of arbitrations, and High Court and Court of Appeal proceedings over the course of six years, that interim enforcement of the DAB decision was obtained. The DAB mechanism in Clause 20 is such that it will become final and binding if neither party provides a Notice of Dissatisfaction within 28 days. If a party issues a Notice of Dissatisfaction, under the FIDIC form, the decision is considered "binding" but not "final and binding". The Court of Appeal considered the latter situation.

The Singapore Court of Appeal held that Clause 20.4 of the Red Book imposes an obligation on the parties to promptly comply with the DAB decision. The Court observed that clause 20.4 evinces a clear intention for parties to promptly comply with a DAB decision, and that irrespective of any disagreement or dissatisfaction with the decision, clause 20.4 "*…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*".

The Court of Appeal also contrasted "*interim*" and "*partial*" awards on one hand, and on the other, "provisional awards". The Court of Appeal confirmed that the former are capable of constituting "awards" under the Singapore International Arbitration Act, and thus being rendered final and binding.



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