CHAPTER 14

Enforcement of DAB decisions under the FIDIC 1999 Forms of Contract

Taner Dedezade

Introduction

14.1 This chapter focuses on enforcement of DAB decisions under FIDIC 1999 Contracts.[1] A brief introduction of Dispute Boards is given prior to focusing on the issues concerning enforcement. A simple definition of a Dispute Board is as follows: 'A Dispute Board is a tribunal which is established to endeavour to avoid or resolve any disputes which may arise between the parties to a particular contract.'[2]

14.2 There are two types of Dispute Board adopted by FIDIC:

(a) A 'standing' dispute board which becomes familiar with a project from its inception[3] and can help resolve disputes early, either informally, by giving opinions that might be adopted by the parties, or formally, by giving a binding decision following the referral process; or

(b) An 'ad-hoc' dispute board, which is formed to resolve a particular dispute at the time a dispute arises between the parties.

14.3 The FIDIC 1999 Red Book embraces the concept of a 'standing' Dispute Adjudication Board (DAB) and the FIDIC 1999 Yellow and Silver Books, an 'ad-hoc' DAB.

14.4 The rationale of the DAB is that it can assist the parties to settle or resolve its disputes at an early stage and often during the currency of the project. When a formal referral is issued to the DAB, it has to give a quick decision[4] and the parties can then use that decision as a springboard to settle the dispute in the amicable settlement period[5] thus avoiding the expensive process of arbitration to resolve the dispute.

1 The FIDIC Conditions of Contract for Construction for building and engineering works designed by the Employer First Edition, 1999 (FIDIC Red Book); FIDIC Conditions of Contract for Plant and Design Build for electrical and mechanical plant and for building and engineering works designed by the Contractor First Edition, 1999 (FIDIC Yellow Book); FIDIC Conditions of Contract for EPC/Turnkey Projects First Edition, 1999 (FIDIC Silver Book).

2 G Owen and B Totterdill, *Dispute Board Procedures and Practice* (Thomas Telford 2008) 4.

3 A standing DAB is normally constituted within 28 days of the commencement date and has regular site visits (normally every three months).

4 Under Sub-Clause 20.4, it is mandatory for the DAB to give a decision within a three-month time-frame, unless extended by agreement between the parties.

5 Sub-Clause 20.5 provides a two-month time mandatory period for amicable settlement prior to a dispute being referable to arbitration.

14.5 The DAB is central[6] to the dispute resolution mechanism of the FIDIC 1999 Forms of Contract[7] and, for it to work effectively, it is suggested that there are two essential elements:

(a) Members of the DAB are required to be impartial and independent of the parties[8] as reflected by the consensual appointment process;[9] and
(b) the DAB's decision is temporarily binding and should be promptly (immediately) payable by the parties.[10]

14.6 Accordingly, fundamental to the successful operation of a DAB system in an international construction project under the FIDIC forms of contract, is for the parties to have not only an obligation to comply with the DAB decision pending arbitration, but a working and effective mechanism to enforce that obligation should it be disregarded. Absent such a mechanism, a party, usually an employer, can wantonly disregard the DAB's decision and there will be no incentive for the parties to settle in the amicable settlement period. The employer is in a much stronger negotiating position if it can withhold payment until the final award, due to inevitable cash-flow considerations that all contractors have.

14.7 In the FIDIC 1999 forms, there is express wording included in the contract at Sub-Clause 20.4(4) that the parties 'shall promptly give effect to [the DAB decision]', but no corresponding clear enforcement mechanism should that obligation be disregarded after one party issues a notice of dissatisfaction (NOD).

14.8 On 1 April 2013, FIDIC finally acknowledged the shortcomings of the FIDIC 1999 forms and issued a Guidance Memorandum that recommends that when new FIDIC 1999 contracts are entered into, alternative wording for Sub-Clause 20.7 ought to be substituted with more robust wording[11] that provides a clearer contractual enforcement mechanism to ensure enforceability of 'non-final' DAB decisions.

14.9 This chapter will consider the issues that arise under the FIDIC 1999 forms in relation to the enforcement of 'non-final' DAB decisions. It is suggested that the issues

6 In the English case of *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC), the judge considered that the contract required disputes to be determined by adjudication and amicable settlement, and only failing that, by litigation. The effect of Clause 20 was for adjudication to be a condition precedent to court proceedings.

7 Prior to the advent of the DAB in the FIDIC 1999 Forms (under the FIDIC 4th editions, although there was a supplement making provision for a DAB in the 4th Edition which was not widely used), if a party disputed the engineer's determination, the only mechanism for resolution of that dispute was arbitration. Some contractors felt that, despite the obligation on the engineer to be 'impartial', as the engineer was the employee of the engineer, the engineer would find himself conflicted in making impartial decisions. The advent of a quick method of dispute resolution, therefore, was welcomed in the industry generally.

8 DABs consist of a panel of three members or a sole adjudicator.

9 For the appointment of a three-person DAB, for the wing members, each party must agree the nomination of the other party and the parties must consult each other (and their nominated DAB members) to agree on the chairman.

10 Statutory adjudication in the UK has a similar rationale to the DAB rationale and is highly successful: in the UK, an adjudicator makes a decision which is temporarily binding and immediately enforceable through the UK courts once made. The philosophy adopted is: 'Pay now; argue later'. When the parties know that there is a robust court system that will enforce the adjudicator's decision and thus enforce an obligation to pay (if that is what an adjudicator decides), the incentive to settle is strong. Percentages tendered by various statisticians suggest high (over 90%) settlement rates for cases that are referred to UK statutory adjudication.

11 Adopted in the FIDIC Gold Book in 2008.

discussed in this chapter are not entirely redundant if the FIDIC form is amended in line with the Guidance Memorandum as even with a clear contractual mechanism to enforce the DAB's decision, questions still arise as to what sort of award should be issued by an arbitrator.

14.10 In this chapter, particular focus is given to the later cases in the Singapore *Persero*[12] litigation.

The FIDIC 1999 wording

14.11 Sub-Clause 20.4 provides that:

(a) a DAB shall give a decision within 84 days (unless the parties agree to revise that period);
(b) the decision is binding (all DAB decisions are binding);
(c) the decision becomes final if no NOD is given with 28 days of receipt of the decision (in such circumstances the DAB's final decision can be enforced via Sub-Clause 20.7);[13]
(d) If a timely NOD is given, the DAB's decision remains binding but is not final and the underlying dispute ('primary dispute') can be referred to arbitration under Sub-Clause 20.6 after expiry of the 56-day amicable settlement period.

14.12 The 'secondary dispute' arises if a DAB adjudges that a sum should be paid ('the adjudicated sum'), a NOD is issued (hence the DAB decision does not become final) and one of the parties fails to pay that adjudicated sum.

14.13 Sub-Clause 20.7 gives express wording enabling the enforcement of a 'final' DAB decision. There is no express wording allowing for the enforcement of a DAB decision that has not become final as a result of one or other party issuing a NOD. This lack of express wording became known as 'the gap' and was first highlighted by Professor Nael Bunni in an article he wrote in 2005.[14]

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12 There are four *Persero* cases:

(1) The High Court judgment of Belinda Ang Saw Ean J: *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 hereinafter referred to as 'HC in *Persero 1*';
(2) The Court of Appeal judgment of Chao Hick Tin JA, Andrew Phang Boon Leong JA and VK Rajah JA (delivering the judgment of the Court): *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 hereinafter referred to as 'CA in *Persero 1*';
(3) The High Court Judgment of Vinodh Coomaraswamy J: *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2014] SGHC 146 hereinafter referred to as 'HC in *Persero 2*';
(4) The Court of Appeal judgment: *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30, hereinafter referred to as 'CA in *Persero 2*'. Quentin Loh J and Sundaresh Menon CJ delivered the Majority judgment, hereinafter referred to as 'CA Majority judgment in Persero 2'. Chan Sek Keong SJ, the former Chief Justice, delivered the dissenting judgment, hereinafter referred to as 'CA Dissenting judgment in *Persero 2*'.

13 If the DAB fails to give a decision within 84 days (and the parties do not agree to extend this period), Sub-Clause 20.4 allows a party wishing to refer such dispute to arbitration to give a NOD in relation to the failure by the DAB to give a decision. Failure to give such a notice would lead to the non-decision becoming final and an inability to refer such decision to arbitration.

14 N Bunni, 'The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Work' [2005] The International Construction Law Review 272.

14.14 Since the gap was first identified, many courts, arbitral tribunals[15] and commentators have sought to elucidate whether parties who have entered into a FIDIC 99 form can enforce the DAB decision notwithstanding the lack of clear wording.

14.15 This chapter seeks to identify the practical issues, the theoretical issues and the solutions put forward. It should be emphasised that the issues discussed in this chapter are very much live issues and, whilst there is authority from the highest Court of Singapore that may put the matter to rest in Singapore,[16] the said judgment will not necessarily be followed or be considered binding elsewhere in the world, particularly as there was a comprehensive dissenting judgment from the former Chief Justice of Singapore.

The issues

14.16 This chapter will focus on six issues:

(a) What is the contractual obligation of a party in relation to compliance with a DAB's decision?
(b) Does the 'failure to pay' amount to a dispute that can be referred to arbitration under Sub-Clause 20.6?
(c) What effect, if any, does a NOD have on the contractual obligation on a party to give prompt effect to the DAB's decision? It has been argued that the giving of a NOD absolves the paying party from complying with the DAB's decision.
(d) Is it necessary for the parties to refer both the primary (the merits of the underlying dispute) and secondary (dispute concerning non-payment of the DABs decision) disputes in a single arbitration?
(e) What sort of award? Partial? Interim? Final? Provisional?
(f) Has the wording in the Gold Book/Guidance Memorandum resolved issues?

What is the contractual obligation of a party in relation to compliance with a DAB's decision?

14.17 This is not controversial. The wording of Sub-Clause 20.4(4) is clear: 'The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below.'

14.18 A party must promptly comply with the DAB's decision. In a case where the DAB orders the payment of money, a contractual obligation arises to pay that money promptly.[17] In South Africa, 'promptly' was considered to mean within 28 days of the decision being given.[18]

15 For an analysis of several ICC cases showing different approaches by different tribunals, see T Dedezade, 'Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions under the 1999 FIDIC Conditions of Contract' [2012] International Arbitration Law Review, Issue 4, 155–156.

16 Although even in Singapore there has been much criticism about the *Persero* judgments.

17 CA Dissenting judgment in *Persero 2* at 120 and 124 he records that 'there could be no dispute whatsoever on this proposition of law' referring to the contractual obligation to pay and the failure to pay being a breach of contract.

18 *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* (06757/2013 ZAGPJHC 155; 2014 SA 244 (GSJ) (3 May 2013), the judge held 'given that a dissatisfied party has 28 days within which to give his notice of dissatisfaction, it follows that the requirement to give prompt effect will precede any notice of dissatisfaction'

Does the 'failure to pay' amount to a 'dispute' that can be referred to arbitration under Sub-Clause 20.6?

14.19 The opening words of Sub-Clause 20.4 allow a dispute to be referred to the DAB: 'if a dispute (of any kind whatsoever) arises between the parties in connection with or arising out of, the Contract . . . either Party may refer the dispute in writing to the DAB for its decision'.

14.20 In the normal course of a construction or engineering project under a FIDIC contract, the way in which a dispute arises is when one party makes a claim, the engineer rejects it in a Sub-Clause 3.5 determination and the party that wishes to pursue that claim rejects the engineer's rejection. At that point, a dispute arises that is capable of referral to the DAB.

14.21 After a DAB has given a decision on that (primary) dispute, that same dispute can then be referred to arbitration for 'final' settlement under Sub-Clause 20.6[19] provided a NOD in relation to the DAB decision is given[20] and the 56-day amicable settlement period has expired.[21]

14.22 There is also an obligation under Sub-Clause 20.4(4) to comply promptly with the DAB decision. If the DAB orders a party to pay and there is a failure to pay, is the dispute capable of referral under Sub-Clause 20.6 and what cause of action arises?

Is the dispute capable of referral under Sub-Clause 20.6?

14.23 This issue did not trouble the Court of Appeal majority in *Persero 2* but it troubled the Court of Appeal dissenting judge in *Persero 2* who explored in detail whether such a dispute was referable to arbitration under Sub-Clause 20.6 as:

> this is not the kind of dispute contemplated by cl 20.6 because of the use of the words 'shall be finally settled by international arbitration' in relation to a dispute which is not settled amicably. Those words, in my view can only refer to a factual dispute such as the parties' primary dispute. To reiterate, a dispute over a question of law cannot be settled amicably in the context of cl 20.6 – i.e. PGN and CRW cannot settle among themselves whether, as a matter of law, DAB No.3 is enforceable by an interim award pending the resolution of the primary dispute by arbitration. That dispute (viz the enforceability dispute) can only be decided by a tribunal or a court. The concept of amicable settlement in cll 20.4 and 20.5 is meant for factual disputes, and not legal disputes such as the enforceability dispute.[22]

14.24 The dissenting judge in *Persero 2* continued:

> Clause 20.4 does not make any provision for a dispute as to the enforceability of DAB No 3. to be settled by arbitration because under this clause, PGN and CRW are already required to 'promptly give effect to [DAB3] unless and until it shall be revised in an amicable settlement or an arbitral award'. In other words, pursuant to cl20.4, DAB is already enforceable unless and until it is revised by an amicable settlement or an arbitral award.[23]

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19 Sub-Clause 20.4: 'unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration'.

20 Sub-Clause 20.6: 'neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause'.

21 Sub-Clause 20.5: 'arbitration may be commenced on or after the fifty-sixth day after the day on which the notice of dissatisfaction was given'.

22 CA dissenting judgment in *Persero 2*, para 160.

23 CA dissenting judgment in *Persero 2*, para 161.

14.25 The dissenting judge concluded:

> For these reasons, in the present case, arbitration under cl 20.6 is limited to arbitration of the primary dispute between the parties. The enforceability dispute is not a cl 20.6 dispute and does not fall within the scope of 20.6 of the Conditions of Contract. Hence the 2011 Tribunal had no mandate to determine any dispute other than the primary dispute; it therefore had no jurisdiction or power to grant, in relation to the enforceability dispute, an interim award ordering the enforcement of DAB No.3 pending its resolution of the primary dispute.[24]

14.26 In further comments, the dissenting judge added:

> In the 2011 Arbitration, unlike in the 2009 Arbitration, PGN did not dispute that it had an obligation under cl 20.4 to comply with DAB No.3. Instead it took the position that there was effectively no dispute between the Parties that could be referred to arbitration under cl 20.6 – i.e. there was in effect no referable dispute between the Parties as to PGN's obligation to promptly comply with DAB No.3 pending the determination on the primary dispute on the merits. Since there was, in relation to the enforceability dispute, no dispute that could be referred to arbitration, there was no legal basis for the exercise of any power vested in the 2011 Tribunal (assuming it had such a power) to make an interim award in respect of that dispute.[25]

What cause of action?

14.27 It would seem to the author that there are two options:

(a) Damages for breach of contract; or
(b) Action for specific performance.

14.28 The author is not aware of any cases in which the courts or tribunals have considered an action for specific performance. All the cases of which the author is aware concern cases where the argument runs that the failure to pay amounts to a breach of contract that leads to a dispute that can be referred under Sub-Clause 20.6.

Damages for breach of contract

14.29 Conceptually, it is necessary to consider the components required to pursue a cause of action stemming from breach of contract as follows:

(a) Does the failure to pay amount to a breach of contract?
(b) If so, what loss flows from that breach of contract?
(c) Is the 'dispute' capable of referral under Sub-Clause 20.6?
(d) Does the 'secondary dispute' need to be referred back to the DAB prior to referral to arbitration?

Does the failure to pay amount to a breach of contract?

14.30 It would seem to the author that there is a clear obligation under the contract in Sub-Clause 20.4(4) for prompt payment and a failure to pay amounts to a breach of contract.

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24 CA dissenting judgment in *Persero 2*, para 162.
25 CA dissenting judgment in *Persero 2*, para 163.

If so, what loss flows from that breach of contract?

14.31 The more difficult question is: what loss flows from the breach of contract? There are two views.

Damages amount to interest only

14.32 Under English law, there is a respectable argument that suggests that damages would not constitute the principal sum adjudged to be due by the DAB but only the interest.[26]

Damages include principal sum

14.33 Some arbitrators have considered this issue and concluded that the principal sum should be included as part of the loss.[27]

14.34 Assuming that this hurdle is passed, the next question is whether the breach of contract can be referred as a dispute.

Does the 'secondary dispute' need to be referred back to the DAB prior to referral to arbitration?

14.35 The HC in *Persero 1* concluded that a failure to refer the dispute back to the DAB means that the arbitral tribunal has no jurisdiction over that dispute.

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26 This view is supported as follows:

- In *ICC Case 16949/GZ*, the Sole Arbitrator suggests that damages for breach of contract

  'would hardly be a claim for damages of the same amounts already awarded'.

- The HC in *Persero 1* saw this as a potential issue when she issued the following note of caution:

  'Suing in contract for breach may not be the best practical move for the winning party, especially when the decision only relates to payment of money. The winning party may need to prove damages, which may be no more than a claim for interests on the sum owing.'

- Christopher Seppälä 'An Engineer's/Dispute Adjudication Board's Decision is Enforceable by an Arbitral Award' (White & Case December 2009) recognises that the tribunal in *ICC Case 101619* could have taken this approach but chose not to. He states:

  'The Tribunal could have held merely that the Employer was in breach of contract and required the Employer to pay damages for such breach, represented by interest on the amount of the unpaid decisions. But, instead, the Tribunal ordered the Employer to pay the amount of the Engineer's decisions on the ground that 'this is simply the law of the Contract.'

- Edwin Peel makes a distinction under English law between

  - an action for a price; and
  - an action for damages.

He considers that an action for an agreed sum differs from a claim for damages not only in its nature, but also in its practical effects. The former is a claim for specific enforcement of the defendant's primary obligation to perform what he has promised. The latter arises where the agreed sum is not paid and the claimant also suffers additional loss. In these circumstances, he may be entitled to bring both the action for the agreed sum and an action for damages. E Peel (ed), *Trietel on The The Law of Contract* (12th edn, Sweet & Maxwell 2007) 21–001.

27 *ICC Case 15751/JHN* and *ICC case 16948/GZ*. For further consideration of these cases see: T Dedezade, 'Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions under the 1999 FIDIC Conditions of Contract' [2012] International Arbitration Law Review, Issue 4, 155–156.

14.36 The Court of Appeal majority judgment in *Persero 2* came to the opposite conclusion:

> the real question is whether it is essential to first go through the process of referring a dispute over the binding effect of a binding but non-final DAB decision – i.e. a DAB decision in respect of which an NOD has been issued – back to the DAB under cl.20.4 and then through the further process of amicable settlement under cl.20.5 before referring it to arbitration under 20.6.[28]

14.37 And gave their answer as follows:

> we consider, for the reasons we have already set out above, that indeed, it is implicit in cl. 20 that a failure to comply with a binding but non-final DAB decision is capable of being directly referred to arbitration without the need for the parties to first go through the process prescribed by cll 20.4 and 20.5.

14.38 The basis of the conclusion of the Court of Appeal majority judgment in *Persero 2* was reliance on:

(a) Mr Christopher Seppälä's view that:

> Nothing was intended to be implied about merely a 'binding' decision as it was obvious, or so it was thought at the time – that such a decision, together with the dispute underlying it, could be referred to arbitration . . . it was unnecessary to deal with binding decisions, as it was clear – or so it was thought – that, as these had been the subject of a notice of dissatisfaction, these could, by definition be referred to arbitration under Sub-Clause 20.6;[29]

(b) The FIDIC Guidance Memorandum, which made clear FIDIC's intentions as presented by Mr Seppälä;
(c) The concept of the 'inherent premise';
(d) The practical difficulty of delay caused by the necessity to re-refer.

Mr Seppälä's view

14.39 The author repeats his views set out in his article[30] that:

> the wording in Sub-Clause 20.6 of the contract does not make it 'obvious' that both the binding DAB decision (for enforcement purposes); and the dispute underlying it can be referred to arbitration . . . The author considers that it is arguable that the former could also be referred to arbitration but it is certainly not obvious – particularly, as no express mechanism was built into the contract to cater for the situation where a party might want that binding DAB decision to be enforced by the arbitral tribunal akin to Sub-Clause 20.7. In the author's view a party wishing to enforce a binding DAB decision, has to exercise some considerable ingenuity.

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28 CA majority judgment in *Persero* 2, para 64.

29 Mr Christopher Seppälä was the legal advisor to FIDIC and has written several articles on the issue of enforcement including the following article: 'Sub-Clause 20.7 of the FIDIC Red Book does not justify denying enforcement of a 'binding' DAB decision' (2011) 6(3) *Construction Law International* 17.

30 T Dedezade, 'Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions under the 1999 FIDIC Conditions of Contract' [2012] International Arbitration Law Review, Issue 4.

The FIDIC Guidance Memorandum

14.40 Both the FIDIC Guidance Memorandum and the publications by Mr Seppälä explain that it was FIDIC's intention that 'binding' but not 'final' DAB decisions should be capable of reference to arbitration under Sub-Clause 20.6 – without Sub-Clauses 20.4 (Obtaining a DAB's decision) and 20.5 (Amicable Settlement) being applicable. The first paragraph of the FIDIC Guidance says as follows:

> This Guidance Memorandum is designed to make explicit the intentions of FIDIC in relation to the enforcement of the DAB decisions that are binding and not yet final, which is that in the case of failure to comply with these decisions, the failure itself should be capable of being referred to arbitration under Sub-Clause 20.6 [Arbitration], without Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] being applicable to the reference. This intention has been made manifest in the FIDIC Conditions of Contract for Design, Build and Operate Projects, 2008 ('Gold Book') by the equivalent Sub-Clause 20.9.

14.41 The author suggests that whilst the intention behind Sub-Clause 20.7 is very interesting, it does not aid the interpretation of how to fill the gap in the contract as drafted. Whatever was intended by FIDIC or Mr Seppälä is irrelevant. It is the wording of the contract itself that needs to be interpreted by reference to the intentions of the parties at the time of entering into the contract. Accordingly, in the author's opinion, the Court of Appeal majority was wrong to reject PGN's argument that 'the Conditions of Contract should not be interpreted with reference to the FIDIC Guidance Memorandum because that was issued after the parties entered into the Contract'.

14.42 In the author's view, the so-called intention of FIDIC set out in the first paragraph of the Memorandum extracted above is irreconcilable with the 'black and white' of the 1999 Red Book contract, because the only clause in the General Conditions concerning the enforceability of DAB decisions which dis-applies Sub-Clauses 20.4 and 20.5, is Sub-Clause 20.7.

14.43 The Court of Appeal dissenting judgment in *Persero 2* resonates more with the author:

> I do not think the FIDIC Guidance Memorandum is intended to make explicit what is implicit in the intention underlying cl.20.6. It would be invidious for FIDIC to make explicit in 2013 the intention of the drafters of a clause which was first adopted in 1957, and which remained in the Red Book largely without any substantive change until 2013, save for the insertion of cl. 67.4 of the 1987 Red Book (now cl 20.7 of the 1999 Red Book). In my view, the purposes of the FIDIC Guidance Memorandum is to make explicit FIDIC's intention to recommend 'changes' to the 1999 Red Book including amending cl.20.7 to provide for summary or expedited relief in cases of non-compliance with binding but not final DAB Decisions. Specifically, FIDIC recommended amending cl.20.7 to provide for such compliance to be directly referred to arbitration without the parties having to first go through the steps set out in cll 20.4 and 20.5.

The concept of an inherent premise

14.44 The Court of Appeal majority concluded that: (1) there was an inherent premise embedded within a DAB decision that a sum to be paid was payable forthwith; and (2) here the dissatisfaction expressed in the NOD inherently extends to the requirement

that payment of the adjudicated sum be made forthwith and so there is nothing further to be referred back to the DAB.[31]

14.45 Whilst at first sight the concept seems an ingenious and neat mechanism to avoid the requirement of referral back to the DAB, there are some difficulties with the logic underlying it. The Court of Appeal majority has not adequately explained the concept of the 'inherent premise'. It is not clear:

(a) whether this is a rule of law or construct particular to Singapore;
(b) whether it is akin to an implied contract term at common law.

14.46 In England, there will be no implied term unless that term is necessary and would have been obviously so to an independent observer at the time when the parties entered into their contract.

14.47 There are said to be two inherent premises – one in the DAB's decision and one in the NOD. In the author's view:

(a) it is not clear that both parties would have assumed such an 'inherent premise' at the time of entering the contract;
(b) such an inherent premise is not so obvious that it should be implied.

14.48 The Court of Appeal majority's concept that the inherent premise is generated at the time of the DAB decision therefore appears to be entirely novel. A much more cogent objection to the Court of Appeal majority's finding is, however, the fact that Sub-Clause 20.4 expressly requires that the NOD shall set out the matter in dispute and the reason(s) for the party's dissatisfaction. If the NOD does not do so with respect to the payment term, then no inherent premise should be implied.[32]

14.49 Frederic Gillion's views align as follows:[33]

> this is probably one of the aspects of the 2015 Court of Appeal decision which, in the author's view, may be the most open to criticism, as the Court of Appeal did not clearly explain where this inherent premise came from and to what extent PGN's notice of dissatisfaction did in fact cover the part of the DAB's decision ordering payment of the Adjudicated Sum . . . the point here is that sub-clause 20.4 expressly requires that the notice of dissatisfaction shall 'set out the matter in dispute and the reason(s) for dissatisfaction.' If PGN's notice of dissatisfaction made no reference to its obligation to pay the Adjudicated Sum awarded by the DAB, as this seems to have been the case, then it is difficult to see how PGN could have somehow conveyed its dissatisfaction with this purported inherent premise that the Adjudicated Sum was to be payable promptly and that in turn the failure to pay could be a matter in dispute. Since sub-clause 20.4 makes clear that 'neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this sub-clause' (i.e. a timely notice setting out the matter in dispute and the reason(s) for dissatisfaction), as a matter of logic, CRW would not in principle be able to bring a dispute over PGN's failure to pay the Adjudicated Sum directly to arbitration, unless a notice of dissatisfaction specifically referred to that issue. It is also logical that the dispute over the paying party's failure to pay the Adjudicated Sum necessarily post-dates the DAB decision, and that therefore PGN's notice of dissatisfaction could not possibly have extended to that dispute, whether inherently or otherwise.

31 CA majority judgment in *Persero* 2, para 66.

32 The author's views on the inherent premise were published in September 2015 Persero2/TD/2015(9)/2/CLAL (Corbett & Co. newsletter publication on Knowledge Hub).

33 F Gillion, 'The Court of Appeal Decision in Persero II: Are we now clear about the steps to enforce a non-final DAB decision under FIDIC?' [2016] International Construction Law Review 4.

14.50 Gerlando Butera in June 2016[34] also gives short shrift to the concept of the inherent premise as follows:

> the SGCA majority judgement presents the novel argument that a DAB's decision which requires payment of a sum of money has also an 'inherent premise' imbedded within it; namely that the adjudicated sum is payable forthwith. Hence dissatisfaction expressed in a notice of dissatisfaction already inherently extends to the requirement that payment of the adjudicated sum is to be made forthwith. Accordingly, the issue regarding the immediate payability of the adjudicated sum has already been decided by the DAB, and therefore that issue may be referred on its own direct to arbitration under FIDIC subcl.20.6 [64–66]. It has to be said that this argument is truly ingenious, and it is one which (so far as the writer is aware) had not previously been aired by countless commentators on the previous Persero decisions, nor by countless commentators on the FIDIC conditions more generally. However, does it reflect reality?

14.51 Mr Butera suggests three reasons why not:

(a) PGN did not dispute that FIDIC subcl 20.4 gave rise to an immediate obligation to make payment in accordance with the DAB's third decision. What PGN disputed was whether that obligation was directly enforceable by arbitration . . . and it might fairly be said to be stretching the imagination to consider that this issue had been addressed by the DAB (particularly on the facts of the Persero case) …

(b) there is a strong argument that, when a party commences arbitration to enforce payment pursuant to a DAB decision, the dispute which it is thereby referring to the arbitral tribunal is the dispute which is constituted by the paying party's failure to have made the required payment, which is one that necessarily post-dates the DAB's decision. Hence it may be said that dispute could not possibly have been already decided by the DAB, and likewise the Notice of Dissatisfaction could not possibly have extended to that dispute, whether inherently or otherwise …

(c) what if the paying party contends that there was a procedural irregularity in the DAB proceedings . . . such that the DAB's decision is not valid? Could it be said that a decision with respect to such an issue is inherently embedded within the DAB's decision, so that the dispute on procedural irregularity has already been decided by the DAB.

The practical difficulty

14.52 The author agrees with the majority of the Court of Appeal that referring the matter back to the DAB is pointless, and involves unnecessary delay. The author disagrees, however, that this can constitute justification for departing from the clear opening words of Sub-Clause 20.6 of the contract.

Specific performance

14.53 A winning party wishing to enforce the DAB's decision may attempt to invite the tribunal to exercise its power of specific performance – assuming it can convince the arbitral tribunal that it has such a power.

34 G Butera, 'The Persero Saga' (2016) 32 Construction Law Journal, Issue 4.

14.54 As this option does not rely on the wording of the contract, the following obstacles are avoided:

(a) it avoids the need to prove damages for breach of contract;
(b) it avoids the argument that it is not a 'dispute' that is capable of reference to arbitration under Sub-Clause 20.6;
(c) there is no requirement for the pointless step of referring the failure to pay back to the DAB first;[35]
(d) arguably, an arbitral tribunal will not be restricted by the wording of Sub-Clause 20.6 (if it exists at all) concerning the necessity to consider the merits as well as the enforcement issue.

Does the arbitral tribunal have the power to order specific performance?

14.55 As the contract does not expressly provide the power to grant specific performance (Sub-Clause 20.7, which is a power to grant specific performance of a final and binding DAB decision, does not cover binding decisions), an arbitral tribunal would have to be satisfied that either the ICC Rules or the applicable law expressly or impliedly conferred it.

14.56 It might be argued (although the author has his doubts as to this argument) that the ICC Rules give the arbitral tribunal an inherent power to grant specific performance. Under the 1988 ICC Rules, there was no express authority to make awards or issue orders for interim measures but Craig, Park and Paulsson nevertheless opined, in the second edition of their seminal work on ICC arbitration,[36] that ICC arbitrators did indeed have the inherent power to make interlocutory orders. However, an examination of the 1988 Rules might have led many to conclude that such an inherent power was difficult to reconcile with those Rules.

14.57 There are ICSID cases that suggest that an arbitral tribunal has an inherent power to grant specific performance.[37] There is also authority for the proposition that even if there is no express power to award specific performance, the courts will nevertheless have such a power.[38]

14.58 An express power to grant specific performance might be found in the applicable law. In England, for example, section 48 Arbitration Act 1996 does provide a power to the arbitral tribunal to order specific performance of a contract. It is arguable,

35 T Dedezade, 'Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions under the 1999 FIDIC Conditions of Contract' [2012] International Arbitration Law Review, Issue 4, 156.

36 L Craig, W Park and J Paulsson, *International Chamber of Commerce Arbitration* (2nd edn, Oceana 1990).

37 In the ICSID case of *Enron Corporation and Ponderosa Assets, LP v The Argentine Republic*, ICSID Case No ARB/01/3:

> 'The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts.'

See also C Schreuer, 'Non-pecuniary remedies in ICSID arbitration' [2004] 4 Arbitration International 325.

38 See eg *Brandon v MedPartners, Inc* 203 FRD 677 at 686 (SD FLA 2001) and 531 (note 57) (para 9.52) of A Redfern and M Hunter with N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009).

however, that this section was conceived with the final award in mind (as opposed to a provisional order).[39]

How should an arbitral tribunal exercise its power?

14.59 It is well known that in common law systems, specific performance is deemed to be an equitable form of relief and, as such, an exceptional remedy, available only in situations where damages do not provide an adequate remedy[40] but that in civil law jurisdictions, specific performance is not a discretionary extraordinary remedy but the general rule.[41]

14.60 *Redfern & Hunter* state that:

> the question of whether an arbitral tribunal is empowered to order specific performance is thus rarely an issue in international arbitration. However, the question whether it is an appropriate remedy, and whether it can effectively be granted in the circumstances of the particular case, may prove less straightforward.[42]

14.61 How this power could be exercised in the context of Sub-Clause 20.4 has not been expressly explored in the cases concerning this issue discussed above.[43]

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39 In the author's opinion, despite the authorities above, it may still be arguable that if the arbitral tribunal does not have a power to order specific performance in relation to a binding DAB decision under the:

- General Conditions of the FIDIC contract (which is clear); or
- ICC Rules (which is doubtful); or
- Applicable law.

It follows that the winning party will not be able to specifically enforce the DAB's decision.

40 In an English case concerning a breach of a covenant to repair, *Rainbow Estates Ltd v Tokenhold* [1999] Ch 64, the High Court gave guidance on when it might be appropriate to grant specific performance:

> 'Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy.'

41 See for example: Risk allocation in the FIDIC Conditions of Contract (1999) for Construction (Red Book) and the FIDIC Conditions of Contract (1999) for EPC/Turnkey Projects (Silver Book) from the perspective of a German lawyer Rechtsanwalt Dr. Götz-Sebastian Hök (published on the FIDIC.org website)

42 A Redfern and M Hunter with N Blackaby and C Partasides, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 9.52.

43 *ICC Case 10619* appears to be predicated on the basis that the arbitrator does have a power to order specific performance ('giving the Engineer's decisions their full effect') of a *binding* DAB decision. Whilst the thinking behind *ICC Case 10619* is not spelt out, it may be that the arbitral tribunal considered it had an inherent power to specifically enforce 'the law of the contract'.

Mr Seppälä does not consider the *ICC Case 10619* award to be based on a cause of action for damages for breach of contract as he recognises in his article Christopher Seppälä 'An Engineer's Dispute Adjudication Board's Decision is Enforceable by an Arbitral Award' White & Case December 2009 that the tribunal in *ICC Case 10619* could also have taken this alternative approach:

> 'The Tribunal could have held merely that the Employer was in breach of contract and required the Employer to pay damages for such breach, represented by interest on the amount of the unpaid decisions. But instead, the Tribunal ordered the Employer to pay the amount of the Engineer's decisions on the ground that 'this is simply the law of the Contract'[43] In the author's [Mr Seppälä's] view, this is the right approach.'

It is unfortunate that the 'the law of the contract' solution put forward in ICC Case 10619 is not explained. It is not clear where in the law of the contract a power is given to an arbitral tribunal to enforce an Engineer's (or DAB's) decision. Ordinarily, an arbitral tribunal (unlike a court) will not have the power to award specific performance unless that power is expressly bestowed upon it by the parties. In certain circumstances, the contract may do that (eg Sub-Clause 20.7). In other circumstances, the applicable law may provide the solution (eg section 48 English Arbitration Act 1996).

14.62 If an arbitral tribunal considers that it has the power of specific performance, it will have to determine how to exercise that power. At least in common law jurisdictions, whether or not it is appropriate will involve the exercise of the arbitral tribunal's discretion.

14.63 If the governing law allows it; or it is considered that an arbitral tribunal has an inherent power to grant specific performance; and the arbitral tribunal consider that they should exercise their discretion to award it, this is the other option.

What effect, if any, does a NOD have on the contractual obligation on a party to give prompt effect to the DAB's decision?

14.64 There is a contractual:

(a) obligation to promptly give effect to the DAB decision 'unless and until it shall be revised in an amicable settlement or an arbitral award';

(b) mechanism to refer a dispute to arbitration after giving a NOD. A NOD, by definition, is a demonstration that one party is dissatisfied with the DAB's decision.

14.65 There are no express words in the contract that suggest that upon issuing a NOD, the issuing party will be relieved of its contractual obligation to comply with the DAB decision simply as a result of pursuing its right to utilise the dispute resolution mechanism (ie issuing a NOD).

14.66 There are, however, differing views on the effect of a NOD on the obligation to promptly give effect to the then non-final DAB decision:

(a) The Court of Appeal majority judgment in *Persero 2*[44] and the South Gauteng High Court in South Africa in two recent cases,[45] considered that the issuance of a NOD does not absolve a party from giving prompt effect to a DAB decision.

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44 CA majority judgment in *Persero 2* emphasised that: 'it may be vital that parties promptly comply with a DAB decision' and that 'it is of general importance that contractors are paid promptly where the contract so provides . . .' . It summarised its interpretation of the effect of a NOD on a DAB decision by holding: 'a DAB decision is immediately binding once it is made; the parties are obliged to give effect to it promptly until such time as it is overtaken or revised by either an amicable settlement or a subsequent arbitral award; *a NOD 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.*' (emphasis added).

45 *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 06757/2013 [2013] ZAGPJHC 155 'The effect of these provisions is that the decision shall be binding unless and until it has been revised as provided. There can be no doubt that the binding effect of the decision endures, at least until it has been so revised. It is clear that the wording of the clause 20.4 that the intention was that a decision is binding on the parties and only loses its binding effect if and when it is revised. The moment the decision is made the parties are required to "promptly" give effect to it. Given that a dissatisfied party has 28 days within which to give his notice of dissatisfaction it follows that the requirement to give prompt effect will precede any notice of dissatisfaction. The final sentence of clause 20.4[4], requiring the contractor to continue to proceed with the works, underscores the intention of the parties to the effect that life goes on and not interrupted by a notice of dissatisfaction. A dissatisfied party may elect to wait 28 days before giving his notice of dissatisfaction. However, this will have no effect on his obligation to give effect to the decision which has to happen promptly on the giving of that decision.'

In *Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV v Bombela Civils JV (Pty) Ltd* SGUC case no. 12/7442 Spilg J found the wording of the relevant contractual provisions to be clear and their effect is that whilst the DAB decision is not final 'the obligation to make payment or otherwise perform under it is'.

(b) Conversely, in ICC Case 11813/DK, the Arbitral Tribunal considered that as a result of the issuance of a NOD, there was no basis for an arbitral tribunal to make an award enforcing a non-final DAB decision:

> The tribunal does not accept that the [DAB decision] rendered by the DAB pursuant to the Contract, provides a basis for awarding any amounts on an interim basis. It is common ground that the DAB Decision was the subject of a notice of dissatisfaction . . . the Notice of Dissatisfaction stated [the employer's] dissatisfaction with substantially all of the DAB's decision . . . notice of dissatisfaction was served in accordance with Article 20 of the Contract (and it is agreed, within the contractually specified period for such notices). As a consequence of the [employer's] notice of dissatisfaction, the DAB decision did not become 'final and binding' upon the parties, as provided by the eighth sub-paragraph of Article 20.4 of the Contract's General Conditions. This subparagraph provides:
>
> 'If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both parties.'
>
> Conversely, if a notice of dissatisfaction is given, then nothing in Article 20.4 provides that the DAB decision will be final and binding on the parties, and, on the contrary, the clear inference of subparagraph 8 is that the decision will in these circumstances not be final and binding.
>
> There is nothing in the wording of Article 20.4 (or otherwise) to support [the employer's argument] that a DAB decision remains final and binding in part, to the extent that the Notice of Dissatisfaction does not express dissatisfaction with the DAB decision.
>
> The [employer] presently disputes liability for the amounts which the DAB Decision found to be due. Absent some basis in the contract for concluding that the DAB decision binds the employer, and cannot be disputed by it, there are no grounds for holding the employer liable for the amounts stated herein. For the reasons detailed above, there is no such basis, in Article 20.4 of the General Conditions, nor does the Tribunal see any serious argument that any other provision in the contract provides such a basis.
>
> Sub-paragraph 5 of Article 20.4 of the General Conditions provides that 'both Parties shall promptly give effect to every DAB's decision, unless and until it shall be revised in an amicable settlement or an arbitrate[sic] award as described below'. The Tribunal is not prepared to conclude, particularly on a summary basis, that this provision requires the parties to carry out directions of a DAB decision in circumstances in which a notice of dissatisfaction is tendered in respect of such decision under subparagraph 8. Such an interpretation would seem to deprive the procedures of subparagraph 8 of much of their apparent purpose. In any event, the Tribunal does not interpret the DAB decision as directing the employer to pay the amounts referred to therein to the contractor irrespective of other claims; rather, the DAB Decision simply provides a resolution of particular disputes submitted to it, without purporting to address the parties' other rights or to direct any action on the part of either party.

14.67 If the former view was to prevail, all that solves is that the nature of a parties' contractual obligation is to comply promptly with a DAB's decision notwithstanding issuing a NOD: it does not help with the next stage of enforcing that obligation. If the latter view was to prevail, then a non-final DAB decision would be unenforceable.

Is it necessary for the parties to refer both the primary and secondary disputes in a single arbitration?

14.68 In *Persero 1*, the sole relief that the contractor sought in a final award was the enforcement of the DAB decision. The merits were not before the arbitral tribunal. The High Court considered that:

> even if, for the sake of argument, the Second Dispute were referable to arbitration under Sub-Clause 20.6 without being first referred to the DAB, one must remember that Sub-Clause 20.6 does not allow an arbitral tribunal to make final a binding DAB decision without first hearing the merits of that DAB decision.[46]

14.69 The Court of Appeal in *Persero 1* reached a similar conclusion:

> we are of the view that the Majority Members simply did not have the power under Sub-Clause 20.6 to issue the final award in the manner that they did, i.e. without assessing the merits of PGN's defence and of the Adjudicator's decision as a whole . . . the Majority Members clearly ignored sub-clause 20.6 (and indeed the TOR as a whole), and fundamentally altered the terrain of the entire proceedings as well as the arbitral award which would have been issued if they have reviewed the merits of the Adjudicator's decision (regardless of what the final outcome might have been).[47]
>
> PGN was thus consistent and, in our view, correct in asserting that after resolving the Preliminary Issues, the Arbitral Tribunal ought to open up, review and revise the Adjudicator's decision in accordance with Sub-Clause 20.6.[48]

14.70 In *Persero 2*, the contractor referred both the merits and the enforcement issue on the guidance of the Court of Appeal in *Persero 1*.

One-dispute approach or two-dispute approach?

14.71 The High Court in *Persero 2* adopted the following phraseology:

(a) the 'primary dispute' – the parties' underlying dispute that forms the subject-matter of the DAB's decision; and
(b) the 'secondary dispute' – the dispute that arises from the paying party's failure to pay, whether promptly or at all, pursuant to the DAB decision.

14.72 The High Court then considered two interpretive approaches:

(a) the 'one-dispute approach'; and
(b) the 'two-dispute approach'.

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46 HC judgment in *Persero 1*, para 33.
47 CA judgment in *Persero 1*, para 82.
48 CA judgment in *Persero 1*, para 90.

14.73 The High Court explained the two different approaches as follows:

> 'One-dispute approach' . . . interprets 'dispute' as meaning only a primary dispute: a dispute about the parties' primary obligations under their contract. 'Dispute' does not mean a subsidiary dispute which arises within or about the dispute-resolution regime once it is invoked. In short, on the one-dispute approach, 'dispute' does not mean a dispute about a dispute. That type of second-order dispute is merely a subsidiary aspect of the primary dispute and is to be subsumed in and resolved in the very same dispute-resolution procedure invoked to resolve the primary dispute.[49]
>
> . . . 'two dispute approach' sees the secondary dispute as a 'dispute' in its own right within the meaning of Sub-Clause 20.4[1] and therefore as a separate and distinct dispute from the primary dispute. This conceptual separation means that the two-dispute approach permits a contractor, if it chooses to refer only the secondary dispute to arbitration under Sub-Clause 20.6. The ensuing arbitration, on this approach, settles only the secondary dispute with finality.[50]

14.74 The 'one dispute approach', therefore, required both the primary and secondary disputes to be referred to arbitration whereas the two-dispute approach allowed only the secondary, and not the primary, dispute to be referred to arbitration.

14.75 The High Court in *Persero 2* correctly observed that the concept adopted in the 1999 Red book in 20.4(4) was loosely modelled on a security-of-payment regime that provides 'pay now, argue later', but that:

> Sub-Clause 20.6 is drafted to resolve the primary dispute and not to resolve the secondary dispute. In other words, Sub-Clause 20.6 is drafted only to enable the employer to 'argue now'. It is not drafted to enable the contractor to compel the employer to 'pay now and argue later'.

14.76 The High Court took some time to give the advantages, disadvantages, and difficulties in relation to both methods; condemned Sub-Clause 20.7 as poorly drafted;[51] and concluded that:

> I am therefore driven to the conclusion that the only way to make the Red Book's security of payment regime workable, at least for non-final DAB decisions, is to ignore the implications of Sub-Clause 20.7. That solution, although undoubtedly unsatisfactory removes the most significant obstacle to the adopting the one-dispute approach, which is cl.20.7's adoption of the two-dispute approach. Adopting the one-dispute approach and applying it to non-final DAB decisions, gives effect in several ways to the essential features of the parties' contractual security of payment regime.

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49 See HC judgment in *Persero* 2, para 59. The judge continues to discuss the one-dispute regime at length from paras 60–64. Paragraph 60 provides: 'On the one-dispute approach, therefore, once a party refers the primary dispute to the DAB under Sub-Clause 20.4[1], that is the one and only "dispute" within the meaning of and for the purposes of the Red Book's dispute resolution regime. That remains the position even after the DAB has rendered its interim adjudication on the primary dispute and even if one or both parties issue notices of dissatisfaction with that decision. The parties' dissatisfaction with the DAB's decision on the primary dispute is simply another aspect of that primary dispute. So too if a recalcitrant employer breaches its obligation to give prompt effect to that DAB decision under Sub-Clause 20.4[4], that breach is simply another aspect of the primary dispute. That breach, and the secondary dispute give rise to, is not a separate "dispute" within the meaning of Sub-Clause 20.4[1].'

50 See HC judgment in *Persero* 2, para 39. The judge continues to discuss the two-dispute regime at length from paragraphs 40–57 of his judgment. Paragraph 41 provides: 'The two-dispute approach best advances the "pay now" objective of the Red Book's security for payment regime. It gives the contractor a quick and relatively inexpensive way of compelling a recalcitrant employer to comply with the DAB's interim adjudication. This approach permits the contractor to refer to an arbitral tribunal the secondary dispute alone, for the tribunal to resolve separately and with finality, without requiring the contractor to incur time and cost involved in having the primary dispute also resolved on the merits.'

51 HC judgment in *Persero* 2, para 65.

14.77 Essentially, therefore, the High Court in *Persero 2* favoured the one-dispute approach (the need to refer both the primary and secondary disputes to arbitration) as the judge felt it necessary to reach a conclusion on which method most effectively gave effect to the Red Book's security of payment regime.[52]

14.78 The Court of Appeal majority judgment in *Persero 2* reached the opposite conclusion and stated:

> With respect, the suggestion that all differences between the parties must be settled in a single arbitration fails to adequately appreciate that an NOD issued in respect of a DAB decision is capable of covering the paying party's dissatisfaction with two different aspects of the DAB decision: (a) the quantum that is required to pay the receiving party; and (b) the need to make prompt payment of that sum (see [66a] above). The dispute over the paying party's failure to promptly comply with its obligation to pay the sum that the DAB finds it is liable to pay is a dispute in its own right which is capable of being 'finally settled by international arbitration'. In our judgement, it is possible to refer that dispute to a separate arbitration.[53]

14.79 It went on and said: 'A tribunal would be entitled to make a final determination on the issue of prompt compliance alone if that is all it has been asked to rule on, as was the case in the 2009 arbitration.'[54]

14.80 Accordingly, in conclusion, both the High Court and the Court of Appeal in *Persero 1* reached the clear conclusion that it was necessary to refer both the 'primary' and 'secondary' disputes to an arbitral tribunal and not just the 'secondary' dispute. The Court of Appeal majority in *Persero 2* reversed that ideology.

What sort of award?

14.81 Perhaps the most difficult issue conceptually to resolve is whether an arbitral tribunal should make an interim, partial or final award in relation to the enforcement of the DAB's decision.

14.82 There are two opposing arguments:

(a) A non-final DAB decision amounts to interim relief as it can be reviewed in a final arbitration on the merits; it is therefore inappropriate to issue a final award in relation to interim relief; even if an award is given for interim relief, as the matter that is the subject of the award will not be resolved finally, it will not be enforceable.

(b) It is appropriate to issue a final award in relation to the enforcement of a DAB's decision as an arbitrator can finally resolve the issue of non-payment.

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52 Mr Seppälä agrees with the HC judgment in *Persero 2*: 'Singapore contributes to a better understanding of the FIDIC disputes clause: The Second Persero case' [2015] ICLR 4 that the one-dispute approach 'best furthers the purpose of the security payment regime and makes it workable' p 23 of Mr Seppälä's article cited above. Frédéric Gillion 'Persero II: 'Pay now, argue later' in the context of DAB decisions – what approach best advances the purpose of the FIDIC's security of payment regime' [2015] International Construction Law Review 27 disagrees and suggests that:

> 'such an approach would not only be a major inconvenience to the winning party, but it would ultimately defeat the purpose of the DAB regime, which, when treated as a security for payment regime, is primarily designed to facilitate the cash flow of contractors.'

53 CA majority judgment in *Persero* 2, para 83.

54 CA majority judgment in *Persero* 2, para 88.

14.83 Before reviewing these opposing arguments, it is necessary to:

(a) review the terminology used for different awards;
(b) determine whether a DAB decision amounts to interim relief;
(c) determine in principle whether it is appropriate to issue a final award in relation to interim relief and, if it is, consider whether an award in relation to interim relief is enforceable under the New York Convention.

Terminology

14.84 The Final Report on Interim and Partial Awards of the working party on dissenting opinions and interim and partial awards of the ICC Commission on International Arbitration, chaired by Martin Hunter in 1990,[55] used the following terminology for the purposes of its report:

(a) For the purposes of this Report only, an 'interlocutory decision' is one which, not necessarily in the form of an award, is made prior to the last or sole award;
(b) an 'interim award' is a general term used to describe any award made prior to the last award in a case;
(c) a 'partial award'[56] is a binding determination, in the form of an award, on one or more (but not all) of the substantive issues.

14.85 This report concluded (and the author agrees) that it is impossible to find terminology acceptable to everyone in different countries concerning the divergent uses of the terms 'interim', 'partial' and 'interlocutory'.

14.86 Fouchard, Gaillard and Goldman explain that a 'final award' is used to mean very different things, but the better interpretation is that 'an award is a decision putting an end to all or part of the dispute, it is therefore final with regard to the aspect or aspects of the dispute that it resolves'.[57]

14.87 The word 'interim' is sometimes used interchangeably with 'partial' to describe a final award.[58] The words 'interlocutory' and 'provisional' are often used

55 'Final Report on Interim and Partial Awards of the working party on dissenting opinions and interim and partial awards of the ICC Commission on International Arbitration' chaired by Martin Hunter (1990 Vol. 1/No.2 ICC International Court of Arbitration Bulletin).

56 JDM Lew, LA Mistelis, SM Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) (hereafter referred to as 'Lew Mistelis and Kroll') at para 24–17 explain that:

> 'an award is final in this sense [referring to the sense above] if it produces res judicata effect between the parties and can be challenged or enforced without necessarily terminating the complete arbitration proceedings'.

57 E Gaillard, J Savage, *Fouchard Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 740, para 1359.

58 H Kronke, P Nacimiento, D Otto and NC Port, *Recognition and Enforcement of Foreign Arbitral Awards A Global Commentary on the New York Convention* (Kluwer Law International 2010) 155 (Kronke et al) state:

> 'In complex matters, arbitration tribunals occasionally issue interim or partial awards on selected issues. The difference between an "interim" and a "partial" award is that an interim award is not a definite adjudication of the matter in dispute but is subject to a subsequent review by the arbitration tribunal. A partial award, by contrast, is an award that is a final ruling on an isolated matter that may be appropriate for resolution at an early stage, such as jurisdiction of the tribunal, validity of an arbitration agreement, or the general basis of liability. Unfortunately, the two terms are often mixed up, and in reality most "interim awards" are in fact "partial awards" that are final determinations of a specific issue.'

to mean the same thing. Sometimes the word 'interim' is used to mean 'interlocutory' or 'provisional'.[59]

14.88 Whatever the language adopted, in principle, it is suggested that there is a distinction between:

(a) an award that finally disposes of a matter and is enforceable (a final award or a partial final award); and
(b) a decision that does not finally dispose of a matter and is not enforceable (an interim award).

14.89 Purists might argue that all awards are, by definition, final and so interim or provisional awards should never be described as awards as such.

Is a binding DAB decision interim relief?

14.90 The fourth paragraph of Sub-Clause 20.4 provides that the DAB's decision shall be binding 'unless and until it shall be revised in an amicable settlement or arbitral award'. If one or both of the parties issue a NOD, the dispute can be referred on to amicable settlement and then arbitration.

14.91 In the author's opinion, it is clear that a non-final DAB's decision that can be revised in arbitration (following a NOD) amounts to interim relief that can be revised by an arbitrator. The question is whether the nature of the relief determines the sort of award that should be issued.

Can a final award be given for relief that is not final and is it enforceable under the New York Convention?

14.92 Many commentators and the Supreme Court of Australia consider that an arbitral tribunal should not give a final award for relief that is not final as such an award is likely to be unenforceable. The only commentator that dissents from this view is Gary Born after a consideration of authorities from the United States.

14.93 According to Lew, Mistelis and Kroll, the prevailing position in relation to the enforcement of interim awards dealing with interim relief is dealt with by the *Resort Condominiums*[60] case where the court held that an interim award is not enforceable under the New York Convention or Australian law.

14.94 The *Resort Condominiums* case states:

> whilst it is true that a valid interlocutory order is in one sense 'binding' on the parties to the arbitration agreement . . . an interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it is not 'final and binding' on the parties.

59 Lew Mistelis and Kroll explain at 634:

> 'According to the working group preparing the Model Law an interim or interlocutory or provisional award is an award which does not definitively determine an issue before the tribunal. The definition is in line with the general meaning of the term "interim" as opposed to "final". However, the definition was not adopted in the final text of the Model law. One of the reasons was that in practice the term "interim award" is often used interchangeably with that of "partial awards".'

60 *Resort Condominiums International Inc (USA) v Ray Bolwell and Resort Condominuims (Australasia) Pty Ltd (Australia)*, (1994) 9(4) Mealesy's IAR A1 (1995) – a decision of the Supreme Court of Queensland, Australia.

14.95 This view is supported by Craig, Park & Paulsson, [61] Gaillard and di Pietro[62], Kronke et al (who describe the *Resort Condominiums* case as the leading case on this topic)[63] and Dr Peter Binder.[64]

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61 WL Craig, WW Park and J Paulsson, *International Chamber of Commerce Arbitration* (Oceana 2000) 465, para 26.05:

> 'Recognition and enforcement under the New York Convention of what is essentially an interlocutory order, modifiable by the arbitral tribunal in accordance with changes of circumstances but rendered in the form of awards must remain doubtful. There is a certain flaw in attempting to use the New York Convention, which was designed to insure enforcement of decision which put an end to a dispute between arbitrating parties, or at least part of a dispute, to secure enforcement of a decision which might, for instance, seek to preserve the status quo until a final arbitration award can be rendered. The flaw was precisely recognised in a much commented Australian case, Resort Condominiums *v* Bolwell.'

62 E Gaillard and D di Pietro, *Enforcement of Arbitration Agreements and international arbitral awards the New York Convention in practice* (Cameron May 2008) 150:

> 'It is advocated that only orders which finally settle one or more of the issues which have validly come within the jurisdiction of the arbitral tribunal should qualify for recognition and enforcement under the Convention . . . the word final implies that once the issue has been adjudicated it would no longer be possible, not even if the tribunal wished, to reopen the issue . . . as far as the arbitral procedure is concerned those issues are res judicata . . . It is clear that even though the content of interim measures of protection may at times coincide with the content of the final award settling the disputes between the parties, interim measured differ radically from final awards. By definition, interim measures are temporary in nature, while one of the main features of awards is that they decide definitively one or more of the disputes submitted to the jurisdiction of the arbitral tribunal. The enforceability of interim measures under the Convention should therefore be dismissed out of hand.'

63 H Kronke, P Nacimiento, D Otto and NC Port, *Recognition and Enforcement of Foreign Arbitral Awards A global Commentary on the New York Convention* (Kluwer Law International 2010) 155:

> 'The New York Convention does not expressly address these types of awards [referring to interim and partial awards]. Most courts take the view that true interim awards, which are not final adjudications by the arbitration tribunals and which can be overturned by arbitration tribunals at a later stage, are not enforceable under the New York Convention. The situation is different for partial awards. As a general rule, partial awards may be enforced under the New York Convention . . . . uncertainty whether an issue decided by a partial award is really 'final' can also impede enforcement.'

64 P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd edn, Sweet & Maxwell 2009) 798:

> 'Finality exists when the ability of the parties to bring direct and collateral challenges against the award ceases. The specifics of finality are contextual. In arbitration, an award is final when it is no longer capable of revision by the arbitral tribunal. This is more apparent from the French version of article 33(2) a translation of which provides that the award "is not susceptible to appeal before an arbitral authority" ("Elle n'est pas susceptible d'appel devant une instance arbitrale"). Under many national arbitration regimes, finality results when the arbitral award is no longer susceptible to invalidation by a reviewing court.
>
> In arbitration under the UNCITRAL Rules, finality attaches when the arbitral tribunal's decision becomes irrevocable. A strong indication of finality is that all the technical requirements for making an award have been satisfied, i.e. the award is made in writing by a majority of the tribunal's members, includes reasons, unless otherwise agreed, and the date and place where the award was made, and is signed by at least two of the three arbitrators. Upon satisfaction of these requirements, the tribunal's decision is locked in and the opportunity for further modification no longer exists . . . are all UNCITRAL awards final?
>
> The rule of finality in Article 32(2) does not distinguish between the various types of award (final, interim, interlocutory and partial) identified in Article 32(1). In practice, however, interim, interlocutory, or partial awards require special consideration. To be sure, final awards are definitive not only because they dispose of all the parties' claims, but also because the rendering of a final award terminates the tribunal's mandate under many national arbitration laws.
>
> By contrast, interim, interlocutory and partial awards often resolve discrete claims or issues without severing the tribunal's powers. One commentator suggests this continuing role of the tribunal leaves open the possibility that the tribunal might amend its decision. (see I Dore, The UNCITRAL Framework for Arbitration in

14.96 Gary Born states:

> historically, some (older) authorities held that only 'final' arbitral awards could be enforced and that 'provisional' measures were by definition not 'final' . . . There was (and remains) a substantial body of commentary also concluding that provisional measures are not recognizable or enforceable as 'final' arbitral 'awards' under either the New York Convention or national arbitration legislation.[65]

14.97 He then goes on to cite American authorities and concludes[66] that the: 'better view is that provisional measures should be and are enforceable as arbitral awards'.

14.98 Accordingly, if the majority of commentators' views are to be adopted, any award related to interim relief is unlikely to be enforceable under the New York Convention.

Argument against final award enforcing DAB's decision

14.99 The argument runs that it would be inappropriate for a final award to be made enforcing a non-final DAB decision as the DAB's decision amounts to interim relief pending a final award on the same dispute in arbitration (assuming the matter does not settle in the amicable settlement period).

14.100 The winning arguments run by the author as counsel in ICC Case 16119/GZ were as follows:

(a) It is inappropriate to give a final award in relation to interim relief – such an award is not likely to be an enforceable award (see 14.92–14.98 above).
(b) A partial final award would have the effect of rendering final and binding (a partial final award is a final and binding award) a decision that was always only intended to have binding-only status.
(c) A partial (final) award concerning sums owed at DAB level has the effect of finally resolving payment of sums owed at DAB level when such sums will be revisited in arbitration – resolving an issue that is yet to be resolved.
(d) The final entitlement of a party to money can only be finally resolved in arbitration by the arbitral tribunal in its final award.

14.101 The Court of Appeal dissenting judgment in *Persero 2* supported this argument:

> PGN has argued that DAB No. 3 is in substance a provisional award, which is not a type of award covered by the definition of 'award' in s.2 of the IAA . . . What is not highlighted in PGN's arguments is the fact that a binding but not final DAB decision is inherently provisional in nature because it is expressly stated in cl. 20.4[4] to be revisable by an amicable settlement or an arbitral award.[67]

Contemporary Perspective (1993) 36 ('the authorisation for 'partial' awards suggests a lower degree of finality than separate final awards on different issues'). We disagree as to interlocutory and partial awards as those terms have been used by the Iran-US Claims Tribunal to indicate decisions on discrete issues or a portion of a group of claims. In these cases, the Tribunal consistently ruled that such awards were final and could not be reopened. A NAFTA Chapter 11 Tribunal reached the same conclusion with respect to a previously rendered partial award.

In contrast, interim awards on interim measures of relief are made in response to a set of contemporaneous circumstances, and while such rulings may not be revisited, they may be replaced by subsequent interim awards issued in response to a new request for interim measures made on the basis of changed circumstances.'

65 GB Born, *International Commercial Arbitration Volume 2* (Wolters Kluwer 2009) 2020.
66 ibid, 2023. This is the citation adopted by Christopher Seppälä in isolation in his article cited at note 29.
67 CA dissenting judgment in *Persero 2*, para 192.

14.102 The Court of Appeal went on to set out the characteristics of a provisional award:

> in my view, in contrast to a final award, a provisional award is one which is subject to alteration or revision, or even nullification, after a full hearing on the merits of the dispute which is in the subject matter of the arbitration (the subject matter of the 2011 Arbitration being, in this case, the parties' primary dispute over the correctness of DAB No.3).[68] ...
>
> PGN contends that the 2011 Majority Arbitrators intended the Interim Award to be a provisional award because they not only said that an award giving effect to DAB No3 would only be 'final up to a certain point in time' . . . and 'will not and cannot be altered until the arbitration hearing', thereby implying that the Interim Award could and might be altered at or after that point in time, but also stated that the Interim Award was an award 'pending the final resolution of the Parties' dispute' – i.e. the Interim Award was intended to have provisional effect. In my view, the aforesaid statements of the 2011 Majority Arbitrators as well as the form and content of the Interim Award show clearly what was in their minds. They did not want to issue an interim award which might have the effect of rendering the 2011 Tribunal functus officio. They wanted to issue an award with interim finality so as to ensure that the 2011 Tribunal would not be functus officio after the award was issued. Hence, they stated that the Interim Award would be unalterable (or final) only 'up to a certain point in time', and thereafter could be altered at the hearing of the parties' primary dispute over the merits of DAB No.3 because cl.20.4[4] expressly provided that a binding but non-final DAB decision was subject to revision by either an amicable settlement or an arbitral award . . . thus the 2011 Majority Arbitrators issued the Interim Award with temporal finality, unalterable only up to the time the primary dispute between the parties was determined on the merits by the 2011 Tribunal, but alterable at or after that point of time. In substance, they issued the Interim Award on the basis or understanding that it could be subject to alteration at the arbitration of the primary dispute. In my view, the 2011 Majority Arbitrators really had no choice but to issue what was in substance a provisional award because of cl. 20.4[4] of the Conditions of Contract. As I have observed earlier, it is inherent in the nature of a binding but non-final DAB decision that it is subject to revision either through an amicable settlement, or at an arbitration of the merits of the underlying dispute between the parties as to the correctness of that DAB's decision.

14.103 In conclusion, the Court of Appeal dissenting judgment in *Persero 2* found that the interim award was, and was intended to be, in substance, a provisional award:

> In my view, the fact that the 2011 Tribunal issued a Partial award to expressly revise the Interim Award supports PGN's argument that all along, the 2011 Majority Arbitrators intended to issue the Interim Award as, in substance, an alterable or revisable award. The Interim Award was meant to be provisional and binding on the parties only until the final adjudication of their primary dispute over the merits of DAB No3. Indeed the words of s.39(3) of the UKAA . . . encapsulate exactly what the 2011 Tribunal did in relation to the Interim Award when it issued the Partial Award.

Arguments in favour of a final award as issue of non-payment resolved finally

14.104 The contrary view advanced by Frederic Gillion[69] and other commentators is that the contractor should seek a partial final award, as such an award would:

> simply be one giving full immediate effect to the winning party's right to have a DAB decision complied with promptly in accordance with Sub-Clause 20.4 or to damages in respect

68 CA dissenting judgment in *Persero 2*, para 201.

69 F Gillion 'The Court of Appeal Decision in Persero II: Are we now clear about the steps to enforce a non-final DAB decision under FIDIC?' [2016] International Construction Law Review 4, 408.

of the losing party's breach of sub-clause 20.4. That award will be final in that it will dispose of the issue of the losing party's failure to give prompt effect to the DAB decision, which is a substantive claim distinct from the underlying dispute covered by the DAB decision.

14.105 Similarly, Gerlando Butera suggests that:

> The author agrees that, in a sense a DAB's decision may be characterised as amounting to interim relief. However, the decision is one that gives rise to a contractual obligation to comply with it. Further, Mr Dedezade's proposition in relation to the Convention misstates the majority commentator's views as discussed earlier in this paper, which are concerned not with the nature of the underlying right which is enforced by an arbitral award, but with the character of the decision made by the tribunal, i.e. within the framework of the arbitration, is it an order for (as opposed to 'related to') interim relief, or is it a final decision on the dispute submitted to the tribunal? Where the failure to comply with a BNFD is itself referred to the DAB as a 'Second Dispute', and is then referred to arbitration, the arbitral tribunal's final award in relation to the Second Dispute is finally dispositive of that dispute.

14.106 The Court of Appeal majority judgment in *Persero 2* dealt with this issue as follows:

> the real point which the 2011 Majority Arbitrators were making was this: until an award on the merits of the parties' Underlying Dispute had been rendered, not only would the Interim Award be the final determination as to PGN's immediate obligation to make prompt payment of the Adjudicated Sum awarded under DAB No.3, there would also be nothing to be set off against that sum. But once, the award on the merits of the parties' Underlying Dispute has been issued, inevitably, an account would have to be taken of the amounts actually due one way or the other, as well as of any payments that might already have been made. It is true that the language in which the 2011 Majority Arbitrators expressed themselves could have been more precise. The language which they used might, on one reading, suggest that they thought the Interim Award could be varied. As a matter of law, of course, it could not . . . in short, it was not the Interim Award that would be changed or revised, but the inevitable monetary consequences and effects of that award once the final award on the merits of the Underlying Dispute has been made.[70]

14.107 The Court of Appeal majority gave their view on the reason for the confusion:

> Much of the confusion in this case seems to us to have stemmed from a failure to differentiate between, on the one hand, interim or partial awards, which entail a final determination of the parties' substantive rights or a final determination of preliminary issues relevant to the resolution of the parties' claims and, on the other hand, provisional awards, which neither entail nor aid in a final determination of the parties' substantive rights. On no basis was the Interim Award a provisional award. On the contrary, it was a final determination of whether PGN had an immediate and enforceable contractual obligation to comply with DAB No.3 even though it had issued an NOD in respect of that decision. This point was answered in the affirmative by the 2011 Majority Arbitrators in the Interim Award, and that answer is not susceptible to change regardless of whatever award the 2011 Tribunal might eventually make on the parties' Underlying Dispute over the merits of DAB No.3. The only thing that is provisional in this context is the set of financial effects and consequences of the Interim Award, and that is so because the Conditions of Contract provide that in certain circumstances, a DAB Decision may be revised by an arbitral award that settles the underlying merits of

70 CA majority judgment in *Persero 2*, para 99.

that decision. If and when an award on the merits of the DAB No. 3 is eventually made, that award would not alter the Interim Award or render it any less final, even though it might alter the financial effects and consequences that flow from the Interim Award.[71]

Conclusion on this issue

14.108 To recap:

(a) The Court of Appeal Majority judgment in *Persero 2* argued that the interim award is final but: 'the only thing that is provisional in this context is the set of financial effects' and that the final award, when eventually made 'might alter the financial effects and consequences that flow from the Interim Award'.
(b) The Court of Appeal dissenting judgment in *Persero 2* argued that:
  (a) there is no dispute that there has been a failure by the employer to pay the DAB's decision and so no jurisdiction of the arbitral tribunal to make a final award on a matter that is not even in dispute.
  (b) 'PGN contends that the 2011 Majority Arbitrators intended the Interim Award to be a provisional award because they not only said that an award giving effect to DAB No3 would only be "final up to a certain point in time" . . . and "will not and cannot be altered until the arbitration hearing", thereby implying that the Interim Award could and might be altered at or after that point in time, but also stated that the Interim Award was an award "pending the final resolution of the Parties' dispute" – i.e. the Interim Award was intended to have provisional effect.'
(c) Mr Gillion advocates for an award that: 'simply be one giving full immediate effect to the winning party's right to have a DAB decision complied with promptly in accordance with Sub-Clause 20.4 or to damages in respect of the losing party's breach of sub-clause 20.4.'
(d) Mr Butera poses the question: 'is it an order for (as opposed to "related to") interim relief, or is it a final decision on the dispute submitted to the tribunal?'

14.109 If an interim award is made that:

(a) finally rules on the fact that there has been a failure to pay (which is not even disputed); but
(b) necessarily acknowledges that the sum to be paid will be revised in the final award on the merits,
(c) then one can see how some arbitrators might reasonably conclude that such an interim award should not be regarded as a final award.

14.110 An example of when an interim award is final, and not provisional, is when, in bifurcated proceedings, an arbitrator is tasked to deal with liability first and then quantum. The interim award issued on liability will be final and irreversible. Similarly, an award on jurisdiction would finally dispose of the issue of jurisdiction.

71 CA majority judgment in *Persero 2*, para 100.

14.111 As cited above, Gaillard and di Pietro state that: 'the word final implies that once the issue has been adjudicated it would no longer be possible, not even if the tribunal wished, to reopen the issue'.[72]

14.112 It would seem to the author that there remains a respectable argument that if it is not open to a party to reopen the issue that forms the interim award (notwithstanding the contention that the failure to pay that is undisputed is final), then there can be no financial or other adjustment of the interim award.

> If this contrary view is correct, the contractor would be granted a final enforceable award for sums that can and indeed are likely to be revised in arbitration: the relief sought by the contractor, properly analysed, is not final relief.[73]

The FIDIC Gold Book[74]

14.113 Under the Gold Book conditions, the enforcement of DAB decisions is dealt with in Sub-Clause 20.9:

> 20.9 Failure to comply with the Dispute Adjudication Board's Decision. In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.8 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.7 [Amicable Settlement] shall not apply to this reference.

14.114 The FIDIC Guidance Memorandum issued in April 2013 follows the above wording. The Gold Book guide[75] provides:

> If a decision of the DAB has become binding, i.e. immediately upon its issue, or final and binding after 28 days with no Notice of dissatisfaction being issued by either Party, and a Party has failed to comply with the decision, then the other Party can refer the failure to arbitration. In such a case there is no requirement to obtain a further decision from the DAB under Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's Decision] or attempt to settle the matter amicably according to Sub-Clause 20.7 [Amicable settlement]. Unless the applicable Law provides otherwise, a Party cannot challenge a DAB decision after it becomes final and binding as provided for in Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's Decision].

Has the wording in the Gold Book/Guidance Memorandum resolved issues?

14.115 The Gold Book wording:

(a) closes the contractual gap as there is express wording that enables a party to refer to arbitration a failure to comply with any DAB decision, whether it be

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72 E Gaillard and D di Pietro, *Enforcement of Arbitration Agreements and international arbitral awards the New York Convention in practice* (Cameron May 2008) 150.

73 T Dedezade, 'Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions under the 1999 FIDIC Conditions of Contract' [2012] 4 International Arbitration Law Review, 154.

74 The FIDIC Conditions of Contract for Design, Build and Operate projects First edition 2008.

75 FIDIC DBO Contract guide for the FIDIC Conditions of Contract for Design, Build and Operate projects. First edition 2011.

binding or *final and binding*. The Gold Book actually states in terms 'whether binding or final and binding'.

(b) makes it clear that the parties do not have to pursue a claim based on damages for breach of contract. A clear contractual right has been given to enforce the DAB's decision (akin to a power of specific enforcement).

(c) in Sub-Clause 20.9 of the Gold Book (equivalent of 20.7 in the 1999 forms) Sub-Clause 20.6 (equivalent of 20.4 in the 1999 forms) is expressly dis-applied. Accordingly, the dispute does not have to be referred back to the DAB first. The Gold Book guide makes it clear that it is unnecessary to refer a failure to the DAB first.

(d) The failure itself can be referred to arbitration in the new Gold Book. Accordingly, it is not necessary for the merits to be considered. The Gold Book anticipates the contractor to seek 'summary or other expedited relief as may be appropriate'.

14.116 What the Gold Book does not deal with is how a party should go about seeking such 'summary or other expedited relief'. Does the enforcement issue and the merits have to be referred in a single arbitration? Will the arbitrators award summary relief as a provisional measure only as, if so, it is unlikely to result in an enforceable final award as it will be a provisional award.

14.117 If a party refers the underlying merits and then seeks an interim award to enforce the DAB's decision, it may apply for an interim and conservatory measure under Article 23 ICC Rules 1998 (or Article 28 2012 ICC Rules).[76] The law of the forum will spell out the circumstances or criteria that must exist before the court can grant interim or conservatory measures, eg prima facie establishment of a case, urgency and irreparable harm, or serious or actual damage, if the measure requested is not granted (see for example section 44 English Arbitration Act 1996). Some still cite the traditional grounds of *periculum in mora* (danger in delay) and *fumus boni iuris* (presumption of sufficient legal basis).[77]

14.118 It may be difficult to persuade the arbitral tribunal that the necessary circumstances or criteria set out in the preceding paragraph will be fulfilled to justify an arbitral tribunal issuing interim or conservatory relief. Ordinarily, it is suggested that there will be no urgency or real risk of irreparable harm or serious or actual harm if the contractor is not paid the sums ordered by the DAB, pending a final determination of these matters by the Arbitral Tribunal as interest is an adequate remedy. Furthermore, even if

76 Derains and Schwartz suggests that the variety of conservatory and interim measures encountered in ICC arbitration proceedings is enormous and includes orders for provisional payment. Y Derains and EA Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law 2005) 297.

77 Working Party of the ICC Commission Report (note 55) states:

> '34. Where only one of the parties asks for an interim or partial award, the Working Party is of the opinion that the arbitrator should make such an award only if, on balance, he is concerned that it serves the interests of the effective and efficient conduct of the arbitration.
>
> 35. In general, the Working Party is of the opinion that in ICC arbitrations the presumption should be in favour of a single final award which decides all of the claims and issues to be determined; and that – except when the parties have indicated a joint wish to the contrary – the arbitrator should examine the justification for issuing an interim or partial award in a critical manner and should not do so unless there are circumstances which weigh clearly in favour of taking this course.'

an interim order or award were to be made, it would not be enforceable under the New York Convention.[78]

Conclusion

14.119 Obviously, FIDIC does not have the power to change either the New York Convention or local laws.[79] Even with a clearly drafted clause, it will be necessary for whatever arbitrator or court is appointed to be willing to read the contract and the New York Convention in such a way as to give effect to the expressly stated intentions and wishes of the parties. In the circumstances, the best that the draughtsman of an international standard form of contract can do is to spell out its intentions and wishes as clearly as possible, so as to encourage the local court/arbitrator to give effect to them. It certainly does not help when the drafting is unclear as is the case in the 1999 Forms.

14.120 Ultimately, a winning party at DAB level wants to be paid the money adjudged as due by the DAB following the issuance of a NOD pending final resolution of the dispute. If the winning party is the contractor then this will alleviate essential cash-flow issues. The 1999 FIDIC forms provide a clear obligation for payment in the fourth paragraph of Sub-Clause 20.4 – prompt effect should be given to the DAB's decision – but unfortunately fails to provide a correspondingly clear enforcement mechanism should the obligation be ignored. The revised wording in the Gold Book suggested in the FIDIC Guidance Memorandum is vastly improved but could go further.

14.121 As has been shown in this chapter, parties (usually contractors), arbitrators and judges have had to try all sorts of ingenious devices to work round the poor drafting in the FIDIC 1999 form.

14.122 The latest pronouncement in Singapore issued by the Court of Appeal Majority in *Persero 2* provides clear answers to many questions:

(a) the 'secondary dispute' can be referred as a sole issue to arbitration without referring the merits;
(b) the 'secondary dispute' does not have to be re-referred to the DAB;
(c) a final award is appropriate relief to enforce the 'secondary dispute'.

14.123 In the author's opinion, however, some of the reasoning and findings of the Court of Appeal majority in *Persero 2* are questionable. Whilst the ruling of the Court of Appeal may be binding in Singapore, its findings are certainly not definitive outside of Singapore. The author suggests that the Court of Appeal majority in *Persero 2*:

(a) failed to clearly address the contractor's underlying cause of action (whether it be breach of contract or specific performance);

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78 According to Lew, Mistelis and Kroll, the prevailing position in relation to the enforcement of interim awards dealing with interim relief is dealt with by a decision of the Supreme Court of Queensland, Australia (*Resort Condominiums International Inc (USA) v Ray Bolwell and Resort Condominuims (Australasia) Pty Ltd (Australia)*, (1994) 9,(4) Mealesy's IAR A1, (1995). The Court held that an interim award is not enforceable under the New York Convention or Australian law. They stated that

> 'the "Interim Arbitration Order and Award" made by the arbitrator . . . is not an "arbitral award" within the meaning of the Convention nor a "foreign award" . . . it does not take on that character simply because it is said to be so'.

79 The Supreme Court in an Eastern European country recently ruled that DAB decisions would not be enforceable.

(b) reached the wrong conclusion on whether a party will need to refer a failure to pay back to the DAB:
  (a) giving inappropriate weight to, and misinterpreting, the so-called 'intention' of FIDIC set out by Mr Seppälä and the FIDIC Guidance Memorandum;
  (b) utilised a concept of an 'inherent premise' that is dubious;
(c) gave incomplete and precarious reasoning on:
  (a) whether the 'one-dispute approach' or 'two-dispute approach' was appropriate despite the lengthy judgment on that issue by the High Court in *Persero 2;*
  (b) whether an interim award can be final in light of the acknowledgement of the Court of Appeal majority in *Persero 2* that the 'set of financial effects' was provisional.

14.124 It is not surprising to the author that the Court of Appeal dissenting judgment in *Persero 2*:

(a) had difficulty with the concept that the 'secondary dispute' was even capable of referral under the contractual scheme when the underlying proposition that the sum should be paid is not even disputed;
(b) reached the conclusion that a final award on the 'secondary dispute', properly analysed, should have been categorised as a provisional award.

14.125 Accordingly, the author considers that:

(a) Despite the Court of Appeal majority judgment in *Persero 2* giving some clear answers to some of the difficulties surrounding enforcement of non-final DAB decisions, there will still be arguments in the rest of the world on whether those answers are correct.
(b) The Gold Book (or FIDIC Memorandum) wording resolves some, but not all, of the difficulties.
(c) One has to question whether the DAB can, or should, survive in its present form when uncertainty and argument is bound to remain even with the new wording.
(d) FIDIC may wish to revise its approach and focus on dispute avoidance in the next edition of the FIDIC forms. Opinions and recommendations from Dispute Boards can be powerful pointers for parties to settle.