WHITE & CASE

How Not to Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in the Persero Case

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I. Introduction

As a result of the recent decision of the Court of Appeal of Singapore (the "**CA**" or the "**Court**") in *CRW Joint Operation v. Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 (the "**Persero case**"), which dismissed an appeal against the judgment of the High Court of Singapore setting aside an ICC arbitration award, there has been increased uncertainty about the effect of a "binding", but not "final", decision of a DAB under the FIDIC Conditions of Contract for Construction, 1999 (the "**1999 Red Book**").[1] The ICC Arbitral Tribunal in that case, on the one hand, and two Singapore courts, on the other hand, arrived at widely different interpretations of Sub-Clauses 20.4 to 20.7 of the 1999 Red Book.

In light of this uncertainty, and given that I have been involved in the review and drafting of the disputes clause in the 1999 Red Book since the fourth edition was published in 1987, I would like to comment on these decisions, specifically the CA judgment, as it is the last – and final – word from Singapore.[2]

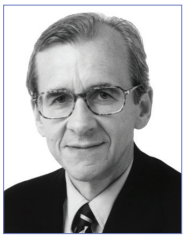
Accordingly, in this article I will briefly review the facts of the Persero case (Section II), the ICC arbitration and award (Section III) and the judgments of the High Court ("**HC**") and the CA in Singapore (Section IV). I will then comment on the CA decision (Section V), before drawing some conclusions (Section VI).

II. The Facts

In 2006 PT Perusahaan Gas Negara (Persero) TBK, a publicly-owned Indonesian company ("**PGN**"), and CRW Joint Operation, an Indonesian joint operation ("**CRW**"), entered into a contract pursuant to which CRW undertook to design, procure, install, test and pre-commission a pipeline in Indonesia. The contract was based on the 1999 Red Book, with modifications which are not relevant here, and was expressed to be governed by Indonesian law.

During the performance of the contract, CRW had submitted thirteen "Variation Order Proposals" ("**VOPs**") to PGN but the parties could not agree on their valuation. Accordingly, the parties referred their dispute to a single-person Dispute Adjudication Board ("**DAB**") which, on November 25, 2008, awarded a sum of US$ 17,298,834.57 to CRW in respect of the VOPs. (The DAB was also termed "the Adjudicator" by the CA.) A day or two later,[3] PGN issued a notice of dissatisfaction ("**NOD**") with such decision.

By a letter dated December 3, 2008, CRW demanded prompt adherence to the DAB's decision and served an invoice on PGN for its amount but PGN rejected the invoice and disavowed any obligation to pay it.[4]



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III. The ICC Arbitration And Award

On February 17, 2009,[5] CRW filed a Request for Arbitration with the ICC (beginning ICC case no. 16122), pursuant to Sub-Clause 20.6 of the 1999 Red Book "for the sole purpose of giving prompt effect to the Adjudicator's decision."[6]

Thereafter, PGN filed an Answer to the Request for Arbitration claiming that the DAB decision was not yet final and binding because PGN had issued an NOD and, thus, PGN was not obliged to make payment. PGN also contended – as a defence – that, pursuant to Sub-Clause 20.6, the DAB decision ought to be re-opened by an arbitral award and CRW's request for prompt payment be rejected.[7] PGN did not file a counterclaim with its Answer.[8]

The Arbitral Tribunal comprised Mr. Alan J. Thambiayah, Chairman, Mr. Neil Kaplan and Professor H. Pryatna Abdurrasyid.[9] The place of arbitration was Singapore and the proceedings were conducted in English.

The Tribunal identified two questions for decision:[10]

1. Whether the Claimants (CRW) were entitled to immediate payment of the US$ 17,298,834.57, and
2. Whether the Respondent (PGN) was entitled to request the Tribunal, pursuant to Sub-Clause 20.6, to open up, review and revise the DAB's decision or any certificate upon which it was based.[11]

The Tribunal stated that the main issue in contention between the parties was the "meaning and effect of the following sentence appearing in the fourth paragraph of [Sub-Clause] 20.4":

> "The (DAB) 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."[12]

In essence, the Tribunal stated that CRW's case was that:

> "…notwithstanding the NOD, the DAB decision, although it may not be '*final*', is nonetheless binding on the Respondent who is obliged, by the express terms of sub-clause 20.4, to comply promptly with the DAB decision to make immediate payment of the sum of US$ 17,298,834.57 to the Claimants."[13] [Emphasis in original]

On the other hand, PGN claimed that the NOD was served in compliance with the contract, that the DAB decision was not an arbitral award enforceable under applicable law, that the DAB decision contained errors and that it would be unfair to enforce it until those errors had been examined by the Tribunal.[14]

PGN denied that it was in breach of contract in not paying the DAB decision because the decision was not final and binding.[15] PGN argued further that the Arbitral Tribunal was at liberty to examine and determine the dispute and should not do so based merely on the DAB decision but also on other material to be adduced by the parties relating to the alleged errors in that decision.[16]

With respect to the first question identified above, a majority of the Arbitrators (the "**Majority Members**"[17]) concluded that the service of a NOD did not alter the fact that the DAB's decision was binding on PGN and that it had an obligation to pay CRW immediately the amount of US$ 17,298,834.57.[18]

As to the second question (*i.e.*, whether PGN was entitled to request the Arbitral Tribunal to open up, review and revise the DAB decision), the Majority Members answered this in the negative as PGN had not served any counterclaim.[19] However, they also reserved PGN's right "to commence arbitration proceedings claiming the opening up, review and revision of the DAB decision dated 25th November 2008."[20]

IV. The Setting Aside Of The Award

A. The HC Decision

PGN applied to the HC to have the award set aside in Singapore on several grounds, including Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (adopted in Singapore), which provides that an arbitral award may be set aside if "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration…".

The HC found that the Majority Members had exceeded the scope of the arbitration provisions in two respects. **First**, the HC found that the arbitrators had issued an award on a dispute which had not been referred to the DAB. The HC said that the opening words of Sub-Clause 20.6[21] require that a dispute be previously submitted to the DAB before it can be submitted to arbitration. According to the HC, the dispute regarding the immediate enforceability of the DAB's decision had not been submitted to the DAB. Indeed, the HC noted that CRW had itself characterized PGN's non-payment of the DAB decision as a "second" dispute,[22] as distinguished from the first dispute concerning whether CRW was entitled to payment for the VOPs.

Second, even if the second dispute was referable to arbitration, the HC found that Sub-Clause 20.6 "does not allow an arbitral tribunal to make final a binding DAB decision without hearing the merits of that DAB decision".[23]

Accordingly, the HC found that the Majority Members had exceeded their powers under the arbitration agreement (Sub-Clauses 20.4 to 20.7) and set aside the Award on the basis of Article 34(2)(a)(iii).[24]

The judgment of the HC which was handed down on July 20, 2010 was followed almost one year later, on July 13, 2011, by the judgment of the CA. Therefore, it is unnecessary to devote any more attention to the judgment of the HC, except to note its argument that the arbitrators had issued an award on a dispute which had not been referred to the DAB.

There is no indication in the award that this argument had been raised before the Arbitral Tribunal.[25] This argument may have arisen before the HC because, as mentioned above, CRW had itself characterized PGN's non-payment of the DAB's decision as a "second" dispute distinct from the one referred to the DAB.[26] In the author's view, at least absent CRW's concession, this ground for the HC's decision is questionable and the CA, rightly, did not adopt it in its judgment.

As a practical matter, is a dispute over the enforcement of a DAB's decision to be distinguished from one over the merits of that decision? Can they not as easily be characterized as just one dispute? Unless CRW abandoned its claim, was it really likely to consider the dispute with PGN to have been finally resolved before it had been paid? Even the HC itself appeared to recognize – somewhat inconsistently – there was only one "real dispute":

> "the real dispute was clearly whether the DAB Decision was correct and following that, whether CRW was entitled to the payment of the sum which the DAB had decided was due."[27]

As to the **second** ground (Sub-Clause 20.6 required the Arbitral Tribunal to consider the merits), this can be considered in the discussion below of the CA's judgment as the CA adopts the same position.

B. The CA Decision

On July 13, 2011, the CA dismissed the appeal, thus upholding the HC's decision to set aside the award, but it did so on somewhat different grounds from those relied upon by the HC.[28]

With respect, the author maintains that the CA made four errors which undermine the value of the CA's judgment. The CA:

1. Failed to understand what the Arbitral Tribunal was appointed to decide;
2. Misinterpreted Sub-Clause 20.7;
3. Misinterpreted Sub-Clause 20.6 in three respects; and
4. Misinterpreted the effect of the Award.

Each of these errors is discussed below.

1. The CA Failed to Understand What the Arbitral Tribunal was Appointed to Decide

The CA begins its reasoning by considering what matters the Arbitral Tribunal was appointed to decide.

CRW maintained that the ambit of the arbitration was "limited to giving prompt effect to the [Adjudicator's] [d]ecision".[29] On the other hand, PGN argued that it had no obligation to pay the amount awarded because it had validly submitted a NOD, which rendered the decision "not yet final and binding".[30] PGN contended that, therefore, the Arbitral Tribunal should open up, review and revise the decision on the merits and that the Arbitral Tribunal "[could] not and [should] not deliberate the current dispute merely based on [the Adjudicator's] [d]ecision".[31]

The CA addressed this issue by reference to the Terms of Reference ("**TOR**") that the parties and members of the Arbitral Tribunal had signed pursuant to Article 18 of the ICC Rules of Arbitration (the "**ICC Rules**"). According to the CA:

> "The TOR stated clearly that the Arbitration was commenced pursuant to sub-cl 20.6 of the 1999 FIDIC Conditions of Contract. Further, it is plain that under the TOR, the Arbitral Tribunal was, by the parties' consent, conferred an unfettered discretion to reopen and review each and every finding by the Adjudicator. In other words, the Arbitral Tribunal was appointed to decide not only whether CRW was entitled to immediate payment of the sum of US$17,298,834.57… but also "any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, [might] deem necessary to decide for the purpose of rendering its arbitral award". With this crucial factual backdrop in mind, we now turn to consider Issue 2, …"[32] [Emphasis added]

This passage indicates that the CA believed that, as the arbitration had been begun under Sub-Clause 20.6 then, because of the wording of the TOR, the Arbitral Tribunal was conferred "unfettered discretion" to exercise the powers that an arbitral tribunal has under Sub-Clause 20.6 to "open up, review and revise… any decision of the DAB…".

However, while undoubtedly an arbitral tribunal potentially has such powers under Sub-Clause 20.6, the extent to which they may be exercised in any given ICC arbitration depends upon the claims and counterclaims, if any, which the parties have asserted in, and the contents of the TOR drawn up for, that arbitration.[33]

In this case, CRW sought immediate payment of the DAB's decision whereas PGN asserted no counterclaim. While the CA was correct that the Tribunal was entitled by Part VII of the TOR – which the CA quotes at the beginning of its judgment[34] – to decide "any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, [might] deem necessary" *etc.*, this was qualified, at the beginning of the sentence, by the words "[s]ubject to Article 19 of the ICC Rules [of Arbitration]," which the CA appears simply to ignore.[35]

Article 19 of the ICC Rules provides that a party may not make a new claim outside the limits of the TOR without authorization from the Arbitral Tribunal. The only claim in the arbitration, as the CA recognizes in its judgment,[36] is CRW's claim for an award to enforce the DAB's decision, inasmuch as PGN had filed no counterclaim.[37] Consequently, any additional issues of fact or law had to relate to CRW's claim – the only claim in the arbitration – or the defences or pleadings relating to that claim, given the prohibition on new claims (except where authorized by the Arbitral Tribunal) in Article 19. The Tribunal was only empowered to enforce or deny that claim.

Accordingly, having overlooked the import of the words "[s]ubject to Article 19 of the ICC Rules of Arbitration," the CA misunderstood the scope of what the Arbitral Tribunal was appointed to decide, which it refers to as a "crucial factual backdrop" for its decision.[38] The Court concludes, wrongly, that under the TOR the Arbitral Tribunal had power – indeed, as we shall see, the Court says the obligation – to open up, review and revise the DAB's decision,[39] whereas (as stated above) it only had in fact the power to enforce or deny CRW's claim.

2. The CA Misinterpreted Sub-Clause 20.7

After considering what the Arbitral Tribunal was appointed to decide, the Court examined the dispute resolution procedure under the 1999 Red Book. In doing so, the Court adopted the following interpretation by certain commentators[40] of Sub-Clause 20.7 of the 1999 Red Book:[41]

> *"Sub-Clause 20.7 only deals with the situation where both parties are satisfied with the DAB decision. If not (i.e. if a notice of dissatisfaction has been served), then there is no immediate recourse for the aggrieved party to ensure the DAB decision can be enforced."*[42] [Emphasis added]

According to this interpretation, as Sub-Clause 20.7 provides for the referral of only a "final and binding" decision to arbitration for enforcement; a decision that is merely binding cannot be enforced by an arbitral award. However, as I believe the history of this Sub-Clause (and its predecessor) bears out, and as I have noted in an article published elsewhere and excerpted here,[43] Sub-Clause 20.7 was not intended to be interpreted – and should not be interpreted – in this way.

The HC and the CA in the Persero case are not the first to deal with this issue. Arbitral tribunals and state courts have – unfortunately – been somewhat divided over whether a decision of a DAB under Clause 20 of the 1999 Red Book which is "binding" but not "final" (as it has been the subject of a notice of dissatisfaction) may be enforced by an arbitral award.[44]

The tribunals and courts that have denied enforcement, like the CA and the HC before it, have often relied on Sub-Clause 20.7 to support the conclusion that arbitrator(s) were only empowered to enforce "final and binding" DAB decisions and not "binding" ones. As Sub-Clause 20.7 only provides for the referral of a "final and binding" decision to arbitration, some tribunals and courts have reasoned that a "binding" decision cannot be enforced by an arbitral award.[45]

It has been said that there is a *lacuna* or gap in Sub-Clause 20.7 in so far as it does not confer an express right on the winning party to refer to arbitration a failure of the losing party to comply with a DAB decision that is "binding" but not "final" in nature [citing often an article of Dr. Nael G. Bunni on the subject[46]].

This conclusion – like that of Dr. Bunni – is understandable: Clause 20 has proven to be unclear in this respect. However, as I believe that I was probably responsible for the inclusion of Clause 20.7 (Sub-Clause 67.4 in the fourth edition, 1987) in the 1999 Red Book, I wish to point out that this provision was not intended to be interpreted in this way.

As older readers may recall, the predecessor to Clause 20 in earlier editions (that is, pre-1999) of the 1999 Red Book was Clause 67. Clause 67 required that all disputes between the Employer and the Contractor be referred to the Engineer for decision before they could be referred to arbitration.

As regards arbitration, Clause 67 of the third edition (issued in 1977) had provided that disputes or differences in respect of which the decision of the Engineer had not become "final and binding" – because a party had expressed dissatisfaction with the decision – could be referred to arbitration. Clause 67 of the third edition had provided:

> "All disputes or differences in respect of which the decision (if any) of the Engineer has not become final and binding as aforesaid shall be finally settled under the Rules of Conciliation of Arbitration of the International Chamber of Commerce…"

It was thus clear that, where a dispute was the subject of a decision of the Engineer that had "not become final and binding" (because a party had expressed dissatisfaction with it in the appropriate way), this dispute and the related decision could be referred to arbitration.

However, nothing was said about what happened if: (1) neither party had expressed dissatisfaction with an Engineer's decision, with the result that it became final and binding, and (2) a party refused to comply with it. For example, what recourse would the Contractor have if the Employer had failed to comply with a final and binding decision of the Engineer in the Contractor's favour?

In the early 1980s, I had the experience of a case where the Employer, a sovereign state, faced with a number of decisions of the Engineer under Clause 67 ordering the payment of money to the Contractor, neither expressed dissatisfaction, nor complied, with them. It just seemed to ignore them. Under Clause 67 as it was then worded, it was therefore very doubtful whether the Contractor could submit such decisions, or the disputes underlying them, to arbitration as, literally, only disputes in respect of which the decision (if any) of the Engineer had "**not** become final and binding" [emphasis added] could be referred to arbitration under Clause 67.

The problem had, doubtless, arisen because, as is well known, the first edition of the FIDIC Red Book published in 1957 had been based closely on a U.K. domestic form of contract (the ICE Conditions) and, under English law (at least at that time), where a debt was "indisputably due" from a debtor in England, relatively speedy summary judgment was available from the English courts. There would be no need for, or advantage in, submitting the matter to arbitration. Therefore, apparently for that reason, arbitration was not provided for in that case in the Red Book, just as it had not been provided for in that case in the relevant UK form of contract.[47]

Evidently, when the Red Book had originally been prepared, the draftsmen had failed to note that, in the case of an international construction project, the Contractor would almost certainly not want to go into a local court, which would typically be in a developing country, because the local court often could not, or would not, grant the desired relief. As a result, no satisfactory remedy was available in the Red Book where, in the case of such a project, a party, typically the Employer, had failed to comply with a final and binding decision of the Engineer under Clause 67.[48]

Therefore, in an article published in the ICLR in 1986, I raised the following question:

> "Why are disputes which are the subject of… "final and binding" decisions of the Engineer not also arbitrable, at least to the extent necessary to permit such decisions to be confirmed by an arbitral award, if necessary?"[49]

After discussing the problem at some length, I recommended as follows:

> "Clause 67 should be amended to make clear that a dispute which is the subject of a… "final and binding" decision of the Engineer may, nevertheless, be submitted to arbitration for certain purposes, such as to obtain an arbitral award confirming a party's entitlement to the amount of the "final and binding" decision."[50]

Thereafter, FIDIC addressed this precise problem in the next edition of the FIDIC Red Book, the fourth published in 1987, by the introduction, with my assistance, of a new Sub-Clause 67.4 into Clause 67.[51] Sub-Clause 67.4 provided as follows:

> "**Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may**, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, **refer the failure to arbitration** in accordance with Sub-Clause 67.3. The provisions of Sub-Clauses 67.1 and 67.2 shall not apply to any such reference." [Emphasis added]

As a result of the introduction of Sub-Clause 67.4, the failure of a party to comply with the Engineer's "final and binding" decision was now, for the first time, expressly referable to arbitration. Neither the decision, nor the underlying dispute, had first to be referred back either to the decision of the Engineer under Sub-Clause 67.1, or to the amicable settlement procedure provided for in Sub-Clause 67.2, as a condition to being submitted to arbitration.

Sub-Clause 67.4 expressly provided for the referral of the "failure" to comply with a final and binding decision to arbitration, so as to try to convey the idea that, unlike in the case of a decision of the Engineer with which one party had expressed dissatisfaction, a final and binding decision should not ordinarily be opened up by the arbitrators.[52]

There was no need to provide that a failure of a party to comply with a decision of the Engineer which had not become final and binding should be referred to arbitration as, in that case, even under the third edition of the Red Book (published in 1977), both the underlying dispute and the Engineer's decision could (and, as a notice of dissatisfaction with the decision had been given by one party, most probably would) be referred to arbitration. Hence, any failure by a party to comply promptly with such Engineer's decision under Clause 67 could be dealt with in that arbitration.

Sub-Clause 20.7 of the 1999 FIDIC Red Book is the successor to Sub-Clause 67.4 of the FIDIC Red Book, fourth edition, 1987, and is expressed in similar terms, except that, as in the case of the other 1999 FIDIC contracts for major works, the DAB has replaced the Engineer in his pre-arbitral role of deciding disputes, and Sub-Clause 20.7 refers to a decision of the DAB rather than a decision of the Engineer.

Sub-Clause 20.7 provides that, when a party has failed to comply with a final and binding decision of the DAB, the other party may 'refer the failure itself to arbitration' under Sub-Clause 20.6, without the need to refer the matter under Sub-Clauses 20.4 (to obtain another decision of the DAB) and 20.5 (to allow 56 days for amicable settlement). Thus, Sub-Clause 20.7, like the former Sub-Clause 67.4, ensures that, where a party has not complied with a final and binding decision, the matter can be referred to arbitration directly.

From this brief excursion into the history of the disputes clause in the FIDIC Red Book, it can be seen that Sub-Clause 67.4, of which Sub-Clause 20.7 is the successor, was simply put into the FIDIC Red Book, fourth edition, 1987, to ensure that, where a party had failed to comply with a final and binding decision, such failure could be referred to arbitration. 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.

Thus, if account is taken of the following three factors:

(1) the fact that "final and binding" decisions were not expressly arbitrable in the first (1957), second (1969) and third (1977) editions of the FIDIC Red Book,

(2) the difficulty that this situation had created, as described in the article published in the ICLR in 1986 which I have referred to, and

(3) FIDIC's response to that difficulty by its inclusion of a new Sub-Clause 67.4 into the fourth edition of the Red Book published in 1987 (the predecessor of Sub-Clause 20.7 in the 1999 Red Book),

Sub-Clause 20.7 should not be interpreted as implying that a failure to comply with a binding decision cannot be referred to arbitration directly. The same applies to Sub-Clause 20.7 of the FIDIC Conditions of Contract for Plant and Design-Build, 1999 (the "**Yellow Book**"), and for EPC/Turnkey Projects, 1999 (the "**Silver Book**"), as that Sub-Clause is worded in identical terms in them.

In any event, this issue under the 1999 Red Book has been clarified in the FIDIC Conditions of Contract for Design, Build and Operate Projects, 2008 (the "**Gold Book**") by Sub-Clause 20.9 providing as follows:

> "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*]… Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.7 [*Amicable Settlement*] shall not apply to this reference." [Emphasis added.]

When FIDIC's 1999 Books are updated, a task which is now underway, they can be expected to contain a similar provision, putting the issue finally to rest.

Against this background, the CA in the Persero Case (like the HC before it) went too far to suggest that, because Sub-Clause 20.7 does not expressly refer to binding decisions of a DAB, a failure to comply with a binding decision may not be referred to arbitration. Sub-Clause 20.7 was not intended to imply such a limitation.

3. The CA misinterpreted Sub-Clause 20.6 in Three Respects

(a) The CA misinterpreted Sub-Clause 20.6 as requiring a re-hearing of a dispute on the merits

Having concluded – incorrectly – that Sub-Clause 20.7 implies that a party may not refer a non-final and binding DAB decision to arbitration, the CA, like the HC below, concluded that a reference to arbitration under Sub-Clause 20.6 necessarily requires a full hearing on the merits, as:

> "… it seems quite plain to us that a reference to arbitration under sub-cl 20.6 of the 1999 FIDIC Conditions of Contract in respect of a binding but non-final DAB decision is clearly in the form of a rehearing so that the entirety of the parties' dispute(s) can *finally* be resolved afresh." [53] [Emphasis in original]

The CA appears to have been led to this conclusion, **first**, by its erroneous interpretation of Sub-Clause 20.7 as being the sole means of enforcing a DAB decision (as discussed above) and, **second**, because Sub-Clause 20.6, second paragraph, confers on an arbitral tribunal:

> "full power to open up, review and revise… any decision of the DAB, relevant to the dispute." [54]

Having arrived at this conclusion, the CA is then obliged to address certain recently published ICC awards where arbitral tribunals have enforced non-final decisions of the Engineer or of a DAB, namely, ICC Case No. 10619 (concerning a binding but non-final Engineer's decision under Clause 67 of the Fourth Edition of the Red Book[55]) and a decision published in a newsletter dated September 2010 of the Dispute Board Federation ("**DBF**").

The CA notes that ICC Case No. 10619 was an "*interim award*" [56] and the decision published in the DBF newsletter is a "*partial* award" [57] and that, in each award, it was made clear that the rights of the party against whom the award was made to have the underlying decision opened up, reviewed and revised in the same arbitration were reserved.[58]

Accordingly, in addition to concluding that a reference to arbitration under Sub-Clause 20.6 requires a full hearing on the merits, the CA concludes (as had the HC before it [59]) that:

> "… both ICC Case No. 10619 and the case mentioned in the September 2010 DBF newsletter suggest that *the practical response is for the successful party in the DAB proceedings to secure an interim or partial award from the arbitral tribunal in respect of the DAB decision pending the consideration of the merits of the parties' dispute(s) in the same arbitration.*" [60] [Emphasis added]

However, the CA's reliance on the second paragraph of Sub-Clause 20.6 as justifying the need for a hearing on the merits is mistaken. The first paragraph of Sub-Clause 20.6 contains a complete ICC arbitration clause in itself, providing for the arbitration of disputes in respect of non-final decisions of the DAB under the ICC Rules.[61] Accordingly, under that paragraph, an arbitral tribunal is – like normally any arbitral tribunal under an arbitration clause – empowered to order the enforcement of the contract in which it is contained.[62] Nothing more is required for it to be able to do so.

The second paragraph of Sub-Clause 20.6 does not detract from, but rather complements, the first paragraph. It provides that, in addition to whatever powers the arbitrator(s) may have under the first paragraph, they shall have full power to open up, review and revise decisions of DABs. In the absence of the second paragraph, it would be unclear whether they would have this supplementary power.

But it is important to appreciate that the second paragraph grants arbitrator(s) powers – it does not impose duties on them. Moreover, their ability to exercise such powers in any given arbitration will necessarily depend upon the claims and counterclaims, if any, and the terms of the TOR, in that arbitration.

Accordingly, the CA, like the HC before it, was wrong to conclude that Sub-Clause 20.6 places an obligation on arbitrator(s) to review the merits of binding but not final decisions of DABs. The wording of Sub-Clause 20.6 does not support this conclusion and it was never intended to.

Here the wording of the award itself could not be more apt. The Majority Members stated that PGN's submissions:

> "have the effect of rendering a DAB decision of no binding effect whatsoever until an arbitral award. Such an interpretation is the complete opposite of what the fourth sentence of the fourth paragraph of Clause 20.4 says." [63]

The same may be said of the judgments of the HC and the CA, which adopted PGN's interpretation.

(b) The CA misinterpreted Sub-Clause 20.6 as "contemplating a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved"

Having concluded wrongly that Sub-Clause 20.6 requires a hearing on the merits, the CA then stated, apparently as a corollary to this conclusion, that Sub-Clause 20.6 "requires" that all disputes relating to a specific DAB decision must be decided in the same ICC arbitration:

> "Where a NOD has been validly filed against a DAB decision by one or both of the parties, and either or both of the parties fail to comply with that decision (which, by virtue of the NOD(s) filed, will be binding but non-final), sub-cl 20.6 of the 1999 FIDIC Conditions of Contract requires the parties to finally settle their differences in the *same* arbitration, both in respect of the non-compliance with the DAB decision and in respect of the merits of that decision. In other words, sub-cl 20.6 contemplates a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved." [64] [Underlining added; italics in original]

The CA refers to no authority or other ground to support this conclusion but states that it is "consistent with the plain phraseology of sub-cl. 20.6", which requires "the parties' dispute" in respect of a binding but not final DAB decision to be "finally settled by international arbitration". The CA says:

> "Sub-Clause 20.6 clearly does not provide for separate proceedings to be brought by the parties before different arbitration panels even if each party is dissatisfied with the same DAB decision for different reasons." [65]

However, Sub-Clause 20.6 simply provides that any dispute in respect of which a DAB decision has not become final and binding "shall be finally settled by international arbitration", *i.e.* by a particular procedure for dispute settlement. While no party is likely to want to bring more arbitrations than necessary, Sub-Clause 20.6 does not restrict the number of arbitrations that a party may bring in respect of any one dispute.

(c) The CA failed to appreciate that, as PGN had referred to Sub-Clause 20.6 as a defence and not as a counterclaim, the arbitral tribunal was without power to grant PGN affirmative relief under that Sub-Clause

Having concluded that, in the case of a reference to arbitration under Sub-Clause 20.6, the Arbitral Tribunal must consider the merits of the dispute, the CA then considered whether the Majority Members:

> "had the power to issue the Final Award without opening up, reviewing and revising the Adjudicator's decision…" [66]

CRW argued that as PGN had not submitted a counterclaim, the Arbitral Tribunal had no power to open up, review and revise the Adjudicator's decision.[67] On the other hand, PGN had argued that it had such power as it had elaborated at length on the alleged errors in that decision.[68]

According to the CA, the Majority Members concluded that, as PGN had not filed a counterclaim, PGN's request for an award to open up, review and revise the DAB's decision was a defence to CRW's claim for immediate payment of the amount of the DAB's decision.[69] As the Majority Members decided to enforce the DAB's decision, they rejected that defence, while reserving in their final award PGN's right to commence a new arbitration to revise the DAB's decision.[70]

Having concluded that the Majority Members did not have the power under Sub-Clause 20.6 to issue a final award without assessing the merits of PGN's defence and the DAB's decision as a whole,[71] the CA added that they should have directed PGN to file a counterclaim:

> "If [the Majority Members] genuinely believed that PGN had to file a counterclaim in order to pursue its objection to making payment…, it was certainly open to them to direct that such a counterclaim be filed. They did not, however, do so…" [72]

Again, the CA is mistaken: under the ICC Rules, it is solely for the Respondent in the arbitration to decide whether to file a counterclaim,[73] which it must normally do when it files its Answer and which will increase the costs payable by the parties (or, at least, the Respondent) to the ICC.[74] The Arbitral Tribunal has no role in the matter and, moreover – as mentioned above – after the TOR have been signed at the beginning of an ICC arbitration, a party cannot introduce a new claim or counterclaim into an arbitration without the Arbitral Tribunal's authorization.[75]

Thus, once again, the CA failed to take account of the particular rules – the ICC Rules – which govern this arbitration.

4. The CA Misinterpreted the Effect of the Award

The CA found that the Majority Members exceeded their jurisdiction as (according to the CA), the Majority Members did not have the power under Sub-Clause 20.6 to make a "Final Award" without assessing the merits of PGN's defence and the DAB's decision as a whole.[76]

In arriving at this conclusion, the CA attached particular importance to the fact that the Majority Members had issued a "Final Award", rather than an interim award or partial award.

As the award of the Majority Members was called a "Final Award" (as it concluded the arbitration), the CA was unwilling to accept that PGN's right to commence a separate arbitration had been adequately reserved – the CA did not seem to understand or, at least accept, that a final award enforcing a non-final, binding DAB decision does not change or affect the non-final, and merely binding, nature of that decision.[77] Indeed, the CA was unwilling to accept that – though PGN had failed to file a counterclaim – PGN should have to begin a separate arbitration to challenge the DAB decision.

> "In this regard, counsel for CRW ingeniously suggested to this court that the Final Award was not in effect "final" since the Majority Members had expressly reserved PGN's right to commence a separate arbitration to challenge the Arbitrator's decision. We cannot accept this submission… *It is as plain as a pikestaff that the Majority Members meant "final" to mean "**conclusive or unalterable**"* [emphasis added in bold italics]… The purported reservation of PGN's rights to commence a fresh arbitration before another arbitral tribunal to review the merits of the Adjudicator's decision was odd, to say the least."[78] [The italics are in the original; the bold italics are a quotation from the award.]

While recognizing that a binding but non-final decision of a DAB may be enforced by an interim or partial award,[79] the CA appears to have difficulty accepting that such decision may be enforced by a final award even though the Majority Members had expressly reserved PGN's right to commence an arbitration to open up, review and revise the award.

The CA's difficulty is hard to understand. The final award merely declared that the DAB decision was binding on PGN and, thus, to be given immediate effect by it until such time (if any) as it was opened up, reviewed and revised in arbitration. It clarified the parties' rights in the "interim" pending a final decision by arbitration. This was the effect of the final award.[80]

The only difference between the final award in this case and the interim and partial awards in the other cases referred to by the CA is that, in this case, because it was a final award (as it would conclude the arbitration), PGN would have to begin a new arbitration in order to have the DAB decision opened up, reviewed and revised, whereas, in the other cases, the Engineer's decision or DAB decision could be opened up, reviewed and revised in the same arbitration.[81]

But this difference was simply due to PGN's failure to file a counterclaim. As PGN had not done so, its reference to Sub-Clause 20.6 was merely a defence and, thus, the Arbitral Tribunal was unable to grant PGN affirmative relief. Had PGN wanted the DAB's decision to be opened up, reviewed and revised in the same arbitration, it should have submitted a counterclaim on the basis of Sub-Clause 20.6 in accordance with Article 5(5) of the ICC Rules. This could have saved it the time and cost of beginning, and having to pursue, a second arbitration. But PGN neglected to do so.

Accordingly, the Arbitral Tribunal was justified in proceeding in the manner that it did, that is, issuing a final award ordering PGN to pay immediately the amount of the DAB's decision while expressly reserving PGN's right to commence a new arbitration to open up, review and revise the DAB's decision. As PGN had not submitted a counterclaim, there was nothing more for the Arbitral Tribunal to decide and, therefore, it had to issue a final award[82] whilst reserving PGN's rights.[83]

Once again, there is nothing in the arbitral award to criticize in this respect.

V. Conclusion

Since the first edition of the Red Book was published in 1957, it has provided for the final settlement of disputes by ICC arbitration. Most accept that arbitrators tend to be more familiar with international commerce, including international arbitration, and standard forms of contract and practices in individual industries, like the construction industry, than many national courts. Indeed, one of the well recognized advantages of arbitration is that it enables disputes in a particular industry to be decided by persons familiar with that industry.

This case provides further reason why international construction disputes should be allowed to be settled finally by international arbitration with only the most minimal court oversight. The CA held that the Majority Members had exceeded their jurisdiction by failing to consider the merits of the DAB's decision before making their final award.[84] On the contrary, the Majority Members could well have exceeded their jurisdiction had they done so, given that the only claim before them, included in the TOR, was that of CRW. In reality, the Majority Members understood Sub-Clauses 20.4 to 20.7 of the 1999 Red Book very well and rendered a concise and sound award. On the other hand, the Singapore courts appear to have misunderstood those Sub-Clauses and the CA misinterpreted the TOR and the ICC Rules as well. Those courts should have left this award alone.

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Endnotes

1 *See*, for example, Frederic Gillion in his article "Enforcement of DAB Decisions under the 1999 FIDIC Conditions of Contract: a Recent Development: CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK" [2011] *International Construction Law Review* ("**ICLR**") 388 (hereinafter cited as "**Gillion**") who refers (at p. 389) to the "confusing message" sent by the High Court judgment.

2 The Court of Appeal is Singapore's highest court.

3 The judgment of the HC dated July 20, 2010 (the "**HC judgment**") (para. 4) says November 26, 2008 whereas the judgment dated July 13, 2011 of the Court of Appeal (the "**CA judgment**") (para. 7) says November 28, 2008.

4 Award, dated November 24, 2009 (the "**Award**"), sub-paras. 4 and 5 of para. 19.

5 Award, para. 14. The CA judgment says February 13, 2009 (para. 9).

6 CA judgment, para. 9.

7 *Ibid.*

8 Pursuant to Article 5.5 of the ICC Rules of Arbitration, if the Respondent has a counterclaim, it is required to file the same with its Answer.

9 CA judgment, para. 10.

10 Award, para. 17. These are identified in the award as "preliminary" issues, though it is unclear why. Possibly, at this early stage of the arbitration (it was before the Terms of Reference under Article 18 of the ICC Rules of Arbitration had been signed) the Tribunal was not yet aware of the scope of the arbitration.

11 Award, para. 17.

12 Award, para. 26.

13 Award, para. 23.

14 Award, para. 31.

15 *Ibid.*

16 *Ibid.*

17 This is the term used in the CA judgment, para. 1, and it will therefore be used here.

18 Award, para. 45.

19 Award, paras. 48 to 52. PGN had relied upon Sub-Clause 20.6 solely as a defence.

20 Award, para. 52. Professor Abdurrasyid, the other arbitrator, issued a dissenting opinion, dated November 26, 2009, emphasizing that the DAB had failed to apply Indonesian law, the governing law of the contract, and that it also awarded CRW money in excess of the amount claimed.

21 "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."

22 HC judgment, para. 30.

23 HC judgment, para. 33. *See also* para. 37.

24 *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2010] SGHC 202, para. 43.

25 Arguably, therefore, this argument could be deemed to have been waived by virtue of Article 33 (entitled "Waiver") of the ICC Rules.

26 HC judgment, para. 30. CRW may have done so to avoid any suggestion that it was questioning its entitlement to the amount of the DAB's decision.

27 HC judgment, para. 37. Moreover,

(1) a central purpose of the DAB procedure is to provide the contractor, principally, with an expeditious dispute resolution procedure in exchange, in part, for his commitment to proceed with the works without interruption, *see* Sub-Clauses 8.1, second paragraph, and 20.6, last sentence, and

(2) yet, any reference back to the DAB is likely to set back the commencement of arbitration, as Mr. Gillion again notes (Gillion, p. 410), by four to five months, as well as to be futile (as Mr. Gillion recognizes on pp. 401 and 402), as the DAB would almost certainly find that its "binding" decision should be enforced.

In short, the essential purpose of Clause 20 – providing for the expeditious resolution of disputes – is undermined by such a formalistic interpretation, without there being any obvious countervailing benefit.

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

29 CA judgment, para. 41.

30 CA judgment, para. 42.

31 *Ibid.*

32 CA judgment, para. 43.

33 In other words, Sub-Clause 20.6 needs to be read together with the ICC Rules of Arbitration to which it refers as well as the TOR for any given arbitration.

34 CA judgment, para. 9.

35 Part VII of the TOR reads in relevant part:

"VII. STATEMENT OF THE ISSUES TO BE DETERMINED

"Subject to Article 19 of the ICC Rules [of Arbitration], the Arbitral Tribunal shall resolve all issues of fact and law arising from the claims and defences and pleadings as submitted by the Parties, including further submissions which are relevant to the merits of the Parties' respective claims and defen[c]es including, but not limited to, the following issues, as well as any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, may deem necessary to decide for the purpose of rendering its arbitral award…" [Emphasis added]

36 CA judgment, para. 9.

37 This is clear also from Part VIII (entitled "Estimated Amount in Dispute") of the TOR quantifying the "total amount in dispute" as US$ 17,298,834.57 (CA judgment, para. 12).

38 CA judgment, para. 43.

39 Thus, later the CA remarks "an arbitration commenced under Sub-cl. 20.6 constitutes a rehearing, which in turn allows the parties to have their dispute "finally settled" in that arbitration. The Majority Members clearly ignored sub-cl. 20.6 (and, indeed, the TOR as a whole)…", CA judgment, para. 82. [Emphasis added] *See also,* CA judgment, para. 79 ("What the Majority Members ought to have done, in accordance with the TOR… was to make an *interim* award in favour of CRW… and then proceed to hear the parties' substantive disputes afresh before making a *final* award." [Emphasis by underlining added])

40 Messrs. Jeremy Glover and Simon Hughes in "*Understanding the New FIDIC Red Book: A Clause by Clause Commentary*" (Sweet & Maxwell 2006), citing to Dr. Nael Bunni "*The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works*", [2005] ICLR 272.

41 Sub-Clause 20.7 – *Failure to Comply with Dispute Adjudication Board's Decision*, reads:

"In the event that:

(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*],

(b) the DAB's related decision (if any) has become final and binding, and

(c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [*Arbitration*]. Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference."

42 CA judgment, para. 55.

43 The following paragraphs (until Section IV.B.3) are largely drawn from the author's article "Sub-Clause 20.7 of the FIDIC Red Book Does Not Justify Denying Enforcement of a "Binding" DAB Decision" (based on a presentation given by the author at the FIDIC Users' Conference in London on December 1-2, 2010), published in *Construction Law International* of the International Bar Association, (2011) 6(3) CLInt. In his article (pages 394-5), Mr. Gillion describes the history of Sub-Clause 20.7 correctly, but gives no source for his description.

44 Compare the conclusion of the HC and the CA in the Persero Case with (i) the interim award in ICC case no. 10619 published in (2009) 19 *ICC International Court of Arbitration Bulletin*, No. 2, 85-90 and (ii) the 'final partial award' in another ICC case published in the September 2010 issue of *The Dispute Board Federation Newsletter* (*see* http://www.dbfederation.org/downloads/newsletter-sep10.pdf), both of which granted enforcement. It should be noted that the CA in the Persero case sought to distinguish these awards from the final award involved in the Persero case on the ground that they were interim or partial awards. *See* also the author's "Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's Decision Under the FIDIC Conditions" [2009] ICLR 414 commenting on the interim award in ICC case no. 10619.

45 For the text of Sub-Clause 20.7, *see* footnote 41, above.

46 Dr. Bunni's article is "The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works" [2005] ICLR 272.

47 *See* Clause 66 of the ICE Conditions of Contract, 4th and 5th editions, published in 1955 and 1973, respectively.

48 For a concrete example of the problem to which this gave rise, *see* the final award in ICC case no. 7910 (1996) in *ICC International Court of Arbitration Bulletin*, Vol. 9/ no. 2, November 1998, 46, where the tribunal declared it was without jurisdiction under Clause 67 in the case of a final and binding decision of the Engineer under the Red Book, third edition (1977).

49 "The Pre-Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contract" [1986] ICLR pp. 315, 334.

50 *Ibid.*, p. 336.

51 *See* the author's article "The Principal Changes in the Procedure for the Settlement of Disputes (Clause 67)" [1989] ICLR pp. 177, 183-84.

52 Certain exceptions to the finality of the decision of the Engineer were described in the author's "The Pre-Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contract" 1986 ICLR pp. 332-333.

53 CA judgment, para. 66. Mr. Gillion's remark about the HC judgment applies equally to the CA judgment: "by reading too much into Sub-Clause 20.7 and its distinction with Sub-Clause 20.6, the High Court also ends up misconstruing Sub-Clause 20.6". Gillion, p. 396.

54 CA judgment, para. 54 (citing to Ellis Baker *et al*, *FIDIC Contracts: Law and Practice,* 2009) and HC judgment, paras. 34 and 35.

55 This case has been the subject of an article by the author, "*Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's Decision under the FIDIC Conditions*", [2009] ICLR 414. Mr. Gillion says that, in that case, the claimant was *see*king "provisional relief" under Article 23 of the ICC Rules (Gillion, p. 408). While this was indeed one of the grounds relied upon by the claimant, it was rejected by the tribunal which preferred to rely on the "law of the contract", *see* (2008) ICC ICArb. Bull. No. 2, 85, 88-89 and the author's article, p. 421.

56 CA judgment, para. 60. [Emphasis in original]

57 CA judgment, para. 65. [Emphasis in original]

58 CA judgment, paras. 61 and 65.

59 HC judgment, para. 38.

60 CA judgment, para. 66.

61 The first paragraph of Sub-Clause 20.6 provides as follows:

> "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. Unless otherwise agreed by both Parties:
>
> (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
>
> (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
>
> (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*]."

62 In this connection, Article 17(2) of the ICC Rules provides in relevant part that:

> "[i]n all cases the Arbitral Tribunal shall take account of the provisions of the contract…"

63 Award, para. 42. Indeed, the CA recognizes – but without resolving – a difficulty: "The drawback… is that the DAB decision becomes of little immediate value". CA judgment, para. 56.

64 CA judgment, para. 67.

65 CA judgment, para. 68.

66 CA judgment, para. 69.

67 CA judgment, para. 70.

68 CA judgment, para. 71.

69 CA judgment, para. 76.

70 CA judgment, para. 77. *See* Section III above.

71 CA judgment, para. 82.

72 CA judgment, para. 83.

73 *See* Article 5(5) of the ICC Rules. The Arbitral Tribunal is, naturally, required to comply with the ICC Rules, *see* Article 15(1) of the ICC Rules.

74 *See* Article 30(2) of the ICC Rules. Indeed, one reason a Respondent may be disinclined to file a counterclaim is precisely to avoid the additional costs this would entail.

75 Article 19 of the ICC Rules.

76 CA judgment, para. 82.

77 Contending that the Arbitral Tribunal should have opened up, reviewed and revised the DAB's decision pursuant to Sub-Clause 20.6, the CA said:

> "PGN justifiably expected that evidence on the merits of the Adjudicator's decision would only be presented at a subsequent hearing to be fixed by the Arbitral Tribunal. [CA judgment, para. 90]

However, the CA ignored the fact that the scope of the ICC arbitration was fixed by the TOR, which had been signed shortly after the arbitration began (on June 17, 2009), and, as PGN had failed to file a counterclaim that was included in the TOR, there was no basis for the Tribunal to grant PGN any affirmative relief and, thus, to receive evidence on the merits of the decision.

78 CA judgment, para . 84.

79 *See* Section IV.B.3(a) above.

80 A somewhat analogous issue is whether a provisional measure should be enforced by an arbitral award. As to this, a leading authority states:

> "The better view is that provisional measures should be and are enforceable as arbitral awards… Provisional measures are "final" in the sense that they dispose of a request for relief pending the conclusion of the arbitration." Gary B. Born *International Commercial Arbitration*, 2009, Vol. II, p. 2023.

Much the same is true of the enforcement by an arbitral award of a binding, but not final, DAB decision.

81 This discussion of interim, partial and final awards is based on the definition given to these terms by the ICC Rules, *see* Article 2(iii) and other Articles. As Mr. Gillion correctly notes (Gillion, p. 407), the law of the country where the award is to be enforced is also relevant and should always be consulted.

82 Award, para. 53.

83 Award, para. 65.

84 CA judgment, para. 85.

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