



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] SGCA 33

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¹ The views expressed in this article are entirely those of the author and not necessarily those of the firm.

² Christopher R. Seppälä, "Enforcement by an Arbitral Tribunal of a Binding but Not Final Engineer's or DAB's Decision under the FIDIC Conditions", I.C.L.R. (2009) 414.

³ ICC Case No. 10619 of 2001 (Italian contractor v. African employer), Interim Award, an extract of which can be found in ICC International Court of Arbitration Bulletin, Vol. 19/No. 2 (2008), p. 85. In an earlier ICC case, an arbitral tribunal had, by a partial award, ordered payment of final and binding decisions of the Engineer under Clause 67 of the FIDIC Conditions of Contract, Second Edition, 1969 (ICC Case no. 3790 of 1983 (French contractor v. Libyan Employer), Partial Award, ICCA Yearbook IX (1984) page 119).

⁴ Mr Seppälä rightly comments in his article that since Article 2(iii) of the ICC Rules does not distinguish between a partial and an interim award "[t]hey mean the same thing and any such award is final as to the issue or matters which it decides". However, local courts may see things differently and consider that an interim award is only a provisional measure incapable of being enforced under the laws of their country. This is addressed further below.

⁵ Sub-Clause 67.1 of the 1987 Red Book provides: "... the Contractor and the Employer shall give effect forthwith to every decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award."

⁶ Sub-Clause 20.4 of the 1999 Red Book provides: "The decision [of a Dispute Adjudication Board] 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."

⁷ In addition to the final award in ICC Case No. 16122, which was subsequently set aside by the Singapore High Court in a judgment dated 20 July 2010 (*PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2010] SGHC 202), the author is aware of three (unpublished) ICC partial awards enforcing binding but not final DAB decisions. They were made in 2010 and 2011 and one of them is referred to in the Dispute Board Federation's Newsletter dated September 2010. Furthermore, earlier this year, a final award (again an ICC award) was rendered by an arbitral tribunal ordering a party to pay by way of damages the amount awarded by a DAB in a non-final decision. Interestingly, these last four cases relate to projects that took place in the same European country, a civil law country which was also the seat of the arbitration.

⁸ *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2010] SGHC 202.

1. Introduction

A couple of years ago, Christopher Seppälä, legal adviser for the FIDIC Contracts Committee, published a very useful commentary² on ICC Case No. 10619. That case was then and appears to be still now the only reported case under the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce ("ICC") where an arbitral tribunal ordered payment by an interim award of the sum set out in an Engineer's decision which had been the subject of a notice of dissatisfaction and was as a result "binding" but not "final"³.

By that award, the arbitral tribunal held in effect that decisions of the Engineer under Clause 67 of the FIDIC Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition, 1987 ("the 1987 Red Book") could be enforced by an interim or partial award⁴ ordering the losing party to pay immediately the amount assessed by the engineer in his Decision.

Considering the implications of that case for the 1999 suite of FIDIC Books in which the Engineer's decision is replaced by a decision of a Dispute Adjudication Board ("DAB"), Mr Seppälä's view was that because the wording of Sub-Clause 67.1 of the 1987 Red Book⁵ and of Sub-Clause 20.4 of the 1999 FIDIC Books⁶ was indeed very similar, the interim award made by the arbitral tribunal in ICC Case No. 10619 was "directly applicable to a decision of a DAB under the 1999 FIDIC Books". Mr Seppälä concluded in his article that: "[e]ven if one or both parties have given a notice of dissatisfaction with respect to a decision of a DAB pursuant to subclause 20.4, each party is bound to give effect to that decision, and if that decision calls for a payment to be made by one party to the other, then that decision should be enforceable directly by an interim or partial award pursuant to the Rules of Arbitration of the ICC."

Since the publication of Mr Seppälä's article, a number of arbitral awards have in fact been rendered confirming the enforceability of non-final DAB decisions by ordering the losing party to pay immediately to the winning party the amounts ordered by the DAB even though a notice of dissatisfaction had been given in respect of those DAB decisions⁷.

A recent decision dated 20 July 2010 of the Singapore High Court in *PT Perusahaan Gas Negara (Persero) TBK* ("PGN") v. *CRW Joint Operation* ("CRW")⁸ has however sent a confusing message to contractors and construction practitioners dealing with FIDIC Books. In that case, the High Court set aside an ICC award on the basis that the Arbitral Tribunal had exceeded its powers in making a final award ordering PGN to make immediate payment to CRW of the sum which the DAB had decided was due to CRW. Following an appeal by

CRW, the Court of Appeal confirmed the lower court's decision to set aside that arbitral award in a judgment dated 13 July 2011⁹ and concluded that what the Arbitral Tribunal did in that arbitration – viz, summarily enforcing a binding but non-final decision by way of a *final* award without a hearing on the merits – was “*unprecedented and more crucially, entirely unwarranted under the 1999 FIDIC Conditions of Contract*”.

The impact of these decisions is difficult to predict. However, one thing is certain, the conclusions of the High Court and the Court of Appeal of Singapore are already being relied upon in other arbitration proceedings in support of defences to claims for immediate payment of amounts awarded by DABs as well as in enforcement proceedings. For this reason, these decisions merit careful examination.

Although some of the findings of the High Court and in particular its interpretation of Sub-Clauses 20.6 and 20.7 are questionable, as explained below, they also have the merits of reminding those involved with FIDIC Books that the enforcement of DAB decisions is not a simple matter and that a number of jurisdictional pitfalls exist which may prevent a winning party from obtaining in arbitration the amounts awarded by the DAB. The present article examines what these pitfalls are in light of the decisions of both the High Court and the Court of Appeal of Singapore and also highlights some of the options which may be open to a winning party who wishes to have a DAB decision enforced by an arbitral award.

2. The facts of the case

In February 2006, PGN, an Indonesian State owned company, entered into a contract with CRW for the construction by CRW of a pipeline and optical fibre cable from Grissik to Pagardewa in Indonesia. The contract incorporated the General Conditions of the FIDIC Conditions of Contract for Construction (1st Edition, 1999) (“the 1999 Red Book”), with some amendments (together “the Conditions of Contract”). The law governing the contract was that of Indonesia.

A dispute arose between the Parties regarding certain variations in respect of which CRW sought additional payment. Following a referral of that dispute to the DAB, the DAB issued several decisions, all of which were accepted by PGN except for one dated 25 November 2008 ordering PGN to pay CRW a sum in excess of US\$ 17 million (“the DAB Decision”). The following day, on 26 November 2008, PGN gave notice of its dissatisfaction with the DAB Decision in accordance with Sub-Clause 20.4 of the Conditions of Contract.

PGN subsequently refused to comply with the DAB Decision. This led CRW to file a request for arbitration with the ICC International Court of Arbitration on 13 February 2009 (ICC Case No. 16122). Importantly, the dispute referred to arbitration was not the underlying dispute which was the subject of the DAB Decision, but it was in fact a new dispute, namely whether CRW was entitled to immediate payment by PGN of the sum awarded by the DAB in its Decision of 25 November 2008 (“the Dispute”).

CRW's case was that, notwithstanding PGN's notice of dissatisfaction, PGN still remained bound by the DAB Decision and was required to “promptly give effect” to that decision in accordance with Sub-Clause 20.4 of the Conditions of Contract. In its defence, PGN argued that the DAB Decision was not “final and binding” as it had served a notice of dissatisfaction and that a binding but not final DAB decision could not be converted into

⁹ CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33.

a final arbitral award without first determining whether the DAB Decision was correct (or ought to be revised) on the merits. PGN in particular sought to argue that the powers of the Arbitral Tribunal set out in Sub-Clause 20.6¹⁰ did not include the power to direct a party to make immediate payment of the sum awarded by the DAB without a review confirming the correctness of the DAB Decision.

The Arbitral Tribunal found in CRW's favour and held in a final award ("the Final Award") that the DAB Decision was binding and that PGN had an obligation to make immediate payment to CRW of the US\$ 17,298,834.57 awarded by the DAB. The Tribunal also dismissed in its award PGN's interpretation of Sub-Clause 20.6 and its argument that the Arbitral Tribunal should open up and review the DAB Decision. It however noted that PGN had still the right to commence a separate arbitration to open up, review and revise the DAB Decision.

CRW then proceeded to register the Final Award as a judgment in Singapore. In response, PGN applied to set aside the registration order and also sought an order from the Court to set aside the Final Award pursuant to Section 24 of the Singapore International Arbitration Act and Article 34(2) of the UNCITRAL Model Law (set out in the First Schedule to the Singapore International Arbitration Act). PGN's application to set aside the registration order was adjourned pending the outcome of this separate application to set aside the Final Award. The primary argument put forward by PGN in support of its application to set aside the Final Award was that the Arbitral Tribunal had exceeded its jurisdiction by converting the DAB Decision into a final award without determining first whether the DAB was correct on the merits.

By its decision dated 20 July 2010 ("the High Court Decision"), the High Court of Singapore found in PGN's favour and set aside the Final Award for lack of jurisdiction of the Arbitral Tribunal.

Dissatisfied with the High Court Decision, CRW filed an appeal, which was dismissed by the Court of Appeal of Singapore in its judgment dated 13 July 2011 ("the Court of Appeal Decision").

3. The proceedings in the court below: PGN v. CRW [2010] SGHC 202

The High Court Decision

In reaching its decision to set aside the Final Award, the High Court of Singapore examined the contractual framework set out in Clause 20 of the Conditions of Contract for the resolution of disputes between the Parties and in particular the requirement for a dispute to have gone through various steps, including a referral of the dispute to the DAB, before it may be referred to arbitration. It also considered the distinction between the proceedings envisaged by Sub-Clauses 20.6 and 20.7 of the Condition of Contract.

The High Court held that the Arbitral Tribunal had acted outside its jurisdiction in two respects:

- (a) The Dispute that CRW referred to arbitration in ICC Case No. 16122 (namely PGN's non-payment of the sum set out in the DAB Decision) had not been first referred to the DAB and was therefore "*plainly outside the scope of sub-cl 20.6 of the Conditions of Contract*"¹¹; and

¹⁰ Sub-Clause 20.6 of the Conditions of Contract provides: "The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute."

¹¹ High Court Decision, [31].

- (b) The arbitration proceedings commenced by CRW were made pursuant to Sub-Clause 20.6 of the Conditions of Contract, which, according to the Singapore court, requires “a review of the correctness of the DAB Decision”¹² and must be distinguished from proceedings brought under Sub-Clause 20.7 which do not require the arbitral tribunal to consider the merits of the DAB decision. That distinction meant, according to the Singapore court, that the Arbitral Tribunal had acted outside its jurisdiction by making final a binding DAB decision without first hearing the merits of that DAB decision.

Those two grounds for allowing PGN's application to set aside the Final Award are discussed briefly below.

First ground: the Dispute had not first been referred to the DAB - a pre-condition to arbitration

The High Court noted in its decision that, under Sub-Clause 20.6 of the Conditions of Contract, before a dispute can be subject to arbitration, it must first have been referred to the DAB and an adequate and timely notice of dissatisfaction must have been served in respect of the DAB decision¹³.

In this case, the Dispute that was referred to arbitration related to PGN's non-payment of the sum set out in the DAB Decision, namely PGN's breach of Sub-Clause 20.4 of the Conditions of Contract which requires the decision to be given effect promptly¹⁴. That Dispute was clearly separate from the substantive dispute decided by the DAB Decision of 25 November 2008 and in respect of which notice of dissatisfaction had been given.

It would seem that following PGN's failure to pay the invoice which CRW had raised in the amount awarded by the DAB, CRW did not consider necessary to revert back to the DAB with its further dispute relating to PGN's refusal to pay that invoice and therefore its failure to comply with the DAB Decision.

Applying strictly the terms of the Contract, the High Court therefore found that since the Dispute had not been referred to the DAB, the Arbitral Tribunal had exceeded the scope of the arbitration agreement in making its Final Award.

In the author's view, this was the right conclusion given the current wording of Sub-Clause 20.7. As mentioned above, Sub-Clause 20.7 makes clear that the only situation where a party may refer directly to arbitration the other party's failure to give effect to a DAB decision without having to comply first with the requirements of Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] is in the event that no party has expressed dissatisfaction with the DAB decision and that DAB decision becomes as a result final and binding. In ICC Case No. 16122, a notice of dissatisfaction had been given by PGN, making the DAB Decision binding but not final. Sub-Clause 20.7 was therefore not applicable.

Second ground: the merits of the DAB Decision had to be heard first - Why the High Court was wrong in its interpretation of Sub-Clauses 20.6 and 20.7

The High Court went on to explain in its Judgment that: “Even if, for the sake of argument, the Second Dispute [namely PGN's failure to comply with the DAB Decision in accordance with Sub-Clause 20.4] were referable to arbitration under Sub-Clause 20.6 without first being referred to the DAB, one must remember that sub-cl 20.6 does not allow an arbitral tribunal to make final a binding DAB decision without first hearing the merits of that DAB decision.”¹⁵

¹² *Ibid.* [37].

¹³ The Singapore court relied in particular on the first sentence of Sub-Clause 20.6 which provides that “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”. This is also clear from the penultimate paragraph of Sub-Clause 20.4 which provides that: “Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment]. 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.”

¹⁴ Sub-Clause 20.4 of the Conditions of Contract provides: “... The decision shall be binding on both Parties, which shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral tribunal...”

¹⁵ High Court Decision, paragraph 33.

Because CRW had not referred to arbitration the merits of the DAB Decision (because it was satisfied with the DAB Decision) but simply PGN's failure to comply with that decision, the High Court found that CRW's reference had "*ignored the provisions of sub-cl 20.6 of the Conditions of Contract concerning dispute resolution*".¹⁶ It then concluded the following:

*"To summarise, 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. However, CRW tried to limit the dispute to only whether payment of that sum should be made immediately and, in doing so, wrongly relied on sub-cl 20.6. In fact, there is no express right of a party to refer to arbitration under sub-cl 20.7 a failure of the other party to comply with a binding but not final decision of the DAB. An arbitration commenced under Sub-Clause 20.6 requires a review of the correctness of the DAB decision. . . . the reference was not on the merits of the DAB Decision (unlike ICC Case No 10619, where the issue regarding the immediate enforceability of the Engineer's decision was pursued as an interim or partial award under the auspices of the arbitration on the merits of the Engineer's decision). Accordingly, the Majority Tribunal exceeded its powers by rendering a final award under the pertaining to. . . a dispute that was not within the scope of the Arbitration Agreement. . ."*¹⁷

The author suggests that the conclusion which the High Court reached here results from a wrong interpretation of both Sub-Clause 20.6 and Sub-Clause 20.7, which in turn led to a misunderstanding by the High Court of the type of dispute which a party may refer to arbitration under Sub-Clause 20.6.

The High Court puts a lot of emphasis in its decision on the distinction between Sub-Clauses 20.6 and 20.7 to suggest that since Sub-Clause 20.7 expressly provides for the enforcement of a DAB decision in arbitration where that decision is "final and binding", then a DAB decision that is "binding" but not "final" cannot be enforced by an arbitral award under Sub-Clause 20.6.

It was however never intended for Sub-Clause 20.7 to be interpreted that way. That provision was in fact introduced in the fourth edition (1987) of the FIDIC Conditions of Contract to correct a deficiency of Clause 67 of the previous second (1969) and third (1977) editions.

Clause 67 of the second and third editions was indeed unclear as it provided that a party could *only* refer a dispute to arbitration if:

- (a) it had referred it to the Engineer for a decision,
- (b) the Engineer had rendered a decision (or failed to decide), and
- (c) a party had expressed dissatisfaction with the decision, if any.

The problem therefore arose as to what a party should do after it had obtained a favourable decision from the Engineer which was not subsequently challenged by the other party (through the issue of a notice of intention to commence arbitration). That decision became as a result "final and binding". If the losing party then failed to comply with that decision, could the winning party refer such failure to arbitration?

¹⁶ *Ibid* [36].

¹⁷ *Ibid.* [37]

That precise question was raised in ICC Case No. 7910¹⁸. In that case, the arbitral tribunal considered that in a situation where the Engineer's decision had become final and binding because the losing party had failed to challenge it within the time prescribed in the contract, the arbitral tribunal had no jurisdiction to make an award in respect of that decision because no party had expressed its dissatisfaction with the Engineer's decision.

This obviously put the winning party in an unsatisfactory position as its only recourse was then to seek to enforce the decision before the courts of the losing party's country, admittedly not an easy task especially if the losing party is the state itself or a state entity.

To address that issue, the 1987 FIDIC Conditions of Contract inserted Sub-Clause 67.4, the language of which is essentially repeated in Sub-Clause 20.7 of the 1999 FIDIC Books. Sub-Clause 67.4 provides 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-Clauses 67.3. The provisions of Sub-Clause 67.1 and 67.2 shall not apply to any such reference."

It is unfortunate that the High Court ignored or was unaware of the background behind the wording of Sub-Clause 20.7. When looking at why Sub-Clause 20.7 (and its equivalent provision in the 1987 FIDIC Conditions of Contract – Sub-Clause 67.4) was introduced, it is clear that the intention of the FIDIC draftsmen was not to create some sort of distinction, as suggested by the High Court of Singapore, between those arbitration proceedings brought under Sub-Clause 20.6 to deal with the merits of a DAB decision and those arbitration proceedings brought under Sub-Clause 20.7 to enforce a DAB decision without consideration of the substantive dispute between the parties. Their intention was simply to ensure that "final and binding" decisions could be enforced in arbitration. It was not to prevent a party from referring to arbitration the other party's failure to comply with decisions that are "binding" but not "final".

With that background in mind, the author suggests, the High Court was wrong in concluding that without an express right provided for under the contract, CRW was not allowed to refer to arbitration the narrow issue of PGN's failure to comply with the DAB Decision.

The position is obviously much clearer now with the recent FIDIC Gold Book (2008) which provides that:

- (a) a DAB decision is binding and the parties have to comply with it "notwithstanding that a Party gives a Notice of Dissatisfaction with such a decision"¹⁹; and
- (b) the winning party may refer directly to arbitration a failure of the losing party to comply with "any decision of the DAB, whether binding or final and binding"²⁰.

A similar wording would have been desirable in the MDB Harmonised Edition of the Red Book which was first published in May 2005 and subsequently amended in March 2006 and June 2010. The High Court specifically relied on the fact that Sub-Clause 20.7 had not been amended in the MDB Harmonised Edition to conclude that the drafters

18 International Court of Arbitration Bulletin Vol. 9/No.2 - November 1998.

19 Gold Book, Sub-Clause 20.6.

20 *Ibid.* Sub-Clause 20.9.

of that form “*implicitly rejected Prof Bunni’s suggestion to allow the winning party to refer to arbitration a failure of the losing party to comply with a DAB decision.*”²¹ This conclusion is totally unfounded.

Significantly, 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. In its decision, it relies on the arbitral tribunal’s express powers under Sub-Clause 20.6 “to open up, review and revise... any decision of the DAB” to suggest that an arbitral tribunal would have no power to determine a dispute relating to the failure of one party to comply with a DAB decision without hearing first the merits of that decision²².

The effect of that wording in Sub-Clause 20.6 is however not to restrict the type of dispute which an arbitral tribunal may determine under that sub-clause. If a winning party were to refer to arbitration the losing party’s failure to comply with a DAB decision in breach of Sub-Clause 20.4, an arbitral tribunal would of course have the power to determine that dispute - which is clearly separate from the dispute of whether the DAB decision is correct – provided that the pre-requisites for arbitration (as set out in Sub-Clauses 20.4 and 20.5) have been satisfied.

This leaves the question of whether the Arbitral Tribunal ought to have opened up, reviewed and revised the DAB Decision in circumstances where the Dispute was limited to the failure to comply with the DAB Decision. According to the High Court, “*An arbitration commenced under Sub-Clause 20.6 requires a review of the correctness of the DAB decision*”²³ and therefore “*the Arbitral Tribunal must be asked by CRW to review the correctness of the DAB Decision before it can made the DAB Decision “final and binding”*”²⁴. Why a successful party must ask an arbitral tribunal to review the correctness of the DAB decision with which it is satisfied is unclear. This, the author suggests, does not make much sense and is certainly not a requirement of Sub-Clause 20.6. It is obviously open to the losing party to request the arbitral tribunal to open up, review and revise the DAB decision. However, such a request should not prevent the arbitral tribunal from making an award in respect of the losing party’s failure to give effect to a DAB decision.

It appears that, on the facts of this case, PGN did ask the Arbitral Tribunal to open up, review and revise the DAB Decision. In these circumstances, *after* having made a partial award ordering payment of the amount set out in the DAB Decision, the Arbitral Tribunal should have looked at the merits of the case by reviewing the DAB Decision. The Arbitral Tribunal however refused to do so in this case, on the basis that PGN had not filed a counterclaim in the arbitration, and it then proceeded to make a final award. This is where, it could be argued, the Arbitral Tribunal may have erred in not giving an opportunity to PGN to present its case in relation to the underlying dispute which was the subject of the DAB Decision. Interestingly, this is the main basis for the Court of Appeal Decision, as explained further below.

4. The decision of the Singapore Court of Appeal: CRW v. PGN [2011] SGCA 33

The Court of Appeal Decision

Although the Court of Appeal ultimately confirmed the High Court Decision to set aside the Final Award, the basis on which it reached its decision is quite different.

The basis for the Court of Appeal Decision dated 13 July 2011 essentially lies with the

21 High Court Decision, paragraph 21.

22 *Ibid.* [35].

23 *Ibid.* [37].

24 *Ibid.*[34].

matters which the Arbitral Tribunal was appointed to decide as set out in the Terms of Reference signed by the parties. The Court of Appeal explains the following:

“The TOR [Terms of Reference] 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”²⁵.

With what the Court of Appeal describes as *“this crucial backdrop in mind”*, it went on to consider whether the Final Award was issued in accordance with Sub-Clause 20.6. The Court of Appeal found that, by refusing to open up, review and revise the DAB Decision and proceeding instead to make a final award without reviewing the merits of that Decision, the Arbitral Tribunal had ignored the clear language of Sub-Clause 20.6 to “finally [settle]” the dispute between the parties. The Court of Appeal considered that: *“What the Majority Members ought to have done, in accordance with the TOR (and, in particular, sub-cl 20.6 of the 1999 FIDIC Conditions of Contract), was to make an interim award in favour of CRW for the amount assessed by the Adjudicator (or such other appropriate amount) and then proceed to hear the parties’ substantive dispute afresh before making a final award.”²⁶*

The Court of Appeal considered that the Final Award was therefore not issued in accordance with Sub-Clause 20.6, which in turn raised the question of whether the Arbitral Tribunal exceeded its jurisdiction in making the Final Award (Article 34(2)(a) (iii) of Model Law) and whether it breached the rules of natural justice (Section 24(b) of the Singapore International Arbitration Act). These were the two grounds relied upon by PGN for setting aside the Final Award and accepted by the Court of Appeal in this appeal²⁷. They are discussed briefly below.

Whether the Arbitral Tribunal exceeded its jurisdiction in making the Final Award

It is interesting to note that the Court of Appeal makes no reference to the fact that the Dispute that CRW referred to arbitration in ICC Case No. 16122 (namely PGN’s non-payment of the sum set out in the DAB Decision) had not been first referred to the DAB and was therefore outside the Arbitral Tribunal’s jurisdiction as the High Court decided (correctly in the author’s view) in its decision of 20 July 2010.

The Court of Appeal found that the Arbitral Tribunal exceeded its jurisdiction in making the Final Award solely on the basis that the Tribunal issued the Final Award without opening up, reviewing and revising the DAB Decision.

Although the Court of Appeal may be right that the Arbitral Tribunal should not have refused to open up, review and revise the DAB Decision in light of the powers given to it by Sub-Clause 20.6 and the Terms of Reference, it is unclear how “[t]he failure of the Majority Members to consider the merits of the Adjudicator’s decision before making the Final Award meant that they exceeded their jurisdiction in making that award.”²⁸ The Court of Appeal, rather confusingly, explains that *“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”²⁹* without defining what the dispute is. In this case, the Dispute simply

25 Court of Appeal Decision, paragraph 43.

26 *Ibid.* [79].

27 PGN did not dispute the decision of the High Court to reject its submissions on Article 34(2)(a)(iv) of the Model Law, namely that “the arbitral procedure was not in accordance with the agreement of the parties, which required the merits of the underlying dispute and/or the question of whether the DAB Decision was made in accordance with the Contract to be determined prior to making that decision a final award” (High Court Decision, paragraph 9).

28 Court of Appeal Decision, paragraph 85.

29 *Ibid.* [82].

related to PGN's non-payment of the sum set out in the DAB Decision in breach of Sub-Clause 20.4, not to the underlying dispute that was the subject of the DAB Decision.

The Arbitral Tribunal made a Final Award in respect of the Dispute that was referred to it. It did not therefore exceed its jurisdiction. The real question is whether the Tribunal failed to exercise the authority that the parties granted to it by declining to open up, review and revise the DAB Decision, and whether this failure falls within Article 34(2)(a)(iii) of the Model Law. Unfortunately, this is not clearly addressed by the Court of Appeal in its decision.

Whether there was a breach of the rules of natural justice at the arbitral hearing

In its decision, the High Court dismissed PGN's submission that there had been a breach of the rules of natural justice at the arbitral hearing. The position of the High Court was that PGN had not been very clear in its allegations as to which rule of natural justice had been contravened, and also pointed out that PGN had been given an opportunity to present or argue its case on why it should be entitled to open up, review and revise the DAB's Decision.

The Court of Appeal did not agree with the High Court's conclusion on that point and considered that: *"PGN was entitled to be accorded a proper opportunity to comprehensively present its case on the Adjudicator's decision, with all the relevant submissions and evidence, at a subsequent hearing before the Arbitral Tribunal. However, it was denied this opportunity as the Majority Members summarily made the Final Award without considering the merits of the real dispute between the parties."*³⁰

The Court of Appeal therefore concluded that there had been a breach of natural justice in this case, which caused real prejudice to PGN insofar as PGN would have to start a fresh arbitration to review the DAB Decision, which would require additional time and costs.

5. Options open to a successful party who wishes to enforce a binding but not final DAB decision

What then can a winning party do to enforce a binding but not final DAB decision if the losing party refuses to give prompt effect to it as required by Sub-Clause 20.4?

As seen above, the High Court clearly dismisses the possibility of a simple referral to arbitration of the losing party's failure to comply with a binding but not final DAB decision. The High Court however felt in its Judgment that it had to highlight *"for completeness"* what would then be open to a winning party in those circumstances. The High Court held *obiter*³¹ that a winning party could do the following:

- (a) refer the underlying dispute covered by the DAB decision to arbitration and ask the arbitral tribunal to review and confirm the DAB decision; and
- (b) include a claim for an interim award in respect of the amount which the DAB ordered the losing party to pay.

This view seems to be shared by the Court of Appeal which suggests 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."*³²

30 Court of Appeal Decision, paragraph 94.

31 High Court Decision, paragraph 38.

32 Court of Appeal Decision, paragraph 66.

This section examines the practical problems raised by the solution proposed by the High Court and considers whether any alternative and *prima facie* more simple options may be available to a party in whose favour a binding but not final DAB decision was made in the event that the other party fails to give prompt effect to it.

Four options will be considered:

- Option 1: Include the amount of the DAB decision in an interim payment application;
- Option 2: Refer directly to arbitration the losing party's failure to comply with the DAB decision;
- Option 3: Commence another DAB in respect of the losing party's failure to comply with the DAB decision and then refer that narrow dispute to arbitration;
- Option 4 (the option favoured by the Singapore courts): Proceed with this second DAB and then refer to arbitration both the underlying dispute and the losing party's failure to comply with the first DAB decision.

Option 1: Include the amount of the DAB decision in an Interim Payment Application

Pursuant to Sub-Clause 14.3(f) of the 1999 Red and Yellow Books³³, a Contractor who has been awarded a sum of money following a DAB decision shall include that sum in an interim payment application. If the Contractor does so, what should the Engineer then do?

In theory, the Engineer should give effect to the DAB decision and certify any amount awarded to the Contractor by the DAB. If the Employer subsequently fails to pay the relevant Interim Payment Certificate ("IPC"), the Contractor may then consider suspending work (Sub-Clause 16.1) or terminating the Contract (Sub-Clause 16.2(c) – Employer's failure to pay the amount due under an IPC).

However, if the Employer has given notice of its dissatisfaction with the DAB decision, the Engineer may consider that no amount is in fact due to the Contractor following the DAB decision, and therefore decide not to include the sum awarded by the DAB in the IPC. Interestingly, the Gold Book has recognised that problem and requires the Employer's Representative to include in the IPC any sums awarded by the DAB³⁴.

With the current edition of the 1999 FIDIC Books, a dispute would arise as to whether the Engineer ought to have certified the sum awarded by the DAB and that dispute could then be referred to the DAB for its decision. No doubt the DAB would subsequently confirm that the Engineer is under the obligation to include the sum awarded by the DAB in an IPC. However, it is equally certain that the Employer would again give notice of its dissatisfaction in respect of that second DAB decision. The Contractor would in effect be back to square one with a further DAB decision that is binding but non final and arguably no real ground for suspending the work or terminating the contract.

Option 1 is therefore unlikely to be an attractive route for a contractor who is seeking immediate payment of the amount set out in a DAB decision.

33 Sub-Clause 14.3 of the 1999 Red and Yellow Books provides: "... The Statement shall include the following items... (f) any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [Claims, Disputes and Arbitration]..."

34 Sub-Clause 14.7 of the Gold Book provides: "... the Employer's Representative shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which... shall include any amounts due to or from the Contractor in accordance with a decision by the DAB made under Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's Decision]..."

Option 2: Refer directly to arbitration the losing party's failure to comply with the DAB decision

Can the winning party simply refer to arbitration the losing party's failure to comply with the DAB decision without having to go back to the DAB?

As seen with the *PGN v. CRW* case, this is questionable because the losing party's failure to comply with the DAB decision gives rise to a fresh cause of action – namely a breach of Sub-Clause 20.4 (which requires the decision to be given effect promptly) – and is a new and separate dispute from the original dispute referred to the DAB. Pursuant to Sub-Clauses 20.4 to 20.6 (and subject to the exception of Sub-Clause 20.8 – DAB no longer in place), any such dispute will have to be referred first to the DAB for its decision, and following the giving of a notice of dissatisfaction, the parties will have to comply with the amicable settlement procedure before the dispute may be referred to arbitration. Failing this, the losing party may object to the jurisdiction of the arbitral tribunal on the basis that the pre-conditions to arbitration have not been fulfilled.

Interestingly, in two of the four recent (unpublished) ICC cases of which the author is aware (in addition to ICC Case No. 16122) where non-final DAB decisions were enforced by arbitral awards, the winning party did not refer first to the DAB the dispute relating to the losing party's failure to comply with the DAB decision. Will this prove fatal to any enforcement of those awards? Maybe not, but the findings of the High Court in the *PGN v. CRW* case will certainly provide further ammunition for the losing party should it seek to resist any enforcement proceedings and set aside the award made against it by arguing that the arbitral tribunal had no jurisdiction to make such award.

To be on the safe side, and to reduce the risk of jurisdictional objections being raised by the losing party during the arbitration or the enforcement proceedings, a winning party should therefore be advised not to proceed directly with Option 2 but to revert first to the DAB for a decision on the losing party's failure to comply with its original DAB decision.

Although a second set of DAB proceedings may appear to be pointless, this is, the author suggests, the result of a lacuna in the drafting of Sub-Clause 20.7 of the 1999 FIDIC Books. As explained above, that problem has now been addressed in the Gold Book which makes clear in its Sub-Clause 20.9 that a party may refer directly to arbitration the other party's failure to comply with any decision of the DAB "whether binding or final and binding".

Option 3: Commence another DAB (DAB 2) in respect of the losing party's failure to comply with the DAB decision and then refer that narrow dispute to arbitration

Option 3 is the situation where a winning party decides to go back to the DAB and then to refer to arbitration only the losing party's failure to comply with the DAB decision.

Once a further decision has been obtained from the DAB (confirming the losing party's breach of Sub-Clause 20.4 for failing to give effect promptly to the first DAB decision and ordering the payment of the sum awarded by the DAB and/or any damages flowing from that breach), the losing party is likely to give again notice of dissatisfaction, and after the expiry of the period for amicable settlement, the winning party will be allowed to proceed to arbitration.

The key question raised by the Singapore courts decisions is whether that arbitration can be limited to the losing party's failure to comply with the first DAB decision so as to simplify the proceedings.

According to the High Court of Singapore in the *PGN v. CRW* case, the answer to that question is most definitely "no". The High Court made clear in its judgment that, in limiting the Dispute to the payment of the sum which the DAB had decided was due, CRW "wrongly relied on sub-cl 20.6" as "[a]n arbitration commenced under Sub-cl 20.6 requires a review of the correctness of the DAB decision"³⁵.

As explained above, the High Court seems to have misinterpreted Sub-Clauses 20.6 and 20.7 and, the author suggests, nothing should in fact prevent a party from only referring to arbitration the other party's failure to comply with a DAB decision, provided of course that the pre-requisites for arbitration set forth in Sub-Clauses 20.4 and 20.5 have been satisfied.

Putting aside any jurisdictional objections which the losing party may seek to raise in light of the findings of the High Court, would the referral of such a narrow dispute any way simplify the arbitration proceedings?

In practice, when faced with a claim for the immediate payment of the sum awarded by the DAB, the losing party is likely to seek to broaden the scope of the arbitration by asking the arbitral tribunal to decide the merits of the original dispute and/or to open up, review and revise the first DAB decision³⁶. This is what in fact PGN sought to do in ICC Case No. 16122 by asking the Arbitral Tribunal in its Answer to CRW's Request for Arbitration "to open up, review and revise the [Adjudicator's] decision, as well as to hear relevant witnesses and experts to obtain actual information and evidence relevant to the dispute."³⁷

As already mentioned above, the Arbitral Tribunal in that case declined to do so, on the basis that PGN had not filed a counterclaim. Arguably, there should be no need for the losing party to file a counterclaim as Sub-Clause 20.6 makes clear that "[t]he arbitrator(s) shall have full power to open up, review and revise ... any decision of the DAB, relevant to the dispute." If the dispute referred to the DAB is the failure of one party to comply with a DAB decision in breach of Sub-Clause 20.4, then the DAB decision should be relevant to that dispute. In any event, in order to avoid any argument (as in ICC Case No. 16122), the losing party can easily file a separate request for arbitration setting out its counterclaim combined with a request to the International Court of Arbitration of the ICC to include its claim in the pending proceedings initiated by the winning party pursuant to Article 4(6) of the ICC Rules³⁸.

Option 3 is therefore unlikely to result in a simple arbitration (if any arbitration proceedings could ever be simple). What is then the benefit of only referring to arbitration the losing party's failure to comply with the first DAB decision?

The effect of forcing the losing party to commence its own arbitration is of course to reverse the parties' role in the arbitration in relation to the underlying dispute which was the subject of the DAB decision. The losing party, as claimant in those proceedings, will have to establish that the first DAB decision was incorrect and that the winning party was not entitled to the money awarded by the DAB. This may be advantageous for the following reasons:

35 High Court Decision, paragraph 37.

36 That said, in one of the four ICC cases of which the author is aware where an arbitral tribunal enforced a binding but non-final DAB decision, the dispute which was referred to arbitration was limited to the losing party's failure to comply with the DAB decision. The losing party decided not to broaden the scope of the arbitration. The arbitral tribunal then rendered a final award ordering the losing party to pay the amount of the DAB decisions by way of damages. That final award was enforced successfully against the losing party.

37 Court of Appeal Decision, paragraph 47.

38 Article 4(6) of the ICC Rules provides: "When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings, provided that the Terms of Reference have not yet been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19." Article 19 of the ICC Rules provides: "After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall have regard to the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances."

- (a) The winning party will be able to get on with its claim for immediate payment of the sum awarded by the DAB without having to spend significant time and money to prove again its entitlement;
- (b) An arbitral tribunal may be more inclined to make a partial award in respect of the winning party's claim at an early stage of the arbitration proceedings if it becomes clear that a long time will be required for the losing party to establish its case regarding the merits of the DAB decision. Any such award, provided of course that it is not ignored by the losing party, would put the winning party in a favourable financial position and also a strong bargaining position in any amicable settlement discussions.

Option 4: Proceed with DAB 2 and then refer to arbitration both the original dispute and the losing party's failure to comply with the first DAB decision

The idea of Option 4, which both the High Court and the Court of Appeal of Singapore court seem to favour, is for the winning party to refer to arbitration both the original dispute covered by the DAB decision and the losing party's failure to comply with the original DAB decision.

According to the High Court, it would then be open to the winning party to request "*an interim award vis-à-vis the DAB decision to be enforced, with amount owed as set out in the DAB decision to be paid pending accordingly.*" The Singapore court also added that "[t]he amount paid out is liable to be returned to the payer, depending on how the tribunal, after reviewing DAB decision, decides the case."

In that situation, the winning party would be the claimant in the arbitration and would therefore lose the benefits of Option 3. That said, some might argue, by being the claimant, the winning party may gain some control over the conduct of the proceedings. Option 4 may also be preferred where the winning party is not entirely satisfied with the DAB decision because some of its claims were dismissed or not considered by the DAB and the amount awarded by the DAB is as a result much lower than the one which the winning party can expect to recover by pursuing its claims in arbitration.

The main problem with Option 4 is the fact that the arbitration will inevitably focus more on the merits of the underlying dispute which was the subject of the first DAB decision than the fact that the DAB decision has been ignored by the losing party.

In practice, unless the arbitral tribunal orders a bifurcation of the winning party's claims at the outset, all of its claims will be pleaded at the same time and the first opportunity which the winning party may have to request a partial award in respect of the losing party's failure to comply with the DAB decision is likely to be many months after the filing of its request for arbitration.

Considerations such as "lack of urgency" may then be raised by the losing party to resist the making of a partial award ahead of the hearing of the underlying dispute, especially if that hearing is only months away. The losing party may also argue that the winning party will in any event be adequately compensated by an award of interest on the sums awarded by the DAB. Why can't the winning party then wait a few more months for the final hearing and a final award on the underlying dispute?

The following points can be made by the winning party:

- (a) Urgency is irrelevant to the winning party's application for a partial award in respect of the other party's failure to comply with a DAB decision. This is because the award sought by the winning party is not a provisional or conservatory measure for which evidence of urgency may need to be demonstrated. The award sought by the winning party is one giving full immediate effect to the winning party's right to have DAB decisions 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. That award will therefore be final with respect to the issue of the losing party's failure to give prompt effect to the DAB decision, which is a dispute separate from the underlying dispute covered by the DAB decision. Unless that is made clear to the arbitral tribunal, the tribunal may proceed to make only a provisional award, which is unlikely to be enforced internationally.
- (b) As for the suggestion that interest is an adequate remedy where damages are being sought, the correct measure of damages for a breach by the losing party of its obligation under Sub-Clause 20.4 to give prompt effect to a DAB decision is for payment of the amount awarded by the DAB, and not simply interest. The winning party should also recover as damages the reasonable costs incurred by him in dealing with the consequences of that breach, which will include for example the costs of DAB 2.
- (c) Also, the suggestion that interest is an adequate remedy fails to take into account that the winning party's case may not simply be framed as a claim for damages, but also (subject obviously to the applicable law) as a claim for the enforcement of the winning party's right to have DAB decisions complied with promptly, i.e. the specific performance by the losing party of its obligation under Sub-Clause 20.4 to pay the amount awarded by the DAB.

Whether the winning party proceeds with Option 4 or Option 3, the above arguments and counter-arguments highlight the importance for the winning party to frame its claim properly and to consider at the outset the form of the award (final/partial/Interim/provisional) and the type of relief (specific performance /damages) which it is seeking. This is discussed further below.

Final / Partial / Interim / Provisional Award?

The problem associated with the form of the award is not new and has in fact given rise to a vast debate amongst arbitration lawyers. Part of the controversy comes from the fact that in order to obtain the benefit of the New-York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), an award must be "binding" (Art. V(1) (e)³⁹, a word which is not defined by the New-York Convention.

Some commentators originally suggested that a "binding award" was just another way of expressing what the 1927 Geneva Convention described as a "final award". Although that simplistic interpretation is no longer prevailing, there remains a debate between those who consider that the word "binding" should have a specific meaning under the Convention, and those for whom an award should only be considered binding if it is binding under the law of the country where the award was made.

39 Article V, paragraph 1(e) of the New-York Convention states that recognition and enforcement can be refused where "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

The purpose of this article is not to add to what is already a rather confused debate.⁴⁰ Suffice to say that the New-York Convention does not determine the procedure under which an award must be recognised or enforced, but simply provides, in its Article III, that “[e]ach Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”, provided that such awards comply with the conditions set forth in the New-York Convention.

It follows that the procedural rules of the country where the award is to be enforced should not be ignored by a winning party who wishes to obtain an award in respect of the other party’s failure to comply with a DAB decision, especially since those local rules often require awards to be “final” in order to be enforceable. If that is the case, then it will be essential for the winning party to ensure that the award which it is seeking will be regarded as “final” for the purposes of those local rules.

The problem is that “final award” is often used to mean two different things.

- (a) A global award which determines all of the issues in dispute in the arbitration, or disposes of any outstanding issues following earlier awards dealing with some aspects of the dispute; and
- (b) A partial award which disposes of at least one aspect of the dispute, for example an award on jurisdiction, liability, preliminary points of law or a distinct substantive claim.

In practice, partial awards are sometimes referred to as “final partial awards” so as to make clear that such awards are conclusive as to the issues with which they deal⁴¹. In that sense, partial awards should be contrasted with global awards, rather than final awards.

The key distinction to bear in mind here is therefore not between “final” and “partial” awards but more between awards which finally dispose of issues between the parties and those which merely order an interim relief pending further resolution of the issues in dispute in a final award. The purpose of the latter, described as interim or provisional awards, is typically to grant interim financial relief in order to preserve the claimant’s cash

flow. As Robert Merkin put it⁴², *“a provisional award anticipates the ultimate finding of the arbitrators and makes an order on account of that finding; a partial award, by contrast, finally disposes of a particular issue which has arisen between the parties and is wholly independent from later awards which may be issued by the arbitrators.”*

Interestingly, in ICC Case 10619, the first reported case of enforcement of a decision of the Engineer under Clause 67, the claimant/contractor did not seek a partial award in respect of a breach of contract (namely the respondent’s failure to pay the amount which the Engineer had determined to be due), but sought instead an *“interim award... ordering the Respondent to immediately pay the amounts determined by the Engineer as an advance payment in respect of any further payment which would result [sic] due by the Respondent pursuant to the final award.”* What the claimant was therefore seeking in that case was a provisional relief, namely *“to order [Respondent] to provisionally pay the sums recognized due by the Engineer, plus accrued interest at the annual rate of 7%, pending the final judgment of the Tribunal on the merit [sic] of the respective arguments of the parties on the whole of the dispute.”* This explains the reference in the claimant’s submissions to the provisions of Article 23(1) of the ICC Rules⁴³ relating to the power of an arbitral tribunal to

40 A full discussion of the opinions of various authors on this subject can be found in Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law International (1999), paragraphs 1677-1684.

41 This was for example the case with the award which was the subject of the article in the Dispute Board Federation’s Newsletter dated September 2010.

42 Robert Merkin, Arbitration Law, LLP (2004), paragraphs 18.7.

43 Article 23(1) of the ICC Rules provides: “Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate...”

order conservatory and interim measures and the rules of the French New Civil Code of Procedure relating to the provisional enforcement of that interim award.

The author understands that the claimant did not seek to enforce the interim award which it obtained in ICC Case 10619. It would have been interesting to see if the enforcement of that award would have succeeded given the provisional basis on which it was made.

To reduce the risk of arguments being raised during any enforcement proceedings, it is advisable for the winning party not to seek a provisional relief or conservatory measure, which will necessarily be in anticipation of the ultimate finding of the arbitral tribunal in a final award, but to seek instead a final partial award in the context of an arbitration brought under Option 4 above or a broadened arbitration under Option 3.

The award to be sought by the winning party should 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. 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.

What relief should be sought by the winning party: damages and/or specific performance?

In paragraph 16 of its decision, the High Court of Singapore explains that “[s]uing 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” as “[t]he winning party may need to prove damages, which may be no more than a claim for interests on the sum owing.”

As mentioned above, the correct measure of damages for a breach by the losing party of its obligation under Sub-Clause 20.4 to give prompt effect to a DAB decision is, the author suggests, for payment of the amount awarded by the DAB, and not simply interest.

This is because, in most jurisdictions, the basic principle of damages for breach of contract is to put the claimant into the same financial position in which he would have been had the contract been properly performed. In this case, if the losing party had promptly given effect to the DAB decision, the other party would have received the amount awarded by the DAB.

Seeking damages for breach of contract should therefore be an adequate remedy, provided of course that the winning party is happy with the amount awarded by the DAB.

In addition, and depending on the applicable law, the winning party may seek the enforcement of its right to have the DAB decision complied with promptly, i.e. the specific performance by the losing party of its obligation under Sub-Clause 20.4 to pay the amount awarded by the DAB.

Here a distinction must be drawn between common law and civil law systems. 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. In contrast, civil law systems proceed on the premise

that the basic right of a creditor of an obligation is to have the contract performed by the debtor⁴⁴. As such specific performance is usually considered the normal remedy in civil law jurisdictions, subject to the distinction made in those jurisdictions between (i) obligations to give or to transfer property or to give and (ii) obligations to do or not to do some act⁴⁵. Where the object of the obligation which has been breached is to give (as this would arguably be the case here with the losing party's obligation to give / transfer to the winning party the amount awarded by the DAB), its execution in kind is likely to be regarded in civil law jurisdictions as being available as of right, regardless of the availability of damages.

The question of the arbitral tribunal's power to make an order for specific performance will therefore depend on the applicable law, but also on whether the arbitration agreement / the Terms of Reference permit such relief. For this reason, the winning party should be advised at the outset to include in its Request for Arbitration, as an alternative remedy, the specific performance by the losing party of its obligation under Sub-Clause 20.4 to pay the amount awarded by the DAB.

6. Conclusion

It will be interesting to see how the issue of the enforcement of DAB decisions will be addressed in the second edition of the 1999 FIDIC Books which is expected to be published next year. As explained above, one approach which the FIDIC Contracts Committee might adopt will be to amend Clause 20 along the lines of the FIDIC Gold Book (2008), i.e. (i) by adding in Sub-Clause 20.6 that the DAB decision is binding and the parties have to comply with it "notwithstanding that a Party gives a Notice of Dissatisfaction with such a decision" and (ii) by providing in Sub-Clause 20.7 that in the event that a party fails to comply with a decision of the DAB, whether binding or final and binding, then the other party may refer the failure itself to arbitration without having to refer first that matter to the DAB and then to wait for the amicable settlement period to expire.

The amendments would bring more certainty to what is currently an ambiguous section of the 1999 suite of FIDIC contracts and would no doubt give parties more faith in the DAB process and its outcome. In the meantime, and as the decision of the High Court of Singapore illustrates, a party in whose favour a DAB decision has been made should be advised to bring a second set of DAB proceedings should the other party issue a notice of dissatisfaction and then ignore the first DAB decision. That second referral will be in respect of what is essentially a separate dispute, namely the losing party's failure to comply with that decision, in breach of Sub-Clause 20.4. A second DAB is of course likely to delay by 4-5 months (i.e. the time for the DAB to make a decision and the 56 day-period of amicable settlement under Sub-Clause 20.5) the commencement of an arbitration, which may be critical in some jurisdictions where the limitation period is particularly short. It is however an essential step if the winning party wishes to enforce the first DAB decision.

They key question is whether the winning party may then refer to arbitration simply the issue of the losing party's failure to comply with the first DAB decision without having to refer also the underlying dispute. The author suggests that there is nothing in Sub-Clauses 20.6 or 20.7 to prevent that. The High Court's suggestion that the result of the "gap" in the current wording of Sub-Clause 20.7 is to prevent the winning party from referring to arbitration that narrow issue is clearly misguided and so it would seem is its

⁴⁴ For example, Article 1184 of the French Civil Code provides: "the party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfil the agreement when it is possible, or to request its rescission with damages."

⁴⁵ See P.D.V. Marsh, "Comparative Contract Law: England, France, Germany", Gower (1994), pages 310, 319 and 337. Also see T. E. Elder, "The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes", *Arb Int Vol.13 no.1* (1997), pages 1-32.

conclusion that an arbitral tribunal would have no power to determine a dispute relating to the failure of one party to comply with a DAB decision without hearing first the merits of that decision.

Although the Court of Appeal in Singapore does not address specifically that question⁴⁶, it would seem from its decision dated 13 July 2011 that its main criticism of the Final Award made by the Arbitral Tribunal in ICC Case No. 16122 is that the Tribunal declined to open up, review and revise the DAB decision where it was requested by PGN to do so. Should no such request be made by the losing party, which may indeed happen⁴⁷, nothing would then prevent the arbitral tribunal from making a final award in respect of the losing party's failure to comply with a DAB decision without having to deal with the merits of the underlying dispute. If, on the other hand, the losing party asks the arbitral tribunal to open up, review and revise the DAB decision (by the filing or not of a counterclaim) and the arbitration is as a result no longer limited to the question of the failure of that party to comply with the DAB decision, then, the author suggests, a partial award can still be made by the arbitral tribunal at an early stage of the proceedings in respect of that separate dispute pending the final resolution of the parties' underlying dispute. This is now a settled practice in arbitration proceedings brought under Sub-Clause 20.6 as even the Court of Appeal of Singapore seems to recognise in the conclusion of its decision⁴⁸.

⁴⁶ The only reference can be found at paragraph 63 of the Court of Appeal Decision.

⁴⁷ See Footnote 36 above.

⁴⁸ Court of Appeal Decision, paragraph 101.