# Enforcement of Dispute Adjudication Board Awards under FIDIC Red Book

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1. The Singapore High Court in July 2014 delivered a significant judgment in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)*[1].

   This follows the July 2011 Court of Appeal judgment of *CRW Joint Operation v PT Perusahaan Gas Negara*[2], which precipitated a great deal of discussion and commentary amongst FIDIC contract circles internationally.

2. The recent judgment is of considerable significance to users of FIDIC contracts because it sets out thoroughly considered views, reflecting a Singapore High Court perspective on:

   (a) the construction of the dispute resolution mechanism under Cl. 20 of the 1999 FIDIC Red Book[3] (the "**Red Book**"), and

   (b) problems with the current drafting of that Clause

## ***The factual background***

3. PGN (an Indonesian state-owned company) and CRW (a tripartite joint operation) are parties to a contract for the construction of a natural gas pipeline and optical fibre network in Indonesia. Their contract adopts the standard conditions of the 1999 FIDIC Red Book[4] (the "**Red Book**"), which contains a tiered dispute-resolution mechanism, requiring all disputes to be referred to a neutral body, known as a Dispute Resolution Board ("**DAB**"), prior to any arbitration.

4. Clauses 20.4–20.7 of the Red Book provide *inter alia* that[5]:

   "*20.4 If a dispute … arises … either Party may refer [it] … to the DAB for its decision …*
   *…*
   *Within 84 days … the **DAB** shall give its **decision** …[which] … **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 …*

   *If … dissatisfied with the DAB's decision, … either Party may, within 28 days … give **notice … of its dissatisfaction** …*

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1 [2014] SGHC 146

2 [2011] 4 SLR 305

3 The Red Book is the first edition of the "Conditions of Contract for Construction" published in 1999 by the International Federation of Consulting Engineers or, as that body is known in French, the Fédération Internationale Des Ingénieurs-Conseils ("FIDIC"). 2014 HC [20]

4 The Red Book is the first edition of the "Conditions of Contract for Construction" published in 1999 by the International Federation of Consulting Engineers or, as that body is known in French, the Fédération Internationale Des Ingénieurs-Conseils ("FIDIC"). 2014 HC [20]

5 See [44] of 2011 CA judgment

*… Except as stated in [Sub-Clauses 20.7 and 20.8] 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*

***If … no notice of dissatisfaction has been given by either Party within 28 days ... the [DAB's decision] shall become final and binding upon both Parties****.*

*[…]*

***20.5 Amicable Settlement***

*[…]*

***20.6 Arbitration***

*Unless settled amicably,* ***any dispute in respect of which the DAB's decision … has not become final and binding shall be finally settled by international arbitration*** *… under the [ICC] Rules of Arbitration …*

*The arbitrator(s) shall have full power to open up, review and revise … any decision of the DAB, relevant to the dispute …*

*Neither Party shall be limited … to the evidence or arguments previously put before the DAB … or to the reasons for dissatisfaction given in its notice of dissatisfaction …*

***20.7 Failure to Comply with [DAB's] Decision***

*In the event that [a Party fails to comply with a DAB's decision that has become final and binding] … the other Party may … refer the failure itself to arbitration under Sub-Clause 20.6 …. [Sub-Clauses 20.4 and 20.5] shall not apply to this reference."*

5. Disputes arose in respect of certain variation claims by CRW. They were referred to a DAB, which made *inter alia* an award of about US$17.3m in CRW's favour[6]. PGN disagreed with the DAB's decision and duly filed a notice of dissatisfaction pursuant to Clause 20.4[7].

6. CRW proceeded to render an invoice for the US$17.3m, but PGN refused to pay on the basis that the DAB's decision was not final and binding, in light of the notice of dissatisfaction that had been filed[8].

7. Given Clause 20.4's clear stipulation that a DAB decision (whether or not final) "*shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised…*", CRW naturally disagreed.

8. It thus initiated arbitration against PGN under Cl. 20.6 for the sole purpose of giving prompt effect to the DAB's decision[9].

6 CA [5-6]
7 CA [7]; 2014 HC [4]
8 CA [8]
9 CA [9]

9. PGN maintained in the arbitration that it was not obliged to pay, because it had issued a notice of dissatisfaction, and thus DAB's decision was not yet final and binding. PGN contended that pursuant to Cl. 20.6, the DAB's decision ought to be re-opened by the arbitral tribunal, and CRW's request for prompt payment of the US$17.3m should be rejected[10].

10. Terms of reference were signed for the arbitration, memorials submitted, and a hearing held[11]. The majority of the three person arbitral tribunal eventually rendered a Final Award, deciding that PGN was (a) obliged to make immediate payment of the US$17.3m to CRW; and (b) not entitled to request the Arbitral Tribunal to open up, review and revise the DAB's decision.

11. The majority of the arbitral tribunal noted in this regard that:

> "*PGN's request for an award to open up, review, and revise the [DAB] decision is but a defence to the claim for immediate payment of [US$17.3m]*" and made it clear that the tribunal's rejection of that defence "*does not in any way affect [PGN's] right to commence an arbitration to seek to revise the [DAB] decision. The Arbitral Tribunal notes that [CRW has] expressly agreed that [PGN] may do so*"[12] (emphasis added).

12. CRW then sought and obtained an order to enforce the Final Award in Singapore. PGN responded with applications to, *inter alia* set aside the enforcement order and the arbitral tribunal's Final Award[13].

## ***The 13 July 2011 Court of Appeal decision***

13. The matter eventually came before the Singapore Court of Appeal ("**CA**"), whose decision was given on 13 July 2011.

14. The CA held that under Clause 20.4, a decision of a DAB is "*binding*" on the parties, who must "*promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award*"[14]. The DAB decision remains binding even if a notice of dissatisfaction is filed, and should be complied with, pending the arbitral tribunal's adjudication of the challenge[15].

15. However the procedure for enforcing a DAB decision that had become final (because no notice of dissatisfaction had been filed) differs from that for enforcing a non-final DAB decision.

    (a) The CA held that a DAB decision that has become final can be referred directly to arbitration under Clause 20.7 for the sole purpose of enforcement. The proceedings would be relatively quick. The arbitrator would effectively be asked to give summary judgment to enforce that DAB decision[16].

    (b) However Clause 20 of the Red Book offers no remedy for a failure to comply with a DAB decision that has not become final, other than that of treating the recalcitrant as being in

10 CA [9]
11 CA [11-13]
12 CA [14, 73, 74, 76, 77]
13 CA [1,16]
14 CA [49]
15 CA [51, 53]
16 CA [55]

breach of contract and thus liable for damages. That of course means a non-final DAB decision has little immediate value. Clause 20.7 does not assist in these situations, as it only applies to final DAB decisions[17].

16. The CA considered that where there is non-compliance with a non-final DAB decision:

(a) Clause 20.6 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, Clause 20.6 contemplates a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved[18].

(b) The non-final DAB decision can be enforced through a claim for an interim award in that arbitration, pending final resolution of the dispute by the arbitral tribunal[19].

17. That, unfortunately, was not how CRW had dealt with PGN's refusal to pay on the non-final DAB decision.

CRW had of course initiated arbitration under Clause 20.6 for the sole purpose of giving prompt effect to the non-final DAB decision[20], but not in respect of the merits of that decision.

The majority of the arbitral tribunal had ruled in CRW's favour, proceeding to render a Final Award for immediate payment by PGN of the US$17.3m to CRW, without allowing PGN to challenge the merits of the DAB's decision in the arbitration.

18. The CA considered that the arbitral tribunal had erred, because it had no power under Clause 20.6 to issue a Final Award without examining the merits of the DAB decision, and had exceeded its jurisdiction in purporting to do so. The arbitral tribunal should instead have made an interim award in favour of CRW for the amount assessed by the DAB, and then hear the parties' substantive dispute afresh before making a final award[21]. There was a breach of natural justice because PGN was not afforded the opportunity to defend its position as to why the US$17.3m awarded by the DAB was excessive[22].

19. The CA reached these conclusions despite the arbitral tribunal's explicit reservation of PGN's right to commence a fresh arbitration to revise the DAB's decision, and CRW's express agreement that PGN may do so[23] - rejecting the suggestion that the Final Award was not in effect *"final"* since the arbitral tribunal had expressly reserved PGN's right to commence a separate arbitration to challenge the DAB's decision[24].

17 CA [56]
18 CA [67-68]
19 CA [63, 66]
20 CA [9]
21 CA [78-79, 82, 85]
22 CA [93]
23 CA [14, 76, 77, 78]
24 CA [84, 101]

*Events following 2011 Court of Appeal decision*

20. Evidently undeterred by the setback, CRW soon commenced a fresh arbitration against PGN in 2011 - this time in relation to both the primary dispute that had been referred to the DAB, and the secondary dispute that arose from PGN's refusal to give prompt effect to the DAB's decision[25].

21. PGN, in response, asked that the tribunal open up, review and revise the DAB decision[26].

22. In 2012, CRW applied for, *inter alia*, a partial or interim award (pending resolution of the parties' dispute in the final award) for the sum of c. US$17.3 million that had been awarded by the DAB[27].

23. PGN resisted CRW's application by contending, *inter alia*, that:

    a. The interim/partial award sought by CRW was not a final award as it was subject to variation or confirmation in a future award;

    b. The tribunal had no power under the International Arbitration Act ("**IAA**") to issue such an award because section 19B(1) of the IAA requires every award to be final and binding on the parties and section 19B(2) prohibits a tribunal from varying, amending, correcting, reviewing, adding to or revoking an award[28];

    c. In other words, PGN could not be compelled to comply promptly with the DAB decision, pending the arbitral tribunal's final award on the primary dispute on the merits[29].

24. The majority of the arbitral tribunal rejected PGN's argument, and proceeded to issue an *"interim"* (or partial) award compelling PGN to give prompt effect to the DAB decision pending the tribunal's final resolution of the parties' underlying dispute. CRW obtained leave to enforce that award against PGN as though it were a judgment of the High Court[30].

## ***The 16 July 2014 High Court decision***

25. PGN subsequently applied to Court to set aside the majority's interim award, and the order permitting the award to be enforced as though it were a judgment of the High Court. The matter came before Justice Coomaraswamy, who noted that PGN was making the applications, despite the fact that:

    a. The interim/partial award simply required payment of a sum which PGN concedes it has been obliged to pay since 2008, and

    b. The tribunal fully intends to hear and finally determine the primary dispute on the merits in the same arbitration[31].

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25 2014 HC [13, 103]
26 2014 HC [104]
27 2014 HC [106, 108]
28 2014 HC [109-110]
29 2014 HC [13]
30 2014 HC [14, 114]
31 2014 HC [6, 14]

26. PGN's position was essentially that there was nothing CRW could do, under the contract and Singapore's arbitration legislation, to enforce PGN's undisputed obligation to comply promptly with the DAB's decision, which PGN had admittedly breached[32].

27. PGN's approach was undoubtedly bold, not only because (as both Counsel for PGN and Justice Coomaraswamy noted) the Court's sympathies must inevitably be with CRW and not PGN[33], but also because it sought to challenge an approach which had been endorsed by dicta of the CA in the previous case between the same parties[34].

28. Justice Coomaraswamy dismissed PGN's applications with costs[35], rejecting PGN's arguments:

    a. that the arbitral tribunal's interim/provisional award was in breach of section 19B of the IAA[36]; and

    b. that the arbitral tribunal had acted in excess of jurisdiction[37]; had breached the rules of natural justice[38]; and had not followed the agreed arbitral procedure[39].

## ***The High Court's views on the construction of, and problems with, Cl 20 of FIDIC Red Book***

29. As foreshadowed, the learned Judge's decision is significant in its thoroughly considered views on the construction of the dispute resolution mechanism at Clause 20 of the Red Book, and problems with the drafting of that Clause

30. In giving those views, the Court drew a fundamental distinction (alluded to at paragraph 20 above) between two kinds of disputes, i.e.:

    a. The parties' underlying dispute which forms the subject-matter of the DAB decision (the "**primary dispute**"), and

    b. The dispute which arises from the employer's failure to pay the contractor pursuant to the DAB decision (the "**secondary dispute**")[40].

31. The learned Judge considered that the Red Book's dispute-resolution provisions (Clauses 20.4 - 20.7) establish a contractual security of payment regime[41], observing *inter alia* that:

    a. The central purpose of the regime is to facilitate the cash flow of contractors in the construction industry. Payment disputes take time and money to settle on the merits and with finality, disrupting the contractor's cash flow, with potentially serious and sometimes

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32 2014 HC [6, 7]
33 2014 HC [7-8]
34 2014 HC [97-102]
35 2014 HC [1, 177]
36 2014 HC [124, 127-128, 135, 137-141, 144]
37 2014 HC [167-169]
38 2014 HC [170-172]
39 2014 HC [173-176]
40 At [6]
41 At [22]

permanent consequences for the contractor. If the contractor's payment claim is justified, that disruption and its consequences for the contractor are unjustified[42].

b. When a dispute over payment arises, the Red Book's security of payment regime facilitates the contractor's cash flow by requiring the employer to pay now, without disturbing either party's entitlement to argue later about the underlying merits of that payment obligation[43].

c. The DAB is the neutral body empowered to make an interim adjudication. Clause 20.4 gives the contractor a right to be paid now, without waiting for the final dispute to be resolved with finality. Clause 20.6 permits parties to argue later[44].

32. Several shortcomings in the drafting of the relevant provisions[45] troubled the High Court. The learned Judge noted *inter alia* that:

a. There are three conditions precedent to arbitration under Clause 20.6.

i. First, either party must submit the relevant dispute in writing to a DAB for determination.

ii. Second, either party must give notice of its dissatisfaction with the determination of the DAB within 28 days of that determination.

iii. Third, either the parties fail to settle the dispute amicably pursuant to Clause 20.5, or 56 days elapse from the notice of dissatisfaction without an attempt at amicable settlement[46].

b. Clause 20.4 makes a DAB decision final if neither party gives notice of dissatisfaction within 28 days, and Clause 20.7 permits a contractor to refer an employer's failure to comply with a final DAB decision directly to arbitration without having to comply with the three conditions precedent to arbitration[47].

c. However, where a DAB decision is not final, there is no equivalent to Clause 20.7 providing a direct route, or "*shortcut*" to arbitration[48].

d. Clause 20.7 is in several respects fundamentally inconsistent with the Red Book's security of payment regime[49]. The Judge noted *inter alia* that:

i. Clause 20.7 draws an unhelpful distinction between final and non-final DAB. It provides an accelerated route to enforce only for final DAB decisions, when a

42 At [23]
43 At [24, 33]
44 At [33]
45 At [35]
46 At [30]
47 At [33]
48 At [45]
49 At [65]

contractor's access to that route ought to be available for all DAB decisions since *every* DAB decision is binding[50].

ii. Clause 20.7 does not implement the consequences of permitting a DAB decision to become final. There is nothing in Clause 20.6 or Clause 20.7 to preclude a party who allows a DAB decision to become final from ever arguing over the primary dispute. Final DAB decisions are channelled to arbitration under Clause 20.6, which in effect mandates an investigation into the primary dispute whenever a tribunal resolves a dispute with finality[51].

33. The central issue before the Court was whether CRW is entitled to enforce the DAB decision by way of an interim award, without the arbitral tribunal first determining the underlying merits of the DAB decision[52].

34. In considering that central issue, the Court considered that it should adopt one of two possible interpretive approaches that could be applied in respect of the Red Book's dispute resolution regime, i.e.[53]:

a. A "**one-dispute approach**", which interprets the reference to *"dispute"* in Clause 20.4 as meaning *only* a primary dispute (a dispute about the parties' primary obligations under their contract).

This approach treats the secondary dispute as merely a subsidiary aspect of the primary dispute, to be subsumed in and resolved in the very same dispute-resolution procedure invoked to resolve the primary dispute. In other words, if a recalcitrant employer breaches its obligation to give prompt effect to a DAB decision under Clause 20.4, that breach is simply an aspect of the primary dispute that had been referred to the DAB earlier.

b. Or a "**two-dispute approach**", which treats the secondary dispute as a *"dispute"* in its own right within the meaning of Clause 20.4, and therefore as a separate and distinct dispute from the primary dispute.

This approach permits a contractor to refer only the secondary dispute to arbitration under Clause 20.6, so that the ensuing arbitration settles only the secondary dispute with finality.

35. Justice Coomaraswamy observed that in the CA's July 2011 decision, it had adopted the one-dispute approach, not the two dispute approach, and that the High Court was therefore bound to adopt and apply the one-dispute approach. However the learned Judge made it clear that even if he were not bound, he considered the one-dispute approach the correct one[54].

50 At [66]
51 At [68]
52 At [15]
53 At [35-37, 39, 59, 60]
54 At [90, 101]

36. The Judge held that applying the two-dispute approach to a non-final DAB decision is inconsistent with both the *"pay now"*, and the *"argue later"* features of a security of payment regime[55]. In this regard, the Judge considered *inter alia* that:

a. A contractor who adopts the *two-dispute approach* of referring only the secondary dispute to arbitration (re the employer's failure to give prompt effect to the non-final DAB decision), would first have to refer that dispute to the DAB, wait up to 84 days for the DAB to render its decision on the secondary dispute, plus another 28 days for the DAB decision on the secondary dispute to become final, or, if either party issues a notice of dissatisfaction within time, a further 56 days while the recalcitrant employer refuses to discuss amicable settlement. This delay undermines the intent of any security of payment regime to give the contractor a quick means of compelling the employer to *"pay now"*[56].

b. That contractor would also face a second more fundamental problem of being caught in an "*infinite recursive loop*". In this regard, the Court considered that the relevant provisions are drafted such that "*so long as an employer serves successive notices of dissatisfaction – whether for tactical or genuine reasons – the contractor has an obligation to refer the successive secondary disputes which arise once again to the DAB. The result of adopting the two-dispute approach therefore is to compel the contractor to secure an infinite series of DAB decisions, each of which is not complied with, but none of which gets the contractor any closer actually to commencing an arbitration to compel the employer to "pay now"*"[57].

c. Clause 20.6 is drafted in a way which permits a recalcitrant employer to insist on the opening up of the DAB decision and an inquiry into the merits of the primary dispute, even if the contractor purports to confine the arbitration only to the secondary dispute. This is a crucial flaw because, for the Red Book's security of payment regime to work, there must be no possibility of inquiry into the primary dispute when a tribunal considers the secondary dispute alone. Clause 20.6 however fails to defer arguments on the merits of the primary dispute in that situation[58].

d. In fact, if a contractor arbitrates only the secondary dispute against an employer, the "*employer's right to "argue later" is illusory. For all practical purposes, the employer must raise the primary dispute as a cross-claim or counterclaim in that arbitration and the tribunal must permit it to do so. Otherwise, the contractor can successfully argue that the employer is precluded from "arguing later"*"[59].

37. The Court preferred the one-dispute approach, because it was more in keeping with the contractual security of payment[60]. In this regard, the Judge observed *inter alia* that:

a. The one-dispute approach calls for a single arbitration aimed at resolving all aspects of the one dispute with finality.

55 At [48]
56 At [45]
57 [46-47]
58 At [49-52]
59 At [54]
60 At [70]

If the contractor wishes to compel the employer to *"pay now"* while the parties wait for the arbitral process to conclude, it can do so by applying to the tribunal for an intermediate award to that effect. That application raises only the secondary dispute, and not the primary dispute. The resulting intermediate award is confined to merely one aspect of the parties' one dispute, being an aspect which does not engage any aspect of the primary dispute, and does not involve the tribunal resolving the entirety of the parties' one dispute with finality.

The arbitrator' power to open up, review and revise the DAB's decision, and the parties' right to adduce new evidence or arguments, under Clause 20.6, would not arise in those circumstances[61].

b. With the same tribunal in the same arbitration determining both the primary and the secondary disputes with finality, no unfair or unjust preclusion could conceivably arise on the primary dispute. The employer cannot argue that a full investigation of the primary dispute is necessary before it is compelled to *"pay now"* or that compelling it to *"pay now"* somehow precludes it from *"arguing later"* about the primary dispute[62].

c. The only disadvantage of the one-dispute approach is that it forces a contractor with a non-final DAB decision to take the initiative in putting the primary dispute before the tribunal even though it typically has no interest in resolving it. This was however considered a minor disadvantage, because once the contractor secures an interim award in its favour, it ceases to be a claimant in all but name, and the carriage of the remainder of the arbitration would shift to the employer[63].

38. In deciding to adopt the one-dispute approach, the learned Judge was conscious that the approach is inconsistent with the language of Clause 20.7, which adopts and endorses the two-dispute approach[64].

39. The Court however considered that the only way to avoid the interpretive difficulty, and make the Red Book's security of payment regime workable at least for non-final DAB decisions, is to acknowledge that Clause 20.7 is poorly drafted and ignore its implications when analysing the position of a contractor with a non-final DAB decision.

Whilst this was an undoubtedly a less than satisfactory solution, and is unfaithful to the text of the relevant provisions, it "*at least advances the objectives of the security of payment regime which the Red Book so clearly intends to put in place for non-final DAB decisions*"[65].

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61 At [73]

62 At [74]

63 At [75]

64 At [64]

65 [65, 70]

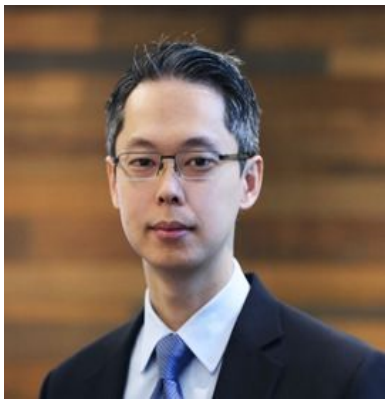
***Conclusions***

40. The High Court's views will be of interest not only to users of the Red Book, but also to those using FIDIC's Silver, Yellow and Pink Books, which have materially similar dispute resolution provisions. Those views are relevant because they inform:

    a. Existing users of the relevant FIDIC forms on how they ought to go about enforcing non-final DAB decisions under Clause 20.4; and

    b. Potential users of the relevant FIDIC forms of where the Singapore High Court considers that there are problems with the current drafting of Clause 20, so that they may consider making appropriate amendments, particularly if it is envisaged that there may be a need for enforcement of their contracts in Singapore.

41. Readers should however be aware that PGN has appealed against the High Court's decision[66], and the potential for further developments over the coming months.



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[66] 2014 High Court, [2]