THE COURT OF APPEAL DECISION IN PERSERO II: ARE WE NOW CLEAR ABOUT THE STEPS TO ENFORCE A NON-FINAL DAB DECISION UNDER FIDIC?

FRÉDÉRIC GILLION

Partner, Pinsent Masons LLP

In the latest chapter of the Persero saga, the majority of the Singapore Court of Appeal concluded in a rare split judgment (“the 2015 Court of Appeal decision”) that a binding but not final decision made by a dispute adjudication board (“DAB”) under a FIDIC form of contract could be immediately enforced by referring directly to arbitration the narrow dispute over the paying party’s failure to comply with the DAB decision.

For the successful contractor in the Persero case, this will be no doubt a bittersweet result as it took no less than two arbitration proceedings (known as Persero I and Persero II), two High Court decisions and two Court of Appeal decisions over a period of six years to reach that conclusion.

Contractors who have been following this long-running case will, however, welcome the decision due to the simplicity of the approach adopted by the 2015 Court of Appeal for the enforcement of DAB decisions, namely: the successful party may refer the paying party’s non-compliance with a DAB decision directly to arbitration, (i) without having to submit at the same time the merits of the DAB decision and also importantly, (ii) without first having to refer the paying party’s non-compliance as a secondary dispute back to the DAB.

Has the 2015 Court of Appeal decision finally provided the much needed clarity and certainty as to the steps required by a successful party to enforce a binding but non-final DAB decision? This is highly doubtful. The 2015 Court of Appeal decision in fact seems to add further confusion to the debate by endorsing an approach which differs from all the previous Persero decisions.

In this article, the author will examine the reasoning behind the 2015 Court of Appeal decision, which considered a second referral to the DAB of the dispute over the paying party’s non-compliance to be “superfluous”, and highlight what difficulties a winning party may face if it adopts the simple approach endorsed by the 2015 Court of Appeal. The author will then conclude with some practical recommendations in relation to the
enforcement of a non-final DAB decision in the light of the Persero case and other cases that have addressed this issue, including some in which the author has had first-hand knowledge.

BACKGROUND: **PERSERO I**

*Persero II* is a successor to an earlier case between the same parties, CRW Joint Operation (Indonesia) (“CRW”) and PT Perusahaan Gas Negara (Persero) TBK (“PGN”).

The facts of *Persero I* have already been covered in a number of articles published in *ICLR*. In summary, 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”). The Contract incorporated the General Conditions of the FIDIC Conditions of the Contract for Construction, First Edition, 1999 (“the 1999 Red Book”), with some amendments. The Contract was governed by Indonesian law.

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. PGN issued a notice of dissatisfaction pursuant to sub-clause 20.4 of the Contract.

CRW filed a request for arbitration with the ICC International Court of Arbitration in 2009 which was limited to PGN’s non-payment of the sum set out in the DAB decision. Critically, CRW had not referred to the DAB the dispute which arose as a consequence of PGN’s failure to comply with the DAB decision.

The arbitral tribunal (“the 2009 Tribunal”) found in CRW’s favour and held that PGN was bound to pay CRW the sum awarded by the DAB (“the Final Award”). PGN then applied to set aside this Final Award in Singapore, the seat of the arbitration.

The Singapore High Court and the Court of Appeal in *Persero I* found in PGN’s favour and held – although on different grounds – that the Final Award should be set aside.

The Singapore High Court set aside the Final Award on the ground that the 2009 Tribunal exceeded its jurisdiction in making that award as the dispute referred by CRW to arbitration – PGN’s failure to comply with the DAB decision – was a separate dispute and as such should have been referred first to the DAB for a decision pursuant to

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sub-clause 20.4. The High Court also considered that the 2009 Tribunal could not convert the DAB decision into a final award without first determining whether the DAB decision was correct on the merits.

The Court of Appeal reached a similar conclusion on the basis that: (i) the 2009 Tribunal had not exercised its discretion to open up, review and revise the DAB decision, which in turn meant that the award was not issued in accordance with sub-clause 20.6; and (ii) the 2009 Tribunal’s refusal to open up and review the DAB decision as requested by PGN amounted to a breach of natural justice.

The Court of Appeal also held that the 2009 Tribunal was not entitled to enforce such a decision by way of a final award. The Court of Appeal observed in *obiter* that an arbitral tribunal could do so by way of a partial or interim award, provided that the merits of the underlying dispute would also be addressed in that same arbitration.

**THE SINGAPORE HIGH COURT DECISION IN PERSERO II – THE ONE-DISPUTE APPROACH: UNDERLYING MERITS AND NON-COMPLIANCE IN A SINGLE ARBITRATION**

Most commentators who have examined *Persero I*, including the author, agree that the High Court and the Court of Appeal in *Persero I* erred in their interpretation of sub-clauses 20.6 and 20.7.

CRW was, however, eager to follow the findings of the Court of Appeal in *Persero I* and began a second ICC arbitration in 2011 with a second tribunal (“the 2011 Tribunal”) to which it referred both the underlying dispute (referred to in *Persero II* as “the primary dispute”) and the paying party’s failure to comply with the DAB decision (“the secondary dispute”).

At an early stage in the proceedings, the 2011 Tribunal rendered an interim award (“the Interim Award”) in CRW’s favour directing PGN to comply with the DAB decision in accordance with sub-clause 20.4 by paying the sum due to CRW immediately (“the Adjudicated Sum”), pending the final resolution of the underlying dispute.

CRW then sought to enforce that interim award against PGN. PGN in turn applied to the High Court of Singapore to have the Interim Award set aside. PGN’s application to set aside this Interim Award was dismissed by the 2014 High Court in a decision dated 16 July 2014 (“the 2014 High Court decision”).

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5 *CRW Joint Operation (Indonesia) v PT Perusahaan Gas Negara (Persero) TBK* (“*Persero I*”) (CA) [2011] SGCA 33; [2011] 4 SLR 305.


In summary, PGN argued that the Interim Award was a “provisional” award intended to have finality only until the arbitral tribunal had rendered an award on the merits of the DAB decision, and that such provisional awards were not permissible under section 19B of Singapore’s International Arbitration Act (“IAA”). PGN, therefore, asserted that the 2011 Tribunal lacked the power to award such provisional relief.

The 2014 High Court rightly considered that “the central issue” of PGN’s challenge was whether CRW was “entitled to enforce the DAB decision by an interim award, which is final and binding without determining the merits.” To address this central issue, the 2014 High Court examined two possible approaches which a winning party could adopt to enforce a binding but not final DAB decision, described as the “one-dispute approach” and the “two-dispute approach”. The 2014 High Court’s analysis is summarised below in order to fully understand the approach which the 2015 Court of Appeal subsequently took in Persero II.

A. One-dispute approach versus two-dispute approach

The 2014 High Court described the two possible approaches for the enforcement of a binding but not final DAB decision as follows:

“The two-dispute approach sees the secondary dispute as a ‘dispute’ in its own right within the meaning of cl 20.4(1), and therefore as a separate and distinct dispute from the primary dispute. This conceptual separation means that the two-dispute approach permits a contractor, if it chooses, to refer only the secondary dispute to arbitration under cl 20.6. The ensuing arbitration, on this approach, settles only the secondary dispute with finality.

“The one-dispute approach therefore interprets ‘dispute’ as meaning only a primary dispute: a dispute about the parties’ primary obligations under their contract. ‘Dispute’ does not mean a subsidiary dispute which arises within or about the dispute-resolution regime once it is invoked. In short, on the one-dispute approach, ‘dispute’ does not mean a dispute about a dispute. That type of second-order dispute is merely a subsidiary aspect of the primary dispute, and is to be subsumed in and resolved in the very same dispute-resolution procedure invoked to resolve the primary dispute.

On the one-dispute approach, therefore, once a party refers the primary dispute to the DAB under cl 20.4(1), that is the one and only ‘dispute’ within the meaning of and for the purposes of the Red Book’s dispute-resolution regime. That remains the position even after the DAB has rendered its interim adjudication on the primary dispute and even if one or both parties issue notices of dissatisfaction with that decision. The parties’ dissatisfaction with the DAB decision on the primary dispute is simply another aspect of that primary dispute. So, if a recalcitrant employer breaches...
its obligation to give prompt effect to that DAB decision under cl 20.4(4), that breach
is simply another aspect of that primary dispute. That breach, and the secondary
dispute it gives rise to, is not a separate ‘dispute’ within the meaning of cl 20.4(1).”

This author has suggested in a previous article on the 2014 High Court
decision that, having accepted that the Employer’s failure to comply with
a DAB decision was a breach of a substantive contractual right, namely
a breach of sub-clause 20.4, it would have been logical for the 2014 High
Court to conclude that a successful party was indeed entitled to enforce the
DAB decision by bringing solely the “secondary dispute” to arbitration.

Interestingly, the 2014 High Court initially reached that conclusion when it stated:

“The two-dispute approach best advances the ‘pay now’ objective of the Red Book’s
security of payment regime. It gives the contractor a quick and relatively inexpensive
way of compelling a recalcitrant employer to comply with the DAB’s interim
adjudication (see [2525(b)] above). This approach permits the contractor to refer to
an arbitral tribunal the secondary dispute alone, for the tribunal to resolve separately
and with finality, without requiring the contractor to incur the time and cost involved
in having the primary dispute also resolved on the merits. Further, because the two-
dispute approach separates clearly the two disputes, the arbitral tribunals’ decision
on the secondary dispute alone does not compromise the employer’s ability in a
future arbitration to ‘argue later’ over the primary dispute.”

The 2014 High Court, however, seems to have changed its mind during
the course of its lengthy analysis and eventually dismissed the “two-dispute”
approach, after having identified certain “shortcomings” in the drafting
of sub-clauses 20.4 to 20.7.

B. An apparent shortcoming in the two-dispute approach: the secondary
dispute over non-payment must go through the steps prescribed by
sub-clauses 20.4 and 20.5

One of the main shortcomings identified by the 2014 High Court, and one
which is directly relevant to the subsequent 2015 Court of Appeal decision,
is the fact that the 1999 Red Book “provides no shortcut to arbitration of
the secondary dispute which is equivalent to clause 20.7.” Sub-clause 20.7

12 2014 High Court decision paragraph 60.
13 2014 High Court decision paragraph 33:

“The DAB is the neutral body empowered to make the interim adjudication. Clause 20.4(4)
obliges an employer who has failed before the DAB to pay now. Most importantly for present
purposes, cl 20.4(4) gives the contractor a correlative right to be paid now, without waiting for
the final dispute to be resolved with finality. This is a substantive contractual right in and of itself.
It is this right which forms the foundation of the secondary dispute. Clauses 20.6(2) and 20.6(3)
permit the parties to argue later. Clause 20.4(7) makes the DAB decision final if neither party
gives notice of dissatisfaction within 28 days.”

14 2014 High Court decision paragraph 40.
15 2014 High Court decision paragraph 35.
16 2014 High Court decision paragraph 43.
The Court of Appeal decision in Persero II

indeed provides that it is only in the event of a binding and final DAB decision (i.e. a decision in respect of which no notice of dissatisfaction has been given) that the successful party may refer the paying party’s failure to comply to arbitration without first referring that narrow dispute to the DAB and for amicable settlement.

According to the 2014 High Court:

“[t]hat in turn means referring the secondary dispute [over the paying party’s failure to pay] to the DAB (cl 20.4(1)), waiting up to 84 days for the DAB to render its decision on the secondary dispute (cl 20.4(4)), plus another 28 days for the DAB decision on the secondary dispute to become final (cl 20.4(7)) or, if either party issues a notice of dissatisfaction within time, a further 56 days while the recalcitrant employer refuses to discuss amicable settlement of the secondary dispute (cl 20.5(1)). All of this delay is in addition to the time which has already elapsed while complying with the three conditions precedent in respect of the primary dispute.”

Having considered that “[t]his delay upon delay is directly opposed to the intent of any security of payment regime to give the contractor a quick means of compelling the employer to ‘pay now’”, the 2014 High Court ruled in favour of the one-dispute approach and concluded that, in order to enforce a non-final DAB decision, CRW was required to submit the underlying and primary dispute to arbitration, and seek at an early stage of the proceeding an interim or partial award regarding the other’s party non-compliance with the DAB decision as a subsidiary aspect of that primary dispute.

This was, of course, precisely what CRW had done in the Persero II case. PGN’s application to set aside the Interim Award was accordingly dismissed. PGN appealed the 2014 High Court decision.

THE SINGAPORE COURT OF APPEAL DECISION IN PERSERO II – SECONDARY DISPUTE OVER NON-COMPLIANCE REFERRED DIRECTLY AND SEPARATELY TO ARBITRATION

PGN’s case on appeal consisted of two arguments.

First, PGN argued that the Interim Award was inconsistent with section 19B of the IAA on the basis that both CRW and the 2011 Tribunal envisaged that it would be “subject to future variation”. PGN suggested that CRW essentially only sought a single relief in those arbitration proceedings, namely enforcement of the DAB decision, and that it never intended for the Interim Award to finally resolve the underlying dispute; indeed, PGN considered that CRW was aware that any interim award made could subsequently be varied by the final award on the merits.

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17 2014 High Court decision paragraph 45.
18 2015 Court of Appeal decision paragraph 26.
Secondly, PGN argued that the effect of sub-clause 20.4 of the Contract was that the DAB decision ceased to be binding as soon as the 2011 Tribunal made any award on the merits of the DAB decision. As the 2011 Tribunal had made certain findings on the merits of the DAB decision in a subsequent partial award, PGN considered that the DAB decision was therefore no longer binding.

The majority of the 2015 Court of Appeal rejected both arguments on the basis that:

- Sub-clause 20.4 imposes a distinct contractual obligation on a paying party to comply promptly with a DAB decision (regardless of whether the decision is final and binding or merely binding and non-final);\(^\text{19}\)
- The Interim Award rendered by the 2011 Tribunal concerned PGN’s obligation under sub-clause 20.4 to make prompt payment of the Adjudicated Sum awarded to CRW under the DAB decision;\(^\text{20}\)
- That obligation remained valid and binding regardless of any subsequent award on the merits of the underlying dispute.\(^\text{21}\)

Accordingly, the majority of the 2015 Court of Appeal found that the Interim Award was a valid award made in accordance with Singapore law and not liable to be set aside.

In his 95-page judgment, the dissenting judge, Senior Judge Chan Sek Keong, considered, on the other hand, that the Interim Award should have been set aside because:

- The secondary dispute over the paying party’s failure to comply with the non-final DAB decision did not fall within the scope of “dispute” in sub-clause 20.4 and therefore it could not be referred to arbitration under sub-clause 20.6;
- The 2011 Tribunal had no mandate under sub-clause 20.6 to issue the Interim Award; and
- Even if the 2011 Tribunal did have a mandate under sub-clause 20.6 to issue the Interim Award, the Interim Award was, and was intended to be, a provisional award that would fall outside the ambit of “award” in section 2 of the IAA and therefore was not enforceable under section 19 of the IAA as a judgment.

The dissenting judge considered that in order to enforce the DAB Decision, CRW should have gone in fact outside the contractual machinery, for instance by seeking summary judgment in a court of competent jurisdiction.

Although the author disagrees with the dissenting judge’s reasoning and conclusion, he correctly flagged what may be a flaw in the majority’s

\(^{19}\) 2015 Court of Appeal decision paragraph 88.
\(^{20}\) 2015 Court of Appeal decision paragraph 109.
\(^{21}\) 2015 Court of Appeal decision paragraph 109.
judgment, namely its reliance on “FIDIC’s intention”, as expressed in the 2013 FIDIC Guidance Memorandum, to justify its view that “it is implicit in clause 20 that a failure to comply with a binding but non-final DAB decision is capable of being directly referred to arbitration without the need for the parties to first go through the process prescribed by clauses 20.4 and 20.5” (emphasis added). This is explained further below by examining the 2015 Court of Appeal’s interpretation of sub-clauses 20.4–20.6 as to the steps that a winning party ought to take to enforce a DAB decision, in particular:

- Is it necessary to refer in a single arbitration both the merits of the DAB decision (the primary dispute) and the paying party’s failure to comply with the DAB decision (the secondary dispute)?
- Is it necessary to go through the steps prescribed by sub-clauses 20.4 and 20.5 and therefore to have a second referral to the DAB in respect of the paying party’s non-compliance?

A. Is it necessary to refer in a single arbitration both the merits of the DAB decision (the primary dispute) and the paying party’s failure to comply with the DAB decision (the secondary dispute)?

As a preliminary matter, the 2015 Court of Appeal considered the one-dispute approach endorsed by the 2014 High Court in order to determine whether the paying party’s obligation to comply with the DAB decision was capable of being enforced by way of a separate arbitration, or – as per the 2014 High Court decision – by way of a separate interim award within the same arbitration that is also concerned with the underlying merits of the DAB decision.

The 2015 Court of Appeal first recognised that sub-clause 20.4 “imposes one distinct contractual obligation on the parties” described as follows:

“we are satisfied that cl 20.4 (specifically, cl 20.4(4)) imposes an affirmative obligation on the parties to ‘promptly give effect to [a DAB decision]’. In particular, the paying party (i.e., the party that is required to make any payment under the DAB’s decision) has a contractual obligation to pay promptly, notwithstanding its views on the merits of the DAB’s decision.”

The 2015 Court of Appeal then considered that the broad terms used in sub-clauses 20.4(1) and 20.6(1), which refer respectively to “a dispute (of any kind whatsoever)” and “any dispute in respect of which the DAB’s decision ... has not become final and binding”, militate against the view expressed by the dissenting judge that the dispute over the payment of a DAB decision did not fall within the scope of “dispute” in sub-clause 20.4.

22 2015 Court of Appeal decision paragraph 70.
23 2015 Court of Appeal decision paragraph 55.
24 2015 Court of Appeal decision paragraph 55.
25 2015 Court of Appeal decision paragraph 55.
The 2015 Court of Appeal seems to have appreciated the major disadvantage of the one-dispute approach which, by forcing a party which may be satisfied with a DAB decision to commence an arbitration on the merits of the DAB decision and spend significant time and costs in this connection, may in fact undermine the “pay now, argue later” principle, as the paying party would see little or no risk in having the DAB decision quickly enforced against it. The 2015 Court of Appeal noted the following:

“74. (…) Given the nature of the building and construction industry, it is of general importance that contractors are paid promptly where the contract so provides. As explained by the Judge at [23] of Persero HC (2014):

... Contractors invariably extend credit to their employer by performing services or providing goods in advance of payment. Contractors are also almost invariably the party in the weaker bargaining and financial position as compared to their employer. A payment dispute between an employer and a contractor takes time and money to settle on the merits and with finality. Doing so invariably disrupts the contractor’s cash flow. That disruption can have serious and sometimes permanent consequences for the contractor. That potential disruption gives the employer significant leverage in any negotiations between the parties for compromise. If the contractor’s payment claim is justified, that disruption and its consequences for the contractor are unjustified.

75. In our judgment, cl 20.4 is aimed at addressing precisely these concerns, and cl 20 should therefore be interpreted in a manner which promotes prompt compliance with a DAB decision, including, as noted above (and also by FIDIC), by enabling a failure to comply with a binding but non-final DAB decision to be directly referred to arbitration without the parties having to first go through the steps prescribed by cl 20.4 and 20.5. In this regard, Frédéric Gillion has suggested in his article ‘Enforcement of DAB Decisions under the 1999 FIDIC Conditions of Contract: A Recent Development: CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK’, [2011] ICLR 388 (at p 408) that the receiving party should seek an award:

... giving full immediate effect to [its] 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.”

Throughout its decision, the 2015 Court of Appeal therefore made clear that “[t]he dispute over the paying party’s failure to promptly comply with its obligation to pay the sum that the DAB finds it is liable to pay is a dispute in its own right which is capable of being ‘finally settled by international arbitration’”25 and that if an arbitral tribunal was asked to open up and revise a DAB decision, it “would be considering a conceptually distinct question, namely, the state of the final accounts between the parties”.26

Accordingly, the 2015 Court of Appeal rightly concluded that it was unnecessary to refer both the merits of the DAB decision (the primary dispute) and the paying party’s failure to comply with the DAB decision

25 2015 Court of Appeal decision paragraph 83.
26 2015 Court of Appeal decision paragraph 54.
(the secondary dispute) in a single arbitration and that “it is possible to refer that [secondary] dispute to a separate arbitration”.\textsuperscript{27} If that secondary dispute is referred to a separate arbitration, the 2015 Court of Appeal then considered that “a tribunal would be entitled to make a final determination on the issue of prompt compliance alone if that is all it has been asked to rule on, as was the case in the 2009 Arbitration”.

The 2015 Court of Appeal also considered that:

“[o]n the other hand, where both the dispute over the paying party's non-compliance with a binding but non-final DAB decision as well as the dispute over the merits of that DAB decision are put before the same tribunal, as was done in the 2011 Arbitration and, hence, in the case before us now, the tribunal can: (a) make an interim or partial award which finally disposes of the first issue (i.e., whether the paying party has to promptly comply with the DAB decision); (b) then proceed to consider the second issue (i.e., the merits of the DAB decision), which is a separate and conceptually distinct matter as we have already noted; and (c) subsequently, make a final determination of the underlying dispute between the parties.”\textsuperscript{28}

B. Is it necessary to go through the steps prescribed by sub-clauses 20.4 and 20.5 and therefore to have a second referral to the DAB in respect of the paying party's non-compliance

Importantly, as already mentioned earlier, the 2015 Court of Appeal considered that the dispute over the paying party's non-compliance with a binding but non-final DAB decision was capable of being directly referred to arbitration pursuant to sub-clause 20.6, \textit{without} having to first go through the preliminary steps set out in sub-clauses 20.4 and 20.5.

In its decision, the 2015 Court of Appeal recognised that:

“[s]uch a dispute could conceivably be referred back, in the first instance, to the DAB since it undoubtedly is one that ‘arises between the [p]arties in connection with, or arising out of, the [c]ontract’ as provided in cl 20.4(1).”

The Court of Appeal also considered that:

“[i]f such a dispute is so referred and if the DAB resolves it affirmatively, there can really be no objection to that later DAB decision (i.e., the DAB decision that a binding but non-final DAB decision ordering the payment of a specified sum does give rise to an immediate obligation on the paying party’s part to promptly pay that sum) being subsequently referred to arbitration (under cl 20.6 if an NOD is issued and no amicable settlement under cl 20.5 is reached, or under cl 20.6 read with cl 20.7 if no NOD is issued), or to the issuance of an arbitral award which affirms the later DAB decision.”

The “real question”\textsuperscript{29} for the 2015 Court of Appeal was whether it was “essential” to have a second referral to the DAB in respect of the paying party’s failure to comply a DAB decision.

\textsuperscript{27} 2015 Court of Appeal decision paragraph 83.
\textsuperscript{28} 2015 Court of Appeal decision paragraph 88.
\textsuperscript{29} 2015 Court of Appeal decision paragraph 64.
The 2015 Court of Appeal was of the view that this second referral was “not only superfluous, but also contrary to the express words of cl 20.4(4)”. It also suggested that an “inordinate delay” would necessarily result from a second referral to the DAB, and “[g]iven the purpose and context of the DAB scheme, it would not be commercially sensible to interpret cl 20 as requiring the receiving party to satisfy the conditions precedent in cl 20.4 and 20.5 before it can refer a dispute over the paying party’s non-compliance with a binding but non-final DAB decision to arbitration.”

The current provisions of the 1999 FIDIC Suite of Contracts make a second DAB referral necessary

Although this second referral to the DAB is clearly undesirable given the “pay now, argue later” principle underlying FIDIC’s security of payment regime, it is unfortunately, in the author’s view, a necessary evil in the light of the express provisions of the FIDIC contract, namely:

- Sub-clause 20.6, which provides that, 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 decision;

- Sub-clause 20.4, which provides in its penultimate paragraph 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”; and

- Sub-clause 20.7, which provides that the only situation where a party may refer directly to arbitration the other party’s failure to comply with a DAB decision, without having to go first through the steps in sub-clauses 20.4 [Obtaining Dispute Adjudication Board’s Decision] and 20.5 [Amicable Settlement], is in the event that no party has given notice of dissatisfaction, with the result that the DAB decision becomes final and binding. It follows, a contrario, that sub-clauses 20.4 and 20.5 are applicable to a dispute over a failure to comply with a binding but not final DAB decision.

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30 2015 Court of Appeal decision paragraph 66.
31 2015 Court of Appeal decision paragraph 66(b).
32 Sub-clause 20.6, first sentence: “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.”
In a previous article on the Persero I case, the author already explained that: “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”.

**Lacuna in the drafting of sub-clause 20.7**

In its judgment, the 2015 Court of Appeal sought to rely on “FIDIC’s intention” in relation to the enforcement of DAB decisions to disregard the above express provisions. The 2015 Court of Appeal considered that the following documents were relevant in this regard:

- An article by Christopher Seppälä – legal adviser for the FIDIC Contracts Committee – entitled “Sub-clause 20.7 of the FIDIC Red Book does not justify denying enforcement of a ‘binding’ DAB decision” and which sets out the history behind the introduction of sub-clause 20.7; and
- The 2013 FIDIC Guidance Memorandum.

The history of the drafting of sub-clause 20.7, as set out in Mr Seppälä’s article on sub-clause 20.7 is of course interesting to explain why the lacuna in the drafting of sub-clause 20.7 may have arisen. Mr Seppälä in particular explains that:

“Sub-clause 67.4, of which sub-clause 20.7 is the successor, was simply put into the FIDIC Red Book, Fourth Edition, 1987, to ensure that, where a party had failed to comply with a final and binding decision, such failure could be referred to arbitration”.

It is, however, hard to see how it can be inferred from that article that it was FIDIC’s intention that the failure to comply with a binding but not final DAB decision may be referred directly to arbitration without having to go first through the steps prescribed by sub-clauses 20.4 and 20.5.

The 2015 Court of Appeal suggested in its decision that:

“[t]his is evident from the following excerpt from his article (at p 20):

… [T]ribunals and courts are, therefore, with respect, going too far to suggest that, because Sub-Clause 20.7 does not refer to binding decisions of a DAB, a failure to comply with a binding decision may not be referred to arbitration. It was unnecessary to deal with binding decisions, as it was clear – or so it was thought – that, as these had been

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35 Previously, clause 67 of the Second (1969) and Third Editions (1977) was unclear as to whether a “final and binding” decision made by the engineer could be enforced in arbitration, as opposed to before the local courts of the paying party’s country. Also see Gillion F, “Enforcement of DAB decisions under the 1999 FIDIC Conditions of Contract – a recent development: CRW Joint Operation (Indonesia) v PT Perusahaan Gas Negara (Persero) TBK”, [2011] ICLR 394–395.
36 2015 Court of Appeal decision paragraph 65.
the subject of a notice of dissatisfaction, these could, by definition, be referred to arbitration under Sub-Clause 20.6 … [Emphasis added]”.

With respect, it is certainly not evident from the above that a dispute over the paying party’s failure to comply with binding but not final DAB decisions would not need to meet the preconditions to arbitration set out in sub-clauses 20.4 and 20.5.

An “inherent premise” embedded within the DAB decision?

In support of its interpretation, the 2015 Court of Appeal explained that there was an “inherent premise” embedded within the DAB decision, which was that the Adjudicated Sum was payable forthwith, and that “[w]hen PGN then issued its NOD [Notice of Dissatisfaction], it undoubtedly meant to convey its dissatisfaction both with the explicit premise of DAB No 3 (namely, the valuation by the DAB of CRW’s claims) as well as with its inherent premise (namely, that the Adjudicated Sum was payable forthwith)” so that there was nothing further to be referred back to the DAB.

This is probably one of the aspects of the 2015 Court of Appeal decision which, in the author’s view, may be the most open to criticism, as the Court of Appeal did not clearly explain where this inherent premise came from and to what extent PGN’s notice of dissatisfaction did in fact cover the part of the DAB’s decision ordering payment of the Adjudicated Sum. The 2015 Court of Appeal simply commented that “[i]f and to the extent this was not made clear on the face of PGN’s NOD itself, it was undoubtedly made clear in the positions that PGN took in the 2009 Arbitration as well as in the 2011 Arbitration.”

The point here is that sub-clause 20.4 expressly requires that the notice of dissatisfaction shall “set out the matter in dispute and the reason(s) for dissatisfaction.” If PGN’s notice of dissatisfaction made no reference to its obligation to pay the Adjudicated Sum awarded by the DAB, as this seems to have been the case, then it is difficult to see how PGN could have somehow conveyed its dissatisfaction with this purported inherent premise that the Adjudicated Sum was to be payable promptly and that in turn the failure to pay could be a matter in dispute.

Since sub-clause 20.4 makes clear that “neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this sub-clause” (i.e. a timely notice setting out the matter in dispute and the reason(s) for dissatisfaction), as a matter of logic, CRW would not in principle be able to bring a dispute over

37 2015 Court of Appeal decision paragraph 66.
38 See the dissenting judgment at paragraph 161:

“In the present case, the subject matter of PGN’s NOD in respect of DAB No 3 was precisely the correctness of the DAB’s determination of the quantum of CRW’s claims, and not the issue of whether or not PGN had to promptly comply with DAB No 3 pending an arbitral award on the correctness of DAB No 3.”
PGN’s failure to pay the Adjudicated Sum directly to arbitration, unless a notice of dissatisfaction specifically referred to that issue. It is also logical that the dispute over the paying party’s failure to pay the Adjudicated Sum necessarily post-dates the DAB decision, and that therefore PGN’s notice of dissatisfaction could not possibly have extended to that dispute, whether inherently or otherwise.

These are precisely the reasons why a second referral to the DAB addressing the dispute over non-payment is indeed required.

The 2013 FIDIC Guidance Memorandum

Admittedly, the 2015 Court of Appeal’s position is consistent with FIDIC’s express policy objectives in relation to the enforcement of DAB decision, as set out in the 2013 FIDIC Guidance Memorandum.

The purpose of this Guidance Memorandum is described by FIDIC as follows:

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

To make FIDIC’s intention explicit this Guidance Memorandum provides changes to be made to the FIDIC dispute resolution clause 20 and in particular to sub-clause 20.7 and, as a consequence, to [sub-clauses] 14.6 and 14.8 of the FIDIC Conditions of Contract for Construction, 1999 (the ‘Red Book’), the FIDIC Conditions of Contract for Plant and Design-Build, 1999 (‘Yellow Book’), and the EPC/Turnkey Projects, 1999 (‘Silver Book’). Compliance with the guidance provided in this Memorandum is highly recommended when using the 1999 FIDIC Red, Yellow or Silver books.” [Emphasis added]

The 2015 Court of Appeal seems to have placed much reliance on this document, and in particular upon the fact that it is directed at “mak[ing] explicit the intention of FIDIC”. Unsurprisingly, PGN argued that the Conditions of Contract should not be interpreted with reference to the 2013 FIDIC Guidance Memorandum because that document was issued after the parties entered into the Contract. The 2015 Court of Appeal however found no force in that argument on the basis that this memorandum was “merely making ‘explicit’ what was all along implicit in cl 20 itself.”

For the reasons set out above, the author does not share the Court of Appeal’s view that:

“it is implicit in cl 20 that a failure to comply with a binding but non-final DAB decision is capable of being directly referred to arbitration without the need for the parties to first go through the process prescribed by cl 20.4 and 20.5.”

[Emphasis added]

39 2015 Court of Appeal decision paragraph 70.
The dissenting judge, Senior Judge Chan Sek Keong, similarly did not share that view. In his 95-page judgment, he stressed that:

“[i]t would be invidious for FIDIC to make explicit in 2013 the intention of the drafters of a clause which was first adopted in 1957, and which remained in the Red Book largely without any substantive change until 2013, save for the insertion of cl 67.4 of the 1987 Red Book (now cl 20.7 of the 1999 Red Book).”

This is even more so, the author submits, when what the 2013 FIDIC Guidance Memorandum is in fact recommending, is to amend sub-clause 20.7 to provide for such non-compliance to be directly referred to arbitration without the parties having to first go through the steps set out in sub-clauses 20.4 and 20.5.

To sum up, in the author’s opinion, without an amendment of sub-clause 20.7 in line with the recommendations of the 2013 FIDIC Guidance Memorandum, the paying party’s failure to comply with a binding but not final decision, like any dispute, needs to go through the preliminary steps set out in sub-clauses 20.4 and 20.5 before commencing arbitration proceedings.

WHAT STEPS TO ENFORCE A NON-FINAL DAB DECISION

So, where does the 2015 Court of Appeal decision leave us in terms of the steps that a contractor should take to enforce a DAB decision that is binding but not final?

In a previous article published in ICLR in 2011 in relation to the Persero I case, the author considered a number of options available to a contractor to enforce a non-final DAB decision. These options are revisited below in the light of the Persero II decisions:

- **Option 1**: include the amount of the DAB decision in a separate interim payment application, and if the engineer subsequently fails to issue an interim payment certificate (“IPC”), then consider

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40 2015 Court of Appeal decision paragraph 184.
41 By replacing sub-clause 20.7 in its entirety with:

“In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under sub-clause 20.6 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] and sub-clause 20.5 [Amicable Settlement] shall not apply to this reference.” (Emphasis added in italics).

42 It is worth mentioning that two recent court decisions in Switzerland (Swiss Federal Supreme Court Case dated 7 July 2014 (4A_124/2014) and in England (Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193 (TCC); [2014] BLR 735) have confirmed the mandatory nature of the reference to the DAB prior to referring a dispute to arbitration (or courts in the English case).

suspending work (under sub-clause 16.1) until payment issue of the relevant IPC and payment by the employer.

- **Option 2 (the option favoured by the Singapore Courts in *Persero I* and the 2014 High Court in *Persero II*):** refer to arbitration both the merits of the dispute underlying the DAB decision and the paying party's failure to comply with that decision and seek an interim or partial award in respect of the non-compliance at an early stage of the proceedings.

- **Option 3:** commence a second DAB referral in respect of the paying party's failure to comply with the DAB decision and then refer that narrow dispute to arbitration.

- **Option 4 (the approach endorsed by the 2015 Court of Appeal in *Persero II*):** refer directly to arbitration the paying party’s failure to comply with the DAB decision without going through the preliminary steps set out in sub-clauses 20.4 and 20.5.

### Option 1: Suspend work until payment of the amount awarded by the DAB

Pursuant to sub-clause 14.3(f) of the 1999 FIDIC Red and Yellow Books, a contractor who has been awarded a sum of money following a DAB decision shall include that sum in an interim payment application. The engineer should then give effect to this decision and certify any amount awarded to the contractor. If the engineer fails to certify that amount or the employer subsequently fails to pay, the contractor is then entitled to suspend work under sub-clause 16.1 unless and until the contractor has received the relevant IPC or payment.

Although Option 1 is not *per se* a method for enforcing a DAB decision, it may, however achieve the same result, providing that the contractor applies for payment of the sum awarded by the DAB in a separate interim payment application (as an under-certification would not a valid ground for suspending work).

### Option 2: Refer in a single arbitration both the merits of the DAB decision (the primary dispute) and the paying party’s failure to comply with the DAB decision (the secondary dispute)

Option 2 was the approach favoured by the Singapore Courts in *Persero I* and the 2014 High Court in *Persero II*.

Whilst considering that it was not necessary to refer in a single arbitration both the merits of the DAB decision (the primary dispute)
and the paying party’s failure to comply with the DAB decision (the secondary dispute), the 2015 Court of Appeal, however, considered that this was also an option:

“where both the dispute over the paying party’s non-compliance with a binding but non-final DAB decision as well as the dispute over the merits of that DAB decision are put before the same tribunal, as was done in the 2011 Arbitration and, hence, in the case before us now, the tribunal can: (a) make an interim or partial award which finally disposes of the first issue (ie, whether the paying party has to promptly comply with the DAB decision); (b) then proceed to consider the second issue (i.e., the merits of the DAB decision), which is a separate and conceptually distinct matter as we have already noted; and (c) subsequently, make a final determination of the underlying dispute between the parties.”

This option is obviously to be preferred when the winning party is not entirely satisfied with the DAB decision because, for example, 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 could expect to recover by pursing its claims in arbitration.

Otherwise, if all the contractor wants is to obtain a prompt payment of the sums awarded by the DAB, there seems to be little point in taking the onerous and time-consuming step of bringing an arbitration on the merits of the DAB decision.

There is also the additional problem of having an arbitration focusing inevitably from the outset chiefly on the merits of the DAB decision (the primary dispute) rather than on the fact that the DAB decision has been ignored by the paying party (the secondary dispute). The contractor would then have to convince the arbitral tribunal, probably during the first case management conference, of the benefits of having a bifurcation of issues so that the secondary dispute is the subject of a partial award at an early stage of the proceedings. Numerous arguments could then be raised by the paying party to resist this bifurcation.

For example, the paying party may wish to challenge the validity of the DAB decision, and seek to argue that significant factual evidence would be required to decide that issue, making the bifurcation potentially an expensive exercise which would not ultimately simplify the remainder of the arbitration.

Considerations such as “lack of urgency” may also be raised by the paying party along such lines as: “the winning party will in any event be compensated by an award on 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?”

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45 2015 Court of Appeal decision paragraph 88.

46 An argument advanced by the respondent/paying party in ICC Case No 15751 (unreported). As already mentioned in a previous article (Gillion F, “Enforcement of DAB decisions under the 1999 FIDIC Conditions of Contract – a recent development: CRW Joint Operation (Indonesia) v PT Perusahaan Gas Negara (Persero) TBK”, [2011] ICLR 405–406), the following points could then be made by the claimant/contractor:
Ultimately, by adopting Option 2, there would be no guarantee that the contractor could obtain a bifurcation of the proceedings to deal with the secondary dispute over payment of the DAB decision. Even if a bifurcation was to be ordered, there would also be a risk that a tribunal may perceive the relief sought by the contractor merely as a provisional measure pending the final resolution of the primary dispute over the merits of the DAB decision, rather than recognising that this is a “separate and conceptually distinct matter” as rightly noted by the 2015 Court of Appeal. As a result, the tribunal could render a provisional award or an interim award which may well be treated as a provisional award by the local courts where the enforcement will be sought. Needless to say, the enforcement of such awards would not be easy, as explained elsewhere.

Option 3: Commence a second DAB referral in respect of the paying party’s failure to comply with the DAB decision and then refer that narrow dispute to arbitration

Option 3 is the situation where a contractor decides to refer back to the DAB the dispute over the paying party’s failure to comply with the DAB decision and then to that narrow dispute to arbitration.

This was precisely the approach adopted by the contractor in *ICC Case No 16948* who sought:

“a decision that the Respondent was in breach of contract (...) and that the previously awarded amounts [in DAB Referral Nos 1 and 3] were to be paid immediately to the Claimant. This is the relief sought by the Claimant in the present arbitration and

(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 suggesting 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 cost 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.”

47 2015 Court of Appeal decision paragraph 88.
Referral No. 4 was started simply as a prudent preliminary step in order to obtain an arbitral award ordering immediate payment."

The contractor/claimant repeatedly emphasised during the arbitration that its claims did not extend to the underlying merits of the DAB decisions (Nos 1 and 3). Surprisingly perhaps, the respondent and paying party did not ask the tribunal to open, review and revise those DAB decisions. As a result, the tribunal made a final award ordering the respondent to pay immediately to the contractor the sums that had been awarded by the DAB.

In that Case No 16948, the tribunal held that:

“a failure to comply with a DAB decision is a breach of contract, and thus a new dispute, that can be referred to arbitration.”

Importantly, the tribunal considered that:

“[i]f, however, such failure is related a DAB decision that has not become final (due to the existence of a notice of dissatisfaction) then the other party may refer this dispute to arbitration only after having again requested a further DAB decision (20.4 of the GCC) and after another attempt of an amicable settlement or elapse of the cooling-off period, whatever occurs earlier (20.5 of the GCC). Otherwise, the Sole Arbitrator would have no jurisdiction to deal with a new dispute arising out of or relating to the breach of contract by non-compliance of the previous DAB Decisions". 49

As seen above, the 2015 Court of Appeal recognised this approach as being a valid option and considered that:

“[i]f such a dispute is so referred and if the DAB resolves it affirmatively, there can really be no objection to that later DAB decision (i.e., the DAB decision that a binding but non-final DAB decision ordering the payment of a specified sum does give rise to an immediate obligation on the paying party’s part to promptly pay that sum) being subsequently referred to arbitration (under cl 20.6 if an NOD is issued and no amicable settlement under cl 20.5 is reached, or under cl 20.6 read with cl 20.7 if no NOD is issued), or to the issuance of an arbitral award which affirms the later DAB decision.”

Admittedly, Option 3 results in some delay in the enforcement of the DAB decision as a further decision needs to be obtained from the DAB confirming the paying party’s breach of sub-clause 20.4, then a notice of dissatisfaction has to be issued, and it is only after the expiry of the 56-day period for amicable settlement under sub-clause 20.5 that the contractor may refer to arbitration the narrow dispute over the paying party’s non-compliance with that second DAB decision.

This second DAB referral was therefore seen by both the 2014 High Court and the 2015 Court of Appeal as creating an “inordinate delay” which was “directly opposed to the intent of any security of payment regime to give

the contractor a quick means of compelling the employer to ‘pay now’" and that:

“[g]iven the purpose and context of the DAB scheme, it would not be commercially sensible to interpret cl 20 as requiring the receiving party to satisfy the conditions precedent in cll 20.4 and 20.5 before it can refer a dispute over the paying party’s non-compliance with a binding but non-final DAB decision to arbitration.”

Although the author agrees that this second DAB referral may appear to be a pointless exercise which delays the enforcement of the DAB decision, it is the unfortunate result of the current provisions of the FIDIC contracts (except for the Gold Book which has addressed this issue – see below).

As the author stressed in a previous article, the effect of that second DAB referral should also not be exaggerated:

“This referral is relatively easy to prepare, since the successful party would only need to ask the DAB to find that the other party failed to give effect to the earlier DAB decision and to order that recalcitrant party to pay immediately the amount awarded by the DAB in that earlier decision plus any interest due on that sum. The author submits that, from his experience, the DAB is likely to deal with such a referral on a document only basis (therefore limiting any legal costs involved) and to render its decision before 84 days.”

**Option 4: Refer the paying party’s failure to comply directly to arbitration without going through the preliminary steps set out in sub-clauses 20.4 and 20.5**

Option 4 is the simple approach favoured by the Singapore Court of Appeal in *Persero II* for the enforcement of non-final decisions, namely a direct referral to arbitration of the dispute over the paying party’s failure to comply without going through the preliminary steps set out in sub-clauses 20.4 and 20.5.

In the author’s opinion, Option 4 is undoubtedly the only approach that truly reflects the “pay now, argue later” principle which underlies the FIDIC’s security for payment regime.

However, without the amendment to sub-clause 20.7 recommended by the 2013 FIDIC Guidance Memorandum, that approach is likely to give rise to some jurisdictional objections – as correctly noted by the tribunal in *ICC Case No 16948* – on the basis that the preconditions to arbitration have not been fulfilled. Even if those objections were not upheld, this would in any event create some delay in the enforcement of the DAB decision.

In the circumstances, the author considers that a contractor would be ill-advised to proceed with Option 4 and that it would indeed be more prudent to refer back to the DAB the dispute over the paying party’s failure

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50 2014 High Court decision paragraph 45.
51 2015 Court of Appeal decision paragraph 66(b).
to comply with the original DAB decision (Option 3). This course of action could be run in parallel with Option 1 (suspension of work), so as to exert maximum pressure on the paying party.

CONCLUSION

Because of the current wording of the 1999 FIDIC Suite of Contracts, the enforcement of a binding but non-final DAB decision is not as straightforward as the approach endorsed by the 2015 Court of Appeal decision may suggest.

Luckily, this issue has been clarified in the FIDIC Gold Book (Conditions of Contract for Design, Build and Operate Projects, 2008) by sub-clause 20.9, which provides:

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

The author understands that the new edition of the FIDIC Red, Yellow and Silver Books (due shortly) is expected to adopt similar wording. This should hopefully put the debate over the enforcement of non-final DAB decisions to rest.

Until then, great care should be taken by contractors who may be tempted to follow the simple approach endorsed by 2015 Court of Appeal.