

# Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions under the 1999 FIDIC Conditions of Contract

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## Introduction

This article is divided into four parts:

Part 1 introduces the dispute resolution mechanism adopted by FIDIC in the 1999 Conditions of contract and explains the gap that exists in the Conditions if a winning party in DAB proceedings wishes to enforce a binding but not final DAB decision: the contract does not expressly provide a mechanism to enforce a binding DAB decision.

Part 2 gives consideration to how different arbitral tribunals and courts have approached this gap. In addition to the published awards and decisions of Singapore that have been the subject of much debate, key reasoning of five unreported awards that the author's firm has dealt with have been reproduced.

Part 3 discusses:

- whether a winning party should bring one set of proceedings encompassing both the underlying merits and the application for enforcement of the binding DAB decision by way of an interim or partial award or whether to refer to arbitration as the sole

issue of the enforcement of the DAB's decision (and hence apply for a final award); and

- whether a winning party should pursue as its basis for enforcement: damages for breach of contract or specific performance. Three discrete obstacles are identified in relation to the former and the difficulties associated with pursuing the latter are also exposed.

Part 4 considers the wording adopted by FIDIC in the 2008 Gold Book and 2011 Subcontract forms and discusses the recommendations of the Beau Rivage Working Group.

Finally, conclusions are drawn.

## Part 1: The dispute resolution mechanism in the contract

Federation International des Ingenieurs-conseils (FIDIC) was founded in 1913 and in August 1957, FIDIC published its first standard form contract—Conditions of Contract (international) for Works of Civil Engineering. That contract which became known as the Red Book was revised in July 1969 (2nd edn), March 1977 (3rd edn), September 1987 with an amendment in 1992 (4th edn) and a supplement in November 1996 introducing the concept of a Dispute Adjudication Board (DAB). The Red Book was for use in civil engineering works. Another contract for electro-mechanical works (the Yellow Book) was introduced in 1963, revised in 1980 (2nd edn) and 1987 (3rd edn). Up until the third edn of the Yellow Book and fourth edn of the Red Book, therefore the forms were classified by different engineering disciplines. In 1995, FIDIC brought out its first design and build form: the Orange Book: Conditions of Contract for Design Build and Turnkey.

In 1999, FIDIC brought out a new rainbow of contracts consisting of:

1. The Conditions of Contract for Construction for building and engineering works designed by the Employer (the new Red Book).<sup>1</sup>
2. The Conditions of Contract for Plant and design-build for electrical and mechanical plant and for building and engineering works, designed by the Contractor (the new Yellow Book).<sup>2</sup>
3. The Conditions of Contract for EPC turnkey projects (the Silver Book).<sup>3</sup>

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<sup>1</sup> 1999 Red Book is not a revision of the 4th edn. But it embodies nearly all the concepts of the old Red Book but with different arrangement of text and significant changes:

- Changed role of engineer — cl.3.
- Subclauses 2.4, 2.5.
- Fitness for purpose.

<sup>2</sup> 1995 Orange Book/1987 Yellow Book became 1999 Yellow Book.

<sup>3</sup> The Silver Book was completely new.

4. The short form of Contract (the Green Book).<sup>4</sup>

The 1999 forms have been classified in accordance with the allocation of design and existence of engineer. The Conditions of Contract for Design Build and Operate Projects (the Gold Book) was published in 2008 and addressed a number of issues that had been identified by users of the 1999 forms. It is understood that the second edition of the 1999 forms will be published at some point in 2013. References to clauses in this paper are references to FIDIC 1999 Red Book unless otherwise stated.

Clause 20 of the FIDIC 1999 Red Book forms sets out the multi-tier dispute resolution mechanism adopted under the contract to deal with claims, disputes and arbitration. Sub-clause 20.1 [contractor's claims] defines the notification process that a contractor must follow if it wishes to progress a claim; explains the draconian "barring" consequences if the notification period is not observed; sets out the obligations of the engineer in responding in the first instance to that claim first approving and disapproving and then in a formal subcl.3.5 determination if agreement cannot be reached.<sup>5</sup> Subclauses 20.2–20.3 are the provisions dealing with the appointment of the Dispute Adjudication Board. Subclause 20.4 provides the mechanism by which the parties can refer a dispute of any kind whatsoever to the DAB; defines the time-scales in which the DAB must make a reasoned decision; sets out the means for the parties to give notice if they are dissatisfied with the DAB's decision (or failure to give a decision) and explains the effect of the DAB's decision depending on whether a notice of dissatisfaction has been issued:

- If no notice of dissatisfaction is given by the Parties then the DAB's decision becomes "final and binding".
- If one or both of the parties gives a notice of dissatisfaction, the DAB's decision is "binding".

In both cases, the parties must give prompt effect to the DAB's decision.

Subclause 20.5 explains the 56 day mandatory period set down for the purposes of achieving amicable settlement.

Subclauses 20.6–20.8 provide the three routes permissible under the contract for a dispute to be referred to arbitration as follows:

The first route is contained in subcl.20.6<sup>6</sup> and arises if the contractor has referred a dispute to the DAB,<sup>7</sup> the DAB has given a reasoned, timely decision (or failed to give a decision), either or both Parties is/are dissatisfied with the DAB's decision (or failure to make a decision) and either or both Parties issue/s a notice of dissatisfaction (NOD) within 28 days of receipt of the decision and the 56 day period for amicable settlement discussions<sup>8</sup> to take place (20.5) has expired. At that point, the dispute can be referred to an arbitral tribunal.

The second route to arbitration is contained in subcl.20.7 and arises if neither of the parties gives a valid notice of dissatisfaction in relation to the DAB's decision (i.e. within 28 days of receipt of the DAB's decision or if applicable within 28 days of the expiry of the 84 day period in the event that a DAB fails to make a decision). In this case, the DAB's decision becomes "final and binding".<sup>9</sup> Subclause 20.7 can then be utilised to enforce the DAB's final and binding decision in arbitration without a requirement of the arbitrator considering the merits of the dispute.

The third route to arbitration, provided for in subcl.20.8, allows the arbitral tribunal to be seised in circumstances in which for any reason, the DAB is not in place. In such circumstances, if there is a dispute between the parties, the dispute can be referred directly to the arbitral tribunal and the parties will not need to go through the processes in subcl.20.4 (DAB) or 20.5 (amicable settlement).

### *The gap in the general conditions relating to enforcement of "binding" DAB decisions*

As set out above, route 2 makes express provision via a referral to arbitration for the enforcement (specific performance) of DAB Decisions which are *final and binding*.

No express provision is made in Clause 20 or elsewhere in the 1999 forms:

- permitting the enforcement of *binding* DAB Decisions, i.e. DAB decisions where a notice of dissatisfaction has been given by a party; and
- specifying the consequences that flow from breach of the fourth paragraph of subcl.20.4 FIDIC 1999 Red book<sup>10</sup> which provides that:

<sup>4</sup> The Green Book was completely new.

<sup>5</sup> The clause is not clear at this stage as to whether there are two steps here for the engineer (approval/disapproval of the claim and then a subcl.3.5 determination) or just one step, namely that the approval/disapproval itself is a subcl.3.5 notice. It is submitted that it is more likely to be the former as otherwise there would be no opportunity for the engineer to seek further particulars.

<sup>6</sup> The relevant wording in subcl.20.6 for route 1 is as follows: "Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration".

<sup>7</sup> Subclause 20.4 allows the parties to refer any dispute whatsoever.

<sup>8</sup> It is mandatory that the 56 day period expires. It is plainly desirable for the parties to engage in productive settlement discussions but even if there are no settlement discussions at all, the 56 day period must expire prior to a request for arbitration being issued.

<sup>9</sup> See final paragraph of subcl.20.4 which states "if the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding on both Parties".

<sup>10</sup> FIDIC Conditions of Contract for Building and Engineering Works designed by the Employer General Conditions.

“The [DAB’s] decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award”.

Parties wishing to enforce a *binding* DAB decision cannot rely on routes 2 or 3. The former only applies to the enforcement of *final and binding* decisions. The latter cannot apply as a DAB is necessarily in place if it has just given a decision.<sup>11</sup> That leaves route 1 as the only possible route to enforce a binding DAB decision under the contract.

Professor Nael Bunni identifies this as a gap in the contract conditions<sup>12</sup> and suggests that: (1) there is no remedy offered by cl.20 of the 1999 FIDIC Red Book, other than that of treating the non-compliant party as being in breach of contract and, accordingly, liable for damages; and (2) subcl.20.7 of the 1999 FIDIC Red Book is of no assistance to the aggrieved party in this scenario as it applies only to DAB decisions which have become final and binding.

Mr Seppälä acknowledges the gap (as identified by Professor Bunni) but opines that<sup>13</sup>

“some arbitral tribunals and courts have inferred from subcl.20.7 of the FIDIC Red book’s expressly providing for the enforcement of arbitration of final and binding decisions of a [DAB] that ‘binding’ decisions of a DAB ... should not be enforced by arbitration. This article ... submits that this was not FIDIC’s intention.”

Mr Seppälä concludes after reciting the history of subcl.20.7 that:

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

In the author’s view, the wording in subcl.20.6 (route 1) of the contract does not make it “*obvious*” that both:

- the binding DAB decision (for enforcement purposes); and
- the dispute underlying it

can be referred to arbitration.

Mr Seppälä,<sup>14</sup> in his latest article, questions whether, as a practical matter, a dispute over the enforcement of a DAB decision is distinguishable from one over the merits of the decision.

The author submits that there is a clear distinction. The former, if permissible, results in an award for sums adjudged as due by the DAB. The latter results in a fresh determination of the matters referred to the DAB by the arbitral tribunal and a final and binding award on the dispute in question that supersedes the DAB’s decision and puts an end to the dispute.

The author considers that the natural reading of route 1 is that it was envisaged that just the latter would be referred to arbitration. It is clear (at least to this author) that the arbitral tribunal is empowered to embark upon a de novo consideration of the merits of the dispute and to then give a final award on the dispute.<sup>15</sup>

The author considers that it is arguable that the former could also be referred to arbitration via route 1 but it is certainly not obvious—particularly, as no express mechanism was built into the contract to cater for the situation where a party might want that binding DAB decision to be enforced by the arbitral tribunal akin to subcl.20.7.

In the author’s view, a party wishing to enforce a binding DAB decision, has to exercise some considerable ingenuity. In Pt 3, the author considers what the contractor needs to do to get a binding DAB decision enforced.

### ***Does the intention behind subclause 20.7 assist in filling the gap?***

The author suggests that whilst the intention behind subcl.20.7 is very interesting it does not aid the interpretation of how to fill the gap in the contract as drafted. The author understands from Mr Seppälä’s article<sup>16</sup> that the intention behind including subcl.20.7 in the General Conditions was to ensure that there was a mechanism by which a losing party to a DAB’s decision which is *final and binding* who fails to comply with that decision can refer the failure itself to arbitration as subcl.20.6 expressly prohibits this.

The intention behind subcl.20.7, therefore, was to empower the arbitral tribunal to grant specific performance or enforce a final and binding DAB decision without the need to consider the underlying merits of the dispute giving rise to the award.

<sup>11</sup> In the Red Book, as there is provision for a standing DAB this would certainly be the case. In the Yellow and Silver Books where there is provision for ad hoc DABs it may not necessarily be so obvious.

<sup>12</sup> Nael Bunni, “The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works” [2005] I.C.L.R. 272.

<sup>13</sup> Christopher Seppälä, “Sub-Clause 20.7 of the FIDIC Red book does not justify denying enforcement of a ‘binding’ DAB decision” (2011) 6(3) *Construction Law International*.

<sup>14</sup> Seppälä, “How not to interpret the FIDIC disputes clause: The Singapore Court of Appeal Judgment in *Persero*” [2012] I.C.L.R. 4, 18.

<sup>15</sup> See the wording in the second and third paragraphs of subcl.20.6 “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 ... neither party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration” and the commentaries cited by the Singapore Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 at [53], [54], [66].

<sup>16</sup> It is mandatory that the 56 day period expires. It is plainly desirable for the parties to engage in productive settlement discussions but even if there are no settlement discussions at all, the 56 day period must expire prior to a request for arbitration being issued.

In Professor Bunni's article<sup>17</sup> he poses the following questions:

"What would the situation be if the non-compliant party submitted in defence a challenge to the reasoning contained in the DAB decision? Indeed what would the situation be if the non-compliant party submitted a counterclaim relating to the merits of the dispute? will the arbitral tribunal decline jurisdiction, as these submissions ought properly to be made pursuant to arbitration under sub-clause 20.6 and not 20.7?"

The author has always considered that the final paragraph of subcl.20.4<sup>18</sup> made it clear that if the decision has become final and binding on both parties, an arbitrator will not be empowered to open up such a decision and so should dismiss:

- any defence challenging the reasoning; and/or
- any counterclaim stemming from the decision that has become final.<sup>19</sup>

It is unfortunate that the wording of subcl.20.7 expressly refers back to arbitration under subcl.20.6 (which expressly states in its opening words, only applies to decisions that have not become *final and binding*). Professor Bunni<sup>20</sup> proposes a solution to this problem with his proposal of adding "subject to Sub-Clause 20.7" in the first sentence of subcl.20.6.<sup>21</sup>

## Part 2: Case law and articles addressing the enforcement of binding dab decisions

Parties who have taken a dispute to the DAB and have obtained a decision that awards them a sum of money have considered that as a result of the wording in the fourth paragraph of subcl.20.4 (that provides that the decision is binding and that prompt effect should be given to the decision unless and until it shall be revised in an amicable settlement or an arbitral award) that they should be paid immediately the sum adjudged as due by the DAB. This view is taken despite the fact that there is no

express mechanism provided in the contract to enforce that "binding" DAB decision—the gap in the General Conditions.

This part considers the cases and awards that have considered the various attempts made by the DAB winning party to enforce the binding DAB decision in arbitration.

The author is aware of three reported decisions concerning this issue:

1. *ICC Case 10619* which concerns the enforceability of an engineer's decision under the FIDIC 4th edn contract.
2. Judge Ean's decision in the High Court of Singapore in the *Persero* case.<sup>22</sup>
3. The Singapore Court of Appeal's decision judgment dismissing the appeal in the *Persero* case<sup>23</sup> was dated July 13, 2011.

The DBF newsletter of September 2010 reported a case without publishing the award itself. This can be referred to as the *DBF* case.

Corbett & Co have acted as counsel in relation to five unreported decisions in relation to ICC arbitrations concerning this subject:

1. **ICC Case 11813/DK.**  
The interim award is dated December 1, 2002.
2. **ICC Case 16119/GZ.**  
The partial award was dated November 29, 2009.
3. **ICC Case 16948/GZ.**  
The final award was dated March 3, 2011.
4. **ICC Case 16949/GZ.**  
The procedural order was dated March 23, 2011.
5. **ICC Case 15751/JHN.**  
The partial award was dated May 20, 2011.

A summary of the outcome of all of the above cases is set out below.

<sup>17</sup> Subclause 20.4 at p.282.

<sup>18</sup> The Green Book was completely new

<sup>19</sup> Pierre M. Genton and Paul-A Gélinas "Compliance with and Enforceability of a Dispute Board Decision: Recommendations by the International Beau-Rivage Palace Forum Working Group" (2012) 28(1) Constr. L.J. 3. The Beau-Rivage Palace Forum Working Group describes its purpose as "to propose improvements to current DB Rules with respect to the prompt enforcement of DB decisions, be they binding and final or binding only". Issue 1 at p.6 speaks of "a general consensus that a final decision [absence of NoD] is not subject to review on the merits." At p.4, the recommendations make proposals on how subcl.20.7 should be improved. They suggest that "it should be expressly stated that failing a timely given NOD, the arbitrator shall neither have jurisdiction nor power to open up, review and revise the decision, but only to ascertain that the parties and the DB complied with the provisions of the contract". The Guide to the new Gold Book states as follows "unless the applicable law provides otherwise, a Party cannot challenge a DAB decision after it has become final and binding as provided for in Sub-Clause 20.6[Obtaining Dispute Adjudication Board's Decision]". It is interesting that the guidance anticipates there being a possibility that the applicable law may potentially allow a party to challenge a decision that is rendered contractually final. The author considers that the guidance given in the new Gold Book adequately covers this recommendation from *Beau Rivage*. Beau Rivage's second recommendation concerning subcl.20.7 provides that "wording could be introduced to provide for expedited proceeding or fast track arbitration or even an 'on documents only' procedure." The Gold Book speaks of "summary or other expedited relief, as may be appropriate".

<sup>20</sup> Subclause 20.4 allows the parties to refer any dispute whatsoever.

<sup>21</sup> The Gold Book resolves the concern that subcl.20.7 [1999 books] refers to subcl.20.6 which only applies to DAB's decision that have not become final and binding. Subclause 20.8 Gold Book [equivalent of 20.6 in the 1999 forms] adds the words "subject to Sub-Clause 20.9 [quasi equivalent of 20.7 in the 1999 forms]". The Subcontract for some reason omits to include these words.

<sup>22</sup> *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202; 137 Con L.R. 69.

<sup>23</sup> *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33.

Four arbitral tribunals enforced the binding DAB decision:

1. The arbitral tribunal in *ICC Case 10619*,<sup>24</sup> considered the enforceability of an engineer's decision under the 4th edn of the Red Book (the 1987 Red Book with 1992 amendments). The arbitral tribunal stated that the decision should be enforced as it was simply the law of the contract. Mr Seppälä then wrote an article<sup>25</sup> putting forward the suggestion that this reasoning was equally applicable to a binding DAB decision under the 1999 Red book.
2. This reasoning appears to have been followed in the first case under the 1999 Red book concerning a binding DAB decision: the *DBF* case. In this case, the contractor sought a partial final award and the merits of the arbitration were before the arbitrator to be determined in the final award. The contractor failed to refer to the DAB the failure to pay prior to its referral to arbitration. The author suggests that for the reasons given below, this case was wrongly decided. First, as the dispute was not referred first to the DAB prior to referral to arbitration and secondly as a partial final award is an inappropriate device for enforcement.<sup>26</sup>

3. A sole arbitrator in *ICC Case 16948/GZ*,<sup>27</sup> said a final award was acceptable to enforce a binding DAB decision. The author suggests that for the reasons given below, this case was wrongly decided as a final award is not an appropriate device for enforcement. This was also the view of the Singapore Court of Appeal in *Persero*.

4. A sole arbitrator in *ICC Case 15751/JHN*<sup>28</sup> made a partial final award to the effect that a party should be required to pay that sum decided by the DAB and interest from the date when payment was due by way of damages for breach. The arbitrator was referred to the High Court of Singapore's decision in *Persero*.<sup>29</sup> The merits were before the arbitral tribunal in this case and the contractor had referred the failure to pay to the DAB prior to its application for a partial final award. The author suggests that for the reasons given below, this case was wrongly decided as a partial final award is not an appropriate device for enforcement.

Three arbitral tribunals and the courts in Singapore declined to enforce the binding DAB decision:

1. In *ICC Case 11813/DK*, the arbitral tribunal declined to make an interim award on the basis that the contract provides no basis for an arbitral tribunal to make an award enforcing a binding DAB decision.<sup>30</sup>

<sup>24</sup> *ICC Case 10619*, "the question now arises as to whether and on what legal basis this Tribunal may adjudicate the present dispute by an interim award...there is no reason why in the face of such a breach the Arbitral Tribunal should refrain from an immediate judgement giving the Engineer's decisions their full force and effect. This simply is the law of the contract. In this respect, this Tribunal wishes to emphasise that neither the provisions of Article 23 of the ICC Rules, nor the rules of the French NCPC relating to the référé provision are relevant. For one thing, the judgement to be hereby made is not one of a conservatory or interim measure, *strictu sensu* but rather one of giving full immediate effect to a right that a party enjoys without discussion on the basis of the Contract and which the parties have agreed shall extend at least until the end of the arbitration. For the second thing, the will of the parties shall prevail over any consideration of urgency or irreparable harm or *fumus boni juris* which are among the basics of the French référé provision".

<sup>25</sup> Seppälä "Enforcement by an Arbitral Tribunal of a Binding but not Final Engineer's or DAB's decision under the FIDIC Conditions" (2009) 414.

<sup>26</sup> It is the author's understanding that the *Persero* judgment of the High Court of Singapore (which provided referral to the DAB first to be mandatory under the General Conditions of Contract) was not before the arbitral tribunal. Had the reasoning in the *Persero* case been followed, the arbitral tribunal would not have enforced purely as the dispute was not referred to the DAB first. There is also a difference between the *DBF* case and the *Persero* case in that in the former the merits were before the tribunal and in the latter they were not.

<sup>27</sup> In *ICC Case 16948/GZ*, the Sole Arbitrator, in a final award, ordered the employer to make an immediate payment of the sums determined to be due by the DAB + interest and costs on the basis that "the Employer was liable for all damages resulting from or in connection with the failure to perform on time or in accordance with the terms of the agreement or not to perform at all [the Employer's breach of the fourth paragraph of Sub-Clause 20.4] ... the Claimant has the right to receive the amount which the DAB considered was due" ([134]). This case has been reported in more detail in Oana Soimulescu and David Brown "Enforcement of binding DAB decisions: A fresh approach to Clause 20 of the 1999 FIDIC Conditions of Contract" [2012] 19.

<sup>28</sup> In *ICC Case 15751/JHN*, the sole arbitrator determined that "it seems to me that the better solution in an appropriate case is that if a Party is obliged to pay a sum of money under a Decision of a DAB in respect of which an NOD has been served and he has failed to do so in breach of Sub-Clause 20.4, that party should be required to pay that sum and interest from the date when payment was due by way of damages for breach of Sub-Clause 20.4, not by way of enforcement of the decision nor by way of pre-judging the underlying substantive dispute. I consider the present to be an appropriate case and will so order".

<sup>29</sup> At that stage, the Court of Appeal's decision had not been published.

<sup>30</sup> The reasoning given by the arbitral tribunal was as follows: "The tribunal does not accept that the [DAB decision] rendered by the DAB pursuant to the Contract, provides a basis for awarding any amounts on an interim basis. It is common ground that the DAB Decision was the subject of a Notice of Dissatisfaction ... the Notice of Dissatisfaction stated [the employer's] dissatisfaction with substantially all of the DAB's decision ... notice of dissatisfaction was served in accordance with Article 20 of the Contract (and it is agreed, within the contractually specified period for such notices). As a consequence of the [employer's] notice of dissatisfaction, the DAB decision did not become 'final and binding' upon the parties, as provided by the eighth sub-paragraph of Article 20.4 of the Contract's General Conditions. This subparagraph provides: 'If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both parties.' Conversely, if a notice of dissatisfaction is given, then nothing in Article 20.4 provides that the DAB decision will be final and binding on the parties, and, on the contrary, the clear inference of subparagraph 8 is that the decision will in these circumstances not be final and binding\* There is nothing in the wording of Article 20.4 (or otherwise) to support [employer's argument] that a DAB decision remains final and binding in part, to the extent that the Notice of Dissatisfaction does not express dissatisfaction with the DAB decision. The [employer] presently disputes liability for the amounts which the DAB Decision found to be due. Absent some basis in the contract for concluding that the DAB decision binds the employer, and cannot be disputed by it, there are no grounds for holding the employer liable for the amounts stated herein. For the reasons detailed above, there is no such basis, in Article 20.4 of the General Conditions, nor does the Tribunal see any serious argument that any other provision in the contract provides such a basis. \*Subparagraph 5 of Article 20.4 of the General Conditions provides that 'both Parties shall promptly give effect to every DAB's decision, unless and until it shall be revised in an amicable settlement or an arbitrate [sic] award as described below'. The Tribunal is not prepared to conclude, particularly on a summary basis, that this provision requires the parties to carry out directions of a DAB decision in circumstances in which a notice of dissatisfaction is tendered in respect of such decision under subparagraph 8. Such an interpretation would seem to deprive the procedures

2. The *Persero* case:
- (a) The High Court of Singapore set aside an arbitral award in which the arbitral tribunal issued a final award enforcing a DAB's decision. The merits of the case were not referred to the arbitral tribunal.<sup>31</sup> The High Court set aside the award on the basis that failure to pay (the second dispute) did not go to the DAB prior to arbitration. Other obiter comments were also made by Judge Ean in relation to whether the arbitral tribunal could enforce without a consideration of the merits of the case.<sup>32</sup>
- (b) The Singapore Court of Appeal<sup>33</sup> upheld the High Court's decision but on different grounds. The Court of Appeal held that a final award without a hearing on the merits was "unprecedented" and "unwarranted" but that as long as the merits are placed before the arbitral tribunal, in principle, an interim or partial award enforcing a binding DAB's decision should be possible.<sup>34</sup>
3. A sole arbitrator in *ICC Case 16119/GZ*<sup>35</sup> suggests that a partial final award (and the author suggests that it follows that also a final award) are inappropriate devices to allow enforcement but suggests, obiter, that an interim award might be effective. This

of subparagraph 8 of much of their apparent purpose. In any event, the Tribunal does not interpret the DAB decision as directing the employer to pay the amounts referred to therein to the contractor irrespective of other claims; rather, the DAB Decision simply provides a resolution of particular disputes submitted to it, without purporting to address the parties' other rights or to direct any action on the part of either party.<sup>31</sup>

<sup>31</sup> The case of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 concerned a pipeline project under the FIDIC 1999 Red Book. Various disputes arose that were referred to the DAB. The DAB decided, inter alia, that the employer owed the contractor a sum of money. The employer issued a notice of dissatisfaction (NOD) and failed to pay the sum determined as due by the DAB. The contractor applied directly to the ICC arbitral tribunal for a final award enforcing the DAB's decision on the basis that there had been a breach of the fourth paragraph of subcl.20.4. Note, the contractor did not first refer the failure to pay as a second dispute to the DAB nor did the contractor refer the merits to arbitration. A majority of the arbitral tribunal gave a final award finding the sum awarded by the DAB to be due without considering the merits. The contractor applied to set aside the arbitral award.

<sup>32</sup> Paragraph 38 of the *Persero* judgment poses the judges solution of how to enforce a binding but not final DAB decision. The judge suggests that following a notice of dissatisfaction, the losing party should ask the tribunal to review and revise the DAB decision and the winning party should ask the tribunal to review and confirm the DAB decision. It seems to the author that the Judge is differentiating between the process intended under subcl.20.6—a de novo hearing, and a new process invented purely for enforcing a DAB decision (review and revise/confirm). The judge also appears to suggest (although it is far from clear) that an interim award is permissible in advance of obtaining the award confirming and revising the DAB decision. If there truly is a distinction being made then the process of a review of the DAB's decision could lead to three possible awards:

1. An interim award enforcing the DAB's decision (the precise basis on which has not been clarified).
2. A partial award reviewing and revising the merits of the DAB Decision.
3. A final award concerning the dispute.

Such a solution, it is submitted would be wholly inefficient. The idea that an arbitrator should review the merits only of the DAB decision and then go on to consider the entire dispute de novo is absurd. If the judge did not intend to make such a distinction and envisaged that the final award was the award reviewing and revising/confirming the DAB decision, then this award should not have been characterised as being limited to a review of the DAB decision. A de novo hearing allows new matters not raised before the DAB to be raised. Further, if this was what was intended, this process would not amount to the enforcement of the DAB decision at all. This reading would not assist the reader in understanding how the interim award enforcing the DAB decision should be pursued. The final interpretation is that the judge envisaged the following:

1. An interim award which is in fact the award reviewing the DAB decision.
2. A final award.

If this is the correct interpretation then again this is absurd as it would be highly inefficient for an arbitrator to go to the trouble of reviewing and revising/confirming a DAB decision, i.e. assessing in detail the merits of the dispute that were before the DAB and then doing almost the same thing again in the de novo determination resulting in the final award. This would not achieve the claimant's objective of a summary enforcement procedure for the DAB decision. It would be quicker for the claimant to proceed directly to a final award and not to pursue an enforcement at all. Finally, on the face of it, [38] suggests that an award can be made for the entire claim. There is a suggestion earlier in the judgment (at [34]) that an interim or provisional award would be limited only to indisputable amount.

The Court of Appeal did not sanction the notion of "review and revise/confirm" adopted by the High Court. It may be that this is because the Court of Appeal was also not convinced by this approach.

<sup>33</sup> On July 13, 2011, the Singapore Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 dismissed an appeal of the decision of the High Court on the basis that: "There appears to be a settled practice, in arbitration proceedings brought under sub-cl 20.6 of the 1999 FIDIC [Red Book], for the arbitral tribunal to treat a binding but non-final DAB decision as immediately enforceable by way of either an interim or partial award pending the final resolution of the parties' dispute. What the Majority Members did in the Arbitration — viz, summarily enforcing a binding but non-final DAB decision by way of a final award without a hearing on the merits — was unprecedented and, more crucially, entirely unwarranted under the 1999 FIDIC [Red Book]."

The CA reasoned that:

- A reference to arbitration under subcl.20.6 in respect of a binding DAB decision is in the form of a rehearing so that the entirety of the parties' dispute(s) can finally be resolved afresh.
- Subclause 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, subcl.20.6 contemplates a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved. This observation is consistent with the plain phraseology of subcl.20.6, which requires the parties' dispute in respect of any binding DAB decision which has yet to become final to be "finally settled by international arbitration".
- Subclause 20.6 clearly does not provide for separate proceedings to be brought by the parties before different arbitral panels even if each party is dissatisfied with the same DAB decision for different reasons.

<sup>34</sup> Mr Seppälä's latest article, Seppälä, "How not to interpret the FIDIC disputes clause: The Singapore Court of Appeal Judgment in *Persero*" [2012] I.C.L.R. 4 concludes that "the Singapore courts misunderstood those sub-clauses [20.4 to 20.7] and the CA misinterpreted the TOR and the ICC Rules as well. Those courts should have left this award alone". Further consideration is given of the issues arising in the *Persero* case below.

<sup>35</sup> In *ICC Case 16119/GZ*, the sole arbitrator declined to order payment of the sums adjudged to be due by the DAB for the following reasons: "Failure to comply with the DAB's decisions is a breach of contract. The appropriate method of enforcing a DAB's decision is therefore by way of an action for breach of contract. The DAB decisions are binding as a matter of contract (fourth paragraph of Sub-Clause 20.4) although they are not final as notices of dissatisfaction have been submitted by both Parties. The DAB decisions enjoy this binding character unless and until revised by the final award. As the DAB decisions are binding, the sums recognized under those decisions are due and payable until the revision of those decisions in the Final Award. Whilst the decisions are binding, they are not final. The DAB decisions are not final and any payment awarded by those decisions may be revised and reversed. Therefore, the Sole Arbitrator cannot issue any final award ordering the payment of the sums decided by the DAB. By necessity, the payment ordered should be provisional or temporary. The partial award requested cannot definitively determine the payment issues and, consequently, any order for payment at this stage must be provisional. It goes against the essence of a final award to make an order that could be revisited and reversed in a further award. . . . In conclusion the payments awarded under the DAB's decision will be revisited by the Sole Arbitrator and cannot be the subject of a final partial award and again the subject of the final award."

reasoning is consistent with the ratio of the decision of the Court of Appeal in the *Persero* case but inconsistent with its obiter comments which suggested that a partial award (as opposed to an interim award) is a permissible device. See the discussion below on whether an arbitral tribunal should issue a partial or final award concerning a binding DAB decision.

4. The sole arbitrator in *ICC Case 16949/GZ*<sup>36</sup> concluded that damages could not include the sum adjudged as due by the DAB and so declined to enforce. In this case, the contractor opted to seek a final award (i.e. the merits were not for determination by the arbitral tribunal).

### Part 3: In light of the case law, what should a party wishing to enforce a binding DAB decision do?

After a party has referred its dispute to the DAB under subcl.20.4 and the DAB has given its timely reasoned decision, if either party issues a notice of dissatisfaction concerning the DAB's decision, that decision will be binding<sup>37</sup> (not final and binding) and the winning party can then refer that dispute ("the underlying merits") to arbitration. In addition, if the losing party before the DAB fails to pay, the winning party might wish to seek to "enforce" the DAB's binding decision.

At this point, the winning party must choose whether to bring one set of arbitration proceedings encompassing both the underlying merits and the application for enforcement of the DAB's binding decision by way of an interim or partial award, or whether to refer to arbitration as the sole issue the enforcement of the DAB's decision and hence apply for a final award. Issue 1.

The winning party will also need to ensure that there is a valid juridical basis on which to pursue its remedy, whether it be damages for breach of contract and/or an action for specific performance (enforcement). Issue 2.

### *Issue 1: What proceedings should be brought?*

The key to answering this question lies in an understanding that an award is final (with the exception of an interim award) and a DAB decision amounts to interim relief. As set out below, the better view is that a final award should not be issued for interim relief. The terminology of different awards must first be examined:

### Terminology

The Final Report on Interim and Partial Awards of the working party on dissenting opinions and interim and partial awards of the ICC Commission on International Arbitration, chaired by Martin Hunter in 1990<sup>38</sup> used the following terminology for the purposes of its report:

"For the purposes of this Report only, an 'interlocutory decision' is one which, not necessarily in the form of an award, is made prior to the last or sole award; an 'interim award' is a general term used to describe any award made prior to the last award in a case; a 'partial award'<sup>39</sup> is a binding determination, in the form of an award, on one or more (but not all) of the substantive issues ...".

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

Fouchard Gaillard and Goldman explain that a "final Award" is used to mean very different things but the better interpretation is that:

"... an award is a decision putting an end to all or part of the dispute, it is therefore final with regard to the aspect or aspects of the dispute that it resolves."<sup>40</sup>

The word "interim" is sometimes used interchangeably with "partial" to describe a final award.<sup>41</sup> The words "interlocutory" and "provisional" are often used to mean the same thing. Sometimes the word "interim" is used to mean "interlocutory" or "provisional".<sup>42</sup>

<sup>36</sup> In *ICC Case 16949/GZ* the sole arbitrator declined to make a final award (the merits were not in front of him) on the basis that "though non-compliance with DAB decisions No.2 and 3 would amount to a breach of contract, the consequences of such breach would hardly be a claim for damages of the same amounts already awarded." The arbitrator then went on to admit under art.19 of the ICC Rules the introduction of a new claim—namely the merits which were not initially placed before the arbitral tribunal. The arbitrator would then proceed in the final award to determine what payment was due to the claimant.

<sup>37</sup> Under the fourth paragraph of subcl.20.4.

<sup>38</sup> "Final Report on Interim and Partial Awards of the working party on dissenting opinions and interim and partial awards of the ICC Commission on International Arbitration" chaired by Martin Hunter (International Court of Arbitration Bulletin, 1990 Vol.1, No.2 ICC).

<sup>39</sup> Julian D M Lew, Loukas A Mistelis, Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) (hereafter referred to as "Lew Mistelis and Kroll") at paragraph 24-17 explain that

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

<sup>40</sup> Emmanuel Gaillard, John Savage Fouchard Gaillard and Goldman on *International Commercial Arbitration* (Kluwer Law International, 1999) p.740 at para.1359.

<sup>41</sup> Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port *Recognition and Enforcement of Foreign Arbitral Awards A global Commentary on the New York Convention* (Kluwer Law International, 2010) at p.155 (hereafter referred to as "Kronke et al") state:

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

<sup>42</sup> Lew Mistelis and Kroll explain at p.634

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

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

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

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

### Can a final award be given for relief which is not final?

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

According to Lew, Mistelis and Kroll, the prevailing position in relation to the enforcement of interim awards dealing with interim relief is dealt with by the *Resort Condominiums*<sup>43</sup> case where the court held that an interim award is not enforceable under the New York Convention or Australian law.

The *Resort Condominiums* case states

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

This view is supported by:

- Craig Park and Paulsson<sup>44</sup>;
- Gaillard and di Pietro<sup>45</sup>;
- Kronke et al describe the *Resort Condominiums* case as the leading case on this topic<sup>46</sup>; and
- Dr Peter Binder.<sup>47</sup>

Gary Born states

“historically, some (older) authorities held that only ‘final’ arbitral awards could be enforced and that ‘provisional’ measures were by definition not ‘final’ .... There was (and remains) a substantial body of commentary also concluding that provisional measures are not recognizable or enforceable as ‘final’ arbitral ‘awards’ under either the New York Convention or national arbitration legislation.”<sup>48</sup>

He then goes on to cite American authorities and concludes<sup>49</sup> that the “better view is that provisional measures should be and are enforceable as arbitral awards”.

<sup>43</sup> *Resort Condominiums International Inc (USA) v Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd (Australia)* (1994) 9(4) Mealesy’s IAR A1 (1995) a decision of the Supreme Court of Queensland, Australia.

<sup>44</sup> W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration* 3rd edn (US, Oceana Publications Inc, 2000), para.26.05: “Recognition and enforcement under the New York Convention of what is essentially an interlocutory order, modifiable by the arbitral tribunal in accordance with changes of circumstances but rendered in the form of awards must remain doubtful. There is a certain flaw in attempting to use the New York Convention, which was designed to insure enforcement of decision which put an end to a dispute between arbitrating parties, or at least part of a dispute, to secure enforcement of a decision which might, for instance, seek to preserve the status quo until a final arbitration award can be rendered. The flaw was precisely recognised in a much commented Australian case, *Resort Condominiums v Bolwell*.”

<sup>45</sup> Emmanuel Gaillard and Dominic di Pietro, *Enforcement of Arbitration Agreements and international arbitral awards the New York Convention in practice* (London: Cameron May, 2008), p.150: “It is advocated that only orders which finally settle one or more of the issues which have validly come within the jurisdiction of the arbitral tribunal should qualify for recognition and enforcement under the Convention ... the word final implies that once the issue has been adjudicated it would no longer be possible, not even if the tribunal wished, to reopen the issue ... as far as the arbitral procedure is concerned those issues are res judicata .... It is clear that even though the content of interim measures of protection may at times coincide with the content of the final award settling the disputes between the parties, interim measures differ radically from final awards. By definition, interim measures are temporary in nature, while one of the main features of awards is that they decide definitively one or more of the disputes submitted to the jurisdiction of the arbitral tribunal. The enforceability of interim measures under the Convention should therefore be dismissed out of hand.”

<sup>46</sup> Kronke, Nacimiento, Otto and Port, *Recognition and Enforcement of Foreign Arbitral Awards A global Commentary on the New York Convention* (2010), p.155: “The New York Convention does not expressly address these types of awards [referring to interim and partial awards]. Most courts take the view that true interim awards, which are not final adjudications by the arbitration tribunals and which can be overturned by arbitration tribunals at a later stage, are not enforceable under the New York Convention. The situation is different for partial awards. As a general rule, partial awards may be enforced under the New York Convention ... uncertainty whether an issue decided by a partial award is really ‘final’ can also impede enforcement.”

<sup>47</sup> Dr Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edn (London: Sweet & Maxwell, 2009), p.798: “Finality exists when the ability of the parties to bring direct and collateral challenges against the award ceases. The specifics of finality are contextual. In arbitration, an award is final when it is no longer capable of revision by the arbitral tribunal. This is more apparent from the French version of article 33(2) a translation of which provides that the award ‘is not susceptible to appeal before an arbitral authority’ (‘Elle n’est pas susceptible d’appel devant une instance arbitrale’). Under many national arbitration regimes, finality results when the arbitral award is no longer susceptible to invalidation by a reviewing court. In arbitration under the UNCITRAL Rules, finality attaches when the arbitral tribunal’s decision becomes irrevocable. A strong indication of finality is that all the technical requirements for making an award have been satisfied, i.e. the award is made in writing by a majority of the tribunal’s members, includes reasons, unless otherwise agreed, and the date and place where the award was made, and is signed by at least two of the three arbitrators. Upon satisfaction of these requirements, the tribunal’s decision is locked in and the opportunity for further modification no longer exists... are all UNCITRAL awards final? The rule of finality in Article 32(2) does not distinguish between the various types of award (final, interim, interlocutory and partial) identified in Article 32(1). In practice, however, interim, interlocutory, or partial awards require special consideration. To be sure, final awards are definitive not only because they dispose of all the parties’ claims, but also because the rendering of a final award terminates the tribunal’s mandate under many national arbitration laws. By contrast, interim, interlocutory and partial awards often resolve discrete claims or issues without severing the tribunal’s powers. One commentator suggests this continuing role of the tribunal leaves open the possibility that the tribunal might amend its decision. (see I Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective* (1993) 36 (‘the authorisation for “partial” awards suggests a lower degree of finality than separate final awards on different issues’). We disagree as to interlocutory and partial awards as those terms have been used by the Iran-US Claims Tribunal to indicate decisions on discrete issues or a portion of a group of claims. In these cases, the Tribunal consistently ruled that such awards were final and could not be reopened. A NAFTA Chapter 11 Tribunal reached the same conclusion with respect to a previously rendered partial award. In contrast, interim awards on interim measures of relief are made in response to a set of contemporaneous circumstances, and while such rulings may not be revisited, they may be replaced by subsequent interim awards issued in response to a new request for interim measures made on the basis of changed circumstances”.

<sup>48</sup> Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009), Vol.2 , p.2020.

<sup>49</sup> Born, *International Commercial Arbitration* (2009), Vol.2 , p.2020. This is the citation adopted by Christopher Seppälä in isolation in his article “Enforcement by an Arbitral Tribunal of a Binding but not Final Engineer’s or DAB’s decision under the FIDIC Conditions” (2009) 414.

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

**Is a binding DAB decision interim relief?** The fourth paragraph of subcl.20.4 provides that the DAB's decision shall be binding "unless and until it shall be revised in an amicable settlement or arbitral award". If one or both of the parties issue a notice of dissatisfaction, the dispute can be referred on to amicable settlement and then arbitration.

As the DAB decision (after a notice of dissatisfaction has been issued) can be referred on to arbitration, the DAB's decision amounts to interim relief pending a final award on the same dispute in arbitration (assuming the matter does not settle in the amicable settlement period).

### What form of award should a party seek/what should the arbitral tribunal issue?

If it is accepted therefore that a binding DAB decision amounts to interim relief then the better view is that an arbitral tribunal should not issue a final award for relief which is not final. Accordingly, it would be inappropriate for a winning party:

- To refer as the sole issue to the arbitral tribunal the losing party's failure to pay, i.e. seek a final award concerning the DAB decision only.
- To refer the underlying merits to arbitration and then seek a partial award as a partial award is a final award.

By a process of elimination, therefore, the author therefore considers that the most appropriate manner in which to enforce a binding DAB decision is to refer the underlying merits and then seek an interim award.

**Interim award** As the DAB's decision amounts to interim relief, it would be appropriate for the winning party to make an application for provisional payment. Such an application ought to take the form of an application for an interim and conservatory measure under art.23 ICC Rules.<sup>50</sup> The law of the forum will spell out the circumstances or criteria which must exist before the court can grant interim or conservatory measures, e.g. prima facie establishment of a case, urgency and irreparable harm, or serious or actual damage, if the

measure requested is not granted (see, e.g. s.44 of the English Arbitration Act 1996). Some still cite the traditional grounds of "*periculum in mora*" (danger in delay) and "*fumus boni iuris*" (presumption of sufficient legal basis).<sup>51</sup>

It is submitted that, in the typical case concerning a binding DAB decision, it will be difficult to persuade the arbitral tribunal that the necessary circumstances or criteria set out in the preceding paragraph will be fulfilled to justify an arbitral tribunal issuing interim or conservatory relief. Ordinarily, it is suggested that there will be no urgency or real risk of irreparable harm or serious or actual harm if the contractor is not paid the sums ordered by the DAB pending a final determination of these matters by the arbitral tribunal as interest is an adequate remedy. Furthermore, even if an interim order or award were to be made, it would not be enforceable under the New York Convention.<sup>52</sup>

**Final award inappropriate** The author suggests that in principle, it would be inappropriate for a party to seek either a final award<sup>53</sup> or a partial final award in relation to the enforcement of a DAB decision as:

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

These were essentially the winning arguments run by the author as counsel in *ICC Case 16119/GZ*.

<sup>50</sup> Derains and Schwartz suggests that the variety of conservatory and interim measures encountered in ICC arbitration proceedings is enormous and includes: orders for provisional payment in Yves Derains and Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd edn (Kluwer Law International, 2005), p.297.

<sup>51</sup> Working Party of the ICC Commission Report: "34. Where only one of the parties asks for an interim or partial award, the Working Party is of the opinion that the arbitrator should make such an award only if, on balance, he is concerned that it serves the interests of the effective and efficient conduct of the arbitration. 35. In general, the Working Party is of the opinion that in ICC arbitrations the presumption should be in favour of a single final award which decides all of the claims and issues to be determined; and that — except when the parties have indicated a joint wish to the contrary — the arbitrator should examine the justification for issuing an interim or partial award in a critical manner and should not do so unless there are circumstances which weigh clearly in favour of taking this course."

<sup>52</sup> According to Lew, Mistelis and Kroll, *Comparative International Commercial Arbitration* (2003), the prevailing position in relation to the enforcement of interim awards dealing with interim relief is dealt with by a decision of the Supreme Court of Queensland, Australia (*Resort Condominiums International Inc (USA) v Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd (Australia)*) (1994) 9(4) Mealesy's IAR A1 (1995). The court held that an interim award is not enforceable under the New York Convention or Australian law. They stated that "the 'Interim Arbitration Order and Award' made by the arbitrator ... is not an 'arbitral award' within the meaning of the Convention nor a 'foreign award' ... it does not take on that character simply because it is said to be so ..."

<sup>53</sup> For different reasons, the Court of Appeal in the *Persero* case also ruled that a single arbitration should be brought.

The contrary view advanced by Frederic Gillion<sup>54</sup> is that the contractor should seek a partial final award as such an award would

“simply be one giving full immediate effect to the winning party’s right to have a DAB decision complied with promptly in accordance with Sub-Clause 20.4 or to damages in respect 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”.<sup>55</sup>

The author considers that this contrary view is fallacious as a partial final award pertaining to the sums ordered as due by the DAB does not solely represent a final resolution of the issue that there has been a non-payment. Such an award goes further and finds that the sums fall due in an enforceable final award. The contractor’s entitlement to those sums has not been finally resolved and so should not be the subject of a final award.

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

Following the reasoning in the *Resort Condominiums* case, regardless of the label put on the award,<sup>56</sup> the substance of the award is that non-final relief is being sought: payment of sums declared to be due by a DAB whose decision can be overturned in arbitration. Such an award, whatever it is called will be treated by most courts as unenforceable.<sup>57</sup>

The absurdity of enabling such an award to be enforceable is evident by virtue of the fact that there would ultimately be two potentially conflicting enforceable awards when the final award is given:

- the sums determined as due by the DAB reflected in the partial award (or final award if the contractor takes the DAB

enforcement issue as the sole issue to an arbitral tribunal as in the *Singapore* case) enforcing the DAB’s decision; and then

- the sums finally awarded as due by the arbitrator in its final award (or in a separate arbitral award commenced in relation to the merits if such a route is chosen).

It has been suggested that the final award could reverse the finding in the partial final award. However, if that is the case, it follows that the partial final award can never have been a final award. It must have been an interim/provisional order/award since a final award can never be revised. This would not, of course, be the case if the first award was interim and so could be superseded in the final award.<sup>58</sup>

Mr Seppälä in the context of his criticism of the Singapore Court of Appeal’s judgment sees no difficulty in the concept of a final award in relation to the enforcement of a binding DAB decision. He states that:

“While recognising that a binding but non-final decision of a DAB may be enforced by an interim or partial award, the CA appears to have difficulty accepting that such decision may be enforced by a final award even though the Majority Members had expressly reserved PGN’s right, in the award, to commence an arbitration to open up, review and revise the award. The CA’s difficulty is hard to understand. The final award merely declared that the DAB decision was binding on PGN and, thus, to be given immediate effect by it until such time (if any) as it was opened up, reviewed and revised in arbitration. It clarified the parties’ rights in the interim pending a final decision by arbitration. This was the effect of the final award.”<sup>59</sup>

In the author’s view, it would be perfectly permissible for an arbitral tribunal to make a mere declaration that the DAB decision was binding and that the non-paying party must give immediate effect to it.<sup>60</sup> What an arbitral tribunal should not do is to go further and give a final award in relation to interim relief resulting in an award which is unlikely to be unenforceable. The sole arbitrator in *ICC Case 16119/GZ* made a declaration to the effect

<sup>54</sup> Frederic Gillion, “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] I.C.L.R. 388, 408.

<sup>55</sup> This second view proceeds on the basis that either there is a power to specifically enforce or it is a claim for damages that the loss question dealt with above encompasses the principal sum.

<sup>56</sup> It was held in the *Resort Condominiums* case that “the ‘Interim Arbitration Order and Award’ made by the arbitrator ... is not an ‘arbitral award’ within the meaning of the Convention nor a ‘foreign award’ ... it does not take on that character simply because it is said to be so ...”. Kronke, Nacimiento, Otto and Port, *Recognition and Enforcement of Foreign Arbitral Awards A global Commentary on the New York Convention* (2010) explain that “the label attached to a decision is not always decisive; it is the substance that counts. For example, courts have occasionally interpreted “orders” by arbitration tribunals to be awards, provided they are final decisions on an issue.”

<sup>57</sup> Article 35 of the 1998 ICC Arbitration Rules (and art.41 of the 2012 Arbitration Rules) provide a general rule that: “In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law.”

<sup>58</sup> Furthermore, the fairness of this approach is questionable since there is always the risk that the contractor might become insolvent between the making of the partial award and the final award.

<sup>59</sup> By way of analogy, Mr Seppälä refers to the enforceability of provisional measures by an arbitral award and cites Gary Born who suggests that the “better view is that provisional measures should be and are enforceable as arbitral awards”. The author suggests that the position concerning the enforcement of provisional measures is by no means clear-cut as set out in the commentaries above.

<sup>60</sup> Gaillard and Di Pietro, *Enforcement of Arbitration Agreements and international arbitral awards the New York Convention in practice* (2008) state “a declaratory award establishes and settles with binding effect the legal relationship of the parties in dispute. Declaratory awards are particularly useful where the parties have an ongoing business relationship. Declaratory relief has become a frequent remedy in international arbitration. In the Aramco arbitration, for example, it was agreed that the award should be of declaratory effect only, with neither of the parties claiming damages for any alleged injury. The Arbitral tribunal observed in this respect that: ‘there is no objection whatsoever to Parties limiting the scope of the arbitration agreement to the question of what exactly is their legal position. When the competence of the arbitrators is limited to such a statement of the law and does not allow them to impose the execution of an obligation on either of the Parties, the Arbitration Tribunal can only give a declaratory award’”

that the DAB decision was binding but did not go further and make an order for payment for precisely this reason. The central reason for this was as he stated:

“[I]t goes against the whole essence of a final award to make an order that could be revisited or reversed in a further award”.

Accordingly, the author considers that a partial (final) award should not be made in relation to a binding DAB decision—only an interim order/award should be made.

## How should an arbitrator determine whether to grant an interim or partial award?

The ICC Report<sup>61</sup> gives guidance on how arbitrators should approach interim awards as follows:

“In general, the Working Party was of the opinion that in ICC arbitrations the presumption should be in favour of a single final award which decides all of the claims and issues to be determined; and that except when the parties have indicated a joint wish to the contrary, the arbitrator should examine the justification for issuing an interim or partial award in a critical manner and should not do so unless there are circumstances which weigh clearly in favour of taking this course. These circumstances should be set out in the interim or partial award itself.”

## Issue 2: Damages for breach of contract or specific performance

There appear to be two juridical bases that a winning party might wish to pursue when seeking to obtain from an arbitral tribunal payment of the monies adjudged as due by a DAB:

1. damages for breach of contract: the employer’s failure to pay amounts to a breach of the fourth paragraph of subcl.20.4, i.e. a failure on the employer’s part to promptly give effect to the binding

DAB’s decision<sup>62</sup> and that such breach can be referred to arbitration via route 1 (subcl.20.6); or alternatively

2. specific performance: the winning party could argue that the arbitral tribunal ought to exercise a power of specific performance. The latter route has not been explored fully in the case law above.

## Damages

If the winning party is seeking damages, it will have to surmount three obstacles in order for the binding DAB decision to become the subject of an award:

1. the dispute must be referred to the DAB first;
2. the principal sum adjudged as due by the DAB must constitute damages for breach of contract;
3. the arbitral tribunal must be able to make a summary decision (i.e. not consider the merits).

**Obstacle 1: DAB first** The winning party will need to refer the dispute to the DAB first (and to wait for the expiry of the 56 days amicable settlement period provided in subcl.20.5) before the arbitral tribunal can be properly seized of the dispute. This is due to the wording in the first sentence of subcl.20.6. The author suggests that a failure to do so will result in the arbitral tribunal lacking jurisdiction to consider the dispute. This was the correct conclusion reached by the High Court in the *Persero* case.<sup>63</sup>

**Obstacle 2: Loss argument** An arbitral tribunal will have to conclude that damages for breach of the fourth paragraph of subcl.20.4 include the principal sum<sup>64</sup> adjudged as due by the DAB. Two sole arbitrators in unreported cases reach this conclusion. Frederic Gillion also supports this view.<sup>65</sup>

<sup>61</sup> Citation for this report is at fn.39 above, three categories are allocated:

- Those decisions which should, whenever made, be scrutinised by the Court of Arbitration pursuant to art.21 and which should therefore be made in the form of an award.
- Those which should not be scrutinised pursuant to art.21 and which should therefore not be made in the form of an award.
- Interlocutory decisions which may or may not be in the form of an award at the time they are made, but which, if not so made must ultimately be incorporated into an award to be scrutinised by the Court of Arbitration pursuant to art.21.

Where only one of the parties asks for an interim or partial award, the working party is of the opinion that the arbitrator should make such an award only if, on balance, he is concerned that it serves the interests of the effective and efficient conduct of the arbitration. Where the parties are not agreed, the working party considers that the arbitrator should look primarily to the following factors for guidance:

- Article 26 of the ICC Rules which calls upon the arbitrator to make “every effort to make sure that the award is enforceable at law”.
- Whether the law of the place of the arbitration permits a party to challenge an interim or partial award (either generally or dependent upon the subject of the particular award).
- Whether the circumstances of a particular case are such that finality and/or enforceability of a decision on a particular point is in the interests of the effective and efficient conduct of the arbitration. Fifteen further guidelines are then given.

<sup>62</sup> The High Court of Singapore considered the employer’s failure to pay the sum adjudged as due by the DAB in the first referral amounted to a second dispute capable of being referred to a DAB for determination at [30]–[31] of the judgment of Judge Ean of the Singapore High Court in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202.

<sup>63</sup> And aligns with Frederic Gillion’s views at p.401 of 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] I.C.L.R. 388, 401.

<sup>64</sup> *ICC Case 15751/JHN and ICC Case 16948/GZ*.

<sup>65</sup> Gillion, “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] I.C.L.R. 388, 406 asserts “the correct measure of damages for a breach by the losing party of its obligations 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”. His reasoning is that “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”. His conclusion is that “... if the losing party had promptly given effect to the DAB decision, the other party would have received the amount awarded by the DAB”.

The author suggests that at least under English law,<sup>66</sup> the opposing and more compelling argument is that the loss that flows from the breach of contract would be limited to a claim for interest and/or costs and not the sum contained within the DAB decision itself.

**Obstacle 3: Summary relief** The author considers that the wording in subcl.20.6 does not *require* a consideration of the merits. The author considers that subcl.20.6 contains a power to open up, review and revise but no obligation on the arbitral tribunal to do so.<sup>67</sup> Whilst subcl.20.6 does not expressly state that summary enforcement is possible, it also does not exclude the possibility. If an arbitral tribunal does need to consider the merits in order to enforce, the author suggests that there can be no efficient means for the arbitral tribunal to consider those merits somehow separately to the underlying dispute. The arbitral tribunal may as well finally determine the matter rendering any enforcement application redundant.<sup>68</sup>

### Specific performance

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

As this option does not rely on the wording of the contract obstacles 1–3 relating to damages (which do stem from the wording of the contract) do not present themselves. Accordingly, if seeking specific performance, the winning party will not need to refer the matter to the DAB first, will not have any issues concerning losses

arising from breach of contract and will not be restricted by the wording of subcl.20.6 (if it exists at all) concerning the necessity to consider the merits first.

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

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

There are ICSID cases which suggest that an arbitral tribunal has an inherent power to grant specific performance.<sup>69</sup> There is also authority for the proposition that even if there is no express power to award specific performance the courts will nevertheless have such a power.<sup>70</sup>

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

<sup>66</sup> This opposing view is supported as follows:

- In *ICC Case 16949/GZ*, the sole arbitrator suggests that damages for breach of contract “would hardly be a claim for damages of the same amounts already awarded”.
- Judge Ean in the High Court of Singapore in the *Persero* case also saw this as a potential issue when she issued the following note of caution: “Suing in contract for breach may not be the best practical move for the winning party, especially when the decision only relates to payment of money. The winning party may need to prove damages, which may be no more than a claim for interests on the sum owing.”
- Mr Seppälä in his article “An Engineer’s Dispute Adjudication Board’s Decision is Enforceable by an Arbitral Award” White & Case December 2009, recognises that the tribunal in *ICC Case 101619* could have taken this approach but chose not to. He states: “The Tribunal could have held merely that the Employer was in breach of contract and required the Employer to pay damages for such breach, represented by interest on the amount of the unpaid decisions. But, instead, the Tribunal ordered the Employer to pay the amount of the Engineer’s decisions on the ground that ‘this is simply the law of the Contract’”.
- Edwin Peel makes a distinction under English law (Edwin Peel (ed.) *Trietel on The Law of Contract* (London: Sweet & Maxwell, 2007), para.21-001 between:
  - an action for a price; and
  - an action for damages.

He considers that an action for an agreed sum differs from a claim for damages not only in its nature, but also in its practical effects. The former is a claim for specific enforcement of the defendant’s primary obligation to perform what he has promised. The latter arises where the agreed sum is not paid and the claimant also suffers additional loss. In these circumstances, he may be entitled to bring both the action for the agreed sum and an action for damages.

<sup>67</sup> The notion that an arbitral tribunal needs to consider the merits of the case in order to enforce a binding DAB decision stems from Judge Ean’s flawed reasoning in the High Court of Singapore in the *Persero* case. Footnote 27 above demonstrates the difficulties that the author has with Judge Ean’s reasoning. The Court of Appeal did not adopt the idea of reviewing and revising/confirming the DAB’s decision but stated at [66] of its judgement that “a reference to arbitration under Sub-Clause 20.6 ... in respect of a binding but non-final DAB decision is clearly in the form of a rehearing so that the entirety of the parties’ disputes can finally be resolved afresh.” Taken in isolation, it may be that this sentence is interpreted as suggesting that under subcl.20.6 there has to be a hearing of the merits. In the following sentence of the same paragraph, however, the Court of Appeal conclude: “While there is a theoretical gap in the immediate enforceability of such a DAB decision under the 1999 FIDIC Conditions of Contract, both ICC Case No 10619 and the case mentioned in the September 2010 DBF newsletter suggest that the practical response is for the successful party in the DAB proceedings to secure an interim or partial award from the arbitral tribunal in respect of the DAB decision pending the consideration of the merits of the parties’ dispute(s) in the same arbitration.” The Court of Appeal appear, therefore, to be suggesting that an interim or partial award is permissible (without hearing the merits) in circumstances in which the merits will be heard later in the same arbitration.

<sup>68</sup> The Beau Rivage report proceeds on the basis of the Singapore courts’ premise that an award concerning DAB enforcement is not possible without a review on the merits. In the author’s view, this was not necessary. See fn.27 above.

<sup>69</sup> In the ICSID case of *Enron Corporation and Ponderosa Assets L.P. v The Argentine Republic* “The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts.” See also, Christoph Schreuer “Non-pecuniary remedies in ICSID arbitration” [2004] 20(4) *Arbitration International* 325.

<sup>70</sup> See, e.g. *Brandon v MedPartners Inc* 203 FRD 677 at 686 (SD FLA 2001) and Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), fn.57 on p.531 (para.9.52).

contract. It is arguable, however, that this section was conceived with the final award in mind (as opposed to a provisional order).<sup>71</sup>

**How should an arbitral tribunal exercise its power?** It is well known that in common law systems, specific performance is deemed to be an equitable form of relief and as such an exceptional remedy, available only in situations where damages do not provide an adequate remedy<sup>72</sup> but that in civil law jurisdictions, specific performance is not a discretionary extraordinary remedy but the general rule.<sup>73</sup>

Redfern and Hunter state that

“the question of whether an arbitral tribunal is empowered to order specific performance is thus rarely an issue in international arbitration. However, the question whether it is an appropriate remedy, and whether it can effectively be granted in the circumstances of the particular case, may prove less straightforward.”<sup>74</sup>

How this power could be exercised in the context of subcl.20.4 has not been expressly explored in the cases concerning this issue discussed above.<sup>75</sup>

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

## Part 4: Bridging the gap

### *The FIDIC Gold Book*<sup>76</sup>

Under the Gold Book conditions, the subclause dealing with the enforcement of DAB decisions is dealt with in subcl.20.9:

“20.9 Failure to comply with the Dispute Adjudication Board’s Decision. In the event that a Party fails to comply with any

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

The new Gold Book guide<sup>77</sup> provides:

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

### *The Subcontract conditions*<sup>78</sup>

Subclause 20.6 of the subcontract provides:

“In the event that a Party fails to comply with any decision of the Subcontract DAB, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.7 [Subcontract Arbitration] for the purpose of obtaining an award (whether interim or other) to enforce that decision. There shall be no

<sup>71</sup> In the author’s opinion, despite the authorities above, it may still be arguable that if the arbitral tribunal does not have a power to order specific performance in relation to a binding DAB decision under the:

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

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

<sup>72</sup> In an English case concerning a breach of a covenant to repair—*Rainbow Estates Ltd v Tokenhold* [1999] Ch. 64, the High Court gave guidance on when it might be appropriate to grant specific performance: “Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy.”

<sup>73</sup> See, for example, Risk allocation in the FIDIC Conditions of Contract (1999) for Construction (Red Book) and the FIDIC Conditions of Contract (1999) for EPC/Turnkey Projects (Silver Book) from the perspective of a German lawyer Rechtsanwalt Dr Götz-Sebastian Hök (published on the *FIDIC.org* website [Accessed June 26, 2012]).

<sup>74</sup> Redfern and Hunter with Blackaby and Partasides, *Redfern and Hunter on International Arbitration* (2009), para.9.52.

<sup>75</sup> *ICC Case 10619* appears to be predicated on the basis that the arbitrator does have a power to order specific performance (“giving the Engineer’s decisions their full effect”) of a *binding*DAB decision. Whilst the thinking behind *ICC Case 10619* is not spelt out, it may be that the arbitral tribunal considered it had an inherent power to specifically enforce “the law of the contract”. Mr Seppälä does not consider the *ICC Case 10619* award to be based on a cause of action for damages for breach of contract as he recognises in his article Seppälä, “An Engineer’s Dispute Adjudication Board’s Decision is Enforceable by an Arbitral Award” White & Case December 2009, that the tribunal in *ICC Case 10619* could also have taken this alternative approach: “The Tribunal could have held merely that the Employer was in breach of contract and required the Employer to pay damages for such breach, represented by interest on the amount of the unpaid decisions. But instead, the Tribunal ordered the Employer to pay the amount of the Engineer’s decisions on the ground that ‘this is simply the law of the Contract’. In the author’s [Mr Seppälä’s] view, this is the right approach.” It is unfortunate that the “the law of the contract” solution put forward in *ICC Case 10619* is not explained. It is not clear where in the law of the contract a power is given to an arbitral tribunal to enforce an Engineer’s (or DAB’s) decision. Ordinarily, an arbitral tribunal (unlike a court) will not have the power to award specific performance unless that power is expressly bestowed upon it by the Parties. In certain circumstances, the contract may do that (e.g. subcl.20.7). In other circumstances, the applicable law may provide the solution (e.g. s.48 of the English Arbitration Act 1996).

<sup>76</sup> The FIDIC Conditions of Contract for Design, Build and Operate projects First edition 2008.

<sup>77</sup> FIDICDBO Contract guide for the FIDIC Conditions of Contract for Design, Build and Operate projects First edition 2011.

<sup>78</sup> Conditions of Subcontract for Construction (First Edition, 2011). For building and engineering works designed by the Employer.

requirement to obtain a Subcontract DAB's decision or to attempt to reach amicable settlement in respect of this reference."

The difference in wording between the Gold Book and the subcontract conditions are set out in the table below.

Gold Book	Subcontract
"Whether binding or final and binding".	These words have not been replicated.
"For summary or other expedited relief as may be appropriate".	"For the purposes of obtaining an award (whether interim or other) to enforce that decision".
"Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's decision] and Sub-Clause 20.7 [Amicable Settlement] shall not apply to this reference."	"There shall be no requirement to obtain a Subcontract DAB's decision or to attempt to reach amicable settlement in respect of this reference."

The new wording of the Gold Book and Subcontract form resolve obstacles 1, 2 and 3 discussed in the context of the damages option above as they:

1. Provide express wording that enable a party to refer to arbitration a failure to comply with any DAB decision, whether it be *binding* or *final and binding*. The Gold Book actually states in terms "whether binding or final and binding". The Subcontract no doubt considered these additional words superfluous. Both contracts clearly apply to "any DAB decision" which includes binding and final and binding.
2. Make it clear that the parties do not have to pursue a claim based on damages for breach of contract. A clear contractual right has been given to enforce the DAB's decision (akin to a power of specific enforcement).
3. In subcl.20.9 of the Gold Book [equivalent of 20.7 in the 1999 forms] subcl.20.6 [equivalent of 20.4 in the 1999 forms] is expressly disapplied. Accordingly, the dispute does not have to be referred back to the DAB first. The Gold Book guide and the Subcontract make it even clearer that it is unnecessary to refer a failure to the DAB first.
4. The failure itself can be referred to arbitration in the new books. Accordingly, it is not necessary for the merits to be considered. The Gold Book anticipates the contractor to seek "summary or other expedited relief as may be appropriate".

It is interesting that the Subcontract form does not adopt the same wording but instead provides that a party can obtain "an award (whether interim or other) to enforce that decision".

If the contractor is seeking enforcement of a final and binding decision then it will be seeking a final award to enforce the decision. There is no doubt about that.

The wording "interim or other" must therefore be referring to the enforcement of a binding DAB decision. It is of note that the only form of award which is expressly suggested is an interim award, which accords to the author as the only appropriate form of award. It seems that the reference to "or other" is reference to either a partial or final award. I have set out above my reasons for why these forms of award are inappropriate.

### *Beau Rivage*

The *Beau Rivage* recommendation for the enforcement of binding DAB decisions commences:

"Because of its provisional nature, the decision cannot be given as such any enforceable value through a final award unless first reviewed on the merits."

The author endorses the conclusion reached by the Beau Rivage Working Group that a final award cannot be given enforceable value because of its provisional nature for the reasons given in the *Resort Condominiums* case.

The author considers, however, that the addition of the words "unless first reviewed on the merits" confuses matters. As set out previously, the concept that there needs to be a review on the merits is not found in the general conditions itself and is derived from the flawed logic adopted by the High Court in the *Persero* case.

The *Beau Rivage* recommendation appears to proceed on the basis that if the issue concerning a review on the merits is removed then the issue concerning the enforceability of a temporary measure somehow disappears. This, in the author's view is illogical.

In the author's view, under the Gold Book, it is inappropriate for a final award to be given in relation to a provisionally binding decision notwithstanding the fact that the Gold Book confers a contractual right on a party to refer a failure to comply with the binding DAB decision to the arbitral tribunal. There is no problem, in principle, giving an interim award, which is possibly why the wording of the Subcontract form specifically suggests such an award.

### Conclusion

A winning party at DAB level wants to be paid the money adjudged as due by the DAB. That is what the contract says the losing party should do in the fourth paragraph of subcl.20.4—prompt effect should be given to the DAB's decision. If a losing party fails to pay, what the winning party really wants is to force the losing party to pay or order the defaulter to comply with the obligation set out in the contract promptly to give effect to the DAB's decision.

Properly analysed, therefore, the author considers that the relief that the winning party is hoping to obtain is the “enforcement” of the DAB’s decision (as opposed to a claim for damages). Ordinarily arbitral tribunals do not have enforcement powers. They certainly do not have powers to enforce arbitral awards under the New York Convention. That is the domain of national courts that possess coercive powers to enable them to enforce awards. These powers form part of the prerogative of the state. One has to question, therefore, whether even if an arbitral tribunal has a power of specific performance, such a power can be interpreted as being a power to enforce that should be exercised.

In relation to an award, a party can always go to a national court for enforcement. As there is no treaty concerning the enforcement of DAB decisions, however, it is doubtful whether a national court, if presented with a DAB decision, will be prepared to treat it as an arbitral award and then enforce it. One has to question, therefore, whether an arbitral tribunal ought to have the power of enforcement of a DAB’s decision when a national court is not likely to have that power.

The author asks rhetorically: why should an arbitral tribunal convert a binding decision into a final and binding award so that it can be enforced by a national court when its true nature is that it is interim relief and when ordinarily a national court would not enforce interim relief?

In conclusion, the author considers that after a winning party has received a DAB decision and the losing party has issued a notice of dissatisfaction, the winning party should wait for the 56 day amicable settlement period to expire prior to issuing a Request for Arbitration referring the underlying dispute to arbitration for a final resolution of the merits.

If a winning party wishes to pursue enforcement of the binding DAB decision, it should probably hedge its bets and seek a declaration<sup>79</sup> that it is entitled to either an interim or a partial award based on either damages or specific performance. To avoid argument concerning the damages claim, the winning party would be well advised to refer the dispute first to the DAB:

- The author considers that the main difficulty in the breach of contract route (as long as the dispute is referred to the DAB

first) is winning the argument that the principal sum amounts to damages for breach of contract.

- In relation to the specific performance route, the author considers that a winning party may well be able to establish that the tribunal has a power of specific performance but convincing the arbitral tribunal to exercise that power for enforcement of a provisional DAB decision will be the difficulty.

If an arbitral tribunal sees a way through one or both of the above routes, it will still have to grapple with the most appropriate form of award to make. In the author’s opinion, there are good reasons why a partial final and/or a final award should not be made. The author considers if an award is to be made the most acceptable form of award, in principle, is an interim award but that the difficulty in persuading an arbitral tribunal for an interim award stems from the difficulty in establishing *perriculum in mora* and *fumus boni iuris*.

## Epitaph

There are many statistics available that suggest that projects that deploy DABs resolve disputes without the parties needing to have recourse to arbitration. That is good for the industry.

It should not be ignored, however that there are also projects in which parties have adopted the 1999 forms but deleted the DAB provisions. This may have been done for various reasons, one of them being the fear that the DAB’s decision will not be enforceable. The author does not encourage this practice as the 1999 forms provide a complete dispute resolution mechanism. Deleting a chunk of it is not desirable particularly if the chunk deleted is not replaced with something else.

All that a party needs to do after receiving a DAB’s decision is to issue a notice of dissatisfaction to ensure that the DAB decision is not final and binding. If there is a risk—and the author suggests in this article that there is a distinct risk—that the binding DAB decision is not enforceable, whatever the wording adopted (including the new Gold Book and Subcontract wording), then one has to question whether the DAB can or should survive in its present form.

<sup>79</sup> A declaratory award would establish the legal position between the parties definitively and would be binding on the parties. Some legislation expressly empowers an arbitral tribunal to make a declaration (See for example s.48(3) of the English Arbitration Act 1996). It should be noted that whilst declaratory relief is capable of recognition, it is not capable of enforcement. See *Redfern and Hunter with Blackaby and Partasides, Redfern and Hunter on International Arbitration* (2009), para.9.63.

