

# An Excellent Decision From Singapore Which Should Enhance the Enforceability of Decisions of Dispute Adjudication Boards—the Second *Persero* Case before the Court of Appeal

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✉ Arbitral tribunals; Decisions; Dispute adjudication boards; Enforcement; FIDIC forms of contract; Jurisdiction; Singapore

## Introduction

The Singapore Court of Appeal, the country's highest court, has recently issued a decision which demonstrates a complete understanding of how the disputes clause in the International Federation of Consulting Engineers' (FIDIC) Conditions of contract is intended to operate. It is the best decision yet by the Singapore courts on this subject and, if followed elsewhere (as it should be), should enhance the enforceability of decisions of Disputes Adjudication Boards (DABs) around the world.

The decision concerns a long-running dispute in the Singapore courts between PT Perusahaan Gas Negara (Persero) TBK, an Indonesian employer (the employer), and CRW Joint Operation, an Indonesian contractor (the contractor). The parties' dispute gave rise to the following question under a contract based on FIDIC's Conditions of Contract for Construction 1999 (the "Red Book")<sup>1</sup>: whether and in what manner the decision of a DAB ordering the employer to make a payment to the contractor, which has been the subject of a notice of dissatisfaction from the employer under subcl.20.4 and thus been prevented from becoming final and binding, may be enforced by an arbitral award?

Consideration of this question has given rise to issues about how both the Singapore International Arbitration Act (SIAA) is to be interpreted and the dispute resolution clause, cl.20, in FIDIC's construction contracts for major works produced in 1999 is to be understood. However, this article will be confined to commenting on what the Court of Appeal had to say about how cl.20 of the FIDIC contracts is

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<sup>1</sup> As they provide for the same dispute settlement procedure, the Singapore court's analysis is equally relevant to FIDIC's Conditions of Contract for Design-Build (Yellow Book) and Conditions of Contract of EPC/Turnkey Projects (Silver Book).

to be understood, specifically as regards to DAB, leaving to others to comment on the SIAA issue.

## The Court of Appeal's decisions as regards cl.20 and the DAB

It will be recalled that cl.20 of FIDIC's conditions of contract for major works issued in 1999 provides for the following multi-tier procedure for settling disputes:

- 1) either the contractor or the employer may refer any dispute to the DAB for decision;
- 2) the DAB, acting as a panel of experts and not as arbitrators, must give its decision to the parties within 84 days;
- 3) if either party is dissatisfied with the DAB's decision (or the DAB fails to give a decision within 84 days) then either may, within 28 days, notify the other of its dissatisfaction; otherwise, the decision becomes final and binding on the parties;
- 4) where a party has given a notice of dissatisfaction, both parties have 56 days thereafter to attempt amicably to settle the dispute; and
- 5) any dispute, which has neither become final and binding, nor been amicably settled, under the preceding steps, is to be finally settled by international arbitration, the Rules of Arbitration of the International Chamber of Commerce (ICC) being specified.

In 2009, an ICC arbitration tribunal with its seat in Singapore had issued, by a majority, a final award enforcing the binding but not final decision of a DAB ordering the employer to pay approximately \$17 million to the contractor (the "2009 Arbitration").

Subsequently, the employer applied to the Singapore High Court to have the award set aside (*Persero I*). In 2010, the High Court found, interpreting cl.20, that the failure by a party to comply with a binding but not final DAB decision gave rise to a secondary dispute separate from the primary dispute that had formed the subject matter of the DAB decision (the "two dispute" approach). This secondary arose from the employer's failure to pay the DAB decision. As the contractor had not referred this secondary dispute to the DAB before commencing arbitration, the High Court found that the arbitrators were without power to deal with it and had exceeded their jurisdiction<sup>2</sup>. The High Court also held that the majority of arbitrators had exceeded their jurisdiction by issuing a final award in respect of that DAB decision without first determining the correctness of the DAB's decision on the merits and, thus, set the award aside.<sup>3</sup>

In 2011, the Court of Appeal agreed with the High Court that the majority of arbitrators had exceeded their jurisdiction by issuing a final award enforcing the DAB decision without considering the merits underlying that decision, but it did not adopt the High Court's "two dispute" approach.<sup>4</sup>

In its judgment, the Court of Appeal commented *obiter dicta* that a binding but not final decision of the DAB was directly enforceable by an interim or partial

<sup>2</sup> *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202; 137 Con. L.R. 69 at [31].

<sup>3</sup> *Persero* [2010] SGHC 202; 137 Con. L.R. 69 at paras [32]–[36] and [43].

<sup>4</sup> *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2011] SGCA 33 at [66]–[68].

award in an arbitration to which the merits of the DAB decision had been submitted but not by a final award in a separate arbitration, as had occurred in this case.<sup>5</sup>

Relying on the Court of Appeal’s *obiter dicta*, in 2011 the contractor began a second ICC arbitration, in which it sought a final determination that the employer was liable on the merits to pay the contractor the amount of the DAB decision and, pending that final determination, an interim or partial award for the sum with interest (the “2011 Arbitration”). In this second arbitration, the majority of the arbitrators held that the DAB decision could and should be enforced by an interim award. They concluded that this would give effect to the parties’ commercial intent in including the DAB mechanism in the conditions of the contract; otherwise the DAB mechanism would be rendered “toothless”.<sup>6</sup>

Despite the interim award, the employer still refused to pay the amount of the DAB decision, instead applying to the Singapore courts to have this second award set aside as well (*Persero II*) which the Singapore High Court refused to do.<sup>7</sup>

On appeal to the Court of Appeal, the employer advanced a novel argument (in addition to an argument based on the SIAA), namely, that the effect of subcl.20.4 was that the DAB decision would cease to be binding as soon as the tribunal in the 2011 Arbitration made any award on the parties’ underlying dispute on the merits of the DAB decision. In this case, the tribunal had made certain findings on the merits of the DAB decision by a partial award in September 2014 and the employer argued that the DAB decision thus ceased to have any binding effect as from the date of issuance of that partial award.<sup>8</sup>

In response, the contractor argued that the commercially sensible way of reading subcl.20.4 was that the decision of the DAB only ceased to be binding upon the final determination of the parties underlying dispute over the merits of the decision, and even if there were any partial determination of the merits of the decision in the meantime, this would not affect the interim award.<sup>9</sup>

In the course of rejecting the employer’s position as not “commercially sensible”<sup>10</sup> (as the contractor had argued), the Court of Appeal addressed and resolved three important issues that have divided commentators and tribunals in relation to cl.20 until now. These issues are as follows:

- 1) Whether a contractor, who has obtained a non-final decision of a DAB which the employer has refused to pay, may request an arbitral tribunal to enforce that decision directly or whether the contractor must first refer the employer’s non-compliance with that decision of the DAB back to the DAB as a separate dispute and thereafter to amicable settlement?<sup>11</sup>
- 2) Whether, given that subcl.20.7 only provides for a failure by a party to comply with a final and binding DAB decision to be referred to arbitration directly, it is to be inferred that a failure by a party to

<sup>5</sup> *Persero* [2011] SGCA 33 at [66]–[68].

<sup>6</sup> Interim award in ICC Case No. 18272 at [49].

<sup>7</sup> *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2014] SGHC 146; [2015] B.L.R. 119; 155 Con. L.R. 169; and see C.R. Seppälä, “Singapore contributes to a better understanding of the FIDIC disputes clauses: the second Persero case” (2015) ICLR 4.

<sup>8</sup> *Persero* [2015] SGCA 30 at [32].

<sup>9</sup> *Persero* [2015] SGCA 30 at [35].

<sup>10</sup> *Persero* [2015] SGCA 30 at [109].

<sup>11</sup> *Persero* [2015] SGCA 30 at [63]–[76].

comply with a non-final DAB decision may not similarly be referred to arbitration directly?<sup>12</sup>

- 3) Whether a non-final DAB decision may only be enforced in an arbitration to which the dispute over the underlying merits of that decision has been submitted or whether the enforcement of that decision may be referred to a separate arbitration under subcl.20.6 and thus be the subject of a final award?<sup>13</sup>

How the majority of the Court addressed—there was a dissenting judge—and resolved each of these issues is discussed below.

### ***Must a failure to comply with a non-final DAB decision be referred back to the DAB?***

As indicated above, the High Court in *Persero I* had taken the “two dispute” approach, that is, it had found that the failure of a party to comply with a binding but not final DAB decision gave rise to a secondary dispute that had to be referred back to the DAB before commencing arbitration.

Rejecting this argument, the Court of Appeal in *Persero II* first asked:

“... what purpose can it serve to ask a DAB whether a decision which it has already issued requiring one party to make payment to the other should be promptly complied with? Why else would the DAB have issued its decision in the first place? In this regard, it bears reiteration that clause 20.4 (4) of the Conditions of Contract explicitly states that the parties ‘shall *promptly* give effect’ [emphasis added] to a non-final DAB decision.”<sup>14</sup>

Second, the Court stated that the receiving party of the decision (that is, its beneficiary) would encounter a number of practical difficulties if it were required to refer the paying party’s non-compliance with a non-final DAB decision through the steps in sub-cll.20.4 and 20.5. Among other things, “there would be inordinate delay”<sup>15</sup> in waiting for another DAB decision (for up to 84 days), then in seeing whether a notice of dissatisfaction were issued with respect to it (up to 28 days) and then in referring the matter to amicable settlement (56 days). Given “the purpose and context of the DAB scheme”, the Court finds that:

“it would not be commercially sensible to interpret clause 20 as requiring the receiving party to satisfy the conditions precedent in clauses 20.4 and 20.5 before it can refer a dispute over the paying party’s non-compliance with a binding but not final DAB decision to arbitration.”<sup>16</sup>

Third, the Court finds support for its position in FIDIC’s Guidance Memorandum for Users of the 1999 Red Book issued on April 1, 2013, noting quite correctly that it “make[s] explicit the intentions of FIDIC” that are already implicit in cl.20,

<sup>12</sup> *Persero* [2015] SGCA 30 at [77]–[82].

<sup>13</sup> *Persero* [2015] SGCA 30 at [83]–[88].

<sup>14</sup> *Persero* [2015] SGCA 30 at [66(a)].

<sup>15</sup> *Persero* [2015] SGCA 30 at [66(b)].

<sup>16</sup> *Persero* [2015] SGCA 30 at [66(b)].

specifically that it is unnecessary to refer a failure to comply with a non-final DAB decision back to the DAB and amicable settlement before referring it to arbitration.<sup>17</sup>

Finally, the Court notes that subcl.20.4

“evinces a clear intention for parties to *promptly* comply with a DAB decision, irrespective of any disagreement or dissatisfaction with it. This serves the financial objective of safeguarding cash flow in the building and construction industry, especially that of the contractor, who is usually the receiving party. The intention underlying clause 20.4 would be completely undermined if the receiving party were restricted to treating the paying party’s non-compliance as a breach of contract that sounds only in damages and must be pursued before the available domestic courts.”<sup>18</sup> (emphasis in the original).

Thus, the Court rejected the argument that it was necessary to refer non-compliance with the decision of the DAB back to the DAB for a further decision and then to amicable settlement.

### ***May a failure to comply with a non-final DAB decision be referred directly to arbitration?***

Some authors and tribunals have suggested that as subcl.20.7 provides for the referral of a failure to comply with “final and binding” DAB decision directly to arbitration, a failure to comply with a “binding” decision cannot be referred directly to arbitration for enforcement.<sup>19</sup> Indeed, this had been part of the reasoning of the Singapore High Court and Court of Appeal in *Persero I*.

After reviewing the history of the incorporation of subcl.20.7 into the Red Book, the Court concluded (following what the present author had written<sup>20</sup>) that subcl.20.7

“... was never intended to exclude a receiving party’s right to seek an arbitral award in relation to a paying party’s failure to comply with a binding *but non-final* DAB decision.”<sup>21</sup> (emphasis in the original)

Thus, a paying party’s failure to comply with a binding but not final decision is itself capable of being directly referred to arbitration.<sup>22</sup>

The present author endorses the court’s conclusion. However, in a lengthy dissent, Chan Sek Keong SJ, took issue with the majority stating:

“While Mr Seppälä’s explanation of the origin of cl 20.7 supports his argument that no inference as to the scope of the disputes referable to arbitration under cl 20.6 should be drawn from the *insertion* of cl 20.7 in the Red Book (in the form of cl 67.4 of the 1987 Red Book), in my view, an inference may reasonably be drawn from the long absence of cl 20.7 until 1987, namely, that disputes over non-compliance with binding but non-final DAB decisions

<sup>17</sup> *Persero* [2015] SGCA 30 at [68].

<sup>18</sup> *Persero* [2015] SGCA 30 at [71].

<sup>19</sup> E.g. Dr Nael Bouni, “The gap in sub-clause 20.7 of the 1999 FIDIC contracts for major works” (2005) ICLR 272.

<sup>20</sup> See Seppälä, “Sub-clause 20.7 of the FIDIC Red Book does not justify denying enforcement of a ‘binding’ DAB decision” (2011) 6(3) Cons. L.I. 17.

<sup>21</sup> *Persero* [2015] SGCA 30 at [82] and see Seppälä, “Sub-clause 20.7 of the FIDIC Red Book does not justify denying enforcement of a ‘binding’ DAB decision” (2011) 6(3) Cons. L.I. 17.

<sup>22</sup> *Persero* [2015] SGCA 30 at [83].

were not intended to be referable to arbitration. *When the Red Book was first published in 1957, enforcement by an arbitral award of a DAB decision that had become final and binding (ie, where no NOD had been issued by either party) was unnecessary, or considered unnecessary, because there was a faster and cheaper way to enforce such a DAB decision—namely, by way of summary judgment in court proceedings.* If an arbitral award were essential for enforcement purposes, FIDIC would surely have inserted cl 20.7 in the Red Book a long time ago. Clause 20.7 became necessary or useful only when the Red Book was adopted for international building and construction contracts in foreign jurisdictions, where disputants might not wish to settle their disputes in “local” courts [...] And indeed, cl 20.7 was inserted only in 1987 (in the form of cl 67.4 of the 1987 Red Book) after Mr Seppälä had drawn attention to its desirability in cases where the Red Book was used in international building and construction contracts.”<sup>23</sup> (my emphasis)

The italicised words, coupled with his earlier words that “[t]he dispute resolution provisions in the 1957 Red Book were good enough for the UK building and construction industry at the time”,<sup>24</sup> indicate that the dissenting judge believes that the Red Book was, initially at least, for use in the UK where summary judgment in court proceedings would be available. With respect, this is incorrect. As I stated in an earlier article,<sup>25</sup> while the first edition of the FIDIC Red Book published in 1957 had been based on a UK domestic form of contract (the Institution of Civil Engineers (ICE) Conditions), the Red Book was intended—and is intended—specifically for international use (indeed, FIDIC, as an international organisation, would not be publishing the form otherwise). As it was (and is) for international use there could be no assumption that a summary judgment from a local court to enforce the decision of an engineer (as the DAB only replaced the engineer in his pre-arbitral role of deciding disputes in the 1999 edition of the Red Book) would be available as might have been true in England. Nor could it be assumed that a foreign contractor, for example, would want to go into a local court, quite possibly against a local public body (as many contracts based on the Red Book are signed with states or state-owned entities), in some developing countries where FIDIC contracts are typically used. Indeed it is to assure a neutral forum for the final resolution of disputes that the Red Book provides for international arbitration.

As I indicated in my article, while the draftsmen of the first edition of the Red Book had provided for international arbitration in that contract, they had apparently overlooked the fact that a foreign contractor might have no desire to proceed before a local court. This in turn had led me to propose, as the result of an experience involving the need to enforce a final and binding decision, which had gone unpaid, that the next edition of the Red Book, which was the fourth edition of 1987, make a failure to comply with such a final and binding decision referable to arbitration directly.<sup>26</sup>

<sup>23</sup> Persero [2015] SGCA 30 at [170].

<sup>24</sup> Persero [2015] SGCA 30 at [168].

<sup>25</sup> The dissenting judge quotes what I said in paragraph 167 of his judgment.

<sup>26</sup> See Seppälä, “The pre-arbitral procedure for the settlement of disputes in the FIDIC (Civil Engineering) Conditions of Contract” (1986) ICLR 315, 334.

It also needs to be recalled that FIDIC is a federation of national associations of engineers and its contracts are drafted by engineers. Consequently, it is entirely possible, especially when the early editions of the Red Book were prepared, that limited legal attention was paid to the dispute resolution clause. It also needs to be recalled that, until the quadrupling of oil prices in the early 1970s leading to the construction boom in the oil producing countries, there was much less international construction in the world and, thus, much less use of FIDIC contracts, than today.

For this reason, many drafting issues with FIDIC contracts, like this one, did not come to the surface until the 1980s and 1990s.

Thus, it should not be surprising that the issues of the enforceability of a final and binding decision were not addressed until 1987 nor that the issue of the enforceability of a non-final decision has not been raised until more recently.

### ***Whether a non-final DAB decision may be enforced by a final, as well as an interim, award?***

The Court of Appeal rejected the position taken both by the courts in *Persero I* and the High Court in *Persero II* that all differences between the parties, whether as the result of a party's failure to comply with a binding but not final decision or as a result of the merits underlying that decision, must be submitted to the same arbitration. The Court of Appeal stated that this position:

“fails to adequately appreciate that an NOD issued in respect of a DAB decision is capable of covering the paying party's dissatisfaction with two aspects of the DAB decision: (a) the quantum that it is required to pay the receiving party; and (b) the need to make *prompt* payment of that sum [...] The dispute over the paying party's failure to *promptly* comply with its obligation to pay the sum that the DAB finds it is liable to pay is a dispute in its own right which is capable of being ‘finally settled by international arbitration’. In our judgment, it is possible to refer that dispute to a separate arbitration.”<sup>27</sup> (emphasis in the original)

Consequently, a majority of the Court of Appeal found that there had been no valid ground to set aside the award of a majority of the arbitrators in the 2009 Arbitration. As the Court put it:

“We thus do not think that the 2009 Majority Arbitrators were wrong to proceed on the basis that the 2009 Arbitration was ‘limited to giving prompt effect to [the DAB decision]’ [...] and to turn down, on the basis, [the employer's] request that the 2009 Tribunal ‘open up, review and revise’ [the DAB decision] on its merits”.<sup>28</sup>

The Court of Appeal summarised its conclusions in relation to subcl.20.7 as follows

<sup>27</sup> *Persero* [2015] SGCA 30 at [83].

<sup>28</sup> *Persero* [2015] SGCA 30 at [87]. As the present author stated in an earlier article: “[The Singapore] courts should have left [the award in the 2009 Arbitration] alone.” See Seppälä, “How not to interpret the FIDIC disputes clause: the Singapore Court of Appeal judgment in *Persero*” (2012) 29(1) ICLR 4, 18.

“[subcl.20.4] imposes a distinct contractual obligation on a paying party to comply promptly with a DAB decision regardless of whether the decision is final and binding or merely binding but non-final, and this obligation is capable of being directly enforced by arbitration without the parties having to first go through the preliminary steps set out in clauses 20.4 and 20.5. Further, we consider that a tribunal would be entitled to make a final determination on the issue of prompt compliance alone if that is all it has been asked to rule on, as was the case in the 2009 Arbitration.”

Thus, the Court of Appeal found that a non-final DAB decision may be enforced by a final, as well as by an interim, award which will be welcome news to all who, like the author, are advocates of enhancing the efficacy of the DAB.

## **Conclusion**

Undoubtedly, in hindsight, the drafting of cl.20 could have been clearer and commentators and tribunals would have less likely been misled by it. But the Court of Appeal of Singapore has now, by this decision, recognised how cl.20 was always intended to operate. In arriving at its decision, the Court has displayed a rare—and most commendable—willingness to review and revise positions which the Singapore courts, including the Court of Appeal itself, had taken, when they are found to have been incorrect.

It is to be hoped that other courts and tribunals will be guided by this decision and avoid the misreadings of cl.20 which have occurred in the past. By doing so, they will also be promoting the DAB which has become the preferred method for resolving disputes (that is, preferred to the engineer’s decision, or international arbitration) in the international construction industry.