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

Suit No:	Originating Summons No 206 of 2010
Decision Date:	20 July 2010
Court:	High Court
Coram:	Belinda Ang Saw Ean J
Counsel:	Philip Jeyaretnam SC and Wong Wai Han (Rodyk & Davidson LLP) for the applicant Siraj Omar and Dipti Jauhar (Premier Law LLC) for the respondent.

Subject Area / Catchwords
Arbitration

Judgment

20 July 2010

Belinda Ang Saw Ean J:

Introduction

1 This originating summons, *viz*, Originating Summons No 206 of 2010 ("OS 206/2010") was filed pursuant to Order 69A Rule 2(1)(d) of the Rules of Court (Cap 322, 2006 Rev Ed) to set aside a final award dated 24 November 2009 ("the Majority Award") issued by the majority members of the arbitral tribunal ("the Majority Tribunal") in the International Chamber of Commerce ("ICC") International Court of Arbitration Case No 16122/CYK("Arbitration Case No 16122"). At the conclusion of the hearing of OS 206/2010, I allowed the application with costs. I now set out the reasons for my decision.

Background

2 The applicant is PT Perusahaan Gas Negara (Persero) TBK ("PGN"), a public listed State owned company established under the laws of the Republic of Indonesia. The respondent is CRW Joint Operation ("CRW"), a tripartite joint operation established under the laws of the Republic of Indonesia and involving PT Citra Panji Manunggal, PT Remaja Bangun Kencana Kontraktor and PT Winatek Widita.

3 On 28 February 2006, PGN and CRW entered into a contract entitled "Pipeline Construction Contract for Onshore Gas Transmission Pipeline Grissik – Pagardewa No 002500.PK/243/UT/2006" ("the Contract"). Under the Contract, PGN engaged CRW to design, procure, install, test and pre-commission a 36-inch diameter pipeline and an optical fibre cable running from Grissik to Pagardewa in Indonesia. The Contract adopted the standard provisions of the *Federation Internationale des Ingenieurs Conseils* ("FIDIC") *Conditions of Contract for Construction* (1st Edition, 1999) ("the 1999 Red Book"), with some modifications made thereto by the parties (these standard provisions as modified, will hereinafter be referred to as "the Conditions of Contract").

4 A dispute subsequently arose between the parties regarding 13 Variation Order Proposals ("VOPs") and CRW's request for payments as stated in these VOPs. Pursuant to sub-cl 20.4 of the Conditions of Contract, the parties referred the dispute to a Dispute Adjudication Board ("the DAB") appointed by the parties. The DAB heard the dispute and rendered several decisions, all of which were accepted by PGN except for the decision rendered on 25 November 2008 ordering PGN to pay CRW the sum of US$17,298,834.57 ("the DAB Decision"). PGN submitted a Notice of Dissatisfaction ("NOD") on 26 November 2008. The reasons for its dissatisfaction were, *inter alia*: (a) the DAB Decision was excessive in that it was for an amount greater than that claimed by CRW (PGN alleged that the DAB gave consideration to additional claims and double-counted some of the sums claimed by CRW); and (b) the DAB Decision was not rendered in accordance with Indonesian law, which was the governing law of the Contract. Attempts to settle by PGN were allegedly not reciprocated by CRW. On 13 February 2009, CRW filed a request for arbitration, *ie*. Arbitration Case No 16122, with the ICC International Court of Arbitration, purportedly in accordance with the Conditions of Contract. By way of explanation, CRW's position, which was based on cl 20 of the Conditions of Contract, was that, notwithstanding the NOD, PGN remained obliged to perform its obligation to pay CRW the sum of US$17,298,834.57 pursuant to the DAB Decision; PGN's refusal to pay that sum to CRW, had caused a "second dispute" between the parties ("the Second Dispute") to arise. Arbitration Case No 16122 was commenced by CRW on 13 February 2009 to resolve this Second Dispute.[note: 1]

5 The hearing of Arbitration Case No 16122 took place on 16 September 2009. The arbitral tribunal comprising Mr Alan J.Thambiayah (Chairman), Mr Neil Kaplan *CBE*, *QC*, *SBS* and Prof. Dr. H. Priyatna Abdurrasyid ("the Arbitral Tribunal") considered two issues: first, whether CRW was entitled to immediate payment of US$17,298,834.57 and, second, whether PGN was entitled to request the Arbitral Tribunal to open up, review and revise the DAB Decision. At the heart of the arbitration was the proper interpretation of sub-cll 20.4 to 20.7 of the Conditions of Contract, *viz*, the arbitration provisions in the Conditions of Contract (hereafter referred to as "the Arbitration Agreement" for short).The relevant sub-clauses read as follows:

> *20.4 Obtaining Dispute Adjudication Board's Decision*
>
> ...
>
> Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. **The 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 as described below**. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.
>
> If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.
>
> In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for

dissatisfaction. Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*] neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

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.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

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. Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.

(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and

(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 *[Law and Language]*.

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. ...

20.7 Failure to Comply with Dispute Adjudication Board's Decision

In the event that:

(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*],

(b) the DAB's related decision (if any) has become final and binding, and

(c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [*Arbitration*], Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference.

[emphasis in original in italics; emphasis added in bold]

6 Initially, CRW challenged the validity of the NOD. If that objection were correct, the DAB Decision would be considered final and binding, and sub-cl 20.7 of the Conditions of Contract, without a doubt, would have applied. However, at the start of the arbitration hearing, CRW accepted, upon reconsideration, that the NOD was valid, but maintained the view that the validity of the NOD did not affect the "binding" nature of the DAB Decision; hence CRW argued, under sub-cl 20.4, PGN was still required to "promptly give effect" to the DAB Decision. PGN, on the other hand, focused on the validity of the NOD to argue that the DAB Decision was *not* "final and binding" as the merits of the DAB Decision had not been the subject matter of a review by the arbitral tribunal. In short, a binding but not final decision could not be converted into a final arbitral award without first determining whether the decision was correct (or ought to be revised) on the merits. That, in essence, was PGN's defence to CRW's claim in the Second Dispute for the immediate payment of the sum set out in the DAB Decision.

7 On 24 November 2009, the majority members of the Arbitral Tribunal ("Majority Tribunal") published its decision (*viz.*, the Majority Award). The Majority Tribunal concluded that the DAB Decision was binding on the parties and that PGN had an obligation to make immediate payment to CRW under the Contract. Hence, the Majority Award, *inter alia*, directed PGN to pay CRW the sum of US$17,298.834.57. As for PGN's contention that the Arbitral Tribunal should open up and review the DAB Decision, the Majority Tribunal held that this argument failed as a defence to CRW's claim for immediate payment of US$17,298,834.57. Concomitantly, the Majority Tribunal noted that PGN nonetheless had the right to commence a separate arbitration to open, review and revise the DAB Decision.

8 CRW proceeded to register the Majority Award in Singapore as a judgment by way of an order of court dated 7 January 2010 in Originating Summons No 7 of 2010/D ("the Registration Order"). PGN, in addition to filing a separate application to set aside the Registration Order, filed OS 206/2010 on 23 February 2010 to set aside the Majority Award. The application to set aside the Registration Order was adjourned pending the outcome of OS 206/2010.

The relief sought by PGN in OS 206/2010

9 In OS 206/2010, PGN sought an order that the Majority Award be set aside pursuant to s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") and Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") (set out in the First Schedule to the IAA). It premised its challenge and application on the following grounds:

(a) the Majority Tribunal exceeded its mandate or jurisdiction in converting the DAB Decision into a final award without determining the merits of the underlying dispute and/or without determining whether the DAB Decision was made in accordance with the Contract (see Article 34(2)(a)(iii) of the Model Law); and/or

(b) the arbitral procedure was not in accordance with the agreement of the parties, which required the merits of the underlying dispute and/or the question of whether the DAB Decision was made in accordance with the Contract to be determined prior to making that decision a final award (see Article 34(2)(a)(iv) of the Model Law); and/or

(c) the refusal and/or failure of the Majority Tribunal to hear the parties on the merits of the underlying dispute and/or the question of whether the DAB Decision was or was not made in accordance with the Contract was a breach of the rules of natural justice, which breach had prejudiced the rights of PGN (see s 24(b) of the

IAA); and/or

(d) the DAB Decision was not made in accordance with the Contract in that the DAB did not apply Indonesian law, which was the governing law of the Contract, and/or added new claims to those originally submitted by CRW, thereby double-counting several claims which had been previously settled.

10 It is trite law that the court will not interfere with an arbitral award even if the award was made on a misapplications of the law or contains errors of fact (see *Government of the Republic of Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278, at [38]). CRW's contention against the granting of this application essentially revolved around the argument that PGN's application was, in reality, an appeal on the merits of the Majority Tribunal's decision, which was, of course, not permitted. PGN's contention, which CRW asserted, was essentially that the Majority Tribunal was wrong to refuse PGN's request to open up, review and revise the DAB Decision in the same arbitration (*ie.* Arbitration Case No 16122). In addition, CRW raised the argument that PGN's fourth ground of challenge was outside the scope of s 24(b) of the IAA and Article 34(2)(a) of the Model Law. It is convenient at this juncture to state that I agreed with CRW for the reason given; accordingly, PGN's fourth and last ground of challenge to the Majority Award failed *in limine*.

11 I did not, however, accept CRW's main contention that the subject matter of this application was an appeal on the merits of the Majority Tribunal's decision. The issue here was whether a failure to comply with a binding but not final DAB Decision made under cl 20 of the Conditions of Contract could be enforced by reference to arbitration under sub-cl 20.6. An important question relating to the issue here (just like the query raised in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 at [24] under the UK Arbitration Act 1996 (Chapter 23)) was whether the Majority Tribunal purported to exercise a power which it did not have. In other words, did the Majority Tribunal act in excess of its powers in making, *inter alia*, the direction in the Majority Award that PGN was to pay CRW the sum of US$17,298.834.57? This question will be considered later under PGN's first ground of challenge, which is based on Article 34(2)(iii) of the Model Law (see [26] to [37] below).

Features of cl 20 of the Conditions of Contract

12 Before going into the main grounds of my decision, an overview of the features of cl 20 of the Conditions of Contract is beneficial for a proper understanding of the contractual framework for resolving disputes between the parties. The procedure for dispute resolutions by the DAB under cl 20 of the Conditions of Contract comprises various specific steps, and the debate here concerned the last step, namely, the admissibility of a reference to international arbitration of *any* dispute in respect of which the DAB decision in question was not "final and binding" and which dispute had not been settled amicably (see sub-cl 20.6 at [5] above).

13 I should first mention sub-cl 20.7 of the Conditions of Contract, which deals with the situation where a party fails to comply with a DAB decision. Sub-cl 20.7 is confined to the enforcement by means of an arbitral award of a DAB decision which has become "final and binding" in that no party has given a notice of dissatisfaction within 28 days after receipt of that decision, and a party fails to comply with the DAB decision against it.

14 The narrow scope of sub-cl 20.7 is highlighted in the leading textbook by Baker, Mellors, Chalmers & Lavers, *FIDIC Contracts: Law and Practice* (Informa, London 2009) ("*FIDIC Contracts: Law and Practice*") at paras 9.164-9.165, which read:

Enforcement of a decision of the DAB

9.164 Although the decision of a DAB is binding on the Parties and they are required to give effect to ... it [1999 Red Book, sub-clause 20.4], promptly, one Party may nevertheless refuse to implement it. When the DAB gives a decision, the following outcomes are possible:

(i) Neither Party gives notice of dissatisfaction, so that the decision becomes final and binding. Both Parties accept and implement it.

(ii) Neither Party gives notice of dissatisfaction, so that the decision becomes final and binding. One Party (or both) refuses to implement the decision.

(iii) One Party (or both) gives notice of dissatisfaction. One Party (or both) refuses to implement the decision.

9.165 In outcome (i), there is obviously no need for either Party to enforce the decision. However, in outcomes (ii) and (iii), such a failure to comply with a decision once it has become binding may be enforced by reference to arbitration. Enforcement of decisions at arbitration is considered further in para. 9.217 *et seq* below.

In this regard, paras 9.217 – 9.218 are also relevant:

Enforcement of a DAB's decision

9.217 Although a decision of the DAB on a dispute is binding on the Parties, and they are obliged under Sub-Clause 20.4... 'promptly' to give effect to it, the Party in whose favour the decision is given may wish to seek to enforce the decision if the other Party does not comply with it.

Final and binding decision

9.218 Under Sub-Clause 20.7...a Party may refer to arbitration the failure of the other Party to comply with a *final* and binding DAB decision. This Sub-Clause expressly excludes the application of Sub-Clauses 20.4 and 20.5 ... to such a reference. Thus, the failure to comply with the decision of the DAB may be referred directly to arbitration as soon as the decision has become final, without any need for the failure itself to be referred back to the DAB or having to wait for 56 days...to attempt to reach an amicable settlement in relation to the failure to comply. Such a reference would be by the Party in whose favour the DAB's decision had been made, seeking not to change, but to enforce it.

[emphasis in original]

15 As can be seen from the above commentary on sub-cl 20.7, any reference of a DAB decision to international arbitration on the basis of a failure to comply with that decision is admissible where the decision is "final and binding". In the present case, it is common ground that the DAB Decision had not become "final and binding" because PGN had filed a valid NOD. It is also common ground that by virtue of sub-cl 20.4, the DAB Decision was "binding" even if it were not "final" (as evident from the phrase "[t]

he decision shall be binding" in sub cl 20.4 of the Conditions of Contract). What then, in the face of a valid NOD, can the party in whose favour a binding but not final DAB decision was made (a "winning party") do to enforce that decision when the other party (the "losing party") fails to give prompt effect to it as required by sub-cl 20.4 of the 1999 Red Book?

16 There appears to be a lacuna or gap in the 1999 Red Book in so far as it does not confer an express right on a winning party to refer to arbitration a failure of the losing party to comply with a DAB decision that is "binding" but not "final" in nature. This lacuna or gap in sub-cl 20.7 was highlighted by Prof Nael G Bunni in his article, "The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Work" [2005] ICLR 272. In his article, Prof Bunni notes that cl 20 of the 1999 Red Book does not expressly confer a right on a winning party to refer to arbitration a failure of the losing party to comply with a DAB decision that is binding but not final. This situation arises where the losing party fails to "promptly give effect" to the DAB decision made against it. Prof Bunni rightly notes that "there is no solution offered within cl 20 other than simply treating the non-compliant party as being in breach of contract" (at p 272). 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. Prof Bunni suggests in his article that one solution could be to amend sub-cl 20.7 and sub-cl 20.6 so as to allow relief by arbitration regardless of whether or not a NOD has been filed and whether or not the DAB decision in question has become final (at p 281). He suggests removing the phrase "final and binding" such that the provision reads as follows (at p 281):

> 20.7 Failure to Comply with Dispute Adjudication Board's Decision
>
> In the event that a Party fails to comply with the Decision of the Dispute Adjudication Board, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

In this way, Prof Bunni states, with the appropriate amendments, the winning party can treat the non-compliance of the losing party as a "dispute" within the arbitration agreement, and then obtain an arbitral award in the form of a declaration that the losing party is to give effect to the decision by the DAB (at p 282).

17 The 1999 Red Book can be compared with the *FIDIC Conditions of Contract for Design, Build and Operate Projects* (1st ed, 2008) ("the Gold Book"). *FIDIC Contracts: Law and Practice* at para 9.219 explains that under sub-cl 20.9 of the Gold Book, the right of a winning party to refer directly to arbitration a failure of the losing party to comply with a decision of the DAB is not dependent on whether the decision has become final. As stated in sub-cl 20.9 of the Gold Book:

> 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. ...

Counsel for PGN, Mr Philip Jeyaretnam SC, observed this to mean that if the form of the parties' contract was the standard form set out in the Gold Book, an award would be given "temporary finality" pursuant to a power granted by the arbitration agreement. [note: 2] In his words, the Gold Book provides for a "contractually mandated award with

temporary finality" and, effectively, "the same tribunal [is not precluded] from returning to the same issues that it would, necessarily, have specifically reserved for its own further consideration on the full merits."[note: 3] In contrast, the 1999 Red Book (like in this present case) does not contain such an express right and power as described. Notably, the gap in sub-cl 20.7 as originally identified by Prof Bunni is acknowledged by Jeremy Glover and Simon Hughes as real in their textbook *Understanding The New FIDIC Red Book, A Clause By Clause Commentary* (Sweet & Maxwell, London 2006) ("*The New FIDIC Red Book*") at para 20-053 in the following manner:

> Sub-clause 20.7 only deals with the situation where both parties are satisfied with the DAB decision. If not (i.e. if a Notice of Dissatisfaction has been served) then there is no immediate recourse for the aggrieved party to ensure the DAB decision can be enforced.

18 Continuing, the authors of *The New FIDIC Red Book* (at para 20-054) highlight the differences between sub-cll 20.6 and 20.7 as follows:

> Note that the arbitral proceedings envisaged by sub-cl. 20.7 are quite distinct from those under sub-cl. 20.6. Whereas sub-cl. 20.6 provides for a fresh procedure to decide the merits of the dispute between the parties, the only purpose of sub-cl 20.7 is to enable the enforcement of a DAB decision, without considering the substantial dispute between the parties.

19 *The New FIDIC Red Book* also contains excerpts of the FIDIC Multilateral Development Bank Harmonised Edition ("the Harmonised Version") first published in May 2005 and subsequently amended in March 2006. By way of background, FIDIC had worked with the representatives of the Multilateral Development Bank ("MDB") to produce this MDB Harmonised Edition, which is a modified form of the 1999 Red Book, for use in MDB projects. Although the Harmonised Version is largely more applicable to multilateral development banks, we can nonetheless take note that the drafters of the Harmonised Version left the gap identified in sub-cl 20.7 of the 1999 Red Book in the Harmonised Version. Sub-cl 20.7 of the Harmonised Version, the text of which is set out below, continues to make the "final and binding" nature of the dispute board decision concerned a pre-condition to the enforcement of that decision by way of an arbitral award. It reads:

> In the event that a Party fails to comply with a *final and binding* DB [Dispute Board] decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [*Arbitration*]. Sub-clause 20.4 [*Obtaining Dispute Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference. [emphasis added]

20 This, in substance, is not different from sub-cl 20.7 of the 1999 Red Book. In contrast, Prof Bunni's suggested amendment in his article to sub-cl 20.7 to plug the gap, so to speak, by allowing a binding but not final decision to be referred to arbitration is wider (see [16] above).

21 From the plain wording of sub-cl 20.7 of the Harmonised Version, it is clear that its drafters decided to retain the distinction between the arbitral proceedings envisaged by sub-cl 20.7 and those envisaged by sub-cl 20.6 (see para 20-054 of *The New FIDIC Red Book* which is referred to in [18] above) and, in doing so, implicitly rejected Prof Bunni's suggestion to allow the winning party to refer to arbitration a failure of the losing party to comply with a DAB decision.

22 Returning to the 1999 Red Book, Prof Bunni in his article questioned, in the context of the 1999 Red Book (like the present case), what the situation would be if the arbitration were on the *narrow issue* of whether or not a party ought to have complied with the DAB decision in question and the non-compliant party submitted in its defence a challenge to the reasoning contained in the decision by the DAB (at p 282). This was precisely the situation in OS 206/2010: PGN's defence to CRW's claim for immediate payment of the sum owing under the DAB Decision was, *inter alia, the non- adherence to the procedure under sub-cl 20.6 to decide the merits of the dispute between the parties*. Prof Bunni answered his own question by stating that depending on the applicable law of the contract, the relevant arbitration rules and the parties' submissions, the arbitral tribunal might issue a provisional award on that issue, pending a final award on the dispute at large (at pp 282 - 283).

23 In fact, Prof Bunni's suggestion of a provisional award was considered in ICC Case No 10619, which was decided a few years before the publication of Prof Bunni's article. The award in that case ("the interim award in ICC Case No 10619") was made in 2001, but has only recently been published by the ICC (see ICC International Court of Arbitration Bulletin, Volume 19, No 2 – 2008, p 85 to 90). ICC Case No 10619 dealt with the enforcement of a decision by the engineer ("the Engineer") made under cl 67 of the FIDIC Conditions of Contract for Works of Civil Engineering Construction (4th edition, 1987), a clause analogous to cl 20 of the 1999 Red Book. In that case, a tribunal of three arbitrators held unanimously that notwithstanding a NOD had been given, the decision by the Engineer was binding and would be enforced by an interim award to the effect that the sum owing pursuant to the Engineer's decision was immediately payable by the losing party pending arbitration on the merits of the underlying dispute. The arbitral tribunal in ICC Case No 10619 reasoned that the legal basis on which it could adjudicate on the dispute and issue an interim award lay in contract law, *viz*, that the parties had agreed in contract that the Engineer's decision was to have an immediate binding effect (see the interim award in ICC Case No 10619 at para 22). ICC Case No 10619 appeared to be the first case of its kind (at least among the decisions that were reported) where an ICC arbitral tribunal directly enforced, by means of an interim award, a binding but not final decision of the Engineer.

24 Referring to ICC Case No 10619, *FIDIC Contracts: Law and Practice* notes in para 9.220:

> *Binding but not final decision*
>
> 9.220 The [1999 Red Book] do[es] not contain an express right of a Party to refer to arbitration a failure of the other Party to comply with a decision of the DAB where notice of a dissatisfaction has been given by either Party. It is, however, suggested that a Party may *include in an arbitration commenced under Sub-Clause 20.6 a claim for an interim award to enforce the decision of the DAB, pending a final resolution of the dispute by the Arbitral Tribunal* [referring to ICC Case No 10619]. [emphasis added]

Attention should be given to the phrase "arbitration commenced under Sub-Clause 20.6" (italicised for emphasis above) and the authors' suggestion to include "in the reference for arbitration a claim for an interim award" to enforce the decision of the DAB pending final resolution of the dispute by the arbitral tribunal. To repeat, both Prof Bunni and para 9.220 of *FIDIC Contracts: Law and Practice* recognise that cl 20 of the 1999 Red Book does not expressly allow arbitration of a "binding but not final" decision of the DAB *per se*. Arbitration is allowed only for (a) "final and binding" decisions under sub-cl 20.7 (for enforcement of the decision of the DAB), and (b) decisions that have *not*

become "final and binding" under sub-cl 20.6 (where the purpose of the arbitration is to, *inter alia*, review and revise the decision of the DAB). It must be remembered that, first, the request for arbitration in ICC Case No 10619 covered a mixture of several complaints such as delays and disruptions arising from design and other associated causes, failure of the employer to grant possession of the site to the claimant, as well as breaches of contract. After the employer's answer was filed, the claimant declared its intention to request the arbitral tribunal to render an interim award to give effect to the Engineer's decisions pending arbitration and an order that the employer immediately pay the amounts determined by the Engineer as an advance payment. Second, the arbitral tribunal did review the facts relating to the Engineer's decisions before considering the issue of "whether and on what legal basis the Tribunal might adjudicate the present dispute by an interim award" (see Christopher R Seppala – "Enforcement by an arbitral award of a binding but not final Engineer's or DAB's decision under the FIDIC Conditions" - ICLR [2009] 414 at p 420).

25 What CRW was seeking by the arbitration in Arbitration Case No 16122 was *not* an interim or provisional payment of the sum set out in the DAB Decision pending a resolution of the review of the DAB Decision. That was what happened in ICC Case No 10619, but it was not so in the present case. CRW's complaint in effect was about PGN's breach of cl 20.4. I will elaborate on this below when discussing the ground for setting aside the Majority Award under Article 34(2)(a)(iii) of the Model Law. Suffice it to say for present purposes that Mr Jeyaretnam argued that whilst the immediate binding effect (as between the parties) of a DAB decision was what sub-cl 20.4 of the Conditions of Contract stipulated, the finality of that DAB decision without it being first reviewed on its merits in the light of a valid NOD was not something envisaged by sub-cll 20.6 and 20.7 of the Conditions of Contract. CRW, so PGN's argument developed, had erroneously conflated the provisions of sub-cll 20.6 and 20.7 in its reference to the Arbitral Tribunal. Furthermore, by issuing a *final award*, the Majority Tribunal had made the DAB Decision "final and binding" and had, therefore, acted outside its powers conferred by the Arbitration Agreement. Put another way, PGN's contention was that the Majority Tribunal had assumed a power which it did not have under the Arbitration Agreement and had ignored the provisions of the Arbitration Agreement.

Grounds for setting aside the Majority Award

(1) Article 34(2)(a)(iii) of the Model Law: The Majority Tribunal acted in excess of its powers

26 Article 34(2)(a)(iii) of the Model Law states as follows:

> **Article 34. Application for setting aside as exclusive recourse against arbitral award**
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside...

Two situations may fall within the ambit of Article 34(2)(a)(iii) of the Model Law. The first contemplates the typical common situation where an award is made by a tribunal that had jurisdiction to deal with the dispute, but exceeded its powers by dealing with matters that had not been submitted to it (see Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* ("*Redfern and Hunter*")(Oxford University Press, Fifth Ed, 2009 at para 10.39). This first situation, as just described, arose and was considered in, for example, *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597. The second situation is where the dispute referred to the arbitrators is one that was not within the parties' arbitration agreement or that went beyond the scope of that agreement. In the present proceedings, the parties did not refer me to any case concerning the second situation. However some guidance can be drawn from cases on Article V(1)(c) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), which is analogous to Article 34(2)(a)(iii) of the Model Law. Article V(1)(c) of the New York Convention, which is set out in the Second Schedule of the IAA, reads as follows:

> **Article V**
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that —
>
> ...
>
> (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced...

27 *Tiong Huat Rubber Factory v Wah-Chang Int'l Co* ("*Tiong Huat Rubber*") [1991] HKLY 51 illustrates a challenge to an award under the New York Convention (to which Hong Kong is a party to (see Sch 3 to Hong Kong's Arbitration Ordinance (Cap. 341) and s 44(2)(d) and s 44(4) of that Ordinance, which reiterates Article V of the New York Convention) on the grounds that the arbitral tribunal dealt with a dispute that was not within the arbitration agreement. In that case, the parties entered into a contract which required the respondent to provide a letter of credit. The said letter of credit was never provided and the claimant sued for non-payment. The arbitrators rendered an award in favour of the claimant. The respondent, however, resisted enforcement, by successfully arguing that the arbitral clause, which stated that "[a]ll disputes as to quality or condition of rubber or other dispute arising under these contract regulations shall be settled by Arbitration", only covered claims based on the quality, size and/or weight of the goods concerned, and consequently, the clause did not give the arbitrators the power to render an award pertaining to the consequences of the non-opening of the stipulated letter of credit. Likewise, the situation that I was concerned with here was of a dispute that was not within the Arbitration Agreement, or that it went beyond the scope of that agreement.

The "dispute" that was referred to arbitration

28 As stated, an arbitration clause defines the scope of the dispute that may be referred to arbitration including the powers of the arbitrators. Whether a dispute falls within an arbitration clause in a contract must depend on first, what the dispute is about

and second, the kinds of disputes which the arbitration clause covers (see *Heyman v Darwins Ltd* [1942] AC 356 at 360 which was accepted by the Court of Appeal in *S A Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd* [2000] 1 SLR(R) 192 at [30]). Notably, the arbitration commenced by CRW in Arbitration Case No 16122 was made under sub-cl 20.6 of the Conditions of Contract, which bears repeating. Sub-cl 20.6 states:

> 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. [emphasis added]

29 A particular feature of sub-cl 20.6 is that before a dispute can be subject to arbitration, it must first have been referred to the DAB (see *The New FIDIC Red Book* at para 20-046). The opening words of the first sentence of sub-cl 20.6 (quoted in [28] above) makes clear that a "dispute" that may be submitted to arbitration under sub-cl 20.6 is one that has been referred to the DAB.

30 In the present case, the "dispute" which CRW wanted the Arbitral Tribunal to resolve (*ie*, the Second Dispute) was whether CRW was entitled to *immediate* repayment by PGN of the sum set out in the DAB Decision. There was no quarrel that such a dispute regarding the immediate enforceability of the DAB Decision was *not* a dispute relating to the DAB Decision. To reiterate, the disputes decided by the DAB Decision were the same disputes in respect of which NOD had been given. By its own admission, CRW had characterised PGN's non-payment of the sum set out in the DAB Decision as a "second" dispute on account of the binding nature of the DAB Decision, and coupled with PGN's breach in refusing to promptly pay the invoice raised by CRW on 3 December 2008 for the sum of US$17,298,834.57 in accordance with the DAB Decision.[note: 4] The relevant portion of the text of the invoice states:

> In order to put into effect [sub-cl 20.4] of the Contract [CRW] hereby submit (sic) Invoice Number 55/X11/CRW/08 dated 3rd December 2008 for [PGN's] prompt payment which is expected to be credit into [CRW's] account not later than 18th December 2008.

31 The Second Dispute, as characterised by CRW, was not only a different dispute, but was also one that had not been referred to the DAB yet. As Prof Bunni observed, the losing party is in breach of contract and the remedy for such a breach of contract is damages that might be imposed at some future date. Given the opening words of sub-cl 20.6, the Second Dispute was plainly outside the scope of sub-cl 20.6 of the Conditions of Contract. It follows that the Majority Tribunal, and hence the Majority Award, exceeded the scope of the Arbitration Agreement; the Majority Award is therefore liable to be set aside under Article 34(2)(a)(iii). This outcome is the result of CRW's formulation of the Second Dispute and the approach taken by CRW in its reference to arbitration under sub-cl 20.6 (*ie*, in Arbitration Case No 16122).

Review of the DAB Decision under sub-cl 20.6

32 The interim award in ICC Case No 10619 held that an arbitral tribunal could enforce by means of an interim or partial award under ICC Rules, a binding but not final DAB decision by ordering the losing party to pay immediately the amount stated in that DAB decision. ICC Case No 10619 presupposes that a reference of this nature is admissible for arbitration, and does not need to be referred to the DAB first.

33 Even if, for the sake of argument, the Second Dispute were referable to arbitration under sub-cl 20.6 without first being referred to the DAB, one must remember that sub-

cl 20.6 does not allow an arbitral tribunal to make final a binding DAB decision without first hearing the merits of that DAB decision. As a reminder, I have referred to the commentary in *The New FIDIC Red Book* pointing out a distinction between arbitration under sub-cl 20.6 (which requires a review of the DAB decision on the merits) and arbitration under sub-cl 20.7 (which enables enforcement of a DAB decision without considering the substantial dispute between the parties) (see [18] above). Mr Mustain Sjadzali, the nominated representative of CRW, deposed at [22] of his affidavit that CRW accepted the DAB Decision as "absolutely correct" and, as such, CRW's request for arbitration did not raise "any issue as to whether the DAB Decision had been correctly made or whether the arbitral tribunal ought to open, review and/or revise the DAB Decision". Mr Siraj Omar (counsel for CRW) also mentioned in his submissions that if PGN were dissatisfied with the DAB Decision, it should be the party to commence an arbitration to review the DAB Decision. The rebuttal to this submission is that nothing in sub-cl 20 of the Conditions of Contract presupposes that the party who filed the NOD must be the party to commence arbitration. In reality, it is often the winning party who has the incentive or initiative to commence arbitration to review the DAB decision in question with a view to *confirming* that decision. In this way, arbitration under sub cl 20.6 can start. Mr Mustain's argument in the context of sub-cl 20.6 is neither here nor there.

34 The essence of PGN's defence to the first issue referred to the Arbitral Tribunal on immediate payment of the sum set out in the DAB Decision was, as I have noted, CRW's non-adherence to the arbitral procedure mandated in sub-cl 20.6, and PGN contended that there was no express power granted to the Majority Tribunal to direct PGN to make immediate payment of the sum set out in the DAB Decision without first obtaining by way of arbitration, a review on the merits of the disputes covered by the DAB Decision. The powers of the Arbitral Tribunal as spelt out in sub-cl 20.6, are, and I repeat, as follows:

> 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.

In short, the Arbitral Tribunal must be asked by CRW to review the correctness of the DAB Decision before it can make the DAB Decision "final and binding". In this regard, I make two points. First, it is upon a reference by the winning party to review and confirm (rather than to revise) the correctness of the decision of the DAB, and a claim for an interim or provisional award based on the DAB decision pending resolution of the review of the decision, that an arbitral tribunal may make an interim or provisional award of indisputable amounts, leaving the remaining items to be adjudicated. This point is consistent with the observations made in para 9.220 of *FIDIC Contracts: Law and Practice* (see [24] above).

35 The second point concerns the issuance of a "final award" by the Majority Tribunal in the form of the Majority Award, there being no outstanding issues on the merits to be determined (see *Redfern and Hunter* at para 9.18). In the circumstances of the present case, given CRW's formulation of the Second Dispute in the form of the first issue put to the Arbitral Tribunal (see [5] above), it is understandable why the Majority Tribunal issued the Majority Award. An arbitral tribunal is bound by the perimeters of the claims submitted to it and, thus, may not order interim measures without the request of a party. However, that did not make the Majority Award valid. Clause 20 of the Conditions of Contract did not allow for an arbitral tribunal to make final a DAB decision without first hearing the merits of that DAB decision. This was, as stated, the defence of PGN to the first issue on immediate payment of the sum set out in the DAB Decision: PGN was seeking to argue that the powers of the arbitrators expressly stipulated in sub-cl 20.6 did

not include the power to direct PGN to make immediate payment of the sum set out in the DAB Decision without a review confirming the correctness of the DAB Decision. In context, the Arbitral Tribunal's powers under sub-cl 20.6 was expressly to open up, review and revise the DAB Decision, which meant that an adjudication on the Second Dispute without determining the correctness of the DAB Decision would be tantamount to converting that binding but not final decision into a final arbitration award and ignoring the provisions of the Conditions of Contract concerning dispute resolution.

36 I am here reminded of the provisions of the standard form in the Gold Book which are unlike the provisions in the present case (see [17] above). If anything, the tribunal in ICC Case No 10619 made an interim or provisional award by giving effect to the governing law of the contract. The tribunal's interim award contained the following specific reservation of the parties' rights (ICC International Court of Arbitration Bulletin, Volume 19, No 2 – 2008, p 90 para 27):

> The rights of the parties as to the merits of their case, including but not limited to the final and binding effect of the Engineer's decision are reserved until the final Award of this Tribunal.

The Majority Tribunal also made express reference in the Majority Award that PGN is free to commence separate arbitration proceedings to review the merits of the DAB Dispute. The problem here, however, is that the reservation of PGN's right to commence separate arbitration is unlike (and will probably not have the same effect as) a reservation of rights to argue before the same tribunal which made an interim award that the award is wrong and that the corresponding amounts should be repaid to PGN. Furthermore, as a preliminary observation, I note that there could *potentially* be issues of *res judicata*. CRW had obtained an ex-parte order (in the form of the Registration Order) to convert the Majority Award into a judgment (see [8] above) and if the judgment of US$17,298,834.57 is not set aside, questions of a merger of the cause of action into the judgment and the associated problem of issue estoppel may arise. The long and short of the matter is that the manner of CRW's reference to arbitration ignored the provisions of sub-cl 20.6 of the Conditions of Contract concerning dispute resolution. The Majority Tribunal's reservation of right is cold comfort to PGN where the Majority Award has been converted into a judgment, there being no specific provision in the Conditions of Contract to address the effect of entry of judgment.

Conclusion on Article 34(2)(iii) of Model Law

37 To summarise, the real dispute was clearly whether the DAB Decision was correct and following that, whether CRW was entitled to the payment of the sum which the DAB had decided was due. However, CRW tried to limit the dispute to only whether payment of that sum should be made immediately and, in doing so, wrongly relied on sub-cl 20.6. In fact, there is no express right of a party to refer to arbitration under sub-cl 20.7 a failure of the other party to comply with a binding but not final decision of the DAB. An arbitration commenced under sub-cl 20.6 requires a review of the correctness of the DAB decision. First, CRW's reference to arbitration involved a "dispute" which was never referred to the DAB. Second, the reference was not on the merits of the DAB Decision (unlike ICC Case No 10619, where the issue regarding the immediate enforceability of the Engineer's decision was pursued as an interim or partial award under the auspices of the arbitration on the merits of the Engineer's decision). Accordingly, the Majority Tribunal exceeded its powers by rendering a final award pertaining to: (a) a dispute that was not referred first to the DAB, bearing in mind that before a dispute can be subject to arbitration, it must first have been referred to the DAB and the appropriate NOD must have been served (see *The New FIDIC Red Book* at para 20-046); and (b) a dispute that was not within the scope of the Arbitration Agreement (similar to the factual scenario in *Tiong Huat Rubber*). Hence, the Majority

Award was liable to be and was indeed set aside under Article 34(2)(a)(iii) of the Model Law.

38 Before moving to the next challenge, for completeness, I now come to the question posed in [15] above on what the winning party can do, in the face of a valid NOD, to enforce a binding but not final decision of the DAB when the other party fails to give prompt effect to it as required by sub-cl 20.4 of the 1999 Red Book. Either party may submit the dispute covered by the DAB decision in question to arbitration if a NOD has been served. The losing party can ask the arbitral tribunal to review and revise the DAB Decision. Alternatively, the winning party can ask the arbitral tribunal to review and confirm the DAB decision. It can include a claim for an interim award *vis-a-vis* the DAB decision to be enforced, with the amount owed as set out in the DAB decision to be paid pending accordingly. The amount paid out is liable to be returned to the payer, depending on how the tribunal, after reviewing DAB decision, decides the case.

(2) Majority Award not made in accordance with the agreed arbitral procedure

39 PGN had also sought to set aside the Majority Award on the further ground that it was not made in accordance with the agreed arbitral procedure set out in Article 34(2)(a)(iv) of the Model Law, which read:

> ***Article 34. Application for setting aside as exclusive recourse against arbitral award***
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (iv) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;

This ground of challenge contemplates situations where there are irregularities in the procedural rules agreed between the parties. These procedural rules will include, for example, rules on the timelines for submission of answers in response to the request for arbitration, the information required to be provided in the submissions, notification to the parties of the names of the members of the arbitral tribunal, *etc*. What PGN was concerned about was the substantial aspect of the Arbitration Agreement, *not* the procedure. This was actually another facet of the same complaint under Article 34(2)(a)(iii) of the Model Law, *viz*, that the Majority Tribunal had acted in excess of its power. I have already taken this argument into account when considering Article 34(2)(a)(iii) of the Model Law.

(3) Alleged breach of the rules of natural justice

40 Section 24(b) of the IAA states that the court may set aside the arbitral award if:

> a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

Article 18 of the Model Law also provides:

> ***Article 18. Equal treatment of parties***
>
> The parties shall be treated with equality and each party shall be given a full

opportunity of presenting his case.

PGN argued that the Majority Tribunal's decision to shut out PGN's arguments on the underlying merits amounted to a breach of the rules of natural justice.

41 The principles regarding the setting aside of an arbitral award on the basis of a breach of the rules of natural justice were extensively considered in *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"), and I shall not endeavor to repeat them here. An allegation of a breach of the rules of natural justice is serious and should not be taken lightly. Borrowing Justice Lax's words in the Canadian case of *Corporacion Transnacional de Inversiones S.A. de C.V.* v. *STET International S.p.A.*, 1999 Carswell Ont.2988 at [33], to establish a breach of the rules of natural justice under Article 18 of the Model Law, "the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of justice and morality".

42 PGN was not very clear in its allegations on exactly which rule of natural justice was contravened. From its submission, PGN seemed to be attacking the Majority Award on the basis that the Majority Tribunal did not give it a proper hearing. However, as just mentioned, it was not clear whether this was indeed PGN's submission. Such a vague allegation was tantamount to PGN taking a shot in the dark, and must be discouraged. On the facts of this case, to say that the Majority Tribunal had, in PGN's words, "shut out" PGN was a rather extreme and perhaps, unfair criticism to make of the Majority Tribunal. Although the Majority Tribunal ultimately decided that PGN was not entitled to open up, review and revise the DAB Decision in Arbitration Case No 16122, the Majority Tribunal's decision, whether right or wrong, was not relevant as to whether there was a breach of the rule of the right to be heard. PGN had indeed been heard for the purposes of determining the issues that were put before this arbitration. PGN was never denied an opportunity to present or argue its case on why it should be entitled to open up, review and revise the DAB Decision. In fact, I noted that there was one occasion where the Arbitral Tribunal invited counsel for PGN to address the point as to the amount of the claim which PGN thought it should be ordered to pay; however PGN's counsel was not prepared to address that issue then since sub-cl 20.6 was raised as a defence. PGN took the position that it would prefer to leave the final sum to be determined by the Arbitral Tribunal with the help of an auditor. In the circumstances, I did not accept PGN's contention that the Majority Tribunal had breached the rules of natural justice.

Result

43 For the reasons stated, the Majority Tribunal had acted in excess of its powers given under the Arbitration Agreement. The application to set aside the Majority Award was therefore allowed with the costs of the proceedings to be taxed if not agreed.

[note: 1]Affidavit of Mustain Sjadzali filed 11 March 2010 at paras13 and 15.

[note: 2]PGN's supplementary skeletal arguments at para 6.

[note: 3]PGN's supplementary skeletal arguments at para 7.

[note: 4]Mustain Sjadzali's affidavit of 11 March 2010 at [13]