PT Perusahaan Gas Negara (Persero) TBK *v* CRW Joint Operation [2015] SGCA 30

Case Number	: Civil Appeals Nos 148 and 149 of 2013; Summonses Nos 5277 and 5985 of 2014
Decision Date	: 27 May 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chan Sek Keong SJ; Quentin Loh J
Counsel Name(s)	: Dr Colin Ong Yee Cheng (Eldan Law LLP) and Wong Wai Han (Rodyk & Davidson LLP) for the appellant; Cavinder Bull SC, Foo Yuet Min, Lim May Jean and Darryl Ho Ping (Drew & Napier LLC) for the respondent.
Parties	: PT Perusahaan Gas Negara (Persero) TBK — CRW Joint Operation

Arbitration – Award – Recourse against award – Setting aside

27 May 2015 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the majority):

Introduction

1 The present appeals are both brought by the appellant, PT Perusahaan Gas Negara (Persero) TBK ("PGN"), against the respondent, CRW Joint Operation ("CRW"). Civil Appeal No 148 of 2013 ("CA 148") concerns the question of whether a majority arbitral award dated 22 May 2013 ("the Interim Award") ordering PGN to pay CRW a sum of US$17,298,834.57 ("the Adjudicated Sum") should be set aside, while Civil Appeal No 149 of 2013 ("CA 149") concerns the question of whether the order of court dated 2 July 2013 granting CRW leave to enforce the Interim Award against PGN in the same manner as a court judgment ("the Enforcement Order") should be set aside. The Adjudicated Sum was the amount that the dispute adjudication board ("DAB") constituted under the contract between the parties ("the Contract") found PGN liable to CRW for. Reference of a dispute to the DAB is the first step under the dispute resolution regime prescribed in the Contract. These appeals turn on the interpretation of various aspe--cts of that regime as well as the effect of s 19B of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA").

2 Justice Quentin Loh and I have had the advantage of reading in draft the judgment of Chan Sek Keong SJ. With respect, we do not agree with Chan SJ's views. This judgment sets out the decision of this court, which is reached by a majority consisting of Loh J and myself.

Background facts

3 PGN is an Indonesian company that owns and operates gas transmission systems in Indonesia. CRW is a group consisting of three Indonesian limited liability companies. In 2006, PGN engaged CRW to design, procure, install, test and pre-commission a pipeline to convey natural gas from South Sumatra to West Java. The parties' relationship was governed by the Contract, which included (among other documents) a set of conditions of contract ("the Conditions of Contract"). The Conditions of Contract adopted, with modification, the standard provisions of the *Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer* ("the Red Book") published by the International Federation of Consulting Engineers or, as that body is known in French, the Fédération Internationale des Ingénieurs-Conseils ("FIDIC"). Specifically, the Conditions of

Contract were modelled on the 1999 edition of the Red Book ("the 1999 Red Book"). The Contract was governed by Indonesian law.

4 In the course of the project, CRW submitted a number of Variation Order Proposals ("VOPs") to PGN for variation works which CRW contended it had carried out. These were disputed by PGN. The parties referred their dispute over 13 VOPs to the DAB in accordance with the dispute resolution mechanism set out in cl 20 of the Conditions of Contract.

The dispute resolution mechanism under cl 20 of the Conditions of Contract

5 The material parts of cl 20 provide as follows (we have numbered each sub-clause in square brackets for ease of subsequent reference):

> **20.4 Obtaining Dispute Adjudication Board's Decision**
>
> [1] If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.
>
> …
>
> [4] 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*. …
>
> [5] 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 as 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.
>
> [6] 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.
>
> [7] *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

[1] 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].

[2] 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. …

[3] 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.

…

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 omitted; emphasis added in italics and bold italics]

6 In our judgment, the operation of the aforesaid dispute resolution mechanism, in general, may be summarised as follows:

(a) If "a dispute (of any kind whatsoever)" arises between the parties "in connection with, or arising out of, the Contract or the execution of the [w]orks [thereunder]", either party may refer

the dispute in writing to the DAB for its decision.

(b) The decision of the DAB shall be binding on both parties, who shall "promptly give effect to it" unless and until it is revised pursuant to an amicable settlement as contemplated in cl 20.5 or by an arbitral award as described in cl 20.6.

(c) If either party is dissatisfied with the DAB's decision, then it may, within 28 days after receiving the decision, issue a notice of dissatisfaction (an "NOD") to the other party. If no NOD is issued within the stipulated time frame, then the decision of the DAB becomes final and binding.

(d) Where an NOD has been issued, the parties are required to first attempt to settle their dispute amicably under cl 20.5 before commencing arbitration.

(e) If attempts at amicable settlement are not successful or if no such attempts are made, the parties' dispute may be referred to arbitration after 56 days from the day on which the NOD is issued. In the course of the arbitration, the tribunal shall have "full power to open up, review and revise" any decision of the DAB that is relevant to the dispute.

(f) Where a DAB decision has become final and binding on the parties because no NOD has been issued within the stipulated time frame, but a party fails to comply with it, that failure may be referred to arbitration directly without the parties having to first go through the steps set out in cll 20.4 and 20.5.

The DAB decision which PGN rejected

7 The DAB rendered several decisions on the 13 disputed VOPs. PGN accepted all of these decisions except the third decision ("DAB No 3"), under which it was required to pay CRW the Adjudicated Sum. This decision was conveyed to the parties on 19 November 2008 at a meeting. The DAB subsequently issued the written grounds for its decision on 25 November 2008. PGN lodged an NOD against DAB No 3 on 20 November 2008 without waiting for those written grounds.

The arbitration in 2009

8 CRW made several requests to PGN for payment of the Adjudicated Sum awarded under DAB No 3, but to no avail. Taking the view that PGN was in breach of its obligations under the Conditions of Contract, CRW commenced arbitration on 13 February 2009 claiming, essentially, a declaration that PGN had an immediate obligation to pay CRW the Adjudicated Sum and an order for "prompt payment" of that sum ("the 2009 Arbitration").

9 PGN did not file a counterclaim. However, by way of its defence, PGN sought from the tribunal ("the 2009 Tribunal") a declaration that: (a) DAB No 3 was not final and binding; (b) PGN was not obliged to pay CRW the Adjudicated Sum; and (c) PGN had not breached any of its obligations under the Conditions of Contract in refusing to pay CRW that sum. In its defence, PGN also requested the 2009 Tribunal to "open up, review and revise" the DAB's decision in DAB No 3. PGN's position, in essence, was that having issued an NOD in respect of DAB No 3, it was no longer obliged to pay the Adjudicated Sum.

10 The majority of the 2009 Tribunal ("the 2009 Majority Arbitrators") agreed with CRW. In their award dated 24 November 2009, which they termed a "final" award ("the Final Award"), the 2009 Majority Arbitrators held (at [41]) that cl 20.4 of the Conditions of Contract made it "abundantly clear" that a DAB decision had to be given prompt effect and could only be varied by a subsequent

amicable settlement or arbitral award. The 2009 Majority Arbitrators concluded that service of an NOD did not alter that position. Such service was no more than compliance with a condition precedent that had to be met before a party dissatisfied with a DAB decision could refer that decision to arbitration. The 2009 Majority Arbitrators, and indeed, even CRW, were in agreement that PGN could, if it wished, commence a new arbitration to review and revise DAB No 3, but this was not a course open to it in the 2009 Arbitration because the only relief which CRW had sought in that arbitration was for DAB No 3 to be honoured, and because PGN had not issued a counterclaim to set aside that decision.

The first set of enforcement proceedings

11 Pursuant to its application in Originating Summons No 7 of 2010, CRW obtained leave under s 19 of the IAA to enforce the Final Award in the same manner as a court judgment. PGN applied by way of Originating Summons No 206 of 2010 ("OS 206") to have the Final Award set aside on various grounds. Primarily, it argued that:

(a) the 2009 Majority Arbitrators exceeded their jurisdiction in converting DAB No 3 into a final award without first determining the correctness of the DAB's decision on the 13 disputed VOPs;

(b) the arbitral procedure was not in accordance with cl 20.6 of the Conditions of Contract, which required the 2009 Tribunal to determine the merits of the parties' underlying dispute over the correctness or the merits of DAB No 3 (the parties "Underlying Dispute") before DAB No 3 could be converted into a final award; and

(c) the 2009 Majority Arbitrators' refusal and/or failure to hear the parties on the merits of the Underlying Dispute was a breach of natural justice.

12 The judge who heard OS 206 ("the OS 206 judge") found in favour of PGN on only the first of the three grounds listed at [11] above and set aside the Final Award on that basis (see *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 ("*Persero HC (2010)*"). She rejected PGN's contention that the parties' agreed arbitral procedure had not been complied with and that there had been a breach of natural justice.

13 CRW appealed against the decision of the OS 206 judge to set aside the Final Award. In its decision issued on 13 July 2011 (reported as *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*Persero CA*")), the Court of Appeal upheld the OS 206 judge's decision that the 2009 Majority Arbitrators had exceeded their jurisdiction in failing to consider the merits of the parties' Underlying Dispute before issuing the Final Award. The Court of Appeal also held that there had been a breach of natural justice because PGN had not been given a real opportunity to defend itself against the claim for the sum it was ordered to pay CRW under DAB No 3.

The arbitration in 2011

14 In *Persero CA*, the Court of Appeal commented, *obiter*, that: (a) PGN was contractually obliged to comply with DAB No 3 even though it had issued an NOD in respect of that decision and the merits of that decision were being arbitrated; and (b) DAB No 3 was "enforceable directly by an interim or partial award" (at [63]). Relying on the Court of Appeal's interpretation of cl 20 of the Conditions of Contract, CRW commenced a second arbitration in October 2011 ("the 2011 Arbitration"). This time, it sought a final determination that PGN was liable, on the merits, to pay CRW the Adjudicated Sum awarded under DAB No 3, and pending that final determination, a partial or interim award for the same sum (with interest).

15 The arbitral tribunal in the 2011 Arbitration ("the 2011 Tribunal") unanimously agreed that DAB No 3 was binding on the parties even though PGN had issued an NOD in respect of that decision. However, the 2011 Tribunal was divided on the issue of whether CRW was entitled to enforce DAB No 3 by way of an interim award. The majority of the 2011 Tribunal ("the 2011 Majority Arbitrators") thought that DAB No 3 could and should be enforced by an interim award. They opined that enforcing DAB No 3 in that manner would give effect to the parties' commercial intent in including the DAB mechanism in the Conditions of Contract; otherwise, the DAB mechanism would be rendered toothless.

16 One of the arguments which the 2011 Tribunal had to deal with was PGN's contention that the interim award sought by CRW would be inconsistent with s 19B of the IAA (referred to hereafter as "s 19B" for short). Section 19B provides:

> **Effect of award**
>
> **19B.**—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
>
> (2) Except as provided in Articles 33 and 34(4) of the Model Law [*ie*, the UNCITRAL Model Law on International Commercial Arbitration], upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award.
>
> (3) For the purposes of subsection (2), an award is made when it has been signed and delivered in accordance with Article 31 of the Model Law.
>
> (4) This section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

17 PGN contended that the interim award sought by CRW would not be "final" for the purposes of s 19B since DAB No 3 was liable subsequently to be opened up and reviewed pursuant to cl 20.6[2] of the Conditions of Contract at the arbitration of the parties' Underlying Dispute over the merits of DAB No 3. The 2011 Majority Arbitrators disagreed with PGN. They were satisfied that an interim award giving effect to DAB No 3 would possess the requisite measure of finality and would not contravene s 19B. Their explanation was as follows (at [51]–[52] of the Interim Award):

> 51. The Tribunal [*ie*, the 2011 Majority Arbitrators] considers that even though [DAB No 3] can be opened up at the arbitration hearing, an award giving effect to it will still be final up to a certain point in time, i.e. pending the resolution of the dispute in the arbitration. Put another way, the decision is final as to the issue before the Tribunal, namely, whether payment has to be made prior to the determination of the matters raised in the NOD. …
>
> 52. In other words, an interim award giving effect to [DAB No 3] pending the resolution of the parties' dispute is still final in the sense that it will not and cannot be altered until the arbitration hearing. ...
>
> [underlining in original]

18 The 2011 Majority Arbitrators therefore granted CRW's application for an interim award and

made the Interim Award ordering PGN to "promptly pay" CRW the Adjudicated Sum awarded under DAB No 3 pending the final resolution of the parties' Underlying Dispute. The dispositive part of the Interim Award stated:

> **VIII**. **AWARD AND ORDER**
>
> 56. Pending the final resolution of the Parties' dispute raised in these proceedings, including the disputes which are set out in the Notice of Dissatisfaction, the majority of the Tribunal declares that:
>
> (i) Upon a true construction of Clause 20 of the [Conditions of] Contract, [DAB No 3] is binding on both Parties who shall promptly give effect to it; and
>
> (ii) [PGN] shall promptly pay the sum of US$17,298,834.57 as set out in [DAB No 3].
>
> 57. All other issues in these proceedings, including of interest and costs to be reserved and dealt with in one or more later awards.

19 The dissenting arbitrator in the 2011 Arbitration regarded the interim award sought by CRW as a *provisional* award and considered that such an award was precluded in an arbitration seated in Singapore by reason of s 19B. He was of the view that by virtue of cl 20.6 of the Conditions of Contract (see [5] above), an interim award giving effect to a decision of the DAB could be revised, and this, he concluded, was directly contrary to s 19B.

The second set of enforcement proceedings

20 Despite the issuance of the Interim Award, PGN maintained its refusal to pay CRW the Adjudicated Sum awarded under DAB No 3, prompting CRW to apply by way of Originating Summons No 585 of 2013 ("OS 585") for leave to enforce the Interim Award in the same manner as a court judgment. Leave was given in the form of the Enforcement Order (as defined at [1] above), but PGN subsequently filed Summons No 3923 of 2013 ("SUM 3923") to set aside that order. At the same time, PGN also filed Originating Summons No 683 of 2013 ("OS 683") to set aside the Interim Award.

21 SUM 3923 and OS 683 were heard by the same judge ("the Judge"), who was a different judge from the OS 206 judge. PGN argued that the Interim Award was in effect a provisional award because the 2011 Majority Arbitrators intended that award to be final only up to the time the 2011 Tribunal determined the parties' Underlying Dispute on the merits with finality. The legislative history of s 19B, PGN submitted, revealed that such provisional awards were prohibited by that section. Furthermore, the Interim Award had the effect of preventing the 2011 Tribunal from proceeding to determine the merits of the Underlying Dispute because that future determination would vary, amend, correct, review, add to or revoke the Interim Award in a manner prohibited by s 19B(2). Therefore, PGN contended, the 2011 Majority Arbitrators had acted in excess of their jurisdiction, in breach of natural justice and/or in breach of the parties' agreed arbitral procedure in issuing the Interim Award, which should therefore be set aside under s 24 of the IAA and/or Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law").

The decision below

22 The Judge declined to set aside the Interim Award and dismissed both SUM 3923 and OS 683 (see *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) and another matter* [2014] SGHC 146 ("*Persero HC (2014)*")). He considered a provisional award to be one which granted

relief that was intended to be effective only for a limited period (at [124]). He accepted that the Interim Award was a provisional award in so far as it would cease to be effective "when … the 2011 [T]ribunal has resolved with finality every aspect of the one dispute before it" (at [143]). However, he held that there was nothing in s 19B which either prohibited or permitted provisional awards. Additionally, he was of the view that the legislative history of s 19B clearly showed its limited purpose: it was added purely to clarify that all arbitral awards, whether interim or final, were final and conclusive as to the merits of the subject matter determined under the respective awards.

23 The Judge also held that the Interim Award did not breach s 19B because it was final and binding. He reasoned that the dispositive part of the Interim Award in effect declared that PGN had a contractual obligation to "promptly pay" CRW the Adjudicated Sum awarded under DAB No 3, and ordered PGN to make prompt payment of that sum. Regardless of how the parties' Underlying Dispute over the merits of DAB No 3 was finally resolved in the future, the Judge stated, it would never cease to be true that PGN had this contractual obligation and ought to have made the requisite payment to CRW promptly. In that sense, the Interim Award was final and binding.

24 Furthermore, the Judge held, a future determination of the merits of the parties' Underlying Dispute would not vary the Interim Award because the final award which set out that future determination could be worded to stand alongside the Interim Award. If the 2011 Tribunal eventually found that the Adjudicated Sum awarded under DAB No 3 was correct, it would merely need to say so in its final award. If the 2011 Tribunal found that the Adjudicated Sum was too little, it would be open to the tribunal to order PGN to pay CRW the additional amount in its final award. Finally, if the 2011 Tribunal found that the Adjudicated Sum was too much, it could require CRW to return the excess to PGN in its final award. In each of these scenarios, the Judge considered, the final award resolving the parties' Underlying Dispute would not vary, amend, correct, review, add to or revoke the Interim Award. Rather, the Interim Award and the final award would stand together for enforcement. Hence, there would be no breach of s 19B(2).

25 On the basis of the foregoing, the Judge held that none of PGN's grounds of challenge (*ie*, excess of jurisdiction, breach of natural justice and/or breach of the parties' agreed arbitral procedure) were sustainable. Consequently, both SUM 3923 and OS 683 were dismissed. PGN filed separate Notices of Appeal against each of those decisions (namely, CA 148 in respect of the Judge's dismissal of OS 683, and CA 149 in respect of his dismissal of SUM 3923).

PGN's case on appeal

26 PGN's case on appeal consists of two arguments. The first is that the Interim Award is inconsistent with s 19B because it is an award that only has interim finality. According to PGN, both CRW and the 2011 Majority Arbitrators envisaged that the interim award sought by CRW would be "subject to future variation". It refers to a number of documents to substantiate this submission.

27 First, it refers to that portion of the Terms of Reference for the 2011 Arbitration where CRW's claim and the relief which it sought are summarised. It points out that what CRW sought was an interim or partial award for the Adjudicated Sum awarded under DAB No 3 "*pending* the resolution of [the] parties' dispute" [emphasis added]. Second, it refers to CRW's Statement of Claim for the 2011 Arbitration and highlights that, similarly, CRW expressly stated at para 30(a) thereof that it sought an interim or partial award "*pending* the resolution of [the] parties' dispute" [emphasis added]. PGN argues that the word "pending" in these two documents demonstrates that CRW never intended the interim relief which it sought to finally dispose of the parties' Underlying Dispute over the merits of DAB No 3. Instead, it always acknowledged the possibility that any interim award made by the 2011 Tribunal to give effect to DAB No 3 could be varied by a final award on the merits of that DAB

decision.

28 The third document which PGN submits supports its first argument on appeal is the Interim Award. PGN points to [37] of that award, where the 2011 Majority Arbitrators summarised CRW's position in the 2011 Arbitration as follows:

> 37. … The Tribunal further acknowledges that [CRW] had at the Preliminary Hearing on 2 March 2012, confirmed its position (which has been recorded in the scope of the Terms of Reference) that:
>
> (i) [CRW] would be relying on [DAB No 3] as the basis for its application for an Interim Award; and
>
> (ii) … in the event that it was unsuccessful at the Interim Award stage, it would continue to rely upon [DAB No 3] in seeking any Final Award, and would not seek to open up and revise [DAB No 3].

PGN argues that the fact that CRW was prepared to rely on DAB No 3 even at the stage of seeking a final award on the merits of the parties' Underlying Dispute demonstrates that CRW essentially sought only one relief in the 2011 Arbitration, *ie*, the enforcement of DAB No 3. PGN reiterates that this shows that CRW never intended the interim award which it sought to finally resolve the parties' Underlying Dispute. Instead, CRW was aware that any interim award made could subsequently be varied by the 2011 Tribunal's final award on the merits of that dispute.

29 In this regard, PGN also refers to [51]–[52] of the Interim Award (reproduced at [17] above) and argues that the 2011 Majority Arbitrators were themselves of the view that the Interim Award would eventually be "altered" by the 2011 Tribunal's final award on the merits of the parties' Underlying Dispute.

30 The fourth document which PGN relies on in respect of its first argument before this court is a unanimous partial award dated 25 September 2014 ("the Partial Award"), which was made in the 2011 Arbitration after SUM 3923 and OS 683 were heard by the Judge. PGN seeks to have the Partial Award admitted into evidence by way of Summons No 5277 of 2014 ("SUM 5277"). Our decision on SUM 5277 is set out below at [37]–[40], together with our decision on PGN's other application for leave to adduce further evidence, Summons No 5985 of 2014 ("SUM 5985") (see [41]–[44] below). For the time being, we simply set out the argument that PGN makes based on the Partial Award.

31 In evaluating CRW's claim against PGN in respect of the 13 disputed VOPs, the DAB formulated nine heads of claim ("Heads of Claim"). One of the questions which the 2011 Tribunal addressed in the Partial Award was whether the DAB's decision on each of the nine Heads of Claim was in accordance with Indonesian law and the provisions of the Contract (including the Conditions of Contract). The 2011 Tribunal summarised its overall conclusion at [100.6]–[100.8] of the Partial Award. Only [100.6(a)] and [100.6(c)] are relevant for present purposes, and they state as follows:

> a) Heads of Claim Nos. 6 (Manufacture and Installation of Additional Bends) and 8 (Additional Costs associated with work at the Northern End of the Site in Areas of Reduced Width of Way-leave) are dismissed;
>
> …
>
> c) *This Partial Award revises the previous majority Interim Award insofar as Heads of Claim*

Nos. 6 and 8 are dismissed.

…

[emphasis added]

PGN contends that the above extract from the Partial Award clearly demonstrates that the Interim Award has in fact been varied by the 2011 Tribunal's subsequent findings in the Partial Award, and this in turn supports its argument that the Interim Award was only meant to have interim finality, in breach of s 19B. Therefore, PGN submits, the Interim Award should be set aside.

32 PGN's second argument on appeal concerns the effect of cl 20.4 of the Conditions of Contract. PGN argues that the effect of cl 20.4 is that DAB No 3 ceases to be binding as soon as the 2011 Tribunal makes any award on the parties' Underlying Dispute over the merits of that DAB decision. Here, the 2011 Tribunal has made certain findings on the merits of DAB No 3 as set out in the Partial Award. PGN argues that DAB No 3 thus ceased to have any binding effect as from the date of issuance of the Partial Award (*ie*, 25 September 2014). However, it does not go further to explain why the Interim Award, which is founded upon DAB No 3, should therefore be set aside.

33 We note at this point that PGN bears the burden of demonstrating that one or more of the grounds listed in s 24 of the IAA and/or Art 34(2) of the Model Law for setting aside an arbitral award are satisfied before the Interim Award can be set aside. PGN has not explained which specific ground for setting aside would be satisfied if either or both of its arguments on appeal are accepted. However, we understand the essence of PGN's case to be that if either or both of these arguments are made out, it will have established that the Interim Award was subject to revision and was hence not final; since such a non-final award would be contrary to s 19B, which is part of the law governing the 2011 Arbitration, it would follow that the 2011 Arbitration was not conducted in accordance with the parties' agreed arbitral procedure. If PGN can establish this, its challenge to the Interim Award would fall within Art 34(2)(*a*)(iv) of the Model Law.

CRW's case on appeal

34 CRW's response to PGN's first argument on appeal hinges on the distinct and separate nature of two questions which CRW says were put to the 2011 Tribunal in the 2011 Arbitration. The first question is whether CRW is entitled to the Adjudicated Sum awarded under DAB No 3 as a final determination of what is ultimately due to it. This, CRW accepts, will entail evaluating DAB No 3 on the merits, and can only be determined after an arbitration that examines and inquires into those merits. The second question is whether CRW is entitled to an immediate award for the Adjudicated Sum on the basis that CRW is entitled to this sum as a matter of the proper interpretation of the Conditions of Contract, even though the 2011 Tribunal's final determination of the first question may eventually lead to a different result. CRW maintains that the 2011 Majority Arbitrators finally disposed of the second question in the Interim Award. The Interim Award, CRW submits, will not be varied by a future final award on the first question because the latter award will deal with only that specific question. CRW also argues that s 19B only precludes the variation by a later award of an interim award previously made, and not the making of an interim award such as the Interim Award in this case.

35 As regards PGN's second argument on appeal, CRW contends that PGN's interpretation of cl 20.4 of the Conditions of Contract is not commercially sensible. It argues that the commercially sensible way of reading cl 20.4 is that DAB No 3 only ceases to be binding upon the final determination of the parties' Underlying Dispute over the merits of that DAB decision, and even if

there is any partial determination of the merits of DAB No 3 in the meantime, this would not affect the Interim Award.

Our decision

PGN's applications for leave to adduce further evidence – SUM 5277 and SUM 5985

36 As mentioned earlier, by way of SUM 5277 and SUM 5985, PGN seeks to adduce further evidence for the purposes of the present appeals. The further evidence which is the subject matter of SUM 5277 is the second affidavit of Mr Muhammad Husseyn Umar ("Mr Umar"), while the further evidence which is the subject matter of SUM 5985 is the fourth affidavit of Mr Umar.

SUM 5277 – Mr Umar's second affidavit

37 Mr Umar's second affidavit pertains to new developments in the 2011 Arbitration that occurred after the hearing before the Judge. The exhibits in that affidavit include the parties' submissions to the 2011 Tribunal on the matters considered in the Partial Award and the Partial Award itself. Apart from what we have already mentioned in relation to the Partial Award (see [30]–[31] above), PGN also points out that the 2011 Tribunal considered the possibility of collusion between the DAB and CRW. During the hearing before the 2011 Tribunal, CRW's representative, Mr Boy Eka Setiabudhi ("Mr Setiabudhi"), admitted that the DAB had prepared his witness statement. The 2011 Tribunal ruled in the Partial Award that PGN had failed to cross the high threshold necessary to make out either bad faith on the DAB's part in arriving at its decision in DAB No 3 or collusion between the DAB and CRW. However, it also stated (at [76] of the Partial Award) that it "may not have been advisable [for the DAB] to … draft witness statements on behalf of any party".

38 PGN argues that it should be given leave to adduce Mr Umar's second affidavit in evidence because that affidavit supports its case on appeal. According to PGN, the Partial Award demonstrates that the Interim Award was only meant to have interim finality. Furthermore, although the 2011 Tribunal did not consider bad faith and/or collusion on the part of the DAB to have been made out, it made the observation at [37] above on the propriety of the DAB's preparation of Mr Setiabudhi's witness statement. PGN maintains that Mr Setiabudhi's admission that the DAB had prepared his witness statement and the 2011 Tribunal's aforesaid observation highlight that "there is a real risk that the DAB was acting unfairly and/or may have colluded with [CRW]". In view of this, PGN submits, the Interim Award should be set aside; otherwise, the above-mentioned discrepancies will simply be whitewashed.

39 CRW does not appear to contest the admission of the evidence set out in Mr Umar's second affidavit. In fact, it relies on the same to demonstrate that the 2011 Tribunal is currently still in the process of reviewing the merits of the parties' Underlying Dispute. Additionally, CRW deals with the merits of PGN's arguments predicated on the new evidence. It argues that the Partial Award does not change the final and binding nature of the Interim Award because the Interim Award only deals with the distinct issue of whether CRW is entitled, pursuant to cl 20.4 of the Conditions of Contract, to prompt payment of the Adjudicated Sum awarded under DAB No 3, notwithstanding the fact that the 2011 Tribunal's final determination of the merits of the Underlying Dispute is still pending. The 2011 Tribunal's subsequent ruling in the Partial Award that CRW is not entitled to the quantum claimed under certain Heads of Claim, CRW submits, is only relevant in so far as the separate issue of its final entitlement to the Adjudicated Sum or any other sum determined by the 2011 Tribunal is concerned.

40 In our judgment, it is relevant for us to consider the effect which the Partial Award has on the finality of the Interim Award. Additionally, we note CRW's willingness to address the merits of PGN's

arguments predicated on the Partial Award. In the circumstances, we allow SUM 5277 and admit Mr Umar's second affidavit.

SUM 5985 – Mr Umar's fourth affidavit

41 Mr Umar's fourth affidavit pertains to further developments in the 2011 Arbitration after the Partial Award was issued. CRW was directed by the 2011 Tribunal to set out its justification for the quantum which it claimed under each of the Heads of Claim that the tribunal had ordered (via the Partial Award) to be opened up, reviewed and revised. CRW took the position that its basis of calculating the quantum which it was entitled to under the 13 disputed VOPs was different from that adopted by the DAB.

42 PGN argues that the evidence pertaining to these new developments is relevant because CRW's attempt to introduce a new basis of calculation raises the question of whether the Interim Award, which is based on DAB No 3, was properly rendered. PGN suggests that it was not properly rendered since it appears that CRW itself intends to challenge the entire basis of DAB No 3.

43 CRW, on the other hand, argues that the evidence in Mr Umar's fourth affidavit is irrelevant for the purposes of the present appeals as it relates to the 2011 Tribunal's consideration of the parties' Underlying Dispute over the merits of DAB No 3. That, CRW submits, is a distinct matter which has no bearing on whether DAB No 3 should be enforced by way of the Interim Award pending the 2011 Tribunal's determination of the parties' Underlying Dispute.

44 We agree with CRW that Mr Umar's fourth affidavit relates to the merits of the parties' Underlying Dispute and not the Interim Award, and therefore has no relevance to the present appeals. Accordingly, we dismiss SUM 5985.

Final, interim, partial and provisional awards

45 We digress briefly at this point to resolve some points of terminology before proceeding to analyse PGN's two arguments on appeal. The terms "partial" award and "interim" award are often used interchangeably to refer to the same category of arbitral awards (see Gary B Born, *International Commercial Arbitration Vol III* (Wolters Kluwer, 2nd Ed, 2014) ("Born") at p 3020; and Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at paras 9.19–9.25). In broad terms, this category of arbitral awards refers to awards made in the course of the arbitral proceedings that dispose of certain preliminary issues or certain claims for relief prior to the disposition of all the issues in the arbitration.

46 Born defines a "partial" award (at p 3015) as one which:

> … finally disposes of part, but not all, of the parties' claim in an arbitration, leaving some claims for further consideration and resolution in future proceedings in the arbitration.

47 In contradistinction, an "interim" award (see Born at p 3020) is one which:

> … does not dispose finally of a particular claim (*e.g.*, one of several claims for damages arising from several alleged breaches of contract), but instead decides a preliminary issue relevant to [the] disposing of such claims (*e.g.*, choice of law, liability, construction of a particular provision). In this sense, an award is "interim" because it is a step towards disposing of a portion of the parties' claim (like a partial award), but does not purport to make a final decision either granting or rejecting those claims.

48 Both partial awards and interim awards are capable of being recognised and enforced by domestic courts. They are also susceptible to being set aside (see Born at pp 3018 and 3021).

49 "Provisional" awards, on the other hand, are awards that are issued to protect a party from damage during the course of the arbitral process. Gary B Born, *International Commercial Arbitration Vol II* (Wolters Kluwer, 2nd Ed, 2014) defines a "provisional" award (at p 2427) as one that is:

> … intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the tribunal having jurisdiction as to the substance of the case.

50 It is evident that provisional awards do not definitively or finally dispose of either a preliminary issue or a claim in an arbitration. Examples of provisional awards include those: (a) maintaining the *status quo*; (b) preserving assets; (c) preserving evidence or providing for inspection of property; (d) preventing aggravation of the parties' dispute; (e) ordering the provision of security for underlying claims; (f) ordering the provision of security for costs; and (g) ordering compliance with a confidentiality obligation (see Gary B Born, *International Arbitration: Law and Practice* (Wolters Kluwer, 2012) at p 210). An order for the interim payment of damages prior to the final assessment of damages taking place, as is contemplated (in an admittedly different but nonetheless useful context for illustrative purposes) in O 29 r 9 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), as well as the award dealt with in *Diag Human SE v Czech Republic* [2013] All ER (D) 309 (although the tribunal in that case appears, in our judgment, to have mistakenly characterised the award as a partial rather than a provisional award) would also fall in this category. Such orders are inherently capable of being varied in due course. They do not give rise to a finding on or a determination of the substantive rights of the parties and, therefore, are *provisional* in nature. Section 12 of the IAA expressly permits an arbitral tribunal to make several such orders or directions in the course of an arbitration. However, s 2 of the IAA provides that such orders or directions are not to be regarded as "award[s]" for the purposes of the IAA.

51 The term "final" award can be understood in a number of ways. First, it can refer to an award which resolves a claim or matter in an arbitration with preclusive effect (*ie*, the same claim or matter cannot be re-litigated). Even provisional awards are "final" in this sense. As Born states (at pp 3013–3014):

> … Even awards granting provisional relief can be considered to be "final", notwithstanding the fact that they will be superseded by subsequent relief, because they finally dispose of a particular request for relief. … [E]very award rendered during the course of an arbitration, before its final conclusion, is "final" because of the preclusive effect that it enjoys.

52 Second, it can refer to awards that have achieved a sufficient degree of finality in the arbitral seat. Born states that this would most obviously be so in cases where the award is granted "confirmation or *exequatur*", or is no longer susceptible to being appealed against or being subject to annulment proceedings in the arbitral seat (at p 3014).

53 Third, it can refer to the last award made in an arbitration which disposes of all remaining claims. This is a "final" award in the sense used in Art 32(1) of the Model Law.

PGN's first argument on appeal

54 Against the background set out at [45]–[53] above, we turn to the substantive issues before this court. In sum, we reject PGN's first argument on appeal because it fails to appreciate that cl 20.4 of the 1999 Red Book (which is identical to cl 20.4 of the Conditions of Contract) imposes a distinct

contractual obligation on the parties to comply promptly with a DAB decision once it is issued. This is so whether or not the DAB decision is subsequently revised or opened up, and whether or not the arbitral tribunal eventually concludes that a different amount from that determined by the DAB is in fact due to the receiving party (*ie*, the party that is to receive payment under the DAB decision). In brief terms, the scheme under a contract which incorporates the dispute resolution mechanism set out in cl 20 of the 1999 Red Book is that any differences as to matters arising under the contract may be resolved in the first instance by the DAB. The DAB's decision (if it is sought) must be complied with and acted upon at once. However, a party that is dissatisfied with the DAB's decision may challenge it. Without derogating from the obligation of the parties to immediately implement and give effect to the DAB's decision, an arbitral tribunal may, usually at a significantly later point in time (and only if the parties fail to amicably settle their differences over the DAB's decision), open up and revise the DAB's decision. In doing so, the tribunal would be considering a conceptually distinct question, namely, the state of the final accounts between the parties. We do not agree that the 2011 Majority Arbitrators intended the Interim Award which they made to be subsequently varied by future awards that would be issued in the course of the 2011 Arbitration. Even if they did, s 19B operates to render the Interim Award final and binding as regards the particular issue which that award decided, namely, PGN's obligation under cl 20.4 of the Conditions of Contract to make prompt payment of the Adjudicated Sum awarded under DAB No 3 to CRW. Nothing that the 2011 Tribunal says or does can change that. We elaborate below.

Interpretation of cll 20.4 and 20.6 of the Conditions of Contract

55 We begin with the interpretation of cl 20.4 of the Conditions of Contract in so far as the effect of a DAB decision is concerned. In our judgment, that clause imposes one distinct contractual obligation on the parties and confers a conditional right on a party who wishes to challenge a DAB decision. First, as to the obligation, we are satisfied that cl 20.4 (specifically, cl 20.4[4]) imposes an affirmative obligation on the parties to "promptly give effect to [a DAB decision]". In particular, the paying party (*ie*, the party that is required to make any payment under the DAB's decision) has a contractual obligation to pay *promptly*, notwithstanding its views on the merits of the DAB's decision. This point is neatly encapsulated by Prof Nael G Bunni ("Prof Bunni") in his article entitled "The Gap in Sub-clause 20.7 of the 1999 FIDIC Contracts for Major Works" [2005] ICLR 272 as follows (at p 276):

> … The [DAB's] decision must be complied with by both parties, which is a characteristic feature of the FIDIC DAB procedure … The decision becomes, in effect, a contractual obligation on both parties such that non-compliance with it by either of them is a breach of contract and the party in breach would be liable in damages.

56 This follows from the plain words of cl 20.4[4] of the Conditions of Contract:

> … 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 as described below. … [emphasis added in italics and bold italics]

57 In our judgment, the following propositions cannot persuasively be disputed and bear emphasis:

(a) A DAB decision is immediately binding once it is made. This may be distinguished from a DAB decision in respect of which no NOD has been issued within the stipulated 28-day time frame. Such a DAB decision, under cl 20.4[7], becomes "*final* and binding" [emphasis added].

(b) The corollary of a DAB decision being immediately binding once it is made is that the parties are obliged to promptly give effect to it until such time as it is overtaken or revised by

either an amicable settlement or a subsequent arbitral award.

(c) The fact that a DAB decision is immediately binding once it is made until and unless it is revised by either an amicable settlement or an arbitral award is significant. As will be evident shortly from our discussion of the second of the two points mentioned at [55] above in relation to cl 20.4, the process of amicable settlement under cl 20.5 or arbitration under cl 20.6 may *only* be initiated by a party with a view to having the DAB decision reviewed and revised if that party has issued an NOD. Hence, the issuance of an NOD self-evidently does not and cannot displace the binding nature of a DAB decision or the parties' concomitant obligation to promptly give effect to and implement it.

58 Our second point in relation to cl 20.4 concerns the dissatisfied party's conditional right to challenge a DAB decision. A dissatisfied party (usually the paying party) who wishes to challenge a DAB decision *must* issue an NOD, and thereafter first attempt to amicably settle its disagreement with the DAB decision with the other party. It is only if no amicable settlement is reached or if no attempt at amicable settlement is made that the dissatisfied party has, after 56 days from the date of issuance of the NOD, the right to refer the merits of the DAB decision to arbitration. This follows from:

(a) cl 20.4[5], which provides that either party, if dissatisfied with a DAB decision, may, *within 28 days* after receiving the decision, give notice of its dissatisfaction by issuing an NOD;

(b) cl 20.4[6], which provides that except as permitted under cl 20.7 or cl 20.8, no party may commence arbitration unless an NOD has been issued;

(c) cl 20.4[7], which provides that if an NOD is not issued within 28 days after receipt of the DAB decision, the decision shall become *final* and binding;

(d) cl 20.5, which states that if an NOD has been issued, the parties are to attempt to settle their dispute amicably before commencing arbitration; and

(e) cl 20.6, which states that "any dispute in respect of which the DAB's decision … has not become final and binding" shall, unless settled amicably pursuant to cl 20.5, be "finally settled by international arbitration".

59 It follows that the issuance of an NOD is a condition precedent to a dissatisfied party's ability to seek a review of a DAB decision on the merits through either negotiations aimed at amicable settlement or arbitration. But, as noted above, the issuance of an NOD does not in any way displace the binding (albeit non-final) effect of the DAB decision in question or the parties' obligation to *promptly* give effect to and implement it. If an NOD has been issued and if no amicable settlement of the parties' dispute is reached (or no attempt at amicable settlement is made) within 56 days from the date of issuance of the NOD, then – and only then – the DAB decision in question may be opened up, reviewed and revised at an arbitration which is directed towards the merits of that decision.

60 With regard to the first point that we have referred to at [55] above (namely, the parties' obligation to comply promptly with a DAB decision), where compliance entails payment of a sum of money determined by the DAB, the question arises as to whether this obligation, if it is not complied with, is capable of being enforced by way of a separate arbitration or, for that matter, by way of a separate interim award within the same arbitration that is also concerned with the underlying merits of that DAB decision. We recognise that there are different views on this. However, in our judgment, this obligation is capable of being enforced by arbitration in the manner just described for the reasons set out below.

61 To begin with, we return to the dispute resolution framework set out in cl 20 of the Conditions of Contract, especially cl 20.6 (which has been reproduced at [5] above), the effect of all of which has been summarised at [6] above. To recapitulate, this framework contemplates that "a dispute (of any kind whatsoever) … in connection with, or arising out of, the Contract or the execution of the [w]orks [thereunder]" may be referred to a DAB for its decision. If such a dispute is indeed referred to a DAB and if the DAB's decision has not become final and binding because of the issuance of an NOD within the permitted time frame, the dispute shall be resolved: (a) first, by amicable settlement, if possible; and (b) failing amicable settlement, by arbitration.

62 The first question which arises is whether the disputes that may be referred to arbitration exclude certain categories of disputes which must be resolved in some other way. In our judgment, the broad terms used in cl 20.4[1] and cl 20.6[1], which refer respectively to "a dispute (of any kind whatsoever)" and "any dispute in respect of which the DAB's decision … has not become final and binding", militate against this.

63 The specific dispute in the present appeals is a narrow one – it is whether a DAB decision ordering the payment of a sum of money gives rise to an immediate obligation on the part of a paying party *who has issued an NOD in respect of that decision* to promptly make the payment ordered by the DAB. Such a dispute could conceivably be referred back, in the first instance, to the DAB since it undoubtedly is one that "arises between the [p]arties in connection with, or arising out of, the [c]ontract" as provided in cl 20.4[1]. If such a dispute is so referred and if the DAB resolves it affirmatively, there can really be no objection to that later DAB decision (*ie*, the DAB decision that a binding but non-final DAB decision ordering the payment of a specified sum does give rise to an immediate obligation on the paying party's part to promptly pay that sum) being subsequently referred to arbitration (under cl 20.6 if an NOD is issued and no amicable settlement under cl 20.5 is reached, or under cl 20.6 read with cl 20.7 if no NOD is issued), or to the issuance of an arbitral award which affirms the later DAB decision.

64 The real question then is whether it is *essential* to first go through the process of referring a dispute over the "binding" effect of a binding but *non-final* DAB decision – *ie*, a DAB decision in respect of which an NOD has been issued – back to the DAB under cl 20.4 and then through a further process of amicable settlement under cl 20.5 before referring it to arbitration under cl 20.6.

65 Mr Christopher R Seppälä ("Mr Seppälä"), who assisted FIDIC in drafting the predecessor of cl 20.7 of the 1999 Red Book (*ie*, cl 67.4 of the 1987 edition of the Red Book ("the 1987 Red Book")) – the sub-clause which has given rise to much of the confusion – has argued that this is unnecessary. In his article entitled "Sub-Clause 20.7 of the FIDIC Red Book does not justify denying enforcement of a 'binding' DAB decision" (2011) 6(3) CLInt 17, he opines that a failure to comply with a binding but non-final DAB decision can be referred directly to arbitration. In such a case, there is no need for the receiving party in whose favour the DAB has ruled to refer its dispute with the paying party over the latter's non-compliance with the binding but non-final DAB decision to the DAB for a further decision by the DAB prior to commencing arbitration. Mr Seppälä observes that in most cases, the party that issued the NOD (usually the paying party) would have referred the merits of the DAB decision to arbitration, and its failure to promptly comply with the DAB decision can then be dealt with as an issue within that arbitration (at p 19). Mr Seppälä appears to take the view that the NOD which is issued by the paying party in respect of the substantive merits of the DAB decision is sufficient to permit the receiving party to refer its dispute with the paying party over the latter's non-compliance with that DAB decision to arbitration. This is evident from the following excerpt from his article (at p 20):

> … [T]ribunals and courts are, therefore, with respect, going too far to suggest that, because

Sub-Clause 20.7 does not refer to binding decisions of a DAB, a failure to comply with a binding decision may not be referred to arbitration. *It was unnecessary to deal with binding decisions*, as it was clear – or so it was thought – that, *as these had been the subject of a notice of dissatisfaction, these could, by definition, be referred to arbitration under Sub-Clause 20.6* … [emphasis added]

66 In our judgment, the position that Mr Seppälä has argued for is self-evidently sensible for several reasons:

(a) First, in cases where an NOD has been issued such that the DAB decision concerned remains binding but non-final, it is important to be precise as to what the real difference between the parties is. This can be explained by reference to the facts in the present appeals. When the dispute emerged between PGN and CRW over the matters that would later become the subject matter of DAB No 3, it was referred to the DAB. The explicit decision in DAB No 3 was that the Adjudicated Sum was payable by PGN to CRW. But, in our judgment, there was also an inherent premise embedded within that decision, which is that the Adjudicated Sum was payable *forthwith*. If, for any reason, the DAB had intended that its decision ordering payment of the Adjudicated Sum should only take effect later, it would have had to make this explicit; otherwise, it seems indisputable to us that DAB No 3 also required the Adjudicated Sum to be paid forthwith by PGN to CRW. When PGN then issued its NOD, it undoubtedly meant to convey its dissatisfaction both with the explicit premise of DAB No 3 (namely, the valuation by the DAB of CRW's claims) as well as with its inherent premise (namely, that the Adjudicated Sum was payable forthwith). If and to the extent this was not made clear on the face of PGN's NOD itself, it was undoubtedly made clear in the positions that PGN took in the 2009 Arbitration as well as in the 2011 Arbitration. In our judgment, this understanding of the true nature of the difference between the parties – namely, as comprising two facets, one explicit and the other, inherent – is reflected in Mr Seppälä's statement in the extract reproduced at [65] above that:

> … 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. … [emphasis added in italics and bold italics]

The point, in essence, is that the dissatisfaction expressed in an NOD already inherently extends to the requirement that payment of the adjudicated amount be made forthwith, and there is nothing further to be referred back to the DAB. This also follows as a matter of logic: after all, 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 cl 20.4[4] of the Conditions of Contract explicitly states that the parties "shall *promptly* give effect" [emphasis added] to a binding but non-final DAB decision. The contrary argument – namely, that a DAB decision need not be complied with once an NOD has been issued in respect of it – seems to us to assume a surreal quality. The purpose of a DAB is to render *interim* decisions that bind the parties until an amicable settlement of their dispute is reached or an arbitral award that resolves the underlying merits of their dispute is made; and the simple point is that given the scheme of the Conditions of Contract as we have analysed it at [55]–[57] above, any requirement to refer a question as to the immediate binding effect of a binding but non-final DAB decision back to the DAB seems to us not only wholly superfluous, but also contrary to the express words of cl 20.4[4].

(b) Second, the receiving party would encounter a number of practical difficulties if it is

required to go through the steps set out in cll 20.4 and 20.5 before it can refer the paying party's non-compliance with a binding but non-final DAB decision to arbitration. As noted by the Judge at [45] of *Persero HC (2014)*, there would be an inordinate delay. The receiving party would have to wait up to 84 days (or such other period proposed by the DAB and agreed to by the parties) for the DAB to render its decision on the separate dispute as to whether the earlier binding but non-final DAB decision is to be complied with promptly, plus another 28 days from the date of receipt of the later DAB decision (answering the question of whether the paying party has an obligation to promptly comply with the earlier binding but non-final DAB decision) to see whether that decision becomes "final and binding" by virtue of no NOD being issued within the stipulated 28-day period. If either party issues an NOD within the permitted time frame, a further 56 days would have to pass to enable the parties to attempt to amicably settle their dispute over the paying party's non-compliance with the earlier (binding but non-final) DAB decision. Given the purpose and context of the DAB scheme, it would not be commercially sensible to interpret cl 20 as requiring the receiving party to satisfy the conditions precedent in cll 20.4 and 20.5 before it can refer a dispute over the paying party's non-compliance with a binding but non-final DAB decision to arbitration.

67 This view is endorsed by FIDIC itself. FIDIC issued a Guidance Memorandum for users of the 1999 Red Book on 1 April 2013 ("the FIDIC Guidance Memorandum"), where it set out its view on how it intended cl 20 to be interpreted. It stated:

> This Guidance Memorandum is designed to *make explicit the intentions of FIDIC* in relation to the enforcement of the *DAB decisions that are binding and not yet final*, which is that *in the case of failure to comply with these decisions, the failure itself should be capable of being referred to arbitration under Sub-Clause 20.6 [Arbitration]*, ***without*** *Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] being applicable to the reference.* [emphasis in original omitted; emphasis added in italics and bold italics]

68 In our judgment, it is significant that the FIDIC Guidance Memorandum is directed at "mak[ing] explicit" the *identical* point which we have canvassed above at [64]–[66], namely, that it is unnecessary to go through the process set out in cll 20.4 and 20.5 before referring a failure to comply with a binding but non-final DAB decision to arbitration under cl 20.6. We do not consider that this approach would extend the scope of the arbitration agreement set out in cl 20.6 at all because it is already possible to refer a failure to honour a binding but non-final DAB decision to arbitration for the reasons we have set out at [61]–[63] and [66(a)] above. Rather, the real issue is over the necessity to go through the preliminary steps set out in cll 20.4 and 20.5 before commencing arbitration. In this regard, FIDIC opted (in our judgment, wisely and sensibly) to "make explicit the intentions of FIDIC" that are already implicit in the cl 20 dispute resolution framework for the reasons we have articulated. Moreover, the FIDIC Guidance Memorandum itself, in the section entitled "Background", makes it clear that it is intended to clarify a point that many arbitral tribunals have found to be "unclear":

> A substantial number of arbitral tribunals have found Clause 20 to be *unclear* on the issue of whether a [P]arty may refer the failure of the other Party to comply with a DAB decision that is 'binding' but not 'final' to arbitration as is explicitly the case of a 'final and binding' decision under Sub-Clause 20.7. … [emphasis added]

69 This is hardly the language of extension. It is true that in its guidance memorandum, FIDIC suggested that cl 20.7 (among other provisions of the 1999 Red Book) be amended, but this does not alter the fact that FIDIC's proposed amendment to cl 20.7 is aimed at *clarifying*, rather than changing, its existing position and intention in relation to the dispute resolution framework under cl 20. The inquiry cannot end at FIDIC's proposed amendment to cl 20.7. The real question is whether

FIDIC intended (via its guidance memorandum) to recommend changes to the substantive position under cl 20. The FIDIC Guidance Memorandum in fact makes it clear that the issuance of the memorandum was driven by *the lack of a consistent understanding of FIDIC's intention* (including on the part of our courts, culminating in the decision in *Persero CA*). In our judgment, this is inconsistent with any intention to change the substantive position under cl 20. Further, we do not in any case think that the absence of the suggested amendment from cl 20.7 of the Conditions of Contract in the present case renders it inappropriate to find, as we do (in line with Mr Seppälä's contention), that the dispute over PGN's non-compliance with the DAB's binding but non-final decision in DAB No 3 was within the scope of the arbitration agreement in the Conditions of Contract. There is certainly nothing in the FIDIC Guidance Memorandum to suggest that FIDIC itself doubted whether, absent this suggested amendment, it would be possible to refer a failure to honour a binding but non-final DAB decision to arbitration directly without the parties having to first go through the preliminary steps set out in cll 20.4 and 20.5.

70 PGN argues that the Conditions of Contract should not be interpreted with reference to the FIDIC Guidance Memorandum because that was issued after the parties entered into the Contract (which includes, among other documents, the Conditions of Contract). We find no force in this argument. First, it is clear from the careful language which FIDIC adopted in that memorandum that it was merely making "explicit" what was all along implicit in cl 20 itself. As we have already said, we consider, for the reasons we have already set out above, that, indeed, it is implicit in cl 20 that a failure to comply with a binding but non-final DAB decision is capable of being directly referred to arbitration without the need for the parties to first go through the process prescribed by cll 20.4 and 20.5.

71 One point that seems to have attracted almost universal acceptance in this case, save of course on the part of PGN, is that cl 20.4 (specifically, cl 20.4[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 vital 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 cl 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.

72 Such a view is incompatible with the express language of cl 20.4 as well as with the analysis we have set out at [55]–[69] above. In addition, we consider that there are a number of other grave difficulties with such a view, namely:

(a) If the receiving party is confined to seeking damages for being denied sums that are eventually found to be due to it, it would seem that the receiving party has no more than a right to pre-award interest or, perhaps, a claim for financing charges. This would be an unduly – and, in our judgment, an unsustainably – parsimonious construction of cl 20.4 since courts and tribunals will often already have the power to grant pre-award interest or allow claims for financing charges.

(b) Secondly, if the contention is that an order may be made to enforce the obligation to promptly give effect to a binding but non-final DAB decision, but only by the local courts and not by an arbitral tribunal established pursuant to the parties' contract, that would be a very narrow contention and one that seems implausible. This is because it would suggest that the intention underlying the dispute resolution framework contained in the 1999 Red Book is to carve out from the jurisdiction of the arbitral tribunal all matters relating to the immediate enforcement of binding but non-final DAB decisions and to vest *only that specific jurisdiction* in the courts, while

preserving for the arbitral tribunal the jurisdiction to rule on the merits of such DAB decisions. To our knowledge, it has never been suggested that this was FIDIC's intention when the predecessor of cl 20 was drafted. Moreover, such a construction fails to explain why a dispute over whether or not a binding but non-final DAB decision is to be immediately complied with cannot be directly referred to arbitration as set out at [61]–[66] above. To say that this is so because such a dispute is not a "dispute" as that term is used in cl 20.4, with respect, flies in the face of what constitutes a "dispute" for the purposes of an arbitration agreement (see *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [33]–[34]) as well as what PGN has in fact contended at various stages of this protracted dispute between the parties.

(c) Further, it is not clear whether a claim by the receiving party for pre-award interest or financing charges, on the alternative hypothesis set out at [72(a)] above, would be capable of being brought before the arbitration of the merits of the parties' underlying dispute has been completed. After all, can it be said that a claim for damages in the form of financing charges or a claim for pre-award interest would accrue before it has been finally determined what is actually due to the receiving party? If not, this would pose a considerable obstacle because such a determination would only take place at the end of the arbitration of the underlying dispute. By then, if the arbitral tribunal rules in favour of the receiving party, he would have an award he can enforce and there would be no need to enforce the DAB decision, which would have been superseded by the award; nor, generally, would there be any need for the receiving party to go to the courts at all in such circumstances.

(d) All of this also wholly undermines any expectation which the receiving party may have of obtaining prompt payment of the sum awarded to it under a DAB decision.

73 Additionally, in some circumstances, it may be vital that parties promptly comply with a DAB decision. By way of example, Prof Bunni has suggested that in some cases, prompt compliance may be necessary simply to enable a party to continue to participate in the arbitration of the merits of the DAB decision concerned. He puts it in this way at p 278 of the article referred to above at [55]:

> … If, for example, the [DAB's decision] involves a large sum of money to be paid to the contractor who is experiencing financial difficulties, then the employer's failure to make such payment promptly might mean the difference between the contractor on the one hand being able to afford to continue in the arbitration; and on the other hand being under such economic pressure that he is forced to concede to the employer. …

74 Indeed, this is true even aside from such dire circumstances. Given the nature of the building and construction industry, it is of general importance that contractors are paid promptly where the contract so provides. As explained by the Judge at [23] of *Persero HC (2014)*:

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

75 In our judgment, cl 20.4 is aimed at addressing precisely these concerns, and cl 20 should therefore be interpreted in a manner which promotes prompt compliance with a DAB decision,

including, as noted above (and also by FIDIC), by enabling a failure to comply with a binding but non-final DAB decision to be directly referred to arbitration without the parties having to first go through the steps prescribed by cll 20.4 and 20.5. In this regard, Frederic Gillion has suggested in his article "Enforcement of DAB Decisions under the 1999 FIDIC Conditions of Contract: A Recent Development: CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK" [2011] ICLR 388 (at p 408) that the receiving party should seek an award:

> … giving full immediate effect to [its] right to have a DAB decision complied with promptly in accordance with sub-clause 20.4 or to damages in respect of the losing party's breach of sub-clause 20.4. That award will be final in that it will dispose of the issue of the losing party's failure to give prompt effect to the DAB decision, which is a substantive claim distinct from the underlying dispute covered by the DAB decision.

76 The position, ultimately, is a simple one. An arbitration that settles the merits of a DAB decision will likely take considerable time to determine. In contrast, an arbitral ruling concerning a party's failure to comply with that DAB decision will almost always be made within a relatively short period of time.

77 We note that Prof Bunni, in his article cited at [55] above, ultimately concludes that cl 20 of the 1999 Red Book does not entitle a receiving party to refer the paying party's non-compliance with a binding but non-final DAB decision directly to arbitration without the parties having to first go through the process set out in cll 20.4 and 20.5. He appears to have reached this conclusion on the basis that since cl 20.7 only provides for the enforcement by arbitration of final and binding DAB decisions, binding but non-final DAB decisions are not similarly capable of being enforced by arbitration. He states (at pp 277–278):

> … [A]lthough the clear intention of sub-clause 20.4 is that the DAB's decision should be complied with promptly, unless and until it is revised in a subsequent forum (amicable settlement or arbitration), and irrespective of whether or not one of the parties is dissatisfied with it, sub-clause 20.7 is worded in such a way that it only deals with the event where the parties are satisfied with the decision. The draftsmen did not deal with circumstances where the parties are dissatisfied with the decision, leaving that situation without any prompt solution or elucidation hence creating a gap. …

78 Prof Bunni states that cl 20 does not offer the receiving party any solution in cases where the paying party fails to comply with a binding but non-final DAB decision, other than to treat the paying party as being in breach of contract. He acknowledges that this leads to an unsatisfactory situation which is inconsistent with the express wording of cl 20.4 (at p 273):

> … [A]s the remedy for such breach is damages that might be imposed at some future date, it is of little value in the immediate term and is in violation of the requirement in sub-clause 20.4 that the parties shall "promptly give effect" to the DAB's decision …

Therefore, he argues that the "gap" should be remedied, and one suggestion he offers is for cll 20.6 and 20.7 of the 1999 Red Book to be amended so as to expressly allow a receiving party to refer a paying party's non-compliance with a binding but non-final DAB decision to arbitration without having to first comply with the provisions of cll 20.4 and 20.5 (at pp 281–282). We note that Prof Bunni's conclusion is based on his interpretation of the effect of the express insertion of cl 20.7 into the Red Book (in the form of cl 67.4 of the 1987 Red Book). We respectfully disagree with him on this and turn to address this point now.

79 In the article cited at [65] above, Mr Seppälä discusses the effect of the express introduction of cl 20.7. He acknowledges that cl 20.7, which expressly provides for the enforcement by arbitration of final *and binding* DAB decisions (*ie*, those in respect of which neither party has issued an NOD within the stipulated time frame), might conceivably be understood to suggest that binding but non-final DAB decisions are not similarly capable of being enforced by arbitration since they are excluded from the scope of cl 20.7. However, he argues that cl 20.7 should not be interpreted in this manner. He undertakes an analysis of the historical reason for the introduction of cl 20.7 (in the form of its predecessor, cl 67.4 of the 1987 Red Book) to support his argument.

80 In all the editions of the Red Book published prior to the 1999 Red Book, the role presently assigned to the DAB was discharged by the "Engineer". Disputes had to be referred to the Engineer for decision before they could be referred to arbitration. There was a gap in the version of the Red Book that was published in 1977 ("the 1977 Red Book"), in that there was no mechanism for a receiving party to enforce an Engineer's decision which had become final and binding save by resort to the local courts. Mr Seppälä observes in his article (at p 19):

> … [I]n the case of an international construction project, the Contractor would almost certainly not want to go into a local court, which would typically be in a developing country, because the local court often could not, or would not, grant the desired relief. As a result, no satisfactory remedy was available in the [1977 Red Book] where, in the case of such a project, a party, typically the Employer, had failed to comply with a final and binding decision of the Engineer under Clause 67.

81 While we do not accept Mr Seppälä's broad and general characterisation of the state of justice generally available in "local" courts and courts in "developing" countries, the passage nonetheless provides a candid explanation for FIDIC's decision to act.

82 Clause 67.4 was first introduced in the 1987 Red Book to ensure that a receiving party could refer a paying party's failure to comply with a final and binding Engineer's decision to arbitration. Mr Seppälä argues that cl 67.4 and its successor, cl 20.7 of the 1999 Red Book, should *not* be interpreted to mean that binding but non-final Engineer's/DAB decisions are not similarly capable of being enforced by arbitration. He states in the article cited at [65] above (at p 20):

> … Nothing was intended to be implied about merely a 'binding' decision as it was obvious – or so it was thought at that 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 (and its predecessor, Sub-Clause 67.3).

It is evident that Mr Seppälä's views are aligned with those expressed in the FIDIC Guidance Memorandum. In short, cl 20.7 makes perfect sense if one sees it as a mechanism by which the receiving party under a DAB decision that has become *final and binding* can take steps, where that decision is not complied with, to convert that decision into an internationally enforceable arbitral award even though there is no dispute as to its underlying merits. We thus agree with Mr Seppälä that cl 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.

83 Before leaving this issue, we make some observations on the views expressed by this court in *Persero CA* at [67]–[68] because our decision here – namely, that a paying party's failure to comply

with a binding but non-final DAB decision is itself capable of being directly referred to a *separate* arbitration under cl 20.6 – differs from those views. In *Persero CA*, the court adopted the view that cl 20 contemplated a *single* arbitration that would deal with all the differences between the parties:

> 67 … Where [an] NOD has been validly filed against a DAB decision by one or both of the parties, and either or both of the parties fail to comply with that decision (which, by virtue of the NOD(s) filed, will be binding but non-final), sub-cl 20.6 of the 1999 [Red Book] 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, *sub-cl 20.6 contemplates a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved*. …
>
> 68 This observation is consistent with the plain phraseology of sub-cl 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". Sub-clause 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.
>
> [emphasis in original in bold italics; emphasis added in italics]

With respect, the suggestion that all the differences between the parties must be settled in a single arbitration 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 different 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 (see [66(a)] above). 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.

84 In the present case, the parties had, by way of the wide Terms of Reference adopted for the 2009 Arbitration, conferred upon the 2009 Tribunal broad authority to not only deal with the issue of whether PGN had to make immediate payment of the Adjudicated Sum awarded under DAB No 3, but also consider the merits of the parties' Underlying Dispute in the same arbitration. As noted by this court at [43] of *Persero CA*, under the Terms of Reference for the 2009 Arbitration, the parties had consented to confer on the 2009 Tribunal:

> … an unfettered discretion to reopen and review each and every finding by the [DAB]. In other words, the Arbitral Tribunal was appointed to decide not only whether CRW was entitled to immediate payment of the sum of US$17,298,834.57 … but also "any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, [might] deem necessary to decide for the purpose of rendering its arbitral award". …

85 Notwithstanding the broad Terms of Reference for the 2009 Arbitration, the 2009 Majority Arbitrators concluded that they were not required to open up, review and revise DAB No 3. This was because: (a) CRW had limited its claim in the 2009 Arbitration to, essentially, a declaration that PGN had an immediate obligation to pay CRW the Adjudicated Sum and an order for "prompt payment" of that sum (see [8] above); and (b) PGN had not filed a counterclaim, but rather, had couched its request for the merits of DAB No 3 to be "open[ed] up, review[ed] and revise[d]" in the form of a *defence to CRW's claim for immediate payment* (see [9] above), which defence was untenable. For these reasons, the 2009 Majority Arbitrators proceeded on the basis that the 2009 Arbitration was "*limited* to giving prompt effect to [DAB No 3]" [emphasis added] (see [6] of the Final Award). This is

evident from the concluding paragraphs of the Final Award, where the 2009 Majority Arbitrators stated:

> 48. [PGN] has not served any counterclaim.
>
> …
>
> 51. It follows that [PGN's] Answer and [PGN's] request for an award to open up, review and revise [DAB No 3] is but a defence to the claim for immediate payment of US$17,298,834.57. For all the reasons set out above, this defence must also fail and the Arbitral Tribunal [*ie*, the 2009 Majority Arbitrators, in the context of this quotation] FINDS accordingly.
>
> This does not in any way affect [PGN's] right to commence an arbitration to seek to revise [DAB No 3]. The Arbitral Tribunal notes that [CRW has] expressly agreed that [PGN] may do so.
>
> …
>
> 53. In the light of the Arbitral Tribunal's findings …, *there is nothing further to be dealt with in this arbitration* and [CRW is] entitled to a final award on [its] claims.
>
> [emphasis added]

86 Unlike the 2009 Majority Arbitrators, the court in *Persero CA* took the view that it made no difference that PGN challenged the merits of DAB No 3 by way of a defence only. It considered this to be a matter of form rather than substance, and said (at [67] and [88]):

> 67 … The respondent to the proceedings may raise the issues which it wishes the arbitral tribunal to consider either in its defence and or in the form of a counterclaim. *There is no particular doctrine or rule that the respondent can only dispute a binding but non-final DAB decision by way of a counterclaim*. …
>
> …
>
> 88 Counsel for CRW therefore accepted [before the 2009 Tribunal] that if PGN had sufficiently particularised its defence for the Arbitration, the Arbitral Tribunal could proceed to examine the merits of PGN's dissatisfaction with [DAB No 3]. However, despite this concession by CRW, the [2009 Majority Arbitrators] – *curiously* – declined to open up, review and revise [DAB No 3] on the ***sole*** basis that PGN had not filed a counterclaim … *As stated above at [67], it was not necessary for PGN to file a counterclaim before it could challenge [DAB No 3] on the merits*. In addition, PGN's memorial dated 10 July 2009, in our view, did include sufficient details of the alleged errors committed by the [DAB] (see [71] above). The Arbitral Tribunal could quite easily have examined the underlying documents placed before it to consider PGN's allegations as well as undertake a rehearing of the parties' dispute in accordance with sub-cl 20.6 of the [Conditions of Contract] after making an interim order for payment in favour of CRW.
>
> [emphasis in original in bold italics; emphasis added in italics]

87 With respect, we disagree with the views expressed at [67] and [88] of *Persero CA*. As noted earlier at [85] above, in the 2009 Arbitration, the 2009 Tribunal had effectively only been asked to consider whether a dispute over the merits of DAB No 3 could be a defence to CRW's claim for immediate payment of the Adjudicated Sum. The 2009 Majority Arbitrators held – in our judgment,

correctly – that such a dispute could not be a defence. In our judgment, cl 20.4[4] of the Conditions of Contract, on its terms, makes it clear that a dispute over the merits of a DAB decision is not a defence to a receiving party's claim for prompt payment of the sum awarded to it by the DAB. If PGN wished to challenge DAB No 3, it was incumbent on PGN to pursue that by filing a counterclaim or lodging a fresh request for arbitration. It was simply no defence to CRW's claim (pursuant to cl 20.4) for immediate payment of the Adjudicated Sum awarded under DAB No 3 to say that an NOD had been issued in respect of that decision. 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 [DAB No 3]" (at [6] of the Final Award) and to turn down, on that basis, PGN's request that the 2009 Tribunal "open up, review and revise" DAB No 3 on its merits.

88 To sum up our analysis at [83]–[87] above, cl 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 cll 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. On the other hand, where both the dispute over the paying party's non-compliance with a binding but non-final DAB decision as well as the dispute over the merits of that DAB decision are put before the same tribunal, as was done in the 2011 Arbitration and, hence, in the case before us now, the tribunal can: (a) make an interim or partial award which finally disposes of the first issue (*ie*, whether the paying party has to promptly comply with the DAB decision); (b) then proceed to consider the second issue (*ie*, the merits of the DAB decision), which is a separate and conceptually distinct matter as we have already noted; and (c) subsequently, make a final determination of the underlying dispute between the parties. This is consistent with the view expressed by Gerlando Butera in his article "Untangling the Enforcement of DAB Decisions" [2014] ICLR 36. He argues (at p 59) that where the paying party lodges a counterclaim in an arbitration commenced by the receiving party to enforce a binding but non-final DAB decision:

> … [T]he merits of the [DAB decision] would ultimately have to be considered within the same arbitration, but (it is submitted) there is ***no reason in principle why in that case the tribunal should not first deal with and make a final (partial) award in respect of [the paying party's failure to promptly comply with the DAB decision] without at the same time reviewing the merits of the first decision*** . On the contrary, it is submitted that that is precisely what the tribunal should in that case do, having regard to the parties' agreement in clause 20.4 of the FIDIC Conditions that they "*shall promptly give effect to*" the decision. … [emphasis in italics in original; emphasis added in bold italics]

89 In our judgment, this in fact is what the 2011 Majority Arbitrators did in this case. They fully intended the Interim Award to be *finally* dispositive of the "prompt compliance" issue mentioned in the extract quoted at [88] above, *ie*, PGN's obligation to comply promptly with DAB No 3. They did not (and, for that matter, could not lawfully) intend their conclusion on that issue to thereafter be varied. We turn now to explain why we disagree with PGN's submissions to the contrary.

Did CRW and the 2011 Majority Arbitrators intend the Interim Award to be varied by future awards in the 2011 Arbitration?

90 PGN relies on a number of documents to argue that CRW and the 2011 Majority Arbitrators intended the Interim Award to be "subject to future variation". We have set out the significant references above at [27]–[31]. We do not agree with PGN's interpretation of those documents for the reasons set out below.

(1) Significance of CRW characterising its claim as one for an interim or partial award "pending" the resolution of the Underlying Dispute

91 Beginning with CRW's Statement of Claim and the Terms of Reference for the 2011 Arbitration, we accept that CRW characterised its claim as one for an interim or partial award "*pending* the resolution of [the] parties' dispute" [emphasis added] (see [27] above). However, this does not signify that CRW intended the Interim Award to be subject to variation by subsequent awards made in the 2011 Arbitration. Rather, we regard this merely as an acknowledgement by CRW that the 2011 Tribunal would have to carry on to consider the parties' Underlying Dispute over the merits of DAB No 3 notwithstanding that it might have rendered a decision granting CRW the immediate relief that the latter sought in the form of an arbitral award ordering PGN to promptly comply with DAB No 3. CRW undoubtedly wanted the 2011 Tribunal to determine its application for such relief first (indeed, immediately), before proceeding to finally resolve the Underlying Dispute. This much becomes evident when para 30(a) of CRW's Statement of Claim, which PGN referred us to, is read in its proper context. We set out below the relevant parts of CRW's Statement of Claim:

> **E**. **TRIBUNAL HAS POWER TO REVIEW AND REVISE [DAB NO 3]**
>
> 27. [CRW] accepts that [PGN], having given Notice of Dissatisfaction of [DAB No 3], is entitled pursuant to Sub-Clause 20.6 of [the Conditions of Contract] to ask the Tribunal to open up, review and revise [DAB No 3]. …
>
> 28. [CRW] however avers that the party challenging [DAB No 3] has the burden of demonstrating to the Tribunal why it was wrong.
>
> 29. [CRW] further avers that pending the revision (if any) of [DAB No 3] in the Final Award, [PGN] is obliged to comply with [DAB No 3]. [PGN's] failure to do so is a breach of Sub-Clause 20.4.
>
> F. **RELIEFS SOUGHT BY [CRW]**
>
> 30. By reason of the aforesaid matters, [CRW] is seeking:
>
> (a) pending the resolution of [the] parties' dispute in the final award, a partial or interim award, for:
>
> (i) the sum of US$17,298,834.57 and interest on that sum from 3 December 2008 (i.e the date of [CRW's] invoice) until payment of the said sum …
>
> …

92 It is clear from this that CRW acknowledged that the 2011 Tribunal had the power to rule on the parties' Underlying Dispute over the merits of DAB No 3. Indeed, having regard to cl 20.6, the contrary was unarguable. However, CRW also sought an interim or partial award to immediately enforce PGN's contractual obligation to promptly pay CRW the Adjudicated Sum awarded under DAB No 3 pending the 2011 Tribunal's determination of the Underlying Dispute.

(2) Significance of CRW's position in the 2011 Arbitration that it would continue to rely on DAB No 3 even at the stage of seeking a final award

93 We turn next to [37] of the Interim Award, which records CRW's position in the 2011 Arbitration

that it would rely on DAB No 3 both at the stage of seeking an interim award, as well as (and even if it were fail in its application for an interim award) at the stage of seeking a final award on the parties' Underlying Dispute over the merits of that DAB decision (see [28] above). PGN argues that the fact that CRW was prepared to rely on DAB No 3 even at the latter stage of seeking a final award demonstrates that CRW never intended the interim award which it sought to finally resolve the Underlying Dispute. We do not think PGN's argument on this point is sustainable.

94 It would be helpful to set out again [37] of the Interim Award, where the 2011 Majority Arbitrators summarised CRW's position in the 2011 Arbitration as follows:

> 37. … The Tribunal further acknowledges that [CRW] had at the Preliminary Hearing on 2 March 2012, confirmed its position (which has been recorded in the scope of the Terms of Reference) that:
>
> (i) [CRW] would be relying on [DAB No 3] as the basis for its application for an Interim Award; and
>
> (ii) … in the event that it was unsuccessful at the Interim Award stage, it would continue to rely upon [DAB No 3] in seeking any Final Award, and would not seek to open up and revise [DAB No 3].

95 In our judgment, all that [37] of the Interim Award indicates is that CRW had conveyed to the 2011 Tribunal that even if it were not granted the interim award which it sought, in seeking a final award on the parties' Underlying Dispute, it would continue to rely on the Adjudicated Sum set out in DAB No 3 as the correct quantum of the payment due to it in respect of the 13 disputed VOPs. This particular paragraph of the Interim Award does not, in our view, suggest in any way that CRW envisaged the interim award which it sought to be "subject to future variation" by the 2011 Tribunal's final award on the parties' Underlying Dispute.

(3) Significance of the 2011 Majority Arbitrators' statement that the Interim Award would be "altered" by the 2011 Tribunal's final award

96 PGN also made reference to certain statements by the 2011 Majority Arbitrators in the Interim Award which could be seen as appearing to suggest that that award could be "altered" by the 2011 Tribunal's final award on the parties' Underlying Dispute (see [29] above). However, this again is not warranted if the pertinent statements are read in their proper context. We set out the relevant parts of the Interim Award below:

> ***Whether [CRW] is entitled to enforce [DAB No 3] by way of an interim/partial award?***
>
> 49. In relation to the last issue, [PGN] relies on [s 19B] to contend that Singapore legislation does not allow for the kind of Interim Award or Partial Award as contemplated by [CRW]. [PGN]'s contention is that, since [DAB No 3] can be opened up at the arbitration hearing, it is not "final" in the sense contemplated in [s 19B] and an interim award cannot be issued. …
>
> …
>
> 51. The Tribunal [*ie*, the 2011 Majority Arbitrators] considers that even though [DAB No 3] can be opened up at the arbitration hearing, an award giving effect to it will still be final up to a certain point in time, i.e. pending the resolution of the dispute in the arbitration. ***Put another way, the decision is final as to the issue before the Tribunal, namely, whether payment***

has to be made prior to the determination of the matters raised in the NOD. …

52. ***In other words***, an interim award giving effect to [DAB No 3] pending the resolution of the parties' dispute is still final in the sense that it will not and cannot be ***altered*** until the arbitration hearing. ...

53. It is also implicit in [*Persero CA*] (the [Court of Appeal] must be presumed to have had the provisions of the IAA in mind and yet raised no difficulty with them), that an interim or partial award to enforce [DAB No 3], pending the resolution of the parties' dispute in the arbitration, would not fall foul of [s 19B].

[underlining in original; emphasis added in bold italics]

97 When [51] and [52] of the Interim Award are read together, it becomes evident, in our judgment, that the 2011 Majority Arbitrators were putting across what they regarded to be the same point in three different ways. The general point they were making was that the Interim Award would bear the requisite measure of finality required by s 19B. They explained that this was because: (a) the Interim Award would finally resolve the position between the parties for a certain period of time (*ie*, the Interim Award would have temporal finality); (b) the Interim Award would finally resolve the issue of whether PGN had to promptly comply with DAB No 3 even though it had issued an NOD in respect of that decision (*ie*, the Interim Award would have subject matter finality); and (c) the Interim Award would be final until and unless it was altered by subsequent awards made in the 2011 Arbitration on the merits of the parties' Underlying Dispute. It is the last of these that might appear problematic. However, as mentioned at the outset of this paragraph, it is evident, in our judgment, that the 2011 Majority Arbitrators regarded all three of their aforesaid explanations to be variations of one another, and therefore, the way in which they put across the point at [52] of the Interim Award should not be read in isolation. Rather, this must be read in the light of the general point that the 2011 Majority Arbitrators were making.

98 Furthermore, [53] of the Interim Award puts paid to any suggestion that the 2011 Majority Arbitrators intended the Interim Award to be varied. It is clear that the 2011 Majority Arbitrators were alive to PGN's argument that an interim or partial award would breach s 19B if the decision that the 2011 Tribunal subsequently issued on the merits of the parties' Underlying Dispute had the effect of varying such an award. The 2011 Majority Arbitrators expressly rejected this submission at [53] of the Interim Award.

99 In our judgment, the real point which the 2011 Majority Arbitrators were making was this: *until* an award on the merits of the parties' Underlying Dispute had been rendered, not only would the Interim Award be the final determination as to PGN's immediate obligation to make prompt payment of the Adjudicated Sum awarded under DAB No 3, there would also be nothing to be set off against that sum. But, once the award on the merits of the parties' Underlying Dispute had been issued, inevitably, an account would have to be taken of the amounts actually due one way or the other, as well as of any payments that might already have been made. It is true that the language in which the 2011 Majority Arbitrators expressed themselves could have been more precise. The language which they used might, on one reading, suggest that they thought the Interim Award could be varied. As a matter of law, of course, it could not (see below at [105]). Be that as it may, what we consider they *were* speaking about was the fact that the *accounts* between the parties would have to be adjusted as a consequence of the 2011 Tribunal's eventual award on the merits of the parties' Underlying Dispute. In short, it was not the Interim Award that would be changed or revised, but the inevitable monetary *consequences and effects* of that award once the final award on the merits of the Underlying Dispute had been made.

100 On this point, we return here to our brief discussion on the proper understanding and definition of the various types of awards mentioned at [45]–[53] above. Much of the confusion in this case seems to us to have stemmed from a failure to differentiate between, on the one hand, interim or partial awards, which entail a final determination of the parties' substantive rights or a final determination of preliminary issues relevant to the resolution of the parties' claims and, on the other hand, provisional awards, which neither entail nor aid in a final determination of the parties' substantive rights. On no basis was the Interim Award a provisional award. On the contrary, it was a final determination of whether PGN had an immediate and enforceable contractual obligation to comply with DAB No 3 even though it had issued an NOD in respect of that decision. This point was answered in the affirmative by the 2011 Majority Arbitrators in the Interim Award, and that answer is not susceptible to change regardless of whatever award the 2011 Tribunal might eventually make on the parties' Underlying Dispute over the merits of DAB No 3. The only thing that is provisional in this context is the set of financial effects and consequences of the Interim Award, and that is so because the Conditions of Contract provide that in certain circumstances, a DAB decision may be revised by an arbitral award that settles the underlying merits of that decision. If and when an award on the merits of DAB No 3 is eventually made, that award would not alter the Interim Award or render it any less final, even though it might alter the financial effects and consequences that flow from the Interim Award.

(4) Significance of the Partial Award's purported revision of the Interim Award

101 The final thread of PGN's argument that CRW and the 2011 Majority Arbitrators intended the Interim Award to be "subject to future variation" concerns the Partial Award, which seemingly purports to revise the Interim Award by dismissing two of the nine Heads of Claim which the DAB had formulated when considering CRW's claim against PGN in relation to the 13 disputed VOPs. It bears repeating the 2011 Tribunal's conclusion at [100.6(c)] of the Partial Award:

> This Partial Award *revises* the previous majority Interim Award insofar as Heads of Claim Nos. 6 and 8 are dismissed. [emphasis added]

102 It is not clear why the 2011 Tribunal formulated its conclusion in those terms. There are a number of difficulties with the terms which it used. First, the use of the word "revises" is odd because the 2011 Majority Arbitrators had, as demonstrated earlier, adopted the view that the Interim Award: (a) only settled the issue of whether payment of the Adjudicated Sum awarded to CRW under DAB No 3 ought to be made forthwith by PGN even though the arbitration of the parties' Underlying Dispute over the merits of that DAB decision was still ongoing; and (b) did not preclude a later decision on the merits of that underlying dispute. The 2011 Tribunal therefore did not have to "revise" the Interim Award when it found that two of the Heads of Claim were not made out.

103 Second, the reference to "Heads of Claim" also makes no sense when considered in the context of the Interim Award. The Interim Award makes no mention of any individual Head of Claim; neither does it make any conclusion as to the merits of any Head of Claim. Consequently, the Interim Award is not capable of being understood as though it could be revised in the manner contemplated at [100.6(c)] of the Partial Award.

104 Given these difficulties, we agree with CRW's submission that this part of the Partial Award should not be used as the basis for concluding that the 2011 Majority Arbitrators intended the Interim Award to be one that could subsequently be varied. The Partial Award concerns the correctness of DAB No 3, which, as we have repeatedly emphasised, is a wholly distinct issue from that finally disposed of in the Interim Award (*ie*, whether PGN had an obligation to comply promptly with DAB No 3 even though it had issued an NOD in respect of that decision). In issuing the Partial Award, the 2011

Tribunal has taken a step in reviewing the merits of the parties' Underlying Dispute over the correctness of DAB No 3. That process is by no means complete. CRW has maintained that it will seek an order in the 2011 Tribunal's final award on the merits of the Underlying Dispute that it is entitled to an aggregate amount exceeding the Adjudicated Sum awarded under DAB No 3. Whether it can or cannot do so, and whether it will or will not succeed are not before us. For these reasons, [100.6(c)] of the Partial Award does not, in our judgment, help PGN's case.

The effect of s 19B

105 In any event, even if the 2011 Majority Arbitrators contemplated that the Interim Award might subsequently be varied by future awards made in the 2011 Arbitration, this would not avail PGN, and in particular, s 19B would not operate to render the Interim Award unenforceable. Rather, that section plainly renders the Interim Award final and binding as regards the particular issue which that award determined. The object of s 19B, which was introduced into the predecessor of the IAA (*ie*, the International Arbitration Act (Cap 143A, 1995 Rev Ed)) only in 2001, was set out by this court at [133]–[142] of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372. There, we noted that s 19B, in particular s 19B(1), was enacted to clarify the position that all awards, regardless of the stage of the arbitration at which they were made, would have the effect of being final and binding. This reflected the accepted position that the issues decided under all arbitral awards were *res judicata.* Such decisions would not be amenable to revision by the arbitral tribunal. Section 19B does not have the effect of rendering the tribunal *functus officio* once it has made an interim, interlocutory or partial award in the sense of precluding it from deciding any further matter in the arbitration which is not covered by the award(s) already made. This is made clear in s 19A, which provides that a tribunal may "make more than one award at different points in time during the arbitral proceedings on different aspects of the matters to be determined". What *is* proscribed by s 19B is a provisional award in the sense described at [49]–[50] above. In our judgment, the Interim Award was not a provisional award in respect of the issue which it dealt with; and if and to the extent the Partial Award purports to vary or revise the Interim Award as opposed to merely reflect the altered monetary consequences and effects that follow upon the issuance of the Partial Award, then it is the Partial Award that would offend s 19B. For the avoidance of doubt, we are merely setting out the logical conclusion of PGN's argument that the Partial Award has varied the Interim Award; not that we think this to be true of the Partial Award for the reasons we have already stated above.

106 We reiterate yet again that PGN's right to have the underlying merits of DAB No 3 reviewed at the 2011 Arbitration is in no way prejudiced by the fact that s 19B renders the issue determined under the Interim Award *res judicata*. This is because the Interim Award only deals with the issue of whether PGN had an obligation to promptly comply with DAB No 3 even though it had issued an NOD in respect of that decision, and says nothing about the underlying merits of DAB No 3.

Our conclusion on PGN's first argument on appeal

107 For these reasons, PGN's first argument before this court, in our judgment, is without merit and we accordingly reject it.

PGN's second argument on appeal

108 We also reject PGN's second argument on appeal. According to PGN, pursuant to cl 20.4 of the Conditions of Contract, DAB No 3 would cease to be binding as soon as the 2011 Tribunal issues any award on any aspect of the parties' Underlying Dispute over the merits of that DAB decision. It contends that once that happens, it will be absolved of its obligation to comply with the tribunal's

interim or partial or any other award ordering it to comply promptly with DAB No 3. However, PGN does not explain why this should be so. The fact that DAB No 3, on which the Interim Award is predicated, ceases to be binding once any award on its merits is made does not automatically render the Interim Award unenforceable or liable to be set aside. PGN bears the burden of demonstrating why this outcome should follow, but it has not discharged that burden.

109 Additionally, in our judgment, it would not be commercially sensible to read cl 20.4 as entailing that DAB No 3 will cease to be binding as soon as the 2011 Tribunal makes any determination on any aspect of the merits of the parties' Underlying Dispute. The key point is this: the Interim Award is a final decision requiring PGN to make prompt payment of the Adjudicated Sum awarded to CRW under DAB No 3 pending the resolution of the Underlying Dispute. That award may be enforced against PGN on its terms, save only if there are grounds to set it aside or to resist enforcement under the applicable legal framework. The Interim Award, at pain of repeating the point, concerns PGN's obligation under cl 20.4 to make *prompt* payment of the Adjudicated Sum to CRW even though PGN has issued an NOD in respect of DAB No 3 and the arbitration of the merits of that DAB decision is still ongoing. That obligation remains valid and binding regardless of any subsequent award on the merits of the Underlying Dispute. If the Interim Award had never been made and the parties had proceeded (in the absence of an amicable settlement) straight to an arbitration of the Underlying Dispute, and if, in that arbitration, DAB No 3 had been set aside, there would no longer be any basis for CRW to seek an award or order for the enforcement of that DAB decision. But, where, as here, the Interim Award requiring prompt payment of the Adjudicated Sum awarded under DAB No 3 has already been made, that award remains enforceable. When the merits of the Underlying Dispute (and, as a corollary, the state of the final accounts between the parties) have been resolved, if there is, as a result, no longer a net sum payable to CRW (the receiving party under the Interim Award), then in those circumstances, there may be nothing left for CRW to enforce. But, that simply is not the position at the present point in time.

110 In our judgment, this is the commercially sensible way of reading cl 20.4 of the Conditions of Contract and the related provisions. In the present case, there has not been a final determination of the parties' Underlying Dispute over the merits of DAB No 3, and nothing has transpired to invalidate or affect the Interim Award or CRW's long overdue right to receive payment thereunder.

Conclusion

111 In the premises, we allow SUM 5277, but dismiss SUM 5985. We also dismiss both CA 148 and CA 149 with costs to be taxed if not agreed, and make the usual consequential orders. It is now a matter for CRW to decide what it will do with the Interim Award, which this court has found (by a majority) to be a valid award made in accordance with Singapore law and one that is not liable to be set aside.

Chan Sek Keong SJ (delivering the dissenting judgment):

Introduction

112 The majority of this court has decided to dismiss the present appeals by the appellant, PT Perusahaan Gas Negara (Persero) TBK ("PGN"), against the High Court's decision declining to set aside: (a) an interim award issued on 22 May 2013 ("the Interim Award") by the majority of the arbitral tribunal in International Chamber of Commerce ("ICC") International Court of Arbitration Case No 18272/CYK; and (b) an order of court made on 2 July 2013 granting the respondent, CRW Joint Operation ("CRW"), leave to enforce that interim award in the same manner as a judgment ("the Enforcement Order"). I have read the majority's judgment ("the Majority Judgment") in draft and

agree with it with regard to the disposition of PGN's applications to this court in Summonses Nos 5277 and 5985 of 2014 for leave to adduce further evidence. However, with regard to the substantive decision on PGN's appeals, I have adopted a different approach from the majority. In setting out my reasons for differing from the majority, I shall in this judgment, unless otherwise indicated, use the same abbreviated terms and case names as those used in the Majority Judgment.

113 The facts and history of the arbitration between the parties are set out in the Majority Judgment at [3]–[21] above. The issue for determination in the present appeals is the legality of the Interim Award made by the 2011 Majority Arbitrators ordering PGN to comply with DAB No 3 forthwith pending the determination by the 2011 Tribunal of the correctness (*ie*, the merits) of DAB No 3.

114 In my view, the Interim Award issued by the 2011 Majority Arbitrators should be set aside on one or more of the following grounds, the first two of which are interrelated:

(a) The Interim Award was issued with regard to "the dispute which arises from PGN's failure to pay CRW, whether promptly or at all, pursuant to [DAB No 3]" (see *Persero HC (2014)* at [6]), *ie*, the dispute as to whether DAB No 3 was enforceable by an arbitral tribunal under cl 20.6 of the Conditions of Contract via an interim award pending the tribunal's determination of the merits of DAB No 3. That dispute, which the Judge termed the "secondary dispute", was not a dispute that was referable to arbitration under cl 20.6 of the Conditions of Contract.

(b) The 2011 Majority Arbitrators had no mandate under cl 20.6 of the Conditions of Contract to issue the Interim Award to enforce DAB No 3 pending the 2011 Tribunal's final adjudication on the parties' dispute over the merits of DAB No 3 (referred to hereafter as the parties' "primary dispute").

(c) Even if the 2011 Majority Arbitrators had the mandate under cl 20.6 of the Conditions of Contract to issue the Interim Award pending the 2011 Tribunal's decision on the primary dispute, the Interim Award was, and was intended to be, in substance a provisional award that fell outside the ambit of an "award" as defined in s 2 of the IAA, and therefore was not enforceable under s 19 of the IAA in the same manner as a judgment.

115 The legal relationship between the parties is set out in the Contract, which is governed by Indonesian law. The Contract is effectively a domestic contract. It includes (*inter alia*) the Conditions of Contract, which incorporate, with modifications, the standard provisions of the 1999 Red Book published by FIDIC. The Red Book is based on the standard conditions of contract used by the UK Institute of Civil Engineers ("the ICE Conditions"), and incorporates common law concepts, in particular, principles of contract law.

116 The Interim Award is the second arbitral award issued in the dispute between CRW and PGN over the issue of the immediate enforceability of DAB No 3 by way of an arbitral award. Since the issuance of DAB No 3, two rounds of arbitration and three rounds of court proceedings have been expended on this issue. Various interpretational issues have been canvassed on the scope of cll 20.4 to 20.7 of the Conditions of Contract, as well as on the effect of s 19 (in particular, s 19B) of the IAA on the Interim Award, which is the subject matter of the present appeals.

The dispute resolution mechanism under the Conditions of Contract

117 The dispute resolution mechanism under the Conditions of Contract is set out in the Majority Judgment at [5]–[6] above. The material clauses are cll 20.4 to 20.7, in particular, cll 20.4 and 20.6. In the context of these appeals, the dispute resolution process under these clauses is as follows (the

sub-clauses are indicated in square brackets for ease of reference):

(a) If "a dispute (of any kind whatsoever)" arises between the parties "in connection with, or arising out of, the Contract or the execution of the [w]orks [thereunder]", either party may refer the dispute in writing to the DAB for its decision (see cl 20.4[1]).

(b) If the dispute is referred to the DAB, the decision of the DAB "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" (see cl 20.4[4]).

(c) Either party who is dissatisfied with the DAB's decision may issue a Notice of Dissatisfaction ("NOD") to the other party within 28 days after receiving the DAB's decision. Except as stated in cl 20.7 and cl 20.8, neither party is entitled to commence arbitration of a dispute unless an NOD has been issued (see cll 20.4[5]–20.4[6]).

(d) If no NOD has been issued by either party within the stipulated time frame, then the DAB's decision shall become "final and binding" upon both parties (see cl 20.4[7]).

(e) Where a DAB decision has become final and binding on the parties by virtue of the fact that no NOD has been issued within the stipulated time frame, and one party fails to comply with the DAB decision, the other party may refer that failure to arbitration directly without the parties having to first go through the steps set out in cll 20.4 and 20.5 (see cl 20.7).

(f) If an NOD is issued by either party, the parties must first attempt to settle their differences amicably pursuant to cl 20.5 before commencing arbitration under cl 20.6. Arbitration may only be commenced if no amicable settlement is reached or no attempt at amicable settlement is made after 56 days from the day on which the NOD was issued.

(g) In the event that the parties do proceed to arbitration under cl 20.6, the arbitral tribunal shall have, in the arbitration, "full power to open up, review and revise … any decision of the DAB … relevant to the dispute". In addition, the parties may, in the arbitration, put forward evidence and arguments which were previously not presented to the DAB and/or not stated in the NOD (see cll 20.6[2]–20.6[3]).

118 It can be seen from the above summary of the material terms of the Conditions of Contract that the parties' primary dispute (as to the merits of DAB No 3) can be referred to arbitration under cl 20.6 because that clause contains the arbitration agreement between the parties. The scope of cl 20.6 is crucial to the determination of whether the 2011 Majority Arbitrators had the mandate to issue the Interim Award pending the 2011 Tribunal's decision on the primary dispute. Whether they had the requisite mandate depends on whether the secondary dispute (as defined by the Judge in *Persero HC (2014)*) is referable to arbitration under cl 20.6. If that dispute is not referable to arbitration, there would have been no basis on which the 2011 Majority Arbitrators could have issued the Interim Award. This is a contractual issue which turns on whether the parties had vested the 2011 Tribunal with the power to make an interim award ordering immediate enforcement of DAB No 3 pending the tribunal's determination of the primary dispute. This contractual issue includes the scope of the 2011 Tribunal's powers under the ICC Rules of Arbitration in force as from 1 January 1998 ("the 1998 ICC Rules of Arbitration") and the IAA, as the parties agreed to arbitrate their disputes under the 1998 ICC Rules of Arbitration and the IAA.

Chronology of the arbitral and enforcement proceedings relating to DAB No 3

119 On 20 November 2008, one day after the DAB communicated its decision in DAB No 3 to the parties at a meeting on 19 November 2008, PGN issued an NOD in respect of DAB No 3 without waiting for the DAB's written grounds of decision, which were subsequently released on 25 November 2008. PGN thereby became entitled (but was not obliged) under cl 20.4[6] to commence arbitration under cl 20.6 to resolve the parties' primary dispute when the parties did not reach an amicable settlement of that dispute within the time frame stated in cl 20.5. However, PGN took no action to refer its dissatisfaction with DAB No 3 to arbitration under cl 20.6, and at the same time, also took no steps to comply with DAB No 3, contrary to what was required by cl 20.4[4].

The 2009 Arbitration

120 PGN's inaction forced CRW to take steps to enforce payment of the Adjudicated Sum awarded under DAB No 3. Clause 20.4[4] required PGN to "*promptly* give effect to [DAB No 3] unless and until it shall be revised in an amicable settlement or an arbitral award" [emphasis added]. Since neither of these outcomes had materialised, CRW was entitled to payment by the terms of cl 20.4[4], and PGN's failure to pay CRW the Adjudicated Sum was clearly a breach of contract. There could be no dispute whatsoever on this proposition of law. CRW was entitled to commence court proceedings against PGN for breach of contract based on cl 20.4[4]. As PGN is an Indonesian company, CRW could have sued PGN in an Indonesian court for payment of the Adjudicated Sum. Subject to any issue of *forum non conveniens*, CRW could also have commenced a similar action in a Singapore court if PGN has assets in Singapore, and would in all likelihood have been able to obtain summary judgment for the Adjudicated Sum, subject to whatever defences and counterclaims PGN might have under Singapore law (see [174] below]). However, for reasons best known to itself, CRW did not commence court proceedings, and instead decided on 13 February 2009 to enforce DAB No 3 by way of arbitration under the 1998 ICC Rules of Arbitration pursuant to cl 20.6 of the Conditions of Contract.

The parties' respective positions in the 2009 Arbitration

121 In its notice of arbitration for the 2009 Arbitration, CRW sought a declaration that it was entitled to immediate payment of the Adjudicated Sum awarded under DAB No 3 and an award for immediate payment by PGN of that sum. CRW did not include the primary dispute in its notice of arbitration.

122 In response, PGN contended that the 2011 Tribunal should:

(a) dismiss CRW's claims;

(b) declare that DAB No 3 was not final and binding on the parties;

(c) declare that PGN was not obliged to pay CRW the Adjudicated Sum;

(d) declare that PGN had not committed any breach of obligation in not paying CRW the aforesaid sum;

(e) open up, review and revise DAB No 3 on the merits, and hear relevant witnesses and experts to obtain information and evidence pertaining to the primary dispute; and

(f) order CRW to reimburse PGN's costs and expenses arising out of the arbitration.

123 At a preliminary meeting with the parties on 1 June 2009, the 2009 Tribunal directed that the following two preliminary issues be heard:

(a) Was CRW entitled to immediate payment of the Adjudicated Sum awarded under DAB No 3 ("Question 1")?

(b) Regardless of whether the answer to Question 1 was yes or no, was PGN entitled to request the 2009 Tribunal to open up, review and revise DAB No 3 or any other certificate on which it was based ("Question 2")?

The Final Award by the 2009 Majority Arbitrators

124 It can be seen from the terms of Question 1 that the answer to it was a foregone conclusion because the answer was already spelt out by the express words of cl 20.4[4] (see [117(b)] above). Clause 20.4[4] required the parties to "*promptly* give effect to [DAB No 3]" [emphasis added]. There is no ambiguity in the words of cl 20.4[4]. The 2009 Majority Arbitrators so held, and added the rider that although PGN had an obligation to make immediate payment of the Adjudicated Sum awarded to CRW under DAB No 3, the DAB's decision could be reviewed in an arbitration.

125 With regard to Question 2, the 2009 Majority Arbitrators held that since PGN had not served any counterclaim, its contention that (*inter alia*) DAB No 3 should be opened up, reviewed and revised was not a defence to CRW's claim.

126 The 2009 Majority Arbitrators accordingly issued an award which they described as a "final" award (*ie*, the Final Award as defined at [10] above of the Majority Judgment) ordering PGN to pay CRW the Adjudicated Sum awarded under DAB No 3, subject to PGN's right to commence a new arbitration to open up, review and revise DAB No 3. In substance, it would appear that the 2009 Majority Arbitrators intended the Final Award to be provisional in nature in that it could be altered or revised in a new arbitration on the merits of DAB No 3.

The first set of enforcement proceedings in the High Court – OS 206

127 CRW applied to the High Court by way of Originating Summons No 7 of 2010 and obtained leave under s 19 of the IAA to enforce the Final Award in the same manner as a judgment. PGN applied via OS 206 to set aside the Final Award under s 24 of the IAA on the following grounds:

(a) the 2009 Majority Arbitrators exceeded their jurisdiction in converting DAB No 3 into a final award without first determining the parties' primary dispute on the merits;

(b) the arbitral procedure was not in accordance with cl 20.6 of the Conditions of Contract, which required the 2009 Tribunal to determine the primary dispute before DAB No 3 could be converted into a final award;

(c) the 2009 Majority Arbitrators' refusal and/or failure to hear the parties' respective arguments on the merits of the primary dispute was a breach of natural justice; and

(d) DAB No 3 was not made in accordance with the Contract (including the Conditions of 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 previously been settled.

The High Court's decision

128 In the High Court, the OS 206 judge (as defined at [12] of the Majority Judgment above)

accepted PGN's first ground for challenging the Final Award and set aside the Final Award on that basis (see *Persero HC (2010)*). However, she rejected PGN's other grounds for challenging the Final Award. The OS 206 judge held as follows:

> (a) The "dispute" which CRW wanted the 2009 Tribunal to resolve was "whether CRW was entitled to *immediate* [payment] by PGN of the [Adjudicated Sum] set out in [DAB No 3]" [emphasis in original] (see *Persero HC (2010)* at [30]). This dispute, which the OS 206 judge termed "the Second Dispute", was plainly outside the scope of cl 20.6 and was also not an issue which had been referred to the DAB. The Final Award, which purported to decide this "dispute", therefore exceeded the scope of the parties' arbitration agreement (at [30] and [37]).
>
> (b) Clause 20.6 did not allow an arbitral tribunal to make final a binding but non-final DAB decision (*ie*, a DAB decision in respect of which an NOD has been issued) without first hearing the parties' submissions on the merits of that DAB decision. The 2009 Tribunal's powers under cl 20.6 were expressly stated as being to "open up, review and revise" DAB No 3, which meant that an adjudication on the Second Dispute without determining the correctness of DAB No 3 would be tantamount to converting that binding but non-final DAB decision into a final arbitral award and ignoring the provisions of the Conditions of Contract concerning dispute resolution (at [33]).

It should be noted that both of the above holdings by the OS 206 judge concerned the jurisdiction of the 2009 Tribunal. I should also point out that the Second Dispute (as defined by the OS 206 judge in *Persero HC (2010)*) is the mirror image of the secondary dispute (as defined by the Judge in *Persero HC (2014)*). For simplicity, I shall hereafter, where appropriate to the context, use the term "the enforceability dispute" to refer interchangeably to the Second Dispute and the secondary dispute.

129 The OS 206 judge's holding at [128(a)] above rests on the premise that the 2009 Tribunal had no jurisdiction to decide the enforceability dispute as it should have been, but was not first referred to the DAB under cl 20.4[1] for its decision. In my view, this premise is not supported by the words of cl 20.4[1]. The enforceability dispute is not a "dispute … in connection with, or arising out of, the Contract or the execution of the [w]orks [thereunder]" for the purposes of cl 20.4[1] as it arose upon the failure of PGN to comply with DAB No 3 and has nothing to do with the Contract or the execution of the works thereunder.

130 After deciding the enforceability dispute, the OS 206 judge made certain observations (at [38] of *Persero HC (2010)*) as to how CRW could have enforced DAB No 3 in an arbitration pursuant to cl 20.6:

> … 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 [an] 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-à-vis *the DAB decision to be enforced, with the amount owed as set out in the DAB decision to be paid … accordingly.* The amount paid out is liable to be returned to the payer, depending on how the tribunal, after reviewing [the] DAB decision, decides the case. [emphasis added]

131 The OS 206 judge made the alternative suggestion set out in italics in the above quotation after taking note of the arbitral award in ICC Case No 10619, which a learned arbitrator, Mr Christopher R Seppälä, had commented on favourably (see [178]–[179] below). In my view, the

logic of the alternative suggestion is, with respect, problematic. If the enforceability dispute (*ie*, "whether CRW was entitled to *immediate* [payment] by PGN of the [Adjudicated Sum] set out in [DAB No 3]" [emphasis in original] (see *Persero HC (2010)* at [30])) was plainly outside the scope of cl 20.6, how could it come within the scope of cl 20.6 (and, as a consequence, be enforceable by an arbitral award) merely by referring the parties' primary dispute to arbitration under that clause?

The Court of Appeal's decision

132 CRW appealed against the OS 206 judge's decision. The Court of Appeal dismissed the appeal (see *Persero CA*). The material holdings of the Court of Appeal in *Persero CA* are summarised below:

(a) A reference to arbitration under cl 20.6 was in the form of a rehearing of the merits of a binding but non-final DAB decision (at [66]).

(b) Clause 20.6 required the parties to finally settle their differences in the same arbitration, both in respect of the non-compliance with the DAB decision concerned and in respect of the merits of that decision. Clause 20.6 contemplated a single arbitration where all the existing differences between the parties arising from the DAB decision concerned would be resolved. In the arbitration, the respondent could raise either a defence or a counterclaim against the claimant's claim (at [67]).

(c) *What the 2009 Majority Arbitrators ought to have done, in accordance with the Terms of Reference for the 2009 Arbitration (and in particular, cl 20.6), was to make an interim award in favour of CRW for the Adjudicated Sum awarded under DAB No 3 (or for such other amount as the 2009 Majority Arbitrators deemed appropriate) and then proceed to hear the parties' "substantive dispute" afresh before making a final award on that dispute* (at [79]).

(d) The 2009 Majority Arbitrators did not have the power under cl 20.6 to issue the Final Award in the manner that they did, *ie*, without assessing the merits of PGN's defence and of DAB No 3 as a whole (at [82]).

(e) The failure of the 2009 Majority Arbitrators to consider the merits of DAB No 3 before making the Final Award meant that they exceeded their jurisdiction in making that award. PGN suffered real prejudice as a result of the decision of the 2009 Majority Arbitrators (at [85]).

(f) *There appeared to be a settled practice, in arbitral proceedings brought under cl 20.6 of the 1999 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 as to the merits of that DAB decision* (at [101]).

133 I pause here to observe that like the OS 206 judge, the Court of Appeal, in holding that the 2009 Majority Arbitrators could and should have made an interim award in favour of CRW *vis-à-vis* the enforceability dispute and then proceed to hear the primary dispute afresh, referred to and expressly approved of Mr Seppälä's comments on the arbitral award in ICC Case No 10619. It would seem that the authority or justification for the Court of Appeal's holding at [132(c)] above was the arbitral award in that ICC case. I should also point out that the Court of Appeal's statement at [132(f)] above as to the "settled practice" in arbitral proceedings under cl 20.6 of the 1999 Red Book is, as will be seen, not supported by the practice of international arbitrators. It would appear that the Court of Appeal justified that particular statement by reference to arbitration cases supporting the approach taken in ICC Case No 10619, but not those which do not support that approach. In any event, the scope of cl 20.6 of the Conditions of Contract cannot be determined by "settled practice",

but must instead be determined by the court on the basis of what that clause states. A "settled practice" is only a factor to be taken into account by the court in construing the scope of cl 20.6.

The 2011 Arbitration

134 Relying on the Court of Appeal's statements at [79] and [101] of *Persero CA*, CRW referred both the primary dispute and the enforceability dispute to a second arbitration under cl 20.6 on 28 October 2011 (*ie*, the 2011 Arbitration). This time, CRW sought, *inter alia*, a "partial or interim award" for payment of the Adjudicated Sum awarded under DAB No 3, or such other sum as might be found by the 2011 Tribunal to be appropriate pending its resolution of the primary dispute.

135 At a preliminary meeting held on 2 March 2012, CRW made it clear to the 2011 Tribunal that: (a) it would be relying on DAB No 3 as the basis of its application for an interim award; and (b) in the event that it was unsuccessful in applying for an interim award, it would still rely on DAB No 3 in seeking a final award, and would not seek to open up, review or revise DAB No 3. In other words, the inclusion of the primary dispute in CRW's reference to arbitration was merely a matter of form, notwithstanding that cl 20.6 required the 2011 Tribunal to open up and review the merits of DAB No 3.

136 CRW filed a Statement of Claim dated 16 March 2012 for the following reliefs as enumerated at para 30:

> (a) pending the resolution of [the] parties' dispute in the final award, a partial or interim award, for:
>
> (i) the sum of US$17,298,834.57 and interest …; or
>
> (ii) in the alternative, the sum of US$17,298,834.57 and damages to be assessed for [PGN's] failure to comply with [DAB No 3];
>
> (b) a final award for the sum [of] US$17,298,834.57 or such sums as determined by the Tribunal [to be] owed by [PGN] to [CRW] for claims under [DAB No 3] …

137 On 12 October 2012, CRW submitted an application for a preliminary hearing limited to the grant of an interim or partial award as set out at [136(a)] above, with the relief set out at [136(b)] above omitted from the application. The 2011 Majority Arbitrators noted at [38] of the Interim Award that CRW had limited the basis of its claim for an interim or partial award to "the enforcement of [DAB No 3], without reviewing the merits of [DAB No 3]".

138 In response, PGN filed a counterclaim disputing, *inter alia*: (a) the 2011 Tribunal's jurisdiction to grant the partial or interim award sought by CRW; and (b) the correctness of DAB No 3. PGN's contentions are set out in the Terms of Reference for the 2011 Arbitration as follows:

> 35. [PGN] denies that the Tribunal has jurisdiction to render a partial or interim award.
>
> 36. The Tribunal has the power and duty to open up and review [DAB No 3] upon the issuance of the Notice of Dissatisfaction.
>
> 37. In so doing[,] the Tribunal has to adjudicate the claims on the basis of the substantive merits of [the] claims in order to render a Final Award.
>
> 38. … [CRW] has to establish the merits of its substantive claim in this reference. [CRW] has

provided no factual [or] legal basis in support of the merits of its substantive claim in its Request for Arbitration and [PGN] is not in a position to respond to it accordingly. In the premises, the claim should be dismissed as lacking in substantiation.

…

40. Yet in the further alternative, by referring [DAB No 3] to arbitration, [CRW] has by conduct recognised that [DAB No 3] is no longer binding and the final entitlement of [CRW] … has to be determined finally based on the merits of the substantive claims … [and] the pleadings[.] [B]asis and substantiation [are] lacking in the Request for Arbitration. The claim should therefore be dismissed in its entirety.

41. … [DAB No 3] did not deal with all [the] matters referred to the [DAB], failed to take into account relevant facts and was not in accordance with Indonesian law. Further, [DAB No 3] failed to give any proper reason contrary to Clause 6 of the DAB Agreement.

42. [DAB No 3] also contained the following errors [five were listed]:

…

44. Based on the above, [PGN] seeks the following reliefs:

(i) To dismiss [CRW's] claims in the Request for Arbitration in its entirety;

(ii) To declare that [DAB No 3] shall be opened-up, reviewed and revised;

…

The parties' arguments before the 2011 Tribunal

(1) CRW's arguments

139 CRW's arguments in support of its claims before the 2011 Tribunal were essentially based on the statements of the Court of Appeal in *Persero CA* at [79] and [101] – *ie*, that CRW was entitled to an interim award giving effect to DAB No 3 pending the final resolution of the parties' primary dispute so long as both the primary dispute and the enforceability dispute were referred to an arbitral tribunal for hearing in the same arbitration. CRW relied on a number of academic articles in support of the Court of Appeal's aforesaid statements in *Persero CA*. However, it is not clear how those articles could have added any weight to CRW's case since the Court of Appeal's statements were themselves founded on those same articles. CRW also argued that the Court of Appeal's statements were part of the *ratio decidendi* of its decision to dismiss CRW's appeal in *Persero CA*.

(2) PGN's arguments

140 PGN relied on the arguments set out in the extract from the Terms of Reference for the 2011 Arbitration quoted at [138] above, and further argued that: (a) the IAA did not allow for a partial or interim award of the nature sought by CRW; (b) the statements of the Court of Appeal at [79] and [101] of *Persero CA* were *obiter*; and (c) the academic articles relied on by CRW did not address mandatory provisions of Singapore arbitration law such as s 19B of the IAA as well as Indonesian law.

The Interim Award by the 2011 Majority Arbitrators

141 The 2011 Majority Arbitrators held in favour of CRW. The dispositive part of the Interim Award stated:

> 56. Pending the final resolution of the Parties' dispute raised in these proceedings, including the disputes which are set out in the [NOD], the majority of the Tribunal declares that:
>
> (i) upon the construction of Clause 20 of the [Conditions of Contract], [DAB No 3] is binding on both Parties who shall promptly give effect to it; and
>
> (ii) [PGN] shall promptly pay the sum of US$17,298,834.57 as set out in [DAB No 3].

142 I pause here to note that except for the addition of the words "[p]ending the final resolution of the Parties' dispute" and "promptly" in the Interim Award, the terms of the payment order made in the Interim Award were almost identical to the terms of the payment order made by the 2009 Majority Arbitrators in the Final Award (see [65(vi)(II)] of the Final Award).

143 The 2011 Majority Arbitrators gave the following reasons for their decision to grant the Interim Award:

> 44. … [T]he entire purpose of [the DAB] mechanism was to ensure the Contractor's cashflow is not disrupted by allowing him to be paid in the interim, while the Employer's right to challenge the preliminary adjudication contained in the DAB decision is reserved until the arbitration. To achieve that commercial purpose, the DAB Decision (even where the NOD has been given by one Party) should be treated as binding in the interim and enforceable pending the final resolution in the arbitration.
>
> 45. … This would also give some meaning to the "binding" effect of a DAB Decision, as otherwise it would be meaningless. This construction [of cl 20.4] is supported by [*Persero CA*], specifically at paragraphs 63, 79 and 101…
>
> …
>
> 47. …[H]aving regard to [*Persero CA*] as a whole, and in particular, paragraphs 63 and 79 of [*Persero CA*] , paragraph 101 was part of the overall reasoning of Clauses 20.4 to 20.6, and therefore forms part of the ratio decidendi of the case.
>
> …
>
> 49. … [PGN] relies on section 19B of the [IAA] to contend that Singapore legislation does not allow for the kind of Interim Award or Partial Award … contemplated by [CRW]. [PGN's] contention is that, since [DAB No 3] can be opened up at the arbitration hearing, it is not "final" in the sense contemplated in section 19B and an interim award cannot be issued. …
>
> …
>
> 51. The [majority of the 2011] Tribunal considers that even though [DAB No 3] could be opened up at the arbitration hearing, an award giving effect to it would still be final up to a certain point in time, i.e. pending the resolution of the dispute in the arbitration. Put another way, the decision is final as to the issue before the [2011] Tribunal, namely, whether payment has to be made prior to the determination of the matter raised in the NOD. …

52. In other words, an interim award giving effect to [DAB No 3] pending the resolution of the parties' dispute is still final in the sense that it will not and cannot be altered until the arbitration hearing. While the [majority of the 2011] Tribunal appreciates that the reasoning is somewhat circular, the issue is whether to adopt a reasoning that better fulfils the entire objective of the DAB provisions, or one that essentially renders the DAB mechanism toothless. The [majority of the 2011] Tribunal feels the former is to be preferred.

53. It is also implicit in [*Persero CA*] (the [Court of Appeal] must be presumed to have had the provisions of the IAA in mind and yet raised no difficulty with them) … that an interim or partial award to enforce [DAB No 3], pending the resolution of the parties' dispute in the arbitration, would not fall foul of section 19B.

[underlining in original]

The dissenting opinion in the 2011 Arbitration

144 The dissenting arbitrator in the 2011 Arbitration ("the 2011 Dissenting Arbitrator") issued a dissenting opinion stating (*inter alia*) the following:

2.7 … [Section 19B(2) of the IAA] makes it clear that once a Tribunal has made an award under [s 19A] of the IAA, the effect of that award is clearly to be a final award which cannot be varied, amended, corrected, reviewed, added to or revoked by a subsequent award.

2.8 If an award issued by a tribunal would amount to a final award under [s 19B(2)] of the IAA, it would mean that any monetary award made in favour of [CRW] would be immediately enforceable under the New York Convention [*ie*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards]. Any such award issued by the Tribunal now, would have to be honoured by courts of a contracting state to the New York Convention.

2.9 [CRW's] lawyers had in their letter to the Tribunal dated 14 February 2013 suggested that the parties will still need to address the merits of the claim in the final award, even if [CRW] had already been rendered with an enforceable interim award now. However, having obtained an enforceable award … that cannot be varied or amended or revoked, [CRW] does have the right to go off to a court of a New York Convention State to seek immediate enforcement [of the] sum of US$17,298,834.57. There is no need and it would in fact be illogical for a claimant who has a final award, to go back to the Tribunal to have the merits heard, and to then make a finding of fact as to whether or not there is a monetary claim due to the claimant. It would be far more likely for any practical claimant to simply proceed with enforcement proceedings as soon as it has obtained an interim award, and not waste further time going off to a hearing to prove the merits of its case on the evidence.

2.10 In addition to the clear and unambiguous wording to be found at [s 19B(2)] of the IAA, I am also persuaded by the clear explanatory notes provided by the legislative drafters of [s 19B] of the IAA itself, and the speech of the Minister for Law in the … Parliamentary Records.

2.11 … [T]he legislative drafters of [s 19B] of the IAA intended that there is to be no power for arbitrators to make provisional awards for the same subject matter, pending the making of a final award.

2.12 The drafters of [s 19B] of the IAA … deliberately intended this to be so. They deliberately did not want to have legislation along the lines of the English Arbitration Act [*ie*, the Arbitration

Act 1996 (c 23) (UK)] that allows for provisional orders.

…

2.16 I also rely on the parliamentary … speech by the Minister of State for Law:

> *… [T]he Minister of State for Law, at the second reading of the International Arbitration (Amendment) Bill 2001, commented that section 14 of the International Arbitration (Amendment) Act (which inserts the new section 19B …)*
>
> > *"… provides clarification on the finality of an interim award. Under UK arbitration law and our domestic Arbitration Act, an interim award, once given, is binding and cannot be reviewed by the arbitrator. The Model Law says nothing about the finality of an interim award but practitioners have long assumed that the position is the same as well … Thus, clause 14* [which later became s 14 of the International Arbitration (Amendment) Act 2001 (Act 38 of 2001)] *… amends the Act to state clearly that the position in Singapore for international arbitrations is that interim awards are final and binding"*.

2.17 … Singapore legislation does not allow for the kind of monetary Interim Award or Partial Award … contemplated by [CRW]. Any award that is issued by the Tribunal will be a final and binding award.

2.18 In this arbitration … [CRW] has clearly requested that the Tribunal grant it a partial/interim award in the sum of US$17,298,834.57. Therefore, [CRW] has sought an award for a fixed sum of US$17,298,834.57, and not simply a declaration that [DAB No 3] is binding, and should immediately be complied with. It is likely that such a declaration would be a final award, which would not contravene the IAA.

…

2.20 The fundamental problem … in this case is that even if the Tribunal comes to contrary findings of fact after hearing the merits of the parties, the Tribunal is not allowed under [s 19B] of the IAA to make any decision that can change, amend, add, reduce or revoke any earlier partial/interim award for the sum of US$17,298,834.57. …

…

2.26 Since all awards in Singapore are deemed to be final and enforceable awards, in accordance with Article 32(1) of the Model Law, a final monetary award issued by this Tribunal will terminate these arbitration proceedings. It may be contended that the Tribunal is effectively already *functus officio*, having rendered an enforceable monetary award for the entire sum of US$17,298,834.57. …

2.27 As the [Interim Award made by the 2011 Majority Arbitrators] would be a final and enforceable award, … the award is actually in an identical position to the Award that was set aside by the Court of Appeal in [*Persero CA*]. This is because the [Interim Award] is a final award without going into the merits of the case, and without hearing the evidence and submissions of the Parties.

2.28 The Court of Appeal had indeed made it very clear that an arbitral tribunal is not entitled to

issue a final award without an examination of the merits of [DAB No 3]. The decision by the [2011 Majority Arbitrators] would in fact contravene this ruling by the Court of Appeal as they would in fact have issued a final award, without examining the merits of [DAB No 3].

[emphasis in original]

145 The 2011 Dissenting Arbitrator also disagreed with the 2011 Majority Arbitrators' opinion that the statements of the Court of Appeal at [79] and [101] of *Persero CA* were part of the *ratio decidendi* of its decision. He pointed out that: (a) the Court of Appeal did not refer to s 19B of the IAA, and the parties did not argue the points mentioned at [79] and [101] of *Persero CA* before the Court of Appeal; and (b) the OS 206 judge also did not mention s 19B of the IAA in *Persero HC (2010).*

The second set of enforcement proceedings – OS 585 and OS 683

146 PGN ignored the Interim Award. CRW once again applied to the High Court (this time via OS 585) for leave to enforce the Interim Award in the same manner as a Singapore judgment. Leave was granted in the form of the Enforcement Order (as defined at [1] of the Majority Judgment above). In response, PGN filed SUM 3923 in OS 585 to set aside the Enforcement Order, and also commenced a separate action (namely, OS 683) to set aside the Interim Award. The Judge dismissed both SUM 3923 and OS 683, and issued his written grounds of decision in *Persero HC (2014)* on 16 July 2014.

The arguments and issues in SUM 3923 and OS 683

(1) PGN's arguments

147 Before the Judge, PGN's principal argument with regard to SUM 3923 and OS 683 was still that, as decided by the Court of Appeal in *Persero CA*, CRW was not entitled to enforce DAB No 3 by way of an interim award which was final and binding without the 2011 Tribunal first determining the parties' primary dispute over the merits of DAB No 3. PGN's arguments, as set out at [16] of *Persero HC (2014)*, were as follows:

(a) The Interim Award was in substance a provisional award because the 2011 Majority Arbitrators intended it to have finality only up to the time the 2011 Tribunal determined the primary dispute on the merits and with finality.

(b) The IAA did not permit a tribunal to issue a provisional award. As a matter of form, s 2 of the IAA referred only to "interim, interlocutory or partial award[s]" and made no mention of provisional awards. As a matter of substance, and more importantly, s 19B(1) of the IAA deemed every award which a Singapore-seated arbitral tribunal issued – however it might be described – to be final and binding. Furthermore, the legislative history of s 19B showed an intent not to permit provisional awards.

(c) The 2011 Tribunal therefore had no power to award CRW provisional relief as it attempted to do in ordering, in the Interim Award, that "[p]ending the final resolution of the Parties' dispute … [PGN] shall promptly pay the sum of US$17,298,834.57 as set out in [DAB No 3]" to CRW.

(d) Section 19B(1) of the IAA deemed the Interim Award to be a final and binding award. That overrode the 2011 Majority Arbitrators' intent that the Interim Award should have only provisional effect. Further, under s 19B(2) of the IAA, no future award made by the 2011 Tribunal could vary

the Interim Award. The 2011 Majority Arbitrators had therefore converted DAB No 3, which had only interim finality under the Conditions of Contract, into an award which, under s 19B of the IAA, was final and unalterable. The 2011 Majority Arbitrators had therefore determined with finality the existence and extent of PGN's obligation to pay CRW. Further, they had done so without determining or even considering the parties' primary dispute on the merits.

(e) The primary dispute was founded on the very question that the 2011 Majority Arbitrators had determined in the Interim Award, namely, the existence and extent of PGN's obligation to pay CRW. The Interim Award had therefore inadvertently rendered the primary dispute *res judicata*. This was contrary to the parties' arbitration agreement, which required an arbitral tribunal to hear the parties' submissions on the primary dispute before determining that dispute on the merits with finality and making it *res judicata*.

(f) In addition, having inadvertently rendered the primary dispute *res judicata*, the 2011 Majority Arbitrators had also rendered the 2011 Tribunal *functus officio* on the issue of how much PGN actually had to pay CRW. The 2011 Tribunal had no power to inquire any further into the primary dispute to ascertain that amount. This was despite the 2011 Majority Arbitrators' express intention to go on to hear and determine (together with the 2011 Dissenting Arbitrator) the primary dispute on the merits and with finality in the 2011 Arbitration.

148 On the basis of these arguments, PGN contended that the Interim Award should be set aside for the following reasons, as set out at [122] of *Persero HC (2014)*:

(a) under Art 34(2)(*a*)(iii) of the Model Law, because the 2011 Majority Arbitrators had exceeded their mandate or jurisdiction in converting the DAB's binding but non-final decision in DAB No 3 into a final award without determining the parties' primary dispute on the merits; and/or

(b) under s 24(*b*) of the IAA, because the 2011 Majority Arbitrators had resolved the primary dispute with finality in breach of the rules of natural justice by shutting out PGN's case on the merits of the primary dispute; and/or

(c) under Art 34(2)(*a*)(iv) of the Model Law, because the arbitral procedure was not in accordance with the parties' arbitration agreement.

(2) CRW's arguments

149 CRW's submissions before the Judge, as set out at [17] of *Persero HC (2014)*, were (*inter alia*) as follows:

(a) CRW was correct to place both the primary dispute and the enforceability dispute before the 2011 Tribunal and to seek an interim award on the latter dispute. That approach was consistent with the parties' arbitration agreement as interpreted by the Court of Appeal in *Persero CA*.

(b) The Interim Award was not a provisional award. It was a final and binding award as mandated by s 19B(1) of the IAA, and would not be varied in breach of s 19B(2) of the IAA by the final award to be made in the 2011 Arbitration. The Interim Award was final and binding with regard to the enforceability dispute pending the final resolution of the primary dispute. And the final award in the 2011 Arbitration need not and would not vary the Interim Award because it would determine with finality a different dispute – namely, the primary dispute.

(c) The 2011 Tribunal was not *functus officio* because it had determined with finality only one of the disputes placed before it – namely, the enforceability dispute – expressly leaving the primary dispute to be heard and determined on the merits and with finality in a future decision.

The Judge's decision in Persero HC (2014)

150 The Judge accepted CRW's arguments and held as follows in *Persero HC (2014)* (at [124]–[143]):

> ***Section 19B does not prohibit provisional awards***
>
> 124 The purpose of s 19B of the IAA … is to deem it that every award issued by a Singapore-seated tribunal precludes the parties, and indeed the tribunal, from revisiting the subject-matter of that award. … [S]o long as that … stricture is complied with, nothing in s 19B prohibits a tribunal from issuing a provisional award. By "provisional award", I mean an award granting relief which is intended to be effective for a limited period. An example is an award which is to be effective pending the determination with finality of every aspect of the parties' dispute.
>
> 125 The legislative history of s 19B shows clearly that this is its purpose. …
>
> 126 Section 19B, the Minister said [when introducing the clause which later became s 19B of the IAA in Parliament], was inserted to confirm that under the IAA "an interim award, once given, is binding and cannot be reviewed by the arbitrator" … He pointed out that that is the effect of an interim award under the English Arbitration Act 1996 and also under Singapore's domestic Arbitration Act (Cap 10, 2002 Rev Ed) ("AA"); and that it had also long been assumed to be the effect under the IAA. The Court of Appeal in [*PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal [2014] 1 SLR 372* ("*First Media")]* found persuasive (at [138]) the view that s 19B was introduced to overrule by legislation a specific 2001 decision of the Court of Appeal which could be taken to have cast doubt on that long-standing view. In that decision, *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley [2001] 3 SLR 327* ("*Tang Boon Jek*"), the Court of Appeal held that an arbitral tribunal under the IAA is not *functus officio* on ***any*** aspect of the dispute before it until it has determined ***every*** aspect of the dispute before it. Section 19B makes clear that every award, whatever type of award it might be, is final and binding on those aspects of the parties' dispute which that award determines.
>
> 127 Section 19B, therefore, ensures that every award carries preclusive effect on its subject-matter, regardless of what other aspects of the dispute remain to be determined, and regardless of whatever else that award might call itself. As the Court of Appeal put it (*First Media* at [140]):
>
> > It can be seen from [the Minister's] speech … that Parliament's intention to align the effect of interim awards with that of final awards was driven by its object of providing that all awards – interim and final – should reflect the principle of finality. What this meant was that an award, once issued, was to be final and conclusive as to the merits of the subject-matter determined under that award; and it could thereafter only be altered in the limited circumstances provided for in Arts 33 and 34(4) of the Model Law. This is nothing more than another way of saying that the issues determined under the award are *res judicata*.
>
> 128 Subject only to that principle, it is my view that s 19B does not prohibit a tribunal from issuing a provisional award, at the very least in a case where (as here) the parties' contract gives them a substantive, contractual right to provisional relief. The IAA deals with the powers of

a tribunal in making an award in two sections: s 19A and s 19B. Neither section prohibits in terms a tribunal from issuing a provisional award. Indeed, there is no section of the IAA which in terms prohibits or permits a provisional award. The IAA does not use the word "provisional" or the term "provisional award" anywhere, in any context.

…

135 In my view, therefore, the explicit objective of section 19B of the IAA is its sole objective. It serves ***only*** to confirm that every award, to be properly called an award, must be final and binding on its subject-matter. The impetus for that confirmation, as the LRRD [*ie*, the Law Reform and Revision Division of the Attorney-General's Chambers] acknowledges in paragraph 2.33.2 of its report [*ie*, "Review of Arbitration Laws" (LRRD No 3/2001)], is to dispel any uncertainty caused by *Tang Boon Jek* (see [126] above). That is why the LRRD says in that paragraph: "We believe that it is important to state clearly … the position … that an award made and delivered in the course of an arbitration is for the purposes of the issues decided therein, final and binding between the parties".

136 Section 19B therefore does not override the parties' autonomy to agree in their contract that they should have substantive provisional rights which, like all substantive rights, are enforceable. The only limitation imposed by s 19B is that an award which enforces any such substantive right must preclude the parties from revisiting the subject matter of that award.

The [Interim Award] is final and binding on its subject-matter

137 It is my view that the [Interim Award] is final and binding on its subject-matter and therefore complies with s 19B(1). The subject-matter of the [Interim Award] is CRW's undisputed substantive provisional right to be paid now and PGN's substantive obligation to argue only later. In other words, the subject-matter of the [Interim Award] is the secondary dispute. The [Interim Award] has thus determined ***with finality*** CRW's substantive but provisional right to be paid promptly, without having to wait for all remaining aspects of the parties' one dispute to be resolved with finality. Section 19B of the IAA prevents the parties and the tribunal from revisiting the secondary dispute.

138 This view is supported by a respected arbitration treatise. Gary Born adopts this view in *International Commercial Arbitration* (Kluwer Law International, 2009) at p 2023:

> The better view is that provisional measures should be and are enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards. Provisional measures are "final" in the sense that they dispose of a request for relief pending the conclusion of the arbitration. Orders granting provisional relief are meant to be complied with, and to be enforceable, in the parties' conduct outside the arbitral process; they are in this respect different from interlocutory arbitral decisions that merely decide certain subsidiary legal issues (e.g., choice of law, liability) or establish procedural timetables. It is also highly important to the efficacy of the arbitral process for national courts to be able to enforce provisional measures. If this possibility does not exist, then parties will be able to be significantly more willing to refuse to comply with provisional relief, resulting in precisely the serious harm that provisional measures were meant to foreclose.

139 This view is also consistent with the approach of the tribunal in ICC 10619, endorsed by the Court of Appeal in [*Persero CA*] … The facts of ICC 10619 are neatly summarised at [57] to [61] of [*Persero CA*]. The contract in that case contained provisions similar to cll 20.4 to 20.7 of

the [1999] Red Book, including the provision that interim adjudications should carry interim finality. The contractor there obtained several interim adjudications in its favour. The employer gave notice of its dissatisfaction with those adjudications and failed to comply with them. The contractor commenced an arbitration, raising both the primary and the secondary dispute [the "secondary dispute" in the context of ICC Case No 10619 being the dispute over the employer's failure to comply with the said interim adjudications].

140 The tribunal in ICC 10619 issued an interim award to the contractor on the secondary dispute. It justified its interim award on the basis that that award merely gave effect to a substantive provisional right under the parties' contract. The tribunal adopted this contractual basis in preference to a procedural basis arising under the applicable rules of arbitration or under a feature of French law. That feature, known as the *référé provision*, allows a claimant to secure an award for interim payment even if there is no contractual right to it, but only if it can show that its ultimate right to the payment is not seriously disputable. As the tribunal said:

> 22. The question now arises as to whether and on what legal basis this Tribunal may adjudicate the present dispute by an interim award.
>
> …
>
> … [T]his Tribunal wishes to emphasize that neither the provisions of Article 23 of the [1998] ICC Rules [of Arbitration] nor the rules of the French [New Code of Civil Procedure] relating to the *référé provision* are relevant. For one thing, the judgement to be hereby made is not one of a conservatory or interim nature, *stricto sensu*, but rather one giving full immediate effect to a right that a party enjoys without discussion on the basis of the [c]ontract 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.*

141 Likewise, the [Interim Award] gives full immediate effect to CRW's substantive provisional right under the [1999] Red Book to be paid now, pursuant to [DAB No 3] and without further discussion, and which the parties agreed shall extend until the end of the 2011 [A]rbitration. It is that substantive right, and nothing else, which is the subject-matter of the [Interim Award]. The [Interim Award] does nothing more than to give effect to the parties' agreement that PGN should "pay now and argue later". And it does so, as required by s 19B, with preclusive effect.

The [Interim Award] will not be varied

142 Section 19B(2) puts it beyond the [2011 Tribunal's] power in any future award to "vary, amend, correct, review, add to or revoke" the [Interim Award]. That is no cause for concern. The [2011 Tribunal] is perfectly able to dispose of the primary dispute without breaching s 19B(2). The final award will be drawn no differently than it would be if, in 2008, PGN had paid CRW voluntarily under [DAB No 3] or if PGN had, under a hypothetical contract which did not include a contractual security of payment regime, made full payment to CRW under protest while validly reserving all its rights to challenge CRW's rights to receive the payment.

143 The [Interim Award], by its terms, ceases to be effective when, and only when, the [2011 Tribunal] has resolved with finality every aspect of the one dispute before it. The award or awards which the [2011 Tribunal] will go on to issue to achieve that resolution need not deal with the [Interim Award] in any way that is inconsistent with s 19B(2). The [Interim Award] will

simply, in accordance with its terms, cease to have effect at that point in time. Further, the fact that each of these future partial award[s] will be immediately enforceable once issued is also not a concern. The [2011 Tribunal] can easily address that issue by releasing a single final award or collecting all partial awards for release together.

[emphasis in original in bold italics]

151 In concluding his analysis, the Judge held that even assuming that the IAA prohibited provisional awards (which he defined (at [124] of *Persero HC (2014)* as "award[s] granting relief which is intended to be effective for a limited period"), the 2011 Tribunal could determine the parties' primary dispute without varying the Interim Award. At [151]–[154] of *Persero HC (2014)*, the Judge explained:

151 If the [2011 Tribunal] finds that the DAB was correct in its decision, then the [2011 Tribunal] need do no more than merely say so in its final award and stop there. The [Interim Award] and the final award will stand together for enforcement. There is no breach of the stricture in s 19B(2).

152 If, on the other hand, the [2011 Tribunal] holds that the DAB awarded CRW too little (assuming that such a holding is open to the [2011 Tribunal] even though CRW has not served a notice of its dissatisfaction), then the [2011 Tribunal] need do no more than make that finding and order PGN to pay CRW the additional amount. Again, the [Interim Award] and the final award will stand together for enforcement. Again, there is no breach of the stricture in s 19B(2).

153 The only possible concern arises if the [2011 Tribunal] finds that the DAB awarded CRW too much. But in that situation, the [2011 Tribunal] need do no more than make that finding and issue a final award requiring CRW to return the excess. Once again, the [Interim Award] and the final award will stand together for enforcement. If PGN fails to comply with the [Interim Award] but nevertheless attempts to recover under that final award, CRW can resist that attempt simply by relying on the [Interim Award] by way of set-off. That is expressly permitted by s 19B(1).

154 In each of these three scenarios, and on the assumption that s 19B does not permit an award whose effectiveness is limited by time even if the parties' contract gives them a substantive right to that effect, the final award will undoubtedly have to accommodate or take account of the [Interim Award]. But in none of these scenarios does that necessarily involve the final award varying, amending, correcting, reviewing, adding to or revoking the [Interim Award] contrary to s 19B. The [Interim Award] and all future awards (whether interim, partial or final) taken together, and after giving effect to any set-off which arises between [the parties] (as s 19B(1) expressly permits), will reflect the ultimate determination of all aspects of the parties' dispute and, in particular, determine who is the ultimate debtor and the ultimate creditor and to what extent.

152 At [129]–[134] of *Persero HC (2014)*, the Judge rejected PGN's argument that the legislative history of s 19B showed that the IAA did not permit provisional awards:

129 Mr Jeyaretnam [counsel for PGN] submits it is by implication that a Singapore-seated tribunal lacks the power to issue a provisional award. He relies on a report issued by the Law Reform and Revision Division of the Singapore Attorney-General's Chambers ("the LRRD") titled "*Review of Arbitration Laws LRRD No 3/2001*". This report led to the amendments to the IAA in 2001 … which inserted s 19A and s 19B into the IAA. Mr Jeyaretnam points to paragraph 2.23.2 of this report and to the footnote to that paragraph. Paragraph 2.23.2 says this: "The omission of

the expression 'provisional awards' … is deliberate as the Bill contemplates that all awards enforcement of which is sought (including interim and partial awards) are to be final in nature". In its footnote to the phrase "provisional awards" in this same sentence, the LRRD says that it deliberately chose not to adopt s 39 of the English Arbitration Act 1996 (c 23).

…

132 I do not accept Mr Jeyaretnam's submission that the LRRD's report shows a legislative intent not to permit provisional awards. First, the LRRD made its comments on the wording of s 19A of the IAA. That provision empowers a tribunal to make different awards at different points in time on different aspects of the matters that it has to determine. Therefore, when the LRRD refers to its deliberate omission of the expression "provisional awards" in s 19A, the LRRD is simply drawing attention to the fact that any award, to be properly called an award, must carry preclusive effect on its subject-matter. In that sense, it appears to me that the LRRD was simply deprecating the ***expression*** "provisional award" rather than the ***concept*** of an award which has provisional effect, but which is also final and binding on its subject-matter. That is not an oxymoron, as I will explain below. The LRRD's decision not to use the term "provisional award" in s 19A of the IAA is to my mind a measure to avoid confusing nomenclature rather than a measure to restrict the content of an award, provided that the award has preclusive effect as required by s 19B.

133 Second, I cannot discern in these passages from the LRRD's report a legislative intent to regulate the content of ***awards*** . It is true that the LRRD states expressly in its footnote (see [129] above) that it decided not to include in our IAA an equivalent to s 39 of the English Act. It is also true that s 39 is headed "Power to make provisional ***awards*** ". But the heading is misleading. The subject-matter of s 39 is not provisional ***awards*** but provisional ***orders*** . What [s] 39 does is to empower an English arbitral tribunal to grant relief by way of a provisional ***order*** if the parties have agreed that it should have that power and if it could grant that same relief by way of a final ***award*** . Section 39 is therefore procedural in nature. It acknowledges and gives effect to the parties' freedom to agree [to] a procedural right to provisional relief. It says nothing about the parties' freedom to agree that they should have by contract a substantive provisional right which is capable in itself of being the subject-matter of an ***award*** . Thus the concluding proviso of s 39 makes it clear that s 39 is entirely separate from an arbitral tribunal's power to make ***awards*** on different aspects of the dispute before it at different times under the English equivalent of s 19A. I cannot discern in this report an intent to prohibit a Singapore-seated arbitral tribunal from issuing a provisional ***award*** , at the very least if the award is based on a substantive provisional right under the parties' contract, and if the award deals with that right with preclusive effect.

134 The flaw in Mr Jeyaretnam's argument is the assumption that an English tribunal has the power to issue an ***award*** which determines its subject-matter in such a way that it can be varied by a future award and that the position in Singapore is consciously different. In fact, as the Minister's speech shows (see [126] above), English law and Singapore law both mandate that an ***award*** must be final and binding.

[emphasis in original in bold italics]

153 Turning to the 2011 Majority Arbitrators' reasons for issuing the Interim Award with interim finality in the sense of only being "final up to a certain point in time" [underlining in original] (see [51] of the Interim Award), the Judge disagreed with the 2011 Majority Arbitrators' characterisation of the legal effect of their award (at [157]–[160] of *Persero HC (2014)*):

157 *First … I do not see the [Interim Award] as being final only "up to a certain point in time" … The [Interim Award] has determined the secondary dispute with finality and without limitation of time. It will always be the case that PGN has* ***now*** *an obligation to pay CRW in accordance with [DAB No 3] promptly and that it do so* ***now****.* … The [Interim Award] will remain final on the secondary dispute even if the [2011 Tribunal] opens up, reviews or revises [DAB No 3] under cl 20.6[2] and even after the [2011 Tribunal] receives PGN's evidence and submissions under cl 20.6[3] and resolves the primary dispute with finality. The only thing that will change with time is that PGN's obligation to pay under the [Interim Award] comes to an end the moment the [2011 Tribunal] disposes with finality of the last aspect of the one dispute before it. All of this is so simply because all of this is what the parties agreed [to] in their contract.

1 5 8 *Second, I do not agree with the [2011 Majority Arbitrators] to the extent that they suggest that the [Interim Award] can or will be "altered" when the [2011 Tribunal] delivers its final award …* The relationship between the final award (or awards) and the [Interim Award] is that the former supersedes the latter on one view (see [143] above) or must accommodate the latter on another (see [154] above). In neither case will the final award or awards ***alter*** the [Interim Award].

1 5 9 *Third, I do not consider the distinction which the [2011 Majority Arbitrators] drew between "binding" and "final" in the context of the [Interim Award] to be a valid one … The [Interim Award] is both final and binding.* That must be so because that is what s 19B(1) mandates. But it is both final and binding only on its subject matter: the ***secondary*** dispute.

160 Fourth, the remaining determination which the [2011 Tribunal] must make with finality is not limited to a determination of the matters raised in PGN's notice of dissatisfaction … The [2011 Tribunal] will have to determine with finality all remaining aspects of the parties' dispute. This includes the entire primary dispute, no aspect of which has as yet been determined. In that determination, PGN will not be limited to relying on the matters it set out in its notice of dissatisfaction. It can invoke cll 20.6[2] and cl 20.6[3] to invite the [2011 Tribunal] to open up [DAB No 3] and to place the entire primary dispute before it for a determination with finality.

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

154 Finally, the Judge held (at [163]–[166] of *Persero HC (2014)*):

The [Interim Award] has no preclusive effect on the primary dispute

…

163 … [T]he result of s 19B deeming the [Interim Award] to be final and binding accords entirely with the parties' contractual intention. Even if the IAA prohibits provisional awards and even if the [2011 Majority Arbitrators have] overreached by trying to issue a provisional award, the result of s 19B operates only with regard to the secondary dispute. The parties' right to have the primary dispute determined on its merits with finality, not being the subject-matter of the [Interim Award], remains unaffected as provided for by their contract. Nothing in the IAA stands in the way now of the [2011 Tribunal] resolving the primary dispute on its merits and with finality.

The merits of the primary dispute are not **res judicata**

164 It follows from the discussion above that the primary dispute is not *res judicata*. The [2011 Tribunal's] final award will not revisit the subject-matter of the [Interim Award].

165 The correct analysis is that the [1999] Red Book's security of payment regime deliberately gives the parties' dispute two temporal aspects. A typical dispute can be divided along topical lines. Section 19A of the IAA permits a tribunal to issue a series of interim or partial awards on each of these topics. Each award in that series is both final and binding on its subject-matter. It is no different where the parties' contract permits the tribunal to divide the one dispute before it on temporal lines. The true distinction between the primary dispute and the secondary dispute is not topical but temporal: argue ***later*** , pay ***now*** . If the parties have agreed that their dispute can be divided in that manner, into two temporal aspects, s 19A of the IAA allows the tribunal to give full effect to the parties' agreement and decide each temporal aspect separately and by separate awards, each of which is final, binding and enforceable on its subject matter.

166 The [Interim Award] is solely concerned with the secondary dispute: how much PGN should pay now. When the [2011 Tribunal] eventually considers the primary dispute, and hears the parties "argue later", it will determine the rights and obligations of the parties on all other aspects, temporal and topical, of the parties' one dispute. It will do so based on different contractual provisions, different evidence, different submissions of law and at a different point in time. That does not restrict the [2011 Tribunal's] freedom to conduct the full inquiry into the primary dispute which the parties' agreement envisages and mandates.

[emphasis in original in bold italics]

155 For all these reasons, the Judge rejected PGN's three specific grounds of challenge against the Interim Award (see [148] above) and dismissed both SUM 3923 and OS 683.

The parties' respective cases in the present appeals

156 The Majority Judgment has summarised PGN's and CRW's arguments on appeal at, respectively, [26]–[33] and [34]–[35] above. Accordingly, I shall refer only to those arguments that are material to my analysis of the issues before this court in the present appeals. In this connection, it may be noted that CRW has provided an extensive submission in response to PGN's arguments that the Interim Award is a provisional award which is not permitted by s 19A and/or s 19B of the IAA. I shall consider CRW's arguments later under my third ground for allowing PGN's appeals. I turn now to my first two grounds, which I shall discuss collectively as they are interrelated.

Whether the enforceability dispute was referable to arbitration under cl 20.6 of the Conditions of Contract and whether the 2011 Majority Arbitrators had the mandate to issue the Interim Award

Clause 20.6 of the Conditions of Contract

157 Whether an interim award may be issued to enforce DAB No 3 pending the 2011 Tribunal's adjudication on the parties' primary dispute turns on an interpretation of the words of cl 20.6 of the Conditions of Contract to determine its ambit. As mentioned earlier, cl 20.6 constitutes the arbitration agreement between the parties as there is no other clause in the Conditions of Contract that provides for arbitration of any dispute between the parties. Although cl 20.7 provides for arbitration upon the failure of a party to comply with a final and binding DAB decision, the arbitration still takes place pursuant to cl 20.6. Before I consider the scope of cl 20.6, it is necessary to note that cl 20.4[6] provides that neither party shall be entitled to commence arbitration of a dispute unless an NOD has been issued in accordance with cl 20.4, or unless either cl 20.7 or cl 20.8 applies. In the present case, PGN served an NOD, and therefore, either PGN or CRW was entitled (subject to compliance with cl 20.5) to commence arbitration of the dispute contemplated by cl 20.4[6].

158 Clause 20.6 provides as follows:

> **20.6 Arbitration**
>
> [1] 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].
>
> [2] 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. …
>
> [3] 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.
>
> …
>
> [emphasis in original omitted]

159 It bears reiteration that cl 20.6 constitutes the arbitration agreement between the parties. The crucial words in cl 20.6 that delineate the kind of dispute that may be referred to arbitration are the opening words of cl 20.6[1], namely:

> 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. …

Clause 20.6 is applicable only to what I shall term (where appropriate to the context) a "cl 20.6 dispute" – *ie*, a dispute in respect of which: (a) the DAB decision concerned "has not become final and binding" as an NOD has been issued; and (b) no amicable settlement has been reached. DAB No 3 is such a DAB decision as PGN issued an NOD in respect of that decision and no amicable settlement was reached between the parties. Clause 20.6 also provides that such a dispute shall be "finally settled by international arbitration". What then is the cl 20.6 dispute in relation to DAB No 3 that is to be finally settled by international arbitration?

160 In my view, the cl 20.6 dispute in relation to DAB No 3 which is to be finally settled by international arbitration is the primary dispute between the parties, *ie*, the dispute as to whether DAB No 3 was a correct adjudication. The words "finally settled" can only apply to the merits of DAB No 3, *ie*, whether that DAB decision was correct. They are only applicable to the primary dispute. They are not intended to and cannot apply to the enforceability dispute (*ie*, whether DAB No 3 is enforceable by an arbitral award pending the determination of the primary dispute on the merits) because of the

preceding qualifying words "[u]nless settled amicably" in cl 20.6[1]. These words refer back to cl 20.5, which requires the parties to try to settle their dispute amicably, failing which the dispute "shall be finally settled by international arbitration". These words are predicated on a dispute that can be settled amicably. On the facts of the present case, the "amicable settlement" requirement can only relate to the primary dispute as to whether or not DAB No 3 was a correct adjudication. That dispute is a factual dispute which PGN and CRW can resolve amicably as it concerns the quantum of CRW's claims against PGN. The "amicable settlement" requirement cannot relate to the enforceability dispute because that is a dispute on what the law is. A dispute on the law is intended to be settled by a tribunal or a court. Of course, it can be argued that even the legal dispute in the present case (*ie*, the enforceability dispute) can be settled amicably between the parties either by PGN agreeing to promptly pay CRW the Adjudicated Sum awarded under DAB No 3 pending an arbitral award on the primary dispute, or by CRW agreeing not to enforce DAB No 3 until the arbitration of the primary dispute has been completed. But, as I have just explained, this is not the kind of dispute contemplated by cl 20.6 because of the use of the words "shall be finally settled by international arbitration" in relation to a dispute which is not settled amicably. Those words, in my view, can only refer to a factual dispute such as the parties' primary dispute. To reiterate, a dispute over a question of law cannot be settled amicably in the context of cl 20.6 – *ie*, PGN and CRW cannot settle among themselves whether, as a matter of law, DAB No 3 is enforceable by an interim award pending the resolution of the primary dispute by arbitration. That dispute (*viz*, the enforceability dispute) can only be decided by a tribunal or a court. The concept of amicable settlement in cll 20.4 and 20.5 is meant for factual disputes, and not legal disputes such as the enforceability dispute.

161 Furthermore, cl 20.4[6] makes it clear that a dispute which a party is entitled to refer to arbitration is a dispute in respect of which an NOD has been issued, *ie*, a dispute as to the correctness of the DAB's adjudication on the claimant's claims. In the present case, the subject matter of PGN's NOD in respect of DAB No 3 was precisely the correctness of the DAB's determination of the quantum of CRW's claims, and not the issue of whether or not PGN had to promptly comply with DAB No 3 pending an arbitral award on the correctness of DAB No 3. Clause 20.4 does not make any provision for a dispute as to the *enforceability* of DAB No 3 to be settled by arbitration because under this clause, PGN and CRW are already required to "*promptly give effect to* [DAB No 3] unless and until it shall be revised in an amicable settlement or an arbitral award" [emphasis added]. In other words, pursuant to cl 20.4, DAB No 3 is already enforceable unless and until it is revised by an amicable settlement or an arbitral award.

162 For these reasons, in the present case, arbitration under cl 20.6 is limited to arbitration of the primary dispute between the parties. The enforceability dispute is not a cl 20.6 dispute and does not fall within the scope of cl 20.6 of the Conditions of Contract. Hence, the 2011 Tribunal had no mandate to determine any dispute other than the primary dispute; it therefore had no jurisdiction or power to grant, in relation to the enforceability dispute, an interim award ordering the enforcement of DAB No 3 pending its resolution of the primary dispute.

163 This conclusion does not detract from the meaning and effect of cl 20.4, and is consistent with it. For CRW to be able to refer the enforceability dispute to arbitration, there has to be a dispute between CRW and PGN in relation to PGN's *obligation* to *promptly* comply with DAB No 3 pending an arbitral award on the correctness of that DAB decision. As I have stated earlier, there can be no such dispute for the simple reason that cl 20.4[4] expressly provides that PGN (as well as CRW) "*shall promptly* give effect to [DAB No 3] unless and until it shall be revised in an amicable settlement or an arbitral award" [emphasis added]. In the present case, there has been neither an amicable settlement of nor an arbitral award on the parties' primary dispute over the merits of DAB No 3. In the 2011 Arbitration, unlike in the 2009 Arbitration, PGN did not dispute that it had an obligation under cl 20.4 to comply with DAB No 3. Instead, it took the position that there was effectively no dispute between

the parties that could be referred to arbitration under cl 20.6 – *ie*, there was in effect no referable dispute between the parties as to PGN's obligation to promptly comply with DAB No 3 pending the determination of the primary dispute on the merits. Since there was, in relation to the enforceability dispute, no dispute that could be referred to arbitration, there was no legal basis for the exercise of any power vested in the 2011 Tribunal (assuming it had such a power) to make an interim award in respect of that dispute.

164 In this connection, Prof Nael G Bunni pointed out in his article "The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Work" [2005] ICLR 272 ("Prof Bunni's article") that cl 20 of the 1999 Red Book did not expressly confer a right on a winning party to refer to arbitration the losing party's failure to comply with a binding but non-final DAB decision. He noted 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). Prof Bunni suggested that cll 20.6 and 20.7 be amended so as to allow relief by way of arbitration regardless of whether or not an NOD had been filed and whether or not the DAB decision in question had become final. In my view, Prof Bunni is correct in stating that there is a gap in cl 20 of the 1999 Red Book in that it does not provide for arbitration to enforce a binding but non-final DAB decision. But, as will be seen, this gap is not accidental. In my view, arbitration was deliberately omitted as a means to enforce such a DAB decision as it was not necessary in the legal environment in which the predecessor of cl 20 (*viz*, cl 67 of the 1987 Red Book) operated (see [166]–[170] below).

Comparison of cl 20.6 and cl 20.7

165 Clause 20.6 may be contrasted with cl 20.7, which is only applicable to a DAB decision that has become final and binding. Under cl 20.7, a failure to comply with such a DAB decision may be directly referred to arbitration under cl 20.6 without the parties having to first go through the steps set out in cll 20.4 and 20.5. As a failure to comply with a final and binding DAB decision is a question of fact, the issuance of a final award under cl 20.7 would normally be a formality. In *Persero CA*, the Court of Appeal held at [55] (quoting from Jeremy Glover & Simon Hughes, *Understanding the New FIDIC Red Book: A Clause-by-Clause Commentary* (Sweet & Maxwell, 2006) at para 20-053):

> *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 [that] the DAB decision can be enforced*. [emphasis in original]

In effect, the Court of Appeal construed cl 20.7 of the 1999 Red Book as implying the absence of any recourse to arbitration as a means of enforcing a binding but non-final DAB decision. Any court reading cll 20.6 and 20.7 would, reasonably, come to the same conclusion. In my view, this interpretation is correct. However, after making the aforesaid statement, the Court of Appeal then stated (without considering the inconsistency with its finding of "no immediate recourse" at [55] of *Persero CA*) that the aggrieved party in the above scenario could have immediate recourse to enforce a binding but non-final DAB decision merely by referring the parties' substantive dispute over the merits of that DAB decision to arbitration under cl 20.6 and seeking, in that arbitration, an interim award ordering enforcement of that DAB decision pending the tribunal's decision on its merits (see *Persero CA* at [63], [66] and [67]). The Court of Appeal did not explain why, if the dispute over a party's non-compliance with a binding but non-final DAB decision could not be referred to arbitration on its own, it could be the subject matter of an interim award if the parties' substantive dispute over the merits of that DAB decision were referred to arbitration under cl 20.6.

166 Leaving this point aside, Mr Seppälä has criticised the Court of Appeal's decision in *Persero CA*

for implying from the wording of cl 20.7 that a failure to comply with a binding but *non-final* DAB decision cannot be directly referred to arbitration without the parties first going through the steps set out in cll 20.4 and 20.5. In his article "How Not To Interpret the FIDIC Disputes Clause: The Singapore Court of Appeal Judgment in Persero" [2012] ICLR 4, he disclosed that he was the drafter of the predecessor of cl 20.7 of the 1999 Red Book, namely, cl 67.4, which was inserted in the 1987 Red Book (the fourth edition of the Red Book). Clause 67.4 was inserted for a limited purpose – to fill the gap in the pre-1987 editions of the Red Book, which did not provide for a remedy where there was non-compliance with a DAB decision that had become *final and binding*. In tracing the history of cl 20.7 in his article "Sub-Clause 20.7 of the FIDIC Red Book does not justify denying enforcement of a 'binding' DAB decision" (2011) 6(3) CLInt 17 (also referred to hereafter as Mr Seppälä's "2011 article" where appropriate to the context), Mr Seppälä wrote (at p 20):

> From this brief excursion into the history of the disputes clause in the FIDIC Red Book, it can be seen that Sub-Clause 67.4, of which Sub-Clause 20.7 is the successor, was simply put into the [1987 Red Book] … to ensure that, where a party had failed to comply with a final and binding decision, such failure could be referred to arbitration. 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.

167 Given its origin, Mr Seppälä is justified in stating that cl 20.7 was not intended to be interpreted in the way that the Court of Appeal did in *Persero CA*. Although this point is well taken, it also gives rise to an equally pertinent point, which is that Mr Seppälä did not consider why cl 67.4 was not added to the Red Book until 1987. There must be a reason – after all, as at 1987, the Red Book, which was first published in 1957, had already been used industry-wide for many decades. A logical reason would be that, if cl 67.4/cl 20.7 was not inserted for such a long time, it was because there was no necessity for it. Indeed, in tracing the origin of cl 20.7 in his 2011 article, Mr Seppälä has also shown this to be the case – why, historically, there was no provision in the nature of cl 20.7 of the 1999 Red Book until cl 67.4 was inserted in the 1987 Red Book. At pp 18–19 of his 2011 article, he wrote:

> As regards arbitration, Clause 67 of the [1977 Red Book (as defined at [80] of the Majority Judgment above)] had provided that disputes or differences in respect of which the decision of the Engineer ***had not become 'final and binding'*** – because a party had expressed dissatisfaction with the decision – could be referred to arbitration. …
>
> …
>
> *However, nothing was said about what happened if:*
>
> *1. neither party had expressed dissatisfaction with an Engineer's decision, with the result that it* ***became final and binding*** *; and*
>
> *2. a party refused to comply with it*.
>
> For example, what recourse would the Contractor have if the Employer had failed to comply with a final and binding decision of the Engineer in the Contractor's favour?
>
> …
>
> *The problem had, doubtless, arisen because, as is well known, the first edition of the FIDIC Red Book published in 1957 had been based closely on a UK domestic form of contract (the ICE*

Conditions) and, under English law (at least at that time), where a debt was 'indisputably due' from a debtor in England, relatively speedy summary judgment was available from the English courts. There would be no need for, or advantage in, submitting the matter to arbitration. Therefore, apparently, for that reason, arbitration was not provided for in that case in the Red Book, just as it had not been provided for in that case in the relevant UK form of contract.

[emphasis added in italics and bold italics]

168 In my view, this passage confirms that there was no necessity for cl 67.4/cl 20.7 in the very first version of the Red Book published in 1957 ("the 1957 Red Book") because the ICE Conditions, upon which it was based, operated in the context of a judicial system (English) that provided a cheaper and faster mode of enforcement in the form of summary judgment. The dispute resolution provisions in the 1957 Red Book were good enough for the UK building and construction industry at that time. There was no need for an alternative method of dispute resolution in the form of arbitration to settle undisputed and undisputable monetary claims. At p 19 of his 2011 article, Mr Seppälä wrote:

> Evidently, when the Red Book had originally been prepared, the draftsmen had failed to note that, in the case of an international construction project, the Contractor would almost certainly not want to go into a local court, which would typically be in a developing country, because the local court often could not, or would not, grant the desired relief. As a result, no satisfactory remedy was available in the [1977 Red Book] where, in the case of such a project, a party, typically the Employer, had failed to comply with a final and binding decision of the Engineer under Clause 67.

169 In 1957, international arbitration was not likely to have been foremost in the minds of the drafters of the Red Book. It was only in 1975 that the UK became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (more commonly known as "the New York Convention"). It is therefore not unexpected that no steps were taken to provide the alternative remedy of an arbitral award for building and construction claims which were undisputed and undisputable. An architect's or an engineer's certificate, whether interim (*ie*, binding but non-conclusive) or final (*ie*, binding and conclusive), was good enough for all practical purposes for enforcement by way of court proceedings, as opposed to arbitral proceedings. As Lord Denning MR noted in *Dawnays Ltd v F G Minter Ltd and Trollope and Colls Ltd* [1971] 1 WLR 1205 ("*Dawnays*") at 1209–1210:

> … An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims, whether good or bad – except so far as the contract specifically provides. Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross-claims. All the more so in a case like the present, when the main contractors have actually received the money.

170 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 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 (as explained by Mr Seppälä at p 19 of his 2011 article). 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.

171 It may also be noted that a binding but non-final DAB decision is similar to an architect's or an engineer's interim certificate of payment, in that both the former and the latter provide for interim finality against the party that is required to make payment (typically the employer). Clause 67 of the 1987 Red Book provides for an engineer's certificate. Clause 20.4 of the 1999 Red Book has merely substituted the DAB for the engineer to adjudicate disputes arising from the contract in question or the execution of the works thereunder. A claim based on a binding but non-final DAB decision is not a claim for damages, but a claim for payment of the sum certified by the DAB as being payable. Such a claim (and likewise, a claim based on an architect's or an engineer's interim certificate of payment) may be enforced by summary judgment in court proceedings.

172 In my view, therefore, the Court of Appeal's conclusion in *Persero CA* – *viz*, that the enforceability of DAB No 3 pending the 2009 Tribunal's determination of the parties' primary dispute over the merits of that DAB decision was not an arbitrable matter within the scope of cl 20.6 – was correct, but for the wrong reason (namely, that it was implicit from the scope of cl 20.7, which applied only to binding and *final* DAB decisions).

173 Mr Seppälä's explanation for the absence of cl 20.7 from the Red Book until 1987 is also equally relevant and pertinent in explaining why cl 20.6 was, from its inception, drafted to be applicable only to a cl 20.6 dispute (as defined at [159] above), and not to a dispute in the nature of the enforceability dispute. As I have just mentioned at [171] above, a binding but non-final DAB decision is akin to an architect's or an engineer's interim certificate of payment under standard building and construction contracts in England and Singapore. In the 1999 Red Book, the DAB is merely substituted for the engineer as the adjudicator under cl 20.4[1] to adjudicate disputes relating to the contract in question or the execution of the works thereunder. An engineer's or an architect's interim certificate entitles the contractor to commence court proceedings for summary judgment on the basis of the certificate, subject to established legal rights such as the right of set-off (among other defences) and counterclaims (see *Dawnays* and also [188] below). Employers and contractors who adopt the 1999 Red Book to govern their contractual relationship may reasonably be assumed to know the purpose of cl 20, and to have agreed to the limited scope of cl 20.6 as originally intended by the drafters of the Red Book.

174 To reiterate, when the Red Book was first introduced in 1957, it was unnecessary to rely on arbitration to enforce an engineer's interim certificate of payment (the then equivalent of a binding but non-final DAB decision) as the ordinary judicial process at that time could provide a speedier and cheaper remedy. No doubt, suing in court might have some disadvantages, in that the losing party could plead a defence of (*inter alia*) set-off or a counterclaim. But, absent such a defence or counterclaim, the winning party would be entitled to judgment based on the engineer's interim certificate on a summary basis. That was the judicial regime upon which the conditions of contract in the 1957 Red Book, and in particular, the scope of the then equivalent of cl 20.6, were predicated. Singapore has a similar, if not more liberal, judicial regime in relation to the Singapore Institute of Architects' standard form of contract (see *China Construction (South Pacific) Development Co Pte Ltd v Leisure Park (Singapore) Pte Ltd* [1999] 3 SLR(R) 583 and the authorities cited therein). Under that regime, a contractor is entitled to summary judgment on an architect's certificate in the absence of fraud or improper pressure (see *GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan and Chan Sau Yan Associates, third parties)* [2015] 1 SLR 671).

175 With respect, the 2009 Majority Arbitrators, the 2011 Majority Arbitrators, the OS 206 judge in *Persero HC (2010)* and the Court of Appeal in *Persero CA* did not undertake a textual, contextual, historical or purposive analysis of cl 20.6. Both the OS 206 judge in *Persero HC (2010)* and the Court of Appeal in *Persero CA* provided no explanation for their assumption that if the parties' primary dispute over the merits of DAB No 3 were referred to arbitration under cl 20.6, the 2009 Tribunal would have the requisite jurisdiction to order the immediate enforcement of DAB No 3 by issuing an interim award to that effect *vis-à-vis* the enforceability dispute.

176 In the court below, the Judge devoted a considerable part of his written grounds of decision in *Persero HC (2014)* to analysing the scope of cl 20.6. At [38], he held that:

> … [Clause] 20.6 is drafted to resolve the *primary* dispute and not to resolve the *secondary* dispute. In other words, cl 20.6 is drafted only to enable the employer to "argue *now*". It is not drafted to enable the contractor to compel the employer to "pay now and argue *later"*. [emphasis in original]

At [49], the Judge reiterated his finding that "cl 20.6 is drafted only with determination *with finality* in mind and even then only of the *primary* dispute" [emphasis in original]. Having made these findings, the Judge, instead of logically following through to hold that cl 20.6 did *not* support the assumption of the OS 206 judge in *Persero HC (2010)* and the Court of Appeal in *Persero CA* (*viz*, that if the parties' primary dispute had been referred to the 2009 Tribunal, the enforceability dispute could have been placed before the tribunal as well on the back of that reference), held – inconsistently with his own findings – that that assumption was correct in law. He then proceeded to consider the application of ss 19A and 19B of the IAA to the Interim Award, and held that the award had been accorded preclusive effect by s 19B on the basis that the enforceability dispute was within the mandate of the 2011 Tribunal under cl 20.6.

ICC Case No 10619

177 In coming to the conclusion that the 2011 Majority Arbitrators had the jurisdiction or power to issue the Interim Award, the Judge also relied on the arbitral award in ICC Case No 10619 as part of his reasoning. I shall now examine this arbitration case (with the caveat that the decision of an arbitral tribunal has no precedent value whatsoever in a court of law).

178 The arbitral award in ICC Case No 10619, which concerned the scope of an arbitral tribunal's powers under cl 67.4 of the 1987 Red Book, provided the foundation for the suggestion of the OS 206 judge in *Persero HC (2010)* and the Court of Appeal in *Persero CA* that in the 2009 Arbitration, CRW should have first referred the parties' primary dispute to arbitration and then sought, in relation to the enforceability dispute, an interim award in the same arbitration for immediate payment of the Adjudicated Sum awarded under DAB No 3. The Court of Appeal expressly endorsed (at [63] of *Persero CA*) the views expressed by Mr Seppälä on the arbitral award in ICC Case No 10619 in his article "Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's decision under the FIDIC Conditions" [2009] ICLR 414. In that article, Mr Seppälä stated that the arbitral tribunal in ICC Case No 10619 (at p 424):

> … perfectly understood the way clause 67 of the [1987 Red Book] is to function and its decision to order payment of the engineer's decisions by way of an interim award, notwithstanding the contractor's earlier notice of dissatisfaction, accords fully with the intention of clause 67.

179 Mr Seppälä stated that the same result should be reached in the case of a DAB decision made under cl 20 of the 1999 Red Book because the relevant language of that clause is essentially the

same as that of cl 67 of the 1987 Red Book. In ICC Case No 10619, the tribunal granted an interim award enforcing certain decisions made by the engineer under cl 67 of the 1987 Red Book on the grounds that the employer's failure to pay the certified sums was a breach of contract. This was despite the fact that the contractor (the party seeking to enforce the engineer's decisions) had issued an NOD in respect of those decisions. The tribunal held as follows:

> 22. The question now arises as to whether and on what legal basis this Tribunal may adjudicate the present dispute by an interim award.
>
> This point can be easily exhausted. If the … Engineer's decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the Arbitral Tribunal should refrain from an immediate judgment giving the Engineer's decisions their full force and effect. This simply is the law of the contract.
>
> …
>
> 27. Finally, whereas according to [cl] 67.1 of the [1987 Red Book], the Engineer's decisions shall have an immediate binding effect, the Arbitral Tribunal holds that *provisional enforcement of this award must be ordered*.
>
> [emphasis added]

180 In *Persero HC (2014)*, the Judge relied on, *inter alia*, ICC Case No 10619 in support of his finding that an interim award carried interim finality and therefore complied with s 19B of the IAA. His reasoning on this point, which I referred to earlier at [150] above, is reproduced again below:

> 137 It is my view that the [Interim Award] is final and binding on its subject-matter and therefore complies with s 19B(1). …
>
> …
>
> 139 This view is also consistent with the approach of the tribunal in ICC 10619, endorsed by the Court of Appeal in [*Persero CA*] … The facts of ICC 10619 are neatly summarised at [57] to [61] of [*Persero CA*]. The contract in that case contained provisions similar to cll 20.4 to 20.7 of the [1999] Red Book, including the provision that interim adjudications should carry interim finality. The contractor there obtained several interim adjudications in its favour. The employer gave notice of its dissatisfaction with those adjudications and failed to comply with them. The contractor commenced an arbitration, raising both the primary and the secondary dispute [the "secondary dispute" in the context of ICC Case No 10619 being the dispute over the employer's failure to comply with the said interim adjudications].
>
> 140 The tribunal in ICC 10619 issued an interim award to the contractor on the secondary dispute. It justified its interim award on the basis that that award merely gave effect to a substantive provisional right under the parties' contract. The tribunal adopted this contractual basis in preference to a procedural basis arising under the applicable rules of arbitration or under a feature of French law. That feature, known as the *référé provision*, allows a claimant to secure an award for interim payment even if there is no contractual right to it, but only if it can show that its ultimate right to the payment is not seriously disputable. As the tribunal said:

> 22. The question now arises as to whether and on what legal basis this Tribunal may adjudicate the present dispute by an interim award.
>
> …
>
> … [T]his Tribunal wishes to emphasize that neither the provisions of Article 23 of the [1998] ICC Rules [of Arbitration] nor the rules of the French [New Code of Civil Procedure] relating to the *référé provision* are relevant. For one thing, the judgement to be hereby made is not one of a conservatory or interim nature, *stricto sensu*, but rather one giving full immediate effect to a right that a party enjoys without discussion on the basis of the [c]ontract 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.*

181 It is pertinent to note the nature of the interim award made in ICC Case No 10619. The tribunal declined to issue the interim award under Art 23 of the 1998 ICC Rules of Arbitration, which sets out the ambit of an arbitral tribunal's jurisdiction to order conservatory and interim measures, because it considered that the interim award was (at [22]):

> … not one of a conservatory or interim measure, *stricto sensu*, but rather one giving full immediate effect to a right that a party enjoys without discussion on the basis of the [c]ontract and which the parties have agreed shall extend at least until the end of the arbitration. …

Instead, the tribunal ordered *provisional enforcement* of the engineer's decisions in question by way of an interim award on the basis that the claimant (the contractor) had an immediate contractual right to payment of the sums certified by the engineer. It should also be noted that there was no discussion by the tribunal as to whether it had the jurisdiction or power to make such an interim award. It would seem that the parties did not dispute that the tribunal had the requisite jurisdiction or power.

182 In the light of ICC Case No 10619 and the article by Mr Seppälä referred to at [178] above, the Court of Appeal in *Persero CA* preferred Mr Seppälä's view (*viz*, that in cases of non-compliance with a binding but non-final DAB decision, an arbitral tribunal under cl 20.6 of the 1999 Red Book had the power to issue an interim award for payment of the sum decided by the DAB pending the tribunal's determination of the merits of the DAB's decision) to Prof Bunni's opinion that there was a gap in the enforcement provisions of cl 20 in this regard. The Court of Appeal went further to hold (at [101] of *Persero CA*) that there appeared to be a "settled practice" in arbitral proceedings brought under cl 20.6 of the 1999 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 tribunal's final resolution of the parties' dispute over the merits of that DAB decision. The Court of Appeal's statement was clearly *obiter* (as the Judge in *Persero HC (2014)* held at [100]–[102]). It is doubtful whether there is indeed such a "settled practice" in international arbitration, and even if there is, it is not necessarily persuasive when considering the issue in the Singapore context. Mr Taner Dedesade, in his article "Are 'Binding' DAB Decisions Enforceable?" (2011) 6(3) CLInt 13, has listed a number of ICC arbitrations where the arbitral tribunals reached different conclusions on the issue of the immediate enforceability of a binding but non-final DAB decision pending an arbitral award on a dispute over the merits of that DAB decision. Indeed, FIDIC has acknowledged that international arbitrators are divided on this issue (see [183] below). It was for this very reason that FIDIC issued the FIDIC Guidance Memorandum on 1 April 2013 to users of the 1999 Red Book to reset the position for future cases. This guidance memorandum is discussed below.

The FIDIC Guidance Memorandum

183 The judgment of the Court of Appeal in *Persero CA* became the subject of opposing comments among international arbitrators and practitioners. In response, FIDIC issued the FIDIC Guidance Memorandum. The full text of the FIDIC Guidance Memorandum is reproduced below:

> **FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1st April 2013**
>
> **Purpose:**
>
> This Guidance Memorandum is designed to make explicit the intentions of FIDIC in relation to the enforcement of the DAB decisions that are binding and not yet final, which is that in the case of failure to comply with these decisions, the failure itself should be capable of being referred to arbitration under Sub-Clause 20.6 [*Arbitration*], without Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] being applicable to the reference. This intention has been made manifest in the FIDIC Conditions of Contract for Design, Build and Operate Projects, 2008 ('Gold Book') by the equivalent Sub-Clause 20.9.
>
> ***To make FIDIC's intention explicit this Guidance Memorandum provides changes to be made to the FIDIC dispute resolution Clause 20 and in particular to Sub-Clause 20.7 and, as a consequence, to [Sub-Clauses] 14.6 and 14.8 of the FIDIC Conditions of Contract for Construction, 1999 (the 'Red Book')*** , the FIDIC Conditions of Contract for Plant and Design-Build, 1999 ('Yellow Book'), and the EPC/Turnkey Projects, 1999 ('Silver Book'). Compliance with the guidance provided in this Memorandum is highly recommended when using the 1999 FIDIC Red, Yellow or Silver books.
>
> **Background:**
>
> A substantial number of arbitral tribunals have found Clause 20 to be unclear on the issue of whether a party may refer the failure of the other Party to comply with a DAB decision that is 'binding' but not 'final' to arbitration as is explicitly the case of a 'final and binding' decision under Sub-Clause 20.7. A DAB decision is 'binding' and not 'final' when either Party, within 28 days after receiving the DAB decision, gives notice to the other party of its dissatisfaction with the DAB decision.
>
> International arbitral tribunals have been divided over whether, in the event of a failure to comply with a DAB decision issued under Clause 20 of the [1999] Red Book, which is 'binding' but not 'final', the failure itself may be referred to arbitration, without Sub-clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] being applicable to the reference. This issue was also the subject of the judgment of the Singapore High Court in [*Persero HC (2010)*] and the judgment of the Court of Appeal of Singapore [in *Persero CA*] dismissing an appeal from that [Singapore High Court] judgment … which set aside an ICC award directing enforcement of a DAB decision.
>
> The same concern applies to Clause 20 of the Yellow Book, and the Silver Book, as that Clause is worded in substantially identical terms in them.
>
> **FIDIC's Recommendation:**
>
> **Clause 20:**

a. Sub-Clause 20.4 – Insert the following as a new penultimate paragraph:

'If the decision of the DAB requires a payment by one Party to the other Party, the DAB may require the payee to provide an appropriate security in respect of such payment[.]'

b. Replace Sub-Clause 20.7 in its entirety with:

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

Clause 14

a. Sub-Clause 14.6 – Insert the following at the end of the last sentence of the first paragraph:

', and shall include any amounts due to or from the Contractor in accordance with a decision by the DAB made under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]'

b. Sub-Clause 14.7, paragraph b – insert the following before '; and':

'including any amounts due in accordance with a decision by the DAB which have been included in the Interim Payment Certificate'

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

184 The express purpose of the FIDIC Guidance Memorandum should be carefully noted. Unlike the majority of this court in the present appeals (see [68]–[69] of the Majority Judgment above), I do not think the FIDIC Guidance Memorandum is intended to make *explicit* what is *implicit* in the intention underlying cl 20.6. It would be invidious for FIDIC to make explicit in 2013 the intention of the drafters of a clause which was first adopted in 1957, and which remained in the Red Book largely without any substantive change until 2013, save for the insertion of cl 67.4 of the 1987 Red Book (now cl 20.7 of the 1999 Red Book). In my view, the purpose of the FIDIC Guidance Memorandum is to make *explicit* FIDIC's intention to recommend "*changes*" [emphasis added] to the 1999 Red Book, including *amending* cl 20.7 to provide for summary or expedited relief in cases of non-compliance with binding but non-final DAB decisions. Specifically, FIDIC recommended amending cl 20.7 to provide for such non-compliance to be directly referred to arbitration without the parties having to first go through the steps set out in cll 20.4 and 20.5. The scope of the type of dispute which could be referred to arbitration under cl 20.6 was enlarged by the changes to cl 20.7 recommended by FIDIC. The contents of the recommended amendment to cl 20.7 makes FIDIC's intention in this regard clear beyond doubt. In my view, the FIDIC Guidance Memorandum is a clear and unambiguous acknowledgement by FIDIC that cl 20.6, without the recommended amendment to cl 20.7, is not applicable to any dispute relating to a failure to comply with a binding but non-final DAB decision, nor to any dispute as to whether or not such a DAB decision is enforceable by an interim award. Such DAB decisions have to be enforced by court proceedings instead as intended by the drafters of cl 20.6. In this connection, I should add that the FIDIC Guidance Memorandum vindicates Prof Bunni's, rather than Mr Seppälä's, opinion on the scope of cl 20.6. The FIDIC Guidance Memorandum does not apply and cannot be used to interpret the scope of cl 20.6 of the Conditions of Contract in the

present case.

185 In cases where FIDIC's recommended amendment to cl 20.7 of the 1999 Red Book is incorporated into the contract in question, a contractor who has the benefit of a binding but non-final DAB decision may obtain an arbitral award to enforce it. Whether, in such cases, this amendment will affect the contractor's right to sue in court based on the binding but non-final DAB decision is not clear. It is not in every case that arbitration is a more effective, expeditious and economical dispute resolution process than court proceedings, as demonstrated by the lengthy arbitral proceedings in the present case.

186 In issuing the Interim Award, the 2011 Majority Arbitrators reasoned (at [45] of the Interim Award) that if DAB No 3 were not enforceable pending the 2011 Tribunal's determination of the primary dispute between the parties, the word "binding" would be "meaningless". In my view, this explanation is not defensible for the following reasons:

(a) First, CRW could have sued PGN for payment of the Adjudicated Sum awarded under DAB No 3 in an Indonesian court (Indonesia being PGN's country of incorporation) or even in a Singapore court (if PGN has assets here (see [120] above and [234] below)).

(b) Second, as suggested by the OS 206 judge in *Persero HC (2010)*, a successful claimant may refer a dispute over *the merits* of the binding but non-final DAB decision in question to arbitration under cl 20.6 immediately upon the respondent failing to comply with it. In the reference, the claimant will produce that DAB decision as *prima facie* evidence that it is correct unless and until it is revised by an amicable settlement or an arbitral award. The burden is then shifted to the respondent to adduce evidence to show the contrary. Clause 20.6 gives the claimant a right to expedite the arbitral process where the respondent deliberately abstains from complying with the DAB decision concerned, as PGN did in this case.

(c) Third, if no NOD is issued by either party, the DAB decision would become final and binding. If it is not complied with, the successful claimant would be able to invoke cl 20.7 to refer the respondent's non-compliance to arbitration under cl 20.6 and obtain an arbitral award for payment of the sum awarded by the DAB. There would be no defence to such a claim.

Clause 20.6 in a security of payment context

187 I mentioned earlier (at [176] above) that in *Persero HC (2014)*, the Judge held that: (a) cl 20.6 was drafted only to enable the employer to "argue *now*" [emphasis in original], and *not* to enable the contractor to compel the employer to "pay now and argue *later"* [emphasis in original] (at [38]); and (b) thus, "cl 20.6 [was] drafted only *with finality* in mind and even then only of the *primary* dispute" [emphasis in original] (at [49]). Nevertheless, the Judge disregarded these findings when he held that cl 20 of the Conditions of Contract incorporated a security of payment scheme akin to that set out in the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). This holding lies at the heart of the Judge's approach. Early on in *Persero HC (2014)*, he said (at [22]):

> The [1999] Red Book's dispute-resolution regime is found in cl 20 under the heading "Claims, Disputes and Arbitration". The heart of this regime is cll 20.4 to 20.7. These provisions have two objectives. First, they establish arbitration as the sole method for the parties to resolve their disputes with finality (or as cl 20.6 puts it, for those disputes to be "finally settled"). *Second, they establish a contractual security of payment regime, intended to be available to the parties even if no statutory regime exists under the applicable law.* [emphasis added]

188 With respect, the two objectives stated in the above passage are problematic. The first objective (*viz*, that of "establish[ing] arbitration as the sole method for the parties to resolve their disputes with finality") applies in relation to only the primary dispute between PGN and CRW, and not the enforceability dispute. Neither cl 20.6 nor cl 20.7 is expressed to apply to the enforceability dispute. The Judge assumed that the enforceability dispute must be resolved by arbitration under cl 20.6 when it was inconsistent with his own findings at [38] and [49] of *Persero HC (2014)*. The second objective – that of "establish[ing] a contractual security of payment regime, intended to be available to the parties even if no statutory regime exists under the applicable law" – is also stated as an undisputed fact. However, there is actually nothing in the Red Book (upon which the Conditions of Contract are based) to suggest that its drafters had in mind a security of payment scheme akin to similar schemes established by legislation in the UK, Singapore and many Australian states. Historically, this is not correct. I have earlier shown (at [168]–[174] above) that historically, an engineer's interim certificate of payment (the precursor of a binding but non-final DAB decision) operated in the context of a judicial system (specifically, the English judicial system) under which a successful claimant in a building and construction dispute could quickly obtain from the respondent payment of the sum awarded by the adjudicating body by commencing a court action for summary judgment (bearing in mind that a binding but non-final DAB decision is akin to an engineer's or an architect's interim certificate of payment). Under English law, a claim based on a binding but non-final DAB decision would be subject to any set-off (among other defences) or any counterclaim (see *Dawnays* and *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 ("*Gilbert-Ash*")), unless otherwise agreed.

189 The very first version of the Red Book (*ie*, the 1957 Red Book) was based on the ICE Conditions (see the extract from Mr Seppälä's 2011 article reproduced at [167] above), and the provisions of the Red Book have remained largely unchanged except for the addition of cl 20.7 to the Red Book in 1987 (in the form of cl 67.4 of the 1987 Red Book). Between 1957 up to the time the FIDIC Guidance Memorandum was issued on 1 April 2013, the FIDIC Red Book did not cater to a "pay now, argue later" regime. I would venture to suggest that it was precisely because contractors did not have the economic power to incorporate contractual provisions requiring employers to "pay now and argue later" that the legislature (in Australia, the UK and Singapore) had to intervene by introducing legislation to establish a statutory security of payment regime so as to ease or protect contractors' cash flow. The security of payment regime is a relatively recent development. It was only in 1996 that the UK established a statutory security of payment scheme for the building and construction industry in England and Wales, followed by Scotland and Northern Ireland. The Australian states were the next to introduce security of payment regimes. Singapore introduced such a regime only in 2004 (via the Building and Construction Industry Security of Payment Act 2004 (Act 57 of 2004)), and Malaysia followed suit in 2012. In my view, the legislature had to intervene because the contractual machinery was inadequate to protect contractors' cash flow. Experience shows that few employers would want to pay contractors promptly if they can argue first and pay later. That is the nature of the capitalist beast.

190 As early as 1964, the problem of cash flow disruptions in the building and construction industry in England was identified in *The Placing and Management of Contracts for Building and Civil Engineering Works* (March 1964), the report of a committee chaired by Sir H Banwell (for a short account of this topic, see Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at paras 1.7–1.12). In *Dawnays*, Lord Denning expounded on the importance of cash flow in the building and construction industry, and interpreted a clause in a building and construction contract between a contractor and a subcontractor in that light. In *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162, Lord Denning reiterated his social philosophy as follows (at 167):

There must be a 'cash flow' in the building trade. It is the very lifeblood of the enterprise.

191 On appeal, the House of Lords overruled *Dawnays* in *Gilbert-Ash*. Lord Diplock commented (at 718):

> My Lords, I accept the importance of "cash flow" in the building industry. In the vivid phrase of Lord Denning M.R.: "It is the very lifeblood of the enterprise" (71 L.G.R. 162, 167). But so it is of all commercial enterprises engaged in the business of selling goods or undertaking work or labour; and so it was in the first half of the 19th century when this common law remedy for breach of warranty was "established" and in 1893 when its application to contracts for sale of goods received statutory recognition in the Sale of Goods Act. "Cash flow" is the lifeblood of the village grocer too, though he may not need so large a transfusion from his customers as the shipbuilder in *Mondel* v. *Steel* [[1841] 8 M & W 858] or the sub-contractor in the instant appeal. It is also the lifeblood of the contractor whose own cash flow has been reduced by the expense to which he has been put by the sub-contractor's breaches of contract. It is not to be supposed that so elementary an economic proposition as the need for cash flow in business enterprises escaped the attention of judges throughout the 130 years which had elapsed between *Mondel* v. *Steel* and *Dawnays'* case in 1971, or of the legislature itself when it passed the Sale of Goods Act in 1893.

In other words, cash flow is important, even vital, to any business. However, it is a different thing to read a security of payment scheme into a contractual structure originally established in 1957 and applied largely without much substantive change up to now (apart from the insertion in 1987 of what is now cl 20.7 of the 1999 Red Book and the amendments recommended by FIDIC in 2013 via the FIDIC Guidance Memorandum) as if employers had agreed with contractors, pursuant to that contractual structure, to pay first and argue later, rather than to argue first and pay later.

Is the Interim Award in substance a provisional award?

192 I turn now to my third ground for allowing PGN's appeals (see [114(c)] above). PGN has argued that DAB No 3 is in substance a provisional award, which is not a type of award covered by the definition of "award" in s 2 of the IAA (see [147(a)]–[147(b)] above). What is not highlighted in PGN's arguments is the fact that a binding but non-final DAB decision is *inherently provisional* in nature because it is expressly stated in cl 20.4[4] to be revisable by an amicable settlement or an arbitral award.

CRW's written case on provisional awards

193 CRW submits that the Interim Award is not a provisional award. Its arguments are set out at paras 63–83 of its written case for the present appeals as follows:

> 63 First, one cannot use the statute of another country [*ie*, the UK] to characterise an interim award that is not subject to the UK Arbitration Act 1996. The only relevant question is whether the Interim Award is an "interim award" under the IAA. …
>
> 64 … Only PGN is calling the Interim Award a provisional award, and it does so for the sole purpose of saying that there is no such thing as a provisional award under the IAA. This is not a valid form of argument. …
>
> 65 Under the IAA, an award includes any interim or partial award. Section 19A(1) makes it clear that an "arbitral tribunal may make more than one award at different points in time during the

arbitral proceedings on different aspects of the matters to be determined." Section 19A(2)(b) makes it clear that an arbitral tribunal may make an award relating to "a part only of the claim" which is submitted to it for decision. That is exactly what the [2011 Majority Arbitrators] did.

66 … [T]here are at least two parts to the dispute in the 2011 Arbitration, namely Question 1 [*ie*, the primary dispute] and Question 2 [*ie*, the secondary dispute as defined by the Judge in *Persero HC (2014)*] … The Interim Award determined part of the dispute in the 2011 Arbitration, that part being whether PGN must make payment to CRW first whilst time is taken for the arbitral process to decide exactly how much PGN owes CRW …

67 … [T]he subject matter of the Interim Award is CRW's undisputed substantive provisional right to be paid now and PGN's substantive obligation to argue only later. CRW has a substantive but provisional right to be paid promptly, without having to wait for all aspects of the parties' dispute to be resolved with finality.

68 As long as the [Interim Award] has preclusive effect on its subject-matter, and is therefore final and binding between the parties, it is irrelevant, for the purposes of recognition and enforcement of the award under the IAA, that the effect of the [Interim Award] is only to provide provisional relief pending the resolution of [the] parties' dispute in the arbitration. In other words, the issue of whether CRW had the right to provisional relief to be promptly paid US$17,298,834.57 pending the final determination in the 2011 Arbitration was merely the subject matter of the Interim Award. The 2011 [Majority Arbitrators'] decision on that issue is however final and binding.

69 … Paragraph 2.23.2 of the LRRD Report [*ie*, "Review of Arbitration Laws" (LRRD No 3/2001) by the Law Reform and Revision Division of the Attorney-General's Chambers ("the LRRD")], which deals with Section 19A of the IAA, contains a footnote which says that "the expression 'provisional awards'" and section 39 of the UK Arbitration Act 1996 [which is headed "Power to make provisional awards"] were deliberately omitted from the IAA because "the [IAA] contemplates that all awards enforcement of which is sought (including interim and partial awards) are to be final in nature".

70 … [T]he LRRD was just seeking to avoid confusing nomenclature. In fact, the drafters of the UK Arbitration Act 1996 had similar concerns when they chose not to use the expression "interim award". …

71 … [T]he LRRD's footnote at paragraph 2.23.2 of the LRRD Report cannot be read as rejecting all that can be found in Section 39 of the UK Arbitration Act 1996. After all, a number of provisions from Section 39 can arguably be found in Section 12 of the IAA; for example, disposition or sale of property between parties (Section 39(2)(a) of the UK Arbitration Act and Section 12(1)(d) of the IAA). …

72 Further, Section 39 is an "opt in" provision. It says that "parties are free to agree" certain things. In that sense, it is no more than a statement of party autonomy and not a mandatory provision. …

73 In any event, it is clear that even in jurisdictions which allow for so-called "provisional awards", DAB- and FIDIC-related interim awards are not considered "provisional awards". A good example is the case of ICC Case No. 10619 … which was cited with approval by the Court of Appeal in [*Persero CA*].

74 … PGN's interpretation of the term "interim award" in Section 2 of the IAA to exclude awards which clarify the rights and obligations of parties in the interim period during the pendency of the arbitration renders the term "interim award" in Section 2 of the IAA superfluous. This cannot have been the intention of the legislature.

75 Section 2 of the IAA provides that an arbitration award includes: (a) an interim award; (b) an interlocutory award; and (c) a partial award. PGN submits that the term "interim award" could have several meanings:

(i) a "partial award" where the tribunal is disposing of part, but not all, of the claims in dispute;

(ii) an award that "decides a preliminary issue"; and

(iii) awards on decisions granting provisional relief.

76 PGN then states that the Interim Award can only fit under category (iii) above, and that the IAA does not empower an arbitral tribunal to make interim awards falling within category (iii). With respect, the Interim Award falls squarely within category (i). …

77 … [A]n interim award could mean a "partial award" where the arbitral tribunal is disposing of part, but not all, of the claims in dispute …

78 … PGN's interpretation of the IAA is inconsistent with the concept of party autonomy in Article II of the New York ("NY") Convention and Section 15A of the IAA. Article II of the NY Convention obliges Contracting Parties to recognise and give effect to the material terms of agreements to arbitrate. Singapore is a contracting party to the NY Convention.

…

82 … Non-recognition of the Interim Award in the present case would therefore be a failure to recognise [the] parties' autonomy in agreeing to arbitrate under [the 1999 Red Book] and the [1998] ICC Rules [of Arbitration]. It would defeat [the] parties' agreement to be bound by a contractual security of payment regime and render the exercise of the 2011 Tribunal's powers pursuant to Clause 20.6 of the 1999 [Red Book] meaningless.

83 PGN's … interpretation of the IAA … deprives Clause 20.4 of the [Conditions of Contract] of its commercial sense. … The Interim Award is simply an interim award under the IAA; and it is enforceable just like any other final and binding [award] under the IAA.

In summary, CRW's arguments are substantially a reiteration of the reasons given by the Judge for rejecting PGN's submission that the Interim Award was in substance a provisional award.

The issuance of the Partial Award dated 25 September 2014

194 It may be recalled that when CRW applied for an interim award for payment of the Adjudicated Sum awarded under DAB No 3, it did not wish the 2011 Tribunal to review the merits of DAB No 3 at the same time (see [137] above). The 2011 Majority Arbitrators issued the Interim Award in a form that expressly reserved to the 2011 Tribunal the power to revise the Interim Award at or after the hearing of the parties' primary dispute as to the merits of DAB No 3. After the 2011 Majority Arbitrators issued the Interim Award on 22 May 2013, the 2011 Tribunal issued a (unanimous)

direction on 4 November 2013 to bifurcate the hearing of the primary dispute into two tranches – first, on "issues of principle", and second, on "issues of quantum" (see [19] of the Partial Award). The hearing of the first tranche took place from 10 to 12 February 2014, with six witnesses (three from each side) testifying on the nine Heads of Claim which were the subject matter of DAB No 3.

195 On 25 September 2014, the 2011 Tribunal issued the Partial Award declaring (at [100.6]) as follows:

> (a) Heads of Claim Nos. 6 (Manufacture and Installation of Additional Bends) and 8 (Additional Costs associated with work at the Northern End of the Site in Areas of Reduced Width of Way-leave) are dismissed;
>
> (b) [DAB No 3] in relation to the following Heads of Claim be opened up, reviewed and revised by the Tribunal, subject to proof of quantum:

Ref	**Description**
1.	Additional Indirect Costs
2.	Additional Survey and Detailed Engineering Costs
3.	Unallocated Standing Time (correction of Records) from 1 March 2007 to at most 15 October 2007
4.	Revised Bill of Quantities for Work completed in 2006
5.	Revised Bill of Quantities for Work completed in 2007
7.	Buoyancy Control (overall effect of not using concrete coated pipes)
9.	Additional Tie-ins Caused by changes in sequence of Working due to late access of Way-leave and Erroneous Site Data

> (c) This Partial Award ***revises*** the previous majority Interim Award insofar as Heads of Claim Nos. 6 and 8 are dismissed.
>
> (d) The issue of quantum in respect of the aforementioned Heads of Claim to be heard in a further hearing, with dates to be fixed.
>
> [emphasis added in bold italics]

At [100.7] of the Partial Award, the 2011 Tribunal stated that it would issue further directions for the parties on the issue of quantum in relation to the Heads of Claim which were to be opened, reviewed and revised by it (subject to proof of quantum).

196 In other words, after the Interim Award was issued, the 2011 Tribunal reviewed DAB No 3 in "principle" to determine whether the nine Heads of Claim based on which the DAB had assessed the value of the 13 disputed VOPs were correctly included in CRW's claims, and found that the DAB had wrongly included two Heads of Claim, Nos 6 and 8. Even at this stage of the inquiry into the merits of DAB No 3 (*ie*, the merits of the primary dispute between the parties), the 2011 Tribunal has already found DAB No 3 to be incorrect, without having to determine the correctness of DAB No 3 with regard to the remaining seven Heads of Claim. The Partial Award has "revise[d]" the Interim Award because it is expressed to have that effect; specifically, the Partial Award has revised the Interim Award by

excluding Heads of Claim Nos 6 and 8. These two Heads of Claims have an aggregate value of US$3,683,756.08, being US$3,175,139.04 for Head of Claim No 6 and US$508,617.04 for Head of Claim No 8 (see [94.1] of the Partial Award, where the quantum of the nine Heads of Claim considered by the DAB is set out). Consequently, the Adjudicated Sum awarded to CRW under DAB No 3 has been revised downwards by US$3,683,756.08, thereby reducing the total amount payable thereunder to US$13,615,078.49.

The parties' skeletal arguments after the issuance of the Partial Award

197 The Partial Award was made after the Judge issued his written grounds of decision in *Persero HC (2014)*, but before the present appeals were heard. PGN and CRW each filed skeletal arguments on 22 December 2014 to address the implications of the Partial Award on the Judge's decision in *Persero HC (2014)*.

PGN's skeletal arguments

198 In its skeletal arguments, PGN argued that since the Partial Award had expressly revised the Interim Award, the latter was never, in substance, intended to be a final and binding award; otherwise, the 2011 Tribunal would not have revised it. According to PGN, the Partial Award raises three questions:

(a) As the substantive effect of the Interim Award was intended to be temporary, is that award enforceable in the same manner as a judgment?

(b) Does the temporary nature of the Interim Award conflict with s 19B of the IAA such that it should be set aside?

(c) As the Interim Award has been revised by the Partial Award such that DAB No 3 is no longer binding on the parties, what is the status of the Interim Award – is it still enforceable in the same manner as a judgment pursuant to the Enforcement Order (as defined at [1] of the Majority Judgment above), or is it liable to be set aside?

199 At para 10 of its skeletal arguments, PGN argues as follows:

(a) As the Partial Award has revised the Interim Award, PGN is no longer obliged to give effect to DAB No 3. Thus, the Enforcement Order made on 2 July 2013 must be set aside.

(b) The 2011 Majority Arbitrators' intention for the Interim Award to have only "interim finality" contravenes s 19B of the IAA.

(c) The Interim Award was issued without consideration of the merits of DAB No 3 and does not accord with the dispute resolution mechanism under the Conditions of Contract.

(d) The Interim Award and the Partial Award cannot stand together for the purposes of enforcement.

(e) The Interim Award should be set aside as the 2011 Majority Arbitrators exceeded their power or jurisdiction, and/or acted contrary to the parties' agreed arbitral procedure, and/or in breach of the rules of natural justice in making that award.

(f) If the Interim Award is not set aside, as a consequence of the application of the principles of *res judicata*, issue estoppel and merger of cause of action, the 2011 Tribunal would become

functus officio for the purposes of the substantive arbitral proceedings concerning the parties' primary dispute over the correctness of DAB No 3.

CRW's skeletal arguments

200 In the skeletal arguments which it filed after the Partial Award was issued, CRW did not respond to PGN's skeletal arguments specifically. It submitted at para 10 of its skeletal arguments that the Partial Award "is simply incapable of having any impact on the Interim Award or the decision below, and is completely irrelevant to these appeals". According to CRW, the Interim Award stands on its own as a separate and independent award. CRW also reiterates all the arguments on provisional awards set out in its written case for the present appeals (see [193] above).

What is a "provisional" award?

201 What is a "provisional" award in the context of arbitration? In the court below, the Judge defined it as "an award granting relief which is intended to be effective for a limited period" (see [124] of *Persero HC (2014)*), without providing the source of his definition. In my view, in contrast to a final award, a provisional award is one which is subject to alteration or revision, or even nullification, after a full hearing on the merits of the dispute which is the subject matter of the arbitration (the subject matter of the 2011 Arbitration being, in this case, the parties' primary dispute over the correctness of DAB No 3). The Judge's definition fits exactly the terms of the Interim Award, which the 2011 Majority Arbitrators intended to be effective with regard to DAB No 3 only until the 2011 Tribunal's final resolution of the parties' primary dispute. The same or similar meaning of "provisional" award can be seen from s 39 of the Arbitration Act 1996 (c 23) (UK) ("the UKAA"), which introduced the concept of a provisional award into the realm of English arbitration law.

Sections 39 and 47 of the UKAA

202 The material provisions of the UKAA for the purposes of this part of my judgment are ss 39 and 47. They read as follows:

> **39 Power to make provisional awards.**
>
> (1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.
>
> (2) This includes, for instance, making —
>
> (a) a provisional order for the payment of money or the disposition of property as between the parties, or
>
> (b) an order to make an interim payment on account of the costs of the arbitration.
>
> (3) Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.
>
> (4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.
>
> This does not affect its powers under section 47 (awards on different issues, &c.).

…

47 Awards on different issues, &c.

(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.

(2) The tribunal may, in particular, make an award relating —

(a) to an issue affecting the whole claim, or

(b) to a part only of the claims or cross-claims submitted to it for decision.

(3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award.

203 In *Persero HC (2014)*, the Judge pointed out that even though the term "provisional *awards*" [emphasis added] was used in the heading of s 39 of the UKAA, that section actually dealt with provisional *orders* instead. In *Nikola Rotenberg v Sucafina SA* [2011] 1 CLC 563 ("*Nikola Rotenberg*"), the English High Court likewise noted this "curious feature" of s 39 (at [43]), and said (in the same paragraph):

> … In any event, it is important to recognise that there is (as stated in paragraph 202 of the DAC Report [*ie*, the report of the Departmental Advisory Committee on Arbitration Law issued in February 1996]) a 'sharp distinction' between an award under s. 39 of the 1996 Act [*ie*, the UKAA] and one made pursuant to s. 47 of the 1996 Act. In particular, unlike an award made pursuant to s. 47 of the 1996 Act, s. 39 of the 1996 Act is concerned (as stated in subs. (1)) with the power of the arbitral tribunal to '… order on a provisional basis any relief which it would have power to grant in a final award.' As there stated, any relief granted pursuant to such a power is 'provisional' only i.e. it is not final and binding.

On appeal, the English Court of Appeal made no distinction between "orders" and "awards" in s 39 when it endorsed the English High Court's interpretation, but said that "[i]t is necessary, however, to set out the distinction between *orders* under s. 38 [which is headed 'General powers exercisable by the tribunal'] and *awards* under s. 39 and s. 47" [emphasis added] (see *Sucafina SA v Rotenburg* [2012] 2 CLC 203 at [23]).

204 Section 47 (read with s 58) of the UKAA corresponds to s 19A (read with s 19B(1)) of the IAA. These provisions make an award final and binding on the parties and on any persons claiming through them. It was on this ground that the Judge held that the argument by PGN's counsel in the proceedings below, Mr Philip Jeyaretnam SC ("Mr Jeyaretnam") – namely, that a Singapore-seated tribunal lacked the jurisdiction to issue a provisional award as provisional awards had been omitted from the IAA – was flawed because it was predicated on the assumption that English arbitration law was different from Singapore arbitration law (see [152] above). To be fair to Mr Jeyaretnam, I do not think he made such an assumption in his arguments. He was merely contending that s 39 of the UKAA provided for provisional awards, but the IAA did not do so because that kind of award had been deliberately omitted by the Law Reform and Revision Division of the Attorney-General's Chambers ("the LRRD") when drafting the IAA.

205 The UKAA does not have an equivalent of s 19B(2) of the IAA, which provides:

> Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award.

Section 19B was introduced to negate the decision of the Court of Appeal in *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 2 SLR(R) 273 ("*Jeffrey Tang*"). In that case, it was held that an arbitral tribunal under the IAA was not *functus officio* on any aspect of the dispute before it until it had determined every aspect of that dispute. Section 19B makes it clear that every award, whatever type of award it might be, is final and binding on those aspects of the dispute which the award determines (see *Persero HC (2014)* at [126]). As the Court of Appeal said in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*First Media*") at [140]:

> … Parliament's intention to align the effect of interim awards with that of final awards was driven by its object of providing that all awards – interim and final – should reflect the principle of finality. What this meant was that an award, once issued, was to be final and conclusive as to the merits of the subject-matter determined under that award; and it could thereafter only be altered in the limited circumstances provided for in Arts 33 and 34(4) of the Model Law. This is nothing more than another way of saying that the issues determined under the award are *res judicata*. …

206 The last sentence of the quotation above suggests that s 19B was introduced to address the issue of *res judicata*. In my view, given that s 19B was specifically enacted to negate the decision of the Court of Appeal in *Jeffrey Tang*, it was intended to restore or restate the established law that once a tribunal has issued an award (be it an interim, interlocutory, partial or final award), the tribunal is *functus officio* in relation to the specific issue(s) dealt with by the award – *ie*, the tribunal cannot revisit its decision and change it even if it turns out to be wrong. Section 19B, as drafted, is wide enough to express both the principle of *functus officio* and the principle of *res judicata* in relation to arbitral awards. But, it was not necessary for s 19B to address the *res judicata* principle since *Jeffrey Tang* was concerned *not* with that principle, but rather, with *the* functus officio *principle.* The *res judicata* principle would continue to apply whether or not s 19B was enacted.

207 An interim award, such as the Interim Award in the present case, does not go into the merits of the substantive or underlying dispute between the parties (in the present case, the primary dispute between PGN and CRW over the correctness of DAB No 3). Therefore, when an interim award is made, no issue of *res judicata* should arise in relation to the merits of the parties' underlying dispute. However, since s 19B is worded so widely as to encompass not only the *functus officio* principle but also the *res judicata* principle with regard to "all awards – interim and final" (as stated in *First Media* at [140]), it is liable to cause confusion, especially in a case like the present case, where an interim award ordering the payment of a sum of money is made. Clearly, the Interim Award cannot render the primary dispute between PGN and CRW over the merits of DAB No 3 *res judicata* since that dispute has yet to be determined with finality by a tribunal. The Judge recognised this when he drew a distinction between the issue decided by the Interim Award and the issue which would be decided by the final arbitral award made in respect of the merits of DAB No 3.

208 Given that s 47 (read with s 58) of the UKAA and s 19A (read with s 19B(1)) of the IAA provide that an arbitral award may not be revisited because the tribunal is *functus officio* in respect of the issue(s) dealt with in that award, the rationale for s 39 of the UKAA is not difficult to appreciate. It is intended to provide a form of arbitral award that would fall outside s 47 (read with s 58) of the UKAA. In other words, given that s 47 (read with s 58) of the UKAA reflects the principle of finality in the sense of a tribunal becoming *functus officio* as just described, s 39 of the UKAA is intended to provide

otherwise *vis-à-vis* provisional awards, *ie*, that a tribunal is not *functus officio* after making a provisional award.

209 For these reasons, I find the Judge's explanation in *Persero HC (2014)* for the omission of a Singapore equivalent of s 39 of the UKAA from the IAA wholly unpersuasive. The Judge held (at [132]) that the LRRD's decision not to use the term "provisional award" in s 19A of the IAA was "to avoid confusing nomenclature rather than … to restrict the content of an award, *provided that* the award has preclusive effect as required by s 19B" [emphasis added]. With respect, the proviso added by the Judge is confusing. A provisional award is, by definition, an award that does not have preclusive effect where the merits of the parties' underlying dispute are concerned as it does not make any determination of the merits of that dispute. Contrary to the Judge's explanation, the LRRD's decision not to use the term "provisional award" in s 19A of the IAA is, as I see it, not merely a matter of "avoid[ing] confusing nomenclature". The inclusion of provisional awards in s 19A (and likewise, in the definition of "award" in s 2) of the IAA would cause no confusion because the mandatory force of s 19B of the IAA would render a provisional award final and binding, just as in the case of an interim award or a partial award. Any confusion would be obliterated by the force of s 19B, which was exactly how the Judge dealt with the Interim Award.

The omission of an equivalent of s 39 of the UKAA from the IAA

210 In its report "Review of Arbitration Laws" (LRRD No 3/2001), the LRRD explained (at para 2.23.2) that the omission of the expression "provisional awards" from the International Arbitration (Amendment) Bill 2001 (Bill 38 of 2001), which introduced (*inter alia*) the clause that later became s 19B of the IAA, was deliberate "as the Bill contemplates that all awards enforcement of which is sought (including interim and partial awards) are to be final in nature". The footnote to this comment also states that s 39 of the UKAA "was not adopted". The LRRD's explanation is quite clear. Because the IAA was intended to apply only to awards that were "final in nature" (although the LRRD did not explain what it meant by this expression in relation to awards under the IAA), there was no room for a provisional award of the kind contemplated under s 39 of the UKAA. A provisional award of that nature would not fit into the statutory scheme of "award[s]" contemplated by the IAA. Section 39 of the UKAA was therefore not incorporated into the IAA. The fact of the matter is that the LRRD did not want to introduce into the IAA the novel concept of a provisional award to cater for awards that might subsequently be altered or revoked.

211 With this background in view, the thrust of PGN's submission that the Interim Award was in substance a provisional award of the type prescribed under s 39 of the UKAA (and excluded from the IAA) is perfectly clear. PGN's contention is that by not adopting s 39 of the UKAA, the LRRD intended the IAA to exclude provisional awards from its ambit; thus, if the Interim Award were in substance a provisional award, it would not be enforceable under the IAA as an award. In my view, the Judge's reasoning does not answer PGN's arguments on this issue. There is really no answer if the Interim Award is indeed in substance a provisional award.

The legislative history of s 39 of the UKAA

212 The legislative history of s 39 of the UKAA shows the purpose of this provision. The UKAA was enacted in 1996 on the basis of a report of the Departmental Advisory Committee on Arbitration Law ("the DAC") issued in February 1996. That report ("the DAC Report") provided the following explanatory notes to cl 39 of the draft Bill considered by the DAB, which later became s 39 of the UKAA:

> ***CLAUSE 39: POWER TO MAKE PROVISIONAL AWARDS***

…

202. *There is a sharp distinction to be drawn between making provisional or temporary arrangements, which are subject to reversal when the underlying merits are finally decided by the tribunal, and dealing severally with different issues or questions at different times and in different awards, which we cover in Clause 47.* It is for this reason that in this provision we draw attention to that Clause.

203. *These considerations have led us firmly to conclude that it would only be desirable to give arbitral tribunals power to make such provisional orders where the parties have so agreed.* Such agreements will, of course, will have to be drafted with some care for the reasons we have stated. Subject to the safeguards of the parties' agreement and the arbitrators' duties, (Clause 33), *we envisage that this enlargement of the traditional jurisdiction of arbitrators could serve a very useful purpose*, e.g.*, in trades and industries where cash-flow is of particular importance.*

[emphasis added]

213 Paragraph 202 of the DAC Report was accepted by the English High Court in *Nikola Rotenberg* as making it clear that the DAC considered provisional orders or awards made under cl 39 of the aforesaid Bill to be different from awards made on different issues at different points in time in the course of arbitral proceedings pursuant to cl 47 of that Bill (cl 47 was later enacted as s 47 of the UKAA, which corresponds to s 19A of the IAA).

214 Paragraph 203 of the DAC Report makes it clear that the DAC considered that cl 39 was intended to *enlarge* the traditional jurisdiction of arbitrators under English arbitration law, which did not extend to the making of provisional awards. Prior to the enactment of s 39 of the UKAA, arbitrators under English arbitration law did not have the power to make provisional awards. The DAC was of the view that *enlarging* arbitrators' jurisdiction by giving them such power could serve a very useful purpose in certain trades and industries where cash flow was of particular importance. The DAC had in mind security of payment schemes, whether contractual or statutory, which required employers to make interim payments to contractors, subject to an adjudicator's final determination. Such orders or awards would be provisional, and not final, in nature.

215 In my view, the DAC's explanations in paras 202 and 203 of the DAC Report are inconsistent with and undermine the Judge's holding as well as CRW's argument that a provisional award is an interim award under s 19A of the IAA.

216 It is not known whether the LRRD considered the reason set out in para 203 of the DAC Report (namely, that a provisional order or award could serve "a very useful purpose" in trades and industries where cash flow is of particular importance) when it decided not to incorporate an equivalent of s 39 of the UKAA into the IAA. Two practitioners' text commentaries provide contrasting views on the objective of s 39 of the UKAA and the status of a provisional award made under that section for the purposes of enforcement as a foreign award in a foreign jurisdiction under the New York Convention. In Robert Merkin & Louis Flannery, *Arbitration Act 1996* (Informa, 5th Ed, 2014) ("*Merkin & Flannery*"), the authors write (at pp 155–156):

Provisional orders or provisional awards?

There is clearly some ambiguity concerning whether section 39 empowers a tribunal to make a provisional ***award*** (as the title of the section suggests) or simply a provisional ***order*** , which is

the word used in section 39. The difference is important: provisional awards may not be enforceable at all in an international context – enforcement under the New York Convention is confined to 'final' awards, whose effect is permanently dispositive (subject to challenges, etc.). Furthermore, there is some ambiguity in the word 'provisional': does it mean 'temporary'?

There are clues in the DAC Report, which refers to this provision being used (for example) 'in trades and industries where cash flow is of particular importance', and the reference to courts having powers to make orders for interim payments. *In our view, the section is indeed intended to confer on arbitrators the power to grant interim financial relief in the form of an award, which may not be entirely dispositive as to the arbitration, nor would it be an award under section 47 (awards on different issues), but it would be final in its own right.* (There is no other form of award recognised by the legislation.)

The clear intention behind the provision was to allow parties to confer on tribunals the right to make a binding award, usually for a sum of money, where liability had been admitted, and substantial damages had been claimed (and were likely to be awarded), so that the only question was as to quantum, in respect of which the final award would only be for the balance due from the respondent. The language used in the section is unfortunate (particularly the use of the word 'provisional'), as it appears that the award would in some way be reversible, which we suggest was not the intention of the drafters of the Act. *A provisional award under section 39 might typically be used to grant interim financial relief on the same basis that interim damages can be awarded by a court, thereby preserving the claimant's cash flow.* Needless to say, anecdotal evidence suggests that the power is rarely exercised by tribunals, who are probably (quite rightly) cautious about making awards unless they are final on the issues concerned.

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

217 In Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) ("*Redfern & Hunter*"), the following point is made (at footnote 4 on pp 514–515):

The English Arbitration Act 1996, s. 39, is an exception to the general rule [that all awards are "final" with regard to the specific issues decided therein] in granting a power to make "provisional awards", if the parties agree that the tribunal shall have the power. Interestingly, s. 39 only mentions the word "award" in the marginal note, and the body of the section refers to "orders". See, Hunter and Landau, *The English Arbitration Act 1996: Text and Notes* (1998, Kluwer), p 35; *whether such orders are enforceable under the New York Convention is questionable, and is a matter for the courts of the country where enforcement is sought*. [emphasis added]

218 Thus, whilst *Merkin & Flannery* expresses the view that an award made under s 39 of the UKAA is intended to be "final" for the purposes of enforcement under the New York Convention, *Redfern & Hunter* says that the enforceability of such an award is questionable and is a matter for the courts of the country where enforcement is sought. As far as Singapore is concerned, whichever view is correct, a provisional award is not an award under the IAA as the definition of "award" in s 2 of the IAA deliberately excludes provisional awards.

219 Professor Bunni's article (cited at [164] above) comments on the effect of s 39 of the UKAA with regard to provisional awards as follows (at pp 282–283):

… Will the applicable law of the contract permit recognition of a provisional award rendered in consequence to arbitration under Sub-Clause 20.7? Will the arbitration rules adopted permit such a course of action?

The answer to these questions would depend not only on the applicable law of the contract, but on the arbitration rules to be applied and of course on the parties' submissions. For example, Article 23(1) of the [1998] ICC Rules of Arbitration provides that:

> "Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate".

The words "any interim or conservatory measure" are wide enough to permit a provisional award to be rendered, *subject of course to the provisions of the applicable law*. Taking, for example, the 1996 English Arbitration Act, section 39(1) provides that:

> "The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award".

Section 39(4) then goes on to provide that:

> "Unless the parties agree to confer such power on the tribunal, the tribunal has no such power".

Therefore, it would seem that in an ICC arbitration case under the 1996 English Arbitration Act, a tribunal would have the power to issue a provisional award under sub-clause 20.7 since the parties involved would have conferred that power on the tribunal through the adoption of the [1998 ICC Rules of Arbitration].

[emphasis added]

The powers of an arbitral tribunal under s 12 of the IAA

220 It is also pertinent to note that s 12 of the IAA vests the following powers in an arbitral tribunal:

> **Powers of arbitral tribunal**
>
> **12.**—(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —
>
> (*a*) security for costs;
>
> (*b*) discovery of documents and interrogatories;
>
> (*c*) giving of evidence by affidavit;
>
> (*d*) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
>
> (*e*) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
>
> (*f*) the preservation and interim custody of any evidence for the purposes of the

proceedings;

(*g*) securing the amount in dispute;

(*h*) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(*i*) an interim injunction or any other interim measure.

(2) An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to administer oaths to or take affirmations of the parties and witnesses.

(3) An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to adopt if it thinks fit inquisitorial processes.

(4) The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (1)(*a*) shall not be exercised by reason only that the claimant is —

(*a*) an individual ordinarily resident outside Singapore; or

(*b*) a corporation or an association incorporated or formed under the law of a country outside Singapore, or whose central management and control is exercised outside Singapore.

(5) Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings —

(*a*) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court;

(*b*) may award simple or compound interest on the whole or any part of any sum in accordance with section 20(1).

(6) All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.

221 Section 12 of the IAA should be read in tandem with Art 17 of the Model Law, which is part of Singapore law by virtue of s 3 of the IAA. Article 17 provides:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

222 It can be seen from s 12 of the IAA that the plenitude of powers conferred on an arbitral tribunal to order interim measures does not include the power to make an interim order for payment of money, unlike s 39 of the UKAA (which expressly mentions "a provisional order for the payment of money"), although it does include the power to prevent the dissipation of assets as a means of avoiding payment to a successful claimant. It is reasonable to assume that s 12 of the IAA was

carefully drafted or structured to meet the objectives of the IAA. If s 12 was intended to include a power on the part of an arbitral tribunal to make an interim order for payment of money, that would have been stated explicitly in the same way that s 39 of the UKAA expressly provides for the making of provisional orders for payment of money.

223 Finally, it should be noted that an order under s 12 of the IAA is not an "award" for the purposes of (*inter alia*) enforcement under s 19 of the IAA. Section 2 of the IAA defines the term "award" as "a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12". Section 2 does not refer to a provisional award for the same reason that a provisional award was excluded from the IAA.

Article 23(1) of the 1998 ICC Rules of Arbitration

224 Article 23(1) of the 1998 ICC Rules of Arbitration, under which the present arbitration between the parties is being conducted, provides as follows:

> Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

225 It is not clear whether interim or conservatory measures under Art 23(1) of the 1998 ICC Rules of Arbitration can include interim awards for payment of money. It may be recalled that in ICC Case No 10619, the arbitral tribunal, in issuing an interim award ordering the payment of money, did not rely on Art 23, but relied instead on the terms of the parties' contract, which was subject to French law. In my view, even if the 1998 ICC Rules of Arbitration can be interpreted to permit an interim award for payment of money, such an award would not be enforceable as a court judgment under the IAA because it would be a provisional order and, hence, would not be an "award" as defined in s 2 of the IAA.

Did the 2011 Majority Arbitrators issue or intend to issue the Interim Award as a provisional award?

226 PGN contends that the 2011 Majority Arbitrators intended the Interim Award to be a provisional award because they not only said that an award giving effect to DBA No 3 would only be "final up to a certain point in time" [underlining in original] (see the Interim Award at [51]) and "will not and cannot be altered until the arbitration hearing" [underlining in original] (at [52]), thereby implying that the Interim Award could and might be altered at or after that point in time, but also stated that the Interim Award was an award "[p]ending the final resolution of the Parties' dispute" (at [56]) – *ie*, the Interim Award was intended to have provisional effect.

227 In my view, the aforesaid statements of the 2011 Majority Arbitrators as well as the form and content of the Interim Award show clearly what was in their minds. They did not want to issue an interim award which might have the effect of rendering the 2011 Tribunal *functus officio*. They wanted to issue an award with interim finality so as to ensure that the 2011 Tribunal would not be *functus officio* after the award was issued. Hence, they stated that the Interim Award would be unalterable (or final) only "up to a certain point in time" [underlining in original omitted], and thereafter could be altered at the hearing of the parties' primary dispute over the merits of DAB No 3 because cl 20.4[4] expressly provided that a binding but non-final DAB decision was subject to

revision by either an amicable settlement or an arbitral award. At the same time, the 2011 Majority Arbitrators also wanted to issue an award in a form that would not fall foul of s 19B of the IAA, bearing in mind the Court of Appeal's decision in *Persero CA*. Ultimately, finding themselves in a dilemma at the crossroads, they had to fall back on that Court of Appeal decision for support. They "presumed" that the Court of Appeal in *Persero CA* had considered s 19B of the IAA and had found no difficulty with it (see [53] of the Interim Award). Thus, the 2011 Majority Arbitrators issued the Interim Award with temporal finality, unalterable only up to the time the primary dispute between the parties was determined on the merits by the 2011 Tribunal, but alterable at or after that point of time. In substance, they issued the Interim Award on the basis or understanding that it could be subject to alteration at the arbitration of the primary dispute. In my view, the 2011 Majority Arbitrators really had no choice but to issue what was in substance a provisional award because of cl 20.4[4] of the Conditions of Contract. As I have observed earlier, it is inherent in the nature of a binding but non-final DAB decision that it is subject to revision either through an amicable settlement, or at an arbitration of the merits of the underlying dispute between the parties as to the correctness of that DAB decision.

The Judge's characterisation of the legal effect of the Interim Award

228 In *Persero HC (2014)*, the Judge declined to accept the 2011 Majority Arbitrators' characterisation of what they intended the legal effect of the Interim Award to be. He held, as a matter of law, that the Interim Award was not merely final up to a certain point in time – instead, it was final and binding under s 19B(1) of the IAA because it had preclusive effect as to the subject matter of the award, and therefore could not be altered in breach of the stricture set out in s 19B(2). The Judge read the Interim Award as complying with s 19B because that section has mandatory effect. He said that the Interim Award would not and could not be varied or altered, and *that it was what the parties had agreed to*. The last statement is curious. The parties had merely agreed to cl 20 of the Conditions of Contract, which provides that DAB No 3 shall be promptly complied with unless and until it is revised by an amicable agreement or an arbitral award. There is no factual basis for concluding that the parties agreed to the DAB's binding but non-final decision in DAB No 3 being made unalterable, given that cl 20.4[4] expressly states the contrary. There is nothing in cl 20 to suggest that the parties had agreed that the enforceability dispute could be referred to arbitration under cl 20.6, or that an arbitral award with provisional effect would be subject to s 19B of the IAA. What the parties had agreed to was the very issue that the Judge had to decide.

Variation of the Interim Award by the Partial Award

229 Notwithstanding the emphatic statements of the Judge that the Interim Award would not and could not be revised, the 2011 Tribunal did precisely that when it expressly "revise[d]" the Interim Award by issuing the Partial Award. In my view, nothing can be clearer than the holding at [100.6(c)] of the Partial Award, which states:

> This Partial Award ***revises*** the previous majority Interim Award insofar as Heads of Claim Nos. 6 and 8 are dismissed. [emphasis added in bold italics]

What this holding means is that Heads of Claim Nos 6 and 8 are no longer part of or enforceable under the Interim Award. In effect, the 2011 Tribunal has decided that DAB No 3 was wrong in so far as it included in the Adjudicated Sum of US$17,298,834.57 the aggregate value of Heads of Claim Nos 6 and 8 amounting to US$3,683,756.08. The Partial Award has excluded two Heads of Claim from the Interim Award. Although the Partial Award is expressed to revise only the Interim Award and not DAB No 3, in reality, it has indirectly revised DAB No 3. Consequently, if DAB No 3 is still binding on the parties (notwithstanding the express words of cl 20.4[4] of the Conditions of Contract), it can only be

for the reduced sum of US$13,615,078.49.

230 Another point to note is that one of the issues before the 2011 Tribunal at the hearing that led to the issuance of the Partial Award was "[w]hether there was collusion between the DAB and [CRW] and/or bad faith on the part of the DAB in reaching [DAB No 3], or bad faith on the part of [CRW] in seeking to enforce [DAB No 3]" [emphasis in original omitted] (at [68] of the Partial Award). The 2011 Tribunal summarised PGN's argument on this point at [69] of the Partial Award as follows:

> [PGN's] global objection to [DAB No 3] is that there was collusion with [CRW] and/or bad faith on the part of the DAB. [PGN relies] on (inter alia) the fact that the DAB came up with its own basis in the evaluation of certain claims, including some which had never been presented by [CRW], "corrected" records and drafted the witness statement of Boy Eka Setiabudi (one of [CRW's] witnesses) dated 24 November 2008, on behalf of [CRW].

After examining the relevant provisions of the 1998 ICC Rules of Arbitration and the Indonesian Civil Code, the 2011 Tribunal concluded that PGN had failed to prove either collusion or bad faith and dismissed PGN's argument (at [70]–[84] of the Partial Award). Supposing, however, that the 2011 Tribunal had found in favour of PGN on the issue of bad faith and/or collusion, the tribunal would surely have set aside DAB No 3, just as it had revised DAB No 3 after considering the evidence on whether the DAB was correct in including Heads of Claim Nos 6 and 8 in DAB No 3. If the 2011 Tribunal had set aside DAB No 3, it would also have set aside the Interim Award, just as it had (via the Partial Award) expressly revised the Interim Award on the facts. If that had been the case, would the Interim Award nonetheless currently still remain extant and "final and binding" under s 19B of the IAA? If so, it would mean that the 2011 Tribunal's award setting aside DAB No 3 (assuming such an award had been made) has no legal effect, just as the Partial Award has no legal effect because it revised the Interim Award contrary to s 19B of the IAA.

231 In my view, the fact that the 2011 Tribunal issued the Partial Award to *expressly revise* the Interim Award supports PGN's argument that all along, the 2011 Majority Arbitrators intended to issue the Interim Award as, in substance, an alterable or revisable award. The Interim Award was meant to be provisional and binding on the parties only until the final adjudication of their primary dispute over the merits of DAB No 3. Indeed, the words of s 39(3) of the UKAA (reproduced earlier at [202] above) encapsulate exactly what the 2011 Tribunal did in relation to the Interim Award when it issued the Partial Award. I set out again s 39(3) of the UKAA below:

> Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.

232 Accordingly, for all the reasons given above, I find that the Interim Award was, and was intended to be, in substance a provisional award. As such, it is not an "award" that is recognised under the IAA, and is therefore not enforceable under s 19 of the IAA in the same manner as a judgment.

Concluding remarks

233 It has taken more than six and a half years since DAB No 3 was issued on 25 November 2008 to reach the stage when, given the Majority Judgment dismissing the present appeals by PGN, CRW is now able to enforce the Interim Award in the same manner as a judgment. But, that may not bring matters to a close as the Partial Award still stands. The following issues come to mind:

(a) Can the Interim Award be enforced against PGN for the whole of the Adjudicated Sum of

US$17,298,834.57, whether in Singapore or elsewhere, when that sum has been revised downwards to US$13,615,078.49 by the Partial Award?

(b) If the Interim Award can be enforced for the whole of the Adjudicated Sum, does it mean that the Partial Award has no legal effect because: (i) the 2011 Tribunal had no power to issue the Partial Award to revise the Interim Award in the face of s 19B of the IAA; and/or (ii) the Partial Award may be disregarded as having no legal effect on the Interim Award (which, it should be noted, is an unexecuted award)?

(c) On the other hand, if the Interim Award can only be enforced for the reduced sum of US$13,615,078.49 (because CRW wishes or is directed by the court to give effect to the Partial Award), does it not mean that in effect, the Interim Award has been revised by the Partial Award, notwithstanding s 19B of the IAA?

These issues will not arise if the court is prepared to recognise the Interim Award as being, in substance, a provisional award that is outside the ambit of an "award" as defined in s 2 of the IAA.

234 I have observed earlier that if PGN has assets in Singapore, CRW could have sued PGN in Singapore from the inception upon PGN's failure to make prompt payment of the Adjudicated Sum. After more than six and a half years, CRW has now obtained a judgment (*viz*, the Majority Judgment) which is no different from the judgment which it might have obtained had it sued PGN in Singapore at the outset as posited. If PGN currently has no assets in Singapore, CRW will have to enforce the Interim Award either in Indonesia (PGN's country of incorporation) or in some other jurisdiction where PGN has assets. Such enforcement proceedings will take time. In the meantime, the adjudication by the 2011 Tribunal on the remaining seven Heads of Claim is on-going and will be resolved sooner or later. It remains to be seen whether CRW will be able to enforce the Interim Award against PGN before the 2011 Tribunal renders its final award on the parties' primary dispute over the merits of DAB No 3.

235 For the reasons given above, I hold that:

(a) the Interim Award was issued with regard to a dispute (*ie*, the enforceability dispute) which was not a dispute that was referable to arbitration under cl 20.6 of the Conditions of Contract;

(b) the 2011 Majority Arbitrators had no mandate under cl 20.6 of the Conditions of Contract to issue the Interim Award to enforce DAB No 3 pending the 2011 Tribunal's final adjudication on the parties' primary dispute over the merits of DAB No 3; and/or

(c) even if the 2011 Majority Arbitrators had the requisite mandate to issue the Interim Award pending the 2011 Tribunal's decision on the primary dispute, the Interim Award was, and was intended to be, in substance a provisional award that fell outside the ambit of an "award" as defined in s 2 of the IAA, and was thus not enforceable under s 19 of the IAA in the same manner as a judgment.

236 I would therefore allow PGN's appeals with costs here and below.