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Are 'binding' DAB decisions enforceable?

Four say YES:

- The arbitral tribunal in *ICC Case 10619* considered that it was simply the law of the contract.
- This reasoning appears to have been followed in the *DBF* case.
- A sole arbitrator in *ICC Case 16948/GZ*, said a final award was OK (this is contrary to the Court of Appeal in Singapore's guidance).
- A sole arbitrator in *ICC Case 15751/JHN* considered that a party should be required to pay that sum decided by the DAB and interest from the date when payment was due by way of damages for breach.

Three say NO:

- The Court of Appeal in Singapore (*CRW v PGN*) say NO in relation to a final award (and upheld the High Court's decision to set aside the arbitral tribunal's award, which was enforced by way of a final award) but, obiter, suggest that as long as the merits are placed before the arbitral tribunal, in principle, an interim or partial award enforcing should be possible.
- A sole arbitrator in *ICC Case 16119/GZ* suggests that a partial final award and consequently also a final award are

inappropriate devices to allow enforcement but suggests, obiter, that an interim award might be effective.
- The sole arbitrator in *ICC Case 16949/GZ* concluded that damages could not include the sum adjudged as due by the DAB and so declined to enforce.

The problem

The fourth paragraph of Sub-Clause 20.4 of the FIDIC 1999 Red Book provides: 'The [DAB's] decision shall be binding on both Parties who shall give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award.'

If no 'notice of dissatisfaction' (NOD) is issued under Sub-Clause 20.4 within 28 days of receiving the DAB's decision, that decision becomes 'final and binding'. The General Conditions make express provision via a referral to arbitration for the enforcement (specific performance) of DAB decisions that are *final and binding* in Sub-Clause 20.7.

By contrast, the 'general conditions' make no provision permitting the enforcement of *binding* DAB decisions, that is DAB decisions where a notice of dissatisfaction has been given by a party. Professor Nael Bunni identifies this as a gap in the contract conditions in his article 'The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works' [2005] ICLR 272 and suggests that:
- there is no remedy offered by Clause 20 of the 1999 FIDIC Red Book, other than that of treating the non-compliant party as being in breach of contract and, accordingly, liable for damages; and
- Sub-Clause 20.7 of the 1999 FIDIC Red Book is of no assistance to the aggrieved party in this scenario as it applies only to DAB decisions that have become final and binding.

Singapore Court of Appeal

On 13 July 2011, the Singapore Court of Appeal dismissed an appeal of the decision of the High Court in the case of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33.

The case concerned a pipeline project under the FIDIC 1999 Red Book. Various disputes arose that were referred to the DAB. The DAB decided, inter alia, that the 'employer' owed the contractor a sum of money. The employer issued an NOD and failed to pay the sum determined as due by the DAB. The contractor applied directly to the ICC arbitral tribunal for a final award enforcing the DAB's decision on the basis that there had been a breach of the fourth paragraph of Sub-Clause 20.4. NB the contractor did not first refer the failure to pay as a second dispute to the DAB, nor did the contractor refer the merits to arbitration.

A majority of the arbitral tribunal gave a final award finding the sum awarded by the DAB to be due without considering the merits. The contractor applied to set aside the arbitral award. The High Court set aside the award on the basis that failure to pay (the second dispute) did not go to the DAB prior to arbitration. Other obiter comments were also made by Judge Ean in relation to whether the arbitral tribunal could enforce without a consideration of the merits. The contractor appealed to the Court of Appeal and the appeal was dismissed on the basis that:

> 'There appears to be a settled practice, in arbitration proceedings brought under sub-cl 20.6 of the 1999 FIDIC [Red Book], for the arbitral tribunal to treat a binding but non-final DAB decision as immediately enforceable by way of either an interim or partial award pending the final resolution of the parties' dispute. What the Majority Members did in the Arbitration – *viz*, summarily enforcing a binding but non-final DAB decision by way of a *final* award without a hearing on the merits – was unprecedented and, more crucially, entirely unwarranted under the 1999 FIDIC [Red Book].'

The Court of Appeal reasoned that:
- A reference to arbitration under Sub-Clause 20.6 in respect of a binding DAB decision is in the form of a rehearing so that the entirety of the parties' dispute(s) can *finally* be resolved afresh.
- Sub-Clause 20.6 requires the parties finally to 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-Clause 20.6 contemplates a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved. This observation is consistent with the plain phraseology of Sub-Clause 20.6, which requires the parties' dispute in respect of any binding DAB decision that

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.

Four more 'binding' DAB enforcement cases

The author's firm has dealt with four other ICC cases in which the contractor pursued the employer in arbitration for the sums ordered by the DAB to be paid to it.

- Two sole arbitrators concluded that the sum determined to be due by the DAB was due as damages for breach of Sub-Clause 20.4.
- Two sole arbitrators declined to award any monetary sum concerning the DAB's binding decision.

All four cases are unreported, were determined by different sole arbitrators and were under the FIDIC 1999 Red Book. In all four, one or both parties issued a valid NOD and the employer failed to pay the sums adjudged to be due by the DAB. The failure to pay was taken to the DAB prior to applying to the arbitral tribunal for enforcement in all cases apart from *ICC Case 16119/GZ*.

In two of the cases (*ICC Case 16948/GZ* and *ICC Case 16949/GZ*), the contractor opted to seek a final award (ie the merits were not for determination by the arbitral tribunal). In the first case, the sole arbitrator made a final award and, in the second, a different sole arbitrator concluded that there should be no enforcement of the DAB's decision.

- In *ICC Case 16948/GZ*, the sole arbitrator, in a final award, ordered the employer to make an immediate payment of the sums determined to be due by the DAB plus interest and costs on the basis that 'the Employer was liable for all damages resulting from or in connection with the failure to perform on time or in accordance with the terms of the agreement or not to perform at all [the employer's breach of the fourth paragraph of Sub-Clause 20.4]... the Claimant has the right to receive the amount which the DAB considered was due' (paragraph 134).
- In *ICC Case 16949/GZ*, the sole arbitrator declined to make a final award (the merits were not in front of him) on the basis that 'though non-compliance with DAB decisions No 2 and 3 would amount to a breach of contract, the consequences of such breach would hardly be a claim for damages of the same amounts already awarded'. The arbitrator then went on to admit under Article 19 of the ICC Rules the introduction of a new claim – namely the merits that were not initially placed before the arbitral tribunal. The arbitrator would then proceed in the final award to determine what payment was due to the claimant.

In the other two cases (*ICC Case 16119/GZ* and *ICC Case 15751/JHN*), the contractor sought a partial final award (and specifically *not* an interim award) with the merits of the DAB decisions to be finally adjudicated in a final award. In the first of these cases, the sole arbitrator declined to make a partial final award enforcing an order to pay. In the second, the sole arbitrator did make a partial final award enforcing an order to pay.

- In *ICC Case 16119/GZ*, the sole arbitrator declined to order payment of the sums adjudged to be due by the DAB for the following reasons:

  'Failure to comply with the DAB's decisions is a breach of contract. The appropriate method of enforcing a DAB's decision is therefore by way of an action for breach of contract. The DAB decisions are binding as a matter of contract (fourth paragraph of Sub-Clause 20.4) although they are not final as notices of dissatisfaction have been submitted by both Parties. The DAB decisions enjoy this binding character unless and until revised by the final award. As the DAB decisions are binding, the sums recognized under those decisions are due and payable until the revision of those decisions in the Final Award. Whilst the decisions are binding, they are not final. The DAB decisions are not final and any payment awarded by those decisions may be revised and reversed. Therefore, the Sole Arbitrator cannot issue any final award ordering the payment of the sums decided by the DAB. By necessity, the payment ordered should be provisional or temporary. The partial award requested cannot definitively determine the payment issues and, consequently, any order for payment at this stage must be provisional. It goes against the essence of a final award to make an order that

could be revisited and reversed in a further award.... In conclusion the payments awarded under the DAB's decision will be revisited by the Sole Arbitrator and cannot be the subject of a final partial award and again the subject of the final award.'

- In *ICC Case 15751/JHN*, the sole arbitrator determined that:

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

For convenience, I also set out the reasoning in *ICC Case 10619*:

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

Difficult issues

The difficult issues that these cases raise include the following:

1. Should an arbitral tribunal make an interim, partial or final award enforcing a DAB's decision?
2. Should the basis of the award be breach of contract or specific performance?
3. Should there be a single arbitration – that is, should the merits be placed before the arbitral tribunal?
4. Does the failure to pay need to go to the DAB first?

As can be seen from the cases above, arbitral tribunals and courts have taken different approaches and there is still no clear guidance on the best way to plug the gap. A detailed consideration of all of these issues is not possible in this short article.

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