PT Perusahaan Gas Negara (Persero) TBK *v* CRW Joint Operation (Indonesia) and another matter
[2014] SGHC 146

Case Number	: Originating Summons No 683 of 2013, Originating Summons No 585 of 2013 (Summons No 3923 of 2013)
Decision Date	: 16 July 2014
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Mr Philip Antony Jeyaretnam SC and Ms Wong Wai Han (Rodyk & Davidson LLP) for the plaintiff in OS 683 of 2013 and the defendant in OS 585 of 2013; Mr Cavinder Bull SC, Ms Foo Yuet Min, Ms Lim May Jean and Mr Ho Ping Darryl (Drew & Napier LLC) for the defendant in OS 683 of 2013 and the plaintiff in OS 585 of 2013.
Parties	: PT Perusahaan Gas Negara (Persero) TBK — CRW Joint Operation (Indonesia)

Arbitration – Recourse against award – Setting aside

16 July 2014

Vinodh Coomaraswamy J:

1 In the two applications before me, PT Perusahaan Gas Negara (Persero) TBK ("PGN") applies to set aside: (1) a majority arbitral award dated 22 May 2013 issued in favour of CRW Joint Operation (Indonesia) ("CRW"); and (2) an order permitting that award to be enforced as though it were a judgment of the High Court. Having received and considered both parties' written and oral submissions, I dismissed both of PGN's applications.

2 PGN has appealed to the Court of Appeal against my decision. In brief, it is my view that the majority's award is entirely consistent with the parties' contract and with the manner in which that contract was interpreted by the Court of Appeal in earlier litigation between the same parties on the same contract. It is also my view that the majority's award is not prohibited by Singapore's international arbitration legislation, whether explicitly or by implication. I now set out the grounds for my decision.

Background

The parties, their contract and their disputes

3 PGN is a listed, state-owned company established under Indonesian law. It owns and operates gas transmission systems in Indonesia. [note: 1] CRW is also an entity established under Indonesian law. It comprises three Indonesian limited liability companies. [note: 2]

4 By a contract entered into 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. [note: 3] In early 2008, CRW and PGN found themselves in dispute on a number of variation claims made by CRW under their contract. The parties referred their disputes for decision by a neutral body constituted by their contract for precisely that purpose. That body is known as a dispute adjudication board ("DAB").

5 In due course, the DAB rendered a series of decisions dealing with all of the parties' disputes. PGN accepted all of the DAB's decisions except for its decision delivered on 25 November 2008. In that decision, the DAB held that as at 25 November 2008, CRW had "become entitled to" the total sum of US$17,298,834.57. [note: 4] PGN has failed to pay to CRW pursuant to that DAB decision.

6 PGN accepts that it has been under a contractual obligation since 25 November 2008 to comply promptly with that DAB decision by paying CRW that sum. PGN further accepts, as it must, that its failure to do so is a breach of contract. I shall refer to the parties' underlying dispute which forms the subject-matter of the DAB decision as the "primary dispute". I shall refer to the dispute which arises from PGN's failure to pay CRW, whether promptly or at all, pursuant to the DAB decision as the "secondary dispute".

7 The phrase "secondary *dispute*" is convenient for present purposes but is not entirely accurate (see [62] below). That is because PGN's contractual obligation to pay CRW pursuant to the DAB decision is indisputable and is in fact undisputed. Despite this, PGN submits that the parties' contract and Singapore's arbitration legislation does not permit CRW to do anything to *enforce* that obligation. Counsel for PGN, Mr Philip Jeyaretnam SC, put it this way in the course of argument: [note: 5]

> Court: … is it common ground between the parties that PGN is in breach in not paying [CRW] pursuant to [the DAB decision] notwithstanding the notice of dissatisfaction and the pending arbitration?
>
> Mr Jeyaretnam: Your Honour, the--- I think we really would not be able to resist that… conclusion on the contract.
>
> The contract… provides for… the DAB decision to be binding and *DAB Decision has been granted*.
>
> …
>
> *And that … has been our legal position*. But the question is what is the enforcement options available and those enforcement options depend on the law and on the

procedural provision in Singapore…

[I]nevitably the Court's sympathies must lie

with the party who has not received

payment under a form of contract such as

this…. [b]ut regardless of that, the question

remains what actually is the legal position.

[emphasis added]

8 It is true that one's sympathies inevitably lie with CRW and not with PGN, whose arguments have evolved over the course of the parties' protracted dispute. But it is my task to judge the parties' arguments on their merits and not on my sympathies. It is on the merits that I have dismissed PGN's applications, for the detailed reasons which follow.

The 2009 arbitration

9 The parties' contract contains an arbitration agreement. CRW has made two attempts through arbitration to compel PGN to pay the sum awarded by the DAB. CRW's first attempt was an arbitration commenced in 2009. That attempt failed. Its second attempt is an arbitration commenced in 2011. It is from this 2011 arbitration that the two applications before me arise.

10 For a variety of evolving reasons, PGN has maintained throughout the 2009 arbitration, throughout the 2011 arbitration and throughout all the associated litigation (including the two applications now before me) that it cannot be compelled to comply promptly with the DAB decision unless its primary dispute with CRW has been heard and determined on its merits and with finality.

11 In the 2009 arbitration, CRW placed before the tribunal *only* the secondary dispute and sought as relief a final award compelling PGN to pay it the sum awarded by the DAB decision. PGN's principal argument before the 2009 tribunal was that the parties' arbitration agreement does not permit an arbitral tribunal to compel PGN to comply with the DAB decision unless the *same arbitral tribunal* in the *same arbitration* goes on to hear and determine the primary dispute on the merits and with finality.

12 By a majority, the 2009 tribunal rejected PGN's argument. The majority issued what it described as a "Final Award" requiring PGN to comply with the DAB decision and noting expressly that PGN was at liberty to commence a *separate* arbitration to have the primary dispute heard and determined on the merits. PGN applied to the High Court to set aside that final award. The High Court in 2010 agreed with PGN that that award should be set aside. CRW appealed to the Court of Appeal against the High Court's decision. The Court of Appeal in 2011 dismissed CRW's appeal. The result is that CRW's attempt through the 2009 arbitration to compel PGN to comply with the DAB decision has failed.

The 2011 arbitration

13 Rebuffed but undaunted, CRW commenced the second arbitration in 2011. In the 2011 arbitration, CRW adjusted its approach specifically to meet PGN's earlier argument. It did so by placing before the 2011 tribunal *both* the primary dispute and the secondary dispute. In response, PGN

adjusted *its* argument to meet CRW's new approach. This time, PGN argued that the parties' arbitration agreement and *Singapore's international arbitration legislation* do not permit an arbitral tribunal to compel PGN to comply promptly with the DAB decision unless the same arbitral tribunal– *in the same award* and not merely in the same arbitration – also hears and determines the primary dispute on the merits.

14 The 2011 tribunal has, by a majority, rejected PGN's argument. It has therefore issued an interim or partial award compelling PGN to comply with the DAB decision. CRW has obtained leave to enforce that award against PGN as though it were a judgment of the High Court. PGN applies now to set aside the 2011 tribunal's interim or partial award and, with it, the order permitting CRW to enforce that award. PGN makes these applications even though: (1) the majority's award simply requires PGN to pay promptly a sum to CRW *now* which PGN accepts it has been obliged to pay promptly to PGN since *2008*; and (2) the 2011 tribunal fully intends to go on to hear and determine the primary dispute on the merits and with finality *in the same arbitration*.

Arguments and issues

PGN's arguments

15 Mr Jeyaretnam puts the central issue before me in the following way:

> The central issue to be decided is whether CRW is entitled to enforce [the DAB decision] by way of an interim award, which is final and binding, without the [tribunal] first determining the underlying merits of the [DAB decision]. [note: 6]

16 PGN's arguments on this central issue, put simply, are as follows:

(a) The majority in the 2011 arbitration have issued an award which they have described as an interim or partial award but which is in truth a provisional award. It is provisional because the majority intend their interim award to have finality only up until the time the 2011 tribunal hears and determines the primary dispute on the merits and with finality. [note: 7]

(b) The International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") does not permit a tribunal to issue a provisional award. As a matter of form, s 2 of the IAA refers only to interim, interlocutory or partial awards and makes no mention of provisional awards. [note: 8] As a matter of substance, and more importantly, s 19B(1) of the IAA (see [109] below) deems every award which a Singapore-seated arbitral tribunal issues – however it may be described – to be *final and binding*. Finally, the legislative history of s 19B shows an intent not to permit provisional awards.

(c) The 2011 tribunal therefore has no power to award CRW *provisional* relief as it attempted to do: as an award that PGN "shall promptly pay the sum of US$17,298,834.57 as set out in the DAB Decision" to CRW "*pending* the final resolution of the Parties' dispute raised in these proceedings" (see [114] below, emphasis added).

(d) Section 19B(1) of the IAA deems the majority's award to be a final and binding award. That overrides the majority's intent that its award should have only provisional effect. Further, under s 19B(2) of the IAA, no future award can vary the majority's award. The majority has therefore converted a DAB decision which has only *interim* finality under the parties' contract into an award which, under s 19B of the IAA, is final and unalterable. The majority has therefore determined *with finality* the existence and extent of PGN's obligation to pay CRW. Further, they have done so without determining or even considering the primary dispute between the parties on

the merits. [note: 9]

(e) The primary dispute is founded on the same question as the majority have determined in their award: the existence and extent of PGN's obligation to pay CRW. The majority's award has therefore inadvertently rendered the primary dispute *res judicata*. This is contrary to the parties' arbitration agreement. That agreement requires an arbitral tribunal to hear and determine the parties' primary dispute on the merits before determining that dispute with finality and making it *res judicata*.

(f) Further, having inadvertently rendered the primary dispute *res judicata*, the 2011 tribunal has also rendered itself *functus officio* on the issue of how much PGN must actually pay CRW. The tribunal has no power to inquire any further into the primary dispute to ascertain that amount on the merits. [note: 10] This is despite the 2011 tribunal's express intention to go on to hear and determine the primary dispute on the merits and with finality in the 2011 arbitration.

CRW's arguments

17 CRW's arguments in response to PGN's submissions are as follows:

(a) CRW is correct to place both the primary and the secondary dispute before the tribunal in the 2011 arbitration and to seek an interim award on the secondary dispute. That approach is consistent with the parties' agreement as interpreted by the Court of Appeal when it upheld the decision to set aside the final award in the 2009 arbitration.

(b) The 2011 tribunal's interim award is not a provisional award. It is a final and binding award as mandated by s 19B(1) and it will not be varied by the final award in the 2011 arbitration contrary to s 19B(2) (see [109] below). It is final and binding on the *secondary* dispute pending the final resolution of the primary dispute. And the final award in the arbitration need not and will not vary the interim award because it will determine with finality a different dispute: the *primary* dispute.

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

(d) The arguments put forward by PGN are inconsistent with: (i) the approach which PGN itself suggested that CRW should have taken when PGN made its submissions in the litigation arising out of the 2009 arbitration; and (ii) the way forward for CRW which the High Court and the Court of Appeal endorsed in that litigation.

The issues

18 The issues which I have to determine are the following:

(a) Is CRW's approach in the 2011 arbitration consistent with the parties' agreement, and in particular with their contractual dispute-resolution regime?

(b) Is the majority's award in truth a "provisional award"?

(c) What effect does the IAA have on the majority's award?

(d) What effect does the majority's award have on the ability of the 2011 tribunal to consider and determine the parties' primary dispute on its merits and with finality?

(e) Can PGN succeed in setting aside the majority's award on any of the three grounds raised?

19 I deal now with these issues in turn.

The contractual dispute-resolution regime

Clauses 20.4 to 20.7 of the Red Book

20 The contract between CRW and PGN incorporates (with slight and immaterial modifications) a set of standard-form terms and conditions commonly known as "the Red Book". The Red Book is the first edition of the "Conditions of Contract for Construction" published in 1999 by the International Federation of Consulting Engineers or, as that body is known in French, the Fédération Internationale Des Ingénieurs-Conseils ("FIDIC").

21 The parties have chosen Indonesian law to govern their contract. Neither party has sought, in the applications before me, to prove the content of Indonesian law or to argue that it is different from Singapore law in any respect which is material for my purposes.

22 The 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.

The essential features of a security of payment regime

23 The central purpose of a security of payment regime is to facilitate the cash flow of contractors in the construction industry. 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.

24 A security of payment regime addresses the imbalance between contractor and employer. Its driving principle is the aphorism "pay now, argue later". When a dispute over a payment obligation arises, the regime facilitates the contractor's cash flow by requiring the employer to pay now, but without disturbing the employer's entitlement (and indeed also the contractor's entitlement) to argue later about the underlying merits of that payment obligation (see *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 at [2] – [5].)

25 To give effect to its central purpose, a security of payment regime implements three essential features:

(a) First, it establishes a quick and relatively inexpensive procedure by which a contractor can secure from a neutral body a binding interim adjudication of its right to receive a disputed payment.

(b) Second, it gives a successful contractor a quick and relatively inexpensive way of compelling a recalcitrant employer to comply with the interim adjudication.

(c) Third, it ensures that the interim adjudication does not in any way preclude the parties from, in the fullness of time, arriving at a resolution of their payment dispute on its merits and with finality.

26 The first and second features taken together comprise the "pay now" element. The third feature enables the "argue later" element. All three features taken together give the interim adjudication what is commonly referred to as "interim finality". This is what distinguishes a security of payment regime from a fast-track dispute-resolution regime with a right of appeal by way of rehearing.

The text of cll 20.4 to 20.7

27 The text of cll 20.4 to 20.7 appears at [28] below. The two questions to bear in mind when reading these provisions are the following:

(a) When a contractor succeeds before the DAB, but either party is dissatisfied with the DAB's decision, what must the contractor do before it can commence an arbitration to compel the employer to "pay now"?

(b) To what extent has the Red Book's arbitration agreement in cl 20.6 been drafted specifically to accommodate a contractor's attempt to compel the employer to "pay now"?

28 I now set out cll 20.4 to cl 20.7. In doing so, I 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…, either Party may refer the dispute in writing to the DAB for its decision….

...

[4] Within 84 days after receiving such reference … 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 … 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] … Except as stated in Sub-Clause 20.7 … 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 … 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 ….

[2] The arbitrator(s) shall have full power to open up, review and revise … 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

[1] In the event that:

(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 …,

(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… . Sub-Clause 20.4 … and Sub-Clause 20.5 … shall not apply to this reference.

[emphasis added]

The Red Book's dispute resolution regime

29 Clause 20.6 is an arbitration agreement within the meaning of s 2A of the IAA. It provides that all disputes arising under the Red Book are to be resolved with finality by international arbitration under the arbitration rules of the International Chamber of Commerce ("ICC"). It is important to note that cl 20.6 is the *only* arbitration agreement available to the parties under the Red Book. It applies to all disputes of whatever nature which arise under the Red Book, whether they are contentious primary disputes or indisputable secondary disputes.

30 A party who wishes to refer a dispute to arbitration under cl 20.6 must satisfy three express conditions precedent. The first condition precedent is for either party to submit the dispute in writing to a DAB for determination (cl 20.4[1]). The second condition precedent is that either party must give notice of its dissatisfaction with the determination of the DAB to the other party within 28 days of that determination (cll 20.4[5] and 20.4[6]). The third condition precedent is either that the parties fail to settle the dispute amicably pursuant to cl 20.5 (cl 20.6) or that 56 days elapse from the notice of dissatisfaction without an attempt at amicable settlement (cl 20.5).

31 Exceptionally, a party may refer a dispute to arbitration under cl 20.6 if some or all of these three conditions precedent are disapplied. There are only two such situations. First, cl 20.4[5] dispenses with the requirement for a DAB decision if the DAB fails to determine within 84 days the dispute placed before it. Second, cl 20.7 read with cl 20.4[6] dispenses with all three conditions precedent to arbitration if neither party has served a notice of dissatisfaction with the DAB decision.

The Red Book's security of payment regime

32 The Red Book's security of payment regime has broadly the same purpose as our statutory security of payment regime found in the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). But the Red Book's regime differs from our statutory regime in two fundamental respects. First, the Red Book's regime may be invoked in respect of any contractual obligation, not just a payment obligation. The statutory regime is limited to a payment obligation. Second, the Red Book's regime is available to both the contractor and the employer. The statutory regime is available only to the contractor. It therefore cannot be assumed that every successful claim before a DAB under the Red Book's regime will result in an obligation owed by the *employer* to the *contractor*. It also cannot be assumed that that obligation will in every case be a *payment* obligation. In that sense, it is not entirely correct to refer to the regime which cll 20.4 to 20.7 establishes as a security of *payment* regime. However, that is the paradigm and that is the case which has arisen here. For convenience in exposition, therefore, I continue to use the security of payment terminology.

33 There is a clear contractual intent in the Red Book's security of payment regime to implement the three essential features I have identified at [25] above and to compel an obligor to pay now and argue later. The DAB is the neutral body empowered to make the interim adjudication. Clause 20.4[4] obliges an employer who has failed before the DAB to pay now. Most importantly for present purposes, cl 20.4[4] gives the contractor a correlative right to be paid now, without waiting for the final dispute to be resolved with finality. This is a substantive contractual right in and of itself. It is this right which forms the foundation of the secondary dispute. Clauses 20.6[2] and 20.6[3] permit the parties to argue later. Clause 20.4[7] makes the DAB decision final if neither party gives notice of dissatisfaction within 28 days. Clause 20.7 permits a contractor to refer an employer's failure to comply with a final DAB decision to arbitration without having to comply with the three conditions precedent to arbitration.

34 It is an important point that *every* DAB decision is binding, and that *every* DAB decision therefore carries interim finality. That is so even if one (or indeed both) parties serve notice of dissatisfaction with that decision. It is therefore a tautology to speak of a *binding* DAB decision. *Every* DAB decision entitles the contractor to be paid promptly from the time that decision is made. The only question is whether that DAB decision eventually becomes final (if *neither* party serves a notice of dissatisfaction within 28 days of the DAB decision (cl 20.4[7])) or does not become final (if *either* party serves a notice of dissatisfaction within 28 days (cl 20.4[5])). For this reason, I will no longer refer to a DAB decision as "binding". That is a tautology, and one which is apt to mislead. It implies that the Red Book envisages a *non-binding* DAB decision. It does not.

The central issue revisited

35 The answer to the central issue (see [15] above) is unfortunately bedevilled with complication because of two shortcomings in the drafting of cll 20.4 to 20.7. I have foreshadowed those shortcomings in my questions posed at [27] above. Assume a contractor in CRW's position, that is: (i) a contractor who secures an interim adjudication from the DAB in its favour; (ii) an employer who serves notice of its dissatisfaction with that decision under cl 20.4[5] and who does not "promptly give effect" to it in breach of cl 20.4[4]; and (iii) a contractor who wishes to compel the employer to pay now.

36 The two subsidiary questions which expose these shortcomings are:

(a) Do the conditions precedent to arbitration continue to apply where the contractor wishes to refer the *secondary* dispute to arbitration under cl 20.6?

(b) When the contractor seeks merely to resolve the *secondary* dispute, what limits are there, if any, on the power of the tribunal to open up the DAB decision under cl 20.6[2] and on the liberty of the parties to attack the DAB decision under cl 20.6[3]?

37 To answer these questions, one can adopt one of two interpretive approaches. I will refer to the two approaches as the "two-dispute" approach and the "one-dispute" approach. Both of these approaches advance the objectives underlying the Red Book's dispute-resolution regime. Unfortunately, neither approach is wholly satisfactory in advancing the objectives of its security of payment regime. Which of these two approaches to adopt is, broadly speaking, what has divided the two arbitral tribunals and the two courts who have thus far dealt with the parties' dispute.

38 The essential difficulty in answering both subsidiary questions on either interpretive approach arises because cl 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*".

The two-dispute approach

39 The two-dispute approach sees the secondary dispute as a "dispute" in its own right within the meaning of cl 20.4[1], and therefore as a separate and distinct dispute from the primary dispute. This conceptual separation means that the two-dispute approach permits a contractor, if it chooses, to refer *only* the secondary dispute to arbitration under cl 20.6. The ensuing arbitration, on this approach, settles *only* the secondary dispute with finality.

40 The two-dispute approach best advances the "pay now" objective of the Red Book's security of payment regime. It gives the contractor a quick and relatively inexpensive way of compelling a

recalcitrant employer to comply with the DAB's interim adjudication (see [2525(b)] above). This approach permits the contractor to refer to an arbitral tribunal the secondary dispute alone, for the tribunal to resolve separately and with finality, without requiring the contractor to incur the time and cost involved in having the primary dispute also resolved on the merits. Further, because the two-dispute approach separates clearly the two disputes, the arbitral tribunals' decision on the *secondary* dispute alone does not compromise the employer's ability in a future arbitration to "argue later" over the primary dispute.

41 The two-dispute approach also neutralises the inevitable tactical dynamic which sets in once a contractor secures a substantial DAB decision in its favour. An employer in that situation has a strong incentive (i) to serve notice of dissatisfaction; and (ii) to withhold payment. Serving a notice of dissatisfaction secures for the employer the opportunity to "argue later" and to contest the primary dispute afresh before an arbitral tribunal. Pursuing that opportunity carries no corresponding disadvantage for the employer. While the employer pursues that opportunity, it has nothing to gain by "paying now", save only perhaps for stopping interest from accruing on the sum payable. That minor advantage is far outweighed by two serious disadvantages which the employer will suffer by "paying now". First, if the arbitral tribunal finds in favour of the employer on the primary dispute, the employer may face serious difficulty in recovering the overpayment from the contractor, because the contractor might be either unable or unwilling to pay the money back. Second, an employer who "pays now" loses a significant bargaining chip in any negotiations for a compromise which may take place in the shadow of the pending arbitration. The employer therefore has every incentive in this scenario to ensure that a secondary dispute follows the primary dispute. The two-dispute approach gives the contractor the contractual means to neutralise this tactical dynamic by referring *only* the secondary dispute to arbitration for a quick and relatively inexpensive determination, leaving it for the employer to incur the time and cost of initiating a separate arbitration to determine the primary dispute.

42 There is slight support for the two-dispute approach in cl 20.4[1]. That clause deliberately defines "dispute" as widely as possible. It thereby draws in not only a dispute about the parties' *primary* obligations under their contract but also a dispute arising from an employer's failure to comply with its *secondary* obligation to give effect promptly to a DAB decision.

43 The clearest indication in favour of the two-dispute approach, however, is cl 20.7. That clause is drafted on the basis that the secondary dispute is a separate dispute which can be referred to arbitration separately. If a DAB issues a decision and 28 days pass without either party serving a notice of dissatisfaction under cl 20.4[7], that DAB decision becomes final. Clause 20.7 then operates to permit the contractor to compel a recalcitrant employer to give prompt effect to that DAB decision. Thus, the operative part of cl 20.7 provides that where an employer fails to comply with a *final* DAB decision, the contractor may "refer the failure itself to arbitration under Sub-Clause 20.6". Clause 20.7[1] goes on to create an express shortcut to arbitration by exempting that contractor from all three conditions precedent to arbitration established by cl 20.4 and cl 20.5. This exemption would not be necessary unless cl 20.7 adopted the two-dispute approach and viewed the secondary dispute as a separate "dispute", within the meaning of cl 20.4, and which would otherwise have to comply with the conditions precedent.

44 Unfortunately, adopting the pragmatic two-dispute approach runs into several obstacles where cl 20.7 does *not* apply because the DAB decision is *not* final. In that situation, the two-dispute approach causes insoluble difficulties with both the "pay now" and the "argue later" aspects of the Red Book's security of payment regime.

45 First, where a DAB decision is *not* final, the Red Book provides no shortcut to arbitration of the

secondary dispute which is equivalent to cl 20.7. That means that a contractor holding a non-final DAB decision and wishing to arbitrate the secondary dispute must comply with the three conditions precedent to arbitration. That in turn means referring the secondary dispute to the DAB (cl 20.4[1]), waiting up to 84 days for the DAB to render its decision on the secondary dispute (cl 20.4[4]), plus another 28 days for the DAB decision on the secondary dispute to become final (cl 20.4[7]) or, if either party issues a notice of dissatisfaction within time, a further 56 days while the recalcitrant employer refuses to discuss amicable settlement of the secondary dispute (cl 20.5[1]). All of this delay is in addition to the time which has already elapsed while complying with the three conditions precedent in respect of the *primary* dispute. This delay upon delay is directly opposed to the intent of any security of payment regime to give the contractor a quick means of compelling the employer to "pay now".

46 Second and more fundamentally, a contractor who attempts to pursue, as a separate dispute, a secondary dispute which arises from a non-final DAB decision finds itself enmeshed in an infinite recursive loop. Clause 20.6[1] is the only arbitration agreement available to the parties. A dispute outside the scope of cl 20.6[1] is not within the parties' arbitration agreement and is therefore not arbitrable under it. Only a "dispute *in respect of which* the DAB's decision (if any) has not become final" comes within cl 20.6[1] (emphasis added). Those words envisage that *every* "dispute" which goes to arbitration under cl 20.6 must be preceded by a DAB decision *in respect of that "dispute"*. That appears to be so whether the dispute is in respect of the employer's breach of a primary obligation under the Red Book or of its secondary obligation to give prompt effect to a DAB decision. The words "if any" appearing in cl 20.6[1] do not constitute a general exemption from the obligation to secure a DAB decision in respect of a dispute before that dispute falls within the parties' arbitration agreement under cl 20.6[1]. Instead, those words are apt to accommodate specific exemptions established elsewhere. There are only two such exemptions, neither of which is available as of right to a contractor holding a non-final DAB decision. The first exemption is cl 20.4[5] which permits a dispute to be referred directly to arbitration if the DAB fails to give its decision within 84 days after that dispute is referred to it. The second exemption is cl 20.7 which applies if – *and only if* – the DAB decision from which the dispute arises is final. There is no equivalent to cl 20.7 which overrides cl 20.4[1] and brings the secondary dispute within the parties' arbitration agreement if the DAB decision is not final. The parenthetical "if any" in cl 20.6[1] is not apt in and of itself to perform that task.

47 This requirement to comply with cl 20.4[1] would not be a problem if there were a base case in cll 20.4 to 20.7 in which a contractor holding a *non-final* DAB decision could at some point proceed straight to arbitration without referring a secondary dispute back to the DAB for a *further* decision under cl 20.4[1]. But there is no such base case. On the two-dispute approach, so long as an employer serves successive notices of dissatisfaction – whether for tactical or genuine reasons – the contractor has an obligation to refer the successive secondary disputes which arise once again to the DAB. The result of adopting the two-dispute approach therefore is to compel the contractor to secure an infinite series of DAB decisions, each of which is not complied with, but none of which gets the contractor any closer actually to commencing an arbitration to compel the employer to "pay now".

48 Applying the two-dispute approach to a non-final DAB decision is thus inconsistent with the "pay now" feature of a security of payment regime. It is also inconsistent with the "argue later" feature of a security of payment regime. This is because the parties' arbitration agreement in cl 20.6 is drafted with only the *primary* dispute in mind. But adopting the two-dispute approach means that cl 20.6 is required to resolve with finality not just (i) an arbitration involving a *primary* dispute alone, but also (ii) an arbitration involving a *secondary* dispute alone; and (iii) an arbitration involving both a primary dispute *and* a secondary dispute. The two-dispute approach thus forces the Red Book's one-size-fits-all arbitration agreement in cl 20.6 to deal in like terms with three fundamentally different dispute configurations.

49 The difficulty arises because cl 20.6 gives the employer and the tribunal the right to open up the DAB decision in *every* arbitration, even one which is concerned *only* with the secondary dispute. Thus cl 20.6[2] gives the arbitral tribunal the express power to open up, review and revise a decision of the DAB. Further, cl 20.6[3] gives the parties the liberty to raise before the tribunal evidence or arguments which were not put before the DAB or which do not appear in the notice of dissatisfaction. It is undoubtedly correct that the parties should be able to invoke these clauses without restriction when a tribunal is determining the *primary* dispute on the merits and with finality. These clauses dovetail with cl 20.4[4] and reflect the fact that a DAB decision, after all, is intended to carry only *interim* finality. But there are no express or implied contractual limits on the tribunal's power under cl 20.6[2] and on the parties' liberty under cl 20.6[3]. That is because cl 20.6 is drafted only with determination *with finality* in mind and even then only of the *primary* dispute. It therefore does not need to envisage that the arbitral tribunal should *ever* decline to exercise its power under cl 20.6[2] or that the parties should *ever* be barred from invoking the liberty under cl 20.6[3].

50 Indeed, the requirement in cl 20.6[1] that the outcome of every arbitration under cl 20.6 be a resolution of the dispute before it *with finality* suggests that an arbitral tribunal can *never* legitimately reject an employer's invocation of cl 20.6[2] and cl 20.6[3] in *any* arbitration under cl 20.6. It is true that cl 20.6[2] and cl 20.6[3] are cast as a *power* of the tribunal and a *liberty* of the parties. It could thus be argued that the full inquiry into the primary dispute which these two clauses envisage is therefore not a *necessary* part of *every* arbitration under cl 20.6. So, the argument would go, an arbitral tribunal which has before it only the *secondary* dispute ought to exercise its discretion to decline to exercise its power under cl 20.6[2] and to shut out a party's attempt to exercise the liberty given by cl 20.6[3] when it settles only the *secondary* dispute with finality.

51 The problem with that view is that cl 20.6 offers no contractual basis for a tribunal legitimately to shut out an inquiry into the primary dispute in *any* arbitration under cl 20.6, whether the dispute being arbitrated is only the primary dispute or only the secondary dispute. That omission cannot be interpreted as giving the tribunal a completely unfettered discretion to disregard an invitation to inquire into the primary dispute. Indeed, if the sole dispute before the tribunal is the *primary* dispute, the tribunal could never justifiably reject an invitation to go behind the DAB decision and inquire into the primary dispute. These provisions, despite being cast as a power and a liberty, create in substance an obligation binding the tribunal whenever it settles any dispute with finality under cl 20.6.

52 These clauses therefore cause acute difficulty when only the *secondary* dispute is before the tribunal. For the Red Book's security of payment regime to work, there must be no possibility of inquiry into the primary dispute when a tribunal considers the secondary dispute alone. In that situation, cll 20.6[2] and 20.6[3] fail entirely to defer arguments on the merits of the primary dispute. The crucial flaw in cl 20.6 is that it does not specify expressly or even by necessary implication any circumstances in which cll 20.6[2] and 20.6[3] *cannot* be invoked and an employer thereby compelled to "argue later". Clause 20.6 therefore permits a recalcitrant employer to invoke either or both of these clauses in *every* arbitration under cl 20.6, even if that arbitration involves only the *secondary* dispute. So long as what the arbitral tribunal is doing is determining the dispute before it with finality, the employer has a compelling argument that the tribunal cannot legitimately shut it out and must therefore proceed under cl 20.6[2] and cl 20.6[3] to open up the DAB decision and inquire into the merits of the primary dispute.

53 Given that cl 20.6 imposes no contractual restriction on the employer's right to invoke cll 20.6[2] and 20.6[3] in any arbitration under cl 20.6, there are only three possibilities where the only dispute placed before the tribunal is the secondary dispute:

(a) First, assume that the employer *fails* to invite the tribunal to proceed under cl 20.6[2] and cl 20.6[3] and inquire into the primary dispute before issuing its final award on the secondary dispute, even though it has in every arbitration the right to do so. In this situation, the contractor will have a compelling argument that the employer is precluded from "arguing later" about the primary dispute once the secondary dispute has been settled with finality through an award issued under cl 20.6. This compelling argument arises because of the doctrine of abuse of process, or as it is sometimes known, the extended doctrine of *res judicata.* This doctrine prevents, in the absence of special circumstances, a party from pursuing in subsequent litigation against the same parties a claim or issue which it could and should reasonably to have raised in earlier litigation. This doctrine is not limited to *claimants*. It is also not limited to *claims*. And it is not limited to *litigation*. It extends to prevent, in the absence of special circumstances, even a *respondent* from raising in subsequent proceedings a *cross-claim* (which includes a counterclaim) which it ought reasonably to have raised in an earlier *arbitration*: see *Denmark Skibstekniske Konsulenter a/s I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 at [37] – [41] citing with approval at [35] *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 at [53] per Sundaresh Menon JC (as the Chief Justice then was).

(b) Second, assume that the employer exercises its right and asks the tribunal to proceed under cl 20.6[2] and cl 20.6[3] and inquire into the primary dispute before issuing its final award on the secondary dispute and the tribunal *declines* to do so. In this situation, the contractor will again have a compelling argument that the employer is precluded by the doctrine of abuse of process from "arguing later". However, in this case, the preclusion arises not through any fault of the employer's but through the tribunal's refusal to proceed under cll 20.6[2] and 20.6[3].

(c) Third, assume that the employer invites the tribunal to proceed under cl 20.6[2] and cl 20.6[3] and resolve the primary dispute before issuing its final award on the secondary dispute and the tribunal *accepts* the invitation. This defeats entirely the "pay now, argue later" objective of the security of the payment regime.

54 The result of adopting the two-dispute approach is that if a contractor arbitrates only the *secondary* dispute against an employer, the employer's right to "argue later" is illusory. For all practical purposes, the employer *must* raise the primary dispute as a cross-claim or counterclaim in that arbitration and the tribunal *must* permit it to do so. Otherwise, the contractor can successfully argue that the employer is precluded from "arguing later".

55 Adopting the two-dispute approach is inconsistent with the "argue later" feature in another way. Clause 20.6 expressly provides that the parties' dispute "shall be finally settled" by an arbitration. The phrase "finally settled" is not defined. Applying the dictionary definition of "final" and of "settle", cl 20.6 stipulates that the arbitration must resolve the parties' dispute at the end of a series of processes, by a result which is reached or designed to be reached as the outcome of that series of processes, and *which allows no further doubt or dispute*. Clause 20.6 thus requires the outcome of every arbitration in *every* case to be an award which precludes any future revision. That is so even if the arbitration encompasses only the secondary dispute. Assume now that a contractor places only the secondary dispute before an arbitral tribunal and the tribunal renders a final award on that dispute. The outcome is inevitably contrary to the interim finality which the DAB decision is intended to have. If the final award upholds the DAB decision without inquiring into the primary dispute, the result is to give the DAB decision *immutable* (and not merely interim) finality. If the tribunal renders a final award which *does* inquire into the merits of the primary dispute, the result is to deny the DAB decision any finality at all.

56 The alternative is for a tribunal which is considering only the secondary dispute to conclude the arbitration not with an immutable final award but with some sort of an "interim" final award which anticipates and permits a future tribunal to render a future final award on the primary dispute. An "interim" final award would not only be an oxymoron but would, more importantly, not *finally* settle parties' dispute as required by cl 20.6.

57 Adopting the two dispute approach, in light of the drafting of cll 20.4 to 20.7, makes it far too easy for an employer to frustrate the "pay now" aspect of the security of payment regime and to claim legitimately that settling the secondary dispute alone with finality without hearing the employer on the merits of the primary dispute precludes it from "arguing later" about the primary dispute. The problem is made worse by the tactical incentives for the employer. An employer who has served notice of dissatisfaction and who is defending a claim by a contractor on only the secondary dispute has every incentive at every stage of that arbitration to invoke cl 20.6[2] and cl 20.6[3] and to conflate the secondary dispute with the primary dispute. Any employer who did not have that incentive would have simply complied with the DAB decision, and no secondary dispute would have arisen in the first place. That sort of tactical behaviour may be deprecated, but it is entirely predictable and must be drafted against. But it is not.

The one-dispute approach

58 The one-dispute approach is the alternative interpretive approach to cll 20.4 to 20.7. Its advantage is that it permits the drafting of the Red Book's dispute-resolution regime to be reconciled with its contractual intent to create a working security of payment regime.

59 The starting point for the one-dispute approach is that the Red Book's dispute-resolution regime could not have intended "dispute" in cl 20.4[1] to be given a recursive definition with the attendant unworkability (see [46] above). The one-dispute approach therefore interprets "dispute" as meaning *only* a primary dispute: a dispute about the parties' primary obligations under their contract. "Dispute" does not mean a subsidiary dispute which arises *within* or *about* the dispute-resolution regime once it is invoked. In short, on the one-dispute approach, "dispute" does not mean a dispute about a dispute. That type of second-order dispute is merely a subsidiary aspect of the primary dispute, and is to be subsumed in and resolved in the very same dispute-resolution procedure invoked to resolve the primary dispute.

60 On the one-dispute approach, therefore, once a party refers the primary dispute to the DAB under cl 20.4[1], that is the one and only "dispute" within the meaning of and for the purposes of the Red Book's dispute-resolution regime. That remains the position even after the DAB has rendered its interim adjudication on the primary dispute and even if one or both parties issue notices of dissatisfaction with that decision. The parties' dissatisfaction with the DAB's decision on the primary dispute is simply another aspect of that primary dispute. So too if a recalcitrant employer breaches its obligation to give prompt effect to that DAB decision under cl 20.4[4], that breach is simply another aspect of that primary dispute. That breach, and the secondary dispute it gives rise to, is not a separate "dispute" within the meaning of cl 20.4[1].

61 The immediate advantage of the one-dispute approach is that pursuing the secondary dispute through arbitration no longer calls for the recursive application of the dispute resolution regime (see [47] above). Because the secondary dispute is not a separate dispute within the scope of cl 20.4[1]: (a) there is no need to refer the secondary dispute to the DAB for decision before arbitrating it under cl 20.6; and (b) there is no need to find an express exemption which permits the secondary dispute to be referred directly to arbitration under cl 20.6. The secondary dispute goes straight to arbitration because it is an integral part of the primary dispute, and because the conditions precedent for the

primary dispute have been satisfied. The fact that the secondary dispute does not come within cl 20.7 because it arises from a non-final DAB decision ceases to be the problem that it is under the two-dispute approach.

62 The one-dispute approach is consistent with the ordinary meaning of the word "dispute" as a disagreement or argument. Clause 20.4[4] makes *every* DAB decision binding without exception and without reservation or qualification. There is simply no contractual ground on which a recalcitrant employer can *disagree* or *argue* about its obligation to give prompt effect to a DAB decision. So when an employer does not give prompt effect to a DAB decision, that is a *breach* or a *failure to comply* (in the language of cl 20.7[1](c)), but it is not strictly speaking a *dispute*. The employer can, of course, dispute the DAB's *reasons* for arriving at its decision. It raises that dispute by serving a notice of dissatisfaction under cl 20.4[5]. It is thereafter free to have that dispute resolved by arbitration under cl 20.6 in the fullness of time. But on the one-dispute approach, the Red Book in no way allows an employer to *create* a "dispute" about its obligation to give prompt effect to a DAB decision by attacking the reasons underlying that decision. For yet a stronger reason, an employer does not, and indeed cannot, *create* a "dispute" about its obligation to give prompt effect to a DAB decision simply by *breaching* that obligation.

63 There are two difficulties with the one-dispute approach, one textual and one structural. The textual difficulty is that cl. 20.4[1] clearly indicates an intent to give "dispute" as wide a meaning as possible, particularly by including the parenthetical words "of any kind whatsoever". That difficulty can, however, be dissolved by recognising that even if the word "dispute" is intended to have the widest possible meaning, that wide meaning is nevertheless constrained by the bounds of the word's ordinary meaning of a disagreement or an argument.

64 The structural difficulty is more problematic. It arises because of cl 20.7. Clause 20.7 adopts and endorses the *two-dispute* approach and is wholly inconsistent with the one-dispute approach. As I have pointed out above (see [43]), cl 20.7 is drafted on the basis that the secondary dispute which arises from non-compliance with any DAB decision, whether final or non-final, is a dispute in its own right. On that basis, it goes on expressly to exempt a secondary dispute from the three conditions precedent to arbitration if the secondary dispute arises from a DAB decision which is final. Clause 20.7 implies that a contractor holding a non-final DAB decision must also treat the employer's failure to comply with it as a separate dispute and not merely as an aspect of the primary dispute.

Cl 20.7 causes problems even where a DAB decision is final

65 The only way to avoid this interpretive difficulty is simply to acknowledge that cl 20.7 is poorly drafted and to ignore its implications when analysing the position of a contractor holding a non-final DAB decision. Although ignoring cl 20.7 is not faithful to the text of cll 20.4 to 20.7, it at least advances the objectives of the security of payment regime which the Red Book so clearly intends to put in place for non-final DAB decisions. This view is supported by the fact that that cl 20.7 is in several respects fundamentally inconsistent with the Red Book's security of payment regime, even when dealing with a DAB decision which has become *final* and which is therefore within its scope.

66 First, cl 20.7 draws a wholly unhelpful distinction between DAB decisions which have become final and DAB decisions which have not. Clause 20.7 provides an accelerated route to enforce a final DAB decision. But a contractor's access to that route should not depend on whether that DAB decision has become *final*. That access ought to be available whenever a DAB decision is *binding*. But *every* DAB decision is binding. So every DAB decision should carry an accelerated route to enforcement, not just those which have become final. Yet cl 20.7 provides that accelerated route only for final DAB decisions.

67 Second, following on from cl 20.4[7], cl 20.7 envisages that even a notice of dissatisfaction which is served by the *contractor* is sufficient to prevent a DAB decision from becoming final and to prevent that contractor from having accelerated recourse to arbitration through cl 20.7. It is difficult to understand why that should be so. Assume a contractor who succeeds before the DAB but only in part. Assume further that the employer does not serve a notice of dissatisfaction but still refuses to pay. The contractor may wish to compel the employer to pay promptly and also to pursue through arbitration, as it is entitled to, the part of its claim on which it failed before the DAB. But this contractor fails to qualify for accelerated access to arbitration under cl 20.7 simply because the contractor itself has been compelled by the circumstances to serve a notice of dissatisfaction and even though the employer has not given notice of any dissatisfaction with the DAB decision.

68 Third, cl 20.7 fails fully to implement the consequences of permitting a DAB decision to become final. Clause 20.7 does not channel a contractor who comes within it into a bespoke arbitration agreement, modified to account for the fact that the employer has allowed the DAB decision to become final. Clauses 20.4 to 20.7 draw a careful distinction between a DAB decision which is final and one which is not. The purpose of drawing that distinction must be to preclude a party who permits a DAB decision to become final from ever arguing over the primary dispute. But there is nothing in cl 20.6 or cl 20.7 to give effect to that. Channelling the contractor in these circumstances into the unmodified cl 20.6 exposes it to the investigation into the primary dispute which cll 20.6[2] and 20.6[3], in effect, mandate whenever a tribunal resolves the parties' dispute with finality. It is fundamentally contrary to the Red Book's contractual intent to permit an employer to invoke these clauses where it has allowed a DAB decision to become final. Yet, that appears to be what cl 20.7 contemplates, at least when read with the one-size-fits-all cl 20.6.

69 Fourth, the result of all this is that there is little practical difference between a DAB decision which has become final and one which has not. Where the employer attempts to invoke cll 20.6[2] and 20.6[3] in an arbitration under cl 20.6 involving a final DAB decision, cl 20.7 offers no guidance to a tribunal as to how it should deal with that attempt. It is entirely possible to envisage circumstances in which the employer has a genuine reason, rather than a tactical reason, for trying to open up the DAB decision even though it failed to serve a notice of dissatisfaction. Assume, for example, that the employer can demonstrate to the tribunal an obvious error in the DAB decision, or a compelling reason for the employer's failure to serve a timely notice of dissatisfaction, or indeed both. It would be a brave tribunal indeed – charged as it is by cl 20.6 with resolving the parties' dispute *with finality* – which would shut that employer out from invoking cl 20.6[3]. And that tribunal will find it impossible to distinguish between a meritorious employer and a tactical employer without exercising its power under cl 20.6[2]. All of this is quite contrary to the apparent intent of cl 20.7, but appears unavoidable in practice.

The one-dispute approach best supports security of payment

70 I am therefore driven to the conclusion that the only way to make the Red Book's security of payment regime workable, at least for non-final DAB decisions, is to ignore the implications of cl 20.7. That solution, although undoubtedly unsatisfactory, removes the most significant obstacle to adopting the one-dispute approach, which is cl 20.7's adoption of the two-dispute approach. Adopting the one-dispute approach and applying it to non-final DAB decisions, gives effect in several ways to the essential features of the parties' contractual security of payment regime.

71 First, as I have explained, the one-dispute approach prevents the contractor becoming trapped in an infinite recursive loop (see [46] above).

72 Second, the one-dispute approach acknowledges that cl 20.6 envisages *one* arbitration arising

out of *one* DAB decision which settles with finality all aspects of the parties' dispute, comprising both the primary dispute and the secondary dispute. I say that cl 20.6 envisages *one* arbitration because it is not easy to fit a secondary dispute standing alone into the opening words of cl 20.6[1]. Those words define the scope of the parties' arbitration agreement. That agreement extends only to "a dispute *in respect of which* the DAB's decision … has not become final". Those words cannot be interpreted as requiring the contractor to make the secondary dispute the subject of a DAB decision. That interpretation would condemn the contractor to the infinite recursive loop (see [46] above). Further, a secondary dispute is more naturally described as a dispute *arising from* a DAB decision and not as one "in respect of which" the DAB has made a decision. The tenor of cl 20.6, therefore, is that the secondary dispute should not be detached from the primary dispute, at least where the DAB decision on the primary dispute is not final. All of this suggests that both the primary dispute and the secondary dispute must be resolved together, in a single arbitration, rather than separately as envisaged by the two-dispute approach. If the primary dispute and the secondary dispute are only two facets of a multi-faceted *single* dispute, then it makes perfect sense that that all facets of that *single* dispute ought to be dealt with comprehensively and with finality in a *single* arbitration.

73 Third, in the absence of any contractual indication, the one-dispute approach indicates with clarity when in an arbitration an employer may legitimately invoke cll 20.6[2] and 20.6[3] and when it may not. Under the two-dispute approach, there is nothing in cl 20.6 to stop an employer from invoking these clauses on any occasion when the tribunal is determining the dispute before it with finality, even if it is only determining the secondary dispute with finality. By contrast, under the one-dispute approach the employer can invoke cll 20.6[2] and 20.6[3] only when the tribunal determines with finality the *primary* dispute, but not otherwise. The reason for that is as follows. The one-dispute approach calls for a single arbitration comprising an integrated series of processes aimed at resolving all aspects of the parties' one dispute with finality. That single arbitration may give rise to any number of awards before it concludes, so long as all of those awards taken together comply with cl 20.6 and determine all aspects of that one dispute on the merits and with finality. If the contractor wishes to compel the employer to "pay now" while the parties wait for the arbitral process to conclude, it can do so by applying to the tribunal for an intermediate award (to use a neutral term) to that effect. That application raises only the secondary dispute, and not the primary dispute. The resulting intermediate award is confined to merely one *aspect* of the parties' one dispute, being an aspect which does not engage any aspect of the primary dispute, and does not involve the tribunal resolving the *entirety* of the parties' one dispute with finality as envisaged by cl 20.6. Nor will the award bring that single arbitration to a conclusion. In those circumstances, there is simply no scope for cl 20.6[2] and cl 20.6[3] to apply.

74 Fourth, the one-dispute approach prevents an employer from behaving tactically and raising the spectre that compelling it to "pay now" on the secondary dispute will somehow preclude it from "arguing later" on the primary dispute. If it is the same tribunal in the same arbitration which will determine both the primary and the secondary dispute with finality, no unfair or unjust preclusion could conceivably arise on the primary dispute. The employer therefore cannot argue that a full investigation of the primary dispute is necessary before it is compelled to "pay now" or that compelling it to "pay now" somehow precludes it from "arguing later" about the primary dispute.

75 The one-dispute approach carries only one disadvantage to set against all of these advantages. It forces a contractor who holds a non-final DAB decision to take the initiative in putting the primary dispute before the tribunal even though it typically has no interest in resolving it. But this is a minor disadvantage. If the contractor secures an interim award in its favour on the secondary dispute, it will cease to be a claimant in all but name. The carriage of the remainder of the arbitration will inevitably shift to the employer. This disadvantage is a minor anomaly compared to the substantive and substantial drawbacks of adopting the two-dispute approach.

CRW first adopts the two-dispute approach

The 2009 arbitration – framing the dispute

76 In its notice of arbitration commencing the 2009 arbitration, [note: 11] CRW deliberately placed *only* the secondary dispute before the tribunal. It therefore sought *only* the following substantive relief, arising from *only* the secondary dispute: [note: 12]

i. a declaration that [PGN] has a prompt obligation to pay to [CRW] the sum of $17,298,834.57;

ii. An order for [PGN] to make prompt payment of the sum of US$17,298,834.57;

77 In doing this, CRW acted exactly as a rational contractor would. Only PGN was dissatisfied with the DAB decision. CRW just wanted to compel PGN to pay. It had no interest in commencing any arbitration which involved resolving the primary dispute with finality. CRW therefore took the rational decision to pursue only the secondary dispute. Its notice of arbitration accordingly treated the secondary dispute as a dispute in its own right. CRW's understandable view was that it was for PGN – as the only party who wanted to open up the DAB's decision on the primary dispute – to take the initiative to have an arbitral tribunal determine the primary dispute with finality. PGN could do this either by way of counterclaim in the 2009 arbitration or in a separate arbitration. And if PGN refused to do either, it made no difference to CRW because, so it thought, the relief it sought related to the secondary dispute, which was a separate dispute having nothing to do with the primary dispute. The tactical dynamic I referred to at [41] above was at work.

78 PGN's principal defence to CRW's claim in the 2009 arbitration was a simple but powerful point. Because the tribunal was acting under cl 20.6 – that being the only arbitration agreement between the parties – PGN invited the tribunal to "open up, review and revise" the DAB's decision on the primary dispute pursuant to cl 20.6[2]. [note: 13] Deliberately and tactically, PGN extended this invitation to the tribunal by way of defence only: it raised no counterclaim to CRW's claim. [note: 14]

79 The majority of the 2009 tribunal rejected PGN's principal argument and granted CRW the relief it sought. [note: 15] They held that PGN's invitation to the tribunal to open up, review and revise the primary dispute afforded no defence to CRW's claim on the secondary dispute (at [51]). That is undoubtedly correct. The employer's obligation to give prompt effect to a DAB decision is without any contractual qualification. Specifically, and in keeping with the "pay now" objective of a security of payment regime, it ought to be and it is not a defence on the secondary dispute to argue that the primary dispute has not yet been settled with finality. The majority therefore held that CRW's claim in the 2009 arbitration succeeded and ordered that PGN pay CRW as required under the DAB decision.

80 The majority then followed the two-dispute approach to its logical conclusion. They accepted that the secondary dispute comprised the entire subject-matter of the 2009 arbitration. They made a finding that their award to CRW dealt completely with the only dispute that the 2009 tribunal had been constituted to determine. They therefore confirmed that their award was a *final* award [note: 16] and brought the 2009 arbitration to a close (at [53]). Basing themselves on the two-dispute approach, the majority saw nothing in their award – which dealt with *and only with* the secondary dispute – which precluded PGN from "arguing later" by initiating a future arbitration against CRW to have the primary dispute settled with finality under cl 20.6. [note: 17]

81 In a dissenting award, the minority member of the 2009 tribunal adopted the one-dispute approach. He held that the tribunal should not and could not conclude the 2009 arbitration by rendering a *final* award compelling PGN to pay CRW based on the DAB decision unless the tribunal at the same time resolved all other aspects of the parties' single dispute with finality as stipulated by cl 20.6. That to him meant that the tribunal was obliged to permit PGN to invoke cll 20.6[2] and 20.6[3] before it rendered a final, preclusive award on the parties' one dispute.

Appeal to the High Court

82 PGN applied to the High Court to set aside the majority award in the 2009 arbitration. Belinda Ang J heard that application. Before Ang J, PGN relied on the one-dispute approach. It argued that cl 20.6 expressly requires an arbitration commenced under it to settle *with finality* the dispute between the parties. Since there was only one dispute between the parties, comprising both the primary dispute and the secondary dispute, the majority was wrong to have issued a *final* award ordering PGN to pay CRW in accordance with the DAB's decision without also settling the primary dispute with finality. On the strength of this fundamental point, PGN submitted that the majority's award should be set aside on three grounds: (a) because the majority had exceeded its mandate or jurisdiction within the meaning of Art 34(2)(a)(iii) of the Model Law; (b) because the majority had followed an arbitral procedure not in accordance with the parties' agreement within the meaning of Art 34(2)(a)(iv) of the Model Law; and (c) because the majority had breached the rules of natural justice by refusing to hear PGN on the merits of the dispute underlying the DAB decision within the meaning of s 24(b) of the IAA.

83 After a review of the parties' submissions, of the authorities and of several authoritative commentaries on the Red Book, Ang J set aside the award. But she did so not because she accepted the one-dispute approach. Instead, she accepted CRW's two-dispute approach, but held that CRW had not satisfied the conditions precedent to arbitrating the secondary dispute. Her judgment is reported as *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 ("*PGN v CRW (HC)*").

84 Ang J began her analysis by noting that CRW had taken the two-dispute approach in the 2009 arbitration and before her (*PGN v CRW (HC)* at [4]). She identified as the central question before her the same question as is now before me: whether, and if so how, cl 20 permits CRW to compel PGN to comply with a DAB decision which is not final (*PGN v CRW (HC)* at [16]). She agreed with CRW that the secondary dispute was a dispute in its own right. One consequence was that it could be detached, as CRW had done, from the primary dispute and resolved by itself in arbitration under cl 20.6. But a second consequence was that it was nonetheless a "dispute" within the meaning of cl 20.4[1]. The result was that CRW could not arbitrate the secondary dispute without referring that *secondary* dispute back to the DAB under cl 20.4[1] (and presumably fulfilling the other conditions precedent to arbitration).

85 She arrived at this view for four reasons:

(a) There is a gap in the dispute resolution regime of the Red Book. The default rule in cl 20 is that a contractor must satisfy certain conditions precedent before it can initiate *any* arbitration under cl 20.6. By way of exception to that general rule, a contractor who holds a DAB decision which has become *final* is exempted from these conditions precedent by cl 20.7. There is no provision which exempts a contractor holding a DAB decision which is *not final* from these conditions precedent (*PGN v CRW (HC)* at [15]). These conditions precedent must therefore be satisfied before the secondary dispute can proceed to arbitration under cl 20.6.

(b) This gap has been acknowledged in leading commentaries on the Red Book.

(c) This gap in the Red Book was not a by-product of poor or careless drafting but was a deliberate choice by FIDIC:

(i) If FIDIC had intended to exempt every contractor from the conditions precedent to arbitration under cl 20.6, regardless of whether the DAB decision in its favour is final, cll 20.7[1](a) and 20.7[1](b) would have been wholly unnecessary. (I have italicised these provisions at [28] above.)

(ii) A later FIDIC publication known as the Gold Book permitted every contractor who had in hand a DAB decision which had not been complied with – whether final or not – to proceed immediately to arbitration under the equivalent of cl 20.6 without complying with any conditions precedent. Clause 20.7 in the Red Book was not amended at the same time. That suggests that the distinction drawn in the Red Book was a considered and deliberate decision by FIDIC (*PGN v CRW (HC)* at [21]).

(d) CRW had failed to refer the *secondary* dispute to the DAB under cl 20.4[1]. The critical condition precedent to arbitration under cl 20.6 was therefore not satisfied.

(e) In addition, the *secondary* dispute was outside the scope of the parties' arbitration agreement. It was not within the introductory words of cl 20.6[1] because it was not a dispute "in respect of which the DAB's decision… had become final". There was no DAB decision at all on the secondary dispute.

86 Ang J therefore held that the majority had dealt with a matter falling outside the scope of the arbitration agreement. They had rendered an award which dealt with the secondary dispute when the secondary dispute had not been referred to the DAB and could not therefore properly be put before the 2009 tribunal.

87 The result of Ang J's reasoning is to uphold the two-dispute approach but to hold that a contractor who wishes to separate the two disputes (as that approach permits) and to pursue only the secondary dispute through arbitration must satisfy the conditions precedent in cll 20.4 and 20.5 in respect of that secondary dispute (*PGN v CRW (HC)* at [37]).

88 By way of *obiter dicta*, Ang J gave an alternative ground for her decision. She held that cl 20.6 is drafted on the clear basis that the end product of every arbitration which takes place under it (save for those not channelled into it through cl 20.7) must be a resolution of the *primary* dispute with finality. Ang J thus held at [35] of *PGN v CRW (HC)* that the tribunal had fallen into error in an additional sense. The error was in issuing a *final* award dealing only with the secondary dispute which had the effect of making the DAB's decision on the primary dispute *final* without resolving the *primary* dispute on the merits and with finality as cl 20.6 so clearly envisages.

89 For both these reasons, Ang J set aside the majority's award under Art 34(2)(a)(iii) of the Model Law on the grounds that the majority had decided a matter going beyond the scope of the submission to arbitration.

Appeal to the Court of Appeal

90 CRW appealed to the Court of Appeal. The Court of Appeal agreed with Ang J that the award should be set aside. Its reasoning, however, was fundamentally different. The Court of Appeal did not

adopt the two-dispute approach that CRW advanced and which Ang J had applied. The Court of Appeal accepted instead the one-dispute approach. It took the view that the Red Book's dispute-resolution regime envisages *one* dispute, comprising both the primary dispute and the secondary dispute, which moves forward as one from a reference to the DAB under cl 20.4[1] until all aspects of that one dispute are "finally settled" by arbitration under cl 20.6. It therefore held that the 2009 tribunal had erred in issuing an award which "finally settled" the parties' one dispute under cl 20.6: (i) without dealing with *all* aspects of that one dispute; and (ii) which had shut out PGN's arguments on the merits of the primary dispute, thereby wrongly precluding PGN from raising those arguments in a future arbitration. The Court of Appeal's decision is reported as *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW v PGN (CA)*").

91 The Court of Appeal's reasons can be summarised as follows:

(a) By using the words "finally settled" in cl 20.6[1] and by including cl 20.6[2] and cl 20.6[3], cl 20.6 envisages an arbitration which inquires into the merits of the primary dispute before arriving at a final resolution of the parties' dispute (*CRW v PGN (CA)* at [66]). The tribunal was therefore wrong to conclude: (a) that it need not consider the various deficiencies in the DAB decision which PGN raised (*CRW v PGN (CA)* at [71] and [88]); and (b) that those deficiencies could not constitute a defence to CRW's claim.

(b) By stipulating that the dispute "shall be finally settled by arbitration", cl 20.6 also envisages a *single* arbitration of the disputes underlying or associated with a DAB decision which finally resolves those disputes (*CRW v PGN (CA)* at [67]). In other words, cl 20.6 requires all aspects of that one dispute to be resolved in a single arbitration.

(c) The tribunal issued an award which it described as final. The tribunal itself defined "final" as meaning "conclusive or unalterable". But the tribunal's "final" award represented the final determination of only one aspect of the parties' one dispute. Because the award was "conclusive and unalterable", and also for the two foregoing reasons, the award also represented the final and preclusive determination of the parties' one dispute, necessarily encompassing the primary dispute (*CRW v PGN (CA)* at [84]).

(d) The tribunal's final award therefore had the effect of turning a decision of the DAB which was expressly *not* final under the parties' contract into one which *was* final. The tribunal had no power to do that without assessing the merits of the primary dispute as cl 20.6[2] and 20.6[3] clearly envisage (*CRW v PGN (CA)* at [82]).

(e) It made no difference that PGN had put its case on the merits of the primary dispute by way of defence only, deliberately stopping short of raising a counterclaim. That was at most a matter of form rather than substance. Counsel for CRW had conceded before the arbitral tribunal that if PGN had particularised its case on the primary dispute in sufficient detail – even if only by way of defence – the tribunal would have been obliged to inquire into those merits (*CRW v PGN (CA)* at [89]). But PGN had in fact sufficiently particularised its case on the merits of the primary dispute (*CRW v PGN (CA)* at [88]). The tribunal had therefore erred in failing to consider those merits.

(f) It made no difference also that the tribunal and CRW both expressly acknowledged PGN's right in the future to initiate a separate arbitration to determine the primary dispute (*CRW v PGN (CA)* at [84]). Even assuming that the tribunal's final award did not preclude PGN from doing that, that would require PGN to incur additional time and costs (*CRW v PGN (CA)* at [85]).

92 The Court of Appeal's finding at [91(e)] above is crucial. In the language of a security of payment regime, it amounts to a finding that the majority's award required PGN to pay now but precluded PGN, *through no fault of PGN's*, from arguing later. That same preclusion would have arisen if PGN had defended CRW's claim on the secondary dispute in the 2009 arbitration *without* placing its case on the merits of the primary dispute before the tribunal for resolution (see [53] above). The doctrine of abuse of process would have operated to prevent PGN from attempting to resolve the primary dispute in a separate arbitration. The important point is that in that situation, PGN would have no right to complain about that outcome because the preclusion would arise from its own failure. But the Court of Appeal found that that was not what had happened in the 2009 arbitration. As the Court of Appeal expressly found, PGN *had* raised its defence on the merits to the primary dispute with sufficient particularity. Further, as counsel for CRW conceded, that fact in itself meant that the 2009 tribunal could not legitimately decline to exercise its power under cl 20.6[2] and could not legitimately ignore PGN's attempt to invoke cl 20.6[3] in arriving at its final award. PGN had mounted a counterclaim in substance, though not in form. On this finding, and in light of this concession, the consequence of the final award of the majority in the 2009 arbitration was that PGN was precluded from arbitrating the primary dispute ("arguing later"), not because it had failed to raise that dispute on the merits and in a form calling for its determination in the 2009 arbitration, but because – despite having done that – the tribunal had deliberately declined to determine it, contrary to the parties' arbitration agreement.

93 The Court of Appeal therefore set aside the majority award on two grounds. First, the Court of Appeal held that the tribunal had exceeded its jurisdiction by issuing a final award which, as stipulated in the parties' arbitration agreement, settled the one dispute between the parties with finality but without considering all its aspects, both primary and secondary (*CRW v PGN (CA)* at [84]). Second, the Court of Appeal held that the tribunal had denied PGN natural justice and thereby caused it prejudice within the meaning of s 24(*b*) of the IAA by declining to hear and determine on the merits PGN's case on the primary dispute (*CRW v PGN (CA)* at [96]) when PGN had placed that case before the tribunal with sufficient particularity and therefore in a form deserving of consideration.

The way forward

94 Both Ang J and the Court of Appeal were concerned about the practical recourse under the Red Book for a contractor entitled to payment under a DAB decision which had not become final. As Ang J asked (*PGN v CRW (HC)* at [15]):

> What then, in the face of a valid [notice of dissatisfaction] can the party in whose favour a binding but not final DAB decision was made…do to enforce that decision when the other party… fails to give prompt effect to it as required by the Red Book?

95 Both Ang J and the Court of Appeal suggested that a contractor in this position ought to commence a single arbitration under cl 20.6 encompassing both disputes (Ang J's view) or all aspects of the one dispute (the Court of Appeal's view) and seek an intermediate award (to use the same neutral term (see [73] above)) on the secondary dispute. That would enable the contractor to compel the recalcitrant employer to comply with the DAB decision ("pay now"), leaving the primary dispute to be settled with finality by the final award in the same arbitration ("argue later").

96 Both Ang J and the Court of Appeal found support for this in the approach taken by the tribunal in the unrelated ICC International Court of Arbitration Case No 10619 ("ICC 10619"). In that case, the contractor applied to the tribunal after the end of the first round of pleadings for an interim award compelling the employer to give prompt effect to the DAB decision. The tribunal issued an interim award in favour of the contractor in terms of the DAB decision. It then went on, in its final award in

the same arbitration, to settle the primary dispute on the merits and with finality. Ang J accepted this practical approach as the way forward for a contractor in CRW's position. She therefore answered her question (see [94] above) by explaining (at [38]):

> …I now come to the question posed in [15] above on what the [contractor] can do, in the face of a valid [notice of dissatisfaction] to enforce a binding but not final decision of the DAB when the [employer] fails to give prompt effect to it as required by sub-cl 20.4 of the…Red Book. Either party may submit the dispute covered by the DAB [d]ecision in question to arbitration if a [notice of dissatisfaction] has been served. The [employer] can ask the arbitral tribunal to review and revise the DAB decision. Alternatively, the [contractor] 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 pending accordingly. The amount paid out is liable to be returned to the [employer], depending on how the tribunal, after reviewing the DAB decision, decides the case.

97 The Court of Appeal too endorsed this practical approach at [63], [79] and [101] of *CRW v PGN (CA)*. At [63], the Court of Appeal said:

> …even if either party has issued a [notice of dissatisfaction] with respect to a DAB decision pursuant to sub-cl 20.4 of the [Red Book], each party is bound to give effect to that decision (which will be binding but non-final by virtue of the [notice(s) of dissatisfaction] issued), and if that decision calls for payment to be made by one party to the other, then the decision should be enforceable directly by an interim or partial award pursuant to the ICC Rules of Arbitration. Further, … while a party has no express right to refer to arbitration the failure of the other party to comply with a DAB decision where a [notice of dissatisfaction] has been given by either party (*ie* where the DAB decision in question has not become final and binding), a party may include (in an arbitration commenced under sub-cl 20.6 of the [Red Book]) a claim for an interim award to enforce the DAB decision pending the final resolution of the dispute of the arbitral tribunal.

98 In its peroration at [101], the Court of Appeal referred to this as settled practice and noted that the majority in the 2009 arbitration had departed from this practice:

> There appears to be a settled practice, in arbitration proceedings brought under sub-cl 20.6 of the [Red Book], for the arbitral tribunal to treat a … 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 [Red Book]. The Majority Members had neither the jurisdiction nor the power to make the Adjudicator's decision "final" without following the prescribed procedure. Further, the purported reservation of PGN's right to refer the Adjudicator's decision to arbitration before another tribunal was questionable, to say the least.

99 These endorsements in both judgments are entitled to the greatest possible weight. They are, for reasons I will come to, correct as a matter of construction of cll 20.4 to 20.7, in principle and as a matter of practicality. But CRW submits to me that they represent part of the *ratio decidendi* of the Court of Appeal's decision and that I am therefore bound by *stare decisis* to accept this approach as correct.

100 With respect, these observations of the Court of Appeal are in my view *obiter dicta*, not *ratio decidendi*. In *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] 1 QB

955 at [16], Buxton LJ said:

> Cases as such do not bind; their *rationes decidendi* do. While there has been much academic discussion of the proper way of determining the *ratio* of a case, we find the clearest and most persuasive guidance, at least in a case such as the present where one is dealing with a single judgment, to be that of Professor Cross, in Cross and Harris, Precedent in English Law (4th edition) at p 72:
>
> > "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him."

101 It is the line of reasoning at [84] above which is the *ratio decidendi* of Ang J's decision. And it is the line of reasoning at [91] above which is the *ratio decidendi* of the Court of Appeal's decision. With respect, it is only that reasoning which binds me. That reasoning sets out the rules of law and the steps necessary for the Court of Appeal to arrive at its conclusion in favour of PGN. In particular, I accept that I am bound by the Court of Appeal's decision in *CRW v PGN (CA)* to adopt and apply the one-dispute approach as opposed to the two-dispute approach. Even if I were not bound, I consider the one-dispute approach to be the correct approach, for the reasons I have given above.

102 However, the remainder of the Court of Appeal's judgment in *CRW v PGN (CA)*, with respect, does not set out steps which were *necessary* for its conclusion that the 2009 tribunal's majority award ought to be set aside. Put simply, for the Court of Appeal to determine CRW's appeal, it was not necessary for it to decide what a contractor in the position of CRW ought to do to compel PGN to comply with the DAB decision. The Court of Appeal's view on that question, though it is of course entitled to the greatest possible weight and in my respectful view correct, is not part of its *ratio* and is not binding on me as a matter of *stare decisis*.

CRW now adopts the one-dispute approach

The 2011 arbitration – framing the dispute

103 In 2011, CRW commenced a fresh arbitration against PGN. Relying on the Court of Appeal's decision in *CRW v PGN (CA)*, CRW adopted the one-dispute approach and the procedure adopted by the claimant in ICC 10619. CRW thus placed squarely before the tribunal both components of the parties' single dispute: the primary dispute between the parties which had earlier been referred to the DAB and the secondary dispute which arose from PGN's failure to give prompt effect to the DAB's decision.

104 The primary dispute is thus squarely before the 2011 tribunal. This is clear from CRW's request for arbitration at paragraphs 9 to 11. [note: 18] In response, PGN engaged CRW on the primary dispute in its answer to the request, by referring to the primary dispute by way of background at paragraphs 15 and 16, and by expressly inviting the tribunal to open up, review and revise the DAB decision at paragraphs 59 to 75. [note: 19] PGN also advanced a counterclaim against CRW in its answer. In that counterclaim, PGN sets out its reasons for dissatisfaction with the DAB decision and seeks a declaration that the DAB decision be opened up, reviewed and revised. [note: 20] Although PGN has chosen not to plead a counterclaim in its formal defence, it will no doubt be permitted to do so if the interim award stands and a formally-pleaded counterclaim proves necessary.

105 The secondary dispute is also squarely before the 2011 tribunal. CRW's request for arbitration

specifically refers to PGN's failure to give prompt effect to the DAB decision and seeks relief for that failure.

106 CRW therefore seeks the following principal relief in the 2011 arbitration covering both the primary dispute ((i) below) and the secondary dispute ((ii) and (iii) below): [note: 21]

> (i) a final award for the sum of US$17,298,834.57 or such sums as determined by the Tribunal owed by [PGN] to [CRW] for the claims under the DAB [d]ecision;
>
> (ii) *pending resolution of the parties' dispute in the final award*, a partial or interim award for 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 the payment of the said sum; and
>
> (iii) *in the alternative, pending resolution of the parties' dispute in the final award*, a partial or interim award for the sum of US$17,298,834.57 and damages for [PGN's] failure to comply with the DAB [d]ecision.
>
> [emphasis added]

107 The parties' one dispute including all subsidiary aspects of it are also incorporated into the parties' Terms of Reference in the 2011 arbitration. [note: 22]

CRW applies for an interim or partial award

108 In 2012, CRW applied for an "interim/partial" [note: 23] award seeking the alternative relief numbered (ii) and (iii) in [106] above. CRW took two principal points in support of the application:

> (a) PGN has a contractual obligation to give prompt effect to the DAB decision, even if it has given notice of its dissatisfaction with that decision; and
>
> (b) CRW's request for arbitration and its application for an interim or partial award adopts the "settled practice" which the Court of Appeal had endorsed in *CRW v PGN (CA)* (at [101]) for a dispute configuration such as this.

109 PGN's principal point in response was that s 19B(1) of the IAA requires every award to be final and binding on the parties and s 19B(2) prohibits a tribunal from varying, amending, correcting, reviewing, adding to or revoking an award. I set out s 19B in full:

> **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, 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.

110 PGN thus argued that:

(a) If the tribunal were to require even *interim* compliance with a DAB decision which is not final, it would expand its jurisdiction beyond that set out in the tribunal's terms of reference and the parties' pleadings;

(b) Section 19B of the IAA mandates that every arbitration award in Singapore must be final and binding on the parties. A tribunal therefore has no power under the IAA to issue a partial or interim award which takes effect *provisionally*, as CRW sought in relief (ii), in the sense that it is subject to variation or confirmation in a future award which determines the same dispute again, but with finality. Any such interim or partial award is not final as mandated by s 19B and therefore in excess of the tribunal's powers.

111 To meet the point that CRW was simply adopting the approach which the Court of Appeal had endorsed on several occasions in *CRW v PGN (CA)* as being correct, PGN submitted that the Court of Appeal's observations were merely *obiter dicta*. For the reasons I have given above (at [94]-[102]), I accept this submission, though not its implications.

The 2011 tribunal's decision

112 The 2011 tribunal has held unanimously that PGN's obligation to give prompt effect to the DAB decision is entirely unaffected by the fact that PGN gave notice of its dissatisfaction with that DAB decision. The 2011 tribunal therefore unanimously agrees that on and from 25 November 2008, "[PGN] was immediately obliged to pay [CRW] US$17,298,834.57 as decided by the DAB". [note: 24]

The majority in the 2011 arbitration compel PGN to pay now

113 Like the 2009 tribunal, however, the 2011 tribunal has split on whether it has the power to compel PGN to "pay now". The majority has held in favour of CRW, though not without hesitation. Although they accept that "there is considerable force in [PGN's] arguments", [note: 25] the majority takes the view that CRW's arguments reflect better the intention underlying the Red Book's dispute-resolution regime. [note: 26] I summarise the majority's reasoning as follows:

(a) Both in its request for arbitration and in the tribunal's terms of reference, CRW gave notice that it would seek as an intermediate step to compel PGN to comply with its contractual obligation to give prompt effect to the DAB decision while the primary dispute goes on to be settled on the merits and with finality. The interim award CRW seeks is therefore within the tribunal's jurisdiction. [note: 27]

(b) Even though it served notice of its dissatisfaction with the DAB decision, PGN has a contractual obligation to give prompt effect to that decision. CRW is entitled, as a matter of contract, to compel PGN to comply with that obligation without a determination of the primary dispute, so long as the tribunal does go on to determine the primary dispute on its merits and with finality. [note: 28]

(c) In *CRW v PGN (CA)*, the Court of Appeal endorsed the approach which CRW has taken as

the proper mode of giving effect to CRW's contractual right to prompt payment. These passages are *ratio*, not *obiter*. Even if they are *obiter*, they are highly persuasive. [note: 29]

(d) The fact that s 19B of the IAA deems the majority's interim award to be final and binding does not preclude the tribunal from later making a final determination on the primary dispute in a final award. The interim award is final, as mandated by s 19B, but "up to a certain point in time, *ie* pending the resolution of the dispute in the arbitration" and "will not and cannot be altered until the arbitration hearing". [note: 30]

114 The majority have therefore issued what they describe as an "interim" award [note: 31] compelling PGN to give prompt effect to the DAB decision pending the tribunal's final resolution of the parties' underlying dispute. [note: 32] The form of the majority's interim award is important and so I set it out in full: [note: 33]

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 Contract, the DAB Decision…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 the DAB [d]ecision ….

57. All other issues in these proceedings, including of interest and costs to be reserved and dealt with in one or more later awards.

115 In its interim award, the majority makes two declarations and couples the second of those two declaration with an imperative, requiring PGN to pay CRW promptly. The majority thereby upholds the parties' agreed security of payment regime, as expressed by their choice to contract on the Red Book form. It has issued an award which, it believes, gives effect to the interim finality of the DAB decision by compelling PGN to "pay now" without precluding it from "arguing later". On the majority's view, therefore, nothing in its interim award precludes the same tribunal from determining the primary dispute on its merits and with finality in a future, final award even though both the interim award and the final award are ultimately founded on the one dispute.

The reasoning of the dissenting arbitrator

116 Mr David Bateson, the dissenting arbitrator, accepts PGN's submissions and accordingly disagrees with the majority's award. [note: 34] The fundamental point on which he disagrees is that he takes the view that s 19B does not allow a Singapore-seated tribunal to give effect to interim finality, no matter how clear the intent of the parties in their arbitration agreement and no matter how clear the intent of a tribunal in making its interim award. In his view, therefore, even though the 2011 tribunal is prepared to go on to hear and determine the primary dispute, s 19B(2) of the IAA prevents it from issuing any future award which will "vary, amend, correct, review, add to or revoke" their interim award.

117 Mr Bateson reasons as follows:

(a) He accepts that, even though PGN gave notice of its dissatisfaction to CRW, it is under a contractual obligation to give prompt effect to the DAB decision and is therefore obliged to pay CRW immediately. [note: 35]

(b) There is a serious flaw in the drafting of sub-cl 20 because it fails to provide expressly for a quick way for a contractor to compel a recalcitrant employer to comply with a binding DAB decision where the employer has given notice of its dissatisfaction. [note: 36]

(c) The clear words of s 19B coupled with its history shows that Singapore's legislature took a considered decision not to permit an arbitral tribunal seated in Singapore to issue a provisional award which binds only until it is varied by a final award in the same arbitration. [note: 37] Therefore, every award in Singapore – including the majority's "interim" award – is deemed by s 19B to be a final, binding and enforceable award. [note: 38] The result is that "even if the Tribunal [were to come] to contrary findings of fact after hearing the merits of the parties, the Tribunal is not allowed under Section 19B of the IAA to make any decision that can change, amend, add, reduce or revoke any earlier partial/interim award." [note: 39]

118 Mr Bateson therefore concludes that s 19B of the IAA prevents the majority from adopting the approach endorsed by the Court of Appeal in *CRW v PGN (CA)* at [101]. This last point is the crucial point which has led to Mr Bateson's dissent. I set out his summary on this point: [note: 40]

1.8 Where I respectfully disagree with the Majority Tribunal is that I do not consider under Singapore law a partial or interim award can be issued by the Tribunal for the amount assessed in [a DAB decision]. This difference arises out of the wording of the relevant Singapore statute, the [IAA]. In many ways, this is unfortunate, and defeats the contractual intent of Clause 20.4, but if the parties choose Singapore as the seat, this is the result, however unintended.

119 The conclusion that Mr Bateson comes to is that the interim award in the 2011 arbitration is in a position identical to the final award in the 2009 arbitration. The majority has once again attempted to issue an award which does not preclude PGN from "arguing later". But under s 19B of the IAA, all awards made in Singapore are final and binding and are therefore immediately enforceable. The majority's award, although cast as an "interim" award with provisional effect until the final award, cannot in law have provisional effect because of s 19B of the IAA. It is in law a final award because it cannot be revised or varied. Having issued an award which is in law a final award, Mr Bateson concludes, the 2011 tribunal is *functus officio*. [note: 41]

PGN's submissions

120 This last point made by Mr Bateson is essentially the primary point which Mr Jeyaretnam advances before me on behalf of PGN as a ground for setting aside the majority's interim award. Mr Jeyaretnam argues that the majority has attempted to enforce the interim finality of a DAB decision in the same manner in which a Singapore court enforces the interim finality of an adjudication under our statutory security of payment regime even though the IAA does not have the same legislative support for interim finality as the Building and Construction Industry Security of Payment Act.

121 Mr Jeyaretnam argues that the majority's interim award has put it beyond the reach of the 2011 tribunal to go on to determine the primary dispute because the outcome of that future determination would be a final award which attempted to vary, amend, correct, review, add to or revoke the interim award. [note: 42] This, Mr Jeyaretnam says, is prohibited by s 19B(2).

122 For these reasons and those summarised at [16] above, Mr Jeyaretnam argues that the majority's award has prejudiced PGN [note: 43] and should to be set aside on the following grounds:

(a) Under Art 34(2)(a)(iii) of the Model Law, because the majority has exceeded its mandate or jurisdiction by converting the non-final DAB decision into a final award without determining the primary dispute on the merits;

(b) Under s 24(*b*) of the IAA because the majority has resolved the parties' primary dispute with finality in breach of the rules of natural justice by shutting out PGN on the merits of the primary dispute;

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

123 I begin by considering whether the majority's interim award is prohibited by s 19B of the IAA before turning to consider these three specific grounds advanced by Mr Jeyaretnam for setting aside the majority's interim award.

The impact of s 19B on the interim award

Section 19B does not prohibit provisional awards

124 The purpose of s 19B of the IAA (see [109] above) 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. In my view, so long as that 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 s19B shows clearly that this is its purpose. The Court of Appeal considered that legislative history, albeit in a different context, 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 [133]-[142]. The Court of Appeal cited in its judgment (at [137]) the reason which the then Senior Minister of State for Law gave in Parliament in 2001 for introducing s 19B into the IAA.

126 Section 19B, the Minister said, was inserted to confirm that under the IAA "an interim award, once given, is binding and cannot be reviewed by the arbitrator" (cited in *First Media* at [137]). 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 *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.

129 Mr Jeyaretnam 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 (see [125] above) which inserted s 19A and s 19B into the IAA. [note: 44] Mr Jeyaretnam points to paragraph 2.23.2 of this report and to the footnote to that paragraph. Paragraph 2.23.2 [note: 45] says this: "The omission of the expression 'provisional awards' [from the AA's identically-worded analogue of s 19A] 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).

130 Section 39 of the English Act gives the parties the freedom to agree that their tribunal shall have the power to grant provisional relief. That section reads as follows: [note: 46]

> **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.).

131 The concluding proviso to s 39 of the English Act says that s 39 does not affect the tribunal's powers under s 47 of the English Act. This section is for all material purposes identical to s 19A of the IAA, which was inserted into the IAA together with s 19B. Section 19A reads as follows:

> **Awards made on different issues**
>
> **19A.** —(1) Unless otherwise agreed by the parties, the 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.
>
> (2) The arbitral tribunal may, in particular, make an award relating to —
>
> (a) an issue affecting the whole claim; or
>
> (b) a part only of the claim, counter-claim or cross-claim, which is submitted to it for decision.
>
> (3) If the arbitral tribunal makes an award under this section, it shall specify in its award, the issue, or claim or part of a claim, which is the subject-matter of the award.

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 section 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 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.

135 In my view, therefore, the explicit objective of section 19B of the IAA is it 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 acknowledges in paragraph 2.33.2 of its report, [note: 47] 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 award is final and binding on its subject-matter

137 It is my view that the majority's 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 majority's 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 *CRW v PGN (CA)* (see [96] above). The facts of ICC 10619 are neatly summarised at [57] to [61] of the Court of Appeal's judgment. The contract in that case contained provisions similar to cll 20.4 to 20.7 of the 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.

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.
>
> …
>
> …this Tribunal wishes to emphasize that neither the provision of Article 23 of the ICC Rules nor the rules of the French NCPC relating to the *référé provision* are relevant. For one thing, the judgement to be hereby made is not one of a conservatory or interim nature, *stricto sensu*, but rather one 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 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 of *fumus boni juris* which are among the basics of the French *référé provision.*

141 Likewise, the majority's interim award gives full immediate effect to CRW's substantive provisional right under the Red Book to be paid now, pursuant to the DAB decision and without further discussion, and which the parties agreed shall extend until the end of the 2011 arbitration. 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 award will not be varied

142 Section 19B(2) puts it beyond the 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 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 the DAB decision 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 majority's 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 tribunal will go on to issue to achieve that resolution need not deal with the majority's interim award in any way that is inconsistent with s 19B(2). The majority's 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 will be immediately enforceable once issued is also not a concern. The tribunal can easily address that issue by releasing a single final award or collecting all partial awards for release together.

Even if s 19B prohibits provisional awards, it is not breached

144 If I am wrong in the foregoing, and the IAA does indeed prohibit provisional awards (in the

sense I use that term, see [124] above), it is my view that the majority's interim award is not provisional. The introductory words to the operative part of the interim award (see [114] above) provide that the interim award is issued "[p]ending the final resolution of the [p]arties' dispute". The effectiveness of the interim award is therefore limited by time. But in my view, even assuming that s 19B prohibits such an award, these introductory words do not bring the majority's interim award into conflict either with the requirement in s 19B(1) that the award be final and binding or with the requirement in s 19B(2) that no award can vary a past award.

The award is still final and binding

145 The operative part of the majority's interim award contains two limbs which, when taken together, comprise two declarations (one in each limb) and an imperative (in the second limb). Neither limb will cease to be effective or will be altered by any future award, including the award or awards in this arbitration which settle all remaining aspects of the parties' one dispute with finality. This is because the two declarations comprise eternal and immutable truths. No words of temporal limitation can falsify them. As for the imperative, that too is eternal and immutable: it will always be true – no matter what the final outcome of the 2011 arbitration is – that PGN now *ought to pay* CRW promptly pursuant to the DAB decision and in the future, that it *ought to have paid* CRW promptly pursuant to the DAB decision.

146 The two declarations in the operative part of the majority's interim award set out eternal and immutable truths. The truth of the propositions they contain will never cease and will never change. The first limb declares that the DAB decision binds both parties, both of whom are obliged to give prompt effect to it under cl 20. Mr Bateson, in his dissenting award, accepts this proposition as correct. Even PGN accepts this proposition to be correct (see [7] above). This declaration therefore states what is common ground between the parties and the unanimous view of the tribunal. But that is not why this proposition is eternal and immutable. It is eternal and immutable because that is what the parties expressly agreed. The content of the declaration in the first limb became true when the parties chose to contract on the Red Book's terms and because of that choice. It has continued to be true ever since. It continued to be true when the DAB issued its decision in 2008. It continued to be true when CRW commenced the 2009 arbitration. It continued to be true when CRW commenced the 2011 arbitration. It continued to be true when the tribunal in the 2011 arbitration interpreted cll 20.4 to 20.7 and issued both the majority and the minority awards. It continues to be true today. Further, the 2011 tribunal has no power to change its truth in a future award (by reason of s 19B(2) of the IAA) and no need to do so (because the 2011 tribunal has determined the secondary dispute with finality). This proposition will therefore still be true no matter what the tribunal decides when it disposes with finality of all remaining aspects of the dispute before it.

147 The second limb declares without qualification that PGN "shall promptly pay the sum of US$17,298,834.57" to CRW. No future award can or will need to change the declaration. Again, it is common ground between the parties and the unanimous view of the tribunal that the DAB decision obliges PGN to pay that sum promptly to CRW. Again, it is more than that: it is what the parties' contract provides. That PGN is subject to this obligation will never change. That PGN is obliged to perform this obligation promptly will never change. How much money PGN is obliged to pay CRW promptly will never change.

148 It is only the imperative comprised in the second limb which the introductory words of the majority's award could conceivably falsify. On one reading, those introductory words mean that the majority's imperative ceases to have effect once the 2011 tribunal has finally resolved all aspects of the parties' one dispute. Even if for some reason it is beyond the power of the tribunal to do that, I do not read these words as foreshadowing a final award in the 2011 arbitration which will deal with

the interim award in a manner prohibited by s 19B(2). If it is necessary, I would prefer to read those words as merely reflecting the fact that their interim award, in accordance with the express provisions of the parties' contract, carries no preclusive effect on the primary dispute, even though it is preclusive on the secondary dispute. Those words would therefore simply confirm, if confirmation is necessary, that the majority's interim award does not preclude PGN from invoking cll 20.6[2] and 20.6[3], and thereby arguing the primary dispute on its merits, when the tribunal turns to resolve the remaining aspects of the party's dispute with finality.

149 The interim award therefore is and will eternally and immutably be final as to PGN's obligation *conceptually* to pay the specified sum to CRW promptly in accordance with the DAB decision and also as to its obligation *actually* to make that payment. The award may, on one view, be phrased provisionally. But if that is not permitted by the IAA, I would read the declarations and imperative it comprises as not being provisional.

No future award will vary the award

150 Even assuming that the IAA prohibits awards whose effectiveness is limited by time, it is my view that the 2011 tribunal can determine the one dispute before it without varying the majority's interim award.

151 If the 2011 tribunal finds that the DAB was correct in its decision, then the tribunal need do no more than merely say so in its final award and stop there. The majority's 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 tribunal holds that the DAB awarded CRW too little (assuming that such a holding is open to the tribunal even though CRW has not served a notice of its dissatisfaction), then the tribunal need do no more than make that finding and order PGN to pay CRW the additional amount. Again, the majority's 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 tribunal finds that the DAB awarded CRW too much. But in that situation, the tribunal need do no more than make that finding and issue a final award requiring CRW to return the excess. Once again, the majority's interim award and the final award will stand together for enforcement. If PGN fails to comply with the majority's 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 them (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.

Nothing in the majority's award detracts from this view

155 There is some language in the majority's reasoning at paragraph 51 and 52 of the interim award which could be said to detract from my view of their award. In that paragraph, the majority say:

> 51. The Tribunal considers that even though the DAB [d]ecision can be opened up at the arbitration hearing, an award giving effect to it [1] will still be final up to a certain point in time, *ie* pending the resolution of the dispute in the arbitration. [2] 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 [PGN's notice of dissatisfaction]. [PGN's] arguments conflate the term "binding" and "final". This was in fact addressed at paragraph 51 of [*CRW v PGN (CA)*] wherein the Court of Appeal stated that "a binding decision is one that has obligatory effect. [3] The terms 'binding' and 'final' are not synonymous. A binding decision is not invariably a final one. A final decision is, in essence, one that is unalterable and not open to further review".
>
> 52. In other words, the interim award giving effect to the DAB decision pending resolution of the parties' dispute is still final in the sense that [4] it will not and cannot be altered until the arbitration hearing. While the Tribunal appreciates 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 Tribunal feels the former is to be preferred."

For ease of reference, I have underlined and numbered in square brackets the points in this passage to which I will now refer.

156 The essence of the majority's reasoning expressed in these paragraphs is consistent with my view that the interim award is binding and final on its subject-matter, *ie* the secondary dispute. That is clear from point [2]. But I make four observations on points [1], [3] and [4].

157 First, for the reasons I have already given, I do not see the majority's interim award as being final only "up to a certain point in time" (point [1]). 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 the DAB decision promptly and that it do so *now*. The tribunal recognises this in point [2]. The interim award will remain final on the secondary dispute even if the tribunal opens up, reviews or revises the DAB decision under cl 20.6[2] and even after the 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 in their contract.

158 Second, I do not agree with the majority to the extent that they suggest that the interim award can or will be "altered" when the tribunal delivers its final award (point [4]). 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.

159 Third, I do not consider the distinction which the majority drew between "binding" and "final" in the context of the interim award to be a valid one (point [2]). 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 tribunal must make with finality is not limited to a determination of the matters raised in PGN's notice of dissatisfaction (point [2]). The 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 20.6[3] to invite the tribunal to open up the DAB decision and to place the entire primary dispute before it for a determination with finality.

The award has no preclusive effect on the primary dispute

161 Finally, I consider the possibility that I am wrong in all my holdings thus far. What is the position if the IAA does in fact prohibit provisional awards and if the majority's interim award is in fact one such provisional award? Mr Jeyaretnam argues that the result then is that s 19B makes the majority's interim award final and binding on the issue of how much PGN must pay CRW and has therefore rendered the 2011 tribunal *functus officio*. That causes PGN prejudice, he says, because it means that the majority has converted the DAB's non-final interim adjudication into a final and binding, enforceable award without ever hearing and considering the merits of PGN's position on the primary dispute.

162 I cannot accept Mr Jeyaretnam's argument. The argument conflates the primary dispute with the secondary dispute. The DAB decision not being final and binding under the Red Book's security of payment regime is entirely compatible with the interim award being final and binding under the IAA. A decision is final if it precludes its subject-matter from being re-opened, whether by the parties or by the tribunal. But the DAB decision and the interim award each have a different subject-matter. The interim award's subject-matter is at one level of abstraction higher than the DAB decision's subject-matter. The concept of finality in each case therefore operates on a different plane. The DAB decision's subject-matter is the primary dispute. That decision is not final because the Red Book's security of payment regime gives PGN a contractual right to "argue later" about the primary dispute on its merits. That lack of finality on the primary dispute says nothing about the *secondary* dispute: about CRW's rights and PGN's obligations *arising from* the DAB decision. It is the secondary dispute which is the interim award's subject-matter. The interim award is final because s 19B of the IAA prevents the parties and the tribunal now from revisiting the secondary dispute. Nothing about the interim award's finality with regard to the secondary dispute affects the tribunal's ability to determine the primary dispute, or indeed to determine any aspect of the parties' dispute which did not comprise the subject-matter of the interim award, for example interest and costs.

163 Even on the assumption I have adverted to in [161] above, therefore, the 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 tribunal has 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 parties' primary dispute is not *res judicata*. The tribunal's final award will not revisit the subject-matter of the interim award.

165 The correct analysis is that the 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 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 tribunal's freedom to conduct the full inquiry into the primary dispute which the parties' agreement envisages and mandates.

The specific grounds of challenge

The majority did not act in excess of jurisdiction

167 I now turn to the specific grounds of challenge.

168 The law on setting aside an award on the ground of excess of jurisdiction under Art 34(2)(a)(iii) of the Model Law was discussed in the *CRW v PGN (CA)* at [31]-[33]. As the Court of Appeal said:

> ...Art 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that [were not] submitted to it or failed to decide matters that [were] submitted to it. In other words, Art 34(2)(a)(iii) addresses the situation where the arbitral tribunal exceeded (or failed to exercise) the authority that the parties granted to it….This ground for setting aside an arbitral award covers only an arbitral tribunal's substantive jurisdiction and does not extend to procedural matters….

The crucial question in every case is whether there was real or actual prejudice to the party seeking to set aside the award.

169 I can detect no excess of jurisdiction in the majority's interim award. PGN concedes that it is under a contractual obligation to pay CRW pursuant to the DAB decision. I have found that the dispute before the 2011 tribunal is a single dispute comprising (at least) two aspects: the primary dispute and the secondary dispute. I have found that the majority's interim award deals only with the secondary dispute and does so with preclusive effect. I have found that that preclusive effect does not extend to any other aspects of the parties' dispute apart from the secondary dispute. The interim award is not an award which is contrary to s 19B insofar as the secondary dispute is concerned and is no award at all on the primary dispute. Every other aspect of the one dispute which is before the 2011 tribunal, including the primary dispute, has been preserved entirely intact for future determination on the merits and with finality. All of this is entirely in accordance with the parties' agreed dispute resolution regime and their agreed security of payment regime. All of this is entirely within the 2011 tribunal's jurisdiction.

There was no breach of the rules of natural justice

170 In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, the Court

of Appeal held at [26] that an applicant challenging an award on the basis of a breach of natural justice has to establish:

(a) which rule of natural justice was breached;

(b) how this rule of natural justice was breached;

(c) in what way was this breach connected to the making of the award; and

(d) how did the breach prejudice the applicant's rights.

171 According to Mr Jeyaretnam, the rule of natural justice breached in this case was the right of PGN to be heard. That rule was breached, he says, because the tribunal did not hear PGN on the primary dispute and the correctness of the DAB decision. This breach led directly to the making of the interim award which in effect rendered the DAB decision immediately enforceable. PGN was prejudiced by the breach because the result was to render the entirety of the parties' dispute *res judicata*. [note: 48]

172 This ground cannot be sustained in light of my analysis above. The interim award deals only with the secondary dispute. The tribunal afforded each party a reasonable right to be heard on the secondary dispute. Nothing which the majority has done by issuing its interim award has rendered the primary dispute *res judicata*. PGN is not precluded from contesting the primary dispute on the merits. It will be heard on that dispute, but at the appropriate time. Under the parties' contract, that time has not yet come.

The majority followed the agreed arbitral procedure

173 In *PGN v CRW (HC)*, Ang J set out the law relating to a challenge under Art 34(2)(a)(iv) of the Model Law at [39]:

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

174 Mr Jeyaretnam contends that the majority erroneously interpreted the Red Book's dispute resolution provisions and applied them contrary to the parties' agreed arbitral procedure. He submits further that this goes to the root of the tribunal's mandate and power. According to him, the agreed arbitral procedure did not include the possibility of either party converting the DAB decision into a final monetary award without the tribunal hearing and considering the merits of the parties' dispute. These were essentially the same arguments supporting his submission on excess of jurisdiction. For the reasons given above, this ground too is not made out. Indeed, in my view, the majority proceeded entirely in accordance with the procedure contemplated by the parties' agreement, as interpreted by the Court of Appeal in *CRW v PGN (CA)*.

175 In his oral submissions, Mr Jerayetnam raises an alternative argument to set aside the interim

award under this ground of challenge. [note: 49] He argues that the majority did not have the power to issue the interim award since PGN's refusal to comply with the DAB decision was not itself referred to the DAB, contrary to the arbitral procedure which was laid down in the parties' contract. In raising this argument, he essentially adopts the two-dispute approach which forms the *ratio* of *PGN v CRW (HC)*.

176 I have already set out above why I am bound by *CRW v PGN (CA)* to adopt the one-dispute approach and why, in any event and with respect, it is my view that the one-dispute approach best advances the objectives of the Red Book's security of payment regime. This particular argument also raises the recursion problem I have referred to above. This argument, too, cannot succeed.

Conclusion

177 For the reasons I have stated, I dismissed OS 683 and SUM 3923 with costs. I further ordered PGN to pay to CRW one set of costs of and incidental to both applications, since both applications were argued and heard together, such costs fixed at $20,000 excluding reasonable disbursements. The disbursements shall be taxed if they cannot be agreed.

[note: 1] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p 661.

[note: 2] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p 661.

[note: 3] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, para 6.

[note: 4] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, pp 279-280.

[note: 5] NE 9 October 2013 Page 7 Line 18 to Page 8 Line 11.

[note: 6] Para 27, PGN's Written Submissions dated 4 October 2013.

[note: 7] NE 9 October 2013 Page 18 Line 26 to Page 19 Line 4.

[note: 8] PGN's Written Submissions at para 32 and 33.

[note: 9] PGN's Written Submissions at para 34, 45 and 51.

[note: 10] PGN's Written Submissions at para 48 and 56.

[note: 11] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p279-280

[note: 12] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p296 at [7].

[note: 13] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p298.

[note: 14] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p305 at [48] to p306 at [51].

[note: 15] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p285 at p310.

[note: 16] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p287 at 307.

[note: 17] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p306.

[note: 18] OS 683 BOD Tab 2 p417-418.

[note: 19] OS 683 BOD Tab 2 p431.

[note: 20] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p448 at [76(2)].

[note: 21] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p419 at [24].

[note: 22] Terms of References para 22, 23, 34, 37 and 44 (OS 683 BOD Tab 2 p651-654).

[note: 23] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p33 at [30].

[note: 24] Dissenting Opinion of Mr David Bateson at para 1.4 (BOD Tab 2 p49)

[note: 25] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p45 at [55].

[note: 26] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p40 at [44], p44 at [52].

[note: 27] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p38 at [39].

[note: 28] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p40 at [45].

[note: 29] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p42 at [47] – [48].

[note: 30] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p43 – 44 at [51] – [52].

[note: 31] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, 14.

[note: 32] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p419 at [24].

[note: 33] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p45 – 46 at [56] – [57].

[note: 34] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p48.

[note: 35] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p49 at [1.4].

[note: 36] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p49 at [1.5].

[note: 37] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p54 at [2.16] – [2.17].

[note: 38] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p54 at [2.15].

[note: 39] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p55 at [2.20].

[note: 40] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p51 at [1.8].

[note: 41] Affidavit of Muhammad Husseyn Umar filed on 29 July 2013, p57 at [2.27] to [2.28].

[note: 42] NE 9 October 2013 Page 18 Line 26 to Page 19 Line 4.

[note: 43] PGN's Written Submissions at para 66.

[note: 44] CRW's SBOA Tab 17 at 104.

[note: 45] CRW's SBOA Tab 17 at 23.

[note: 46] *Ibid*.

[note: 47] CRW's SBOA Tab 17, page 27.

[note: 48] PGN's Written Submissions at para 63.

[note: 49] NE 9 October 2013 Page 36 Line 25-32; NE 10 October 2013 Page 15 Line 23 – Page 17 Line 21.