

The legal justification for the 'enforcement' of a 'binding' DAB decision under the FIDIC 1999 Red Book

A previous article proposed that difficult questions arose from recent cases on the enforceability of Dispute Adjudication Board (DAB) decisions, including the correct basis of the award and the appropriate type of order. This article offers answers to these questions.

In the October 2011 edition of *CLInt* (pp 13–16), this author considered the case law concerning the enforceability of binding DAB decisions and identified, at the conclusion of the article, some of the difficult issues that the cases present. This article explores the answers to three questions (a summary of the answers put forward in this article follows in italics):

- Should the basis of the award be breach of contract or specific performance?

Specific performance is the correct route.

- Does the failure to pay need to go to the DAB first?

No, if specific performance is sought. Yes, if damages are sought.

- Should an arbitral tribunal make a 'final', 'interim', 'provisional' or 'partial' award/order 'enforcing' a DAB's decision?

The appropriate form of award is a provisional order.

This article seeks to demonstrate that, in relation to each of these questions, the competing arguments are finely balanced. It is no coincidence, therefore, that there is an almost equal number of courts and tribunals willing to enforce to those unwilling to enforce 'binding' DAB decisions.

To recap, the problem concerns the inadequate wording in the FIDIC 1999 books to deal with the 'enforceability' of 'binding' DAB decisions. Sub-Clause 20.7 provides clear words enabling a party to enforce a DAB decision that is final and binding. There is no clear route (described by Professor Bonni as '*the gap*') to enforce a binding DAB decision (i.e. a decision that has had a notice of dissatisfaction registered against it) set out in the contract.

Issue 1: damages v specific performance

Should the DAB winning party be asking the arbitral tribunal specifically to enforce the fourth paragraph of Sub-Clause 20.4 (which provides that the parties should give prompt effect to the DAB's decision), or should it be seeking damages for breach of the same provision of the contract?

It is well known that in common law systems, specific performance is deemed to be an equitable form of relief (and as such an exceptional remedy, available only in situations where damages do not provide an adequate remedy) but that, in civil law jurisdictions, specific performance is not a discretionary extraordinary remedy but the general rule.

Specific performance (enforcement)

As the contract does not expressly provide the power to grant specific performance (Sub-Clause 20.7, which is a power to grant specific performance of a final and binding DAB decision, does not cover binding decisions), an arbitral tribunal would have to be satisfied that either the ICC Rules or the applicable law expressly or impliedly conferred it.

It might be argued (although the author has his doubts as to this argument) that the ICC Rules give the arbitral tribunal an inherent power to grant specific performance. Under the 1988 ICC Rules, there was no express authority to make awards or issue orders for interim measures but Craig, Park, and Paulsson nevertheless opined in the second edition of their seminal *International Chamber of Commerce Arbitration* that ICC arbitrators did indeed have an inherent power to make interlocutory orders. However, an examination of the 1988 Rules might have led many to conclude that such an inherent power was difficult to reconcile with those Rules.

An express power to grant specific performance might be found in the applicable law. In England, for example, section 48 of the *Arbitration Act 1996* does provide a power to the arbitral tribunal to order specific performance of a contract. It is arguable, however, that this section was conceived with the final award in mind (as opposed to a provisional order).

If a power is conferred on an arbitral tribunal to grant specific performance, then, unlike under Sub-Clause 20.7, the arbitral tribunal must determine whether to enforce the binding DAB decision by the exercise of its discretion.



An analysis of the decisions of the courts and tribunals shows as follows:

- In the author's opinion, *ICC Case 10619* is predicated on the basis that the arbitrator does have a power to order specific performance ('giving the Engineer's decisions their full effect') of a *binding* DAB decision. While the thinking behind *ICC Case 10619* is not spelt out, it may be that the arbitral tribunal considered it had an inherent power specifically to enforce '*the law of the contract*'.
- It appears that Christopher Seppälä does not consider the *ICC Case 10619* award to be based on a cause of action for damages for breach of contract, as he recognises in his article 'An Engineer's/Dispute Adjudication Board's Decision is Enforceable by an Arbitral Award' (White & Case, December 2009) that the tribunal in *ICC Case 10619* could also have taken this alternative approach:

'The Tribunal could have held merely that the Employer was in breach of contract and required the Employer to pay damages for such breach, represented by interest on the amount of the unpaid decisions. But, instead, the Tribunal ordered the Employer to pay the amount of the Engineer's decisions on the ground that "this is simply the law of the Contract". In the author's [Mr Seppälä's] view, this is the right approach.'

It is unfortunate that the '*the law of the contract*' solution put forward in *ICC Case 10619* is not explained. It is not clear where in the law of the contract a power is given to an arbitral tribunal to enforce an engineer's (or DAB's) decision. Ordinarily, an arbitral tribunal (unlike a court) will not have the power to award specific performance unless that power is expressly bestowed on it by the parties. In certain circumstances, the contract may do that (for example, Sub-Clause 20.7). In other circumstances, the applicable law may provide the solution (eg section 48 of the English *Arbitration Act 1996*).

Damages for breach of contract

The winning party could argue that the employer's failure to pay amounts to a breach of the fourth paragraph of Sub-Clause 20.4 (ie a failure on the

employer's part promptly to give effect to the binding DAB's decision).

There are two alternative views concerning the question as to what loss flows from the breach to promptly give effect to a DAB decision ('the loss argument').

The first view is that the loss includes the principal sum adjudged as due by the DAB:

- Two sole arbitrators in unreported cases reached the conclusion that damages do consist of the principal sum.
- Frederic Gilli on in his article 'Enforcement of DAB Decisions under the 1999 FIDIC Conditions of Contract: A recent development: *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*' ([2011] *International Construction Law Review* 388) also supports this view. He asserts that '*the correct measure of damages for a breach by the losing party of its obligations under sub-clause 20.4 to give prompt effect to a DAB decision is... for payment of the amount awarded by the DAB, and not simply interest*'. His reasoning is that '*in most jurisdictions, the basic principle of damages for breach of contract is to put the claimant into the same financial position in which he would have been had the contract been properly performed*'. His conclusion is that '*... if the losing party had promptly given effect to the DAB decision, the other party would have received the amount awarded by the DAB*'.

The second view is that any claim for damages would be limited to a claim for recovery of losses that the claimant had incurred as a consequence of the respondent's non-compliance with the DAB's decision (ie losses caused by the breach, which are not likely to be anything other than interest). This view is supported as follows:

- In *ICC Case 16949/GZ*, the sole arbitrator suggests that damages for breach of contract '*would hardly be a claim for damages of the same amounts already awarded*'.
- Judge Ean in the High Court of Singapore also saw this as a potential issue when she issued the following note of caution in the *PT Perusahaan* case: '*Suing in contract for breach may not be the best practical move for the winning party, especially when the decision only relates to payment of money. The winning party may need to prove*



*damages, which may be no more than a claim for [interest] on the sum owing.*¹

- Mr Seppälä in his 2009 article noted above recognises that the tribunal in ICC Case 10619 could have taken this approach as set out in the extract reproduced above but chose not to.
- Edwin Peel makes a distinction under English law (at paragraph 21-001 of *Treitel on the Law of Contract* (12th edn, Sweet & Maxwell, 2007) between an action for a price and an action for damages. He considers that an action for an agreed sum differs from a claim for damages not only in its nature, but also in its practical effects. The former is a claim for specific enforcement of the defendant's primary obligation to perform what he has promised. The latter arises where the agreed sum is not paid and the claimant suffers additional loss. In these circumstances, he may be entitled to bring both the action for the agreed sum and an action for damages.

Conclusions on issue 1

The author considers that the relief that a winning party is seeking, properly framed, is the 'enforcement' of the DAB's decision. In other words, the winning party wishes the arbitral tribunal to order the defaulter to comply with the obligation set out in the contract promptly to give effect to the DAB's decision.

In the author's opinion, it is arguable that if the arbitral tribunal does not have a power to order specific performance in relation to a binding DAB decision under the:

- General Conditions of the FIDIC contract (which is clear); or
- ICC Rules (which is doubtful); or
- applicable law,

it follows that the winning party has no ability to enforce the DAB's decision.

The author considers that, if the winning party is seeking damages for breach of contract, the correct position, under English law at least, is that, as a matter of principle, such a claim cannot include the sum contained within the DAB decision itself.

The author considers that a winning party would be best advised to 'ride both horses' in the alternative (ie seek both specific performance and damages for

breach of contract). An arbitrator would then have the task of determining:

1. whether there was a power for specific performance and, if so, whether to exercise it; and, if not
2. whether to find in favour of the contractor on the loss argument.

The author considers that there will be cases in which arbitrators (with defensible justification) will take the view that neither 'horse' has the legal stamina to 'reach the finishing line'.

Issue 2: Does the failure to pay need to go to the DAB first?

To introduce this issue, it is necessary to understand the three routes to arbitration under the FIDIC books.

1. The first route is contained in Sub-Clause 20.6 and arises if:
 - the contractor has referred a dispute to the DAB;
 - the DAB has given a reasoned, timely decision (or failed to give a decision);
 - either or both of the parties is/are dissatisfied with the DAB's decision (or failure to make a decision); and
 - either or both parties issue(s) a notice of dissatisfaction ('NOD') within 28 days of receipt of the decision and the 56-day period for amicable settlement discussions to take place (20.5) has expired.

The arbitral tribunal will then embark on a *de novo* consideration of the merits of the dispute that has been referred to the DAB. The DAB's decision in these circumstances remains 'binding'.

2. The second route to arbitration is contained in Sub-Clause 20.7 and arises if neither of the parties gives a valid notice of dissatisfaction in relation to the DAB's decision (that is, within 28 days of receipt of the DAB's decision or, if applicable, within 28 days of the expiry of the 84-day period in the event that a DAB fails to make a decision). In this case, the DAB's decision becomes '*final and binding*'. Sub-Clause 20.7 can then be utilised to enforce the DAB's final and binding decision in arbitration



without a requirement for the arbitrator to consider the merits of the dispute.

3. The third route to arbitration, provided for in Sub-Clause 20.8, allows the arbitral tribunal to be seized in circumstances in which, for any reason, the DAB is not in place. In such circumstances, if there is a dispute between the parties, the dispute can be referred directly to the arbitral tribunal and the parties will not need to go through the processes in Sub-Clauses 20.4 (DAB) or 20.5 (amicable settlement).

It is plain from the analysis of the contractual scheme above that the FIDIC *General Conditions of Contract* have been drafted on the basis that a party aggrieved by the DAB's decision should simply issue a NOD and take the dispute to arbitration for a resolution on the merits. It may have been thought it was unnecessary or undesirable to have an express mechanism to enforce a 'binding' DAB decision; alternatively, and more likely, the issue was simply overlooked.

If the winning party is seeking specific performance, the author suggests that there should be no need for an arbitral tribunal to refer back to the DAB the issue of the failure to pay simply because that party is not pursuing a claim under route 1 as noted above: the winning party is relying on either a power bestowed on it by the ICC Rules or applicable law. In fact, in these circumstances, if the winning party does refer the matter to the DAB, the DAB would be bound to decline jurisdiction over the issue as the DAB, so far as its previous referral is concerned, would be *functus officio* (its power has been discharged). The author suggests that, while the procedural rules provide that a DAB has the power to grant interim measures, it is highly unlikely that such measures would include the power to order specific performance as the idea that a DAB has the power to enforce its own decisions is absurd.

If the winning party seeks damages for breach of contract, then the author suggests that it is mandatory for that party to refer the issue of damages to the DAB first as route 1 of the contract is being pursued: the winning party is arguing that there is a dispute that is to be referred to arbitration. The only way this can be done is via route 1. A failure to do so would amount to a failure to comply with the multi-tier dispute resolution process in the contract.

This was also the conclusion reached by the High Court of Singapore in the *PT Perusahaan* case. The DAB and subsequently the arbitral tribunal will have to wrestle with the loss point set out above and whether to grant

a provisional order or an interim, partial, or final award as discussed below.

Conclusions on issue 2

The winning party does not need to go to the DAB first if the relief sought is specific performance, but does if the relief sought is damages for breach of contract.

Issue 3: should an arbitral tribunal make a 'final', 'interim', 'provisional' or 'partial' award/order 'enforcing' a DAB's decision?

A Final Report on Interim and Partial Awards from the working party on dissenting opinions and interim and partial awards of the ICC Commission on International Arbitration, chaired by Martin Hunter in 1990, proposes the following definitions:

- an 'interim award' is 'a general term used to describe any award made prior to the last award in a case';
- a 'partial award' can be enforced like any other award, produces a *res judicata* effect and is 'a binding determination, in the form of an award, on one or more (but not all) of the substantive issues'; and
- an 'interlocutory decision' (akin to a provisional order – note *not* award) is 'one, which, not necessarily in the form of an award, is made prior to the last or sole award'.

This report concluded (and the author agrees) that it is impossible to find a terminology acceptable to everyone in different countries concerning the divergent uses of the terms 'interim', 'partial' and 'interlocutory' but that for the purposes of the report the above definitions are adopted.

Fouchard, Gaillard and Goldman (... *on International Commercial Arbitration*) explain that a 'final award' is used to mean very different things, but the better interpretation is that '*an award is a decision putting an end to all or part of the dispute, it is therefore final with regard to the aspect or aspects of the dispute that it resolves.*'

Lew, Mistelis and Kroll (in *Comparative International Commercial Arbitration*) explain that:

'according to the working group preparing the Model Law an interim or interlocutory



or provisional award is an award which does not definitively determine an issue before the tribunal. The definition is in line with the general meaning of the term "interim" as opposed to "final". However, the definition was not adopted in the final text of the Model law. One of the reasons was that in practice the term "interim award" is often used interchangeably with that of "partial awards".¹

Whatever the language adopted, in principle, it is suggested that there is a distinction between:

- an award that finally disposes of a matter and is enforceable ('species 1'); and
- a decision that does *not* finally dispose of a matter and is not enforceable ('species 2').

Purists might argue that all awards are, by definition, final and so species 2 decisions should never be described as awards as such. The article makes the distinction between a species 1 award and species 2 decision so as to avoid confusion in terminology. In the author's view, as developed below, an arbitral tribunal should not give a species 1 award if it agrees with the author's view that the relief sought by a contractor, properly analysed, is not final relief.

These issues raise a number of sub-questions, which may be dealt with as follows.

Can an arbitral tribunal issue a partial (final) award concerning a binding DAB decision, as to do so would mean that this would be a determination of this issue finally?

It seems to the author that there are two competing views:

1. The first view is that by its nature a binding DAB decision concerning sums of money is not final as a notice of dissatisfaction has been issued. As a binding decision may be reviewed and revised by an arbitral tribunal in a final award, it is inappropriate for an arbitral tribunal to issue a partial (final) award concerning the sums found to be due in that binding DAB decision. To do so would have the effect of rendering final and binding (a partial final award is a final and binding award) a decision that was always only intended to have binding status. In other words, it is inappropriate for an arbitral

tribunal to issue a partial (final) award concerning sums owed as the effect of such an award would be finally to resolve an issue that is yet to be resolved. The final entitlement of a party to money can only be resolved in arbitration by the arbitral tribunal in its final award. This was the winning argument run by the author as counsel in *ICC Case 16119/GZ*.

2. The second view, advanced by Frederic Gillion, is that the winning party should seek a partial final award. His analysis is that such an award would:

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

The author considers the second view to be fallacious, as a partial final award pertaining to the sums ordered as due by the DAB does not solely represent a final resolution of the issue of non-payment. Such an award goes further and finds that the sums fall due in an enforceable species 1 award. The contractor's entitlement to those sums has not been finally resolved and so should not be the subject of a final award.

If the second view is correct, the winning party would be granted a species 1 award for sums that can be – and, indeed, are likely to be – revised in arbitration.

In these circumstances, there would then be two potentially conflicting awards when the final award is given. For this reason, the author prefers the first view and considers that only a species 2 decision should be made.

Can an arbitral tribunal issue a species 2 decision concerning the binding DAB decision?

If the arbitral tribunal is empowered to give provisional relief (as it is under Article 23 ICC Rules), it is not objectionable, as a matter of principle, for it to issue a



species 2 decision concerning the binding DAB decision.

It is arguable that, if a party involved in ICC proceedings wishes to enforce the DAB's decisions, this could be construed as an application for provisional payment, which, in turn, could take the form of an application for an interim and conservatory measure under Article 23 ICC Rules.

If that were the case, then the law of the forum will spell out the circumstances or criteria that must exist before the court can grant interim or conservatory measures: for example, *prima facie* establishment of a case, urgency, and irreparable harm, or serious or actual damage, if the measure requested is not granted (see, for example, section 44 of the English *Arbitration Act 1996*). Some still cite the traditional grounds of '*periculum in mora*' (danger in delay) and '*Fumus boni iuris*' (presumption of sufficient legal basis).

It is submitted that, in the typical case concerning a binding DAB decision, it will be difficult to persuade the arbitral tribunal that the necessary circumstances or criteria set out in the preceding paragraph will be fulfilled to justify an arbitral tribunal issuing interim or conservatory relief. Ordinarily, it is suggested that there will be no urgency or real risk of irreparable harm or serious or actual harm if the contractor is not paid the sums ordered by the DAB pending a final determination of these matters by the arbitral tribunal as interest is an adequate remedy. Furthermore, even if a species decision were to be made, it would not be enforceable under the New York Convention.

According to Lew, Mistelis and Kroll, the prevailing position in relation to the enforcement of interim awards dealing with interim relief (referred to in this article as 'species 2 decisions') is dealt with by a decision of the Supreme Court of Queensland, Australia (*Resort Condominiums International Inc (USA) v Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd (Australia)*).¹ The court held that an interim award is not enforceable under the New York Convention or Australian law. They stated that:

'the "Interim Arbitration Order and Award" made by the arbitrator... is not an "arbitral award" within the meaning of the Convention nor a "foreign award"... it does not take on that character simply because it is said to be so'.

¹ (1994) 9(4) Mealey's IAR A1 (1995).

Should an arbitral tribunal issue a final award?

This question envisages the winning party referring, as a sole issue, the issue of non-payment of the binding DAB decision (ie the merits are not put before the arbitral tribunal). Again, there may be two views:

1. For precisely the same reasons as set out above in the context of the possible issue of a partial award (namely, that a final award would finally resolve an issue that is yet to be resolved), it would be equally inappropriate to issue a final award.
2. If the only issue before the tribunal is the enforcement of the DAB decision, then necessarily the award sought is a final award as there is nothing else to determine.

The trouble with the latter argument is that the employer still has the right to bring to arbitration the merits and so he will need to bring separate arbitration proceedings concerning this. Ultimately, when those proceedings are concluded, there may be two separate and potentially conflicting awards. This cannot have been the intention of the drafters of the General Conditions.

The Court of Appeal in the Singapore case gives clear guidance to contractors not to refer the sole issue of the enforcement of a DAB decision to an arbitrator for a final award but instead to ensure that the merits are also before the arbitrator.

Conclusions on issue 3

In the author's opinion:

- Legally and conceptually, it would be most appropriate for a winning party to seek a species 2 decision (provisional order) enforcing the DAB's binding decision. Practically, however, it may not be a winning solution owing to the difficulties in persuading an arbitral tribunal that it would be appropriate under Article 23 ICC Rules and the law of the forum. Further, a contractor that obtains a species 2 decision may not be able to enforce it, and so the objective of obtaining enforcement of a DAB's binding decision may not be met.
- A partial final award (a species 1 award) has recently become the most popular solution to fill the gap, but it is suggested that it is the wrong



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choice and does not sit with the leading commentators' view on the meaning of a partial award: a partial award is a final award and the issue to be determined is not final.

- A final award is also likely to be the wrong choice for the same reasons as a partial award is the wrong choice. For different reasons, the Singapore Court of Appeal also reached this decision.

The future

The FIDIC Gold Book includes – and it is understood that the next editions of the 1999 FIDIC forms will include – in the equivalent of the existing Sub-Clause 20.7 the ability to 'enforce' both binding and 'final and binding' DAB decisions. While this will eliminate issues 1 and 2 discussed above, issue 3 may well remain a live issue under the new books.

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thoughts or to discuss any concerns.

