# CRW Joint Operation *v* PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33

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| **Case Number** | : Civil Appeal No 59 of 2010 (Summons No 4970 of 2010) |
| **Decision Date** | : 13 July 2011 |
| **Tribunal/Court** | : Court of Appeal |
| **Coram** | : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA |
| **Counsel Name(s)** | : Siraj Omar and Dipti Jauhar (Premier Law LLC) for the appellant; Philip Jeyaretnam SC and Wong Wai Han (Rodyk & Davidson LLP) for the respondent. |
| **Parties** | : CRW Joint Operation — PT Perusahaan Gas Negara (Persero) TBK |

*Arbitration*

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 4 SLR 672.]

13 July 2011 Judgment reserved.

**V K Rajah JA (delivering the judgment of the court):**

**Introduction**

1 This is an appeal by CRW Joint Operation ("CRW") against the decision of the High Court judge ("the Judge") in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 ("the GD") allowing the application by the respondent, PT Perusahaan Gas Negara (Persero) TBK ("PGN"), to set aside a final award dated 24 November 2009 ("the Final Award") issued by the majority members of the arbitral tribunal ("the Majority Members") in International Chamber of Commerce ("ICC") International Court of Arbitration Case No 16122/CYK ("the Arbitration").

2 This appeal raises some interesting issues in relation to the effect of a decision by a dispute adjudication board ("DAB") constituted pursuant to the terms of a construction contract that has incorporated the provisions in *Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer* (1st Ed, 1999) ("the 1999 FIDIC Red Book") published by the Fédération Internationale des Ingénieurs-Conseils ("FIDIC"), a federation which aims to represent globally the consulting engineering industry by promoting the business interests of firms supplying technology-based intellectual services for the built and natural environment. [note: 1] The 1999 FIDIC Red Book contains the standard provisions recommended by FIDIC for building or engineering contracts where the contractor undertakes works in accordance with a design provided by the employer. Despite the prevalence of these standard provisions in the construction industry, the issues raised in this appeal *vis-à-vis* the effect of a DAB decision do not, surprisingly, appear to have received any judicial scrutiny to date. In this judgment, we shall analyse the dispute resolution scheme in and the relevant clauses of the 1999 FIDIC Red Book. However, the salient legal points cannot be understood without a statement of the background facts, to which we now turn.

**Background facts**

3 CRW is a tripartite joint operation established under the laws of the Republic of Indonesia consisting of PT Citra Panji Manunggal, PT Remaja Bangun Kencana Kontraktor and PT Winatek Widita.

PGN is a public listed state-owned company established under the laws of the Republic of Indonesia.

4 Pursuant to a contract dated 28 February 2006 entitled "Pipeline Construction Contract For Grissik-Pagardewa Onshore Gas Transmission Pipeline No 002500.PK/243/UT/2006" [note: 2] ("the Pipeline Contract"), PGN engaged CRW to design, procure, install, test and pre-commission a 36-inch diameter pipeline and an optical fibre cable running from Grissik to Pagardewa in Indonesia. The Pipeline Contract adopted, with certain amendments, the standard provisions set out in the 1999 FIDIC Red Book (these standard provisions will be collectively referred to hereafter as "the 1999 FIDIC Conditions of Contract").

5 A dispute arose between the parties regarding 13 variation order proposals submitted by CRW to PGN. In accordance with sub-cl 20.4 of the 1999 FIDIC Conditions of Contract, the dispute was referred to a DAB consisting of a single member, Mr Iain Clark McIntosh ("the Adjudicator"), under a dispute adjudication agreement dated 22 February 2008. [note: 3]

6 In his written decision handed down on 25 November 2008, the Adjudicator awarded a sum of US$17,298,834.57 to CRW. [note: 4] He indicated that the documentary evidence produced by the parties, the access granted to their files and records as well as the witnesses' sworn statements negated the need for an oral hearing. [note: 5]

7 The Adjudicator made a detailed analysis of the construction project undertaken by the parties ("the Project"), including the causes of delay (*eg*, late delivery of pipelines to the site and adverse ground conditions). [note: 6] Although the governing law of the Pipeline Contract was Indonesian law, the Adjudicator referred extensively to common law cases on the various issues raised by the parties [note: 7] and then gave his interpretation of the effect of the parties' amendments to the 1999 FIDIC Conditions of Contract. Having considered the legal and the factual positions, the Adjudicator elaborated on his findings apropos the different heads of claim filed by CRW. Disappointed with the Adjudicator's determination, PGN filed a notice of dissatisfaction (hereafter referred to interchangeably as a "NOD") on 28 November 2008. [note: 8]

8 CRW, on the other hand, issued an invoice dated 3 December 2008 to PGN for the amount awarded by the Adjudicator (*viz*, the sum of US$17,298,834.57). [note: 9] Unsurprisingly, PGN rejected the invoice on the basis that it had filed a NOD and, thus, the Adjudicator's decision was not yet final and binding. It took the position that the parties should attempt an amicable settlement of their dispute in accordance with sub-cl 20.5 of the 1999 FIDIC Conditions of Contract. [note: 10]

9 As the parties could not resolve their differences, CRW filed a request for arbitration ("Request for Arbitration") on 13 February 2009 with the ICC International Court of Arbitration pursuant to sub-cl 20.6 of the 1999 FIDIC Conditions of Contract for the sole purpose of "giving prompt effect to the [Adjudicator's] [d]ecision". [note: 11] In response, PGN filed an answer to CRW's Request for Arbitration ("Answer to Request for Arbitration") dated 24 April 2009 submitting that the Adjudicator's decision was not yet final and binding because it (PGN) had properly issued an NOD; thus, it had no obligation to pay CRW the sum of US$17,298,834.57. [note: 12] PGN also contended that pursuant to sub-cl 20.6 of the 1999 FIDIC Conditions of Contract, the Adjudicator's decision ought to be re-opened by an arbitral tribunal and CRW's request for prompt payment of the aforesaid sum should be rejected. [note: 13]

10 On 3 April 2009, the ICC International Court of Arbitration confirmed the appointments of Mr Neil

Kaplan ("Mr Kaplan"), who was CRW's nominee, and Prof H Priyatna Abdurrasyid ("Prof Abdurrasyid"), who was PGN's nominee, as co-arbitrators of the arbitral tribunal which was to hear the parties' dispute ("the Arbitral Tribunal"). [note: 14] On 30 April 2009, Mr Alan J Thambiayah ("Mr Thambiayah") was appointed as the chairman of the Arbitral Tribunal by the ICC International Court of Arbitration upon the proposal of the ICC's Singapore national committee. [note: 15]

11 At a preliminary meeting held on 1 June 2009, the parties and the Arbitral Tribunal discussed, *inter alia*, whether there was any issue or question which would be appropriate to determine preliminarily. The Arbitral Tribunal, after consideration, gave the following directions on 4 June 2009: [note: 16]

> 1. On the 16th and 17th September 2009[,] the Tribunal [*ie*, the Arbitral Tribunal defined at [10] above] will hear the parties on:
>
> (i) whether [the] Tribunal should rule on the questions identified below as preliminary issues and if the Tribunal decides to rule on such questions as preliminary issues,
>
> (ii) the substantive answers to each question.
>
> …
>
> The Questions:
>
> 1. Whether [CRW is] entitled to immediate payment of the US$17,298,834.57?
>
> 2. If the answer to question 1 above is either yes or no, is [PGN], in this arbitration, entitled to request the Tribunal to open up, review and revise the [Adjudicator's] decision dated 25th November 2008 or any certificate upon which it is based?
>
> If preliminary issue 2 is answered in the positive
>
> The Tribunal will issue appropriate directions, in consultation with the parties, for *inter alia*, service of details or particulars of the parties' case relating to any opening up, review and revision of the [Adjudicator's] decision dated 25th November 2008 and the procedure and timeline for such cases to be heard and determined[,] including production of relevant documents, service of witness statements (including any expert witnesses), service of written opening statements dealing with fact, liability, quantum and law, venue(s) and dates for hearing.

The two questions specified by the Arbitral Tribunal in the above extract – *viz*, (a) whether CRW was entitled to immediate payment of the sum of US$17,298.834.57 awarded by the Adjudicator; and (b) whether PGN was entitled, in the Arbitration, to request the Arbitral Tribunal to open up, review and revise the Adjudicator's decision – will hereafter be referred to as "the First Preliminary Issue" and "the Second Preliminary Issue" respectively, and as "the Preliminary Issues" collectively.

12 On 17 June 2009, pursuant to Art 18 of the ICC Rules of Arbitration in force as from 1 January 1998 ("the ICC Rules of Arbitration"), the parties signed the terms of reference for the Arbitration ("the TOR"). (The TOR was admitted as further evidence for the hearing before this court by way of CRW's application in Summons No 4970 of 2010, which we allowed, with costs to PGN fixed at $500.) The TOR states: [note: 17]

## II. PROVISIONS CONCERNING ARBITRATION AND CHOICE OF LAW

Sub-clauses 20.6 and 1.4 of the [1999 FIDIC] Conditions of Contract, … forming part of the [Pipeline] Contract, provide, relevantly, as follows:

*"20.6 Arbitration*

*Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties*:

(*a*) *the dispute shall be finally settled under the [ICC] Rules of Arbitration …*,

(*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 [of the 1999 FIDIC Conditions of Contract.]*

*The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer* [as defined in sub-cl 1.1.2.4 of the 1999 FIDIC Conditions of Contract]*, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute*.

*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*.

*Arbitration may be commenced prior to or after completion of the Works* [as defined in sub-cl 1.1.5.8 of the 1999 FIDIC Conditions of Contract]*. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works*.

…

…

## VII. STATEMENT OF THE ISSUES TO BE DETERMINED

***Subject to Article 19 of the ICC Rules [of Arbitration], the Arbitral Tribunal shall resolve all issues of fact and law arising from the claims and defences and pleadings as submitted by the Parties, including further submissions which are relevant to the merits of the Parties' respective claims and defen[c]es including, but not limited to, the following issues, as well as any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, may deem necessary to decide for the purpose of rendering its arbitral award*** :

1. Whether [CRW is] entitled to any award/reliefs as claimed or any other relief flowing from

the said claims?

2. Whether [PGN] is entitled to any award/reliefs as claimed or any other relief flowing from the said claims?

3. Whether the [Adjudicator's] decision is binding on and to be given immediate effect by the Parties?

4. Whether the [Adjudicator's] decision is subject to be opened up, reviewed and revised in order to have an accurate and fair conclusion pertaining to the dispute?

5. Whether [CRW] and [PGN] are entitled to the reimbursement of all costs and expenses arising out of these arbitration proceedings, including but not limited to reasonable attorneys' fees?

6. Whether [CRW] and [PGN] are entitled to any other relief?

**VIII ESTIMATED AMOUNT IN DISPUTE**

***The total amount in dispute is presently quantified at US$17,298,834.57 million. The Arbitral Tribunal reserves the right to revise the estimated amount in dispute by taking into account the submissions made by [CRW] and [PGN] in the course of the proceedings*** .

…

**XII APPLICABLE PROCEDURAL RULES AND OTHER MATTERS**

By the execution of these Terms of Reference, the Arbitrators [*ie*, Mr Kaplan, Prof Abdurrasyid and Mr Thambiayah] confirm the acceptance of their appointments.

By the execution of these Terms of Reference, the Parties confirm that, on the date hereof, they have no ground for objecting to the Arbitrators.

***The Parties accept the jurisdiction of the Arbitral Tribunal to hear and adjudicate upon all matters in dispute between them in these arbitration proceedings*** .

The Arbitral Tribunal shall determine the procedure to be followed in these arbitration proceedings subject to the applicable mandatory provisions of any Singapore statute relating to international arbitrations but otherwise in accordance with the ICC Rules [of Arbitration] and shall not be obliged to follow any particular municipal system of procedure.

With the exception of the time limit for the [f]inal [a]ward to be rendered under Article 24 of the ICC Rules [of Arbitration], the Arbitral Tribunal is authorised to impose and, if and when necessary, and after consultation with the Parties, to extend any time limit in these arbitration proceedings.

***The Arbitral Tribunal may make partial and/or interim awards as well as procedural orders if deemed necessary or appropriate*** .

The Parties shall not be bound by strict rules of evidence and may produce evidence in any form permitted by the Arbitral Tribunal. The Arbitral Tribunal shall decide the relevance,

cogency and weight to be given to the evidence.

The Arbitral Tribunal may, at the request of a Party or on its own volition, order a Party to produce documents or records in the possession or within the control of that Party. Any request for production shall identify sufficiently such document and set out the reasons for the request.

A Party who knows that any provisions of, or requirements under, the applicable procedural rules or any direction given by the Arbitral Tribunal has not been complied with, and yet proceeds with the arbitration proceedings without promptly recording any objection to such non-compliance, shall be deemed to have waived its right to object.

…

[underlining, emphasis in italics and emphasis in bold in original; emphasis added in bold italics]

13 After the parties filed their respective memorials on the Preliminary Issues and their respective replies thereto, the hearing of the Preliminary Issues ("the Arbitral Hearing") took place on 16 September 2009. After hearing the parties' arguments, the Arbitral Tribunal reserved its decision.

14 On 24 November 2009, the Majority Members (namely, Mr Thambiayah and Mr Kaplan) issued what they described as a "*final award*" [note: 18] [emphasis added] in favour of CRW (*ie*, the Final Award defined at [1] above). With regard to the First Preliminary Issue, the Majority Members held that PGN had an obligation to make immediate payment of the sum of US$17,298,834.57 to CRW. [note: 19] As for the Second Preliminary Issue (*ie*, whether PGN was entitled to request the Arbitral Tribunal to open up, review and revise the Adjudicator's decision), the Majority Members answered this in the negative. [note: 20] However, they also reserved PGN's right "to commence an arbitration to seek to revise the [Adjudicator's] decision". [note: 21]

15 On 26 November 2009, Prof Abdurrasyid issued a dissenting opinion. [note: 22] He emphasised that the Adjudicator had failed to apply Indonesian law, which was the governing law of the Pipeline Contract, and had also awarded CRW a sum of money in excess of the amount claimed (see also [71] below), which was prohibited under Indonesian law. In Prof Abdurrasyid's view, these factors made a re-examination of the Adjudicator's decision necessary. Further, it was imperative to have a site visit "to understand the real and actual condition of the [P]roject". [note: 23]

16 Having secured the Final Award, CRW promptly applied (via Originating Summons No 7 of 2010) for leave to enforce the Final Award in Singapore as though it were a judgment of a Singapore court. On 7 January 2010, an order of court to that effect ("the Enforcement Order") was made. PGN, on its part, filed separate applications to set aside the Enforcement Order and the Final Award. The former application was adjourned pending the outcome of the latter application.

## The proceedings in the court below

### *The parties' respective submissions before the Judge*

17 At the hearing of its application to set aside the Final Award, PGN submitted that the Final Award ought to be set aside under Arts 34(2)(a)(iii)–34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 ("the Model Law") and s 24(*b*) of the International Arbitration Act (Cap 143A,

2002 Rev Ed) ("the IAA"). In particular, it submitted that:

(a) The Majority Members exceeded their mandate and jurisdiction in converting the Adjudicator's decision into a final award without determining the merits of the parties' underlying dispute and/or without determining whether the Adjudicator's decision had been made in accordance with the provisions of the Pipeline Contract (citing Art 34(2)(a)(iii) of the Model Law).

(b) The arbitral procedure was not in accordance with what the parties had agreed on, which required the merits of the underlying dispute and/or the accordance (or otherwise) of the Adjudicator's decision with the provisions of the Pipeline Contract to be determined prior to the making of a final award (citing Art 34(2)(a)(iv) of the Model Law).

(c) The Majority Members' refusal and/or failure to hear the parties on the merits of the underlying dispute and/or the accordance of the Adjudicator's decision with the provisions of the Pipeline Contract constituted a breach of the rules of natural justice (citing s 24(*b*) of the IAA).

(d) The Adjudicator's decision was not made in accordance with the provisions of the Pipeline Contract as the Adjudicator did not apply the governing law of that contract (*viz*, Indonesian law), and/or added new claims to the claims originally submitted by CRW, thereby double-counting several claims which had previously been settled.

18 We should add that the last of the aforementioned grounds of challenge to the Final Award was briskly (and, in our view, rightly) rejected by the Judge as being outside the scope of s 24(*b*) of the IAA and Art 34(2)(a) of the Model Law (see [10] of the GD). This particular ground of challenge is no longer in issue in the present appeal.

19 CRW, on its part, contended in the court below that PGN's application to set aside the Final Award was substantially an appeal on the merits of that award, which was not permissible. It characterised the parties' dispute on whether PGN was obliged to make immediate payment of the sum of US$17,298,834.57 as "a 'second dispute' between the parties" (see [4] of the GD), and explained that it had commenced the Arbitration for the purpose of resolving that second dispute ("the Second Dispute") in accordance with the 1999 FIDIC Conditions of Contract. [note: 24] Its Request for Arbitration, CRW contended, was strictly limited to the Second Dispute, *ie*, to the issue of whether PGN was obliged to immediately comply with the Adjudicator's decision.

***The Judge's decision***

20 The Judge did not accept CRW's main contention that PGN's application to set aside the Final Award was an appeal on the merits of the Majority Members' decision. In her view, the issue was whether the Majority Members had purported to exercise a power which they did not have under the 1999 FIDIC Conditions of Contract in ordering PGN to make immediate payment of the sum of US$17,298,834.57 to CRW (see [11] of the GD).

21 After a carefully considered analysis of cl 20 of the 1999 FIDIC Conditions of Contract, the Judge set aside the Final Award on the ground that the Majority Members had exceeded the scope of the arbitration provisions in the 1999 FIDIC Conditions of Contract, namely, sub-cll 20.4–20.7 thereof (collectively referred to hereafter as "the 1999 FIDIC Arbitration Provisions" where appropriate). The Judge gave the following explanation for her decision on this point:

(a) The Majority Members had issued a final award on the Second Dispute even though that dispute had not been referred to the Adjudicator as required under the 1999 FIDIC Arbitration

Provisions (see [30]–[31] and [37] of the GD); and

(b) even if the Second Dispute was referable to arbitration, the 1999 FIDIC Arbitration Provisions did not entitle the Arbitral Tribunal to make the Adjudicator's decision final without first hearing the parties on the merits of that decision (see [33]–[37] of the GD).

22 Having decided in favour of PGN on the above ground (which is, in essence, the ground set out in Art 34(2)(a)(iii) of the Model Law), the Judge proceeded to consider PGN's submissions apropos Art 34(2)(a)(iv) of the Model Law and s 24(*b*) of the IAA. She rejected PGN's submissions on both of these provisions – *ie*, she allowed PGN's application to set aside the Final Award based on Art 34(2)(a)(iii) of the Model Law alone.

23 Dissatisfied with the Judge's decision to set aside the Final Award, CRW filed the present appeal.

**Issues arising in this appeal**

24 The issues arising in this appeal are as follows:

(a) What was the Arbitral Tribunal appointed to decide in the Arbitration? (This shall be referred to as "Issue 1".)

(b) What is the structure of the dispute resolution procedure set out in the 1999 FIDIC Conditions of Contract? (This shall be referred to as "Issue 2".)

(c) Was the Final Award issued in accordance with sub-cl 20.6 of the 1999 FIDIC Conditions of Contract? (This shall be referred to as "Issue 3".)

(d) If the answer to Issue 3 is "No":

(i) did the Majority Members act in excess of their jurisdiction ("Issue 4"); and

(ii) was there a breach of the rules of natural justice at the Arbitral Hearing ("Issue 5")?

(f) If the answer to Issue 4 and/or Issue 5 is "yes", should the court exercise its residual discretion to refuse to set aside the Final Award? (This shall be referred to as "Issue 6".)

Before we proceed to analyse these issues, we shall first outline the relevant legal principles apropos the court's discretionary power to set aside international arbitral awards (referred to hereafter as "arbitral awards" *simpliciter* for short).

**The court's discretionary power to set aside arbitral awards**

***Overview***

25 The court's power to set aside an arbitral award is limited to setting aside based on the grounds provided under Art 34 of the Model Law and s 24 of the IAA. As declared by this court in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [59], the current legal framework prescribes that the courts should not without good reason interfere in the arbitral process. This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.

26 However, it has also been said (correctly) that no State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award, or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings (see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2010) at para 7-001).

27 While the Singapore courts infrequently exercise their power to set aside arbitral awards, they will unhesitatingly do so if a statutorily prescribed ground for setting aside an arbitral award is clearly established. The relevant grounds in this regard can be classified into three broad categories (see generally Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) ("*Redfern and Hunter*") at paras 10.30–10.86). First, an award may be challenged on jurisdictional grounds (*ie*, the non-existence of a valid and binding arbitration clause, or other grounds that go to the adjudicability of the claim determined by the arbitral tribunal). Second, an award may be challenged on procedural grounds (*eg*, failure to give proper notice of the appointment of an arbitrator), and, third, the award may be challenged on substantive grounds (*eg*, breach of the public policy of the place of arbitration).

***The grounds for setting aside in the present case***

28 As stated at [22] above, in the court below, the Judge set aside the Final Award pursuant to Art 34(2)(a)(iii) of the Model Law only, relying on the specific ground that the Majority Members had exceeded their jurisdiction. She rejected PGN's arguments that the Final Award could also be set aside based on Art 34(2)(a)(iv) of the Model Law and s 24(*b*) of the IAA. In this appeal, PGN does not dispute the Judge's decision to reject its submissions on Art 34(2)(a)(iv) of the Model Law. Accordingly, we are concerned only with the applicability of Art 34(2)(a)(iii) of the Model Law and s 24(*b*) of the IAA.

*Setting aside based on excess of jurisdiction: Article 34(2)(a)(iii) of the Model Law*

29 Article 34(2)(a)(iii) of the Model Law states:

> An arbitral award may be set aside by the court … only if:
>
> (a) the party making the application furnishes proof that:
>
> …
>
> (iii) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside* …
>
> [emphasis added]

30 In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, this court held (at [44]) that the court had to adopt a two-stage enquiry in assessing whether an arbitral award ought to be set aside under Art 34(2)(a)(iii) of the Model Law. Specifically, it had to determine:

(a) first, what matters were within the scope of submission to the arbitral tribunal; and

(b) second, whether the arbitral award involved such matters, or whether it involved "a new difference … outside the scope of the submission to arbitration and accordingly … *irrelevant to the issues requiring determination*" [emphasis in original] (at [40]).

31 It is useful, at this juncture, to set out some of the legal principles underlying the application of Art 34(2)(a)(iii) of the Model Law. First, 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 had not been submitted to it or failed to decide matters that had been 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 (see Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) at vol 2, pp 2606–2607 and 2798–2799). This ground for setting aside an arbitral award covers only an arbitral tribunal's substantive jurisdiction and does not extend to procedural matters (see Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ("*Singapore Arbitration Legislation*") at p 117).

32 Second, it must be noted that a failure by an arbitral tribunal to deal with *every* issue referred to it will *not* ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. In this regard, the following passage in *Redfern and Hunter* (at para 10.40) correctly summarises the position:

> *The significance of the issues that were not dealt with has to be considered in relation to the award as a whole*. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different. [emphasis added]

33 Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Art 34(2)(a)(iii) of the Model Law (see *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [19]–[22]). In the House of Lords decision of *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221, which concerned an application to set aside an arbitral award on the ground of the arbitral tribunal's "exceeding its powers" (see s 68(2)(b) of the Arbitration Act 1996 (c 23) (UK) ("the UK Arbitration Act")), Lord Steyn made clear (at [24]–[25]) the vital distinction between the erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported exercise by the arbitral tribunal of a power which it did not possess. Only in the latter situation, his Lordship stated, would an arbitral award be liable to be set aside under s 68(2)(b) of the UK Arbitration Act on the ground that the arbitral tribunal had exceeded its powers. In a similar vein, Art 34(2)(a)(iii) of the Model Law applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute (see above at [31]).

34 Based on the above principles, the challenge under Art 34(2)(a)(iii) of the Model Law to the Final Award in the present case involves the determination of:

(a) whether the Majority Members had the power under the TOR – in particular, under sub-cl 20.6 of the 1999 FIDIC Conditions of Contract, which forms part of the TOR (see [12] above) – to issue the Final Award without opening up, reviewing and revising the Adjudicator's decision;

and

(b) if the Majority Members did not have such power, whether their conduct in acting in excess of their jurisdiction caused real or actual prejudice to PGN.

*Setting aside based on breach of the rules of natural justice: Section 24(b) of the IAA*

35 Section 24(*b*) of the IAA provides that notwithstanding Art 34(1) of the Model Law, an arbitral award can be set aside if a breach of the rules of natural justice occurred in connection with the making of the award, by which the rights of any party have been prejudiced. In this regard, Art 18 of the Model Law provides that the parties to an arbitration shall be treated with equality and each party shall be given a full opportunity of presenting his case.

36 As noted in *Soh Beng Tee* at [63], the appointed arbitrator will usually be an expert in the field of law and/or trade that is the subject of dispute, and the parties intend to rely on his expertise to obtain a sound and expeditious decision. The courts, therefore, must not blindly and/or mechanically apply the rules of natural justice so as to require every conclusion that the arbitrator intends to make to be put to or raised with the parties (see also David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd Ed, 2010) at para 16.28). As stated in *Singapore Arbitration Legislation* at p 65, a mere failure by an arbitrator to act as efficiently as he might or a minor divergence from the procedural rules established by the parties is not of itself sufficient to justify a remedy for breach of the rules of natural justice. An arbitrator is perfectly entitled to adhere to procedural rules agreed to by the parties or adopted by the arbitrator himself *within his powers*.

37 To set aside an arbitral award under s 24(*b*) of the IAA, the court has to be satisfied, first, that the arbitral tribunal breached a rule of natural justice in making the arbitral award. Second, and more importantly, the court must then be satisfied that the breach of natural justice caused *actual or real prejudice* to the party challenging the award. In other words, the breach of the rules of natural justice must have actually altered the final outcome of the arbitral proceedings in some meaningful way before curial intervention is warranted. Where the same result could or would ultimately have ensued even if the arbitrator had acted properly, there would be no basis for setting aside the arbitral award in question (see *Soh Beng Tee* at [29] and [82]–[91]).

38 As in the preceding section *vis-à-vis* challenging the Final Award based on Art 34(2)(a)(iii) of the Model Law (see [34] above), the pertinent questions where challenging the Final Award based on s 24(*b*) of the IAA is concerned are: (a) whether the Majority Members breached any rule of natural justice in making the Final Award without opening up, reviewing and revising the Adjudicator's decision; and, (b) if they did commit such a breach, whether the breach caused actual or real prejudice to PGN.

39 Having set out the broad legal principles above, we can now turn to analyse the issues which we have identified (at [24] above) as being the relevant issues in this appeal.

**Issue 1: The matters which the Arbitral Tribunal was appointed to decide**

40 We begin with Issue 1, *viz*, the issue of what matters the Arbitral Tribunal was appointed to decide in the Arbitration.

41 As mentioned at [9] above, CRW filed its Request for Arbitration pursuant to sub-cl 20.6 of the 1999 FIDIC Conditions of Contract. However, it expressly stated in its Request for Arbitration that the ambit of the Arbitration was "limited to giving prompt effect to the [Adjudicator's] [d]ecision", [note:

25] and framed the issue to be decided by the Arbitral Tribunal as follows: [note: 26]

> 13. [CRW] seeks arbitration in relation to [PGN]'s failure to give effect to the [Adjudicator's] [d]ecision dated 25 November 2008[,] which decision is binding on [CRW] and [PGN], whereby [PGN] has failed to perform payment amounting to US$17,298,834.57 (seventeen million two hundred ninety eight thousand eight hundred thirty four United States Dollars and fifty seven cents) to [CRW].
>
> 14. *This request for arbitration shall be limited to giving prompt effect to the [Adjudicator's] [d]ecision dated 25 November 2008 in which instance shall be the fulfillment of [PGN's] obligation to perform payment of the US$17,298,834.57 (seventeen million two hundred ninety eight thousand eight hundred thirty four United States Dollars and fifty seven cents) to [CRW]*.
>
> 15. As the request for arbitration is limited to giving prompt effect to the [Adjudicator's] decision dated 25 November 2008[,] hence we propose that the [A]rbitration be performed pursuant to the Document Only Arbitration Method.
>
> [emphasis added]

42 PGN firmly rejected CRW's position in its Answer to Request for Arbitration. PGN submitted, *inter alia*, that it had no obligation to pay the US$17,298,834.57 awarded by the Adjudicator because it had validly submitted a NOD, which rendered the Adjudicator's decision "not yet final and binding". [note: 27] PGN contended that, therefore, the Arbitral Tribunal ought to open up, review and revise the Adjudicator's decision, as well as hear the relevant witnesses and experts to obtain actual information and evidence pertinent to the parties' dispute in accordance with sub-cl 20.6 of the 1999 FIDIC Conditions of Contract. [note: 28] It emphatically stated that the Arbitral Tribunal "[could] not and [should] not deliberate the current dispute merely based on [the Adjudicator's] [d]ecision". [note: 29]

43 Subsequent to the directions given by the Arbitral Tribunal on 4 June 2009 (see [11] above), the parties signed the TOR on 17 June 2009 (see [12] above). The TOR stated clearly that the Arbitration was commenced pursuant to sub-cl 20.6 of the 1999 FIDIC Conditions of Contract. Further, it is plain that under the TOR, the Arbitral Tribunal was, by the parties' consent, conferred an unfettered discretion to reopen and review each and every finding by the Adjudicator. In other words, the Arbitral Tribunal was appointed to decide not only whether CRW was entitled to immediate payment of the sum of US$17,298,834.57 (*viz*, the First Preliminary Issue defined at [11] above), but also "any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, [might] deem necessary to decide for the purpose of rendering its arbitral award". [note: 30] With this crucial factual backdrop in mind, we now turn to consider Issue 2, *viz*, the structure of the dispute resolution procedure prescribed in the 1999 FIDIC Conditions of Contract.

**Issue 2: The dispute resolution procedure under the 1999 FIDIC Conditions of Contract**

44 The dispute between the parties centred on the construction of the dispute resolution provisions in the 1999 FIDIC Conditions of Contract, in particular, on sub-cll 20.4–20.7 thereof (*viz*, the 1999 FIDIC Arbitration Provisions defined at [21] above). These sub-clauses outline the process of referring a dispute to a DAB and, subsequently (where applicable), to arbitration as follows:

> 20.4 Obtaining [DAB]'s Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

…

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. ***The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below*** . Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [*Failure to Comply with [DAB]'s Decision*] and Sub-Clause 20.8 [*Expiry of [DAB]'s Appointment*] neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

20.5 Amicable Settlement

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

20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding ***shall be finally settled by international arbitration*** . Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the [ICC] Rules of Arbitration …,

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

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

***The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute*** . Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

***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 [DAB]'s Decision

In the event that:

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

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

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

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

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

45 It can be seen from the foregoing that the dispute resolution procedure under the 1999 FIDIC Conditions of Contract envisages a dispute being referred to a DAB first, with arbitration being resorted to only if there is dissatisfaction with the DAB's decision which the parties are unable to resolve amicably. Accordingly, in the analysis which follows, we shall consider dispute resolution by a DAB first, before turning to dispute resolution by arbitration.

***Dispute resolution by a DAB***

*The character of a DAB*

46 In Cyril Chern, *Chern on Dispute Boards: Practice and Procedure* (Blackwell Publishing, 2008) ("*Chern*"), the general nature of a DAB is succinctly summarised (at p 2) thus:

A dispute board is a 'job-site' dispute adjudication process, typically comprising three independent and impartial persons selected by the contracting parties. The significant difference between dispute boards and most other alternative dispute review techniques ... is that the dispute board is appointed at the commencement of a project *before* any disputes arise, and by undertaking regular visits to the site[,] it is actively involved throughout the project (and possibly any agreed

period thereafter). [emphasis in original]

47 *Chern* elaborates (at p 192) on the inquisitorial nature of a hearing conducted by a DAB:

> Dispute boards are slightly different [from courts] in that the normal rules of evidence do not generally apply. Indeed, dispute boards operate from a different principle in that … dispute boards are not based upon any principle of fairness in the presentation of evidence. While it is true that the vast majority of dispute board chairs follow the niceties of listening patiently to the parties and witnesses and allowing most documents to be presented, i.e. giving the parties a 'fair shake' in presenting their evidence, *the fact remains that dispute boards are not courts – they are inquisitorial by contractual agreement. This allows the dispute board to actually go out and obtain its own evidence, if necessary, to make its decisions or determinations. In this regard the dispute board chair usually determines in what order the witnesses should proceed after being presented with a 'proposed' list of witnesses and evidence to be adduced*. Evidence is handled, in most cases, in a similar fashion to an arbitration proceeding or a court proceeding, however, in that the party proposing that some document be shown to the dispute board should first share it with the other party, and if possible, obtain [the latter's] consent to that document being used as a piece of evidence. Once this document (or piece of evidence) has been shown to the other party, either during or before the hearing commences, the party offering it should give it a number for ease of reference and present it to the dispute board for … inclusion in the group of exhibits [for] the hearing. [emphasis added]

48 In short, the DAB is not bound by any fixed rules of procedure, and is able to adopt the most appropriate method in making its determination (such as conducting a hearing or undertaking an inquisitorial process), subject to the general requirements of: (a) acting fairly and reasonably; and (b) giving each party a reasonable opportunity to advance its case and to respond to the other party's case. Indeed, the DAB may even do without an oral hearing if it believes that such a hearing is unnecessary, unless one or both of the parties request for it (see Susanne Kratzsch, "ICC Dispute Resolution Rules: ICC dispute boards and ICC Pre-Arbitral Referees" (2010) 26 Constr LJ 87 at p 94).

*The status of a DAB decision*

49 In the present case, the status or effect of a DAB decision under the 1999 FIDIC Conditions of Contract formed the crux of the dispute in the Arbitration. Sub-clause 20.4 of the 1999 FIDIC Conditions of Contract provides that a decision of a DAB shall be "binding" on the parties, who shall "promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award".

5 0 *Chern* remarks (at p 5) that a DAB decision has *interim binding effect*, as opposed to a decision of a dispute *review* board, which only serves as a non-binding recommendation. According to *Chern* (likewise at p 5):

> *[T]he interim-binding decision [of a DAB] has meaning in that the [DAB]'s decision is contractually to be implemented immediately – even if one or other party is unhappy. Thus the "losing 'party' will be in breach of contract if it does not pay/grant time in accordance with the [DAB] decision*. [emphasis added]

While it is generally accepted that a DAB decision has interim binding effect, the mode of enforcing such a binding decision has been the subject of much debate and, unsurprisingly, no little controversy. In Ugo Draetta, "Dispute Resolution in International Construction-Linked Contracts" (2011) 1 IBLJ 69, the author assesses the effect of a DAB decision as follows (at p 80):

> The members of a Dispute Board [which, in the context of this quote, may be either a DAB or a dispute review board] are not arbitrators. *Neither their recommendations, even when they eventually become contractually binding, nor their decisions have the nature of arbitral awards as they cannot be enforced as such according to the 1958 New York Convention* [*ie*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting]. A clause contemplating a dispute board cannot thus be conceived as the only dispute resolution clause in a construction contract, without providing for … recourse to arbitration (or to ordinary jurisdiction). [emphasis added]

51 A binding decision is one that has an obligatory effect. 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. Where a DAB decision is concerned, the decision remains binding and has contractual force even if a NOD is filed. But, the decision is not conferred the status of a final decision. It does not have the status of finality that an arbitral award has under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting ("the New York Convention"). *Vis-à-vis* arbitral awards to which the New York Convention applies, our courts have little choice but to recognise and enforce such awards unless one or more of the grounds prescribed in Art V of the New York Convention for refusing to recognise and enforce an arbitral award exist (see ss 29 and 31 of the IAA). In contrast, a DAB decision is not a final award or decision in the conventional sense as the entire underlying dispute which gave rise to the decision can be reheard if and when it is referred to arbitration pursuant to the scheme set out in the 1999 FIDIC Conditions of Contract.

52 Since there is no treaty or legislation based on which a DAB decision may be enforced, any avenue of enforcement of a DAB decision is dependent on the terms of the contract between the parties (see Doug Jones, "Dealing with Multi-Tiered Dispute Resolution Process" (2009) 75 Arbitration 188 at pp 193–194). In the present case, CRW sought to rely on sub-cl 20.6 of the 1999 FIDIC Conditions of Contract to enforce the Adjudicator's decision by commencing the Arbitration for the sole purpose of giving prompt effect to that decision. The crucial question is whether, under sub-cl 20.6, the Majority Members could issue a *final* award without first considering the merits of PGN's NOD by opening up, reviewing and revising the merits of the Adjudicator's decision. This requires a consideration of the arbitration regime set out in the 1999 FIDIC Conditions of Contract, to which we now turn.

***Arbitration under the 1999 FIDIC Conditions of Contract***

53 Sub-clause 20.6 of the 1999 FIDIC Conditions of Contract provides that any DAB decision which has not become final and binding "shall be ***finally*** *settled by international arbitration*" [emphasis added in italics and bold italics]. It further provides that neither party shall be limited in the arbitral proceedings to the evidence or arguments previously presented to the DAB or to the reasons for dissatisfaction stated in the NOD filed. Prof Nael G Bunni ("Prof Bunni"), a leading arbitrator in international dispute resolution concerning construction disputes, has written an authoritative commentary, "The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works" [2005] ICLR 272 ("Prof Bunni's article"), in which he argues (at p 280) that since the parties to an arbitration under sub-cl 20.6 of the 1999 FIDIC Conditions of Contract can make new submissions before the arbitral tribunal, the case presented to the arbitral tribunal could be an entirely different one from that examined by the DAB. Prof Bunni suggests, therefore, that sub-cl 20.6 is "not intended to be an appeal but a fresh submission that would lead to a new case" (at p 280), with the arbitral tribunal discharging not an appellate or confirmatory role, but a fresh adjudicatory role in the new case

presented to it. However, Prof Bunni also maintains (correctly, in our view) that pending the arbitral tribunal's adjudication, there should be compliance with the DAB decision.

54 A similar view has been cogently expressed in Ellis Baker *et al*, *FIDIC Contracts: Law and Practice* (Informa, 2009) as follows:

> 9.214 *Arbitration of the dispute is not an appeal on the DAB's decision but a rehearing of the dispute*. In this context, the *FIDIC Guide*, however, notes that "Arbitrator(s) may regard a well-reasoned decision as persuasive, especially if it was given by a DAB with direct knowledge of how a Party was affected by the event or circumstance relevant to the dispute".
>
> 9.215 The second paragraph of Sub-Clause 20.6 … grants the arbitral tribunal the "full power to open up, review and revise any certificate, determination, instruction, opinion and valuation of the [contract administrator], and any decision of the [DAB …] relevant to the dispute". *It therefore follows that the arbitral tribunal has the power to revise, not only the decision of the DAB which is the subject of the notice of dissatisfaction, but other decisions of [the] DAB provided th[ey] are "relevant to the dispute". Although not stated expressly, it is suggested that the arbitral tribunal may not revise any decision of the DAB which has become final and binding upon both Parties*.
>
> 9.216 It is frequently the case that the respondent party in an arbitration may wish to include counterclaims. Counterclaims are permitted by the ICC Rules [of Arbitration]. It is, however, suggested that the dispute to which the counterclaim relates must first have been referred to the DAB and that the counterclaim relates either to the enforcement of the decision of the DAB on that dispute under Sub-Clause 20.7 … or notice of dissatisfaction has been given in relation to that decision, the period for amicable settlement under Sub-Clause 20.5 … has elapsed, and the counterclaim is advanced in the arbitration by way of a rehearing of that decision of the DAB under Sub-Clause 20.6 …
>
> [emphasis added]

55 Where a DAB decision is not challenged within the prescribed time period of 28 days provided for in sub-cl 20.4 of the 1999 FIDIC Conditions of Contract, it becomes *final and binding* on the parties. In such a situation, pursuant to sub-cl 20.7 of the 1999 FIDIC Conditions of Contract, non-compliance with the DAB decision can be referred to arbitration for the sole purpose of enforcement. As stated in Jeremy Glover & Simon Hughes, *Understanding the New FIDIC Red Book: A Clause-by-Clause Commentary* (Sweet & Maxwell, 2006) ("*Understanding the New FIDIC Red Book*") at para 20-053:

> Where a decision of the DAB has not been complied with and no notice of dissatisfaction [has been] served, the other party is entitled to arbitrate and need not attempt an amicable settlement. This provision gives force to the DAB. It is envisaged that arbitration proceedings commenced for the enforcement of a DAB decision will be relatively quick. The arbitrator will be asked, in effect, to give summary judgment to enforce that DAB decision.
>
> In situations, however, where a notice of dissatisfaction has been served by a party and that party also refuses to comply with the DAB's decision (contrary to the clear provisions of cl. 20.4) then there appears to be a gap in cl. 20.7, as first identified by Professor Nael Bunni [see Prof Bunni's article at, *inter alia*, p 272].
>
> *Sub-clause 20.7 only deals with the situation where both parties are satisfied with the DAB*

*decision. If not (i.e. if a Notice of Dissatisfaction has been served) then there is no immediate recourse for the aggrieved party to ensure the DAB decision can be enforced*.

[emphasis added]

56 Prof Bunni's article penetratingly analyses the situation where a DAB decision has not become final and binding, and the party against whom the decision was made fails to comply with it (this is the "gap" which is the subject matter of that article). Prof Bunni's article points out (at p 276) that in such a case, there is no remedy offered by cl 20 of the 1999 FIDIC Conditions of Contract, other than that of treating the non-compliant party as being in breach of contract and, accordingly, liable for damages. The drawback of this method of recourse is that the DAB decision becomes of little immediate value. Sub-clause 20.7 of the 1999 FIDIC Conditions of Contract is of no assistance to the aggrieved party in this scenario (*ie*, where there is non-compliance with a binding but non-final DAB decision) as it applies only to DAB decisions which have become final and binding.

57 Both Prof Bunni and the learned authors of *Understanding the New FIDIC Red Book* did not consider the decision in ICC International Court of Arbitration Case No 10619 ("ICC Case No 10619"), which, although rendered in 2001, was published only in 2008. In ICC Case No 10619, the claimant contractor entered into two separate contracts with the respondent employer for the construction of roads. The contracts incorporated the provisions set out in FIDIC's *Conditions of Contract for Works of Civil Engineering Construction* (4th Ed, 1987) ("the 1987 FIDIC Red Book"). The engineer made certain decisions ordering payment by the employer to the contractor, but the employer did not comply with those decisions. Subsequently, the contractor filed a Request for Arbitration with the ICC International Court of Arbitration pursuant to cl 67 of the 1987 FIDIC Red Book. The contractor claimed damages based on several complaints, including the employer's failure to grant funding for the project and possession of the site, as well as the employer's "failure to give effect to [the] Engineer's decision[s] pursuant to sub-clause 67.1 of the [1987 FIDIC Red Book]" (see para 4(e) of the interim award made in ICC Case No 10619). It should be noted that prior to filing its Request for Arbitration, the contractor had also issued a NOD in respect of the engineer's decisions (*ie*, the contractor, although dissatisfied with the engineer's decisions, was at the same time seeking to enforce those decisions).

58 The relevant portion of sub-cl 67.1 of the 1987 FIDIC Red Book provides that:

> … [T]he Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised … in an amicable settlement or an arbitral award.

59 After the contractor's Request for Arbitration and the employer's Answer to Request for Arbitration were filed, the contractor declared its intention to request the arbitral tribunal to render an interim award to the following effect (see para 6 of the interim award made in ICC Case No 10619):

> (i) declaring that the [employer] must give effect to the Engineer's Decision[s] pursuant to sub-clause 67.1 [of the 1987 FIDIC Red Book] regardless of the pending arbitration, and (ii) ordering the [employer] to immediately pay the amounts determined by the Engineer as an advance payment of any further payment which would result [*sic*] due by the [employer] pursuant to the final award.

60 The arbitral tribunal granted an *interim award* in respect of two of the engineer's decisions on the ground that this was simply a matter of contract law (it rejected, however, the contractor's

request for an interim award in respect of two other decisions of the engineer on the ground that those decisions had been rendered out of time). The arbitral tribunal explained its decision as follows in the interim award:

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

61 The arbitral tribunal in ICC Case No 10619 thus astutely made it clear that enforcing the engineer's decisions by way of an interim award would not prejudice the employer's right to argue later in the *same* arbitration that those decisions were wrong and that the corresponding amounts which the engineer had ordered to be paid to the contractor should be repaid to the employer. The arbitral tribunal subsequently released a final award which examined fully the merits of the parties' dispute.

62 In Christopher R Seppälä, "Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's decision under the FIDIC Conditions" [2009] ICLR 414 ("Seppälä's article"), the author suggests (at p 424) that the arbitral tribunal in ICC Case No 10619:

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

The author argues (at p 426) that the same result should be reached in the case of a DAB decision under cl 20 of the 1999 FIDIC Conditions of Contract because the relevant language of that clause is essentially the same as that of cl 67 of the 1987 FIDIC Red Book.

63 Accordingly, Seppälä's article suggests (correctly, in our view) that even if either party has issued a NOD with respect to a DAB decision pursuant to sub-cl 20.4 of the 1999 FIDIC Conditions of Contract, each party is bound to give effect to that decision (which will be binding but non-final by virtue of the NOD(s) 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, as stated at para 9.220 of *FIDIC Contracts: Law and Practice*, 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 NOD 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 1999 FIDIC Conditions of Contract) a claim for an interim award to enforce the DAB decision pending the final resolution of the dispute by the arbitral tribunal.

64 Subsequent to the publication of the decision in ICC Case No 10619, the Dispute Board Federation, an organisation founded to promote the use of dispute boards as a means of dispute avoidance on large infrastructure projects in developing countries, [note: 31] published on its website a special edition of its newsletter dated September 2010 ("the September 2010 DBF newsletter") highlighting another recent decision of the ICC International Court of Arbitration. [note: 32] In that decision, the arbitral tribunal was concerned with the enforcement of two binding but non-final DAB decisions rendered under a slightly amended version of the 1999 FIDIC Conditions of Contract. The DAB decisions were effectively obtained *ex parte* by the contractor in its favour as the employer had continually refused to participate in any stage of the DAB process. The employer then served a notice of dissatisfaction against the DAB decisions and proceeded to refer its own disputes to arbitration. The contractor counterclaimed for damages by relying on the DAB decisions and applied for bifurcation of the arbitral proceedings, seeking a partial award that, *inter alia*, the DAB decisions were binding and enforceable against the employer. (The contractor sought a *partial* award instead of an *interim* award because the former was considered to be more straightforward than the latter where enforcement in the courts of the employer's jurisdiction was concerned.)

65 The arbitral tribunal agreed with the contractor's primary argument that the DAB decisions were enforceable under a *partial* award. In reaching that conclusion, the arbitral tribunal made it very clear that the subject matter of the DAB decisions could be opened up, reviewed and revised by the arbitral tribunal subsequently in the *same* arbitration in accordance with the express power to do so as granted by sub-cl 20.6 of the 1999 FIDIC Conditions of Contract.

66 In the light of the foregoing, it seems quite plain to us that a reference to arbitration under sub-cl 20.6 of the 1999 FIDIC Conditions of Contract in respect of a binding but non-final DAB decision is clearly in the form of a rehearing so that the entirety of the parties' dispute(s) can *finally* be resolved afresh. While there is a theoretical gap in the immediate enforceability of such a DAB decision under the 1999 FIDIC Conditions of Contract, both ICC Case No 10619 and the case mentioned in the September 2010 DBF newsletter suggest that the practical response is for the successful party in the DAB proceedings to secure an interim or partial award from the arbitral tribunal in respect of the DAB decision pending the consideration of the merits of the parties' dispute(s) in the same arbitration.

67 In addition, we note an important point which was not considered in the court below. Where a NOD has been validly filed against a DAB decision by one or both of the parties, and either or both of the parties fail to comply with that decision (which, by virtue of the NOD(s) filed, will be binding but non-final), sub-cl 20.6 of the 1999 FIDIC Conditions of Contract requires the parties to finally settle their differences in the *same* arbitration, both in respect of the non-compliance with the DAB decision and in respect of the merits of that decision. In other words, sub-cl 20.6 contemplates a single

arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved. The respondent to the proceedings may raise the issues which it wishes the arbitral tribunal to consider either in its defence and or in the form of a counterclaim. There is no particular doctrine or rule that the respondent can only dispute a binding but non-final DAB decision by way of a counterclaim. Even if both parties were to file NODs in respect of the DAB decision, all the disputes have to be resolved in one consolidated arbitration.

68 This observation is consistent with the plain phraseology of sub-cl 20.6, which requires the parties' dispute in respect of any binding DAB decision which has yet to become final to be "finally settled by international arbitration". Sub-clause 20.6 clearly does not provide for separate proceedings to be brought by the parties before different arbitral panels even if each party is dissatisfied with the same DAB decision for different reasons.

**Issue 3: Whether the Final Award was issued in accordance with sub-clause 20.6 of the 1999 FIDIC Conditions of Contract**

69 We move on now to Issue 3, *viz*, whether the Final Award was issued in accordance with sub-cl 20.6 of the 1999 FIDIC Conditions of Contract. This turns on whether the Majority Members had the power to issue the Final Award without opening up, reviewing and revising the Adjudicator's decision (see [34] and [52] above).

***The parties' arguments before the Arbitral Tribunal***

70 In its memorial dated 13 July 2009, CRW argued that PGN was not entitled to request the Arbitral Tribunal to open up, review and revise the Adjudicator's decision. It submitted that the scope of the Arbitration was limited to giving prompt effect to the Adjudicator's decision as reflected in its Request for Arbitration (see above at [9]). As PGN had not submitted a counterclaim, its request to open up, review and revise the Adjudicator's decision should be rejected. [note: 33] We should also point out that CRW initially challenged the validity of PGN's NOD on the basis that it had not been properly submitted. [note: 34] However, at the commencement of the Arbitral Hearing, CRW retracted that objection.

71 In contrast to the position taken by CRW, PGN, in its memorial dated 10 July 2009, set out in a detailed manner the Arbitral Tribunal's power to: (a) open up, review and revise the Adjudicator's decision; (b) hear the relevant witnesses and experts in order to obtain actual information and material evidence; and (c) independently determine the actual payment that either party had to make to the other. [note: 35] PGN elaborated at length on the alleged errors in the Adjudicator's decision (*eg*, it argued that the decision was not made in accordance with the governing law of the Pipeline Contract, which was Indonesian law, as the Adjudicator had referred extensively to common law cases and had not referred to Indonesian law at all). [note: 36] In addition, PGN alleged that the Adjudicator had failed to observe factual conditions, and had also failed to afford PGN a reasonable opportunity to present its case as he had accepted the evidence of a representative of CRW without giving PGN the chance to respond to that evidence. [note: 37] Importantly, PGN also referred to various underlying documents to submit that the Adjudicator had strangely expanded CRW's claim from US$13,955,634 to US$17,298,834.57 as a result of several erroneous instances of double-counting. [note: 38] Based on the above factors, PGN submitted that the Arbitral Tribunal ought to grant its request to open up, review and revise the Adjudicator's decision. [note: 39]

72 The parties resolutely maintained their respective positions in their reply memorials and also

during the Arbitral Hearing on 16 September 2009 (save for a crucial concession made by CRW (see below at [87])).

***The Final Award***

73 After the Arbitral Hearing on 16 September 2009, the Majority Members issued the Final Award on 24 November 2009. It is noteworthy that the Majority Members acknowledged (at para 25 of the Final Award) that the dispute had been referred to arbitration under sub-cl 20.6 of the 1999 FIDIC Conditions of Contract.

74 With regard to the First Preliminary Issue, the Majority Members analysed sub-cll 20.4–20.6 of the 1999 FIDIC Conditions of Contract and stated thus in the Final Award: [note: 40]

> 37. Having considered clause 20 as a whole, the Tribunal [*ie*, the Majority Members] is unable to find any ambiguity warranting the Tribunal other than to give the words their plain and ordinary meaning.
>
> 38. Binding means obligatory. To be bound means to be compelled or obliged by a covenant or promise or [to] be subject to a legal obligation to do an act. ***Final means conclusive or unalterable*** .
>
> 39. It is of significance that the sentence in the fourth paragraph of [sub-clause] 20.4 … refers to "*binding*" and does not mention the word "*final*". The reason for this is because [sub-]clause 20.4 foresees the possibility of an arbitral award which may vary the DAB decision. On this basis, it [*ie*, the DAB decision] is not final. This is in sharp contradistinction to the last paragraph of [sub-clause] 20.4 which juxtaposes both "*final*" and ["]*binding*" but that is in the situation where no notice of dissatisfaction has been served and thus the binding decision becomes also a final one in that it is then unalterable.
>
> 40. Having set out what is meant by "*binding*" and "*final*", the Tribunal now must turn to consider whether the words "*unless and until it shall be revised in an arbitral award*" affect or deviate from the binding nature of a DAB decision.
>
> 41. The fourth sentence of the fourth paragraph of [sub-]clause 20.4 makes it abundantly clear that the binding nature of a DAB decision remains and has to be given prompt effect, and the decision can only be varied by a subsequent amicable settlement or arbitral award.
>
> 42. [PGN]'s submissions have the effect of rendering a DAB decision of no binding effect whatsoever until an arbitral award. Such an interpretation is the complete opposite of what the fourth sentence of the fourth paragraph of [sub-]clause 20.4 says.
>
> [emphasis in original in italics; emphasis added in bold italics]

75 It can be seen from the above extract that the Majority Members were clearly aware of the distinction between a final and binding DAB decision and a binding but non-final DAB decision. The Majority Members concluded (at para 45 of the Final Award) that PGN had an obligation to make immediate payment of the sum of US$17,298,834.57 to CRW.

76 As for the Second Preliminary Issue (*ie*, whether PGN was entitled to request the Arbitral Tribunal to open up, review and revise the Adjudicator's decision), the Majority Members placed emphasis (at paras 48–51 of the Final Award) on the fact that PGN had not served any counterclaim.

They considered PGN's request for a review of the Adjudicator's decision to be merely a defence to CRW's claim for immediate payment, which defence was untenable. The Majority Members reasoned as follows in the Final Award: [note: 41]

> 47. In paragraph 35 of its Answer [to Request for Arbitration], [PGN] also requests for an award
>
> > *"v. To open up review and revise the [Adjudicator's] decision, as well as to hear relevant witnesses and experts to obtain actual information and evidence relevant to the dispute"*.
>
> 48. [PGN] has not served any counterclaim.
>
> 49. In his email of … 8th May 2009 counsel for [PGN] stated:
>
> > *"… we would like to clarify that we are not submitting any counterclaim(s) in our Answer dated 24 April 2009. Please note that our response to the relief sought as provided in paragraph 35 pages 10 and 11 of our Answer does not contain any counterclaim(s) filed against [CRW]. In addition, our response to the relief sought cannot be deemed [as] containing counterclaim(s) since we did not elaborate any counterclaim(s) in accordance with the provision of article 5 paragraph 5 of [the] ICC Rules [of Arbitration,] which provides that any counterclaim(s) made by [PGN] shall provide (a) a description of the nature and circumstances of the dispute giving rise to the counterclaim(s); and (b) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) counterclaimed."* (emphasis provided).
>
> 50. The Arbitral Tribunal [*ie*, the Majority Members] concurs with [PGN]'s counsel.
>
> 51. ***It follows that [PGN's] Answer and [PGN]'s request for an award to open up, review and revise the [Adjudicator's] decision is but a defence to the claim for immediate payment of US$17,298,834.57. For all the reasons set out above, this defence must also fail and the Arbitral Tribunal FINDS accordingly*** .
>
> ***This does not in any way affect [PGN]'s right to commence an arbitration to seek to revise the [Adjudicator's] decision. The Arbitral Tribunal notes that [CRW has] expressly agreed that [PGN] may do so*** .
>
> [emphasis in original in italics; emphasis added in bold italics]

77 The Majority Members thus decided that the answer to the Second Preliminary Issue was "no", although they reserved PGN's right to commence a fresh arbitration to revise the Adjudicator's decision. The Majority Members concluded at para 53 of the Final Award: [note: 42]

> In the light of the [Majority Members'] findings and the answers to the two questions [*ie*, the Preliminary Issues defined at [11] above], ***there is nothing further to be dealt with in this arbitration*** and *[CRW is] entitled to a* ***final award*** *on [its] claims*. [emphasis added in italics and bold italics]

78 In our view, the emphasised part of the above quote sets out the crucial difference between the Arbitration in the present case and the other two ICC International Court of Arbitration cases referred to above at [57]–[66], where an interim or partial award was granted to enforce binding but non-final DAB decisions. Despite purporting to reserve PGN's right to commence fresh arbitration

proceedings to open up, review and revise the Adjudicator's decision, the fact remains that the Arbitration concluded with the Majority Members making the *Final Award* upholding that decision without an examination of its merits.

79 We find it difficult to understand why the Majority Members ignored the clear language of sub-cl 20.6 of the 1999 FIDIC Conditions of Contract to "finally [settle]" the dispute between the parties and instead abruptly enforced the Adjudicator's decision (by way of the Final Award) without reviewing the merits of that decision. What the Majority Members ought to have done, in accordance with the TOR (and, in particular, sub-cl 20.6 of the 1999 FIDIC Conditions of Contract), was to make a n *interim* award in favour of CRW for the amount assessed by the Adjudicator (or such other appropriate amount) and then proceed to hear the parties' substantive dispute afresh before making a *final* award.

80 Accordingly, our answer to Issue 3 is "no" – *ie*, the Final Award was not issued in accordance with sub-cl 20.6 of the 1999 FIDIC Conditions of Contract. This in turn raises the question of whether the Majority Members exceeded their jurisdiction in making the Final Award (which is Issue 4) and whether they breached the rules of natural justice (which is Issue 5). If Issue 4 is answered in the affirmative, the Final Award may be set aside under Art 34(2)(a)(iii) of the Model Law, whilst if Issue 5 is answered in the affirmative, the Final Award may be set aside under s 24(*b*) of the IAA.

**Issue 4: Whether the Majority Members exceeded their jurisdiction in making the Final Award**

***CRW's waiver/estoppel argument apropos Issue 4***

81 Before we consider Issue 4, it is necessary to briefly deal with a preliminary point raised by CRW, namely: PGN had not raised any jurisdictional objections before the Arbitral Tribunal and, therefore, it had (according to CRW) waived its right to object to the Arbitral Tribunal's lack of jurisdiction and/or was estopped from raising this objection before the Judge. [note: 43] In our view, this argument is entirely misconceived. From the time PGN filed its Answer to Request for Arbitration, it steadfastly objected to CRW's submission that the Arbitral Tribunal had the authority or power to limit the scope of the Arbitration to giving prompt effect to the Adjudicator's decision without going into the merits of that decision. We need say no more on this.

***Our ruling on Issue 4***

82 Given what we have said earlier about the structure of the dispute resolution procedure under the 1999 FIDIC Conditions of Contract, we are of the view that the Majority Members simply did not have the power under sub-cl 20.6 to issue the Final Award in the manner that they did, *ie*, without assessing the merits of PGN's defence and of the Adjudicator's decision as a whole. As we have shown above (at [53]–[54]), an arbitration commenced under sub-cl 20.6 constitutes a rehearing, which in turn allows the parties to have their dispute "finally settled" in that arbitration. The Majority Members clearly ignored sub-cl 20.6 (and, indeed, the TOR as a whole), and fundamentally altered the terrain of the entire proceedings as well as the arbitral award which would have been issued if they had reviewed the merits of the Adjudicator's decision (regardless of what the final outcome might have been).

83 The Majority Members did not say in the Final Award that there were no merits in PGN's grounds for refusing to make payment of the sum of US$17,298,834.57 to CRW. If they genuinely believed that PGN had to file a counterclaim in order to pursue its objection to making payment (in this regard, see further [87]–[88] below), it was certainly open to them to direct that such a counterclaim be filed. They did not, however, do so. Instead, they inexplicably proceeded to adopt an unprecedented

course of action – *viz*, making the Arbitrator's decision final without assessing its merits – and did not adequately explain the basis for this course of action.

84 In this regard, counsel for CRW ingeniously suggested to this court that the Final Award was not in effect "final" since the Majority Members had expressly reserved PGN's right to commence a separate arbitration to challenge the Arbitrator's decision. We cannot accept this submission. Quite apart from the fact that the award made by the Majority Members was conspicuously labelled as a "*Final* Award" [note: 44] [emphasis added] on its cover page, the Majority Members stated (at para 53 of the Final Award) that "*there [was] nothing further to be dealt with in th[e] [A]rbitration*" [note: 45] [emphasis added]. *It is as plain as a pikestaff that the Majority Members meant "final" to mean "**conclusive or unalterable**"* [note: 46] [emphasis added in bold italics] (see para 38 of the Final Award). The purported reservation of PGN's rights to commence a fresh arbitration before another arbitral tribunal to review the merits of the Adjudicator's decision was odd, to say the least.

85 The failure of the Majority Members to consider the merits of the Adjudicator's decision before making the Final Award meant that they exceeded their jurisdiction in making that award. Further, it meant that PGN had to pay the sum awarded by the Adjudicator whilst being deprived of its contractual right to have the Adjudicator's decision reviewed unless it incurred additional time and costs in commencing fresh arbitration proceedings (assuming such an option were legally feasible). In our view, PGN suffered real prejudice as a result of the decision of the Majority Members.

86 What we have said at [82]–[85] above suffices to dispose of Issue 4. Before we move on to Issue 5, we wish to make some observations on PGN's failure to file a counterclaim in the Arbitration and the bearing which this had (if any) on whether or not the Arbitral Tribunal had to review the Adjudicator's decision on the merits.

***PGN's failure to file a counterclaim in the Arbitration***

87 Much was made by CRW of PGN's failure to file a counterclaim in the Arbitration. CRW argued repeatedly both during the Arbitration and in the court proceedings that PGN's failure in this regard meant that the Arbitral Tribunal was not required to review the Adjudicator's decision on the merits. However, we note that CRW made a crucial concession on this issue during the Arbitral Hearing, as can be seen from the following exchange between CRW's counsel, Mr Siraj Omar ("Mr Omar"), and the Arbitral Tribunal: [note: 47]

> THE ARBITRATOR: Do you need a counter claim [*sic*] if the opening up of the [Adjudicator's] decision could amount to a substantive defence to [CRW's] claim?
>
> MR OMAR: There are two issues, sir. The first is assuming that we are right on the first issue – which is that [PGN] ha[s] to make prompt immediate payment of the sum – we are then entitled to come to this tribunal for assistance if [PGN] failed to comply with that obligation, which is what we have done.
>
> [PGN is] then entitled, of course, to commence arbitration to seek to review the [Adjudicator's] decision, but [PGN] cannot, we say, in this arbitration, which has been brought to effectively enforce a DAB decision, seek to then overturn that [decision] or to go behind that decision to see whether it was validly made. That's our submission.
>
> …

MR KAPLAN: Do you have to have a cause of action – the [Adjudicator's] decision is wrong because A, B[,] C, D, E[?]

MR OMAR: That's something on which [PGN] would have to satisfy the tribunal.

MR KAPLAN: In the absence of that, what I'm trying to get at is we are interested in the effect of the absence of anything like that in the answer for the arbitration.

MR OMAR: The absence of anything like that, I think my respectful submission is that it supports our assertion that that matter is not properly before this tribunal.

In the ordinary course, [PGN] would file a notice of arbitration. That notice of arbitration would pray, I would assume, that the [Adjudicator]'s decision be set aside on these grounds. That, we say, is absent and that supports our assertion that your [*sic*] cannot read the defence as, effectively, a notice of arbitration vis-[à]-vis the issues which [PGN] seek[s].

MR KAPLAN: I assume [PGN] did that, *assume [PGN] said the decision is wrong because a variation was allowed without a notice in writing or out of time and this should be reduced – had [PGN] done that, would [its] counterclaim have gone on regardless of what happened with your claim in this arbitration, or would [PGN] still have to start another arbitration?*

MR OMAR: *I would say it was certainly open to [PGN] at the start to either file a notice of arbitration or* ***to put in sufficient particularity in the defence*** *such that the issues are then both before this tribunal, but we say [PGN] ha[s]n't done that*.

CHAIRMAN: *I think Mr Kaplan is really asking that if [PGN] had done it in the way that you say [it] should have*, ***with particularity in the defence*** *, then you are saying that, nonetheless, you are still entitled to an award and payment, and* ***then this tribunal will proceed to look at whether there is any merit in what [PGN] say[s] about the [Adjudicator's] decision*** .

MR OMAR: *If [PGN] had done that, yes*.

[emphasis added in italics and bold italics]

88 Counsel for CRW therefore accepted that if PGN had sufficiently particularised its defence for the Arbitration, the Arbitral Tribunal could proceed to examine the merits of PGN's dissatisfaction with the Adjudicator's decision. However, despite this concession by CRW, the Majority Members – curiously – declined to open up, review and revise the Adjudicator's decision on the *sole* basis that PGN had not filed a counterclaim (see [76] above). As stated above at [67], it was not necessary for PGN to file a counterclaim before it could challenge the Arbitrator's decision on the merits. In addition, PGN's memorial dated 10 July 2009, in our view, did include sufficient details of the alleged errors committed by the Adjudicator (see [71] above). The Arbitral Tribunal could quite easily have examined the underlying documents placed before it to consider PGN's allegations as well as undertake a rehearing of the parties' dispute in accordance with sub-cl 20.6 of the 1999 FIDIC Conditions of Contract after making an interim order for payment in favour of CRW.

89 While the Arbitral Tribunal did express concerns about the inability of PGN to provide at the Arbitral Hearing an exact figure of what it believed was owed to CRW, it bears reiteration that the Arbitral Hearing was merely a preliminary hearing in accordance with the directions made on 4 June 2009 (see above at [11]). PGN's position was that once the Preliminary Issues had been resolved, the Arbitral Tribunal could proceed to examine the merits of the Adjudicator's decision. This emerges from

the following exchange between Mr Kaplan and Mr Efendi Manurung ("Mr Manurung"), PGN's Indonesian solicitor, at the Arbitral Hearing: [note: 48]

> MR KAPLAN: … [W]hat I am interested in is the fact that, at the end of it, you're not [in] a position to say, "We don't owe 17 million. We only owe 3.5 million, or we owe nothing." You don't give us any idea of what the scope of this dispute is. In other words, you're trying to attack the [A]djudicator's decision but don't tell us what the real position is, in your view, your submission as to what [the real position] is.
>
> MR MANURUNG: In one affidavit of evidence, it shows there, but *our proposed submitting … of the evidence is not merely about what would be the amount. That's more for noncompliance, but* ***if you would like to refer, that would be after the discussion of the tribunal*** [*ie*, the Arbitral Tribunal defined at [10] above].
>
> However, firstly, why it is finally before the tribunal is because *we come to the tribunal to figure out what would be the amount, what a figure should be, so, fairly speaking, we need the assistance or help of the tribunal*. Then our colleagues have already given [the] idea that it would be proper to have a skilled quantifier, or whatever you say, or auditor – let's sit down together, put everything on the table, what would be the figures, fairly speaking.
>
> [emphasis added in italics and bold italics]

90 PGN was thus consistent and, in our view, correct in asserting that after resolving the Preliminary Issues, the Arbitral Tribunal ought to open up, review and revise the Adjudicator's decision in accordance with sub-cl 20.6 of the 1999 FIDIC Conditions of Contract. The reason why evidence on the merits of the parties' respective positions *vis-à-vis* their dispute over the Project was not adduced at the Arbitral Hearing was because of the peculiar manner in which CRW initiated the Arbitration, *ie*, solely for the purpose of giving prompt effect to the Adjudicator's decision. As a result, a dispute arose as to whether PGN was entitled to request the Arbitral Tribunal to open up, review and revise the Adjudicator's decision, which in turn necessitated a hearing (*ie*, the Arbitral Hearing) to resolve the Preliminary Issues. PGN justifiably expected that evidence on the merits of the Adjudicator's decision would only be presented at a subsequent hearing to be fixed by the Arbitral Tribunal.

91 We should add that it is significant that CRW had, prior to the Arbitral Hearing, adopted the position that PGN had not validly submitted a NOD (see [70] above). That position, if correct, would have meant that the Adjudicator's decision had become final and binding, and CRW could then have referred PGN's non-compliance with that decision to arbitration under sub-cl 20.7 of the 1999 FIDIC Conditions of Contract for the sole purpose of enforcing the decision. However, once that position was abandoned by CRW (see [70] above), there was no longer any basis for the Arbitration to proceed for the sole purpose of giving prompt effect to the Adjudicator's decision.

**Issue 5: Whether there was a breach of the rules of natural justice at the Arbitral Hearing**

92 Turning now to Issue 5 (*viz*, whether there was a breach of the rules of natural justice at the Arbitral Hearing), the Judge dismissed PGN's submission that there had been such a breach. She considered (at [42] of the GD) that PGN had not been very clear in its allegations on which rule of natural justice had been contravened, and also pointed out that PGN had been given an opportunity to present or argue its case on why it should be entitled to open up, review and revise the

Adjudicator's decision. The Judge further highlighted the inability of PGN to answer the Arbitral Tribunal's enquiries on how much it believed it owed to CRW.

93 With respect, we do not agree with the Judge's conclusion on this point. In our view, PGN was not given a real opportunity to defend its position as to why the sum of US$17,298,834.57 awarded by the Adjudicator was excessive. As stated above at [89]–[90], the questions raised by the Arbitral Tribunal on how much PGN believed it owed to CRW were clearly premature given the nature of the Arbitral Hearing. Mr Kaplan's criticism of the inability of PGN to particularise its position (see [89] above) was, in our view, rather unfortunate.

94 To fault PGN for its inability at the Arbitral Hearing to specify the amount which it claimed it owed to CRW is, in our view, an affront to the principle that each party must have a reasonable opportunity to present its case. As stated above (at [89]–[90]), PGN had not envisaged having to produce evidence on how much it believed it owed to CRW during the Arbitral Hearing, which had a rather limited compass. PGN was entitled to be accorded a proper opportunity to comprehensively present its case on the Adjudicator's decision, with all the relevant submissions and evidence, at a subsequent hearing before the Arbitral Tribunal. However, it was denied this opportunity as the Majority Members summarily made the Final Award without considering the merits of the real dispute between the parties.

95 As pointed out in the course of our discussion of Issue 4, even if PGN could validly rely on sub-cl 20.6 of the 1999 FIDIC Conditions of Contract to commence a fresh arbitration to review the Adjudicator's decision, the parties would have to agree on the members of the new arbitral tribunal and draw up a new timetable for resolving the dispute, amongst other procedural requirements. All these steps would require additional and, in our view, utterly unnecessary, time and costs. Further, to require PGN to commence fresh arbitration proceedings to challenge the Adjudicator's decision would be to disregard the existence of the earlier properly-constituted arbitral tribunal (*ie*, the Arbitral Tribunal), which undoubtedly had jurisdiction to resolve all the disputes of fact and law between the parties.

96 Our ruling on Issue 5 is thus in the affirmative. We also hold that the breach of natural justice in this case caused real prejudice to PGN. This finding is consistent with the observation in *Soh Beng Tee* (at [71]) that in the ordinary run of cases, the answer to whether an issue decided by the arbitral tribunal was within the scope of submission to the tribunal should be the same as the answer to whether the rules of natural justice were observed by the tribunal in making its arbitral award.

**Issue 6: Whether this court should exercise its residual discretion to refuse to set aside the Final Award**

97 In view of our ruling that: (a) apropos Issue 3, the Final Award was not made in accordance with sub-cl 20.6 of the 1999 FIDIC Conditions of Contract; (b) apropos Issue 4 and Issue 5, the Majority Members exceeded their jurisdiction and also breached the rules of natural justice in making that award; and (c) the Majority Members' conduct caused real prejudice to PGN, the elements necessary to set aside the Final Award under both Art 34(2)(a)(iii) of the Model Law and s 24(*b*) of the IAA have clearly been established. What we now have to consider is Issue 6, *viz*, whether this court should exercise its residual discretion to refuse to set aside the Final Award. In this regard, the learned author of *International Commercial Arbitration* states (at p 2563) that although the court is not mandatorily required to annul an arbitral award where one or more of the grounds specified in Art 34(2) of the Model Law (and/or s 24 of the IAA) applies, in many cases, the existence of any one of these grounds will be "sufficiently serious [for] annulment of the award [to] be virtually automatic". We agree with this summary of the salient legal principle.

98 Before us, CRW raised a new argument that was not canvassed in the court below, namely, that the court had a residual discretion to refuse to set aside an arbitral award even though one or more of the prescribed grounds for setting aside had been made out. [note: 49] CRW did not point us to any direct case authority for this submission and instead referred to *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) ("*Halsbury's Laws of Singapore*"), which states (at para 20.140), in the context of *enforcement* of arbitral awards, that the court has a residual discretion to enforce an arbitral award notwithstanding that one of the prescribed grounds for resisting enforcement has been established.

99 The footnote for the above proposition in para 20.140 of *Halsbury's Laws of Singapore* refers to, *inter alia*, *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR(R) 1, where Woo Bih Li JC cited (at [20]–[29]) the Hong Kong case of *Paklito Investment Limited v Klockner East Asia Limited* [1993] 2 HKLR 39 ("*Paklito*"). In *Paklito*, the plaintiff obtained an arbitral award in its favour in China. It successfully applied, *ex parte*, to the High Court of Hong Kong for an order giving it leave to enforce the Chinese arbitral award in Hong Kong, but that enforcement order was later set aside after an *inter partes* hearing. The plaintiff's appeal against the setting aside of the enforcement order was dismissed by Kaplan J on the ground that the enforcement order had been rightly set aside as there had been a serious procedural irregularity in the Chinese arbitral proceedings, in that the defendant had not been given an opportunity to deal with new evidence presented by the plaintiff in the course of those proceedings (see s 44(2)(c) of the Arbitration Ordinance (Cap 341) (HK) ("the Hong Kong Arbitration Ordinance"), which is *in pari materia* with Art 34(2)(a)(ii) of the Model Law). *Vis-à-vis* the submission by the plaintiff's counsel that the court could, in its discretion, still allow enforcement of the Chinese arbitral award even though the ground for refusing enforcement under s 44(2)(c) of the Hong Kong Arbitration Ordinance had been made out, Kaplan J stated (at 49–50):

> In relation to the ground relied upon in this case[,] I could envisage circumstances where the court might exercise its discretion [to allow enforcement], having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute. …
>
> It is not necessary for me in this judgment to decide whether this is the only circumstance where the discretion [to allow enforcement] could be exercised or to lay down circumstances where it would be appropriate for the court to exercise its discretion after finding a serious due process violation. In this case [counsel for the plaintiff] has accepted that he could not argue that the result would inevitably have been the same.
>
> … I have a very limited function under the [Hong Kong] Arbitration Ordinance. Having concluded that a serious breach of due process has occurred[,] I cannot see that it would be right or proper to exercise my discretion in favour of enforcement. I am quite satisfied that even when one takes into account that the parties have chosen an arbitral law and practice which differs [from] that practised in Hong Kong[,] there is still a minimum requirement below which an enforcing court, taking heed of its own principles of fairness and due process, cannot be expected to approve [a request for leave to enforce an arbitral award]. Regrettably, this case is a classic example of such a situation.

100 We accept that the court may, in its discretion, decline to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out. However, in our view, the court ought to exercise this residual discretion only if no prejudice has been sustained by the aggrieved party. In the present case, as shown at [85] and [94]–[95] above, PGN has suffered real prejudice as a result of the Majority Members acting in excess of their jurisdiction and also in breach of the rules of natural justice. Given the prevailing circumstances, there is simply no basis for this

court to invoke its residual discretion to refuse to set aside the Final Award.

**Conclusion**

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

102 For the foregoing reasons, this appeal is dismissed with costs and the usual consequential orders. All costs and disbursements incurred in the Arbitration are to be borne by CRW.

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[note: 1] See <http://www1.fidic.org/federation/> (assessed on 8 July 2011).

[note: 2] See the Record of Appeal filed on 1 October 2010 ("ROA") vol 3(A) at pp 95–248.

[note: 3] See ROA vol 3(C) at pp 643–652.

[note: 4] See para 465 of the Adjudicator's written decision dated 25 November 2008 ("the Adjudicator's written decision") (at ROA vol 3(B), p 372).

[note: 5] See paras 17–19 of the Adjudicator's written decision (at ROA vol 3(A), pp 254–255).

[note: 6] See para 26(j) of the Adjudicator's written decision (at ROA vol 3(A), p 259).

[note: 7] See, *eg*, paras 60–74 of the Adjudicator's written decision (at ROA vol 3(A), pp 266–269).

[note: 8] See ROA vol 3(B) at p 376.

[note: 9] See ROA vol 3(C) at pp 667–670.

[note: 10] See ROA vol 3(C) at p 674.

[note: 11] See ROA vol 3(B) at p 383.

[note: 12] See ROA vol 3(B) at pp 396–397.

[note: 13] *Ibid*.

[note: 14] See the Appellant's Core Bundle filed on 1 October 2010 by CRW ("ACB") at vol 2, pp 51–52.

[note: 15] See ACB at vol 2, p 52.

[note: 16] See the enclosure to the letter dated 2 December 2010 from PGN's solicitors to the court.

[note: 17] See Annex A to Summons No 4970 of 2010.

[note: 18] See para 53 of the Final Award (at ACB vol 2, p 66).

[note: 19] See para 45 of the Final Award (at ACB vol 2, p 64).

[note: 20] See paras 51–52 of the Final Award (at ACB vol 2, pp 65–66).

[note: 21] See para 51 of the Final Award (at ACB vol 2, p 65).

[note: 22] See the Respondent's Supplemental Core Bundle filed on 1 November 2010 by PGN ("SCB") at pp 114–117.

[note: 23] See para 3 of Prof Abdurrasyid's dissenting opinion (at SCB, p 115).

[note: 24] See ROA vol 3(C) at pp 734–735.

[note: 25] See ROA vol 3(B) at p 383.

[note: 26] *Ibid*.

[note: 27] See ROA vol 3(B) at p 396.

[note: 28] See ROA vol 3(B) at pp 396–397.

[note: 29] See ROA vol 3(B) at p 397.

[note: 30] See Part VII of the TOR (at Annex A to Summons No 4970 of 2010).

[note: 31] See <http://www.dbfederation.org/about-us.asp> (accessed on 8 July 2011).

[note: 32] See <http://www.dbfederation.org/downloads/newsletter-sep10.pdf> (assessed on 8 July 2011).

[note: 33] See ROA vol 3(B) at pp 409–411.

[note: 34] See ROA vol 3(B) at pp 411 and 441–444.

[note: 35] See ROA vol 3(B) at p 423.

[note: 36] See ROA vol 3(B) at pp 424–425.

[note: 37] See ROA vol 3(B) at pp 427–429.

[note: 38] See ROA vol 3(B) at pp 430–434.

[note: 39] See ROA vol 3(B) at p 436.

[note: 40] See ACB vol 2 at p 63.

[note: 41] See ACB vol 2 at pp 64–65.

[note: 42] See ACB vol 2 at p 66.

[note: 43] See the Appellant's Case filed by CRW on 1 October 2010 ("the Appellant's Case") at paras 50–52.

[note: 44] See ACB vol 2 at p 46.

[note: 45] See ACB vol 2 at p 66.

[note: 46] See ACB vol 2 at p 63.

[note: 47] See ROA vol 3(B) at pp 519–522.

[note: 48] See ROA vol 3(B) at pp 545–546.

[note: 49] See the Appellant's Case at paras 100–104.