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Case Note

INTERIM ENFORCEMENT OF AN ADJUDICATION DECISION

PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation **[2015] 4 SLR 364**

This case note discusses the Singapore Court of Appeal's most recent guidance on the proper construction of the dispute resolution clause contained in the widely adopted FIDIC 1999 Conditions of Contract, and the manner in which adjudication decisions may be enforced pending a review of their merits.

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I. Introduction

1 The International Federation of Consulting Engineers ("FIDIC") 1999 Conditions of Contract ("the Red Book") is now reportedly the most widely adopted standard form contract internationally for construction contracts.[1] One feature of the Red Book is that cl 20 provides for a three-tiered dispute resolution framework which begins in adjudication, proceeds to amicable settlement and concludes in arbitration ("the Dispute Resolution Clause").

2 The popularity of the Red Book belies long-standing controversy surrounding the precise operation of the Dispute Resolution Clause. Questions have been raised as to (a) whether a dispute concerning non-compliance with an adjudication decision could be referred to arbitration pending a review of the merits of that decision; (b) whether such a dispute could be referred directly to arbitration without going through the first two steps prescribed by the Dispute Resolution Clause; and (c) whether an arbitral decision determining such a dispute could be enforced as an award.

3 These were the questions which the Singapore Court of Appeal had occasion to determine in *PT Perusahaan Gas Negara (Persero)*

1 This statement is taken from the official website of the International Federation of Consulting Engineers at <http://fidic.org/node/915> (accessed 20 January 2016).

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TBK v CRW Joint Operation[2] ("*PT Perusahaan*"). It answered all three questions affirmatively, but only by a majority ("the CA Majority"). The minority judge ("the CA Minority") answered all three questions in the negative, and the polar views expressed by both sides of the bench in *PT Perusahaan* is representative of the ongoing debate surrounding the proper interpretation of the Dispute Resolution Clause.

4 This case note will critically appraise the disparate views expressed in *PT Perusahaan* and provide further elaboration on why the CA Majority's decision should, for the most part, set a precedent for future cases in Singapore and other jurisdictions adopting the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration[3] ("the Model Law"). Finally, this case note hopes to provide practical suggestions for overcoming residual difficulties surrounding the use of the Dispute Resolution Clause.

II. Summary of *PT Perusahaan*

5 CRW Joint Operation ("CRW") and PT Perusahaan Gas Negara (Persero) TBK ("PGN") (collectively "the Parties") entered into an agreement in 2006 for the design, procurement, installation, testing and pre-commissioning of a gas pipeline in Indonesia ("the Agreement"). The Agreement adopted the standard provisions of the Red Book, including the Dispute Resolution Clause.

6 Taken in the round, the mechanism prescribed by the specific provisions in the Dispute Resolution Clause entailed the following.

(a) Any party must first refer a dispute arising out of the Agreement for resolution by a dispute adjudication board ("DAB").

(b) The DAB must issue a decision within 84 days from the referral of the dispute to it. The DAB's decision would 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".

(c) Any party dissatisfied with the DAB's decision could issue a notice of dissatisfaction ("NOD"). The DAB's decision would become "final and binding" if no notice of dissatisfaction has been given by either party within 28 days of receiving the DAB's decision.

2 [2015] 4 SLR 364.

3 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

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(d) If an NOD is issued, the Parties have up to 56 days from the NOD's issuance to reach an amicable settlement of their dispute. If no amicable settlement is reached within that time period, then the Parties may commence arbitration pursuant to the Parties' arbitration agreement set out at cl 20.6 of the Dispute Resolution Clause ("the Arbitration Agreement").

(e) The Arbitration Agreement provides that any dispute in respect of which the "DAB's decision has not become final and binding" shall be resolved by arbitration. Additionally, cl 20.7 provides that a party's failure to comply with the DAB's decision, if it "has become final and binding", may be referred to arbitration directly without first being referred to the DAB or amicable settlement attempts.

7 In the course of the Parties' commercial relationship, disputes arose over PGN's obligation to pay CRW for work allegedly carried out under the Agreement. The disputes were referred to the DAB in accordance with the Dispute Resolution Clause. The DAB duly rendered several decisions on CRW's claims to payment. PGN accepted all of the DAB's decisions except one ("DAB 3") which ordered PGN to pay to CRW a sum of US$17,298,834.57 ("the Adjudicated Sum").

8 PGN issued an NOD against DAB 3 shortly after it was issued, and did not respond to CRW's subsequent requests for payment of the Adjudicated Sum in accordance with DAB 3. CRW then commenced an arbitration against PGN on 13 February 2009 ("the 2009 Arbitration"), seeking an order that PGN comply with DAB 3 notwithstanding that it had issued an NOD against it. The procedural history of the 2009 Arbitration is not material for the purposes of this case note, save that the tribunal in the 2009 Arbitration issued a "final award" in favour of CRW for the Adjudicated Sum pending a review of DAB 3, but decided not to review DAB 3 while reserving PGN's rights to pursue that review in subsequent arbitral proceedings. That award was set aside by the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*[4] ("*Persero (CA)*"), where it was held that the Arbitration Agreement required the determination of both non-compliance with DAB 3 pending a review of DAB 3 ("the Enforceability Dispute") as well as a review of the merits of DAB 3 ("the Primary Dispute") in the same arbitration,[5] and that the tribunal in the 2009 Arbitration failed to do so in accordance with the Arbitration Agreement.[6]

4 [2011] 4 SLR 305.

5 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [67].

6 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [79], [80] and [85].

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9 In 2011, CRW commenced a fresh arbitration against PGN ("the 2011 Arbitration"), seeking a final determination of both the Enforceability and Primary Disputes. The majority of the tribunal in the 2011 Arbitration ("the Majority 2011 Arbitrators") found in favour of CRW on the Enforceability Dispute, and decided that PGN was obliged to comply with DAB 3 notwithstanding the issuance of the NOD and the pending resolution of the Primary Dispute. The Majority 2011 Arbitrators further found that compliance with DAB 3 could be enforced by way of an "interim award" ordering immediate payment of the Adjudicated Sum, and the 2011 Tribunal proceeded to issue an award in those terms ("the 2011 Interim Award"). The dissenting arbitrator in the 2011 Arbitration reached the opposite conclusion, opining that such an award would be "provisional" in nature and could not be enforced in Singapore.

10 CRW then applied to enforce the 2011 Interim Award in the Singapore courts and was granted leave to do so by an enforcement order. PGN applied to set aside both the enforcement order and the 2011 Interim Award. The High Court in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)*[7] ("*PT Perusahaan (HC)*") dismissed PGN's applications, and it is that dismissal which was the subject of appeal in *PT Perusahaan*. On 25 September 2014, the 2011 Tribunal issued a partial award purporting to "revise" various parts of the 2011 Interim Award" ("the Partial Award").

III. The decision in *PT Perusahaan*

11 The Court of Appeal unanimously held that, once a decision of the DAB was issued, the parties would be contractually obliged to give effect to the decision by making timely payments of money in accordance with it notwithstanding that an NOD had been issued against the decision.[8]

12 The principal controversy which arose in *PT Perusahaan*, and which the Court of Appeal was divided on, was the *means* by which the contractual right to prompt compliance with a DAB's decision should be enforced by a receiving party. Specifically, the Court of Appeal had to decide whether a DAB's decision could be enforced by way of an arbitral award notwithstanding that the merits of the decision would be reviewed in an arbitration. This turned on the following questions which the Court of Appeal considered:

7 [2014] SGHC 146.

8 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [55] and [124].

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(a) whether the Enforceability Dispute fell within the scope of the Arbitration Agreement; and

(b) whether the 2011 Interim Award was a "final" award within the meaning of s 19B(1) of the International Arbitration Act[9] ("IAA").

A. Whether the Enforceability Dispute fell within the scope of the Dispute Resolution Clause

13 Whether the 2011 Tribunal had jurisdiction to determine the Enforceability Dispute turned on a proper construction of the Dispute Resolution Clause.

(1) The CA Majority's decision

14 The CA Majority held the Enforceability Dispute fell within the scope of the Dispute Resolution Clause. It reasoned that, because the Dispute Resolution Clause is drafted in broad terms and covered "a dispute of any kind whatsoever" and "any dispute in respect of which the DAB's decision … has not become final and binding", the provision could not be interpreted to exclude certain categories of disputes which must be resolved by alternative means.[10]

15 The CA Majority understood the Enforceability Dispute as one concerning whether the party which issued the NOD against DAB 3 was required to comply immediately with DAB 3.[11] Having regard to the broad language of the Dispute Resolution Clause, the CA Majority concluded that the Enforceability Dispute fell within the scope of the Arbitration Agreement.

16 In the CA Majority's view, the real issue was not whether the Enforceability Dispute could be referred to arbitration at all. Rather, it was whether it was essential to first refer the Enforceability Dispute to the DAB, after DAB 3 was issued, and then to amicable settlement before the Enforceability Dispute could proceed to arbitration.[12] The CA Majority held that it was not necessary to do so, because DAB 3 contained an implied premise that the Adjudicated Sum was payable forthwith, and that an NOD issued against DAB 3 was an expression of

9 Cap 143A, 2002 Rev Ed.

10 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [62].

11 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [63].

12 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [64] and [68].

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dissatisfaction with that implied premise. That gave rise to a dispute which could be referred to arbitration.[13]

17 Further, the CA Majority also reasoned that any contrary interpretation of the Dispute Resolution Clause would be uncommercial because it would give rise to inordinate delay in securing compliance with DAB 3 and upset any expectation of prompt payment of the Adjudicated Sum by the receiving party.[14]

(2) The CA Minority's decision

18 The CA Minority's view was that the Enforceability Dispute was not referable to arbitration and fell outside the scope of the Dispute Resolution Clause. Particular attention was paid to the wording of the Arbitration Agreement which covered only "any dispute in respect of which the DAB's decision (if any) has not become final and binding" unless the dispute was "settled amicably".[15] The CA Minority concluded that only the Primary Dispute fell within these parameters.[16] The CA Minority reasoned that only a dispute of fact could be settled by the Parties amicably, whereas disputes of law had to be settled by a court or tribunal. Since the Enforceability Dispute was a legal dispute, it could not fall within the scope of the Dispute Resolution Clause.[17]

19 Referring to the language of the Dispute Resolution Clause, which provided that the Parties could not commence an arbitration to resolve a dispute unless an NOD was first issued in relation to it, the CA Minority held that PGN's NOD was only in relation to the correctness of DAB 3's determination of the quantum of CRW's claims under the Agreement, and not whether DAB 3 was enforceable pending resolution of the Primary Dispute.[18]

20 The CA Minority was reinforced in its views by the drafting history of the Dispute Resolution Clause, in particular that of cl 20.7. Clause 20.7 provided that a party's failure to comply with a final and binding decision of the DAB which was not the subject of an NOD can

13 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [66(a)].
14 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [66(b)] and [72(d)].
15 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [159].
16 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [160].
17 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [160].
18 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [161].

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be referred directly to arbitration. After surveying the evolution of the Red Book from its inception and observing that cl 20.7 was inserted only in the 1987 Red Book, approximately 30 years after the Red Book was first published, the CA Minority held that the absence of cl 20.7 in pre-1987 versions of the Red Book was evidence that it was not required. The explanation for this, in the CA Minority's view, is that recourse to the (English) judicial system by means of summary judgment was the envisaged solution when the first version of the Red Book was published.[19] Accordingly, recourse to arbitration was unnecessary and unlikely to have been at the forefront of minds of disputants at the time, especially since the UK became a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards[20] ("New York Convention") only in 1975.[21] It was only after the Red Book saw heightened international use in foreign construction projects that arbitration came to be adopted as a dispute resolution mechanism and cl 20.7 acquired relevance.

21 The CA Minority also rejected the suggestion by the High Court in *PT Perusahaan (HC)* that the Dispute Resolution Clause was intended to effect a contractual security of payment regime.[22] The CA Minority did not think such an interpretation was supported by the Red Book's express language, history or context. The CA Minority expressly rejected that the importance of cash flow to the construction industry was a special consideration which could affect the interpretation of the Dispute Resolution Clause.[23] He also noted that statutory legislations in Commonwealth jurisdictions providing for a contractor's right to security of payment were only introduced very recently, and reflected the prior absence of such rights under most construction contracts.[24]

19 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [168].
20 10 June 1958; entry into force 7 June 1959.
21 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [168] and [169].
22 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [187]–[191].
23 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [191].
24 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [189].

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B. Whether the 2011 Interim Award was a "final" award within the meaning of s 19B(1) of the IAA

(3) The CA Majority's decision

22 The CA Majority found that the 2011 Interim Award was a "final" award within the meaning of s 19B(1) of the IAA and was therefore enforceable. At the outset of its analysis, the CA Majority distinguished between enforceable "partial" and "interim" awards on the one hand, and non-final "provisional" awards on the other.[25] Only the former category was final because it entailed a final determination of the parties' substantive rights or a final determination of preliminary issues relevant to the parties' claims.[26]

23 The CA Majority found that the Dispute Resolution Clause imposed a separate and distinct obligation on the parties to promptly comply with a decision of the DAB, regardless of whether an NOD was issued and whether the decision would eventually be reversed in part or whole. Accordingly, the 2011 Interim Award, which addressed the Enforceability Dispute, was "final" because its pronouncement on PGN's obligation to promptly comply with DAB 3 by paying the Adjudicated Sum (while the Primary Dispute was pending) would not be revised or varied by any future awards determining the Primary Dispute.[27] The Primary Dispute concerned a conceptually distinct question, namely the state of the final accounts between the parties.[28] The CA Majority emphasised that the 2011 Award could not be regarded as a "provisional award" simply because its financial effects and consequences could be affected by a subsequent award adjudicating the merits of DAB 3.[29] What pointed decisively towards the 2011 Award being an interim or partial award was that it finally determined the question of CRW's claim to enforce DAB 3 pending the resolution of the Primary Dispute.[30] In the CA Majority's words, the Enforceability Dispute was "a dispute in its own right which is capable of being "finally settled by international

25 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [48]–[49].
26 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [100].
27 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [54], [100] and [106].
28 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [54].
29 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [100].
30 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [100].

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arbitration" and being referred to a separate arbitration.[31] With this pronouncement, the CA Majority reversed the Court of Appeal's finding in *Persero (CA)* that both the Enforceability and Primary Disputes had to be resolved in the same arbitration.

(4) The CA Minority's decision

24 The CA Minority disagreed with the CA Majority and held that the 2011 Interim Award was a "provisional" award that could not be enforced. A "final" award was one which rendered the tribunal *functus officio* in relation to the issue decided in that award, and would give rise to *res judicata* over that issue.[32] In the CA Minority's view, the 2011 Interim Award was not "final" because it was intended to be revised in a later award and was eventually revised by the Partial Award.[33]

IV. Comments on *PT Perusahaan*

25 The CA Majority's judgment in *PT Perusahaan* will doubtlessly be welcomed by entities operating in the construction industry which are likely to be receiving parties in a DAB decision. In permitting a receiving party to enforce the DAB's decision in an arbitral award pending a review of that decision (without first referring non-compliance with it to the DAB and amicable settlement), *PT Perusahaan* recognises that receiving parties effectively have a contractual right to secure the sum in dispute, and that the timely exercise of that right could not be trammelled by a paying party's challenge against the DAB's decision. This pronouncement was a conscientious effort to give effect to the expectation of prompt payment by receiving parties.[34]

26 This author suggests that, as between the views expressed by the CA Majority and the CA Minority, the CA Majority's decision is preferable as it better accords with established principles of contractual interpretation and robustly meets the commercial needs of affected industries. However, because it is not free from difficulties, there is no certainty that the CA Majority's decision represents the last word in the debate (beyond Singapore) on the proper interpretation of the Dispute

31 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [83].
32 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [206].
33 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [226]–[232].
34 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [71], [72(d)] and [73]–[76].

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Resolution Clause.[35] Accordingly, this case note will also consider practical steps which potential disputants may adopt to mitigate or overcome any residual risks accompanying the adoption of the Dispute Resolution Clause.

A. Construing the Dispute Resolution Clause

27 One of the principal controversies in *PT Perusahaan* was whether the Dispute Resolution Clause permitted the parties to refer the Enforceability Dispute to arbitration at all. The views expressed by the CA Majority and CA Minority have thrown into the spotlight several questions which shed light on the issue.

28 The first is whether, as the CA Minority opined,[36] a distinction ought to be drawn between factual disputes and legal disputes when determining the scope of an arbitration agreement. Relying on the proviso "[u]nless settled amicably" contained in the Dispute Resolution Clause, the CA Minority was of the view that the Enforceability Dispute was not covered by the provision. It reasoned that the "concept of amicable settlement … is meant for factual disputes, and not legal disputes",[37] so it could not apply to "a dispute on what the law is" such as the Enforceability Dispute because such a dispute is "intended to be settled by a tribunal or a court".[38] In the author's view, this distinction is fraught with difficulties.

29 It is questionable whether the term "amicable settlement" was intended to impose any conceptual limits on the types of disputes falling within the ambit of the Dispute Resolution Clause. The CA Minority presupposed that the words "amicably settled" had a defined legal meaning and delineated the scope of the Arbitration Agreement. However, it could equally be, if it is not more likely, the case that it is the meaning of the term "dispute" which is decisive. On that view, the expression "amicably settled" was not intended to be anything more than a synonym for "disposed of" or "resolved". If so, the generous approach towards interpreting the term "dispute" espoused in Commonwealth jurisprudence would undermine the CA Minority's conclusion. In

35 See Lukas Klee, *International Construction Contract Law* (Wiley-Blackwell, 1st Ed, 2015) at pp 251–253 for an overview of the various, conflicting interpretations of the dispute resolution clause proposed by commentators.

36 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [160].

37 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [160].

38 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [160].

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Tjong Very Sumito v Antig Investments Pte Ltd,[39] the Singapore Court of Appeal defined the term "dispute" in the widest terms and approvingly cited[40] the following definition from Michael Mustill and Stewart Boyd:[41]

> General words such as these confer the widest possible jurisdiction … it would, for example, if included in a contract of carriage, embrace claims for damage to the goods, even if framed in tort. It would also embrace all contractual remedies, apart from those which sought to impeach the initial existence of the contract, so that it would cover claims for damages arising from a repudiation or a deviation, claims for rectification, or avoidance on the ground of misrepresentation. *It would, of course, include issues of law as well as fact.* [emphasis added]

30 The contradiction between the passage above and the CA Minority's proposed distinction is self-evident.

31 There are also practical difficulties with drawing a distinction between factual disputes and legal disputes in construing the scope of an arbitration agreement. Taking the CA Minority's reasoning to its logical conclusion, a dispute involving mixed issues of fact and law, which is representative of most disputes, could only be resolved partly (where factual disputes are concerned) in arbitration and partly (where legal disputes are concerned) in court litigation. It is distinctly improbable that fragmented litigation, with all its accompanying evils,[42] was what commercial parties intended to embrace when adopting the Dispute Resolution Clause.

32 A second consideration is the extent to which commercial parties are bound by the original drafting intentions underlying standard form precedents which they adopted in their contracts.

33 The CA Minority placed much emphasis on maintaining fidelity to the original intentions of the Red Book's drafters. He undertook a painstaking, historical analysis of its evolution since inception, and explained how various drafting amendments collectively supported his narrow interpretation of the Dispute Resolution Clause.[43] The CA Majority confronted these views directly, and held that the historical

39 [2009] 4 SLR(R) 732.

40 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [33].

41 Michael Mustill & Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at pp 118 and 119.

42 The undesirable consequences of fragmented litigation have been canvassed extensively in the House of Lords' decision in *Donohue v Armco* [2002] CLC 440 at [29]–[36] and, as was held in that case (at [39]), may rise to the level of "strong cause" justifying non-compliance with an exclusive jurisdiction clause.

43 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [166]–[175].

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evolution of the Red Book evidenced, rather than negated, an intention by the Red Book's drafters that a receiving party should be entitled to enforce a DAB's decision pending resolution of the underlying dispute.[44]

34 The CA Majority's historical account of the intentions of the Red Book's drafters might not have been warranted. Where a contract was modelled after a standard form agreement which has undergone prior revisions, the utility of a forensic examination of its evolution was doubted by Moore-Bick LJ in *Seadrill Management Services Ltd v OAO Gazprom*,[45] where he made the following observations:[46]

> I am doubtful, however, whether it is legitimate simply to compare the earlier and later versions of the contract form on the assumption that the parties consciously intended to achieve a particular result by adopting the later version.
>
> Such an exercise is not wholly removed from that of referring to drafts produced during the course of negotiations, which are not a proper aid to construction.
>
> …
>
> The fact is that in the present case we have no evidence of why specific changes were made, nor any evidence that the parties turned their minds to the differences between two forms and there must be a real likelihood that they simply reached for the current form without any consideration of the earlier version. In any event, *times have moved on and one cannot assume that the commercial background has not moved with them*. In my view the right course when seeking to ascertain the intention of the parties is to consider this contract *on its own terms against the commercial background it existed at the time it was made*.
>
> [emphasis added]

35 Indeed, given that the essence of contractual interpretation is ascertaining the *parties*' intentions *at the time the contract was made*, the narrow depth of field afforded by a restrictively textual and historical analysis can be unhelpful at times. Moore-Bick LJ's exhortation empowers courts to look afresh at contracts adopting standard forms through the lens of the prevailing commercial circumstances and legal background at the time. Doing so would cut through the Gordian knot of divining the drafter's original intentions, an exercise which often yields little more than speculations about the intentions of a third party which the contracting parties might not necessarily share. The principle also suggests that, in a competition between commercial sensibility and

44 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [67]–[69] and [77]–[82].

45 [2010] EWCA Civ 691.

46 *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691 at [17].

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giving effect to the original drafter's intention, the former should prevail.

36 It is also worth considering how the interpretation of standard form contracts would be affected by subsequent legal developments, in particular Lord Hoffmann's oft-cited 2007 judgment in *Fiona Trust & Holding Corp v Privalov*[47] ("*Fiona Trust*"). This point was not expressly considered by the Court of Appeal in *PT Perusahaan*. In *Fiona Trust*, Lord Hoffmann endorsed Longmore LJ's judgment below in the Court of Appeal which promulgated a "fresh start" to how arbitration agreements ought to be construed.[48] In the words of Lord Hoffmann, one should:[49]

> … start from an assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal [and construe arbitration agreements] in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

Accordingly, an unduly textual approach which turns on semantics and "various linguistic nuances" should be eschewed.[50]

37 Although the Agreement was formed only in 2006, before *Fiona Trust* was decided by the House of Lords, the principle espoused by Lord Hoffmann remains relevant (and certainly applies to all contracts entered into after *Fiona Trust* was decided). As explained by Arden LJ in *Lymington Marina Ltd v MacNamara*,[51] in considering the relevant legal background while construing a contract, the court is entitled to take into account legal developments taking place after the contract was formed:[52]

> In my judgment there can be no necessary implication that, where parties come to an agreement, that agreement must be interpreted on the basis of the law as it stood when the agreement was made as if it were in some time warp. It is part of the factual matrix known to both parties that both statute law and the common law develop over time.

38 The *Fiona Trust* principle supports the CA Majority's reluctance to accept that only domestic courts could enforce a "binding but

47 [2007] UKHL 40. This decision was approvingly cited by Singapore's Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414 at [13].
48 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 at [17].
49 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 at [13].
50 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 at [12].
51 [2007] EWCA Civ 151.
52 *Lymington Marina Ltd v MacNamara* [2007] EWCA Civ 151 at [33].

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non-final" DAB decision, since the effect of this proposition would be to carve out specific matters from the arbitrator's jurisdiction. The presumption that parties desired one-stop adjudication would also overcome the lack of an express conferment of a right to refer the Enforceability Dispute to arbitration, a point which commentators have relied on in support of the conclusion reached by the CA Minority.[53] Applying that presumption, the phrase "a dispute … in connection with, or arising out of, the Contract or the execution of the Works" in the Dispute Resolution Clause may be expansively read to include the Enforceability Dispute, as the CA Majority held.[54]

39 To conclude that parties intended to carve out that dispute from the Arbitration Agreement would require "clear language" to that effect,[55] and it is suggested that such language is absent from the Dispute Resolution Clause. Such an intention may be evidenced by pointing to some countervailing commercial benefit from carving out issues from an arbitration agreement. The desire for expeditious enforcement of security (at least, more so than in arbitration) by summary judgment in domestic courts is one such example.[56] In contrast, the notion that the Enforceability Dispute was carved out from the Arbitration Agreement is not plausible. Clause 20.7 of the Dispute Resolution Clause already provides that, in respect of a final and binding DAB decision, a dispute arising out of a failure to pay can be referred directly to arbitration. The nature of such a dispute is materially similar to the Enforceability Dispute, the only distinction being one of timing for referring the dispute over non-payment to arbitration. Clearly, the Parties did not see any fundamental incompatibility between disputes concerning non-compliance with the DAB's decisions, as a general class, and arbitration. It is difficult to see how this timing difference could explain why the Parties would wish to carve out the Enforceability Dispute from the Arbitration Agreement.

40 A third pertinent principle is one of general contractual construction. That principle directs the courts to adopt the more commercial interpretation when the text of a contractual provision gives rise to ambiguity and supports two or more interpretations.[57]

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53 Nael Bunni, "The Gap in Sub-clause 20.7 of the 1999 FIDIC Contracts for Major Work" [2005] ICLR 272.

54 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [63].

55 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 at [7].

56 See *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] SGHC 31.

57 See, for example, the UK Supreme Court's articulation of the principle in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 at [30], that "where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense".

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41 It is apparent that the CA Majority's decision was intended to address the especial vulnerability of entities operating in the building and construction industry towards cash-flow constraints.[58] This much is clear from its endorsement[59] of the following passage of the High Court's judgment in *PT Perusahaan (HC)*:[60]

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

42 The CA Minority did not accept that cash-flow considerations in the building and construction industry were sufficiently weighty or special to affect the manner in which the provisions of a construction contract ought to be understood. To this end, he relied on Lord Diplock's well-known admonition in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*[61] ("*Gilbert-Ash*") against attaching any special weight to cash-flow considerations in the construction industry.[62] In Lord Diplock's view, the importance of cash flow ought not to be given special weight in the construction context because its importance was universally shared across many industries.[63]

43 It is suggested that Lord Diplock's comments in *Gilbert-Ash* should be confined to the facts of that case. In *Gilbert-Ash*, the question was whether a contract should, as the respondent argued, be construed in a manner which deprived one party of remedies it should be presumed to have against breaches of contract, on the basis that such a construction better ensured cash-flow stability in the construction industry. That was the context in which Lord Diplock inveighed against attaching special importance to cash flow and rejected the respondent's

58 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [71].

59 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [74].

60 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146 at [23].

61 [1974] AC 689.

62 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [191].

63 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 718.

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proposed construction. It is doubtful that Lord Diplock intended his declaration to be turned on its head in support of an interpretation of the Dispute Resolution Clause which would deprive rather than support a party of a right (to arbitrate) which he should be presumed to have.[64]

44 In any event, *Gilbert-Ash* was decided four decades ago, and there is now indication that Lord Diplock might not have been on the right side of history in refusing to recognise the special importance of cash flow to the construction industry. Whatever hesitation the English courts might have had about doing so, legislatures in many jurisdictions have forged ahead with statutory mechanisms to safeguard what Lord Denning described as "the lifeblood of the enterprise".[65] Statutory security of payment schemes have since been legislated in the UK[66] and, in similar vein, in numerous other jurisdictions including New Zealand,[67] Australia[68] and Singapore.[69] These statutory security of payment schemes were instated for the express purpose of improving cash flow in the construction industry.[70] This is not least because the wider economy is usually at stake,[71] since the stalling of projects and contractors going insolvent often have significant knock-on effects on many third parties such trade creditors. Indeed, the especial vulnerability of entities in the construction industry (in particular, receiving parties such as contractors and subcontractors) towards cash-flow instability

64 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 at [13].

65 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* (1973) 71 LGR 162 at 167.

66 Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK).

67 Construction Contracts Act (2002 No 46) (NZ).

68 Building and Construction Industry Security of Payment Act 2009 (ACT); Building and Construction Industry Security of Payment Act 2009 (Tas); Building and Construction Industry Security of Payment Act 2009 (SA); Building and Construction Industry Security of Payment Act 1999 (NSW); Building and Construction Industry Payments Act 2004 (Qld); Building and Construction Industry Security of Payment Act 2002 (Vic); Construction Contracts Act 2004 (WA); Construction Contracts (Security of Payments) Act 2004 (NT).

69 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

70 On New Zealand's Construction Contracts Act (2002 No 46), see Peter Degerholm, *Managing Contractors' Cashflow: Making the Construction Contracts Act Work for You* (Auckland: Rawlinsons Media, 2003). On the English Housing Grants, Construction and Regeneration Act 1996 (c 53), see *William Verry v Camden LBC* [2006] EWHC 761. On Australia's legislations, see, for example, the second reading of the Building and Construction Industry Security of Payment Amendment Bill 2013 (24 October 2013). On Singapore's Building and Construction Industry Security of Payment Act, see the second reading of the Building and Construction Industry Security of Payment Bill in *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1112–1120 (Cedric Foo Chee Keng, Minister of State for National Development).

71 Rupert Reece & Natasha Peter, "Enforcing Adjudication Decisions" (2013) 5 IBLJ 403 at 404.

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has been the subject of intense study and is now well documented.[72] It is also telling that, notwithstanding Lord Diplock's judgment in *Gilbert-Ash*, recent English decisions continue to acknowledge that the importance of cash flow should guide judicial decision-making over issues arising in the construction industry.[73]

45 There is one further reason why the CA Majority's construction is preferable. Given the preponderance of empirical evidence that potential receiving parties such as contractors and subcontractors are often more financially vulnerable than potential paying parties such as employers, a receiving party's entitlement to receive prompt payment of the sum in dispute and, more importantly, the availability of an efficient means of enforcing it affect the very viability of the framework prescribed by the Dispute Resolution Clause. Without these, a receiving party experiencing cash-flow difficulties would be unlikely to have sufficient funds for financing the conduct of its case in the eventual arbitration where the DAB's decision would be reviewed. That would only facilitate and encourage spurious challenges by a paying party to acquire a tactical advantage over receiving parties by waging a war of financial attrition which receiving parties are likely to lose.

46 Accordingly, it is suggested that it was wholly legitimate for the CA Majority to recognise, within the framework of an interpretative analysis, a commercial consideration which numerous jurisdictions have seen fit to address by statute, and prefer an interpretation which best gave effect to the spirit of that commercial sensibility.

B. Whether an award determining the Enforceability Dispute would be enforceable

47 Although the CA Majority held that the Enforceability Dispute could be referred to arbitration, that was not the end of the inquiry. A further point of contention was whether an "award" determining the Enforceability Dispute was one which could be enforced in domestic courts.

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72 United Kingdom, Sir Michael Latham, *Constructing the Team – Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry: Final Report* (July 1994); United Kingdom, Department for Business and Innovation Skills, *Trade Credit in the UK Construction Industry: An Empirical Analysis of Construction Contractor Financial Positioning and Performance* (BIS Research Paper No 118, July 2013); Thanuja Ramachandra & James Rotimi, "The Nature of Payment Problems in the New Zealand Construction Industry" (2011) 11(2) *Australian Journal of Construction Economics and Building* 22.

73 See *Gray & Sons Builders (Bedford) Ltd v Essential Box Co Ltd* [2006] EWHC 2520 at [13] and *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] EWCA Civ 1750 at [1].

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48 Throughout the life of the dispute in *PT Perusahaan*, an overarching theme was whether the 2011 Interim Award amounted to a "provisional award" that could not be enforced in Singapore. That question shaped PGN's case, underpinned the dissenting opinion issued in the 2011 Arbitration and was the subject of heavy discussion in both *PT Perusahaan (HC)* as well as *PT Perusahaan*. As will be explained below, that inquiry is not meaningful because it obscures and distracts from the real question at hand, which is whether a decision issued by the tribunal was final and, by definition, an "award" at all rather what *type* of award the tribunal issued.[74] The CA Majority's answer could not be clearer:[75]

> Much of the confusion in this case seems to us to have stemmed from a failure to differentiate between, on the one hand, interim or partial awards, *which entail a final determination of the parties' substantive rights or a final determination of preliminary issues relevant to the resolution of the parties' claims* and, on the other hand, provisional awards, *which neither entail nor aid in a final determination of the parties' substantive rights*. [emphasis added]

49 Although the CA Majority did not completely discard the language of "provisional" and "interim" awards, it drew a clean line between tribunal decisions which involved or aided in the final determination of the parties' *substantive rights* on the one hand, and those which did not. Evidently, the CA Majority regarded this distinction as decisive in determining whether a tribunal's decision was a "final", and therefore enforceable, award. The CA Majority also clarified that what is *not* material is the finality or provisionality of the "financial effects and consequences that flow" from the legal pronouncements in a later award.[76] This must be right, and there is now authority to the effect that an earlier judgment would still be final even if separate but related proceedings resulted in a second judgment which may be set off against or otherwise used to abate the sums due under the earlier judgment.[77] Similarly, the 2011 Interim Award would not cease to give rise to a *res judicata* even though the award settling the Primary Dispute might be set off against or reduce the sums awarded in the 2011 Interim Award.

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74 See generally Chiu Hse Yu, "Final, Interim, Interlocutory or Partial Award: Misnomers Apt to Mislead" (2001) 13 SAcLJ 467 and Jennifer Kirby, "What Is an Award, Anyway?" (2014) 31 J Int Arb 475 at 476.

75 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [100].

76 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [100].

77 Lord Collins of Mapesbury *et al*, *Dicey, Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) at p 676; *Bussoleno Ltd v Kelly* [2011] IEHC 220.

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50 The principle articulated by the CA Majority is consistent with how the court has defined an award in other instances. In *PT First Media TBK v Astro Nusantara International BV*[78] ("*PT First Media*"), the Court of Appeal held that all awards "should reflect the principle of finality" by rendering all issues determined under the award *res judicata*.[79] Given that cause of action estoppel, which prohibits the re-litigation of the same substantive issue in later proceedings,[80] forms part of the *res judicata* doctrine,[81] a conclusive indicator as to whether a tribunal intended an award to be *res judicata* is whether the tribunal is permitting the same substantive claim or issue determined in one award to be re-litigated in the subsequent award. If the tribunal intended the same substantive claim or issue to be reheard for determination in a later award, the logical corollary is that the earlier award was not intended to be *res judicata*. In this regard, much turns on the proper characterisation of the issues considered in the respective awards.

51 Because the CA Majority regarded the Enforceability and Primary Disputes as being respectively concerned with different substantive rights and obligations,[82] any *legal pronouncements* on those rights and obligations in the Enforceability Dispute would not be affected by a subsequent decision on the Primary Dispute. CRW's monetary claims in the Enforceability and Primary Disputes are identical (at least from CRW's perspective) where quantum is concerned, but that is where similarities end. The *legal bases* of CRW's claims in the Enforceability and Primary Disputes are fundamentally different. Whereas CRW's claim for monetary payment in the Primary Dispute is premised on its completion of works carried out under the Agreement, CRW's claim for monetary payment in the Enforceability Dispute arises from the mere fact that the DAB has issued a decision awarding it the Adjudicated Sum. Whatever conclusions the 2011 Tribunal eventually reaches on the extent of satisfactory performance by CRW under the Agreement, these could not affect or negate CRW's right to receive and hold the Adjudicated Sum, even if only for a temporary period of time, which arose from the issuance of DAB 3. The CA Majority was correct to regard the 2011 Interim Award as final and enforceable.

52 It is suggested that the protracted nature of the dispute in *PT Perusahaan* is attributable, at least in part, to the distractions that

78 [2014] 1 SLR 372.
79 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [140].
80 *Thoday v Thoday* [1964] P 181 at 197 and 198.
81 Ken Handley, Spencer Bower & Handley, Res Judicata (LexisNexis Butterworths, 4th Ed, 2009) at para 1.05.
82 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [55], [88] and [104].

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flow from asking whether the 2011 Interim Award was an unenforceable "provisional award". The undesirability of using misleading descriptors such "interim award" and "provisional award" is not merely a matter of semantics. It misdirects the focus of the legal inquiry to unwelcome effect at the substantive level.[83] Specifically, such descriptors place undue emphasis on any one of the following matters, none of which are conclusive as to the finality of a tribunal's decision:

(a) the point in time at which the decision is issued;

(b) whether the decision finally disposes of some or all issues in the arbitration; and/or

(c) the temporality of the *effects* of the decision.

53 Much of the arguments and views expressed throughout the life of the dispute in *PT Perusahaan* were preoccupied with the temporal *effects* of the 2011 Interim Award or the stage (of the arbitral proceedings) at which the award was issued, neither of which are conclusive of the finality of a purported award. In *PT Perusahaan*, PGN's argument was that the 2011 Interim Award was only a non-final "provisional award" because it was intended to be final only up to a certain point.[84] The manner in which the argument was framed was likely the result of attaching too much importance to the natural meaning of the descriptor "provisional". The argument is problematic because it presupposes the answer to the question that PGN was required to answer, which is how finality should be understood for the purposes of characterising a tribunal's decision. The 2011 Tribunal appears to have been afflicted by a similar confusion. The Majority 2011 Arbitrators agreed with PGN that the 2011 Interim Award was indeed "final up to a certain point in time" and "cannot be altered until the arbitration hearing" but, in the same breath and contradictorily, said that it was nevertheless a final determination of the Enforceability Dispute.[85] Had the 2011 Tribunal directed itself towards determining specifically whether the same or different *substantive claims* were being determined in the Enforceability and Primary Disputes, it would have realised the error of describing the Partial Award as one which "revises" the 2011 Interim Award.[86] In so describing the Partial Award, the

83 In *Rotenberg v Sucafina* [2012] EWCA Civ 637, the English Court of Appeal cautioned against the use of such terms as "interim" when describing an award, remarking that "it is capable of giving rise to confusion".

84 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [21].

85 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [96].

86 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [101].

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2011 Tribunal obscured its true intention as to whether the 2011 Interim Award finally determined the Enforceability Dispute.[87]

54 The dangers of being distracted by asking what *type* of award was issued were drawn into sharp focus in *Persero (CA)*. There, the Court of Appeal construed the Arbitration Agreement as requiring the resolution of the Enforceability and Primary Disputes in a single arbitration. Great weight was placed on how the Arbitration Agreement required the arbitral tribunal to issue an award which would "finally" settle the parties' dispute.[88] The Court of Appeal also noted suggestions in authorities that the Enforceability Dispute should be determined in "an interim or partial award … pending the consideration of the merits of the parties' dispute(s) in the same arbitration".[89] It proceeded to state that:[90]

> … [w]hat the [tribunal in the 2009 Arbitration] ought to have done, in accordance with the TOR (and, in particular, [the Arbitration Agreement]), was to make an *interim* award in favour of CRW for the [Adjudicated Sum] … and then proceed to hear the parties' substantive dispute afresh before making a *final* award. [emphasis in original]

It appears that the Court of Appeal in *Persero (CA)* defined a "final" award as one which resolves the entirety of the parties' dispute, and only by contrasting it against interim and partial awards which only entail the partial resolution of the parties' entire dispute. The adoption of this approach, which the CA Majority rejected in *PT Perusahaan*, was unfortunate since the Court of Appeal in *Persero (CA)* had adopted a different, but correct, definition of a "final" decision as one which was "unalterable and not open to further review" earlier in its analysis in *Persero (CA)*.[91] Instead of expounding on this definition, which might have led the Court of Appeal in *Persero (CA)* to reach the same conclusion as the CA Majority in *PT Perusahaan* on what finality meant,

87 As a result of the apparent inconsistency between this expression and the 2011 Tribunal's expressed intention that the 2011 Interim Award was final, substantial arguments were raised by CRW Joint Operation and PT Perusahaan Gas Negara (Persero) TBK in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 as to what the Majority 2011 Arbitrators really intended the nature of the 2011 Interim Award to be. The CA Majority observed in (at [102]) that the expression was inappropriate and unnecessary.

88 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [67] and [68].

89 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [66].

90 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [79].

91 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [51].

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the Court of Appeal's analysis in *Persero (CA)* took a surprising turn by premising its decision on the distinction between interim and partial awards on the one hand and final awards on the other.

55 The foregoing demonstrates how substantive reliance on descriptive labels tends to frustrate, rather than facilitate, the resolution of a dispute over the enforceability of an award. One contributory factor is that such descriptive labels are not legal terms of art. Neither the New York Convention nor the Model Law provides any fixed meaning to the terms "interim", "partial", "interlocutory" or "provisional" for the purposes of describing an award. What this means is that courts of other Model Law jurisdictions, let alone those of jurisdictions not adopting the Model Law, cannot be expected to adopt a uniform understanding of these descriptors or what a tribunal intended the nature of its decision to be when such descriptors are used.[92] The resulting potential for confusion can only be obstructive for parties seeking to enforce the same award in multiple jurisdictions. This is exacerbated when one considers arbitral rules. For instance, the Singapore International Arbitration Centre ("SIAC") Rules 2013[93] describes a decision issued by an emergency arbitrator as an "interim award",[94] even though an emergency arbitrator's decisions are subject to revision and modification by the tribunal eventually constituted.[95] However, an "interim award" within the meaning of Sch 1 of the SIAC Rules 2010[96] does not possess the requisite finality that is characteristic of an "interim award" described by the CA Majority in *PT Perusahaan*, and is more akin to a procedural order rather than an award.[97]

56 One further illustration warrants mention. Although the High Court judge in *PT Perusahaan (HC)* ultimately held that the 2011 Interim Award was final because it pronounced on the parties'

92 See Erik Schäfer, Herman Verbist & Christoph Imhoos, *ICC Arbitration in Practice* (Kluwer Law International, 1st Ed, 2005) at p 119 where it was observed that:

> … [t]he definition of an interim award appears more complex … There is no consistency in the use of the terms in international arbitration practice and national arbitration laws do not always define them either. These variations in terminology are unimportant in themselves, but they may lead to situations in which an arbitral tribunal rules by way of a procedural order on a matter that should have been dealt with in an award.

93 5th Ed, 1 April 2013.

94 Singapore International Arbitration Centre Rules (5th Ed, 1 April 2013) Sch 1, para 6.

95 Singapore International Arbitration Centre Rules (5th Ed, 1 April 2013) Sch 1, para 7.

96 4th Ed, 1 July 2010.

97 See Lye Kah Cheong, Yeo Chuan Tat & William Miller, "Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules" (2011) 23 SAcLJ 93.

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substantive rights,[98] he also adopted a curious definition of a "provisional award" as one which "[grants] relief which is intended to be effective for a limited period".[99] He then proceeded to conclude that the 2011 Interim Award was "not provisional" *because* it was "final and binding".[100] Two observations may made at this juncture. First, the different definitions adopted by the CA Majority in *PT Perusahaan* and the High Court in *PT Perusahaan (HC)* make it clear that the meanings that can be ascribed to the expression "provisional award" are myriad, and can obfuscate what would otherwise be a simple disagreement over the nature of an award.[101] Although the High Court judge did not refer to any controlling authority for the definition he adopted, an observation pithily made by the CA Minority,[102] this should not be surprising since the term "provisional award" is not defined in the IAA, the Model Law, or the New York Convention. The diversity of meanings attributable to the expression will surely expand if it continues to see popular use in future cases. Second, the implication that the broadly defined "provisional award" described in *PT Perusahaan (HC)* could not be "final and binding" is contradictory. Like the 2011 Interim Award, an award which determines a claim based on a contractual right which by its nature is intended to be temporal in its effectiveness would be a "provisional award" in that broad sense yet final and binding because it finally determined a substantive claim. These two points are testament to the dangers of attempting to root the fundamental concept of an award in amorphous descriptors.

57 *PT Perusahaan* is therefore a cautionary tale that relying on descriptive labels such as "provisional award" and "interim award" as premises in substantive reasoning tends to shed more heat than light, and should be avoided as far as possible. Disputants and tribunals conducting an arbitration seated in Singapore or intending to enforce an arbitral award in Singapore would do well to adhere to the approach prescribed by the CA Majority, which is to determine whether the decisions issued by a tribunal sought to determine the same or different substantive rights. The CA Majority's judgment conscientiously sheds any substantive reliance on descriptive labels such as "interim awards"

98 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146 at [137] and [145]–[163].

99 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146 at [124].

100 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [144].

101 Contrast the CA Majority's definition of a "provisional award" in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [49] and [50] with the definition adopted in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146 at [124].

102 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [201].

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and "provisional awards" and should be applauded for the clarity of the principle it espouses. It is hoped this will provide proper guidance for the resolution of future disputes over the finality of an award and dispel confusion arising from the use of unhelpful descriptive labels.

C. Arbitrating the Enforceability Dispute

58 Having found that the Enforceability Dispute was referable to arbitration and could be enforced by an arbitral award, the CA Majority noted that there was a further question of whether one could do so only after referring the Enforceability Dispute to the DAB for decision and attempting to amicably settle it in accordance with the three-tiered procedure prescribed by the Dispute Resolution Clause. The CA Majority held that it was not necessary to do so and the Enforceability Dispute could be referred directly to arbitration.

59 The supporting explanation offered by Christopher Seppälä, who assisted the FIDIC in drafting the Dispute Resolution Clause, was that the mere fact that an NOD was issued would satisfy the required conditions for referring the Enforceability Dispute to arbitration.[103] In his words, "as [the Enforceability Dispute] had been the subject of a [NOD], [this] could, by definition, be referred to arbitration under Sub-Clause 20.6".[104]

60 In the CA Majority's view, Seppälä's conclusion is correct because DAB 3 carried with it an inherent premise that the Adjudicated Sum was payable forthwith, such that there was "nothing further to be referred back to the DAB".[105] Put another way, the DAB had already decided the Enforceability Dispute, which would necessarily have cleared the first two steps prescribed by the Dispute Resolution Clause:

> The explicit decision in DAB No 3 was that the Adjudicated Sum was payable by PGN to CRW. But, in our judgment, there was also an inherent premise embedded within that decision, which is that the Adjudicated Sum was payable forthwith. The point, in essence, is that the dissatisfaction expressed in an NOD already inherently extends to the requirement that payment of the adjudicated amount be made forthwith, and there is nothing further to be referred back to the DAB. This also follows as a matter of logic: after all, what purpose can it serve to ask a DAB whether a decision which it has already issued requiring one party to make payment to the other should be promptly

103 See generally Christopher Seppälä, "Sub-clause 20.7 of the FIDIC Red Book Does Not Justify Denying Enforcement of a 'Binding' DAB Decision" (2011) 6(3) CLInt 17.

104 Christopher Seppälä, "Sub-clause 20.7 of the FIDIC Red Book Does Not Justify Denying Enforcement of a 'Binding' DAB Decision" (2011) 6(3) CLInt 17 at 20.

105 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [66(a)].

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complied with? Why else would the DAB have issued its decision in the first place?

61 This line of reasoning warrants closer appraisal. It is important to recall precisely what claim the Enforceability Dispute concerned. In the CA Majority's words, it concerned the enforcement of "a distinct contractual obligation on the parties to comply promptly with a DAB decision *once it is issued*" [emphasis added].[106] The specific legal issue in dispute was whether the issuance of an NOD provided any justification for a paying party to withhold compliance with DAB 3.[107] The paradox arising from the CA Majority's reasoning is this: How could the DAB have decided on a "dispute" concerning non-compliance with a decision it had yet to issue or the effects of an NOD which comes into existence only after the DAB has issued its decision? The notion that the DAB had *anticipatorily* decided the Enforceability Dispute is at odds with the definition of a "dispute" adopted by the CA Majority,[108] which requires the making of "a claim by one party and its rejection by the other".[109] If PGN could not and, presumably, did not assert a right to prompt compliance with DAB 3 (which can only arise after DAB 3 was issued) before the DAB, that claim could not give rise to a "dispute" that is referable to the DAB in the first instance.

62 Although the result which the CA Majority strove to achieve is eminently commercial and desirable from a policy perspective, it is questionable whether it is consonant with legal principle and internally consistent. In a contest between desiderata such as certainty, avoiding inordinate delay, and achieving commercial fairness on the one hand and conformity to legal principle on the other, the former "must give way" to the latter.[110]

63 This is likely the reason that other commentators and arbitral tribunals have suggested that the correct approach is to treat a failure to promptly comply with the DAB's decision as giving rise to a fresh

106 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [54].

107 This was the formulation was adopted by the CA Majority in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 ("*PT Perusahaan*") at [63]. As noted in *PT Perusahaan* (at [9]), PT Perusahaan Gas Negara (Persero) TBK's position in the 2009 Arbitration was that "having issued an NOD in respect of [DAB 3], it was no longer obliged to pay the Adjudicated Sum". It maintained this position in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 and in the 2011 Arbitration.

108 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [72(b)].

109 Singapore's Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [34] endorsed this definition of a "dispute".

110 *The Golden Victory* [2007] 2 WLR 691 at [38].

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dispute, which must be referred back to the DAB for decision and amicable settlement in accordance with the Dispute Resolution Clause.[111] This approach, while principled, would spawn adjudicative inefficiencies which the CA Majority had vehemently criticised in *PT Perusahaan*. It would mean that a receiving party could expect to wait up to half a year before *commencing* an arbitration to resolve the Enforceability Dispute.[112]

64 There is no easy answer when deciding between Scylla and Charybdis. Placed at the horns of this dilemma, Singapore's Court of Appeal has made its choice in *PT Perusahaan*, but it is far from obvious whether other Commonwealth jurisdictions will follow suit. Given that there does not appear to be any contractual principle which can readily overcome the limitations imposed by the text of the Dispute Resolution Clause, it might finally be time to call a spade a spade by acknowledging that the Dispute Resolution Clause is mechanically defective (in the sense that its drafting prohibits the accomplishment of its intended object) and requires corrective amendments. It is undesirable that courts of various jurisdictions in which enforcement is sought may hold legitimately divergent views on when an arbitral tribunal may hear the Enforceability Dispute, which consequently affects the tribunal's jurisdiction to issue any award in respect of it.[113] As will be explained below,[114] commercial parties are at liberty to avert that difficulty by prudent drafting, and it is entirely in their interests to do so.

V. Lessons from *PT Perusahaan*

65 As the CA Minority observed, it has taken CRW more than six and a half years to enforce DAB 3 since it was issued.[115] In that time, CRW has had to grapple with the many ambiguities embedded in the Dispute Resolution Clause and the uncertainty surrounding the nature of the 2011 Interim Award before two differently constituted Court of

111 This view was expressed in Gerlando Butera, "Untangling the Enforcement of DAB Decisions" (2014) 31 ICLR 36 – Part 1. It was also the approach adopted by the arbitral tribunals in International Chamber of Commerce Case Nos 15751 and 16948.

112 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [66(b)].

113 In *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 1130 at [63], the Court of Appeal held that a failure to comply with mandatory steps preceding arbitration, in accordance with a multi-tiered dispute resolution provision, would preclude the arbitral tribunal from having jurisdiction to determine a dispute.

114 See paras 65–69 below.

115 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [233].

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Appeal benches and two arbitral tribunals. However, commercial parties can avert a similar disaster by taking appropriate, pre-emptive steps.

66 It is now settled in Singapore that first, the Enforceability Dispute falls within the scope of the Dispute Resolution Clause; and second, the Enforceability Dispute can be resolved in arbitration without first referring it to the DAB. Although the first proposition will likely be adopted in other jurisdictions, the same cannot be said of the second proposition for the reasons already discussed above.[116] To foreclose the possibility of protracted litigation elsewhere over the issues raised in *PT Perusahaan*, parties adopting the Dispute Resolution Clause should not hesitate to embrace the amendments recommended in the FIDIC's Guidance Memorandum for users of the Red Book[117] which would dispel all prior ambiguities. Parties which ignore these recommendations do so at their peril.

67 The proper characterisation of the issues in dispute is key to avoiding any confusion as to whether an earlier award might be varied or revised by a later award. In this regard, the issues to be dealt with in each award should be accurately described to reflect whether they involve independent and distinct substantive claims or the same substantive claims. This is something disputing parties have control over. They may settle at an early stage of the arbitration (whether by agreement or by determination by the tribunal) a list of issues which properly establishes the relationship between and identifies the substantive claims advanced in the arbitration. If the preparation of a list of issues is not required under the applicable arbitral rules[118] or directed to be produced by the tribunal, it is entirely in the parties' interests to request that one be established. Assuming the tribunal adheres to the list of issues when describing the issues dealt with in multiple awards, there would be little room for an unsuccessful party to conflate those issues and argue that an earlier award was revisable and not final.

68 Finally, *PT Perusahaan* is an illustration of how the language adopted in a tribunal's award can inflame a disagreement concerning the finality and enforceability of the award. In *PT Perusahaan*,

116 See paras 61–64 above.

117 International Federation of Consulting Engineers Guidance Memorandum to Users of the 1999 Conditions of Contract (1 April 2013).

118 Article 23(1)(d) of the International Chamber of Commerce Rules of Arbitration 2012 requires the arbitral tribunal to include a list of issues in the terms of reference, except where doing so would be inappropriate. The arbitral rules of other leading arbitral institutions, such as the Singapore International Arbitration Centre Rules (5th Ed, 1 April 2013), the London Court of International Arbitration Arbitration Rules 2014, and the Hong Kong International Arbitration Centre Administered Arbitration Rules 2013, do not contain a similar provision directing or requiring the preparation of a list of issues.

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PGN's argument that the 2011 Interim Award was intended to be subsequently revised was supported by express language to that effect in the 2011 Interim Award and the Partial Award, a point which the CA Majority found puzzling.[119] If there arises any ambiguity or contradiction in an award which might affect its enforceability, one suggested alternative to expensive and time-consuming litigation over its proper interpretation in domestic courts is for the successful party to pre-emptively seek clarity from the very tribunal which issued it. For arbitrations seated in Singapore and other Model Law jurisdictions, a party may apply to correct or seek the tribunal's interpretation of a particular point or part of the award.[120] Whichever way the ambiguity is resolved by the tribunal, it would at least narrow the scope of the parties' disagreement.

69 With the CA Majority's guidance in *PT Perusahaan* and the insights that may be gleaned from it, parties have reason to be optimistic that the story of their dispute will not take the same unhappy, meandering course as that between PGN and CRW.

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119 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [101] and [102].

120 International Arbitration Act (Cap 143A, 2002 Rev Ed) First Sched, Art 33(1).

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